WORLD TRADE ORGANIZATION

WT/DS265/R
15 October 2004

(04-4209)

TABLE OF CONTENTS

TABLE OF CASES CITED IN THIS REPORT

Short Title

Short Title	Full Case Title and Citation
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Dairy (Article 21.5 – New Zealand and US II)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by the Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R
EC – Bananas III (US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, as modified by the Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, 943
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Computer Equipment	Panel Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by the Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
EC –Sugar Exports (Australia)	Panel Report, *European Communities – Refunds on Exports of Sugar(Complaint by Australia)*, adopted 6 November 1979, BISD 26S/290
EC –Sugar Exports (Brazil)	Panel Report, *European Communities – Refunds on Exports of Sugar(Complaint by Brazil)*, adopted 10 November 1980, BISD 27S/69
EC – Tariff Preferences	Panel Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS/246/AB/R
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
EEC (Member States)– Bananas I	Panel Report, *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R

Short Title	Full Case Title and Citation
Guatemala – Cement I	Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R, DSR 1998:IX, 3797
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
India – Autos	Appellate Body Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
India – Quantitative Restrictions	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
India – Quantitative Restrictions	Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Mexico – Corn Syrup (Article 21.5 – US)	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/RW, adopted 21 November 2001, as upheld by the Appellate Body Report, WT/DS132/AB/RW
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001
Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001
Turkey – Textiles	Panel Report, *Turkey –*

Short Title	Full Case Title and Citation
US – Cotton Yarn	Panel Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/R, adopted 5 November 2001, as modified by the Appellate Body Report, WT/DS192/AB/R
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot* Panel *SCM* Report,

I. INTRODUCTION

1.1 This proceeding was initiated by three complaining parties, Australia, Brazil and Thailand.

1.2 In communications dated 27 September 2002, Australia and Brazil requested consultations with the European Communities pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("*DSU*"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 19 of the *Agreement on Agriculture*, and Articles 4.1 and 30 of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"), with respect to export subsidies provided by the European Communities to its sugar industry[1]. Australia and Brazil held consultations with the European Communities in Geneva on 21 and 22 November 2002 but these consultations did not result in a resolution of the dispute.

1.3 On 14 March 2003, pursuant to Article 4 of the *DSU*, Article XXIII of the GATT 1994, Article 19 of the *Agreement on Agriculture*, and Articles 4 and 30 of the *SCM Agreement*, Thailand requested consultations with the European Communities with respect to certain subsidies provided by the European Communities in the sugar sector.[2] Consultations were held in Geneva on 8 April 2003 but failed to resolve the dispute.

1.4 On 21 July 2003, Australia, Brazil and Thailand requested the establishment of a panel pursuant to Articles 4.7 and 6 of the *DSU* and Article XXIII:2 of the GATT 1994.

1.5 At its meeting on 29 August 2003, the Dispute Settlement Body (DSB) established a panel pursuant to the requests of Australia (WT/DS265/21); Brazil (WT/DS266/21); and Thailand (WT/DS283/2), in accordance with Article 6 of the *DSU*. At that meeting, the parties to the dispute agreed to establish a single panel pursuant to Article 9.1 of the *DSU* with standard terms of reference.

1. Terms of reference

1.6 The terms of reference are the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Australia in document WT/DS265/21, by Brazil in document WT/DS266/21 and by Thailand in document WT/DS283/2, the matters referred therein to the DSB by Australia, Brazil and Thailand, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

2. Panel composition

1.7 On 15 December 2003, Australia, Brazil and Thailand requested the Director-General to determine the composition of the panel, pursuant to paragraph 7 of Article 8 of the *DSU*. This paragraph provides:

> "If there is no agreement on the panellists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with

[1] WT/DS265/1, G/L/569, G/AG/GEN/52, G/SCM/D47/1 and WT/DS266/1, G/L/570, G/AG/GEN/53, G/SCM/D48/1, respectively.

[2] WT/DS283/1, G/ L/613, G/AG/GEN/58, G/SCM/D53/1.

> any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.8 On 23 December 2003, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Warren Lavorel

Members: Mr Gonzalo Biggs
Mr Naoshi Hirose

3. Third parties

1.9 Australia, Barbados, Belize, Brazil, Canada, China, Colombia, Côte dIvoire**,** Cuba, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, New Zealand, Paraguay, Saint Kitts and Nevis, Swaziland, Tanzania, Thailand, Trinidad and Tobago, and the United States notified their interest to participate in the panel proceedings as third parties.

1.10 At the request of some third parties, all third parties were invited to attend, as observers, the entirety of the first and second substantive meetings with the parties (see paragraphs 2.5-2.9 below).

4. Organizational meeting

1.11 On 9 January 2004, the Panel sent a draft timetable and draft working procedures to the parties. These were subsequently discussed at the organizational meeting that the Panel held with the parties on 14 January 2004. The timetable (tentative) and working procedures were adopted as amended at the organizational meeting. No decision with respect to third parties was taken at the organizational meeting. (See also paragraphs 2.1-2.9 below.)

5. Meetings with the parties and third parties

1.12 The Panel met with the parties on 30, 31 March, 1 April, and on 11 and 12 May, 2004. In accordance with paragraph 6 of Appendix 3 of the *DSU*, third parties were invited to a session during the first substantive meeting set aside for that purpose. Third parties were also invited to observe the entirety of the first and second substantive meetings (see paragraphs 2.5-2.9 below).

6. Reports

1.13 At the request of the European Communities, pursuant to Article 9.2 of the *DSU* on multiple complaints, the Panel is issuing three reports for this dispute, one for each complaining party.

1.14 On 4 August 2004, the Panel issued its Interim Reports to the parties. On 17 August 2004, the Panel received comments from the parties. On 24 August 2004, the parties submitted further written comments on the comments received on 17 August 2004. The Panel issued its Final Reports to the parties on 8 September 2004.

II. PRELIMINARY RULINGS BY THE PANEL AND OTHER ISSUES

1. Notification of third parties' interest

2.1 In this case, the Republic of Kenya (Kenya) on 26 September, 2003 and the Republic of Côte d'Ivoire (Côte d'Ivoire) on 5 November, 2003 requested to participate as third parties after the ten-day notification period specified by the Chairman of the DSB at the time of the establishment of the Panel, but before the Director-General was asked by the parties to compose the Panel pursuant to Article 8.7 of the *DSU*. The parties agreed to accept Kenya as a third party but the Complainants objected to the participation of Côte d'Ivoire.

2.2 Article 10 of the *DSU* is silent on when Members need to notify to the DSB their interest in participating in any specific dispute as third parties. All parties referred to the GATT Council Chairman's Statement of June 1994, providing for a ten-day notification period.[3] The status of that Chairman's Statement had been discussed on several occasions at the DSB and the timing of third-party notifications was the subject of proposals in the context of the *DSU* negotiations.

2.3 The Panel recalled, *inter alia*, the Appellate Body's decision in *EC – Hormones*, which stated that "the DSU leaves panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."[4] In addition, with regard to the two requests at issue, the Panel noted that in this particular dispute:

(a) the selection and composition of the Panel did not appear to have been adversely affected; and

(b) the Panel process had not been hampered.

2.4 On the basis of these considerations, the Panel therefore decided, in its ruling dated 16 January 2004, to accept as third parties all Members that had expressed a third-party interest and saw no reason to treat them differently. In doing so, the Panel emphasized that its decision was specific to this dispute and was not intended to offer a legal interpretation of the ten-day notification period referred to in the GATT Council Chairman's Statement.

2. Third parties enhanced rights

2.6 In a letter dated 1 April 2004, the same countries requested enhanced rights as third parties in the remaining procedure of the Panel. After comments by the parties on this request, the Panel decided, in a ruling dated 14 April 2004 "that, beyond those rights already provided for in the *DSU*, in the Working Procedures adopted by this Panel, as well as in its ruling dated 16 January 2004 (see paragraph 2.4 above), the following additional rights were granted to *all* third parties for the purpose of this case:

(a) "the third parties will receive a copy of the written questions to the parties posed in the context of the first substantive meeting of the Panel;

(b) the third parties will receive the written rebuttals of the parties to the second meeting of the Panel and the parties' replies to the questions mentioned in (i) above;

(c) the third parties may attend the second substantive meeting of the Panel to take place on 11 and 12 May 2004, as observers (but it is not envisaged that the third parties will provide any further written submission or make an oral statement to the Panel during that second meeting); and

(d) the third parties will review the summary of their respective arguments in the draft descriptive part of the Panel report."

2.7 In considering whether to grant any additional rights to third parties, the Panel believed that it was important to guard against an inappropriate blurring of the distinction drawn in the *DSU* between the rights of parties and those of third parties. Furthermore, the Panel considered that, as a matter of due process, it was appropriate to provide the same procedural rights to *all* third parties."

2.8 On behalf of the sugar-exporting ACP countries, Guyana, on 22 April 2004, requested that ACP sugar-producing countries be allowed to "present arguments, including oral statements and observations " at the second substantive meeting of the Panel with the parties.

2.9 After consideration of Guyana's request on behalf of ACP sugar-producing countries, the Panel did not see any need to change its decision of 14 April 2004 (see paragraphs 2.6 and 2.7 above) and reiterated its invitation to all third parties to attend the second meeting of the Panel as "observers", on the understanding that the third parties would not make any (further) written or oral statements to the Panel.

3. Request for additional working procedures for the protection of proprietary information

2.10 On 13 January 2004, Australia and Thailand requested that the Panel adopt additional working procedures for the protection of proprietary information purchased from LMC International (LMC) relating to data on EC costs of sugar production that the complaining parties claimed they would use in their first written submission.[6] Such additional working procedures would, *inter alia*, limit the third parties' access to such confidential information to "view-only" prescriptions.

[6] On this question, Australia and Thailand jointly sent a written communication to the Panel on 13 January 2004 and Australia, with the support of Thailand, sent another written communication to the Panel on 19 January 2004. Finally, Australia, Brazil and Thailand also sent a written communication to the Panel on 23 January 2004.

information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate.

2.25 The Panel received responses, dated 8 June 2004, from Australia, the European Communities (parties), and from India (third party). All three Members supported the request made by Brazil (see paragraph 2.21 above).

2.26 On 10 June 2004, the Panel requested, in a letter, information from the WVZ "with respect to the exact source[s] (documents, websites, etc.) used for the data referred to" in its document. The Panel further requested "information about the original currency nominations if different from the nominations in Euros used" in the document.

2.27 The Panel received a response from WVZ on 15 June 2004 in which WVZ indicated that it had been able to examine an attachment to Brazil's submission, the Datagro report, which referred to another LMC study than the one used by WVZ in the document received by the Panel on 24 May 2004. According to WVZ, this LMC document was not designated as confidential. It also indicated that WVZ was "not in a position to reveal the source of its information regarding the evidence submitted by Brazil."

2.28 Comments on the response from WVZ were received from Brazil on 18 June 2004 in which Brazil reiterated its request (see paragraph 2.21) that the Panel summarily reject the WVZ *amicus curiae* brief. Brazil also requested that the Panel "make a full report of this incident to the Dispute

per tonne whereas the minimum price for B beet has been fixed at €32.42 per tonne.[23] Manufacturers are required to pay growers at least the minimum price for A and B beet they process into A and B sugar. The price for beet paid by the manufacturer to produce C sugar may be lower than that paid for A and B beet.[24]

if thealia

5. Basic production levy and B levy

3.9 In accordance with Article 15, a basic production levy shall be charged to manufacturers on their production of *inter alia* A and B sugar, when the forecasts and adjustments[25] result in a foreseeable overall loss.[26] Such a levy shall not exceed 2 per cent of the intervention price for white sugar. Another levy of a maximum 37.5 per cent of the intervention price for B sugar may be charged if the loss is not fully covered by the proceeds from the levy mentioned above.

6. Import and export licences

0667 3w (Sucocee licenrefundB sugrawr may be chully-220.5 c TD5 TD -0.1596 30 0 Tw .31 1.09) t 2) Tjthat Tj

3.10

According to the European Communities' latest notification (marketing year 2001/2002) to the Committee on Agriculture, total exports of sugar amounted to 4.097 million tonnes (product weight).

10. Preferential import arrangements

3.14 The European Communities is required to import 1,294,700 tonnes (white sugar equivalent) of cane sugar, called "preferential sugar" under Protocol 3 to Annex IV to the ACP/EC Partnership Agreement.[28] It also has agreed to import 10,000 tonnes of preferential sugar from India. Preferential sugar is imported at zero duty and at guaranteed prices. [29]

3.15 In addition to imports of ACP/India preferential cane sugar, special preferential raw cane sugar (SPS sugar) may be imported from the same countries which benefit from the ACP/India preferential arrangements in order to ensure adequate supplies to Community refineries.[30] Volumes of SPS sugar vary from year to year but have amounted to around 320,000 tonnes per year in recent years. A reduced rate of duty is levied on imports of such sugar. The quantities of SPS sugar to be imported is decided on the basis of a supply balance forecast for each marketing year.

11. Review

3.16 The current EC sugar regime is scheduled for review in 2006.

IV. MAIN ARGUMENTS[31]

A. PARTIES' R Volumes of

- alternatively, if the Panel finds that the EC's export subsidies on C sugar are not export subsidies within the meaning of Article 9.1 of the *Agreement on Agriculture*, the EC is applying other export subsidies in a manner which results in, or threatens to lead to, circumvention of export subsidy commitments, inconsistently with the provisions of Article 10.1 of the *Agreement on Agriculture*;

- under either of the alternatives, as the EC provides export subsidies on C sugar otherwise than in conformity with the *Agreement on Agriculture* and with the commitments as specified in its Schedule, the EC is acting inconsistently with its undertaking under the provisions of Article 8 of the *Agreement on Agriculture*;

- the EC is providing export subsidies to C sugar inconsistently with the provisions of Articles 3.1(a) and 3.2 of the *SCM Agreement;*

- the EC grants direct export subsidies on the export of 'ACP/India equivalent' sugar, within the meaning of Article 9.1(a) of the *Agreement on Agriculture*;

- the export subsidies have not been subjected to the EC's reduction commitments under the *Agreement on Agriculture*, inconsistently with Article 9.1;

- the footnote to the EC's Schedule does not permit the EC to derogate from its reduction commitment obligations under Articles 9.1, 3.3 and 8 of the *Agreement on Agriculture*;

- the export subsidies on 'ACP/India equivalent' sugar are in excess of the budgetary outlay and quantity reduction commitments specified in the EC's Schedule, inconsistently with Article 3.3 of the *Agreement on Agriculture*;

- as the EC is providing export subsidies on 'ACP/India equivalent' sugar otherwise than in conformity with the *Agreement on Agriculture* and with the commitments specified in its Schedule, it is acting inconsistently with the provisions of Article 8 of the *Agreement on Agriculture*;

- the EC is providing direct export subsidies to 'ACP/India equivalent' sugar, within the

- the EC accords subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture* to its exports of C sugar; the EC therefore grants subsidies in excess of its quantity reduction commitment for sugar inconsistently with Articles 3.3 and 8 of the *Agreement on Agriculture*;

- the export subsidies that the EC grants to A and B quota sugar and to ACP/India sugar are subject to the EC's reduction commitments for sugar; the EC therefore grants subsidies in excess of its quantity reduction commitment for sugar inconsistently with Articles 3.3 and 8 of the *Agreement on Agriculture*; and

- the EC's export subsidies for quota sugar, C sugar and ACP/India equivalent sugar are granted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement*;

- alternatively, if the Panel finds that the footnote is a valid qualification of the EC's substantive obligations under the *Agreement on Agriculture*, the EC is not complying with the terms of its footnote and is thus violating Articles 3.3, 8 and 9.1 of the *Agreement on Agriculture*.

- alternatively, if the Panel finds that the EC's subsidies on sugar are not export subsidies within the meaning of Article 9.1 of the *Agreement on Agriculture*, these subsidies are export subsidies that are applied in a manner which results in, or threatens to lead to, circumvention of the EC's export subsidy reduction commitments and are therefore inconsistent with

- the quantity of sugar in respect of which the EC grants export subsidies within the meaning of Article 9:1 of the *Agreement on Agriculture* is in excess of its export quantity reduction commitment;

- the expenditures that the EC allocates for subsidies within the meaning of Article 9:1 of the *Agreement on Agriculture* to its exports of sugar are in excess of its budgetary outlay reduction commitment; and

- to rule in the light of these findings that the subsidies granted by the EC to its exports of sugar are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture*;

- alternatively, if the Panel finds that the EC's subsidies on exports of sugar are not export subsidies within the meaning of Article 9.1 of the *Agreement on Agriculture*, these subsidies are export subsidies inconsistent with Article 10.1 of that Agreement;

- the EC's export subsidies for quota sugar and ACP/India equivalent sugar are granted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement.*

4.8 Thailand requests the Panel to recommend, in accordance with Article 19.1 of the *DSU* and Article 4.7 of the *SCM Agreement*, that the DSB request the European Communities to bring its export subsidies for sugar into conformity with its obligations under the *Agreement on Agriculture* by withdrawing within 90 days the export subsidies for sugar that are inconsistent with that Agreement.

4.9 For the reasons set out in its submissions, the **European Communities** requests the Panel to find that:

- exports of C sugar did not benefit from export subsidies within the meaning of Article 9.1(c) of the

- subsidiarily, the alleged inconsistency did not nullify or impair any benefits accruing to the Complainants;

- to the extent that it was within the Panel's terms of reference, the claim that footTc ants;

different from those presented in their respective panel requests. In their view, the European Communities was confusing "claims", which must be stated in panel requests, with "arguments", to be developed in the course of the Panel's proceedings. According to the Appellate Body, Article 6.2 of the *DSU* required that the claims, but not the arguments, had to be sufficiently specified in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint.[33]

4.15 The Complainants stressed that the European Communities' contentions had to be examined in light of Article 10.3 of the *Agreement on Agriculture*. Because of the reversal of the burden of proof, it was not incumbent on them to identify or enumerate the WTO agreements, provisions, or export subsidy definitions that the European Communities might choose to invoke in its defence. It was the European Communities' duty to prove that no subsidy of *any* kind, under *any* WTO agreement, had been granted by *any* EC measure to sugar exports in excess of its reduction commitments. In the Complainants' view, *any* and *all* EC measures that might confer a subsidy on these sugar exports, *any* and *all* WTO agreements with subsidy provisions were thus within the terms of reference of the Panel by virtue of Article 10.3 of the *Agreement on Agriculture*. In particular, since the scope

relevant legal provisions. Australia noted that the precise nature of the "payments" under Article 9.1(c) were legal arguments that did not have to be included in the panel request.

4.18 Furthermore, in the **Complainants**' view, nothing prevented them from anticipating the European Communities' rebuttal arguments, either in their first written submissions or in their rebuttal submissions. Article 9.2(b)(iv), for example, was brought into the case by the Complainants as a counter-argument, not as a claim of inconsistency, in response to arguments made by the European Communities. As the European Communities itself had raised the footnote as justification for non-compliance with its obligations, the Complainants were entitled to provide rebuttal arguments in that context, citing any WTO provisions, any EC laws or regulations, or other factual evidence. The Complainants had referred specifically to Article 9.2(b)(iv) to underline that the footnote, even if interpreted as imposing a quantity limit, would lead the European Communities to act inconsistently with its obligations by failing to achieve the reductions required by that provision. As a consequence, the European Communities would be providing export subsidies in contravention of the *Agreement on Agriculture* – a violation of Article 8, which0387.25 Tf TD 0 7 Tc314u1ropean 6rrTc 0 .5675 0 T TD 0.0090

4.26

4.31 The European Communities explained that it did not grant any export subsidies to exports of C sugar. However, if the Panel were to find that C sugar indeed benefited from export subsidies, the European Communities submitted that its sugar exports would not be in excess of the reduction commitments when those were interpreted in good faith and in the context of the Modalities Paper. With respect to ACP/India equivalent sugar, the European Communities submitted that the burden of proving their case rested with the Complainants because they had also misinterpreted the footnote. In the European Communities' view therefore, exports of ACP/India equivalent sugar were *not* in excess of its scheduled commitments, when these were interpreted in good faith.[38]

2. Export subsidization aspect

4.32 The **Complainants** submitted that, a

D. C SUGAR

4.35 With respect to C sugar, the **Complainants** recalled that, by subsidizing exports in excess of its reduction commitments[42], the European Communities had acted inconsistently with Articles 3.3, 8, and 9.1(c) or, alternatively, 10.1 of the *Agreement on Agriculture*, and that the European Communities had the burden of proof (see Section IV.C above).

1. Article 9.1(c) of the Agreement on Agriculture

4.36 The **Complainants** submitted that C sugar benefited from export subsidies falling within the description of Article 9.1(c) of the *Agreement on Agriculture* and observed that Article 9.1(c) subsidies were subject to reduction commitments in accordance with the provisions of Article 9.1. A measure that met the description of any of the subparagraphs (a) through (f) of Article 9.1 was, by definition, an export subsidy and, as such, necessarily subject to the reduction commitments of the scheduled product in question. They pointed out that Article 9.1 was, in that respect, similar to the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement.* Since the European Communities had not subjected C sugar to the required quantity reduction commitments, the Complainants argued that the non-inclusion of C sugar in the quantity reduction commitments was inconsistent with Article 9.1, and thus with Articles 3.3 and 8, of the *Agreement on Agriculture.*

4.37 The **European Communities** replied that the exports of C sugar Article 9.1, and of *Communica*

prices paid were sufficient for producers to recover the average fixed and variable costs of production and thus avoid making "losses" over the longer term.[48] Furthermore, since the international obligations of the European Communities, not of its member States, were at issue in the present case, the benchmark had therefore to be a single, Community-wide, cost of production figure rather than the cost of production figures for each individual EC member State.[49]

4.39 **Australia** identified a "payment" on C sugar in that it was being sold at below the average total cost of production by the sugar producer to the world market. Australia defined "producer" as a collective term for all enterprises engaged in the production of sugar, from the growing of sugar beet or cane to the processing/refining of sugar from sugar beet or sugar cane or from raw cane sugar. The transfer of resources in this case was from the EC sugar producer to the purchaser, in that the price charged by the producer of the sugar was less than the proper value of the sugar to the producer.75 The on pasu

(a) high internal prices paid by EC consumers, through a combination of governmental actions such as intervention prices, quotas, export refunds and import restraints, to processors of C sugar. [53] According to Brazil, a similar payment was made by EC

and returns on world markets. They submitted production cost data[57] which showed that, for the marketing years 1992/93 to 2002/03, beet growers failed to recoup between *** and *** per cent of their total cost of producing C beet. These losses were financed by the very high returns received by the growers of beet for A and B quota sugar. During the same period, the processors failed to recover between *** and *** per cent of their total cost of production of C sugar, while export market returns from C sugar represented *** per cent of the average total production costs.[58] Further statistical evidence[59] showed that, while the average total cost of sugar production in the European Communities was higher than the prices received for C sugar on the world market, C sugar continued to be exported in what the Complainants considered to be significant quantities. In their view, the losses would be unsustainable in normal commercial operations if processors were to produce only C sugar. The fact that there was no independent production of C sugar confirmed that C sugar could not be produced absent a payment.

4.43 Citing various studies[60], the Complainants contended that in 2002/03, the Community-wide cost of production of all sugar in the European Communities was *** per tonne. At the same time, the world market price for sugar (as measured by the London Daily Price) was on average €144.88 per tonne, which was less than *** per cent of the cost of production in the European Communities, implying that the cost of producing sugar was more than *** times the price that same sugar commanded on the world market. The Complainants pointed to the assessments undertaken by the European Communities' own official bodies, which had acknowledged that the gap between the cost and the price of C beet and C sugar was financed by virtue of the governmental action taken by the European Communities through its sugar regime.[61] According to the Complainants, the figures also showed that for the entire period from marketing year 1992/93 through 2002/03, although C sugar prices were below average total costs,[62] these prices exceeded marginal costs. Thus, C sugar prices were able to generate a positive contribution to net income once marginal costs were covered.[63] Whichever method was considered the most accurate for estimating the world market price, the price received for C sugar was invariably lower than the average cost of producing C sugar (see also paragraph 4.74 et seq.).

4.44 The **European Communities** responded that only one of the payments cited by the Complainants was properly before the Panel, i.e. the payments-in-kind from EC sugar producers in the form of export sales of C sugar below total average cost of production. The EC considered that each of the other "payments" alleged by the Complainants constituted a distinct claim that was not within the Panel's terms of reference (see Section B above, Terms of reference). While raising doubts regarding the precise nature of those "payments" and the way in which they would provide an export subsidy within the meaning of Article 9.1 (c.)im

certain financial services (export credits, guarantees and insurance) at a price below the cost to the service provider. Like the measure at issue in *Canada – Dairy*, and unlike the measure at issue in this dispute, Items (j) and (k) of the Illustrative List were concerned with input subsidies.

4.49 Recalling that Article 9.1(c) did not identify any specific benchmark, and that the examination of whether a measure involving "payments" had to be made, in each case, having regard to the "factual and regulatory setting of the disputed measure"[67], the European Communities drew attention to the reasoning of the Appellate Body with respect to the "administered domestic price"[68], as well as with world market prices[69], when these had been considered for their relevance as possible benchmarks in *Canada – Dairy*:

> "... a comparison between CEM prices and world prices gives no indication on the crucial question, namely whether Canadian export production has been given an advantage. Furthermore, if the basis for comparison were world market prices, it would be possible for WTO Members to subsidize domestic inputs for export processing, while taking care to maintain the price of these inputs to the processors at a level which equalled or marginally exceeded world market prices." [70]

4.50 According to the European Communities, this statement was additional proof that the Appellate Body's decision not to use the world market price as a benchmark in *Canada – Dairy* was linked to the fact that the alleged "payments" consisted of the provision of inputs for processing within Canada (see also paragraph 4.45). The European Communities asserted that the mere fact of exporting goods below the average total cost of production provided no "advantage" to that "export production", unlike the provision of inputs below cost within the exporting country.

