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TABLE OF CONTENTS

Can the ACP/India Footnote be regarded as a second component of the European Communities' commitment level that would

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Australia – Automotive Leather II	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, DSR 1999:III, 951
Australia – Automotive Leather II (Article 21.5 – US)	Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, 1189
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Canada – Aircraft	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft (Article 21.5 – Brazil)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS70/AB/RW, DSR 2000:IX, 4315
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy (Article 21.5 – New Zealand and US)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by the Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001

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

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

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

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.

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:

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

2.11 The European Communities opposed[7] the request, arguing, *inter alia*, that LMC statistical data was not the type of information that should benefit from exceptional and additional rules for the protection of confidential information. It added that the rules suggested by Australia and Thailand were discriminatory *vis-à-vis* third parties who would only be entitled to "view" the confidential data.

2.12 After consideration of the parties' arguments, the Panel decided, in a ruling dated 27 January 2004, to reject the request from Australia and Thailand.

2.13 The Panel recalled, in particular, that the following provisions of the *DSU* and of the Rules of Conduct, were relevant and applicable to the issue of confidential information in WTO dispute settlement proceedings.

2.14 Article 18.2 of the *DSU* on communications with panels or the Appellate Body provides:

> "2. 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.* A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public." (emphasis added)
>
> Moreover, paragraph 3 of Appendix 3 to the *DSU* states:
>
> "3. The deliberations of the panel and the *documents submitted to it shall be kept confidential.* Nothing in this Understanding shall preclude a party to a dispute from mation 6 0.1875 Tc 0

> 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. *Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.*" (emphasis added)

2.17 The Panel was of the view that parties and third parties were bound by the *DSU* provisions on confidentiality. In the present circumstances, these provisions were, according to the Panel, sufficient to protect the confidentiality of the statistical data from LMC, during the panel process and afterwards, as indicated above.

2.18 As for the Panel, pursuant to the *DSU*

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 "

proof has been supplied that the C sugar has been exported within the required time limits, a charge is levied on that sugar.[11]

3.5 Sugar production quotas are allocated in the first instance to member States, with current quotas applying to the marketing years 2001/02 to 2005/06. Member States, in turn, allocate quota to each undertaking (processor) on the basis of its actual production during a particular reference period.[12]

3.6 The Regulation fixes a basic quota for the entire Community for the production of A and B sugar. The basic quantities for A and B sugar are set, respectively, at 11,894,223.3 tonnes (white sugar)[13] and 2,587,919.20 tonnes (white sugar)[14]. Each of these quantities is broken down by member State which in turn allocates quantities to producer undertakings established on its territory. A Member state may transfer quota between undertakings, "taking into consideration the interests of each of the parties concerned, particularly sugar beet and cane producers", up to a maximum of 10 per cent of an undertaking's A or B quota (with some limited exceptions).[15] Each undertaking may carry forward to the next marketing year sugar that it has produced in excess of its A and B quota (i.e. C sugar) up to a limit of 20 per cent of its A quota.[16] It may also carry forward all or part of its B sugar production. In addition, an undertaking may carry forward all or part of its production of A and B sugar which has been reclassified as C sugar after reduction of the guaranteed quantities in conformity with Article 10 of the Regulation. Quantities carried forward must be stored for 12 consecutive months from a date to be determined.[17]

3. Intervention price

3.7 To achieve the objectives of the common agricultural policy and in order to stabilize the EC sugar market, the EC Regulation provides for intervention agencies to buy in sugar. An intervention price is established for this purpose at a level which will ensure a fair income for sugar-beet and sugar-cane producers.[18] The intervention price valid for standard quality[19] is €63.19/100 kg for white sugar and €52.37/100 kg for raw sugar.[20] The actual price received for white sugar is, on average, around 10 to 20 per cent in excess of the intervention price. The intervention price is valid for the domestic market and as a guaranteed minimum price to be paid by EC purchasers for imports of sugar from ACP states and India.

4. Basic and minimum prices

3.8 A basic price for quota beet of standard quality[21] is derived from the intervention price of white sugar and has been established at €47.67 per tonne.[22] The Regulation also establishes minimum prices for A and B beet, standard quality, intended to be processed into A and B sugar, respectively and paid by sugar manufacturers buying beet. The minimum price of A beet has been set at €46.72

[11] Article 13 of the Regulation.
[12] Paragraph 11 of the Recital of the Regulation.
[13] Article 11.1 of the Regulation.
[14] Article 11.2 of the Regulation.
[15] Article 12 of the Regulation.
[16] Commission Regulation (EEC) No. 65/82, Article 2.
[17] Article 14 of the Regulation.
[18] Recital 2 of the Regulation.
[19] "Such standard qualities should be average qualities representative of sugar produced in the Community and should be determined on the basis of criteria used by the sugar trade." Recital, 3 of the Regulation.
[20] Article 2 of the Regulation.
[21] For the definition of "standard quality" of beet, see Annex II of the Regulation.
[22] Article 3 of the Regulation.