4.51 The European Communities submitted further that the alleged payments conferred no "benefit" to C sugar and that the Complainants' interpretation of Article 9.1(c) would make it possible to establish the existence of an export subsidy in a situation where, far from receiving a benefit through the alleged subsidy, the supposed recipient of the subsidy was in fact making a financial contribution and providing a benefit to another operator in another Member. The European Communities reasoned that if the sales of C sugar involved a "payment", it would follow that the producers of C sugar were foregoing part of the sugar's "proper value" to them. Insofar as the C sugar producers received a benefit, such benefit was not conferred by the "payments" themselves, but instead by the previous "financing" of the payments "by virtue of governmental action". Such government "financing", however, did not necessarily involve a subsidy and, even if it did, it was not contingent upon export performance. According to the European Communities, the Complainants' interpretation of Article 9.1(c) would render inapplicable the other constituent element of the notion of subsidy, i.e. the requirement that the measure provided a "benefit". It would transform Article 9.1(c) into a *financingconment*

not only intended to explain the factual situation existing in that case. To the contrary, the Complainants reaffirmed that, on the basis of the jurisprudence cited in paragraph 4.38, neither the text of Article 9.1(c), nor *Canada – Dairy*, limited the universe of export subsidies or payments as alleged by the European Communities. The Appellate Body had interpreted the precise provision that the Complainants had argued was being breached in the present case, i.e. Article 9.1(c). In their view, the European Communities' assertion would imply that no Appellate Body or panel reports would be considered relevant because of differing factual situations.

4.60 The Complainants maintained that payments by private parties came within the definitional scope of Article 9.1(c). In this connection, they argued that the European Communities' argument that the "payment" must confer the benefit was based on the importation of a notion into Article 9.1(c) that could not logically be applied to payments by private parties. While a government may decide for non-economic reasons to sell a product on non-commercial terms, a private party would, in the normal course of business, make sales on conditions prevailing in the market, thus in a manner that did not confer a "benefit" on the recipient of the payment. If the European Communities were correct that only sales on terms conferring a benefit on the purchaser were regarded to be "payments" within the meaning of the Article 9.1(c), this provision would in practice not apply to payments by private parties. Therefore, yet again its purpose would be defeated.

4.61 In the Complainants' view, the European Communities' interpretation would also place undue emphasis on the recipients of the payment, requiring that they obtain an "advantage" or "benefit". The Complainants submitted that the European Communities' argument could not be reconciled with the jurisprudence of the Appellate Body relating to this issue. In *Canada – Dairy*, the panel had found that "[a] reading of Article 9.1(a) to the effect that a 'payment' exists only if a benefit is granted, is further mandated by the general context of this provision which includes Article 1 of the *SCM Agreement*… [t]hat provision explicitly requires that a "benefit" be conferred for there to be a 'subsidy' under the *SCM Agreement*".

parties could make the payments, it was the Member which was "responsible for ensuring that it respects its export subsidy commitments under the covered agreements".[77]

4.63 **Brazil** pointed out that EC sugar producers did, in any case, obtain a benefit from the Article 9.1(c) subsidies on the export of C sugar to the extent that those subsidies made profitable sales that were made well below the producers' total cost of production. Brazil considered that, as a factual matter, the European Communities had not disputed this benefit. Further, this benefit satisfied the requirements of Article 1.1(b) of the *SCM Agreement.*

4.64 In relation to the European Communities' contention regarding the appropriate benchmark in order to determine the existence of payments, the **Complainants** reiterated that the most appropriate benchmark in this case was the cost of production benchmark, for the reasons articulated by the Appellate Body in *Canada – Dairy*, and referred to in paragraph 4.38 *tconsidered ti Tc 6-0.1884 0 T*

existence of a "benefit" was inherent in the notion of "subsidy". Consequently, if the exports of a given agricultural product received no benefit from a certain measure, these products could not be deemed "subsidized" by such a measure.

4.67 The European Communities submitted that its reading of Article 9.1(c) and of *Canada – Dairy* as addressing exclusively the supply of inputs within the exporting country, was supported contextually both by the *SCM Agreement*, as confirmed by the Appellate Body[80], and by the Members' schedules. The European Communities held that the definition of a subsidy in the *SCM Agreement*

countries, including Australia, Brazil, and Thailand, had been exporting sugar at a loss for years, and applying measures to keep domestic prices above world market prices.[86] [87]

(b) "Financed by virtue of governmental action"

4.70 The **Complainants** submitted that there was a strong demonstrable link between the "payments" and the "governmental action" in the present case and referred to an assessment by the EC Commission[88] suggesting that full liberalization of the EC sugar market would lead to a reduction in EC production of sugar to one third of present levels and even to its disappearance in the long run, and that profitability was only maintained through the EC sugar regime. The Complainants inferred that, under such circumstances, sugar production, including C sugar, in the European Communities depended on governmental action for its existence.

4.71 The Complainants recalled that the EC sugar regime regulated C sugar production and exports through Council Regulation No. 1260/2001. The funding of the payments that C sugar producers were making was the direct consequence of the extremely tight regulatory framework set out in that Regulation, under which quota holders were accorded the exclusive rights to make sales at guaranteed prices covering all or most of their fixed costs of production. The European Communities had created a legal framework that encouraged overproduction, segregated the export market for C sugar from the domestic market, generated the profits used to fund the export of that sugar, and imposed sanctions for failure to export such sugar. The EC Commission itself regarded the regime as a factor of market balance[89], fulfilling market stabilization objectives.[90] According to the Complainants, the governmental action involved in the EC sugar regime represented therefore a strong nexus with the 'payments', sufficient to meet the Appellate Body's test established in *Canada – Dairy.*

4.72 The Complainants asserted that the instruments of the regime provided a strong incentive to EC quota holders to defend their quotas through surplus C sugar production, whether or not the production of C sugar would be below the costs of its production. A quota value was delivered to a sugar quota holder through a combination of the EC system of subsidies and domestic supply restrictions. The intervention price provided a guaranteed price some three times greater than the world price, but due to the domestic supply restrictions, quota holders secured market prices substantially in excess of the intervention price. They also received export subsidies for quota quantities in excess of domestic supply needs. As there had not been any intervention purchasing for around 25 years, subsidized exports were obviously more profitable than selling into intervention. Given that high costs of production made EC sugar processors uncompetitive by world market standards, the quota value was directly attributable to the governmental action prescribed in the EC regime.

---

[86] Exhibit EC-21. See also Exhibit EC-17, pp. 27-30; Exhibit EC-18, p. 2; Exhibit EC-20, pp. 1-4; Exhibits EC-22 and EC-23; Exhibit EC-19.

[87] At the interim review, Australia recalled that the Complainants strongly rebutted the European Communities' position, arguing that to assert an equivalence between the EC regime and the sugar policies of other exporters ignored the elements of the EC regime which made it WTO-inconsistent. Specifically, the exceptionally high level of EC support, the delivery of that support through quotas for sales on the domestic market, the restrictions on carryover of C sugar and the requirement that C sugar not carried over be exported. These elements of the EC regime drove the production and export of subsidized C sugar and distinguished it from other regimes. The Complainants noted that the European Communities had failed to respond to the other

4.73 The Complainants sustained that beneficiaries of sugar production quotas were protected from virtually all foreign sources of competition, through a combination of import tariffs and special safeguard measures, and through the exportation, with export refunds, of a quantity of sugar allegedly

4.76

4.80 In relation to the Complainants'

that resulted from a governmental action. Each of the three elements constituting an export subsidy within the meaning of Article 9.1(c) was thus present only if the

the meaning of that Agreement. Further, C sugar could only be sold upon its exportation: if not carried forward, C sugar "may not be disposed of on the Community's internal market and must be exported without further processing."[105] Because of that legal requirement, the Complainants considered that subsidies to C sugar, which must be exported, were subsidies "on the export" of that product. Similarly, because C beet could be processed only into C sugar, a product that had to be exported, payments to growers of C beet were also payments "on the export" of that product.

4.88 The **European Communities** responded that the alleged "payments" took the form of exports, but were not made on "exports." The requirement of "contingent upon export performance" set out in the *Agreement on Agriculture* had to be read in the same way as the same requirement imposed by the *SCM Agreement*.[106] Unlike in *Canada – Dairy*, the making of the alleged "payments" was not conditional on any exports being made by the recipient of the payments or by a third party. By ignoring this difference, the Complainants' interpretation of Article 9.1(c) collapsed two distinct legal requirements, i.e., the existence of "payments", and the existence of "exports", with the former action being contingent upon the second. Combining the two requirements made it possible to characterize as "export subsidies" payments which were not conditional upon exports. In the European Communities' view, this amounted to saying that the alleged "payments" were contingent upon themselves, which would render the second legal requirement, "on exports", redundant. Such interpretation also confused the distinction between the disciplines on domestic support, export subsidies and market access, a distinction which was, in the European Communities' opinion, a fundamental feature of the *Agreement on Agriculture*.

4.89 From the domestic support perspective, the European Communities continued, the Complainants' interpretation would imply that, whenever a system of price support had the incidental effect of financing exports below average total cost of production, the Member concerned would be required, in order to avoid a breach of its export subsidy commitments, to dismantle that system of price support, even if such a system was fully in conformity with the relevant provisions of the *Agreement on Agriculture* concerning domestic support. If a subsidy were export contingent, the European Communities continued, it should be possible, at least in theory, to remove the condition which made it export contingent, while maintaining the subsidy. If an alleged export subsidy could not be withdrawn except by withdrawing a legitimate system of domestic price support, it was because, according to the European Communities, it was not contingent "on exports".

4.90 With respect to market access, the European Communities recalled that the terms "governmental action" in Article 9.1(c) encompassed a broad range of government measures[107], including import tariffs.[108] The Complainants' interpretation would imply that, if high import duties had the incidental effect of "cross-financing" exports below the average total cost of production, the Member concerned would have no alternative but to lower its import duty levels, even if such duties were within that Member's tariff bindings. The European Communities reiterated that the domestic support for A and B sugar was not contingent upon exports of C sugar which was demonstrated by the fact that some sugar producers did not produce any C sugar at all. The European Communities noted that according to data for the most recent marketing year, there were no exports of C sugar from Italy, Greece and Portugal, while exports from Finland, Spain and Belgium/Luxemburg represented only a fraction of their total sugar output.

4.91 The **Complainants** responded that the European Communities incorrectly ascribed to them an interpretation that the "payments themselves" were "exports" and considered that the sole argument in that regard rested on the assertion that domestic support could not form part of export subsidization.

---

[105] Article 13.1 of Regulation No. 1260/2001.
[106] Appellate Body Report on *US – FSC*, para. 141.
[107] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 112.
[108] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 144.

Having rebutted such argument in paragraphs 4.55, 4.59 and 4.82

that the European Communities could repeal the requirement that C sugar be exported and permit C sugar to be sold in the domestic market or introduce changes requiring that any sugar produced in excess of any year's quota be carried over to the next year's quota. The sugar regime was the only EC regime governing an agricultural product that required excess production to be exported. **Thailand** stressed in this connection that the CMO for sugar was the only CMO of the European Communities that permitted (and indeed encouraged) producers to exceed their production quotas and required them to export the surplus. Thailand's interpretation of Article 9.1(c) would therefore not require the European Communities to do anything that it was not already doing in the field of agriculture. If the European Communities were to align its sugar policies to those followed in other agricultural sectors, it would ensure their consistency with Article 9.1(c). According to the **Complainants**, this also suggested that the European Communities was fully capable of devising means to provide permissible domestic support without allowing this support, in the words of the Appellate Body, to produce "spill-over economic benefits for export production."[111] The Complainants noted in this regard that the Appellate Body had specifically stated in *Canada – Dairy* that an appropriate benchmark in determining whether "payments" existed under Article 9.1(c) should respect the separation between export subsidy and domestic support disciplines. The Appellate Body had stated that if domestic support could be used, without limit, to provide support to exports, it would undermine the benefits intended to accrue through a Member's export subsidy commitments.

4.97 The **European Communities** responded that if it permitted sales of C sugar in the EC market, those sales would depress the prices within the EC internal market, thereby undermining the level of domestic price support. Further, they would not be made at below the average total cost of production, but rather at the supported price prevailing within the EC market. In the European Communities' view, therefore, those sales would not involve "payments". In order to withdraw the alleged "export contingency", the European Communities would have no option but to eliminate the price differential between its domestic market and the export market, which was the very essence of any system of domestic price support. Removing the "export contingency" element by preventing exports of C sugar would amount, in the European Communities' opinion, to withdrawing the subsidy, since the alleged subsidies were the "payments" and not the domestic support and other measures that, according to the Complainants, financed the "payments".

4.98 Furthermore, the European Communities maintained that the Complainants' interpretation would introduce an unjustified difference in treatment between two equally legitimate forms of domestic support: price support (including price support resulting from tariff protection) and income support linked to production (e.g. through "deficiency payments" equal to the difference between the market price and a target price). In the European Communities' opinion, both systems of domestic support were just as apt to "finance" exports below cost of production. Yet, on the Complainants' interpretation, such exports would be prohibited only if they were "financed" by a system of price support, or by tariff protection, but not if they were "financed" by deficiency payments or a similar system. Any Member providing domestic price support or tariff protection would be required to put in place mechanisms to ensure that it made no exports below cost of production. In contrast, Members would be free to "finance" an unlimited quantity of exports below cost of production via "deficiency payments" or other systems of income support linked to production, because sales in the domestic market would also be made below cost. The Complainants' interpretation would alter the architecture of the *Agreement on Agriculture* by redrawing the agreed boundary between domestic support and export subsidies in a manner that no participant in the Uruguay Round negotiations could have anticipated. And it would introduce a totally unjustified difference in treatment between different forms of domestic support and, ultimately, between Members.

[111] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 90.

2. In the alternative, Article 10.1 of the *Agreement on Agriculture*

4.99 Should the Panel decide that the exports of C sugar were not subsidized by payments financed by virtue of governmental action within the meaning of Article 9.1(c), the **Complainants** submitted, in the alternative, that the European Communities had to address their claims under Article 10.1. In this regard, they recalled that under Article 10.3 of the *Agreement on Agriculture*, the European Communities had the burden of establishing that sugar exported in excess of its quantity commitment level was not subsidized by way of export subsidies not listed in Article 9.1[112], and that this reversal of the burden of proof extended to establishing the absence of *any* export subsidy whether listed in Article 9.1 or not (See section IV.C, Burden of proof).

4.100 Referring to the Appellate Body finding in *US-FSC*[113], the Complainants continued, three elements had to be met under Article 10.1 of the *Agreement on Agriculture*, i.e. that: (a) there was a subsidy not identified in Article 9.1; (b) that subsidy was contingent on export; and (c) the subsidy resulted in, or threatened to lead to, circumvention of a Members' export subsidy commitments (the "circumvention" element). Though the European Communities had the obligation to demonstrate that these elements were not present, the Complainants set out the following arguments for reasons of procedural efficiency, and without waiving their rights under Article 10.3 of the *Agreement on Agriculture*. The Complainants thus argued that the European Communities was applying an export subsidy of a type not listed in Article 9.1, in a manner which resulted in, or which threatened to lead to, circumvention of export subsidy commitments, inconsistently with Article 10.1. t o , A c i r

for sale on the domestic market, and thus most C beet was processed into C sugar for export.[116] All C sugar must be exported without an export refund.[117] Conversely, most sugar on the domestic market was quota sugar, processed from A and B beet. Second, while growers were guaranteed a fixed minimum price for quota beet,[118] no fixed price was set for C beet, the Regulation permitting the provision of C beet at a lower price than quota beet. While the price obtained for C beet was not uniform, as a general rule C beet was provided to processors on terms more favourable than those of A and B beet. Referring to the average prices, as did the panel in *Canada – Dairy*[119], products for export production, the Complainants continued, were being supplied for less than like products for domestic production. By controlling the disposal of C sugar, the European Communities limited the use to which C beet could be put and hence ensured that C beet was available at prices that were "more favourable" than the prices of A and B beet. According to the Complainants, the first element of Item (d) of the Illustrative List was therefore satisfied.

4.104 With respect to the second element, the Complainants noted its similarity to the "governmental action" component of Article 9.1(c) of the *Agreement on Agriculture* as both phrases denoted some level of governmental involvement in the subsidization of export products. However, the Complainants pointed out that the residual nature of Article 10.1 meant that it might cover export subsidies which did not satisfy some component of an Article 9.1 subsidy.[120] Thus, this second element had been interpreted more broadly, according to the Complainants, than similar phrases in Article 9.1(a) and Article 9.1(c) of the *Agreement on Agriculture*.[121] The Complainants submitted that should the Panel find that there was no 'governmental action' component under Article 9.1(c), this would not preclude a positive finding on the second element of Item (d) of the Illustrative list.

4.105 Turning to the substantive test of the second element, the Complainants recalled that the panel in *Canada – Dairy* had held that the prohibition on diversion of CEM back into the domestic regulated market and the exemption which gave processors for export access to the lower CEM prices were sufficient for a finding that the provision of milk was "made or mandated by government for export."[122] They considered that these two factors were also present in the EC sugar regime as the European Communities exempted C beet from the minimum price requirement under Article 5 of the Regulation, while Article 13 of the Regulation operated to ensure that C beet could not be used to produce products that would obtain the higher regulated prices for sugar sold within the European Communities. Similarly, by exempting C beet from the minimum price requirement and preventing the use of C beet to produce sugar that could be placed on the domestic market, the European Communities mandated the provision of beet for C sugar exports on terms more favourable than would be available for beet used for the production of sugar for sale on the domestic market. The second element of Item (d) of the Illustrative List was therefore satisfied.

4.106 As concerns the third element, the Complainants considered that the focus of the third element was on the comparative attractiveness to exporters of sourcing products for export production from either the domestic market or from the world market, rather than specifically on the regulation of access to the world market. If the domestic market was a more attractive source than the world market, this element was established. Furthermore, the domestic product supplied on favourable terms for export production was beet. There was no world market for beet in commercial quantities, as beet was perishable and comparatively expensive to transport. Pointing to footnote 57 to Item (d)

Tj 250.5 -24 TD 0 Tc 0.1875 Tw (82u4.2qand 6availab.5 -12.( ) Tj -321 -24.75

of the Illustrative List, the Complainants held that, when comparing the attractiveness to exporters of sourcing beet from the EC domestic market or the world market, the former was necessarily more attractive to exporters as, for technical and other reasons (including protective tariffs against imports)[123] commercial quantities of beet could not be acquired on the world market on any terms. The terms of domestic supply were thus inevitably more favourable, according to the Complainants. The third element of Item (d) of the Illustrative List was therefore satisfied.

4.107 Contending that they had established the three elements of Item (d) of the Illustrative List, the Complainants held that it was not necessary to consider whether the subsidies provided were "contingent upon export performance"[124], as all measures within the Illustrative List were, by definition, contingent upon export performance. Recalling the Appellate Body's finding that the determination of 'export subsidies' under Article 10.1 of the *Agreement on Agriculture* should draw on the interpretation of that term under the *SCM Agreement*[125], the Complainants argued that the export subsidy provided under the sugar regime thus fell within the terms of Article 10.1 of the *Agreement on Agriculture*. Under Article 10.1, the European Communities

the C beet was freely agreed between the growers and the sugar producers. In the European Communities' view, the absence of any element of government compulsion was confirmed by the fact that, in some member States, there was no production of either C beet or C sugar (see also paragraph 4.90).

4.110 The European Communities was of the view that the mere fact that a government measure enabled or promoted the provision of goods by private parties was not sufficient to consider that such action was "mandated" by the government. The interpretation of "mandated" found contextual support in the definition of "subsidy" included in Article 1 of the *SCM Agreement*, according to which the supply of goods to an enterprise could not be considered as a subsidy unless it was carried out by the government or by a public body. The only exception to this was provided in paragraph 1.1(a)(1)(iv). The European Communities recalled that the panel in *US – Export Restraints*[128], had rejected the claim by the United States that a restriction on exports of an input conferred a subsidy to the processors simply because it had the effect of making that input available at a lower price in the Canadian market. To the European Communities, the term "mandated" suggested a greater degree of government compulsion than the terms "entrust" or "direct". Since the EC authorities had not "explicitly and affirmatively delegated or commanded" the beet farmers to provide beet to the sugar producers for export, it was not providing goods indirectly through a "government-mandated scheme" within the meaning of Item (d) of the Illustrative List.

4.111 The European Communities contended that the Complainants' reasoning with respect to the term "mandated" and their reliance on the interpretation made by the panel in *Canada – Dairy*, disregarded the ordinary meaning of that term. According to the European Communities, that reasoning had been implicitly but unequivocally rejected by the Appellate Body in that same case, when it had emphasized that the terms "by virtue of governmental action" did not, unlike the term "mandated", involve any

subsidy shall be deemed to exist if there was any form of income or price support in the sense of Article XVI of GATT 1994; and a benefit was thereby conferred.

4.114 With respect to the first requirement, Australia held that the EC regime was explicitly designed to provide income support for beet growers through the minimum price scheme previously outlined above (see for instance paragraphs 4.103 and 4.105,) The "chapeau" of Council Regulation No. 1260/2001[131] described the objectives of the sugar regime as "to ensure that Community growers of sugar beet and sugar cane continued to benefit from the necessary guarantees in respect of employment and standards of living…". To achieve this, Australia continued, the regime provided for an intervention price which "…must be fixed at a level which will ensure a fair income for sugar-beet and sugar-cane producers…". The high import barriers and the existence of quota limits maintained the high price of sugar sold on the domestic market, and supported the income of growers and processors.

4.115 Australia noted that Article XVI of GATT 1994 included within its scope any income or price support "which operates directly or indirectly to increase exports of any product". According to Australia, the income guaranteed to EC growers and processors from the sale of quota sugar acted to counter any loss incurred on

3. Good faith

(a) Exports of C sugar were consistent with the reduction commitments

4.122 The **European Communities** submitted that even if exports of C sugar were found to benefit from export subsidies, these would not exceed the reduction commitments scheduled by the European Communities, or would do so by much less than claimed by the Complainants. According to the European Communities, the Complainants' allegations failed to take into account the context provided by the Modalities Paper (see, for instance, paragraphs 4.37 and 4.143-4.145) as well as the requirements of the principle of good faith. By disregarding that the base quantity in the EC's Schedule did not include exports of C sugar, the Complainants' interpretation led to a result which was unfair because it would require the European Communities to reduce its exports by a much larger percentage (60 per cent) than that agreed in the Modalities Paper and applied by all other Members (21 per cent). In the European Communities' view, that result was not compatible with a good faith interpretation of its commitments.

4.123 The European Communities first recalled that its schedule of export subsidy reduction commitments was "an integral part" of the GATT 1994 and, therefore, of the *WTO Agreement*. As such, it had to be interpreted in accordance with the "customary rules of interpretation of public international law" embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). Noting that the "general rule of interpretation" set out in Article 31.1 of the *Vienna Convention* required interpreting treaty provisions "in good faith",[133] the European Communities maintained that, even if the Modalities Paper was not part of the *WTO Agreement*, it was an agreement reached by all the participants in the Uruguay Round in connection with the conclusion of the *Agreement on Agriculture*. As such, it was relevant "context" for the interpretation of the schedules of reduction commitments, in accordance with Article 31.2(a) of the *Vienna Convention*.

4.124 The European Communities asserted that its schedule reflected the understanding that exports of C sugar did not benefit from export subsidies and that the Complainants were aware of this fact. The figure shown in the EC's Schedule LXXX under the heading "base quantity level" only included the exports of A and B sugar during the base period 1986-1990. The European Communities supplied statistical data showing that the total quantity of sugar exported from the European Communities during the base period was higher than the scheduled 1986-1990 base levels in EC Schedule LXXX.[134] The figures that appeared under the heading "annual and final quantity commitment levels" were calculated from that "base quantity level" by applying the reduction percentage agreed in the Modalities Paper. Recalling its reasoning summarized in paragraphs 4.122 and 4.125, the European Communities concluded that the base quantity level would have been 3,188,200 tonnes instead of 1,612,000 tonnes, and the final commitment level would have been 2,514,700 tonnes (i.e. 79 per cent of 3,188,200 tonnes) instead of 1,273,500 tonnes (i.e. 79 per cent of 1,612,000 tonnes)[135] if C sugar had been taken into account. Ttisti7s3 TD /F0 11.5 5.25 Tc2c16ket Tc2yred 0 t1/0 t2ere awd0 19.5 0 TD -0.045Pap

[133] sugar

.25 Tc2c1617nnes ins 4MTtisti7belowTD 0 Tc 0.1875 Tw ( ) Tj 30.12.1942 Tw above.0783 Tc 02720 Tw (") Tj Tw (durivelthe base period was higher than the 1 Tc 0.1875 ling i Tw (135)ing summaTj -63.75 -12.7 the scr

4.125 The

production as an export subsidy. Also, three successive rulings by the Appellate Body on the same issues had been necessary to define the test on which the Complainants had relied in the present case. The European Communities contended that the interpretation eventually adopted had not been advanced by any of the parties during the proceedings and was strongly criticised by all of them, as well as by other Members, before the DSB on the grounds that it had no basis in the text of the *Agreement on Agriculture*.[143]

4.128 The European Communities underlined what it considered as fundamental differences between the present dispute and *Canada – Dairy*. First, the alleged violation of the scheduled commitments in Canada Dairy did not result from a scheduling error made during the negotiations, but rather from Canada's introduction, after the conclusion of the WTO Agreement, of a new regulatory regime. Secondly, the measures at issue in *Canada – Dairy* did not exist when the reduction commitments were negotiated, as they were not introduced by Canada until August 1995. Third, Canada had believed that the new regime would allow milk processors to increase their exports without breaching Canada's reduction commitments.[144] Fourth, Canada did not contest that the regime in place during the base period, and up to 1995, conferred export subsidies, which was why Canada deemed it necessary to replace it.[145] Fifth, Canada did not argue that the base level did not include all the subsidized exports made during the base period. For these reasons, the panel's finding in Canada Dairy that Canada had acted inconsistently with its reduction commitments did not require it to reduce its subsidized exports beyond the level agreed by the participants in the Uruguay Round. In contrast, the European Communities continued, the regime in the present case was in place at the time of the negotiations and indeed was the basis for the negotiated commitments. The European Communities, reiterating the points made in paragraphs 4.122-4.126, submitted in the alternative, that exports of C sugar should not be deemed to be in excess of the European Communities' reduction commitments, unless it was established (and, if so, only to that extent) that the quantity of subsidized exports exceeded the level of the final commitment that resulted from applying the reduction percentage agreed in the Modalities Paper to a base quantity which included exports of C sugar made during the base period.

4.129 Alternatively, should the Panel find that the C sugar regime provided export subsidies in excess of the reduction commitments, the only course of action consistent with the requirements of good faith would be for the Complainants to agree to the correction of the European Communities' scheduling commitments so as to include the exports of C sugar in the base levels and to rectify the annual commitments accordingly. Otherwise, the European Communities would be prejudiced, because it would be effectively required to reduce the quantity of subsidized exports by a much larger percentage than the one agreed to in the negotiations, namely by 60 per cent. Furthermore, if the footnote on ACP/India sugar were found to be invalid, the overall percentage of export subsidy reduction would be 73 per cent. (See also paragraphs 4.123-4.124) In this regard, the European Communities indicated that the possibility to correct errors in the text of a treaty was specifically envisaged in Article 79 of the *Vienna Convention.*

4.130 The **Complainants** responded that the issue before the Panel was the treaty text, i.e. the EC Schedule, which had to be interpreted in accordance with the customary rules of interpretation of public international law. Consequently, their alleged understandings during ationr47 -0ugj 33e1

rules of the *Vienna Convention* were to be used to "clarify the existing provisions", and that dispute settlement must not add to or diminish rights and obligations provided in the covered agreements. Panels must follow the textual approach underlying the *Vienna Convention* rules and "interpretation was not a matter of revising treaties or of reading into them what they did not expressly or by necessary implication contain".[146] The Complainants held that, rather than a good faith clarification, the European Communities was seeking from the Panel a revision of its Schedule, and a diversion from the ordinary meaning imparted from the Schedule's text, and ultimately changing the figures in the EC Schedule by "interpreting" them. In their view, the figures indicated in the EC Schedule in respect of its export reduction commitments for sugar were unequivocal.

4.131 The **Complainants** rejected the characterization of the Modalities Paper as an "agreement" reached by all participants in the Uruguay Round. In their view, only the commitments undertaken under the *Agreement on Agriculture* were legally binding, which explained why that Agreement made no reference to the Modalities Paper. Recalling that the Modalities Paper was prepared during the latter stages of the negotiation of the *Agreement on Agriculture*, and not "on the occasion of the conclusion of the treaty" as required by Article 31.2 of the *Vienna Convention*, the Complainants held that the Modalities Paper did not provide "context" for the determination of the scope of subsidy reduction commitments in these proceedings because it was not an "agreement" relating to the *Agreement on Agriculture*, and because it was not accepted as an "instrument" made in connection with the conclusion of the *Agreement on Agriculture*.

4.132

4.135 **Australia** submitted that it did not have access to information that would have enabled it to make a definitive assessment that C sugar exports were being subsidized in the sense of Article 9.1(c) of the *Agreement on Agriculture.*

its reduction commitments, as originally specified in its Schedule.[151] Brazil also recalled the European Communities' standpoint in those circumstances.[152]

4.139 The **Complainants** agreed with the European Communities (see paragraph 4.129) that Article 79 of the *Vienna Convention* set out the process by which an error can be corrected in a treaty. However, the nature of the error addressed was clarified by Article 48.3 of the *Vienna Convention* which stated that Article 79 applied to an "error relating only to the wording of the text of a treaty", i.e., addressing situations where there were drafting errors in the treaty text, and only applying in situations "where the parties are agreed that it contains an error". The Complainants asserted, therefore, that Article 79 had no application to the case of a contracting State failing to meet its obligations under a treaty. Article 48 of the *Vienna Convention* dealt with the much more serious case of error that might be invoked by a State to invalidate its consent to be bound by a treaty. A State

(13 11 standpoing

existed before the *WTO Agreement* came into effect – including, for example, the US foreign sales corporation tax rules challenged by the European Communities itself – had since been found to be inconsistent with one or more of the WTO agreements. The European Communities, therefore, could not argue that, because of its wrong judgement, it ought to be allowed to correct its Schedule. A Panel finding to the contrary would have troubling implications for future negotiations. **Thailand** added that there was thus no

Paper was an "agreement". It had, in fact, exhausted its legal effects upon the conclusion of the *WTO Agreement*, which, in the European Communities' view, explained why it had not been carried over to the *Agreement on Agriculture*. The European Communities also asserted that, in practice, the participants in the Uruguay Round had treated the Modalities Paper as a binding agreement, since the purpose of the "verification process" was to check the conformity of the schedules with the Modalities Paper. Citing Article 1(a) of the *Vienna Convention*, the European Communities held that the term "agreement" could encompass not only treaties but also informal and/or non-binding agreements. The Modalities Paper was thus "context", not "preparatory work". In accordance with the basic rule of interpretation of Article 31.1, treaty provisions must be interpreted always in their context, and, in the European Communities' view, this included also the elements falling within Article 31.2 (a).

4.145 However, in the alternative the European Communities submitted that, if the Panel were to conclude otherwise, it would still be justified to resort to the Modalities Paper under Article 32 of the *Vienna Convention* as preparatory work. It was precisely because the Modalities Paper was drafted with a view to agreeing on the commitments to be scheduled subsequently in the *WTO Agreement*, that it must be considered as made "in connection" with that Agreement. The European Communities stressed that the preamble of a treaty, which by definition imposed no legal obligations, was classified as "context" under Article 31.2 of the *Vienna Convention* (see also paragraph 4.149).

4.146 Il5 -12 TD -0.7a5p9
as

4.1484.148

settlement panel to determine, in appropriate cases, whether a Member had not acted in good faith, [162] and that the principle of good faith controlled not only the performance of obligations but also the exercise of Members' rights, enjoining them to exercise their WTO rights "reasonably" and prohibiting the "abusive" exercise of those rights.[163] The European Communities described the principle of good faith as "pervasive" in certain cases, particularly "if post-determination evidence relating to pre-determination facts were to emerge, revealing that a determination was based on … a critical factual error."[164] The European Communities also held that the exercise of the right to submit claims to a panel had to be used reasonably, and in accordance with Article 3.10 of the *DSU* and with the general principle of good faith.

4.152 The European Communities also referred to estoppel as a general principle of international law[165], which followed from the broader principle of good faith. The European Communities argued that it was one of the principles which Members were bound to observe when engaging in dispute settlement procedures, in accordance with Article 3.10 of the *DSU*.[166] The European Communities referred to several descriptions of the operation of the principle of estoppel as a basis for its claims and argumentation, and held that the following features were generally accepted as essential elements of estoppel: the party invoking estoppel must have been induced to undertake legally relevant action or abstain from it; by relying in good faith upon clear and unambiguous representations by the other State; and reliance must prejudice the addressee, i.e., subsequent deviation from the original representation must cause damage to the relying State, or result in advantages for the representing State. Estoppel might arise not only from express statements, the European Communities continued, but also from various forms of conduct, including silence, where, upon a reasonable construction, such conduct implied the recognition of a certain factual or juridical situation.[167]

4.153 In view of the above, the European Communities concluded that, if the Complainants held that they were already of the view, at the time of the conclusion of the *WTO Agreement*, that exports of C sugar benefited from export subsidies, the European Communities considered that they would not have acted in good faith because they had failed to advise the European Communities to include those exports in the base quantity. If, on the other hand, the Complainants confirmed that they believed until recently that exports of C sugar did not involve export subsidies, the European Communities submitted that they would not be acting in good faith by seeking to take advantage of an excusable and common scheduling error in order to exact from the European Communities a concession that was never negotiated with, or requested from, the European Communities during the

---

[162] Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 297.

[163] Appellate Body Report on *US – Shrimp*, para.158; B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*, Cambridge, Grotius, 1987, p. 118.

[164] Appellate Body Report on *US – Cotton Yarn*, para. 81.

[165] The European Communities gave the following examples of judicial application of the principle of estoppel in support of its view: *Arbitral Award by the King of Spain Case* (ICJ Reports, 1960, 192 at 213); *Temple of Preah Vihear Case* (ICJ Reports, 1962, 6 at 32); opinions of Judges Alfaro and Fitzmaurice in the *Temple of Preah Vihear Case* (ICJ Reports, 1962, 39-51, and 61-51); Brownlie, *Principles of Public International Law* (Oxford, 2003), p. 616); J.P. Müller and T. Cottier, in *Encyclopaedia of Public International Law*, Ed. Max Planck Institut, North Holland, 1992, p. 118.

[166] According to the European Communities, the panel in *India – Autos* suggested that the principle of estoppel was applicable in WTO disputes (footnote 364). The panel in *Argentina – Poultry Anti-Dumping Duties* declined to rule on this issue, in view of the fact that the conditions identified by Argentina for the application of that principle were not present (footnote 58). The European Communities further stated that a number of other panels have addressed and rejected estoppel arguments, having regard to the specific facts of the dispute, without questioning the applicability of this principle to GATT/WTO disputes. See Panel Report on *EEC (Member States) – Bananas I*, para. 362; Panel Report on *Guatemala – Cement II*, paras. 8.23-8.24, and Panel Report on *EC – Asbestos*, para. 8.60.

[167] The European Communities referred in this regard to the judgement of the ICJ in the *Temple of Preah Vihear Case* (ICJ Reports, 1962, 6-32 32); see also opinions, in the same case, of: Judge Fitzmaurice, p. 62; Judge Alfaro, pp. 41-42; case law summarized by Judge Alfaro at pp. 43-51 of his opinion.

engaged in dispute settlement procedures ("if a dispute arises"). The

4.162 The **Complainants** contested the premises upon which the European Communities had based its argumentation on estoppel. Recalling the situation with regard to the availability and access to the relevant sources of information during the Uruguay Round (see paragraph 4.135), **Australia** contended that the European Communities provided substantial manufacturing and export subsidies to sugar processors but did not consider it appropriate to conduct a survey of the E

the "procedures" regulated by the *DSU* and not just the panel phase, including, *inter alia*, the provisions of Article 6. It was also incorrect that the exercise of the right to request a panel was subject exclusively to Article 3.7 of the *DSU*. That provision was but one of the expressions of the principle of good faith.[184]

4.167 Responding to the argument summarized in paragraph 4.164, the European Communities considered that the principle of estoppel did not operate by derogating or amending tacitly the treaty rights and obligations of the parties concerned but was a procedural defence which precluded one party from exercising a right *vis-à-vis* another party but without modifying the substantive obligations of that party.[185] In the present case, the European Communities' contention was that the Complainants were precluded from bringing a claim under Article 9.1(c) and therefore that the Panel should reject their claims, even if it upheld them in substance. Since estoppel did not alter the substantive rights of Members under the *WTO Agreement* but only the exercise of those rights, the European Communities was of the view that it could operate exclusively between two Members.

4.168 Further, the European Communities underlined that estoppel was a matter of adjectival, rather than substantive, law and accordingly the effect of a true estoppel was confined to the parties.[186] The contention that estoppel amounted to "consent" (see paragraph 4.160) was wrong and without foundation in public international law. Referring to recent panels' interpretation of that notion[187], the European Communities sustained that the existence of estoppel must be established from the perspective of the party who claimed it. The issue was whether that party could rely legitimately on the representations made by the other party, regardless of whether such representations amounted to "consent"

view. Additionally, the Complainants' lack of reaction during the Uruguay Round clearly indicated to the European Communities that they shared the understanding that the C sugar regime did not provide export subsidies.

4.171 The **Complainants** responded that the sugar policies applied by other WTO Members referred to by the European Communities were irrelevant in these Panel proceedings.

4.172 **Thailand**, in turn, submitted that it was precisely because the doctrine of estoppel was a procedural defence precluding a party from exercising its rights vis-à-vis another party, that it would create discrepancies between the rights that different WTO Members might assert under the *DSU*. The European Communities' argumentation implied that in future multilateral trade negotiations Members would be forced to make objections against another Member's attempts to qualify obligations under WTO law through notes in schedules, lest they would risk losing their rights under the WTO. This would create an onerous negotiating environment, where the better resourced WTO Members would have an advantage over the smaller and poorer countries. WTO law would not provide an efficient, secure and fair framework for multilateral trade negotiations if WTO Members were allowed to use the silence of other Members during the negotiations as an excuse for not performing their commitments.

E. ACP/INDIA "EQUIVALENT" SUGAR

4.173 The **Complainants** claimed that the European Communities had exceeded its export subsidy reduction commitments, *inter alia*, by according export subsidies to ACP/India equivalent sugar[188]. They recalled that the European Communities had the burden of proof under Article 10.3 of the *Agreement on Agriculture* to establish that it had not exceeded its export subsidy reduction commitments.

4.174 The Complainants asserted that they were not questioning the preferential access of ACP/India sugar to the EC market and were not asking for a change in the requirement that ACP/India sugar be purchased at intervention prices. Rather, the Complainants were seeking to address the measures which, in their view, did not conform to the WTO disciplines, notably by asking the European Communities to cease exporting sugar in excess of its reduction commitments.

1. Article 9.1(a) of the *Agreement on Agriculture*

4.175 The **Complainants** submitted that the European Communities granted export subsidies listed in Article 9.1(a) of the *Agreement on Agriculture* to exports of ACP/India equivalent sugar. By virtue of Article 2 of the *Agreement on Agriculture*, the European Communities' budgetary outlay and export quantity reduction commitments covered this category of sugar notwithstanding the footnote inserted in the European Communities' Schedule of Concessions. Consequently the European Communities acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*.

4.176 The Complainants further submitted that a quantity of sugar that the European Communities considered to be "equivalent" to the amount of sugar imported under preferential trade arrangements was exported from the European Communities to third countries using export refunds. The export refunds granted to ACP/India equivalent sugar were the same as the export refunds granted to A and B quota sugar and thus these payments clearly constituted "direct subsidies" provided by government, to firms, to the exporting industry and to producers of sugar, "an agricultural product", and were "contingent on export performance", within the meaning of Article 9.1(a) of the *Agreement on*

[188] The Complainants explained that, by bringing this case, they were not seeking to affect the preferential access of the ACP countries and India to the EC market and were not requesting that the European Communities withdraw the preferential market access it granted to those countries.

Agriculture. As the export refund system was identical to the system of export refunds for quota sugar, which the European Communities recognized to be covered by its export subsidy reduction commitments[189], Article 9.1(a) brought within its scope such subsidies, which had to be, accordingly, subject to reduction commitments.

4.177 The Complainants pointed out that, as the European Communities had exported 1,725,100 tonnes of this sugar category alone during marketing year 2001-2002, such subsidized exports were in excess of the European Communities' scheduled commitment levels for that year.[190] The Complainants submitted statistical data which suggested that most of the "preferential" sugar imported by the European Communities (principally into the UK) was actually consumed in the European Communities.[191] The European Communities had also admitted that the export subsidies on "preferential" sugar were subsidies on EC quota sugar, up to a quantity limit of 1.6 million tonnes.[192]

4.178 The **European Communities** responded that the Complainants had failed to properly interpret the European Communities' scheduled commitments. The allegations that the European Communities had exceeded its export subsidy commitments should therefore be rejected. The European Communities explained that it had provided export refunds to an amount of exports equivalent to the sugar it imported under preferential import arrangements and that such exports were eligible to receive export refunds. The European Communities noted that its export statistics did not distinguish between refined sugar obtained from ACP/India equivalent sugar and other sugar.

4.179 According to the **Complainants,** the figures supplied by the European Communities in its submissions to the Panel, as well as its notifications to the Committee on Agriculture clearly indicated that it had exceeded its quantity commitment levels in marketing year 2001-2002.[193] These figures constituted an admission on the part of the European Communities that, in that marketing year, it had granted export refunds to 2,651,900 tonnes of sugar amounting to €1,217,247,000. The Complainants also took note of the European Communities' categorization of quantity of sugar that benefited from these refunds into "ACP/India equivalent sugar" and "notified A+B sugar". The European Communities had also confirmed that it was applying export subsidies to ACP/India equivalent sugar within the meaning of Article 9.1(a) of the *Agriculture Agreement*, in line with the historical record.[194] The Complainants recalled that, if the European Communities claimed that the exports of ACP/India equivalent sugar were not subsidized, it had the burden of proof, under Article 10.3 of the *Agreement on Agriculture*, to establish that no export subsidies applied to such exports.

4.180 The Complainants reiterated that their claim was based on the following premises: the export refunds were export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture*; the export refunds granted to ACP/India equivalent sugar and "notified A+B sugar" should be counted against the European Communities' reduction commitments; and, for marketing year 2001-2002, the European Communities' quantity commitment level was 1.273 million tonnes and budgetary outlay commitment level was €499.1 million. In their view, the European Communities' reduction commitments covered the exports of ACP and India equivalent sugar, given the European Communities' own admission that all the export refunds granted to sugar were export subsidies, and

---

[189] The European Communities notified certain export refunds for quota sugar. These refunds, provided under Article 27 of the Regulation, were the same as those provided to ACP/India equivalent sugar.

[190] Exhibit COMP-15, p. 17.

[191] The United Kingdom was the major importer of "Preferential" sugar (approximately 1.1 million tonnes), but exported less than 400,000 tonnes (104,000 tonnes to other EC member States and 383,000 tonnes to third countries). Source http://statistics.defra.gov.uk.

[192] EC advice at consultations 21/22 November 2002, confirming that the exports in question of 'Preferential sugar' were sourced from A and B quota. See also Exhibit COMP-11, p. 9; and L/4833 para. 2.19 (GATT Panel Report on *European Communities – Refunds on Exports of Sugar*).

[193] See Tables 10, 11, and 12 of the European Communities' first written submission.

[194] Exhibit ALA -0.21ilunds granted to TD 0.0 ha84r1565.75 07ird countries).

that the export refunds granted to *all* categories of sugar were subject to reduction commitments. The European Communities' contention that its export subsidy commitment levels were significantly higher than the level cited by the Complainants found no basis in the EC's Schedule, when considering the figures under the headings "annual and final outlay commitment levels" and "annual and final quantity commitment levels".

2. Exemptions through unilateral insertions in Schedules

4.181 Referring to the European Communities' assertion before the WTO Committee on Agriculture that it had not assumed reduction commitments in respect of ACP/India equivalent sugar[195], the **Complainants** considered that such a position was legally untenable. They submitted that Members could not exempt themselves from their obligations under the *Agreement on Agriculture* by including reservations in their Schedule of Concessions that must be subsequently accorded the same, or greater weight, than any provision of a *WTO Agreement* with which the schedule text might directly conflict. To the extent that the European Communities purported to diminish its obligations under the *Agreement on Agriculture*, the footnote, in their view, constituted an impermissible reservation under international law.

4.182 The Complainants considered that, if Members could validly modify their obligations under the *Agreement on Agriculture* through entries in their Schedule, the purpose of Article XVI:5 of the *WTO Agreement* would be frustrated. The *WTO Agreement* foreclosed the possibility of making any reservation to the obligations under these Agreements. If Members were permitted to qualify their obligations under the *Agreement on Agriculture* or Article II of GATT through notes to their Schedules, the *WTO Agreement* would effectively be reopened by interpretation. The Complainants sustained that the *Agreement on Agriculture* did not provide for reservations of any kind, and in this respect, was different from GATS, which expressly permitted Members to impose "conditions and qualifications" on certain types of scheduled obligations.[196] This

scheduled commitments. In this context, the Complainants asserted that the reduction commitments under the first clause of Article 3.3 represented narrower commitments than the export subsidy commitments on unscheduled products mandated by the second clause of Article 3.3.[197]

4.185 Having recalled the substance of Article 3.3, the Complainants held that, under Article 8, each WTO Member undertook not to provide export subsidies otherwise than in conformity with the *Agreement on Agriculture* and with the "commitments as specified" in the Member's Schedule. The Complainants submitted that the footnote was not a "commitment" "specified" "in" a schedule

bound the base levels in its Schedule. The Complainants noted that the European Communities had neither sought nor received a waiver for the exclusion of ACP/India equivalent sugar from its WTO commitments.

4.190 The **European Communities** responded that a waiver was only necessary if the underlying situation was inconsistent with a Member's obligation. The European Communities pointed out that, while a waiver may be obtained with the support of only three quarters of the membership of the WTO, inserting a footnote into a Member's schedule required the agreement of all WTO Members.[201] In this context, the European Communities considered that, by virtue of Article 16 of the *Vienna Convention*, the Complainants had consented to be bound by the terms of the treaty footnote contained in the EC's Schedule, by ratifying the *WTO Agreement.* Thus, they had agreed to it. Denying any legal effect to the footnote would amount to finding that part of the *WTO Agreement* was inconsistent with another part of that Agreement, ultimately undermining the balance of concessions. According to the European Communities, this would also be contrary to Article 3.2 of the *DSU* which stated that dispute settlement "cannot add to or diminish the rights and obligations provided in the covered agreements."

4.191 The European Communities contended that schedules were an integral part of the *WTO Agreement* by virtue of Article 3.1 of the *Accropean Cmmunities t*

operation of these two components mean

4.195 Even if it were accepted that the footnote indicated the basis for quantity levels for subsidized exports of ACP/India equivalent sugar, the Complainants underlined that the footnote was silent about what values would be multiplied by those quantity levels to arrive at the putative ceiling for budgetary outlays on subsidies on these exports. Further, the alleged "ceiling" had several flaws. First, i

4.197 **Thailand** also referred to the principle of "*contra proferentem*" to argue that the European Communities prepared, and inserted, the footnote in its Schedule for its own benefit.[211] Thailand explained that, unlike tariff concessions which were inserted in the schedules after a negotiated and reciprocal *exchange* of concessions, the export subsidy reductions commitments were inserted in the schedules unilaterally and their consistency with the guidelines set out in the Modalities Paper was checked in the verification process. Thus, even if the factual statement about the amount of past subsidized exports were "interpreted" to constitute a commitment to observe a ceiling on the future subsidization of those exports, that meaning would not be the preferred meaning according to the "*contra proferentem*" principle. Thailand held that this principle was *a fortiori* applicable if the meaning that was least to the advantage of the party which prepared or proposed the provision was the meaning which that party had consistently acknowledged in the past. In this regard, the European Communities' present position was inconsistent with its prior statements as well as its prior practice.

4.198 The Complainants took issue with the inconsistency between the interpretation now advanced by the European Communities and its prior statements before the A268 Tc 1.9643.2edistently acknowledged

submitted any notifications to the Committee on Agriculture relating to the export of ACP/India equivalent sugar and indeed had refused to provide this information, notably when requested by Australia.

4.200 In this context, the Complainants underlined the approach adopted by the Appellate Body in *Korea – Various Measures on Beef* in reaching a conclusion on the interpretation of Korea's Schedule, "after examining Korea's subsequent statements before the Committee on Agriculture and Korea's annual notifications to that Committee."[215] In their view, this implied that, in interpreting a commitment assumed by a Member under the *Agreement on Agriculture*, a panel could also take into account the interpretation of that commitment advanced by the Member in statements before the Committee on Agriculture or implied in its notifications to that Committee. The Complainants suggested that the Panel rely also, in the present case, on the European Communities' statements before the Committee on Agriculture, and its annual notifications, as a supplementary means of interpretation.

4.201 The **Complainants** thus considered that the Panel needed to determine the proper interpretation of the footnote and its implications for the resolution of the present dispute. However, independently of how it was interpreted, the footnote could not have the legal effect of exempting export refunds granted to ACP and India equivalent sugar from reduction commitments. Any interpretations would ultimately lead to the same legal result, namely that the export refunds granted to ACP/India equivalent sugar were inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*. The Complainants sustained that, if the Panel concluded that the footnote purported to exempt exports of sugar of ACP or Indian origin from the European Communities' export subsidy reduction commitments, then the Panel would have to declare the footnote without legal effect because it diminished the European Communities' obligations under Articles 3.3 and 9 of the *Agreement on Agriculture*.

4.202 **Thailand** noted that, in the alternative, the Panel may conclude that the footnote indicates that "sugar of ACP or Indian origin" was not to be considered a scheduled product for the purposes of analysing the European Communities' commitments. This interpretation could be based on the fact that the footnote qualified the entry "sugar" in the EC's Schedule. As such it indicated that the term "sugar" "does not include" the quantity of sugar specified in the footnote. If this included "sugar of EC origin of a quantity equivalent to the sugar imported from the ACP countries or India" then it followed that this ACP/India equivalent sugar was not included in the EC's Schedule (assuming such a division could be made under the *Agreement on Agriculture*. For these reasons, the footnote could also be interpreted to remove this sugar from the EC's Schedule altogether. Thailand noted that this interpretation would be based on the terms of the footnote and would give legal effect to it. Under Article 3.3 of the *Agreement on Agriculture*, export subsides listed in Article 9.1 of the Agreement may not be granted to an unscheduled agricultural product. If the footnote was interpreted to remove ACP/India equivalent sugar from the EC's Schedule, export subsides could not be granted on that

Agreement on Agriculture, in that it required that Schedules and any footnotes therein conform to the Agreement, and did not diminish the European Communities' obligations under that Agreement. If the conflict could not be resolved by way of interpretation through Articles 31 and 32 of the *Vienna Convention*, a choice had to be made in such a way that the fundamental, multilaterally negotiated provisions prevailed over a unilaterally inserted footnote to a Member's Schedule. The approach taken by the Appellate Body and panels, as outlined in paragraph 4.188, served to support this principle. This principle was equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994, and was confirmed by paragraph 3 of the Marrakesh Protocol.[218] In the Complainants' view, the footnote clearly sought to diminish specific obligations placed upon the European Communities by Article 9.1 of the *Agreement on Agriculture*. **Australia** underlined that the Uruguay Round schedules were prepared with the full knowledge of the *US – Sugar* panel report, which was adopted in June 1989. **Thailand** noted that under Article 3.1 of the Agreement on Agriculture the "domestic support and export subsidy commitments" contained in Part IV of a Member's Schedule of Commitments are made an integral part of the GATT 1994. The footnote becomes an integral part of the GATT 1994 only to

[218] Panel Report, *European Communities – Tariff Treatment of Certain Information Technology Products*, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1851, paragraph 7.61.

subsidized exports was reduced, this base was not to be reduced, and was therefore to act as a fixed ceiling.