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]

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

3.10 Imports into and exports from the European Communities of *inter alia* cane or beet sugar and isoglucose are subject to the presentation of an import or export licence, issued by the respective member States. These licences are valid throughout the Community and are subject to the lodging of a security.

7. Export refunds

3.11 In order to enable *inter alia* the products mentioned in paragraph 3.3 above to be exported without further processing at world market prices, the difference between the world market price and the Community price may be covered by export refunds. The export refund for raw sugar may not exceed that of white sugar. Such refunds shall be the same for the whole Community and for all sugar except C sugar but may vary according to destination. Refunds may be fixed at regular intervals or by a tendering procedure for products for which such a procedure has been used in the past.[27] Refunds are paid directly from the EC budget. However, the system of levies outlined in paragraph 3.9 is designed to recover from EC producers part of the cost of export refunds for quota sugar produced in excess of EC consumption.

8. Management Committee for Sugar

3.12 Article 42 of the Regulation establishes a Management Committee for Sugar to assist the EC Commission to consider any issue referred to it by the Commission, or by a member State, with respect to the management of the sugar regime, such as the preparation of supply and demand forecasts.

9. Commitments

3.13 The commitments set out in the table in Section II, of Part IV of the EC's Schedule amount to €499.1 million and 1,273.5 thousand tonnes. A footnote to the table provides:

> "Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio t."

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[23] Article 4 and Article 5 of the Regulation.
[24] Article 21 of the Regulation.
[25] Paras. 1 and 2 of Article 15 of the Regulation.
[26] See paragraph 3 of Article 15 of the Regulation.
[27] Article 27 of the Regulation.

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* w (Agreement on Agriculture) TjBi05 Tcn
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- 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 footnote 1 did not permit the EC's practice of exporting with refunds a quantity equivalent to the ACP/India imports was unfounded.

B. TERMS OF REFERENCE

1. Provisions and measures at issue

4.10 The **European Communities** submitted that certain issues brought by the Complainants constituted separate "claims" and thus fell outside the Panel's terms of reference.

4.11 The European Communities contended that, while the Complainants' panel requests cited Article 10.1 of the *Agreement on Agriculture* (but not Item (d) of the Illustrative List of Export Subsidies), none of the Complainants specified the measure which

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 of Article 10.1 of the *Agreement on Agriculture* extended to export subsidies as defined in the WTO agreements other than those listed in Article 9.1, the Article 10.1 obligation was not contingent on a claim of inconsistency with the provisions of the *SCM Agreement* or any other WTO Agreement. For the Complainants, the export subsidy definitions of GATT 1994 had application to the export subsidies covered by the provisions of Article 10.1 of the *Agreement on Agriculture.*

4.16 The Complainants also countered that they had sufficiently identified the regulations that were likely to be relevant in the present dispute in their requests for consultations, in their respective requests for the establishment of a panel, as well as in their first submissions. They considered the reference to (EC) Council Regulation No. 1260/2001 to be sufficiently specific to meet due process requirements. For example, Article 10.1 of the *Agreement on Agriculture* had been clearly identified in their respective panel requests as a claim in the alternative in relation to their basic claim regarding exports in excess of export subsidy reduction commitments. To allege subsidized exports in excess of reduction commitments as well as an inconsistency with Articles 3.3 and 8 of the *Agreement on Agriculture* was sufficient, in their view, to meet the requirements of Article 6.2 of the *DSU*. By virtue of Article 10.3, it was then up to the exporting Member to prove that "no export subsidy, whether listed in Article 9 or not, has been granted with respect to" those exports of sugar in excess of reduction commitment levels. Imposing the requirement on the Complainants to identify all "other" export subsidies individually would have the effect of limiting the burden of the exporting Member, re-reversing the burden of proof of Article 10.3 as applied to Article 10.1, and ultimately rendering Article 10.3 meaningless and ineffective, contrary to the basic rules of treaty interpretation.