ModaliTj 28.5 018 -0.09 Tc 061.7717

4.206 Turning to the Complainants' contentions regarding the absence of budgetary outlay commitment in the footnote, the European Communities sustained that Article 3.3 incorporated the export subsidy commitments into the GATT, but did not prescribe any form for such commitments. Since the European Communities considered that it had respected the commitments it had undertaken to limit subsidization on A/B sugar and ACP/India equivalent sugar, it had acted consistently with Article 3.1. Moreover, since the European Communities had not provided export subsidies in excess of the commitment levels set out in its schedule, it had acted consistently with Article 3.3. Here, the European Communities recalled the operation of its commitments on exports of A/B sugar as imposing a *de facto* budgetary limit. Moreover, in the European Communities' opinion, Article 3.3 did not impose an obligation to have both a budgetary outlay and a quantity commitment level, but merely referred to the "commitment levels specified therein". Article 3.3 only set out the obligation to provide Article 9.1 listed subsidies in conformity with the commitments specified in a Member's schedule. The obligation to schedule both types of commitments was only set out in the paragraph 11 of the Modalities Paper, of which, the European Communities recalled, the footnote was a negotiated departure.

4.207

since the early 1930s[222], due to its imprecise nature and scope. That principle could not be used in the present case since, in particular, doubts had been cast on it.[223] The European Communities raised questions as to the applicability of this principle to a multilateral treaty, and as to how it fitted into the *Vienna Convention*, which was, in the European Communities' opinion, based on the principle of good faith. The European Communities regarded the principle of *in dubio mitius* as more appropriate, since it applied to treaties, had been recognized by the Appellate Body, and required that an interpretation be preferred which impinged as little as possible on the sovereignty of Members.[224] According to the European Communities, in the present case, this would imply interpreting the footnote as setting a ceiling in order to allow the European Communities to continue to provide export subsidies on this portion of its exports.

4.209 The **Complainants** contended that the European Communities had drawn a number of false analogies

wT5Au

Complainants, or any other WTO Member, prior to the completion of the Uruguay Round, and there was no record of the nature of the compensation received. Also, by contrast with *Korea – Various Measures on Beef*, there was no ambiguity over the ordinary meaning of the European Communities' footnote. Resorting to negotiating history, or to the Modalities Paper, as suggested by the European Communities in paragraph 4.193 would therefore serve no purpose.

4.211 Moreover, the Complainants noted that the European Communities did not cite the relevant provision of the Modalities Paper that would have permitted it to adopt a lesser obligation than that expressed in the language of paragraphs 11

therefore covered refunds on exports equivalent to imports. Second, the European Communities had made its intentions clear in two letters, when submitting draft schedules and associated documents to the negotiating group[230], reiterating its objective to have the footnote adopted by the other negotiating parties. Since the footnote was adopted as proposed, the European Communities submitted that these cover letters were equally relevant in establishing the meaning of the footnote, i.e. that it covered exports "corresponding" to imports.

4.218 The **Complainants** reaffirmed that the scope of application of the footnote was a subsidiary argument supporting their legal claim that the European Communities was exceeding its export subsidy reduction commitments. They sustained that the words "ACP and Indian origin" needed to be interpreted in accordance with the ordinary meaning of "origin" to mean sugar that came from the ACP countries or India. They registered the European Communities' recognition, in paragraph 4.217, that it exported an amount of sugar "equivalent" to the amount it imported from ACP countries and India, and that may actually be of domestic origin. They noted, however, that the amount of sugar exported was not equivalent to the amount of sugar imported under the preferential arrangements[231], but was set at an arbitrary limit based on preferential imports plus, presumably, Special Preferential Sugar (SPS), despite the fact that SPS was not eligible for export refunds. Even assuming that the footnote was a legitimate derogation from the *Agreement on Agriculture*, the European Communities' [illegible]

European Communities had made it clear that it considered that the footnote covered a volume of exports corresponding to the volume of imports from ACP countries and India.

4.221 The European Communities confirmed that it granted export subsidies on exports of sugar "equivalent" to the amount of imports which c

exports".[237]

negotiated balance of the varied interests of all participants in the Uruguay Round. The European Communities submitted that, in challenging the European Communities' footnote, the Complainants were trying to alter that balance.[242] The European Communities considered that it was only normal that importing Members defined their offers (and their ensuing obligations) in terms which suited their needs. On the other hand, exporting Members had to ensure that their corresponding rights were described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, were guaranteed. According to the European Communities, a special arrangement was made for this purpose in the Uruguay Round, and a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed the participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions. The fact that Members' Schedules were an integral part of the GATT 1994 indicated that, while each Schedule represented the tariff commitments made by one Member, they represented a common agreement among all Members. The European Communities held that the claims which the Complainants made in these proceedings should have been raised during the verification process, and if considered valid, the Members concerned could have negotiated a different balance of concessions.

4.228 According to the European Communities, the Complainants were aware, by virtue, *inter alia*, of the inclusion of the footnote in the European Communities' export subsidy commitments, both in its draft and final form, of the existence of the European Communities' intended treatment of ACP/India equivalent sugar. The European Communities contended that, in 1981, the Complainants had argued against ACP equivalent sugar being treated separately from other export refunds on EC sugar. In 1993 and 1994, the Complainants explicitly agreed to the compartmentalized treatment of ACP/India equivalent sugar in negotiating and concluding the *WTO Agreement.* The elements on which the Complainants based their challenge in this dispute were in existence at the time of conclusion of the Uruguay Round.

4.229 With respect to ACP/India equivalent sugar, the **Complainants** rejected the European Communities' claim that they were estopped from bringing their complaint, and that they implicitly agreed to the footnote in the EC's Schedule. The Complainants indicated that their rebuttal on good faith and estoppel for C sugar (see Section IV.D.3(b) With respect t Uruguay40.2156 Tw5 0 TIV.D.37he

9.75 0 TD -0.1335 Tc 1.071 Tw (t- Tw (had arg) T

negotiations. The closing weeks and days of negotiations would see a flood of footnotes qualifying one previously negotiated commitment after another. WTO Members might never sign the agreements, as they would see negotiated benefits eliminated by footnotes or would simply conclude that they could not be sure what the agreements meant. According to the Complainants, dispute settlement would soon be concerned with interpreting treaty text in light of footnotes, and even one footnote in light of another (see also arguments with respect to C sugar in Section IV.D.3(b) above).

F. ARTICLE 3 OF THE *SCM AGREEMENT*

4.232 The **Complainants** submitted that the export subsidies granted in respect of exports of quota sugar[243], ACP/India equivalent sugar and C sugar were prohibited subw (ye4I390 0 TD -2041

and providing for different remedies. A measure could be inconsistent with one agreement but not with the other, or it could be inconsistent with both. A finding that a measure was inconsistent with both, however, would require proof of different elements.

4.235 In this respect, the Complainants referred to the *US-FSC* panels and Appellate Body reports which analysed export subsidies granted to agricultural products under both the *SCM Agreement* and the *Agreement on Agriculture*. For the Complainants, the relevant provisions of the SCM and the *Agreement on Agriculture* needed to be read in context and needed to give meaning to the intent of the negotiators to integrate – at least partially – agricultural export subsidies into the *SCM Agreement*. Here, the Appellate Body had examined the challenged measures under both the *Agreement on Agriculture* and the *SCM Agreement*, without any suggestion that to do so in any way undermined Article 21.1 of the Agreement on Agriculture.[245] The Appellate Body, in both the original proceedings and the recourse to Article 21.5, found that the subsidies in that case were not only prohibited export subsidies under Article 3.1(a) and 3.2 of the *SCM Agreement* but also inconsistent with the export subsidy obligations under Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture*.[246]

4.236 The Complainants also cited Article 3.1 of the *SCM Agreement*, which prohibited export subsidies, "except as *provided* in the *Agreement on Agriculture*." In *Canada – Dairy*, the Appellate Body had said that this clause "indicates that the WTO-consistency of an export subsidy for agricultural products has to be examined, *in the first place*, under the *Agreement on Agriculture*."[247] If an examination "in the first place" of export subsidies under the *Agreement on Agriculture* revealed that these subsidies were not "as provided in the *Agreement on Agriculture*," then an examination "in the second place" was required under the *SCM Agreement*.

4.237 For the Complainants, there was no inconsistency or conflict between the references in Article 3.1 of the *SCM Agreement* ("except as provided in the *Agreement on Agriculture*") and that in Article 21.1 of the *Agreement on Agriculture* (that provisions of other agreements apply "subject to the provisions of this Agreement"). These two provisions, read together, meant that any subsidy permitted under the *Agreement on Agriculture* was not subject to the disciplines of the *SCM Agreement*. However, this reading did not compel or even imply the additional inference drawn by the European Communities that subsidies not permitted under the *Agreement on Agriculture* were equally not subject to the disciplines of the *SCM Agreement*. Nothing in the text or, indeed, the object and purpose, of either provision supported such a broad reading of the two provisions. The European Communities' interpretation of the relationship between these agreements and the limited scope of application of the *SCM Agreement* in respect of export subsidies granted to agricultural products could not be reconciled with the plain wording of the provisions regulating this matter. The meaning of the terms in the *SCM Agreement* was unambiguous: "except" where the *Agreement on Agriculture* provides otherwise, the disciplines set out in Article 3 of the *SCM Agreement* apply to subsidies on agricultural products.

4.238 The **European Communities,** in response to the Complainants arguments in paragraph 4.235 in relation to the *US – FSC* dispute submitted that neither the panel nor the Appellate Body had found that the *SCM Agreement* applied to agricultural products. The panel had found that the FSC scheme was inconsistent with the *SCM Agreement*, "except as provided in the *Agreement on Agriculture*".[248] The panel, however, did not make a finding that, because the FSC scheme was inconsistent with the *Agreement on Agriculture*, it was subject to and inconsistent with the *SCM Agreement* as far as

[245] Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 256-257.

[246] Appellate Body Report on *US – FSC*, paras. 177(a) and (d). See also Appellate Body Report on *US – FSC (Article 21.5 – EC)*, paras. 256(b) and (d).

[247] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123 (emphasis added).

[248] Panel Report on *US – FSC*, paras. 7.130 and 8.1.

agricultural products were concerned. Furthermore, the panel considered it necessary to make separate recommendations under the *SCM Agreement* and the *Agreement of Agriculture*.[249] This suggested that the panel considered that the *Agreement on Agriculture* excluded the applicability of the *SCM Agreement* with respect to agricultural products. In determining the level of countermeasures under Article 4.10 of the *SCM Agreement* in the Article 22.6 arbitration in the FSC dispute, the European Communities continued,

relationship between the two agreements during a specific time-period (the nine year implementation period for Article 13). Given the existence of Article 21.1 of the

4.248 Brazil also argued that the EC price support regime permitted producers to cover a disproportionate share of their fixed costs through guaranteed high returns on A and B quota beet and sugar, and also generated the production of C beet and C sugar. It was therefore a financial contribution to producers of C beet and C sugar within the meaning of Article 1.1 of the *SCM Agreement*. This financial contribution permitted them to produce and sell C beet and C sugar below the average total cost of production, thereby benefiting those producers. Since C sugar must be exported, and the C beet from which it was made was devoted exclusively to the production of C sugar, the subsidies received by the producers of C beet and C sugar were contingent on exports within the meaning of Article 3.1(a) of the *SCM Agreement*. These subsidies were, accordingly, prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*.

4.249 The **Complainants** noted that if a panel were to find the measure at issue to be inconsistent with one of the multilateral trade agreements, such a finding normally would resolve

4.259 Thus, for the European Communities, while under the *Agreement on Agriculture* the measure providing the subsidy could be maintained (providing the relevant commitments were respected), under the *SCM Agreement* the measure providing the subsidy would have to be withdrawn without delay. This would mean that, if the commitments were exceeded at some point in a future year, the measure would have to be withdrawn, but that the losing Member would be able to reinstate it at the beginning of the next year. However, such a situation would clearly be ill-matched with the concept of withdrawal, which implied a permanent removal of a measure, and with the concept, in the second sentence of Article 4.7 of the *SCM Agreement*, that the measure should be withdrawn within a specific period of time. The European Communities referred to the findings of the panel in *Canada – Dairy*, which concluded[256]:

> "In the Panel's view, it results from Articles 8 and 21.1 of the *Agreement on Agriculture* and Article 3.1 of the *SCM Agreement* that the Panel would not be able to recommend Canada to 'withdraw' – as interpreted by the Appellate Body – measures constituting an export subsidy, exclusively in respect of agricultural products, both within the meaning of Article 9.1(c) of the

- Procedures: According to Article 21.3(c) of the DSU, the implementation period shall be determined by binding arbitration, while Article 4.7 of the SCM Agreement assigned the task of determining the implementation period to the panel.

4.263 Of the three differences listed above, the third was of particular importance to the Complainants in order to avoid arbitrat216sk of dg-451.5 5 Tw ( ) Tj -300 -12.7r negotiaj -451616sk of dg-4513nces li (

Agreement".[259] Citing Article 3.8 of the *DSU*, the European Communities submitted that Article 3.8 of the *DSU* made clear that, while a finding of violation of a covered agreement gave rise to a presumption of nullification or impairment of benefits accruing under that agreement, the defending party had the possibility to rebut such a presumption.

4.268 The European Communities held that, even if the C sugar regime resulted in a violation of Articles 3.3, 8 or 10.1 of the *Agreement on Agriculture*, such violation would not nullify or impair any benefits accruing to the complaining parties under those provisions as the Complainants could have had no reasonable expectations that the European Communities would take any measure to reduce its exports of C sugar. Those Articles did not confer a right to a certain volume or amount of trade, the European Communities continued. Rather, the "benefits" accruing under Articles 3.3, 8 and 10 of the *Agreement on Agriculture* consisted of the *expectations* of improved competitive opportunities which arose out of the limitations placed on export subsidies by those provisions.

4.269 The European Communities referred in particular to the Appellate Body report in *India – Patent (US)* in which case the Appellate Body emphasized that the expectations of the complaining party only become relevant *after* a violation had been found, as part of the examination of whether such violation led to nullification or impairment.[260] At the time of the conclusion of the WTO Agreement, the European Communities continued, and until recently, the Complainants had shared the European Communities' understanding that the C sugar regime did not provide export subsidies and, therefore, could have had no expectations that the European Communities would reduce its exports of C sugar. The European Communities considered, therefore, that the Complainants could not now act as if their expectations were being nullified or impaired by the alleged inconsistency with Articles 3, 8 or 10.1 of the *Agreement on Agriculture.*

4.270 The European Communities

4.280

V. ARGUMENTS BY THIRD PARTIES

5.1 The **ACP**

5.5 The preferences granted to the ACP sugar exporting countries in terms of market access and the scope of the reduction commitments of the European Communities in the Uruguay Round, the ACP countries submitted, were to be considered as a whole and not in isolation from the European Communities' export possibilities. The purpose of Footnote 1 in the EC Schedule, interpreted in the context of both the Sugar Protocol and the CMO, was, in the opinion of the ACP countries, to allow for the exportation by the European Communities of quantities corresponding to those imported under the preferential agreements. The

granted on its exports of sugar. Therefore, in the opinion of the ACP countries, the European Communities had complied with its export subsidy commitments.

5.9 With respect to the *US – Sugar Waiver* and the *EC – Bananas III* cases referred to by the Complainants, the ACP countries asserted that

indirect employment was significantly higher. The export of bulk raw sugar earned Barbados an average of US $25 million per year during the same 5-year span.

5.15 Barbados explained that as a small, vulnerable Net Food-Importing Developing Country (NFIDC) which already imported approximately 75 per cent of its food, food security was a major concern. Sugar cane was one of the few crops appropriate for large-scale cultivation under the climatic and agronomic conditions in Barbados and could be fairly regarded as a stabilising factor within the agricultural sector. The sugar industry therefore played a major role in helping Barbados achieve its food security goals by maintaining a significant area of the island's landmass under agricultural production with a systematic crop rotation process and also by providing a vital source of foreign revenue.

5.16 Barbados contended that the foreign exchange earnings from the sugar exports would be significantly lower without the preferential margin enjoyed under the ACP/EC Sugar Protocol. Barbados was therefore deeply concerned abou n

avs od theECe pic

5.76

first and third of these elements were at issue before the Appellate Body in *Canada – Dairy*.[279] Therefore, that analysis could not be applied automatically in the present dispute.[280] Canada was of the view that the Panel should turn to a contextual reading of Article 9.1(c), looking at the whole of the Article and its place in the *Agreement on Agriculture*, to provide guidance as to the appropriate relationship between these elements.

5.21 Canada expressed concern over the suggestion that the average cost of production would be

considered that it did not allow any WTO Member to derogate from the export subsidy commitments contemplated therein. China

notification requirements on exports amounting to approximately 1.6 million tonnes per year of "ACP/Indian origin" sugar. China was of the view that the European Communities must demonstrate or establish the legal basis for the exemption of "ACP/India equivalent sugar" from reduction commitments. Due to the equivocal meanings derived from the footnote, the European Communities' "two – parts" interpretation of its subsidy commitments – *i.e.* "limits" subject to reduction in respect of "*scheduled*" sugar and "*a fixed ceiling*" in respect of "ACP/India equivalent sugar" – could not, in China's opinion, be justified as representing "a common agreement among *all* Members".[292]

5.30 **Colombia** noted that it was the eighth largest exporter of sugar in the world and had one of the lowest cost of production levels and highest yields per hectare. Considering that Colombia could count on an efficient and productive sector, Colombia was facing many difficulties participating in international trade, not only in the European Communities but also in other countries. The distortions in the price of sugar, in particular those which resulted from the complex regulation of the European market, were causing problems to the Colombian exports not only in the Europe but also in other markets in which those distortions had been identified as the reason for Colombia's limited access. Therefore, this dispute had both a systemic and commercial importance to Colombia.

5.31 Referring to the legal value of the footnote, Colombia enquired whether there was a legal basis to exclude a quantity of sugar equivalent to the European Communities' imports from India and ACP countries from the export subsidies reduction commitments. Colombia was of the view that, since exceptions in the WTO must be agreed upon through the multilateral procedure provided in Article IX of the Marrakech Agreement, the possibility of granting legal value to the footnote would be unrealistic.

5.32 With regard to the concept of estoppel, Colombia noted that it had never been recognised in the jurisprudence of the WTO and the concept in itself had its application limited to bilateral relationships. Accordingly, even if the Panel found that some Members were aware of the European Communities' exemption to the reduction commitments, it was unthinkable that such a "bilateral understanding" could be applied in the multilateral context.

5.33 Colombia considered that there were two types of export subsidy commitment. The first related to reduction and prohibition as laid down in Articles 8 and 9 of the *Agreement on Agriculture*. The combination of agreed disciplines under those Articles implied, according to Colombia, that subsidies included by Members in their Schedules must be reduced in accordance with multilateral disciplines. Similarly, in its interpretation, subsidies for which no phasing-out commitments had been made should be prohibited.

5.34 The second export subsidy commitment, Colombia continued, related to anti-circumvention and was governed by Article 10.1 of the *Agreement on Agriculture*. Colombia was of the view that Article 10.1 applied only to expressly permitted subsidies. Its objective was to discipline the manner in which those subsidies were applied in order to avoid that such application resulted in, or threatened to lead to, circumvention of export subsidy commitments.[293]

5.35 **Côte d'Ivoire**[294]

industry had experienced a clear development as Côte d'Ivoire privatized its sugar industry in 1997. Today, the industry was represented by two companies, Sucaf-Ci and Sucreivoire with sugar production being the second most important activity after cotton in the north of Côte d'Ivoire.

5.36 In the last five years, €85 million had been invested in order to increase the country's sugar production, which thus went from 120,000 tonnes in 1997 to 170,000 tonnes currently, exceeding local consumption by some 20,000 tonnes per year. Most of this quantity was exported to the European Communities under the Sugar Protocol and the SPS arrangements, representing some 15 per cent of the sugar revenues of Côte d'Ivoire.

5.37 The sugar industry, Côte d'Ivoire continued, employed some 2,000 individuals directly and another 5,000 indirectly which, in the African context represented revenues for the subsistence of around 200,000 people. On top of the approximately 22,000 hectares industrially planted, some 2,400 hectares were village plantations, a policy recommended by the government and which had led to the reinsertion of some 800 families.

5.38 In conclusion, Côte d'Ivoire, not wishing to see the only efficient international co-operation arrangement destroyed, hoped that the Panel would contribute to put development as an essential objective at the heart of the discussions.[295]

5.39 **Cuba** noted that sugar was one of its chief export items but Cuba was also interested in averting the erosion of the tariff preferences granted to the ACP States under the EC sugar regime. Cuba considered that this dispute must be viewed in the light of the basic objectives of the GATT 1994, which included raising standards of living and securing the progressive development of economies, while paying special attention to the fact that the achievement of these objectives was "particularly urgent" for the least-developed economies.

5.40 Export income, Cuba continued, played a crucial role in many underdeveloped economies as their main source of subsistence and an important factor of economic development. The size of that income depended on the prices countries paid for essential imported products, the volume of their exports and the prices they were paid for the products they exported. Therefore, the preferential access granted by the European Communities to sugar from the ACP countries was vital to the economies of those countries and compensated, albeit to a limited extent, for the unfair terms of trade to which their underdeveloped economies were made subject.

5.41 Cuba, therefore, submitted that the starting point for consideration of this dispute should be the preambular provision of the *Agreement on Agriculture*, which states that "... in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members ...". Furthermore, Cuba submitted that the aim of these provisions on preferences was to foster the development of the ACP States in order to reduce and gradually eliminate poverty in those countries and integrate them into the mainstream of global trade. These objectives were consistent with WTO aims and principles and with the development dimension concept established at the Doha Ministerial Conference, which was the basic guideline for the current negotiations.

5.42 **Fiji**[296] noted that it had a substantial interest in this dispute, being a major producer and exporter of sugar to the European Communities under the Sugar Protocol. It explained that Fiji's raw

exchange for the country. The ACP/EC Sugar Protocol and the more recent Special Preferential

agricultural product, came from sugar. One out of every five persons in the entire population of Guyana was dependent upon sugar.

5.48 Guyana submitted that in the event of a successful challenge, the European Communities might be obliged to reform its sugar regime. This could result in a substantial reduction in the intervention price paid for preferential imports of raw sugar. For several reasons Guyana, like most ACP countries, would find it well-nigh impossible to enhance its productivity, in order to enable it to sell competitively in European markets. The removal or containment of sugar preferences in Guyana would have a most disastrous influence not only on the rural economies, but on the national economy as a whole. The collapse of preferences would lead to social and economic disintegration.[299]

5.49 **India** considered that this dispute was of great systemic importance not merely in terms of clarifying the rights and obligations of parties under the WTO *Agreement on Agriculture* but also in terms of its impact on the Doha Round. India noted that the Complainants had stated expressly that they had not raised any issues concerning the preferential access accorded by the European Communities to sugar of ACP and Indian origin. It recalled the statement in the preamble of the *Agreement on Agriculture* that " …[I]n implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review…". The preferential access granted by the European Communities to the sugar of ACP and Indian origin had resulted in significant economic benefits especially to the ACP countries. India hoped, accordingly, that the preferential access to the EC market for sugar of ACP and Indian origin would not be undermined as a result of this dispute. At the same time, India appreciated the importance to the Complainants of ensuring genuine and speedy liberalization of agricultural export markets. India noted that rulings of the Appellate Body and of dispute settlement panels in *Canada – Dairy* had clarified that the term "payments" under Article 9.1(c) of the *Agreement on Agriculture* included both payments-in-kind to an exporter in the form of inputs that were sold at reduced prices;[300] and where there was a single line of production, the financing of below cost-of-production exports through "highly remunerative prices" in the domestic market that fully covered total fixed costs.[301]

5.50 Whether a particular payment was financed by governmental action, India continued, must be assessed in terms of "governmental" action and involvement as a whole that permitted a transfer of resources to an exporting producer.[302] India considered that the critical issue was whether "… governmental action was instrumental in providing a significant percentage of producers with the resources that enabled them to sell at below the costs of production".[303] Further, export contingency existed because "[o]nly by contracting for export and effectively exporting [the agricultural product in question] can producers and processors engage in transactions outside he regulatory framework…applicable to domestic market…transactions…". In such a case, the payment is made 'on the export of an agricultural product'". It was not correct that the above principles would lead to confusing the distinction between domestic support and export subsidies. In India's view, where there was a single line of production and the quantities produced were to be sold in two separate markets, domestic support would result also in an export subsidy if two conditions were satisfied: (i) the regulatory framework ensured, for example, through domestic price support mechanisms and import barriers, that the revenue from domestic sales alone was large enough that the entire fixed costs of

[299] Third party written submission and oral statement by Guyana.
[300] Appellate Body Report on *Canada – Dairy*, paras. 113-114.
[301] Appellate Body Report on *Canada – Dairy (Article 21.5 New Zealand and US II)*, paras. 139-140 and 145-146.
[302] Appellate Body Report on *Canada – Dairy*, paras. 119-120.
[303] Appellate Body Report on *Canada – Dairy (*Article *21.5* New Zealand and US *II*), para. 147.

5.56 A plea of "scheduling error" attributable to a mistaken interpretation of the provisions of the *Agreement on Agriculture*

Communities' obligations under the WTO *Agreement on Agriculture*. According to Jamaica, WTO case-law required that the party who had the burden of proof must establish a prima facie case as discussed in the Appellate Body report on *US – Shirts and Blouses*[308] and had been cited in practically all subsequent disputes when a burden of proof issue arose.

5.61 Referring to the panel report on *India – Autos* where it was established that if the party carrying the burden of proof did not manage to establish a prima facie case, the panel had no basis for a specific ruling on the issue at hand[309], Jamaica submitted that if the European Communities successfully rebutted the Complainants' arguments or simply provided submissions which balanced out those made by them, the Panel should rule in favour of the European Communities in line with the WTO jurisprudence

5.62 With respect to the footnote in the EC Schedule, Jamaica was of the view that it was an integral part of the European Communities' commitments on sugar. Jamaica considered that the interpretation of the schedule did not form part of the Panel's terms of reference, but should the Panel consider this issue, a proper interpretation of the footnote in accordance with the general rules of interpretation of the *Vienna Convention* would allow the European Communities to export 1.6 million tons, with the benefit of export refunds, corresponding to its imports of ACP/Indian sugar.[310]

5.63 **Kenya**[311] noted that it was part of a large block of developing countries under the auspices of ACP countries whose partnership with the European Communities was geared towards a long-term objective of eradicating poverty and supporting development in the ACP countries. The ACP sugar exports to the European Communities created the requisite market access and formed part of the ACP/EC arrangement. Sugar is one of the few major commercial crops grown in Kenya. The

5.73 Malawi noted that it had for a long time depended on tobacco as the predominant foreign exchange earner and for its development. However, tobacco was experiencing a great deal of problems as a result of the global anti-smoking lobby. Malawi therefore needed to diversify its economy and sugar provided the most viable alternative. All these were huge challenges for a small landlocked, commodity dependent LDC. For Malawi to be economically viable and for it to graduate to the next level of development, it had to continue making huge sacrifices. The outcome of this challenge could therefore very well determine how Malawi would confront and succeed in its development efforts amidst these daunting challenges. Only a positive outcome would guarantee Malawi's competitiveness in its trade and trade related activities.[316]

5.74 **Mauritius**[317] explained that the sugar industry had a multifunctional role in Mauritius, having both an economic impact as well as a socio-economic, energy and environmental impact. Mauritius noted that 50 per cent of the land area in the country was devoted to agriculture, 90 per cent of which was used for sugar cane production. Also, 90 per cent of agricultural export proceeds came from sugar exports with gross sugar export earnings amounting to some US$330 million or some 20 per cent of all merchandise exports. The net sugar export earnings covered 75 per cent of the food import bill in a country that had to import nearly all of its food requirements; this food procurement capacity, Mauritius submitted, was vital for its food security.

5.75 Furthermore, some 200,000 persons were directly or indirectly dependent on the sugar sector for their livelihood, out of a population of 1.2 million, and sugar proceeds were used to provide key services such as research and insurance to the industry. Electricity generated by sugar factories or power plants using bagasse, Mauritius continued, an environment friendly renewable source of energy, represented 25 per cent of the national production. The use of bagasse in an island devoid of fossil fuels was a key element of the energy strategy. With respect to the environmental impact of the sugar industry, Mauritius observed that the cane plant was by far the most important carbon sequestrator of all cultivated plants. The high yield per hectare of cane helped to mitigate the enhanced greenhouse effect.

5.76 Mauritius had remained largely a single-commodity exporter, not out of choice but as the result of the inherent constraints the country faced as a small island state located in a cyclonic belt. In view of the overall importance of the sugar industry, any disruption of the EC sugar regime would result in a significant fall in Mauritius export earnings and would severely damage the island's fragile economy, social fabric and environment.

5.77 Mauritius submitted that the sugar exports of Mauritius or other ACP sugar- 18 Tc -0.4547 w

payments were financed.[323] New Zealand argued that, as was the case in *Canada – Dairy*, producers could cover their fixed production costs through sales of 'A' and 'B' quota sugar and needed to cover only the marginal costs of C sugar production on sales in the export market. In this way the domestic sales of 'A' and 'B' sugar cross-subsidised exports of C sugar that would otherwise not occur or be made at a loss. New Zealand believed, as demonstrated by the Complainants, that governmental action created both the means and the incentive for this cross-subsidisation to occur and exports of C sugar to be made. Governmental action was inherent throughout the tight regulatory controls that the European Communities exercised over every aspect of sugar production in the European Communities. Those controls set guaranteed prices for 'A' and 'B' sugar production for the domestic market. The high domestic prices offset some of the cost of C sugar production, which was further encouraged by other aspects of the regime. Thus, for New Zealand, there was clearly a "demonstrable link" between the relevant "governmental action" and the means by which "payments" were financed.

5.84 In the alternative, New Zealand submitted, the European Communities' sugar regime provided export subsidies not listed in Article 9 resulting in circumvention of the European Communities' export subsidy commitments contrary to Article 10.1 of the *Agreement on Agriculture.* New Zealand considered that the Complainants had demonstrated that the EC sugar regime provided an export subsidy as described in paragraph (d) of Annex I to the *SCM Agreement.* As the Appellate Body had confirmed, the Illustrative List in Annex 1 to the *SCM Agreement* provides a list of practices considered to be "export subsidies

5.88 **Paraguay** considered that the assistance granted by the European Communities to its Member States was at odds with the multilateral provisions of the *SCM Agreement* and the *Agreement on Agriculture* as well as with the rules of the GATT 1994. For the purposes of this dispute, given that not only was this assistance distorting international trade, but the distortion was, in the opinion of Paraguay, particularly damaging to the developing countries, Paraguay submitted that there was a violation of rules and principles as well as adverse effects on trade which were seriously injuring the economy and development, in this case of Paraguay.

5.89 As regards inconsistency with the *Agreement on Agriculture*, Paraguay noted the effects on the export and competitiveness of the product at issue in the international market, which were, in Paraguay's opinion, inconsistent with Articles 3.3 and 8 of the Agreement. Paraguay deemed it important to consider Article

fragile and vulnerable nature of its economy, Swaziland would not be in a position to absorb precipitous changes without serious disruptions in its socio-economic stability. As a narrowly based economy, which was difficult to diversify, Swaziland could not absorb changes in the same time scale as more developed and broadly based economies.

5.99 Swaziland considered that a ruling in favour of the Complainants would be devastating for its fragile economy. It would result in a drastic reduction in the level of economic activity in a country where two-thirds of the population lived below the poverty line. Swaziland concluded that the consequences of the ruling in favour of the Complainants in this dispute would be much against the spirit of the ACP/EC Partnership Agreements and the objectives set out in the Preamble of the Marrakech Agreement, as well as the objectives of the GATT and WTO.[332]

5.100 **Tanzania**[333] was of the view the Sugar Protocol was anchored in a moral imperative to create a special opportunity that could support the development aspirations of ACP countries, among whom were some of the world's weakest and most vulnerable nations. Unlike Australia, Brazil and Thailand, Tanzania remained one of the world's poorest countries classified as LDCs. The economy was weak, dominated by agriculture which made up about 60 per cent of the GDP, 85 per cent of total export earnings and employed 90 per cent of the active labour force. Over 90 per cent of Tanzania's agriculture relied on smallholder peasants. Topography and harsh climatic conditions limited crop production to less than 4 per cent of the total land area.

5.101 The Industry sector, which accounted for only 10 per cent of Tanzania'edTj 5j 2.f tAf -4a5 0 10.5 0 . ATj 1

communities where cane farming and production was prominent. It was the benefits derived from preferential access that permitted

an agreement at all, and did not provide "context" for interpreting the text of the WTO Agreement.[338] It stressed that the modalities document itself established that it was not a covered agreement.[339]

5.109 In this respect, the United States recalled the Appellate Body report in *EC – Bananas III*, in which the Appellate Body made the observation that the modalities paper was not referred to in the *Agreement on Agriculture*.[340] The United States also contended that Members had explicitly rejected the modalities guidelines as "context" for interpreting Member Schedules. The United States was further of the view that it was not necessary, in this case to have recourse to supplementary means of interpretation as set out in Article 32 of the *Vienna Convention*.

5.110 Accordingly, to determine whether the measures at issue constituted export subsidies for purposes of the *Agreement on Agriculture*, it was necessary to refer to the definition of export subsidy in that Agreement and related provisions. Similarly, it would be necessary to refer to the definition and related provisions in the EC

may be applied in WTO dispute settlement, nor was there any other basis for importing into the WTO other provisions or obligations of public international law.

5.114 The lack of any textual basis for importing the principle of estoppel, the United States continued, was further emphasized by the lack of consistent description of the concept when panels had had occasion to discuss estoppel in the past. In *EEC (Member States) – Bananas I*, for example, the panel stated that estoppel can only "result from the express, or in exceptional cases implied, consent of the complaining parties."[342] In *EC – Asbestos* and *Guatemala – Cement* , by contrast, the panels stated that estoppel was relevant when a party "reasonably relies" on the assurances of another party, and then suffers negative consequences resulting from a change in the other party's position.[343] These inconsistencies illustrated the dangers of seeking to identify purportedly agreed-upon legal concepts beyond the only source all Members *had* agreed to – the text of the *DSU* itself.[344]

VI. INTERIM REVIEW

6.1 On 17 August 2004, pursuant to Article 15.2 of the *DSU*, Article 16 of the Panel's Working Procedures and the revised Timetable for Panel Proceedings, the parties provided their comments on the Interim Reports. None of the parties requested a meeting to review part(s) of the Interim Reports. On 24 August 2004, pursuant to the revised Timetable for Panel Proceedings, the parties submitted further written comments on the comments that had already been provided on the Interim Reports on 17 August 2004.

6.2 In light of the parties' interim comments, the Panel has reviewed its Findings. Pursuant to Article 15.3 of the *DSU*, this section of the Panel Reports contains the Panel's response to the main comments made by the parties in relation to the Interim Reports and forms part of the Findings of the Panel Reports.

the Interim Rx0 TD -0.0A6ig he Pan Tw gds

makes clear that in such c

and B sugar. Therefore "C sugar producers" are EC sugar producers who produce C sugar in addition to A and B sugar. The same is true for C beet. There are no beet farmers who grow only C beet. C beet is grown by farmers of A and B beet. Therefore "C beet growers" are the EC beet farmers who also grow C beet, in addition to A and B beet. The Panel has tried to make this clear in footnote 544 of its Panel Reports. In the present dispute, the Panel has had to assess whether the exports of sugar in amounts exceeding the European Communities' scheduled commitment levels are subsidized. The Panel understands that the exceeding sugar is composed of C sugar and ACP/India equivalent sugar. In its assessment of whether exports of C sugar are subsidized, the Panel examines the costs of growing C beet as well as the costs of processing and producing C sugar. In doing so the Panel refers to C beet growers and C sugar producers with a view to focussing on the exports of sugar that are above the European Communities' commitment levels.

D. A REFERENCE TO THE EUROPEAN COMMUNITIES' COMMITMENTS FOR BUDGETARY OUTLAYS

6.12 Australia has requested that the Panel clarifies in its conclusions that Footnote 1 to Section II, Part IV of the European Communities' Schedule does not enlarge or otherwise modify the European Communities' specified quantity commitment of 1,273,500 tonnes per year, nor does it modify or enlarge the European Communities' specified budgetary outlays.

6.13 The Panel agrees with Australia and has clarified its findings and conclusions so that it is now clear that the European Communities' annual budgetary outlay and quantity commitment levels for [illegible] 1,273,500 tonnes per year, [illegible] the costs 0-0.deter-243d.25 0 5 TDence2.5 omposntrhat ays

VII. FINDINGS

A. MAIN CLAIMS AND GENERAL ARGUMENTS OF THE PARTIES

7.1 The Complainants' claim[346] that the European Communities has, since 1995, been exporting quantities of subsidized sugar in excess of its annual commitment levels, contrary to Articles 3 and 8 of the *Agreement on Agriculture*. In particular the Complainants claim that in the 2001-2002 marketing year the European Communities exported 4.097 million tonnes of subsidized sugar, well above the 1.273 million tonnes specified in its Schedule.[347] The Complainants argue that, regardless of how the sugar is categorized, such subsidized exports of sugar were inconsistent with the European Communities' obligations under Articles 3, 8 and 9, or in the alternative, with Article 10.1 of the *Agreement on Agriculture*. Finally, the Complainants also claim that the said measures are inconsistent with the *SCM Agreement*.

7.2 The European Communities admits that its exports of sugar have been in excess of the figure shown in Section II, Part IV of its Schedule[348]. The European Communities submits that its export subsidy commitments for sugar are, in fact, made up of two components: (i) one component which has been subject to progressive reduction during the implementation period; and (ii) a second component, Footnote 1 to Section II, Part IV to its Schedule containing the so-called "ACP/India sugar Footnote" which, it maintains, is subject to a ceiling of 1.6 million tonnes.[349] Thus, for the European Communities, its exports of ACP/India equivalent sugar are not in excess of its commitment level. The European Communities denies that C sugar benefits from subsidies that are inconsistent with the *Agreement on Agriculture* or the *SCM Agreement*. The European Communities argues, "subsidiarily", that if the Panel concludes that C sugar is subsidized, the only course of action consistent with the requirement of good faith would be for the Complainants to agree to the correction of the European Communities' Schedule, in accordance with the Modalities Paper when interpreted in light of the principle of good faith.[350] The European Communities rejects the Complainants' claims under Article 10.1 of the *Agreement on Agriculture* on the grounds that they are outside the Panel's terms of reference. In the alternative, the European Communities submits that exports of C sugar do not benefit from any "other export subsidies" within the meaning of Article 10.1. Finally, the European Communities contests the applicability of the *SCM Agreement* to the present dispute.

B. PROCEDURAL ISSUES IN THIS DISPUTE

1. The European Communities' challenges of the Panel's jurisdiction under its terms of reference

7.3 The Panel recalls the parties' arguments with respect to the terms of reference, summarized in paragraphs 4.10-4.24 above. The European Communities has raised various objections to the Panel's jurisdiction over some of the Complainants' claims under the *Agreement on Agriculture*. The European Communities submitted that the Complainants' panel requests did not include some of the claims they subsequently developed in their written and oral submissions. The European Communities also alleged that the Complainants have not always properly identified the measures subject to challenge.

---

[346] See the Complainants' panel requests in Annex D. The Panel also recalls that the complainants have accepted as their own the evidence and arguments submitted by the other complaining parties.

[347] See para. 4.28 above.

[348] European Communities' reply to Panel question No. 9.

[349] See also paras. 4.191-4.193 above.

[350] European Communities' first written submission, paras. 34, 142 and 192.

7.4 The Panel notes that pursuant to Article 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (*DSU*), the mandate and jurisdiction of a panel are determined by the complaint of t

7.9 At the same time, the Panel agrees that certain issues relating to the "jurisdiction" of a panel can be raised at any time and even by the panel itself:

> "[I]n the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity. [358] (...) At the same time, however, as we have observed previously, certain issues going to the jurisdiction of a panel are so fundamental that they may be considered at any stage in a proceeding. [359] (emphasis added)"

7.10 The Panel is not convinced that the European Communities raised all its objections at the earliest possible time. Nevertheless, some of the European Communities' objections are concerned with the jurisdiction of this Panel, for which deficiencies cannot be cured. These objections may thus be viewed as so fundamental that they could be considered at any stage of the Panel proceeding. In this event, it is not clear to what extent the challenging Member needs to prove any prejudice.[360]

7.11 In light of the above rules and with the view to ensuring clarity in the Panel's terms of reference and the security of this panel process, the Panel turns to exploring the issues of this Panel's jurisdiction and the European Communities' challenges thereof.[361]

(b) The Complainants' requests for establishment of a panel[362]

7.12 Before examining the parties' argumentation on the European Communities' objections to the Panel's jurisdiction under its terms of reference, the Panel recalls the relevant parts of the panel requests where the Complainants identified the measures at issue and the violations claimed to have occurred.

7.13 For Australia, the measures are:

> (a) "The measures that are the subject of this request are the *subsidies provided by the EC in* excess *of its reduction commitment levels* on sugar and sugar containing products including sugar cane and sugar beet, processed and unprocessed cane and beet sugar and chemically pure sucrose in solid form, molasses resulting from the extraction of refining of sugar, isoglucose, inulin syrup and the other products listed in Article 1 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the European Communities' Common Organization of the markets in the sugar sector (Official Journal of the European Communities, 30 June 2001, L178/1-45).
>
> The above mentioned subsidies are accorded through the EC sugar regime, which is contained in a number of EC regulations including Council Regulation No 1260/2001 and related EC regulations, administrative policies, rules, decisions and other instruments including instruments pre-dating the above regulation, and their

[358] Appellate Bodyes,0 /F0 6.lte Eu1.25 -40 0 TD 5 -0.y1er 9 255 Tc 0Mexico.1875 25).

implementation. These various instruments will be referred to as "the EC sugar regime."[363]

and the violations are:

(b) "Australia considers that the provision of the above subsidies and the relevant elements of the EC sugar regime are inconsistent with the EC's obligations under the following provisions: Articles 3.3, 8, 9.1(a), 9.1(c), and alternatively, 10.1 of the *Agreement on Agriculture*;"

in particular Australia adds:

"Australia is particularly concerned at the subsidies provided by the EC for 'C sugar' exports under the EC sugar regime. Under the regime, producers of C sugar are able to sell C sugar on the world market at below the total average cost of production through cross-subsidisation of C sugar from quota sugar profits. By financing payments on the export of C sugar, the EC exceeds its export subsidy reduction commitments under the *WTO Agreement on Agriculture*.

Australia is also particularly concerned at the provisions of the EC sugar regime which accord direct subsidies contingent on export performance for quantities of approximately 1.6 million tonnes of sugar which are additional to the budgetary outlays and quantities of subsidised exports notified by the EC to the Committee on Agriculture under the provisions of Article 18.2 of the Agreement on Agriculture. In the application of those provisions, the EC significantly exceeds its budgetary outlays and quantity commitments for export subsidies on sugar under the *Agreement on Agriculture*."[364]

7.14 For Brazil, the measures are:

(a) "The specific measures at issue in this dispute are the *subsidies* provided and maintained by the European Communities, *in excess of the EC's reduction commitment levels for sugar*, under Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the European Communities' common organization of the markets in the sugar sector[365], and pursuant to all other legislation, regulations, administrative policies and other instruments relating to the EC regime for sugar, including the rules adopted pursuant to the procedure referred to in Article 42(2) of Council Regulation (EC) No. 1260/2001 of 19 June 2001, and any other provision related thereto."

and the violations are:

(b) "The EC provides *export subsidies for sugar in excess of its reduction commitment levels* specified in Section II of Part IV of its Schedule of Concessions (Schedule CXL-European Communities), in violation of the Agreement on Agriculture and the

[363] Australia's panel request continues as follows: "In addition to setting down the conditions attaching to imports of sugar, the EC sugar regime provides conditions attached to the production, supply and exports of sugar, including domestic support and export subsidies. Sugar is classified into quota and non-quota sugar. Non-quota sugar is known as C sugar. The sugar regime provides for the reclassification from quota to C sugar and from C sugar to quota sugar. Sugar classified as C sugar cannot be disposed of in the EC market".

[364] See Australia's panel request in Annex D below.

[365] Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the common organization of the markets in the sugar sector, OJ L 178/1-45, 30.6.2001, p. 1.

7.23 The Complainants also held that, because of the reversal of the burden of proof, it was not incumbent on them to identify or enumerate the WTO agreements, provisions, or export subsidy definitions, that the European Communities might choose to invoke in its defence.[375] It was the European Communities' duty to prove that no subsidy of *any* kind, under *any* WTO agreement, had been granted by *any* EC measure to sugar exports in excess of its reduction commitments.[376]

(ii) Assessment by the Panel

7.24 The Panel recalls the content of the Complainants' Panel requests in paragraph 7.13, 7.14 and 7.15 and in Annex D to this Panel Report where the complaining parties have identified essentially the same measures and the same alleged violations (thus the same claims).

7.25 In the Panel's view, the Complainants' allegation that exports of C sugar, subsidized through the operation of EC Regulation No. 1260/2001, are in excess of the European Communities' scheduled commitments and, thus, contravene Articles 3 and 8 of the *Agreement on Agriculture*, is sufficiently specific so as to allow the European Communities and the third parties to be "informed of the legal basis of the complaints".[377]

7.26 The European Communities argued that the Complainants have confused the requirements of Article 6.2 of the *DSU* with respect to the specificity of panel requests and the consequences of the special rules on the burden of proof of Article 10.3 of the *Agreement on Agriculture.* Conversely, the Complainants submitted that it is the European Communities that has confused claims and arguments. The Panel examines these issues in turn.

7.27 In this dispute, the special rules on the reversal of the burden of proof of Article 10.3 of the *Agreement on Agriculture* have been invoked by the Complainants. Article 10.3 provides:

> "Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question."

7.28 With respect to the issue of burden of proof and the special rule of Article 10.3, the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US II)* determined that there are two separate parts to a claim under Article 3 of the *Agreement on Agriculture* and in light of Article 10.3, a different standard of burden of proof applies to each part.

> "In identifying the nature of the special rule, it is useful to analyze the character of claims brought under these provisions. Pursuant to Article 3 of the *Agreement on Agriculture*, a Member is *entitled* to grant export subsidies within the limits of the reduction commitment specified in its Schedule.[378] Where a Member claims that another Member has acted inconsistently with Article 3.3 by granting export subsidies in excess of a quantity commitment level, there are *two* separate parts to the claim. First, the responding Member must have exported an agricultural product in quantities exceeding its quantity commitment level. If the quantities exported do

[375] Brazil's first oral statement, para. 51; Brazil's second written submission, paras. 7-15; Australia's reply to Panel question No. 4.

[376] Ibid.

[377] Appellate Body Reports on *EC – Bananas III*, para. 142; *Korea – Dairy*, paras. 120-131; *US – Carbon Steel*, para. 127.

[378] (*footnote original*) Under Articles 3.1 and 3.3 of the *Agreement on Agriculture*, "commitments limiting subsidization" of exports are specified in the Schedule in terms of "budgetary outlay and quantity commitment levels".

> not reach the quantity commitment level, there can be no violation of that commitment, under Article 3.3. However, merely exporting a product in quantities that exceed the quantity commitment level is not inconsistent with the commitment. The commitment is an undertaking to limit the quantity of exports that may be *subsidized* and not a commitment to restrict the volume or quantity of exports *as such*. The second part of the claim is, therefore, that the responding Member must have granted export subsidies with respect to quantities exceeding the quantity commitment level. There is, in other words, a *quantitative* aspect and an *export subsidization* aspect to the claim.[379] (underlining added)

7.29 Therefore, the Panel is of the view that a claim under Article 3 of the *Agreement on Agriculture* requires allegations that, first, the European Communities has exported sugar above its commitment level and, second, that such exports of sugar were subsidized.

7.30 In the Panel's view, the Complainants have satisfied these requirements adequately. The legal basis of the Complainants' claims is Articles 3 and 8 of the *Agreement on Agriculture*. In their requests for establishment of a panel, the Complainants did not have to detail how and why such exports were being subsidized, only that the commitment levels were exceeded and that exports were subsidized. Moreover, the Complainants did indicate some

q( ) Tj -386.25 -12.75 TD -0.0112 Tc 0 Tw (Agriculture) Tj ex

substantive demonstrations of violations (through evidence and argumentation) taking place during the entire panel process.[382]

7.33 Again in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body determined that a different standard of burden of proof applies to each part of a claim under Article 3:

(e) Alleged lack of proper identification of "claims" under Article 9.2(b)(iv) of the *Agreement on Agricultur*

that the European Communities' Footnote 1 is a component of its overall export subsidy commitments. The Complainants disagree.

7.52 In the Panel's view, when the European Communities made reference to Footnote 1 as evidence and in support of its argument that its level of commitment was not limited to 1,273,500 tonnes but, rather, should include the 1.6 million tonnes mentioned in Footnote 1, the Complainants had the right to challenge such arguments as well as the scope of the European Communities' commitment; the Complainants were entitled to use rebuttal arguments to challenge the conclusions drawn by the European Communities from Footnote 1. Again the Panel recalls that the Complainants' claims are not that the EC's Schedule contains a WTO inconsistent entry (Footnote 1) or that the European Communities' categorization of its subsidies is inconsistent with the *Agreement on Agriculture* but rather that the European Communities is exporting subsidized sugar in quantities above the European Communities' scheduled commitment levels specified in Section II, Part IV of its Schedule. The Panel additionally notes that in their panel requests the three complaining parties mentioned the issue of subsidies to exports of products either as "equivalent to the quantity of raw sugar imported under preferential arrangements"[394], or "for quantities of approximately 1.6 million tonnes of sugar which are additional to the budgetary outlays and quantities of subsidised exports notified

7.56 The European Communities argues that estoppel is a procedural defence, which precludes one party from exercising a right vis-a-vis another party, but without modifying the substantive obligations of that party. It adds that estoppel is a matter of adjectival, rather than substantive, law and accordingly the effect of a true estoppel is confined to the parties. The European Communities does not contend that its obligations under Article 9.1(c) of the *Agreement on Agriculture* have been modified by virtue of the principle of estoppel. Rather, the European Communities' contention is that the Complainants are precluded from bringing a claim under that provision and, therefore, that the Panel should reject their claims even if it upheld them in substance.

7.57 For the European Communities, since estoppel does not alter the substantive rights of Members under the *WTO Agreement*, but only the exercise of those rights, it may operate exclusively between two Members.[397]

7.58 The Complainants respond that, as a matter of legal principle, the European Communities could not infer from silence that other Members shared the view that C sugar was not subsidized, because they did not have a "duty" to object. The Complainants submit that even if they had been silent, their silence on the European Communities' base quantity levels as well as the ACP/India sugar Footnote does not amount to a clear and unambiguous representation upon which the European Communities could rely, especially as there was no legal duty upon the Complainants to do so.[398]

7.59 For Australia, if the European Communities were permitted to have recourse to estoppel, it would operate to diminish the rights of the Complainants, contrary to the provisions of Articles 3.2 and 19.2 of the *DSU*. It is one thing to have a right subject to relevant provisions of a covered agreement, but entirely another to have that right subject to the operation of a principle which is not recognized in the provisions of the covered agreement. Furthermore, Australia argues that it is the responsibility of the European Communities to make sure it is acting in accordance with the *Agreement on Agriculture* and other *WTO Agreements*.

an TD -0.2344 Tc 0

to bad faith, and, elements or essentials of such estoppel include: change of position to prejudice of person claiming estoppel; damages if the estoppel is denied; duty and opportunity to speak; inducing person claiming estoppel to alter his position; knowledge of facts and of rights by person estopped; misleading of party claiming estoppel; reliance upon silence of party sought to be estopped."[402]

7.63

> *regulating* in deciding whether any such action would be 'fruitful'. (emphasis added)' "[407]

7.67 Given the "largely self-regulating" nature of the requirement in the first sentence of Article 3.7, panels and the Appellate Body must presume, whenever a Member submits a request for establishment of a panel, that such a Member does so in good faith, having duly exercised its judgement as to whether or not

7.77

of the confidential nature of the latter. On 10 June 2004, the Panel therefore requested WVZ to identify the source of the information used in its *amicus curiae* brief. WVZ acknowledged that it "was able to examine" Brazil's exhibit but refused to provide the source of its information: "WVZ is not in a position to reveal the source of its information regarding the evidence submitted by Brazil."

7.83 The Panel regrets this refusal to cooperate which, regardless of the merits (or lack thereof) of WVZ submission, undermines not only elemental fairness to the parties, but also compromises the integrity of the dispute settlement system itself by hindering further openness and the transparency of the dispute settlement process.

7.84 The WTO dispute resolution confidentiality rules apply to WTO Members, the Panel members and WTO staff involved in the dispute proceedings. Nevertheless, the Panel considers that if the WVZ, though not a party to the proceedings, wanted to be considered a "friend of the court", it should have followed an appropriate standard of behaviour towards the Panel and the parties together with making every possible effort to respect WTO dispute settlement rules, including confidentiality rules.