4.17 **Australia** added that the European Communities would fall short of meeting its own standard given that, on a number of occasions it had used comparable language in its own panel requests. **Brazil** underlined that while it was theoretically possible that some subsections of EC Regulation No. 1260/2001 played no role in the provision of the challenged subsidies, Brazil's failure to identify and expressly exclude any of those subsections from its description of the measure at issue would not mean that Brazil had not properly identif

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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- 76D -0.1145 Tc0 Tw (A Tc 1) Tj 4. Communit2.75 -10875 TD -0.1055 Tc Tw (Complainant') Tj 1.5 0 62

4.26 Drawing attention to the analyses by the Appellate Body in a number of cases[35], the Complainants held that they only bore the burden of proof in relation to the *quantitative aspect*, i.e. that the European Communities was exporting quantities in excess of its scheduled reduction commitment level. If the Complainants met this burden and the European Communities contested the *export subsidization aspect* of the claim, then the European Communities had an obligation, or legal burden, to establish that no export subsidy had been granted to the quantity exported in excess of the reduction commitment level specified in its Schedule. According to the Complainants, this analysis applied to their claims under Articles 3, 8, 9 and 10.1 of the *Agreement on Agriculture*.[36]

4.27 The **European Communities** agreed that it would have the burden of proof under Article 10.3 of the *Agreement on Agriculture* with respect to the "subsidization aspect" of the Complainants' claim, assuming that the Complainants had met their burden of proof with respect to the "quantitative aspect" of their claims. However, the European Communities held that some of the Complainants' "claims", in its view, had not been properly stated in the panel requests as required by Article 6.2 of the *DSU*, and were therefore outside the terms of reference of the Panel (see paragraphs 4.10-4.13 and 4.19-4.20).

1. Quantitative aspect

4.28 In order to discharge their burden of proof in respect of the quantitative aspect of their claims under Articles 3, 8, 9 and 10.1 of the *Agreement on Agriculture*, the **Complainants** referred to the European Communities' notifications to the Committee on Agriculture.[37] The notified data showed that the European Communities had exported 4.097 million tonnes of sugar in the 2001-2002 marketing year. The Complainants pointed out that this figure, which excluded food aid, represented more than three times the scheduled quantity reduction commitment level of 1.273 million tonnes, and underlined that in every marketing year since 1995, the European Communities had exported sugar in amounts three to four times the level of its reduction commitments. The Complainants stressed that it was the fact that the European Communities'

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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, as the party claiming that the excess quantity was not subsidized, the European Communities had the obligation to demonstrate that such excess had not been granted export subsidies. In other words, that none of the Article 9.1 listed subsidies had been granted in respect of the quantity of sugar that was exported in excess of the European Communities' scheduled reduction commitment level; and no "other" export subsidies were being applied to such sugar exports, for the purposes of Article 10.1. The Complainants held that, if the European Communities did not produce any evidence in that regard, it would have failed to establish that an export subsidy was not being applied to sugar, within the meaning of either Article 9.1 or Article 10.1 of the *Agreement on Agriculture*.

4.33 The **European Communities** responded that the Complainants' interpretation of Article 10.3 of the *Agreement on Agriculture* was incompatible with the basic requirements of due process[39] because it would impose upon it the impossible task of identifying *all* the conceivable export subsidies which, the European Communities held, it did *not* grant. The inversion of the burden of proof could not possibly have the consequence of depriving the defending party of this fundamental procedural right. Referring to the Appellate Body's analysis in *Canada – Dairy*[40], the European Communities indicated that it was not requesting that the Complainants make a prima facie case that the elements of the "claimed exports subsidies" were present. Rather, the European Communities contended that the export subsidization aspect was also part of the claim to be made by a complaining party, and that Article 10.3 did not exempt the Complainants from identifying the relevant "payments" that provided the alleged export subsidies.[41] While acknowledging that Article 10.3 transferred to the respondent the burden of proof with respect to the "export subsidization aspect", the European Communities stressed that, before such transfer could take place, the Complainants had to comply with the requirements of Article 6.2 of the *DSU*.

4.34 The **Complainants** reiterated that the European Communities had failed to discharge its burden of proof in its submissions and in panel hearings. As already indicated in paragraph 4.18 above, Article 10.3 of the *Agreement on Agriculture* did not require them to lead in the presentation of evidence to the Panel in relation to the export subsidization aspect. Nevertheless, for reasons of procedural efficiency, but without relieving the European Communities of its burden, and without waiving their rights under Article 10.3 of the *Agreement on Agriculture*, the Complainants had addressed several points in their respective submissions, but only in anticipation of arguments that they expected the European Communities to submit.

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[38] The parties' arguments in respect to these claims are presented in Section IV.D with respect to C sugar, and in Section IV.E with respect to ACP/India equivalent sugar.

[39] Appellate Body Report on *Thailand – H Beams*, para. 88.

[40] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 70-71.

[41] See Section IV.B, Terms of reference.

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

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. According to Australia, the export production received an advantage because the payment was financed by virtue of governmental action. In response to additional questions from the Panel, Australia went on to identify other "payments" within the production chain which involved sales at prices that did not reflect the "proper value" of the product to the producer. In respect of these payments, Australia indicated however that while, in its view, they clearly fell within the definition of Article 9.1(c), and were indistinguishable from the *Canada – Dairy* case, it was not necessary to dissect the structure of the EC sugar regime to find a payment. These payments were as follows: [50]

(a)

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.) of the *Agreement on Agriculture*, the European Communities disagreed that the prices paid by the EC consumers for A and B sugar involved "payments". The EC consumers paid the prevailing domestic market price and, therefore, transferred no "economic value" to the sugar producers.

4.45 In the European Communities' view, the Complainants had misread the jurisprudence in *Canada – Dairy*, on which they were basing their claims and allegations. The *Canada – Dairy* cases concerned different factual circumstances involving the provision of an agricultural input below its

[57] Exhibit ALA-1, pp 9; Exhibit COMP-2, Table 2.1, pp. 8-9; Exhibit BRA-1, Table 5, p. 29; Diagram 2, para. 18.

[58] Exhibit ALA-1, p. 9.

[59] Including official EC and member State documentation, OECD papers, studies of research institutes, information available fromthe private sugar sector as well as confidential LMC data.

[60] Exhibit BRA8

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.

definition within the meaning of Article 9.1(c). On the contrary, subsidization of exports through legitimate price support had been captured by export subsidy definitions since the early days of GATT. The fact that the system of income or price support constituted a subsidy contingent on export performance was irrelevant. The real issue, according to the Complainants, was whether such support, in whole or in part, came within the definitional scope of an export subsidy within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. (See also paragraph 4.59 below).

4.57 Referring to the European Communities' arguments summarized in paragraph 4.46, the Complainants submitted that the provider of the export subsidy was the European Communities itself, because there were "payments on the export of an agricultural product that are financed by virtue of governmental action" within the meaning of Article 9.1(c). The European Communities itself, not its sugar producers, took the governmental action that financed the payments, thereby giving rise to the subsidy. The EC producers were the recipients of the subsidy, in that they could increase their net income by making sales of C sugar at prices well below the cost of production. The EC producers, in turn, also made the "payments" when selling the C sugar to the world market buyer at prices below total cost. But this was irrelevant as "the payment could be made by private parties."[72] According to Article 1 of the *SCM Agreement*, however, a "subsidy" could only be provided by a government, or at government direction.

4.58 The Complainants submitted further that the "subsidy" was conferred by the "payments financed by virtue of governmental action", and that the European Communities had erred in assimilating the concept of "payment" with the broader concept of "subsidy". In their view, the "payment" was only one element of a "subsidy" as defined in Article 9.1(c). Nothing in the text of Article 9.1(c), or in the Appellate Body's interpretation thereof, suggested that the recipient of the payment was, or needed to be, the same person that received the subsidy. The payment could be made by, or to, a private party. Moreover, it was well established that there could be more than one beneficiary of a subsidy, with one party being the beneficiary of a subsidy that was actually paid to another party.[73] In the present case, the EC sugar producers received a subsidy notwithstanding the fact that the world market buyers of C sugar might also benefit. Citing the ruling of the Appellate Body in *Canada – Dairy*[74], the Complainants maintained that a payment could only be financed by virtue of a governmental action that conferred a benefit on the entity making the payment. However, for there to be a "payment" by the entity benefiting from that governmental action, it was not necessary that the benefits of that governmental action be transferred to the recipient of the payments.[75]

4.59 The Complainants, referring to the European Communities' arguments with respect to "benefit" (see for instance paragraph 4.51) disagreed that the notion of "benefit", or the requirement that a benefit be "conferred" on the recipient of the payments, was a constituent element of Article 9.1(c). That word was not even reflected in the text of that provision. The Complainants recalled that the *chapeau* of Article 9.1 made clear that all the items listed in the subsections of that article constituted an "export subsidy." Because Article 9.1 stipulated that a payment within the meaning of Article 9.1(c) constituted an export subsidy, once the elements of Article 9.1(c) were satisfied, then for the purposes of the *Agreement on Agriculture*, there was no need to make any additional showing that the other elements of an export subsidy as defined under Article 1 of the *SCM Agreement* were also present.[76] The Complainants also recalled that, in any case, under Article 10.3 of the *Agreement on Agriculture*, the burden was on the European Communities

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.