7.85 In light of the above, the Panel, having the discretionary legal authority to accept and consider or not unsolicited *amicus curiae* briefs submitted by individuals or organizations, whether governmental or non-governmental,[421] declines to further consider the *amicus curiae* brief submitted by WVZ.

4. Breach of confidentiality

(a) Factual background[422]

7.86 Brazil informed the Panel on 2 June 2004 that the *amicus curiae* brief submitted by WVZ, the association of German sugar producers, disclosed information that Brazil had submitted to the Panel in confidence. Brazil, accordingly, wished to bring the alleged breach of confidentiality to the Panel's attention and requested that the Panel "investigate how the breach occurred" and that it take any further action that it deems appropriate, including "mak[ing] a full report of this incident to the Dispute Settlement Body." Thailand and Australia supported the comments and request made by Brazil in this regard.

7.87 The Panel noted in a letter to the parties and third parties, dated 4 June 2004, the seriousness of the matter at issue, and invited them to comment on Brazil's allegation, and on the appropriate remedy, "if such a breach had in fact occurred". Such comments were to be submitted by 8 June 2004. The Panel received responses within this timeframe from Australia, Thailand, the European Communities (parties), and from India (third party).

7.88 The European Communities noted that it attached the utmost importance to the strict observance by all parties and third parties of the confidentiality rules set out in the *DSU* and in the Working Procedures of the Panel. It shared the concerns expressed by Brazil, and noted for the record that it had treated as strictly confidential all information designated as such in these proceedings.

7.89 Australia observed that the cost of production data cited by WVZ was also included in a confidential exhibit submitted by Australia[423] and requested that the Panel undertake an investigation of the source of the LMC information cited by WVZ. Australia submitted that in the event that the

[421] Appellate Body Reports on *US – Shrimp*, para. 107 and on *US – Lead and Bismuth II*, para. 41.
[422] See paras. 2.21 to 2.28 above.
[423] The WVZ quoted LMC figure of costs of production of ***/tonne which is cited in table 2 of Exhibit ALA-1, p. 8.

Panel establishes a breach of confidentiality on the part of any party to this dispute, specifically in reference to the LMC data designated as confidential by Brazil and Australia, that the Panel record the breach of confidentiality in its report, in the context of Article 3.10 of the *DSU*. Australia further considered that any unauthorized use or citation of information which has been designated as confidential by a party to a dispute should automatically constitute grounds for rejection of an *amicus* submission.

7.90 Thailand supported the comments and requests made by Brazil and Australia.

7.91 On 10 June 2004, the Panel, by letter, requested information from WVZ "with respect to the exact source[s] (documents, websites, etc.) used for the data referred to" in its document and a clarification as to the use of the euro currency in such data.

7.92 The Panel received a response from WVZ on 15 June 2004 in which WVZ indicated that it had been "able to examine" an attachment to Brazil's submission. According to WVZ, this document was not designated as confidential. It also indicated that WVZ was "not in a position to reveal the source of its information regarding the evidence submitted by Brazil." It did not discuss the currency of such data.

7.93 Comments on the response from WVZ were received from Brazil on 18 June 2004 in which Brazil reiterated its request that the Panel summarily reject the WVZ amicus brief and report the incident to the Dispute Settlement Body. Furthermore, Brazil submitted that the cover and every page of all hard copies of the exhibit in question provided to the Panel, the parties and third parties, were stamped manually, in block letters, "CONFIDENTIAL". Brazil had stated in its cover letters, that its submissions, including its two exhibits, were confidential. The recipients of electronic copies were also put on notice as to the confidential nature of all its submissions. Every authorized recipient of Brazil's submission was thus made aware of the confidential nature of the documents.

7.94 Brazil also submitted that it had, to the best of its knowledge, confirmed with LMC, that the total cost of production figures referred to in the *amicus curiae* brief of WVZ appear only in the LMC report commissioned by Brazil which, again, were submitted to the Panel as a confidential document in one of its exhibits. Moreover, Brazil noted that the data referred to by WVZ in its *amicus curiae* brief do not appear in the December 2003 report referred to in WVZ's footnote 2, or in any other LMC report, which had been made available to the public.

(b) Assessment by the Panel

7.95 On the issue of confidentiality, the Panel recalls that, in addition to its emphasis on the confidentiality of Members' oral and written submissions to the panels and the Appellate Body, Article 18.2 of the *DSU* provides explicitly that Members must respect the confidentiality of any information designated as such by another Member in the context of the settlement of a dispute:

> "Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential... ."

7.96 The Panel recalls that the Complainants had explicitly designated the said LMC Report as confidential. The Panel also wishes to recall that on a number of occasions throughout the proceedings of this Panel it strongly emphasized and reminded parties and third parties of the confidential nature of the *DSU* proceedings.

7.97

Agriculture, invoked by the Complainants. When Article 10.3 is invoked by a complaining Member, and it is proven that exports actually exceed the challenged Members' commitment level, it is for that exporting Member to demonstrate that its exports *are not subsidized.* Based on the Panel's conclusions on the European Communities' commitment level for sugar and the Panel's conclusions on the application of Article 10.3, the Panel will then proceed to assess whether the European Communities' exports of sugar exceed the European Communities' commitment level, inconsistently with Articles 3 and 8 of the *Agreement on Agriculture*.

7.104 In Section D.2 below, the Panel examines first whether the ACP/India sugar Footnote relating to 1.6 million tonnes of sugar can be considered as part of the European Communities' commitment level. In Section D.3, the Panel addresses the European Communities' argument that participants in the Uruguay Round (now Members of the WTO), have "agreed" to the inclusion of Footnote 1 in Section II of Part IV of the European Communities' Schedule. Finally, once the Panel has determined the European Communities' commitment level, it will be able, in Section E, to determine whether Article 10.3 of the *Agreement on Agriculture* can find application in the present dispute where the Complainants have claimed violations of Articles 3 and 8 of the *Agreement on Agriculture*. If this is the case, the Panel will examine whether the Complainants have made a *prima facie* factual demonstration of the quantitative aspect of their claims, namely that the European Communities has exported quantities of sugar in excess of its quantity commitment level; stmentnN3nnelSTj 13.5 0 0 10 TaD -0.1136 Tc 0 Tw 10.3, thehe

2. What is the European Communities' commitment level in light of the ACP/India sugar Footnote?

(a) Arguments of the parties

7.109 Further to their claims[429], the Complainants underline that, in every marketing year since 1995, the European Communities' total exports of sugar have consistently exceeded its scheduled commitment levels. In particular, during the marketing year 2001-2002, the European Communities

7.114 The Complainants submit that Members could not exempt themselves from their obligations under the *Agreement on Agriculture* by including reservations in their Schedule of Concessions that would subsequently be accorded the same, or greater weight, than any provision of a *WTO Agreement* with which the schedule text might directly conflict such as with the fundamental provisions of the *Agreement on Agriculture*. If the differences between the terms of a schedule and the terms of the *Agreement on Agriculture* cannot be reconciled by interpretation through Articles 31 and 32 of the *Vienna Convention*, a conflict exists. The Complainants submit that GATT and WTO jurisprudence endorsed by the Appellate Body establishes that WTO Members could incorporate in their Schedule of Concessions only acts yielding rights, not acts diminishing obligations. Therefore the Footnote was legally invalid. Moreover, to the extent that the European Communities purported to diminish its obligations under the *Agreement on Agriculture*, the Footnote, in their view, constituted an impermissible reservation under international law and WTO law.

7.115 With respect to the Complainants' alleged conflicts between the ACP/India sugar Footnote and Articles 3 and 8 of the *Agreement on Agriculture*, the European Communities responded that when properly interpreted, the Footnote could not be considered to conflict with the *Agreement on Agriculture*. For the European Communities, the Panel was not obliged to declare the Footnote, which was part of a validly concluded treaty, invalid. The European Communities notes that under general public international law, one part of a treaty could rarely render another part of the same treaty without legal effect.

7.116 Subsidiarily, the Complainants argue that the terms of the Footnote do not mean what the European Communities intends to draw from this Footnote. The Complainants submitted that the

to be bound by the terms of the treaty Footnote contained in the European Communities' Schedule, by ratifying the *WTO Agreement.*

7.119 The Complainants responded that they did not "agree" that this Footnote entitled the

composed exclusively of the commitments for export subsidies that have to be reduced (in the case of the EC sugar 1,273,500 tonnes) or whether Members are also entitled to maintain, for instance, *ad hoc* "limitations" on export subsidization not subject to reduction which would therefore be part of the overall commitment level of a Member.

7.122 To resolve the issue before it, the Panel will therefore have to examine the relationship between terms of (and commitments contained in) a Member's Schedule, in this dispute the content of Footnote 1 (on ACP/India sugar), and the provisions of the *Agreement on Agriculture.* In particular, the Panel needs to assess whether it is possible to interpret harmoniously the terms of the *Agreement on Agriculture* together with those of Footnote 1 of Section II, Part IV of the European Communities' Schedule. If this is not possible, the Panel will have to resolve such a conflict.

7.123 For the Panel to assess whether there is a conflict between Footnote 1 to Section II of Part IV of the European Communities' Schedule, and Articles 3, 8 and 9 of the *Agreement on Agriculture*, the Panel must first determine the extent and the scope of Members' obligations under those provisions. Second, the Panel will need to examine what Members are entitled to do in their Schedules and how terms of Members' Schedules should be interpreted. Thirdly, the Panel will examine the nature of the commitment, if any[438], included in Footnote 1. The Panel will then discuss the relationship between the European Communities' obligations under Articles 3, 8 and 9 of the *Agreement on Agriculture* and Footnote 1 with a view to assessing whether the two sets of rights and obligations can be read harmoniously or whether they conflict. The Panel will then be able to conclude on the European Communities' commitment level for exports of sugar for the purposes of the present dispute.

(ii) The obligations of the Agreement on Agriculture with respect to export subsidies – Articles 3, 8 and 9 of the Agreement on Agriculture

7.124 In order to assess the Complainants' claims that the European Communities exceeded its level of commitments for exports of subsidized sugar, and the parties' disagreement on the European Communities' level of commitment for exports of subsidized sugar, the Panel interprets first the provisions of the *Agreement on Agriculture* dealing with Members' obligations with respect to exports subsidies on agricultural products.

7.125 The Panel notes first that Article 3 does not define the terms "commitment level", nor do Articles 9 and 10.3 of the *Agreement on Agriculture* define the term "reduction commitment" level. Moreover, Article 8 does not define what can constitute "commitments as specified in that Member's Schedule".

7.126 Since, pursuant to Article 31 of the *Vienna Convention*[439], the ordinary meaning of the terms do not inform the Panel sufficiently, the Panel proceeds to the examination of the "context" of Articles 3, 8, 9 and 10 of the *Agreement on Agriculture*, so as to allow the Panel to assess what can comprise a "Member's commitment level" for the purposes of Articles 3.3, or a Member's "specified commitment" within the meaning of Article 8 of the *Agreement on Agriculture*, and a Member's "reduction commitment" for the purpose of Articles 9 and 10.3 of the *Agreement on Agriculture.* The Panel thus examines Members' obligations with respect to export subsidies, as reflected in those provisions.

of the provi -0.2625 in-85

7.127 Article 8 of the *Agreement on Agriculture* on "Export Competition Commitments" contains a general prohibition on export subsidies and provides that:

Section II of Part IV is entitled "Budgetary Outlay and Quantity *Reduction Commitments*." In the Panel's view, Article 9.1 of the *Agreement on Agriculture* makes clear that in the absence of a specific exemption contained in that Agreement, all export subsidies coming within the definitions of Article 9.1(a) – 9.1(f) have to be subject to reduction commitments. Specifically, in accordance with Article 9.2(b)(iv) of the *Agreement on Agriculture*, at the end of the implementation period, the Schedule *must* provide for budgetary outlay and quantity commitments no greater than 64 and 79 per cent of their respective base period levels.[440] This is the case for Members who took advantage of the flexibility of Article 9.2(b) which was the case of the European Communities.[441] Therefore, export subsidies contained in Section II, Part IV of a Member's Schedule ought to have been subject to the reduction commitments provided for in Article 9 of the *Agreement on Agriculture*.

7.134 In sum, in the Panel's view, Articles 8 and 3 of the *Agreement on Agriculture* make it clear that Members may not provide export subsidies other than in conformity with the *Agreement on Agriculture* ***and*** - *not "or"* - Members' Schedules. In particular, Article 3 of the *Agreement on Agriculture* provides that export subsidies are only possible for products listed in Section II, Part IV of Members' Schedules and only for amounts at or below the maximum level of commitment provided for in a Member's schedule. Through the application of Articles 3, 9.1 and 9.2(b)(iv) of the *Agreement on Agriculture*, all WTO-consistent export subsidies on scheduled products have been subject to reduction commitments.

7.135 The Panel notes also that Article 3.3 of the *Agreement on Agriculture* contemplates that a Member may exclude an agricultural product entirely from Part IV, Section II of its Schedule, but does not contemplate that when an agricultural product is included in its Schedule, subsidies provided to that product do not have to be reduced.

7.136 In the Panel's view, this is in line with the Preamble of the *Agreement on Agriculture* – as legal context to Articles 3, 8 and 9 – which in its third and fourth paragraphs provide:

> "*Recalling* further that 'the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets';
>
> *Committed* to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and ... "

7.137 In the Panel's view, to comply with Article 3.3 of the *Agreement on Agriculture*, a Member that exports a scheduled product must comply with two distinct requirements: (1) its subsidized exports must be within the quantity limitation specified in its schedule; *and* (2) its corresponding budgetary outlays must also be within its commitments. The Panel considers that Article 3.3 (and Article 9.2(b)(iv)) makes it clear that the level of commitment of export subsidies on specified products must be scheduled both in terms of quantity and in terms of budgetary outlays, as the level of reduction of any such export subsidies apply to both their quantity and to their budgetary outlays: "a Member shall not provide export subsidies … in excess of the budgetary outlay ***and*** quantity commitment levels specified [in its Schedule]." (emphasis added).

---

[440] Article 9.2(f) of the *Agreement on Agriculture* provides that: "In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that: (iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 per cent, respectively."

[441] See G/AG/N/EEC/20/REV.1, dated 9 March 2000, at p. 2.

7.138 The European Communities counters that export subsidies do not have to be expressed both in terms of budgetary outlays and quantity.[442] The Panel notes that if the EC's Schedule did not specify both of these limitations, it could export a subsidized scheduled product in excess of its commitment level and remain in compliance with Article 3.3 of the *Agreement on Agriculture*, because the challenging Member will be unable to demonstrate that the European Communities' exports do not exceed *either* of the two limitations. In the Panel's view, if Article 3.3 of the *Agreement on Agriculture* did not impose an obligation to have both a budgetary outlay and a quantity commitment level, then it would be effectively impossible, after the conclusion of the implementation period, to ensure that export subsidies never exceed the two levels set out in Article 9.2(b)(iv) of the *Agreement on Agriculture* which includes both.

7.139 For the European Communities the obligation to schedule both types of commitments was only set out in paragraph 11 of the Modalities Paper, from which, the Members could "negotiate departures".[443] As evidence of such Members' practice, the European Communities suggests that Australia and New Zealand negotiated such departures from the Modalities Paper.[444] Australia had sub-divided the category "other milk products" into two categories, fats and solid non-fats (which were not listed in the Modalities Paper), specifying separate quantity commitments, while indicating a budgetary outlay commitment only on the general product. New Zealand did not specify any quantitative limits but only scheduled reductions in budgetary outlays.

7.140 After examining Australia's Schedule[445], the Panel is of the view that Australia has scheduled both forms of reduction commitments, budgetary outlay as well as quantity, in respect of a single product group, i.e. "other milk products", benefiting its sub-category of fats and non-fats. Turning to New Zealand's Schedule[446], the Panel concludes that Members which have undertaken reduction commitments covering all Annex 1 products have scheduled both the budgetary outlay, and the

quantity reduction commitments, in a consistent and uniform manner, by clearly specifying a figure with respect to the last implementation year.

7.141 In the Panel's view, Australia's and New Zealand's scheduled reduction commitments cannot be assimilated to examples of "negotiated departures" from the Modalities Paper, as claimed by the European Communities.

7.142 On the basis of the evidence submitted to it, the Panel, therefore, concludes that the European Communities has not substantiated its assertion that there are other situations in which a Member has undertaken commitments in Section II of Part IV of its Schedule that did not contain both budgetary

7.149 The primary purpose of treaty interpretation is to identify the *common* intention of the

should be interpreted as a whole, and, in particular, its sections and parts should be read as a whole."[455] (underlining added, footnote omitted)

7.153 In *Canada – Dairy*, the Appellate Body made it clear again that a treaty interpreter cannot lightly assume that a WTO Member projected no demonstrable purpose on a specific provision of its schedule:

> "In interpreting the language in Canada's Schedule, the Panel focused on the verb 'represents' and opined that, because of the use of this verb, the notation was no more than a '*description*' of the 'way the size of the quota was determined'. The net consequence of the Panel's interpretation is a failure to give the notation in Canada's Schedule *any* legal effect as a 'term and condition'. If the language is *merely* a 'description' or a 'narration' of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule. *The Panel, in other words, acted upon the assumption that Canada projected no identifiably necessary or useful qualifying or limiting purpose in inscribing the notation in its Schedule. The Panel thus disregarded the principle of effectiveness in its interpretive effort.*"[456] (emphasis added)

7.154 The Panel considers, therefore, that in the interpretation of Footnote 1 to Section II, Part IV of the EC's Schedule it must use its best endeavours to give due meaning to the said Footnote and respect the principle of effective treaty interpretation.

(iv) The issue of "conflict" between provisions of a Member's Schedule and provisions of the Agreement on Agriculture

7.155 The Panel recalls that in international law, there is a presumption against conflicts when treaties have the same membership.[457] This principle has been recognized by the WTO jurisprudence when dealing with internal conflicts within the *WTO Agreement* which includes Members' Schedules. The WTO jurisprudence has maintained the general principle that there is a conflict only when two provisions are mutually exclusive, that is when only one provision "applies" because it is not possible for a single measure to be consistent with both provisions.[458]

---

[455] Ian Sinclair, *The Vienna Convention on the Law of Treaties*, (Manchester University Press, 1984), p. 468. See also Ian Sinclair, *Vienna Convention*, 1984, at p.97.) " … a

7.156 The Panel is also aware of the WTO jurisprudence that has established the relationship between provisions of a WTO agreement and provisions of a Member's Schedule. For instance, the Appellate Body in *EC – Bananas III*[459] concluded, as the GATT panel report on *US – Sugar*[460], that:

> "The market access concessions for agricultural products that were made in the Uruguay Round of multilateral trade negotiations are set out in Members' Schedules annexed to the *Marrakesh Protocol*, and are an integral part of the GATT 1994. By the terms of the *Marrakesh Protocol*, the Schedules are 'Schedules to the GATT 1994", and Article II:7 of the GATT 1994 provides that "Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement'. With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States - Restrictions on Importation of Sugar* ("*United States - Sugar Headnote*") found that:
>
> theiovTrr of TwD 0.gweuS w
>
> > ... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement."

7.157 The same principle was reiterated in *EC – Poultry*[461] and in *Chile – Price Band System*.[462] In the Panel's view, GATT and WTO jurisprudence indicate that WTO Members may use entries in their schedules of concession *to clarify and qualify* the "concessions" they individually agree to assume in their Schedules but the w

theiemaTbd0.-0.12755c

quantities; moreover, to be consistent with the *Agreement on Agriculture*, all such export subsidies must have been subject to reduction commitments pursuant to Articles 3 and 9.1 (and 9.2(b)(iv)).

7.165 Having these guidelines in mind and recalling the Appellate Body ruling in *Korea – Dairy* that it is "the *duty* of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously'[468]"[469], the Panel needs to see whether the content of Footnote 1 of the EC's Schedule on the one hand, and the European Communities' obligations pursuant to Articles 3, 8 and 9 of the *Agreement on Agriculture* on the other hand, can be read "harmoniously" or whether the content of Footnote 1 – being inconsistent and conflicting with the European Communities' basic obligations under the *Agreement on Agriculture* – should be considered without any legal effect and would thus not enlarge or otherwise modify the commitment level specified in Section II, Part IV of the European Communities' Schedule.

> It is the second sentence which is vital to understanding the footnote (and which is entirely ignored by the Complainants). It expresses the "average of export" of ACP/India equivalent sugar in the period 1986-1990. This sentence cannot be disregarded. It is deprived of meaning if it is considered as merely a statement of fact or a narration of particular circumstances.[472] The reference to the period 1986-1990 (which was the base period for the reduction commitments) is telling. If, as the Complainants would have it, the footnote is simply an exclusion, there would be no need to insert the second sentence, and no reason to refer to the 1986-1990 base period. The reference to the base period indicates that the EC was committing itself, as it had done for the other component of its exports of sugar, to limit its exports to a level established on the basis of the exports made in the base period. It operates in precisely the same way as the other component of the EC's commitments – it is a limited authorisation to provide export subsidies.
>
> Therefore, according to a proper interpretation of the footnote the EC has articulated its subsidy commitments in two components. One component sets limits which are subject to reduction, and the second component (the footnote) sets a fixed ceiling. Overall, the EC has reduced its export subsidies on sugar."[473]

Footnote 1 does not contain any "limitation" on export subsidies of ACP/India sugar

7.169 The Panel does not agree with the European Communities' interpretation of Footnote 1. Firstly, the ordinary meaning of the terms of the Footnote does not indicate any "limitation on export subsidies for sugar" to 1.6 million tonnes. The Panel therefore fails to see any commitment "limiting subsidization".

7.170 The Complainants highlight a number of inconsistencies between: (a) the European Communities' assertion before this Panel that Footnote 1 in the European Communities' Schedule has legal effect and constitutes a "commitment", and that, overall, the European Communities has subjected all export subsidies on sugar to reduction commitments[474]; and (b) the European Communities' own notification practice to omit the data relating to export subsidies of ACP/India "equivalent" sugar, as well as its responses to requests for clarification, in the Committee on Agriculture.

do' veor

7.172 The European Communities suggests that the evidence[475] demonstrates that it has considered and treated 1.6 million tonnes as a "cap" on the amount of exports which can benefit from export subsidies as ACP/India equivalent sugar. For the European Communities, the sugar CMO is managed in order to respect this limit, which forms an integral part of the regulatory structure of the regime. Indeed, since the export refunds are maintained at the difference between the world and the Community price (and thus the Community authorities have limited control over the evolution of the amount of individual refunds) the limits imposed by the *WTO Agreements* are respected through the control of the quantity of products which may be exported with the benefit of a refund (see Article 27(14) of Regulation 1260/2001).[476] The Commission verifies on a weekly basis that the export refunds granted stay within the limits set out in the WTO Agreement which permits the Commission to ensure that export refunds are not granted which might exceed the EC's export subsidy commitments.

7.173 The Panel recalls the Appellate Body's reliance, in *Korea – Various Measures on Beef*, on statements and notifications by Members before the Committee on Agriculture[477], as evidence of a Member's consistent treatment of its commitments under the *Agreement on Agriculture*.

7.174 The Panel first observes that the EC notifications to the Committee on Agriculture do not suggest that Footnote 1 constitutes a limitation on subsidization.[478] The European Communities, rather, appears to argue that Footnote 1 exempts it from any export subsidy reduction commitment with respect to sugar of ACP and Indian origin. Indeed, since the entry into force of the WTO Agreement, the European Communities has consistently indicated, in Footnote 5 to its Table ES:1 notifications to the Committee on Agriculture, that the information presented:[479]

> "Does not include exports of sugar of ACP and Indian origin on which the Community has no reduction commitments."

7.175 The Panel also notes that, during the review process (25-26 June 1998 and 17-18 November 1998) undertaken by the Committee on Agriculture pursuant to Article 18 of the *Agreement on Agriculture*, the European Communities stated, *inter alia*, that:

> "Exports of ACP and Indian sugar are eligible to receive export refunds. As mentioned in the EC's Schedule, no reduction commitment is made on this category of sugar."[480]
>
> and
>
> "As indicated in footnote 1 of the table on export subsidies contained in Part IV, Section II of Schedule CXL, the EC is not undertaking any reduction commitment on exports of ACP or Indian sugar. Consequently, any financial assistance is not

[475] See European Communities' first submission, table 10. The Panel notes that Australia raised the issue of the statistical inaccuracy of the tables cited by the European Communities, Australia's oral statement at the first substantive meeting, para. 54 and Australia's oral statement at the second Panel meeting, para. 51.

[476] European Communities' first submission, paras. 175-184.

[477] Appellate Body Report on *Korea – Various Measures on Beef*, paras. 103-105.

[478] The Panel recalls that the practice of a Member may be relevant in the interpretation of that Members' schedule. See the Appellate Body report on *EC – Computer Equipment*, para. 92.

[479] Exhibit COMP-17, Footnote (5) to Table ES:1 notifications.

[480] See G/AG/R/15, p. 59. See also G/AG/R/17.

> reported to the WTO. For information, these exports amount to approximately 1.6 million tonnes per year."[481]

7.176 The Panel must assume that the European Communities has been complying with the notification requirements adopted by the Committee on Agriculture[482]

statement that exports of subsidized sugar of ACP/Indian origin will not be subject to the reduction commitments provided for in Articles 3, 9.1 and 9.2(b)(iv) of the *Agreement on Agriculture*.

Footnote 1 does not provide for any commitment for sugar "equivalent" from ACP/India

7.180 The Panel is also of the view that the ordinary meaning of the terms of Footnote 1 does not provide that an amount of subsidized sugar "equivalent" to the amount of sugar imported from ACP/India will be maintained for export. In the Panel's view, the Footnote appears to require that the

regime (including the ACP/India equivalent sugar) on the other hand; they added that Members were aware since the 1970s that the Footnote related to a quantity of exports equivalent to the quantity of sugar it imports from ACP countries and India and that this portion of its subsidized exports should be entitled to differential treatment which is, according to the European Communities, articulated in the ACP/India Footnote.