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[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 arguments on "payments" raised by the Complainants and hence the European Communities had not met its burden of proof on these issues under Article 10.3 of the *Agreement on Agriculture*.

[88] Exhibit COMP-6, p. 33.

[89] Exhibit COMP-6, p. 34.

[90] EC Council Regulation No. 1260/2001, chapeau para. 2.

4.73

4.76 The Complainants considered that the distinction between domestic support and export subsidies in the *Agreement on Agriculture* would be eroded if a WTO Member were entitled to use domestic support without limit to subsidize the exports of agricultural products. The benefits intended to accrue through a WTO Member's export subsidy commitments would thus be undermined.[97] This rationale applied to the EC sugar industry, including both growers and processors who disposed of C beet and C sugar at prices that did not recover their total costs of production. The provision of domestic support measures coupled with high levels of tariff protection allowed extensive support to producers, inconsistent with the limitations imposed through the export subsidy disciplines.

4.77 The Complainants contended that C sugar exports were not incidental to the manufacture and sale of quota sugar as these amounted to between *** per cent and *** per cent of quota production between the 1992/93 and 2001/02 marketing years.[98] The share of C sugar in production and exports demonstrated that C sugar was thus not a mere "spill over" of quota production, but a significant structural component of EC sugar production. As EC sugar production was dependent on governmental action for its very existence, there was clearly a demonstrable link between the payment and the governmental action sufficient to meet the tests established by the Appellate Body. The regulation of the EC regime, in the form of guaranteed prices for quota sugar and the forced export of over-quota production, the Complainants continued, underscored this governmental action. The maintenance of C sugar production and exports in the face of the high difference between production costs and prices received was only made possible by the subsidies on quota sugar and sugar processed from imported raw cane sugar and because of the absence of controls in the EC regime to prevent cross-subsidization.

4.80 In relation to the Complainants' assertions in paragraph 4.77, the European Communities observed that the volume of C sugar production fluctuated considerably from one marketing year to another, due to weather conditions, which affected both the beet yield and the sugar content of the beet, and to the evolution of the world market prices for sugar.[100] Sugar producers were free to decide whether or not to produce C sugar for export. The European Communities submitted that, far from requiring the exportation of C sugar, the EC regulations provided for the possibility to store and "carry forward" to the next marketing year any sugar produced in excess of the A and B quotas up to an amount equivalent to 20 per cent of the A quota (see also paragraph 4.48).[101]

4.81 The **Complainants** responded that the European Communities' arguments in paragraphs 4.78 and 4.79 disregarded the fact that any type of governmental action financing payments on exports of agricultural products was covered by Article 9.1(c).[102] There could be no doubts therefore that the governmental action financing the payments could take the form of import tariffs, safeguard actions and other measures that would not constitute subsidies within the meaning of Article 1 of the *SCM Agreement*.

4.82 The European Communities also incorrectly ascribed a test to Article 9.1(c) requiring that the financing it provided to C sugar exports be contingent on such exports. In doing so, the European Communities was shrinking the export subsidy definition of that provision into one single element, thus implying that the governmental action constituted the subsidy. The terms of Article 9.1(c) clearly linked the requirement of export contingency to the "payments", not to the "governmental action" by virtue of which they were financed.[103] Hence, in order for the "payment on the export", including that made by a private party, to constitute an export subsidy in accordance with Article 9.1(c), such a payment had to be financed "by virtue of governmental action", with the requisite nexus existing between both elements.[104] The Complainants thus considered that the "demonstrable link" and "clear nexus" between the "payments" and the "governmental action" was well established in this case.