7.182 7.182

7.186 The Panel has reached the conclusion that all export subsidies scheduled pursuant to Articles 3 and 8 of the *Agreement on Agriculture* must have been subject to reduction commitments. The European Communities argues that although the ACP/India sugar Footnote acts as a ceiling on subsidization and is not subject to any reduction commitment, the European Communities' overall commitment on export subsidies to sugar has been reduced. According to the European Communities, export subsidies provided for in its Schedule are not inconsistent and in conflict with Article 9.1 and 9.2(b)(iv) of the *Agreement on Agriculture*, being of the opinion that Article 9.2(b)(iv) is outside the Panel's terms of reference.

7.187 The Panel disagrees with the European Communities. The Panel recalls that the possibility of maintaining export subsidies is an exception to the general prohibition against export subsidies contained in Article 8 of the *Agreement on Agriculture*. As discussed in paragraphs 7.133-7.135, WTO-consistent export subsidies that could be maintained if and when scheduled, had to be subject to reduction commitments. In other words, export subsidies that were not subject to any reduction commitment could not be maintained, and are prohibited pursuant to Article 8 as interpreted in light of Articles 3 and 9 of the *Agreement on Agriculture.*

7.188 Mor[illegible]

Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.[495]

> The ACP/India Footnote does not contain any budgetary outlays so it cannot consist of an export subsidy consistent with the *Agreement on Agriculture*

7.192 The Panel is also of the view that since the ACP/India sugar Footnote does not contain any reference to budgetary outlays, it cannot be considered as a component of a scheduled export subsidy commitment. The European Communities is of the view that Article 3.3 does not require that all export subsidy commitments contain both quantity and budgetary outlays reduction commitments. As mentioned before, the Panel disagrees with the European Communities in this regard. In paragraphs 7.137-7.142 the Panel has reached the conclusion that all export subsidy commitments are to be expressed both in terms of volume and in terms of budgetary outlays, but the European Communities' Footnote does not contain any such budgetary outlay commitment.

7.193 The European Communities adds that Footnote 1 contains a "*de facto* budgetary limit of 1.6 million multiplied *by the average export refund which can be granted within the first component of the EC's commitments*" because the refunds for both types of sugar must be the same. In the Panel's view, what the European Communities describes as a "budgetary limit" does not arise from a commitment it has assumed in its Schedule but from its own practice of according the same subsidies to A and B sugar and to ACP/India equivalent sugar. The European Communities therefore describes it as a "*de facto*" limit.[496]

7.194 The Panel considers that there is nothing in the ordinary terms of the Footnote which expresses a legally binding commitment that the per unit subsidization of exports of ACP/India equivalent sugar shall not exceed that for exports of A and B sugar. Moreover, on this construction, the budgetary outlay commitment level cannot be predicted beforehand. It can only be known in retrospect once the European Communities has *finished* granting export refunds for a particular year. The Panel notes that the purpose of the requirement that reduction commitments be expressed both in terms of quantity and budgetary outlays is to ensure transparency so that Members know in advance what level of export subsidies will be provided on a yearly basis. Limitations resulting from a Member's own domestic law or practices and unknown future events are therefore not compatible with the *Agreement on Agriculture*.

7.195 The Panel also notes that the European Communities' Council Regulation No. 1260/2001 at issue in this case, explicitly recognizes that "the Agriculture Agreement provides for export support to be reduced, in terms of *both* the quantities covered and the *level* of the subsidies involved."[497]

7.196 Therefore, the Panel concludes that the ACP/India sugar Footnote cannot be reconciled with the requirements of Article 3.3 that reduction commitments be expressed both in terms of quantity and of budgetary outlays. The content of Footnote 1 is thus inconsistent and conflicts with the requirements of Articles 3 and 8 of the *Agreement on Agriculture*f/F0 11.25 Tf a5 th6w (Agrenote 1 is thus3 1noal

sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.[498]

(vi) Conclusion on the legal value and effect of the ACP/India sugar Footnote

7.197 The Panel is therefore of the view that, even if it were to be considered as including a commitment limiting subsidization to 1.6 million tonnes of ACP/India equivalent sugar, which it does not, the content of Footnote 1 to Section II, Part IV of the EC's Schedule is inconsistent and conflicts with Articles 3, 8, 9.1 and 9.2(b)(iv) of the *Agreement on Agriculture* and as such cannot be read harmoniously with the provisions of the *Agreement on Agriculture*: it does not provide for any budgetary outlays, and subsidies provided to ACP/India equivalent sugar have not been subject to any reduction. Footnote 1 cannot therefore constitute a second component of the European Communities' overall commitment level for export subsidies on sugar.

7.198 Consequently, the Panel finds that the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.

3. Was the European Communities authorized to deviate from the *Agreement on Agriculture*'s basic obligations through a negotiated departure from the Modalities Paper?

(a) Arguments of the parties[499]

7.199 For the European Communities, Footnote 1 is a negotiated departure from the Modalities Paper. The European Communities insists that export subsidy commitments, like tariff concessions, were the subject of detailed (and often very difficult) negotiation during the Uruguay Round. The European Communities' commitments, while applicable to its exports, represent the negotiated balance of the varied interests of all participants in the Uruguay Round. In challenging the Footnote, the Complainants are trying to unsettle that balance. For the European Communities, the claims and objections which the Complainants make in this proceeding were as available to them during the verification process as they are now. Had they been raised during the verification process, and considered valid, the Members concerned could have negotiated a different balance of concessions.

7.200 Moreover, in the context of its claim that the Complainants are acting inconsistently with their good faith obligation pursuant to Article 3.10 of the *DSU*, the European Communities argues that the Complainants were undeniably aware, by virtue, *inter alia*, of the very inclusion of the Footnote in the European Communities' export subsidy commitments (both in their draft and final form), of the existence of the European Communities' intended treatment of ACP/India sugar. The European Communities provides correspondence in which the European Communities' Ambassador is allegedly making clear that the European Communities never intended and never undertook any commitment to reduce its export subsidies of equivalent ACP/India sugar and this was known and accepted by the other Members. The European Communities adds also that the Complainants never challenged the European Communities during the verification process. Although the Complainants may have been silent at the time, today they deny concluding any such agreements.

[498] The European Communities draws a third analogy between the Footnote and the case of incorporated products, for which only one form of commitment (budgetary) was scheduled, as specifically envisaged in the Modalities Paper. Moreover, the Panel fails to recognize any similarity between the content of Footnote 1 and "incorporated products". The only provision of the *Agreement on Agriculture* dealing with "incorporated" agricultural products is Article 11, which is of no relevance to the present dispute.

[499] See also paras. 4.207 et seq above.

items".[513] For Australia, this Press Communiqué does not include all outstanding or settled issues between the parties and, in any case, this Press Communiqué does not have the status of a record of settlement of negotiations.[514]

7.209 Then , the European Communities wrote to the Deputy Director of the GATT in March 1994 that it would make some changes to its Schedule (though not necessarily all the changes requested by the contracting parties).[515] The European Communities nonetheless continued to include the Footnote in its Schedule and from 1995 onwards notified to the WTO Committee on Agriculture that the data on its subsidized exports "does not include exports of sugar of ACP/Indian origin on which the Community has no reduction commitment."[516]

7.210 The Panel also examined evidence produced by the European Communities arguing that Australia was aware that ACP/India sugar had not been included in the reduction commitments made by the European Communities.[517] The Panel considers that the fact that Australia knew and made public its knowledge that ACP/India sugar had not been made part of the reduction commitments does not mean that Australia agreed with the situation. The evidence and submissions produced by all parties show that the Complainants did not agree to any European Communities' deviations from the *Agreement on Agriculture*. On the contrary, Australia presented evidence that it had objected to such exclusion from the very beginning of its bilateral discussions with the European Communities, while the other Complainants assert that they had never agreed to such an insertion and deviation from the *Agreement on Agriculture*.

7.211 In this respect, the Panel refers to the findings of the panel in *EC – Bananas (Article 21.5 – EC)* stating that silence or failure to challenge a measure by a Member does not create the presumption that said Member has agreed that the measure at stake is consistent with the *WTO Agreement*. The Panel held:

> "We agree with the European Communities that there is normally no presumption of inconsistency attached to a Member's measures in the WTO dispute settlement system. At the same time, we also are of the view that the failure, as of a given point in time, of one Member to challenge another Member's measures cannot be interpreted to create a presumption that the first Member accepts the measures of the other Member as consistent with the *WTO Agreement*."[518]

7.212 In the Panel's view, even assuming that the participants in the Uruguay Round were authorized to negotiate departures from the Modalities Paper which is not clear, such negotiated departure would only be relevant to the extent that it is reflected in the European Communities' Schedule and is WTO consistent.[519] The acknowledgment of the existence of Footnote 1 or the absence of agreement to the inclusion of said Footnote does not, for the Panel, equal acquiescence on the part of the interested parties. The Panel recalls that in *Canada – Dairy*, the Appellate Body considered the negotiations which took place with regard to Canada's and the United States' respective

---

[513] European Communities' second oral statement, para. 94.
[514] Australia's second written submission, para. 84.
[515] Exhibit ALA-7, EC Letter of 25 March 1994 to GATT.
[516] See paras. 7.174-7.178.
[517] Exhibit EC–12, Australian brochure on July 1994, page 38; and Exhibit EC 14-ABARE Report, page 39.
[518] Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.13.
[519] The Panel recalls *inter alia* that pursuant to Articles 3.2 and 19.2 of the DSU panels "cannot add to or diminish rights and obligations provided in the covered agreements".

Schedules and highlighted that though Canada's commitment had been made unilaterally, *they were the result of lengthy negotiations*:[520]

> "In considering 'supplementary means of interpretation', we observe that the 'terms and conditions' at issue were incorporated into Canada's Schedule *after lengthy negotiations between Canada and the United States*, regarding reciprocal market access opportunities for dairy products. Both Canada and the United States agree that those *negotiations* failed to produce any agreement between them."[521]

7.213 Unlike the situation highlighte

membership as it would have nullified or impaired the rights of WTO Members, other than the Complainants. If the Panel were to sanction such a proposition it would be acting contrary to Articles 3.2 and 19.2 of the *DSU* which deny panels the authority to "add to or diminish the rights and obligations provided in the covered agreements".

7.219 The Panel notes finally the distinction between the present dispute and the situation prevailing in the *EC – Bananas III* dispute where the WTO-inconsistent measures challenged were "required" by the Lomé Convention some of which benefited from a WTO waiver.[525] In the present dispute, the EC/ACP Waiver authorizes the European Communities to adopt measures inconsistent with Article I of the GATT 1994 in favour of imports of sugar from ACP countries but the Cotonou Agreement or Sugar Protocol do not require the European Communities to subsidize exports of sugar imported from the ACP countries, even less so if this is inconsistent with the *Agreement on Agriculture*.

. 7.22014 Tc 0.2982 Tw (Bananas III) Tj 52.5 0 TD /F0 11.25 Tf 0 Tc 0.1875 Tw ( ) Tj 3 0 TD -0.16P0 Tw (In

2. The application of the special rule on the burden of proof to this dispute[530]

(a) The quantitative aspect

7.230 In the present dispute, the Complainants have provided prima facie evidence that since 1995, the European Communities has been exporting sugar in quantities exceeding its commitment level. In particular, while the European Communities' export subsidies commitment level was for 1,273,500 tonnes of sugar for the 2000/2001 marketing year, its actual sugar exports amounted to 4,097,000 tonnes, that is some 2,823,500 tonnes in excess of its commitment level[531]

(b) The subsidization aspects of the claim

7.231 Having reached the conclusion that the European Communities has exceeded its commitment level for exports of subsidized sugar every year since 1995 and in particular in the marketing year 2000/2001, the Panel now proceeds to examine the European Communities' argumentation that its excess exports of sugar are not subsidized. The Panel agrees with the Complainants that the essential fact is that the total quantity of sugar exported by the European Communities exceeds its commitment level for sugar. The Panel understands that sugar in excess of the European Communities' commitment level is essentially composed of ACP/India equivalent sugar and C sugar. The Complainants argue that ACP/India equivalent sugar, and C sugar, are respectively subsidized within the meaning of Article 9.1(a) and (c) of the *Agreement on Agriculture.* The Panel therefore proceeds to examine the Complainants' arguments in turn.

3. Has the European Communities demonstrated that its exports of ACP/India equivalent sugar are not subsidized?

(a)

on Agriculture. Consequently, the European Communities acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture.*

7.234 The European Communities does not deny that ACP/India equivalent sugar benefits from the same level of export refunds per unit as A and B sugar do. It claims essentially that the amount of ACP/India equivalent sugar that it exports is included in its commitment level pursuant to Article 3.3 of the *Agreement on Agriculture.*

(b) Assessment by the Panel

7.235 The Panel recalls that the European Communities does not deny the Complainants' allegation that ACP/India equivalent sugar benefits from the same level per unit of export refunds as A and B sugar do; the European Communities does not refute either the Complainants' claim that exports of ACP/India equivalent sugar are subsidized within the meaning of Article 9.1(a) of the *Agreement on Agriculture* which reads as follows:

7.240 In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body interpreted Article 10.3 of the *Agreement on Agriculture* to mean that "where a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it has granted WTO-*inconsistent* export subsidies, for the excess quantities, unless the Member presents adequate evidence to 'establish' the contrary."[534] The Panel has already reached the conclusion that the European Communities' exports of its ACP/India equivalent sugar are inconsistent with its obligations under Articles 3 and 8 of the *Agreement on Agriculture*.[535] The Panel examines hereafter whether the European Communities has proven satisfactorily that its exports of C sugar are not and were not subsidized in any manner.

(b) Arguments of the parties[536]

7.241 The Complainants argue that the European Communities has created a legal framework that: (i) encourages the overproduction of sugar; (ii) segregates the export market for C sugar completely from the domestic market by imposing sanctions for failure to export such sugar; and (iii) generates the profits and capital used to fund the below production cost exports of that sugar. This legal framework contemplates various payments within the meaning of Article 9.1(c) of the *Agreement on Agriculture* in relation to C sugar production and exports. The Complainants mainly contend that EC sugar producers receive a payment as evidenced by the fact that C sugar is being exported at prices that do not reflect its proper value because the price received does not cover its average total cost of production. Accordingly, C sugar is receiving a payment. The Complainants also refer to payments by way of below cost of production sales of C beet to C sugar producers. Under the above analysis, the Complainants argue that C beet, an input in C sugar, priced at below cost of production, serves as a payment resulting in an export subsidy as defined by Article 9.1(c) of the *Agreement on Agriculture*.

7.242 The European Communities responds essentially that C sugar does not involve any payment within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. It argues that export sales of C sugar into the world market is the only form of alleged payment that is brought by the Complainants before the Panel within the Panel's terms of reference and finds that cost of production is not a relevant benchmark for such a payment in this dispute. The European Communities argues further that world market prices should be the relevant benchmark in this dispute and, accordingly, does not find any payments. In addition to arguing that the other forms of alleged payment that the Complainants have put forward are outside the Panel's term of reference, the European Communities claims that the alleged payments do not offer any benefits to EC sugar producers.[537]

7.243 The Complainants argue that there is a demonstrable link between the payments and the governmental action in the present dispute. They argue that the payments that allow C sugar to be produced below its cost of production arise from governmental action regulating the entire EC sugar industry. They claim that EC sugar producers can make the below cost of production sales of C sugar for export by way of their participation in the government regulated domestic market. The Complainants argue further that all the payments received for C sugar are on the export since C sugar is a product that must be exported. The European Communities responds that the benefits to the EC sugar industry from the EC sugar regime would exist regardless of the export of C sugar and are not contingent on the production or exportation of C sugar.

---

[534] Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 73.
[535] See para. 7.238 above.
[536] See also Section IV.D. of this Panel Report.
[537] See paras. 4.44 and 4.51 above.

exercise pressure on C beet growers so that C beet is sold to C sugar producers at reduced prices. Furthermore, various aspects of the sugar regime provide the beet growers with an incentive to produce beet beyond their A and B quota levels, as C beet. The discounted prices for C beet below its cost of production and the incentive for beet growers to produce C beet serve as an advantage for the export production of C sugar.

7.248 In accordance with Article 15 of the EC Regulation, a basic production levy is charged to manufacturers on their production of A and B sugar.[545] The levy charged on A quota sugar is set at 2 per cent while the levy on B quota sugar is set at 37.5 per cent. These levies are used *inter alia* to fund export refunds given to exported A and B quota sugar under the co-financing principle of the EC sugar regime.[546] The levies charged are split 42 per cent to sugar producers and 58 per

demonstration of three elements. First, it requires that "payments" be made. Second, that those payments be made "on the export of an agricultural product". And third, that those payments be "financed by virtue of governmental action".

7.252 The Complainants point to what they consider to be multiple "payments" which would be made "on export" and be "financed by virtue of governmental action." The Complainants submit that the EC sugar regime involves a series of payments including: (a) payment in the form of below costs C beet sales to C sugar producers/exporters; (b) payment in the form of cross-subsidization resulting from the profit-

C sugar

Is such payment-in-kind through sales of below-costs C beet made "on the export"?

7.271 The Complainants argue that since C beet can only be used in the processing of C sugar, which in turn must be exported, any payments received by C sugar producers are "on the export".[576]

7.272 The European Communities does not offer any specific arguments as to C beet and the issue of whether such payments to C sugar producers through below-costs-C beet are on the export. Instead, the European Communities focuses on the general argument in regard to C sugar (which encompasses C beet) that sugar producers are free to choose whether they want to produce C sugar for export.[577] For the European Communities, even if the relevant EC measures provide an indirect benefit to C sugar, the governmental action which provides these benefits is not contingent upon the export of C sugar, since sugar producers may qualify for A and B quota rights and privileges regardless of whether they produce C sugar for export.[578]

7.273 The Panel is of the view that the European Communities misinterprets the requirements of Article 9.1(c) with respect to "on the export". The European Communities focuses on the fact that C sugar production is not required under the EC Regulation and that the advantages received by sugar producers as a result of EC governmental action in regard to A and B sugar would be afforded whether or not they produce and export C sugar. But in the Panel's view, a payment "on export" does not need to be contingent upon export. An analysis of Article 9.1(c) would put its emphasis on whether the payment in question received is on the export, not on whether, as appears to be the case, the EC price support as a whole is de facto contingent upon C sugar being exported. In other words, when identifying whether a payment is *on the export* as defined under Article 9.1(c) of the *Agreement on Agriculture*, once a payment is identified, the focus is on whether *this payment* is made *on the export*, and not on whether the source of the payment is dependent or contingent on export production.

7.274 The Panel also recalls that in *India – Autos* the Panel dealt with the expression "*on* importation" which, in the Panel's view, has similarities with the expression "on export" with respect to the use of the term "on":

> "The Panel turns therefore to consider the ordinary meaning of the phrase 'restriction…on importation'. An ordinary meaning of the term '*on*', relevant to a description of the relationship which should exist between the measure and the importation of the product, includes 'with respect to', 'in connection, association or activity with or with regard to'.[579] In the context of Article XI:1, the expression 'restriction… *on importation*' may thus be appropriately read as meaning a restriction 'with regard to' or 'in connection with' the importation of the product. On a plain reading, this would not necessarily be limited to measures which directly relate to the 'process' of importation. It might also encompass measures which otherwise relate to other aspects of the importation of the product."[580] (underlining added)

7.275 In the Panel's view a payment "on export" need not be "contingent" on export but rather should be "in connection" with exports.

7.276 The Panel considers that there is a very close link between C beet production and C sugar production, and in the Panel's view decisions by farmers of C beet whether or not to grow more C beet

---

[576] Brazil's first written submission, para. 57.
[577] European Communities' first written submission, para. 45.
[578] European Communities' first written submission, para. 44.
[579] Webster's New Encyclopedic Dictionary, 1994 ed.
[580] Panel Report on *India – Autos*, at para. 7.257.

is essentially based on the needs of C sugar producers. The Panel recalls that C beet can only be used in C sugar.[581] The Panel is aw

world market prices that did not reflect its average total production cost. In its written submissions or oral statements the European Communities has not addressed this criteria

permits processors to buy the beet they use to produce C sugar at prices below these minimums.[597] However, because growers of C beet are also growers of A and B beet and because C beet can only be used in C sugar, which in turn belongs to the same production line as A and B quota sugar, the EC sugar regime ensures that the sale of under-priced C beet to C sugar producers is an integral part of the governmental regulation of the sugar market. Indeed, the production of C beet will depend on the needs of C sugar producers (since C beet can only be used in C sugar). Conversely, to be competitive, C sugar must be exported at the world price. Because of the low world price relative to C sugar costs of production, C sugar producers will exercise pressure on C beet growers so that C beet are sold to C sugar producers at reduced prices. As further detailed below, C beet growers can use the profits made on the sales of A and B beet to cross-subsidize the sale of C beet to C sugar producers at prices below the total costs of production of C beet while still making profits. C sugar producers will therefore be willing to pay C beet growers proportionally to what they receive on the sales of C sugar.

any sectoral production for which expected revenue is persistently less than the cost of production, in this case, production of C beet.

7.287 In the P

it highly remunerative to farmers/growers of C beet. Government action also controls the supply of A and B beet (and sugar) through quotas. The imposition by government of financial penalties on producers of C sugar that divert C sugar into the domestic market is another element of governmental control over the supply of beet and sugar. Further, the degree of government control over the

prices result in covering the fixed costs to produce the exported C sugar, hence, serving as a subsidy to C sugar producers.[607]

7.296 The European Communities argues that some of the measures cited by the Complainants, such as import tariffs or safeguard measures, are not subsidies. Other measures, such as the intervention price and the production quotas, are indeed typical domestic price support mechanisms, and are already subject to the European Communities' domestic support reduction commitments under the *Agreement on Agriculture*. Therefore, the question of whether these measures provided export subsidies to C sugar does not even arise.

7.297 The Panel acknowledges, as was stated by the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US*), that normal economic operators must cover their total costs of production and if they do not, this may be evidence that they receive an advantage of some sort:

> "For any economic operator, the production of goods or services involves an investment of economic resources. In the case of a milk producer, production requires an investment in fixed assets, such as land, cattle and milking facilities, and an outlay to meet variable costs, such as labour, animal feed and health-care, power and administration. These fixed and variable costs are the total amount which the producer must spend in order to produce the milk and the total amount it must recoup, in the long-term, to avoid making losses. To the extent that the producer charges prices that do not recoup the total cost of production, over time, it sustains a loss which must be financed from some other source, possibly "by virtue of governmental action".[608]

7.298 The Panel recalls that in the ordinary course of business, a private business or economic operator would make the decision to produce and sell a product, not only to recover the total cost of production, but also with the objective of making profits. The Panel is of the view that export sales below total cost of production cannot be sustained unless they are financed from some other source, possibly "by virtue of governmental action".[609]

7.299 The Panel recalls that the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* determined that the appropriate "benchmark" to assess *the proper value* of the subject good, considering the facts and circumstances of the dispute, was the average total cost of production of the CEM milk. In determining the *proper value* to the producer, a payment analysis "requires a comparison between the price actually charged by the provider of the goods or services … and some objective standard or benchmark which reflects *the proper value* of the goods or services to their provider...".[610] In that dispute the Appellate Body, in search of an objective standard that would establish the proper value of milk to the milk producer, found that the average total cost of production took best into account the "motivations of the independent economic operator who is making the alleged 'payments'" and the value of milk to it.[611] The Appellate Body used this benchmark as it answered the "crucial question, namely, whether Canadian export production has been given an advantage".[612] (emphasis added)

---

[607] The Complainants submit that the subsidy, as defined in Article 9.1(c) of the Agreement on Agriculture, takes shape by way of the coverage of costs serving as a payment on exports which is the result of financing by governmental action.

[608] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87.

[609] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87.

[610] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 74.

[611] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 92.

[612] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 84.

7.300 The Panel recalls that the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* looked at why dairy farmers could make such below cost of production sales, and why they were able to do so without making a loss, indeed while making a profit. In reviewing the Canadian dairy regime the Appellate Body found that profits from domestic milk were spilling over to allow the sale of CEM milk at discounted prices – through governmental price controls.[613]

7.301 The evidence submitted shows that C sugar prices have been well under its average total cost of production every year, from 1992/1993 to 2002/2003.[614] In marketing year 2000/2001, the price per tonne of C sugar, based on the London Daily Price[615], was €222.32, while the total cost of production for that sugar was *** per tonne.[616] [617] This data illustrates that the price charged for C sugar does not even remotely cover its cost of production.[618]

7.302 Referring to publicly available information, the European Communities considers that, as a general rule, sugar producers operate at a profit.[619] In the Panel's view, profits are only possible if

[613] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras.136

C sugar is being sold above average variable costs despite being sold below its average total cost of production and its fixed costs are financed through some other way.

7.303 In the Panel's view, payments could occur by virtue of a combination of factors and measures.

the EC regime is predicated on a single stream of manufacture of quota and non-quota sugar by sugar quota holders, given that quota and non quota sugar are reclassifiable to a certain extent and given also the conditionality attached to the grant of an export certificate for C sugar. As acknowledged by the EC Commission, the production of C sugar is directly linked to quota production.[625]

7.307 Important by-products of this production support are structural surpluses, with EC sugar production substantially in excess of consumption. Consumption averages around 12.5 million tonnes, whereas production ranges between 15-18 million tonnes. In addition to sugar manufactured from domestically harvested beet or cane, a further 1.8 million tonnes of sugar is manufactured from raw cane sugar imported mainly from the ACP countries.[626] The regime ensures that domestic production surplus to consumption is disposed of on export markets. Approximately 20 per cent of all sugar produced is exported.

7.308 Export subsidies are funded by producer levies, calculated on the basis of quota production by sugar producers.[627] The EC Commission awards export subsidies through Management Committee procedures. Export refunds/subsidies to A and B quota sugar may be fixed at regular intervals or by a tender system the proceeds of which cover the difference between the EC domestic sugar price and the world market price for sugar, hence, enabling EC sugar to be exported and sold on the world market.[628] The export refund amounts are significant which indicates that the EC sugar industry needs a great deal of support or subsidies to competitively sell sugar on the world market.

7.309 When EC consumers pay the regulated high price for domestic sugar (A and B quota sugar), these domestic transactions generate substantial financial resources and constitute an "advantage" to the same producers in their production of C sugar.