4.83 The Complainants submitted that it was this additional requirement which prevented Article 9.1(c) from becoming a *per se* anti-dumping rule, as advanced by the European Communities (see paragraph 4.51), and distinguished the subsidization defined in Article 9.1(c) from the kind of price discrimination by private actors with which anti-dumping instruments were concerned. In response to the European Communities' argument that the Complainants' interpretation would transform Article 9.1(c) into a provision prohibiting dumping by private operators, it was argued that Members would not be made responsible for export transactions by private operators that escaped their control. This was because there could only be an export subsidy within the meaning of Article 9.1(c) if there were (i) "payments" (ii) "on the export" (iii) "financed by virtue of governmental action". As to "payments", the Appellate Body stated that that the government "must play a sufficiently important part in the process by which a private party funds 'payments', such that the requisite nexus exists between 'governmental action' and 'financing'". It was thus clear that only payments which were directly linked to a governmental action were covered by Article 9.1(c). As to the requirement that the payments be "on the export", the Canada – Dairy panel correctly concluded that there was a payment "on the export" only if the Member caused it to be a payment contingent upon export performance. In the Complainants' view, the mere fact that private persons decided to export products below the average total cost of production was consequently not sufficient to establish export contingency. Finally, not any "financing" was covered by Article 9.1(c) but only financing

[100] Exhibit COMP–2, pp. 117-121.

[101] Article 14 of Regulation No. 1260/2001; and Article 2(1) of Commisslay a sufTc 0.1875 Tw 14 ate pers
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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 Member, not private operators, caused it to be present.

4.84 The Complainants held that the inconsistency of the C sugar regime was attributable to numerous governmental decisions. In particular, the Complainants noted that: first, the European Communities had decided to provide price support to sugar producers, thereby "financing" the "payments on the export" of C sugar; second, the European Communities had chosen to deliver that support through a set of shares in quota access to the domestic market, third,; third, the European Communities had decided to permit (and encourage) producers to sell an amount of sugar that exceeded the amount of that quota, which – together with a series of other measures – had created the requisite [illegible] financed; and, fourth, the European Communities had decided to require producers to sell the excess [illegible] sugar on the world market, thereby en1sures "

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.

Having rebutted such argument in paragraphs 4.55

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

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)

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[116] Except for C sugar carried forward or for use in the manufacture of alcohol and ethanol.
[117] Article 1 of Regulation No. 1260/2001.
[118] Ibid., Article 5.
[119] Panel Report on *Canada – Dairy*, paras. 2.51, 7.129.
[120] Ibid., para. 7.125.
[121] Panel Report on *Canada – Dairy*, para. 7.130; Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 5.160.
[122] Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 5.160.

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*

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.

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exported (unless carried over). C beet was excluded from the fixed minimum prices required for A and B beet, conditional upon its not being used for quota sugar production. Therefore, the provision of C beet at lower cost for C sugar manufacture was conditional upon the exportation of C sugar. The regime therefore provided a subsidy contingent upon export performance.

4.118 The **European Communities** replied that the EC sugar regime provided price support to A and B sugar and to A and B beet, but not to C sugar or C beet. Moreover, the price support for A and B sugar and beet was not contingent upon exports of sugar and, therefore, did not constitute an export subsidy. There was no requirement to produce C sugar and, consequently, no requirement to export C sugar in order to benefit from the price support. Furthermore, the EC regulations allowed sugar produced above the A and B quotas, up to an amount equivalent to 20 per cent of the A quota, to be "carried forward". The European Communities further submitted that the definition of "export subsidy" found in Articles XVI.1 and XVI.3 of the GATT 1994 did not purport to define the notion of export subsidy. The European Communities considered that for the purpose of the *Agreement on Agriculture*, Article 1(e) defined the notion of "export subsidies" as "subsidies contingent upon export performance". A system of price or income support which "operates so as to increase exports" was not "contingent upon export performance" and could not be considered as an export subsidy for the purposes of the *Agreement on Agriculture*, regardless of its characterization under Article XVI. According to Australia's definition, virtually any form of domestic support would then have to be considered as an export subsidy.

4.119 **Australia** submitted that the European Communities' rebuttal was premised on the same, in its view, legally incorrect arguments that the European Communities had used in relation to Article 9.1(c) of the *Agreement on Agriculture*, i.e. that "contingency" must attach to the provision of price support, as compared to a "contingency" attached to "export." Australia underlined that Article XVI of GATT 1994 was *not* predicated on the subsidy being contingent on export. Rather, on the basis of a plain reading of Article XVI of GATT 1994, it was the *operation* of the income or price support in increasing exports that constituted a subsidy contingent on export performance.

4.120 Australia recalled that the export subsidy definitions in the *SCM Agreement* provided contextual guidance on the definition of an export subsidy for the purposes of Article 10.1 of the *Agreement on Agriculture*, as did Article 1.1 of the *SCM Agreement*, for the purposes of a definition of a "subsidy". Article 1.1(a)(2) made it clear that income or price support in the sense of Article XVI of GATT 1994 came within the scope of a subsidy definition. For the purposes of those export subsidies listed in the Illustrative List, the element of subsidization provided through price or income support formed part of an export subsidy in the circumstances described in Items (b), (d) and (l). Read in the context of Article 3.1(a) of the *SCM Agreement*, all subsidies included in the Illustrative List constituted 'subsidies contingent on export performance' in the circumstances defined in the respective items. According to Australia, therefore, the income or price support did not need to be provided *exclusively* for exports.

4.121 In this context, Australia considered that the Ad Note to Article XVI:3, paragraph 2,

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.

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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 ation47 -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*.

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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*. It contended, however, that the

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*

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 basis in law or logic that would permit the re-interpretation of an export reduction commitment in the light of jurisprudence that emerged after the commitment was made. Thailand suggested that this could possibly be done by the membership under the procedures for interpretations set out in Article IX:2 of the *Marrakesh Agreement Establishing the WTO (WTO Agreement)*, but certainly not by a panel in the framework of a proceeding under the *DSU*.

4.142 Thailand stressed that it would not be consistent with the principle of good faith if the European Communities were the only Member of the WTO that would effectively be exempted from this obligation through a re-interpretation of its export reduction commitments in the light of the allegedly unexpected consequences of the Appellate Body's interpretation of Article 9.1(c). Thailand considered that in invoking the principle of good faith, the European Communities was actually asking the Panel to replace the export subsidy reduction commitments that it assumed in its schedule, with the export subsidy reduction commitments that it claimed it would have assumed if it had known of the Appellate Body's interpretation of Article 9.1(c) at the time when it formulated its reduction commitments. Alternatively, the European Communities was asking the Panel to deny Thailand the right to invoke Article 9.1(c) in *DSU* proceedings because, allegedly, Thailand too, could not have expected that interpretation. WTO Members, including the European Communities, would be extremely concerned if panels were to begin dividing the Appellate Body's rulings into "expected" and "unexpected" rulings and were to refuse to give full effect to any "unexpected" rulings.

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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).

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settlement panel to determine, in appropriate cases, whether a Member had not acted in good faith, [162]

Uruguay Round, and for which no compensation was paid nor received. Referring to its arguments concerning the awareness, lack of reaction, and shared understanding in paragraphs 4.124 and 4.126, the European Communities submitted that it legitimately should have been able to rely upon the Complainants' conduct when it decided not to include exports of C sugar in the base levels. Its position had therefore been prejudiced as outlined in paragraph

view, these conditions were without a doubt not satisfied in this case. First, the European Communities had not argued that it relied upon "clear and unambiguous representations" made by the Complainants, but rather that it relied upon their "silence" (see for instance paragraph 4.152). The Complainants recalled that, in *EEC (Member States) – Bananas I,* the panel had rejected a similar argument presented by the European Communities, noting that: "estoppel could only result from the express, or in *exceptional cases* implied, consent of such parties or of the contracting parties". Applying this standard the panel had found that "[t]he mere inaction of the contracting parties could not in good faith be interpreted as an expression of their consent to release the EEC from its obligations under Part II of the GATT".[179]

4.160 Since silence could only amount to representation in "exceptional circumstances" such as where there was a duty or obligation to object, **Thailand** noted that the European Communities had pointed to no legal authority, as there was none in its view, to support a lower threshold of "reasonable expectations to speak". Moreover, the Complainants were under no "duty to object"[180] during the bilateral meetings or the verification process and furthermore could not reasonably be expected to do so. In this respect, Thailand recalled that the purpose of the verification process, referred to by the European Communities in these proceedings as giving an opportunity to the Complainants to object (see paragraph 4.126), was to give each participant in the Uruguay Round the opportunity to verify whether the export subsidy reduction commitments assumed by the other participants were consistent with the guidelines for negotiations set out in the Modalities Paper. The purpose of the verification process was not, in Thailand's view, to alert participants to instances in which they had not retained options open to them under the Modalities Paper or to settle disputes about the consistency of the commitments assumed with the *Agreement on Agriculture*. Therefore, the Complainants' silence could not be deemed to have constituted an implicit agreement, seemingly because they failed to object during the verification process.

4.161 Transposing the reasoning of the Appellate Body in *EC – Computer Equipment*[181], Thailand also contended that the Complainants only had the duty to ensure that their export interests were safeguarded. Thailand had not therefore "acted in bad faith by not advising the EC" [illegible] also could Communities a

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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 negotia

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 fawere 29gs9

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 principle was reinforced by Article 3.1 of the *Agreement on Agriculture*.