7.310 The Panel finds that there is clear evidence that the relatively high EC administered domestic market (above-intervention) prices for A and B quota sugar allow the sugar producers to recover fixed costs and to sell exported C sugar over average variable costs but below the average total cost of production. Sugar is sugar whether or not produced under an EC created designation of A, B or C sugar. A, B or C sugar are part of the same line of production and thus to the extent that the fixed costs of A, B and C are largely paid for by the profits made on sales of A and B sugar, the EC sugar regime provides the advantage which allows EC sugar producers to produce and export C sugar at below total cost of production.[629] For the Panel this cross-subsidization constitutes a payment in the form of a transfer of financial resources.

7.311 The European Communities submitted that, despite the fact that a party derives an "advantage" from certain "governmental actions", it does not follow necessarily that any provision of goods made by that party would "transfer economic resources" to the recipient of the goods. The European Communities contends that the "benefit" had to be examined on its own merits, and under

incidental effect of "financing" sales at a loss. According to the European Communities, this was never intended by the drafters of the *Agreement on Agriculture.*

7.312 The Panel is of the view that Article 9.1(c) of the *Agreement on Agriculture* does not require the demonstration of a benefit for a measure to constitute a payment within Article 9.1(c) of the *Agreement on Agriculture.* The special nature of Article 9.1(c) is such that once an advantage or payment has been demonstrated, there is no need to prove separately that such an advantage provide "benefits" to the producers. The only additional requirements are that the advantage or payment is on export and is financed by virtue of governmental action.

7.313 Finally, to the European Communities' argument that several of the measures identified by the Complainants are not subsidies but rather tariffs and other types of border measures, the Panel recalls that in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body stated that governmental action, within the meaning of Article 9.1(c) embrace a full-range of activities by governments and that governmental action may be a single act or omission, or a series of acts or omissions.[630]

7.314 The Panel finds therefore that the cross-subsidization taking place through the cumulative effect of various measures involved in the operation of the EC sugar regime, including high prices charged to domestic consumers, enables C sugar producers to produce and sell C sugar. In the Panel's view, there is a payment in the form of transfers of financial resources from the high revenues resulting from sales of A and B sugar, for the export production of C sugar, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

Is the payment *on export*?

7.315 The Complainants contended that the payments made to C sugar producers were payments "on the export" of "an agricultural product" within the meaning of Article 9.1(c) of the *Agreement on Agriculture.*

7.316 For the European Communities, even if these measures provided for an indirect benefit to

whether C sugar is exported by C sugar producers or some other intermediate is of no relevance; what matters is that C sugar must be exported.[631]

7.319 Moreover, the Panel notes that the European Communities has not disputed that

Is this cross-subsidization payment *financed by virtue of governmental action*?

7.323 The Complainants submit that as in *Canada – Dairy*, the controlling governmental actions are "indispensable" to the transfer of resources from consumers and tax payers to sugar processors for A and B quota sugar and, through them, to growers of A and B quota beet.[638]

7.324 The Panel recalls that the "demonstrable link" and clear "nexus" between the "financing of payments" and the "governmental action" must be established in order to qualify as a payment "by virtue of governmental action."[639] Ith

Member concerned would have no alternative but to lower its import duty levels, even if such duties were within that Member's tariff bindings.

7.328 The Panel is of the view that the production of C sugar is not incidental. The Panel recalls that there are no independent producers producing exclusively C sugar: C sugar production exists only for producers of A and B quota sugar. The EC sugar regime provides the incentive to EC sugar producers to produce C sugar. This incentive lies in the fact that under the EC sugar regime if all the allocated quota for A and B sugar is not satisfied by the producer, the producer runs the risk that the quota will be reallocated to another sugar producer. There is evidence that C sugar was initially intended to secure the full quota for a given year and should amount to approximately 6 per cent of quota production.[648]

high domestic prices well above the intervention price.[652] Additionally, penalties levied against sugar producers that divert C sugar production into the domestic market are evidence of further governmental control. The collection of production levies and distribution of export refunds also contribute to the high degree of EC governmental control. Lastly, the imposition of high import tariffs illustrates again governmental action in the EC sugar regime.

7.332 Accordingly, the EC sugar regime uses the high profits on A and B quota sugar to cover fixed costs for C sugar and, most importantly, requires C sugar to be exported and diverted from the domestic market. Again, the result of the EC sugar system is not the production of C sugar in marginal or superfluous amounts simply in the pursuit of ensuring quota fulfilment. Rather, as the EC Court of Auditors stated, over the past years, C production has varied between 11 and 21 per cent of quota production, a significant portion of the European Communities' entire sugar production.[653]

7.333 In the Panel's view, the EC sugar regime and the cross-over benefits that it creates are thus the direct and foreseeable consequences of actions by the European Communities, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, not merely the decisions of private sugar producers responding to market incentives.

7.334 Therefore, the Panel finds that the production of C sugar receives a payment, through cross-subsidization resulting from the operation of the EC sugar regime; there is a payment, in the form of transfers of financial resources on export *financed by virtue of governmental action.*

7.335 Pursuant to Article 10.3 of the *Agreement on Agriculture*, the Panel finds that the European Communities has not demonstrated that exports of C sugar that exceed the European Communities' commitment levels since 1995 and in particular since the marketing year 2000/2001, are not subsidized. Consequently, the European Communities is acting inconsistently with Articles 3 and 8 of the *Agreement on Agriculture.*

5. Overall conclusion

7.336 The Complainants have provided prima facie evidence that the European Communities' exports of sugar exceeds its commitment levels since 1995 and in particular since the marketing year 2000/2001.

7.337 The Complainants have also provided prima facie evidence that producers/exporters of ACP/India equivalent sugar that exceed the European Communities' commitment levels receive subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture.*

7.338 The Complainants have provided prima facie evidence that producers/exporters of C sugar that exceed the European Communities' commitment levels receive payments on export by virtue of governmental action: (i) through sales of C beet to C sugar producers below their total costs of production; and (ii) in the form of transfers of financial resources, through cross-subsidization resulting from the operation of the EC sugar regime, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

7.339 In light of Article 10.3 of the *Agreement on Agriculture*, the Panel reaches the conclusion that the European Communities has not demonstrated that its exports of C sugar and ACP/India (equivalent) sugar that exceed the European Communities' commitment level *are not subsidized.*

---

[652] LMC Data, Exhibit BRA-1, Tables 3.1-3.4, pp. 18-22 and Exhibit ALA-1.
[653] EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 23, para. 38.

7.340 Consequently, the Panel finds that the European Communities has been acting inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture* by providing export subsidies on sugar within the meaning of Articles 9.1(a) and 9.1(c) of the *Agreement on Agriculture*,

> of the European Communities' scheduling commitments so as to include the exports of C sugar in the base levels and to rectify the annual commitments accordingly."[656]

7.346 For the Complainants, the Modalities Paper does not provide "context" as defined in Article 31.2 of the *Vienna Convention* as it does not constitute an agreement relating to the *Agreement on Agriculture* made in connection with the conclusion of that Agreement. Instead, it constitutes merely an informal note issued by the Chairman of the Market Access Group on his own responsibility to assist the participants in the preparation of specific binding commitments included in the Schedules associated with the *Agreement on Agriculture*. In relation to Article 31.2(b) of the *Vienna Convention*, the Modalities Paper does not constitute an instrument relating to the *Agreement on Agriculture* made in connection with the conclusion of the Agreement. It does not represent an instrument made by one or more parties and, critically, it was a document prepared during the latter stages of negotiation of the Agreement, not at the time of its conclusion. While not providing "context" as defined in Article 31.2 of the *Vienna Convention*, the Modalities Paper does form part of the preparatory work, as recognised in Article 32 of the *Vienna Convention*, of the *Agreement on Agriculture*, having been developed as part of the negotiating process.

7.347 For the Complainants, the European Communities' arguments that its failure to include C sugar in its calculation of its base levels constitutes an error that it should be allowed to correct, has no foundation in the *WTO Agreements* or in WTO jurisprudence. Moreover, they consider that under the *DSU*, the Panel does not have the authority to permit the European Communities to "correct" its Schedule.[657] Furthermore, they contend that the "error" of the European Communities is not "excusable" because "the decision on how to schedule support was one for each Member to take at the end of the day, based on its own interpretation of the application of the draft provisions to the regimes applying in each sector. Any risk in regard to so-called 'under-calculations' of the base period outlays and quantities was the responsibility of the scheduling Member, in this case the EC."[658]

(b) Assessment by the Panel

7.348 The Panel recalls first that participants in the Uruguay Round submitted draft schedules essentially on the basis of the 1991 Draft Final Act Modalities. It also notes that the Modalities Paper was first issued in 1991 and then revised in December 1993 whereas discussions, among others on the scope of the Footnote inserted in the EC Schedule, went on thereafter and even after the European Communities submitted its final Schedule in March 1994. The version of the Modalities Paper (MTN.GNG/MA/W/24) referred to by the parties was prepared after the 15 December 1993 conclusion of the negotiation for the purpose of verification.

7.349 The Panel further recalls that the Modalities Paper cannot be the basis for dispute settlement under the *WTO Agreement*. The Panel also recalls that in *EC – Bananas III* the European Communities emphasized that: "[t]here was no doubt that any guidelines that existed for scheduling in the agricultural sector were left out of the *Agreement on Agriculture* on purpose".[659] The Appellate Body also stated that "We note further that the *Agreement on Agriculture* makes no reference to the *Modalities* document ..."[660]

doc Tc 1.0 Tj 47.295-12.75 ies em. r schedulin on thewrd 4.n59 Tce Fool,ta.5 0 T8 t14j -62.25 -12.24ed its (-w (Modalities) T2.234Schedu(1 onnote in

7.350 Clearly, the so-called Modalities Paper is not a covered agreement and thus cannot provide for WTO rights and obligations to Members. Nonetheless, it could be relevant when interpreting the *Agreement on Agriculture*, including Members' Schedules.

7.351 The Panel is of the view, that even if, *arguendo*, the Modalities Paper is to be considered as "context", within the meaning of Article 31.2 of the *Vienna Convention* and even if it becomes clear that the European Communities did not take account of its subsidies to C sugar in the calculation of its base quantity for export subsidies, this does not necessarily imply that the European Communities is now entitled to recalculate its base quantity.

7.352 Even if there were clear evidence that if the European Communities had known that C sugar was subsidized, it would have increased its base quantity to include additional subsidies to C sugar, the fact that the European Communities did not do so at the time, does not in and of itself entitle the European Communities to claim a correction of its Schedule today. WTO Members were not *obliged* to maintain export subsidies, they were only *authorized* to maintain them as exceptions to the prohibition in Articles 8 and 3.3 of the *Agreement on Agriculture*. Even if the interpretation provided by the Appellate Body in *Canada – Dairy* was novel as suggested by the European Communities[661], the fact remains that this Panel is bound by the wording of the WTO treaty and it does not have the competence to assess whether the European Communities at the time misinterpreted the scope of its obligations.

7.353 In the Panel's view, the European Communities' assertion that in light of the circumstances, the only course of action is for the Complainants to agree to the correction or revision of the European Communities' Schedule is not a matter for which the Panel has any authority as it goes beyond the scope of a panel recommendation which, according to Article 19.1 of the *DSU* , should be limited to recommending that the concerned Member "bring the measure into conformity with the *Agreement on Agriculture*".[662] The Panel is not authorized, under the *DSU*, to force the Complainants to agree to such a correction or revision. of the European Communities' Schedule.

7.354 Therefore, the only recommendation that this Panel can make, is for the European Communities to bring its measures into conformity with the *Agreement on Agriculture*. In the Panel's view this matter is of a multilateral nature and should not be resolved in the context of dispute settlement. The Panel notes that Members are free to negotiate and agree on a revision to the European Communities' Schedule or to agree on a waiver in that regard.

F. ARTICLE 10.1 OF THE AGREEMENT ON AGRICULTURE

1. Arguments of the parties[663]

7.355 The Complainants submitted that should the Panel decide that the exports of C sugar were not subsidized by payments financed by virtue of governmental action within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, the Panel should, in the alternative, address their claims under Article 10.1 of the *Agreement on Agriculture.*

---

[661] On the contrary the Appellate Body's interpretation of Article 9.1(c) would not seem to be a novel legal development but a confirmation or clarification of said provision.

[662] Article 19.1 of the *DSU* provides: "Where a panel or the Appellate Body 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. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

[663] See Section IV:D.2 above.

2. Assessment by the Panel

7.356 Since the Panel has found that the European Communities is acting inconsistently with Articles 3 and 8 of the *Agreement on Agriculture*, in providing producers/exporters of C sugar and ACP/India equivalent sugar, with payments on exports financed by virtue of the EC sugar regime, within the meaning of Article 9.1(a) and (c) of the *Agreement on Agriculture* in excess of the European Communities' commitment level, those subsidies *cannot*, by definition, be "export subsidies *not* listed in paragraph 1 of Article 9", as required by Article 10.1 of the *Agreement on Agriculture*.[664] In this respect the Panel refers to the finding of the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* which held:

> "It is clear from the opening clause of Article 10.1 that this provision is residual in character to Article 9.1 of the *Agreement on Agriculture*. If a measure is an export subsidy listed in Article 9.1, it cannot simultaneously be an export subsidy under Article 10.1."[665]

7.357 The Panel therefore sees no reason to examine the Complainant's claims under Article 10.1 of the *Agreement on Agriculture*.

G. NULLIFICATION OR IMPAIRMENT

extent that the current volume of subsidized exports exceeded 79 per cent of the quantity of subsidized exports made during the base period.

7.362 The Complainants considered that

impairment on the basis that the United States has never exported a single banana to the European Community, and therefore, could not possibly suffer any trade damage." The Appellate Body stated:

> "[W]e note that the two issues of nullification or impairment and of the standing of the United States are closely related….[T]wo points are made that the Panel may well have had in mind in reaching its conclusions on nullification or impairment. One is that the United States is a producer of bananas and that a potential export interest by the United States cannot be excluded; the other is that the internal market of the United States for bananas could be affected by the EC bananas regime and by its effects on world supplies and world prices of bananas….*They are…relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment.* (emphasis added)
>
> So, too, is the panel report in *United States–- Superfund*, to which the Panel referred. In that case, the panel examined whether measures with 'only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 ...'. The panel concluded (and in so doing, confirmed the views of previous panels) that:
>
> > 'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'[669]
>
> The panel in *United States – Superfund* subsequently decided *'not to examine the submissions of the parties on the trade effects of the tax differential'* on the basis of the legal grounds it had enunciated. *The reasoning in United States – Superfund applies equally in this case.*"[670] (emphasis added)

7.368 The Panel also notes that in the panel on *Turkey – Textiles*, Turkey argued that even if its quantitative restrictions on imports of textile and clothing products from India were in violation of WTO law, India had not suffered any nullification or impairment of its WTO benefits within the meaning of Article 3.8 of the *DSU* because imports of textile and clothing from India had increased since the Turkish measures at issue had entered into force. The panel rejected this argument in a

exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the *DSU* were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption -12.777777777777777

7.372 Moreover, the Panel notes that the European Communities has not rebutted the evidence submitted by the Complainants with regard to the amount of trade lost by the Complainants as a result of the EC sugar regime. The Panel recalls that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".[676]

7.373 The Panel is, therefore, of the view that the European Communities has not effectively refuted the Complainants' allegation that the European Communities' violations nullified or impaired the benefits to which they are entitled. In particular, the European Communities has not submitted sufficient factual evidence to suggest that the Complainants did not suffer an "adverse impact" from the European Communities' exports of C sugar and ACP/India equivalent sugar provided in excess of the European Communities' commitment level. The fact that the Complainants did not bring their claims forward earlier does not relieve the European Communities from adducing sufficient arguments and evidence to rebut the presumption in Article 3.8 of the *DSU*.

7.374 Consequently, the Panel finds that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits to which the Complainants were entitled under the *Agreement on Agriculture*.

H. ARTICLE 3 OF THE *SCM AGREEMENT*

1. Arguments of the parties

7.375 The arguments of the parties are summarized in paragraphs 4.232 to 4.266 of this Panel report.

7.376 The Complainants submit that the export subsidies granted in respect of exports of quota sugar, ACP/India equivalent sugar and C sugar were prohibited subsidies under the *SCM Agreement*. More specifically, the Complainants claimed that the EC sugar regime provided subsidies that amounted to an export subsidy listed in Item (d) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* (hereinafter the "Illustrative List of the *SCM Agreement*) and that the export refund on exports of ACP/India "equivalent" sugar amounted to an export subsidy listed in Item (a) of the same Illustrative List. Furthermore, Australia and Brazil claimed that the EC sugar regime was also otherwise inconsistent with Article 3.2 of the *SCM Agreement*.

7.377 The European Communities argued that the *SCM Agreement* was not applicable to agricultural products. It pointed to, *inter alia*, Article 21.1 of the *Agreement on Agriculture* [illegible] to Tj in 61.5 0 TDs nt T (6 Tc 0.422 Tw 92 [illegible] cultu [illegible] 0 15021 hat [illegible] ( ) Tj

7.378 The Complainants reiterated that there were essentially three differences between the remedy, and the implementation of recommendations and rulings, provided by Articles 19 to 21 of the *DSU* and that provided by Article 4.7 of the *SCM Agreement* pertaining to the nature of the remedy, the time-frame and the procedural aspects. Of these differences the last was of particular importance to the Complainants in order to avoid further negotiations with the European Communities and possibly

with the European Communities' export subsidy commitments under the *Agreement on Agriculture*.[682] As a matter of logic, therefore, it would appear that the European Communities would, by fully implementing a recommendation by the DSB to bring the European Communities' sugar regime into conformity with its obligations under the *Agreement on Agriculture*, also preclude any finding in the context of a review procedure under Article 21.5 of the *DSU* that the regime is inconsistent with the export subsidy disciplines of the *SCM Agreement*. Accordingly, the Panel's findings under the S C M

7.387 For these reasons, the Panel exercises judicial economy and declines to examine the Complainants' export subsidy claims under Article 3 the *SCM Agreement.*

VIII. CONCLUSIONS, RECOMMENDATION AND SUGGESTION

A. CONCLUSIONS

8.1 The Panel *concludes* that:

(a) the European Communities' budgetary outlay and quantity commitment levels for exports of subsidized sugar is determined with reference to the entry specified in Section II, Part IV of its Schedule and the content of Footnote 1 in relation to these entries is of no legal effect and does not enlarge or otherwise modify the European Communities' specified commitment levels.

(b) the European Communities' quantity commitment level for exports of sugar pursuant to Articles 3.3, and 8 of the *Agreement on Agriculture* is 1,273,500 tonnes per year, with effect from the marketing year 2000/2001.

(c) the European Communities' budgetary outlay commitment level for exports of sugar pursuant to Articles 3.3, and 8 of the *Agreement on Agriculture* is €499.1 million per year, with effect from the marketing year 2000/2001".

(d) the Complainants have provided prima facie evidence that since 1995 the European Communities' total exports of sugar exceeds its quantity commitment level. In

32625 Tf -763591 Tcn peque 0.12

B. RECOMMENDATION

8.5 In light of the above conclusions, the Panel *recommends* that the Dispute Settlement Body request the European Communities to bring its EC Council Regulation No. 1260/2001, as well as all other measures implementing or related to the European Communities' sugar regime, into conformity with its obligations in respect of export subsidies under the *Agreement on Agriculture*.

C. SUGGESTION BY THE PANEL

8.6 The Panel is aware of the concerns and interests expressed, in the context of these proceedings, by several developing countries, with regard to their continued preferential access to the EC market for their sugar exports.

8.7 Pursuant to Article 19.1 of the *DSU*, the Panel suggests that in bringing its exports of sugar into conformity with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, the European Communities consider measures to bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.

8.8 In this regard, the Panel notes the recent statement of the European Communities on 14 July 2004 tnts wtes th conment to

including its

ANNEX A

LIST OF EXHIBITS SUBMITTED BY THE PARTIES

EXHIBIT	CONFIDENTIAL (C)

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
BRA-1	C	Considerations over C Sugar Production and Exports in the European Communities, report prepared by Plinio M. Nastari, Ph.D., Datagro, Brazil
BRA-2	C	LMC Data
COMP-1		Eu

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
		J. Commission Regulation (EC) No 1464/1995 of 27 June 1995 on special detailed rules for the application of the system of import and export licences in the sugar sector
		K. Council Regulation (EC) No 3448/93 of 6 December 1993 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products
		L. Commission Regulation (EEC) No 65/82 of 13 January 1982 laying down detailed rules for carrying forward sugar to the following marketing year.
COMP-6		Commission of the European Communities, Commission Staff Working Paper, *Reforming the European Union's sugar policy – summary of impact assessment*, SEC(2003) September 2003
COMP-7		Commission of the European Communities, Sugar: *International Analysis Production Structures within the EU*, 22 September 2003
COMP-8		Commission of the European Communities, *Common Organisation of the Sugar Market, Description* [europa.eu.int/comm./agriculture/markets/sugar/index_en.htm]
COMP-9		European Communities Court of Auditors, *Extracts from Annual Report concerning the financial year 2001 2002*/C 295/01, 28 November 2002
COMP-10		Commission of the European Communities, Official Journal L103/1, 24.4.2003, Commission Decision of 20 December 2001 declaring a concentration to be compatible with the common market and the EEA Agreement, (Case COMP/M.2530 - Südzucker/Saint Louis Sucre), (C(2001) 4524)
COMP-11		European Communities Court of Auditors, *Special Report No 9/2003 (pursuant to article 248, (4), second subparagraph, EC) concerning the system for setting the rates of subsidy on exports of agricultural products* (Export Refunds) together with the Commission's replies, 2003/C 211/01, 5 September 2003
COMP-12		Commission of the European Communities - Commission Responds to Court of Auditors' report on the sugar market organization, press release BIO/00/214,

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
COMP-17		WTO Committee on Agriculture, notifications concerning export subsidy commitments (Tables ES:1 to ES:3) received from the delegation of the European Communities for marketing years 1995/1996 to 2001/2002, G/AG/N/EEC/5, 11, 20, 23, 32, 36, 44.
COMP-18		WTO Committee on Agriculture, notifications concerning domestic support commitments, (Table DS:1 and the relevant supporting tables) received from the delegation of the European Communities for marketing years 1995/1996 through to 1999/2000, G/AG/N/EEC/12, 16, 26, 30, 38
COMP-19		Negotiating Group on Market Access - 20 December 1993, Modalities for the Establishment of Specific Binding Tthe Eue Eus(-) Tj 3.753r

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
EC-15		*Effects of the Uruguay Round Agreement on U.S. Agricultural Commodities*, USDA, March 1994
EC-16		*Sample control sheet for export refunds under the sugar CMO*, DG Agriculture, European Commission
EC-17	C	*Update of Sugar Policy in Selected Countries*, LMC International
EC-18	C	

ANNEX B

SCHEDULED EXPORT SUBSIDY COMMITMENT LEVELS (QUANTITIES), AND NOTIFIED TOTAL EXPORTS

Scheduled [(1)] implementation period	Scheduled quantity levels [(1)]	*Commitment level alleged by the EC*[685]	Notified total exports [(2)]
Marketing year starting 1October/30 September	*Thousand tonnes, white sugar equivalent*	*" Annual reduction commitments + 1.6 million tonnes, [illegible]*	

ANNEX C

SCHEDULE CXL

ANNEX D

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS265/21
11 July 2003

(03-3752)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Request for the Establishment of a Panel by Australia

The following communication, dated 9 July 2003, from the Permanent Mission of Australia to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

My authorities have requested me to submit the following request for the establishment of a

regulations, administrative policies, rules, decisions and other instruments including instruments pre-dating the above regulation, and their implementation. These various instruments will be referred to as "the EC sugar regime".

In addition to setting down the conditions attaching to imports of sugar, the EC sugar regime provides conditions attached to the production, supply and exports of sugar, including domestic support and export subsidies. Sugar is classified into quota and non-quota sugar. Non-quota sugar is known as C sugar. The sugar regime provides for the reclassification from quota to C sugar and from C sugar to quota sugar. Sugar classified as C sugar cannot be disposed of in the EC market.

Australia is particularly concerned at the subsidies provided by the EC for "C sugar" exports under the EC sugar regime. Under the regime, producers of C sugar are able to sell C sugar on the world market at below the total average cost of production through cross-subsidisation of C sugar from quota sugar profits. By financing payments on the export of C sugar, the EC exceeds its export subsidy reduction commitments under the WTO Agreement on Agriculture.

Australia is also particularly concerned at the provisions of the EC sugar regime which accord direct subsidies contingent on export performance for quantities of approximately 1.6 million tonnes of sugar which are additional to the budgetary outlays and quantities of subsidised exports notified by the EC to the Committee on Agriculture under the provisions of Article 18.2 of the Agreement on

WORLD T

Communities), in violation of the Agreement on Agriculture and the SCM Agreement. In particular, Brazil is concerned with two categories of subsidized EC exports:i) Br3.3, 8, 9.1 (a). -0.

WORLD TRADE ORGANIZATION

WT/DS283/2
11 July 2003

(03-3757)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Request for the Establishment of a Panel by Thailand

The following communication, dated 9 July 2003, from the Permanent Mission of Thailand to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 14 March 2003, pursuant to Article 4 of the Understanding on Rules and Procedures

[redacted]

Furthermore, under its sugar regime, the EC grants export refunds to an amount of white sugar that the EC claims to be equivalent to the quantity of raw sugar imported under preferential import arrangements. The export refunds cover the difference between the world market price and the high prices in the EC for the products in question, thus making it possible for those products to be exported. The export refunds constitute direct subsidies contingent on export performance.

Under the Agreement on Agriculture, the EC undertook budgetary outlay and export quantity reduction commitments with respect to sugar. In determining its budgetary outlays for export subsidies for sugar and the quantities benefiting from such subsidies, the EC does not take into account exports of C-sugar and exports of an amount of white sugar equivalent to the quantity of raw sugar imported under preferential import arrangements. As a result, the EC provides export subsidies for sugar in excess of its reduction commitments and consequently acts inconsistently with its obligations under Articles 3.3, 8, 9.1(a) and 9.1(c) of the Agreement on Agriculture or, alternatively, Article 10.1 of the Agreement on Agriculture. By granting export subsidies within the meaning of Articles 1.1(a)(1)(i) and (iv), 1.1(a)(2), and 1.1(b) of the SCM Agreement, that are not permitted by the Agreement on Agriculture, the EC also acts inconsistently with its obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.

I would appreciate it if this request for the establishment of a panel were placed on the agenda for the meeting of the DSB scheduled for 21 July 2003.