4.183 With respect to the *Agreement on Agriculture*, the Complainants submitted that a Member could not grant export subsidies without a corresponding reduction commitment. First, Article 3.1 made clear that export subsidy commitments expressed in a Schedule "constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994." A Member may not use a footnote to negate "an integral part of GATT 1994."

4.184 The Complainants submitted further that Article 3.3 prohibited Members from providing export subsidies in respect of agricultural products specified in their Schedules "in excess of the budgetary outlay and quantity commitment levels specified therein". Further, Members "shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule". Thus, any subsidy provided to a scheduled agricultural product, such as sugar, was subject to the reduction commitments "specified" in a Member's Schedule. In the Complainants' view, export subsidies granted to an agricultural product were therefore either subject to reduction commitments in accordance with Article 9.2(b)(iv), or they were inconsistent with the requirements of the *Agreement on Agriculture*. There was no alternative category. The Complainants reasoned that, as sugar was a product "specified" in the EC's Schedule, the European Communities was under the obligation to reduce its budgetary outlays and export quantities of subsidized sugar in accordance with its

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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*

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

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 ts 2..1or the r Tj 0is6ai-g preduct3.25 005TD -0.04 Tc33 0 Tw (4.201)j 0 Tc 0 D -0.14

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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

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

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 The European Communities also submitted that participants in the Uruguay Round could negotiate departures from the reduction formulae agreed in the Modalities Paper, and that the footnote constituted one such departure. The European Communities contended that in the absence of any express indication to that effect, such departures could not be presumed. Consequently, it could not be assumed that, without having being requested to do so by any other Member, the European Communities undertook voluntarily reduction commitments well in excess of those agreed as part of the Modalities Paper. In this context, the European Communities argued that it was not alone in negotiating such departures. New Zealand did not specify any quantitative limits in its schedule, and only scheduled reductions in budgetary outlays.[220] 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.[221] The European Communities alleged that there was nothing to distinguish such commitments from the footnote. The European Communities also submitted that the Modalities Paper explicitly foresaw that it might not be possible to schedule quantitative limitations, particularly in respect of incorporated products. As for the footnote, only one set of commitments was scheduled for these products. Since, in the European Communities' view, the Complainants had failed to establish that the footnote was inconsistent with the *Agreement on Agriculture*, consequently, the footnote itself could not be regarded as inconsistent with Article 8. With respect to Article 9.1, the European Communities recalled that, because it did not wish to reduce its commitment levels for sugar, it had negotiated a departure from the Modalities Paper in its Schedule, in the form of the footnote. The European Communities considered, however, that it had subjected the maximum amount of export subsidies it granted to exports of sugar to reduction commitments over the implementation period, and that, consequently, it had also acted consistently with Article 9.1. Concerning Article 9.2(b), the European Communities submitted that it was not before the Panel, and had lapsed (see Section establish that 135-0.065 0 Tw.0655

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

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 accorb3 Tce3.75 0 TD 0 Tc2.75 TD -0.03 Tcneede91 w (2.75 TD0Tj -362j 3 0 TD - ( ) Tjsidy
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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] More explicitly in the European Communities' view, the Australian memorandum on "Issues still requiring settlement" of 31 January 1994 referred to export subsidies covered by the footnote as those "corresponding to [the EC's] imports of sugar from ACP countries and India".[238] Given that Australia was the only Complainant who directly negotiated the footnote with the European Communities and was the only WTO Member (with the exception of the ACP countries and India) who discussed the footnote with the European Communities, the European Communities submitted that Australia's understanding of the footnote was highly probative of the parties intentions in adopting the footnote.

4.225 **Australia** contested the European Communities' allegation that it had negotiated special exceptions from its WTO export subsidy reduction commitments for sugar, and noted that the European Communities could not cite any provision in the Modalities Paper – let alone any of the WTO agreements – for what it has described as an entitlement to differential treatment, a treatment more favourable than that accorded to developing country sugar exporters under the provisions of the *Agreement on Agriculture.* There was no document signifying agreement by any participant in the Uruguay Round that the European Communities should enjoy differential treatment. In signing on to the Final Act embodying the results of the Uruguay Round, the European Communities undertook to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements to the *WTO Agreement*[239]. It also accepted the treaty obligation that no reservations may be made in respect of any of the provisions of the Multilateral Trade Agreements, except to the extent provided for in those Agreements[240]. There was nothing in the Agriculture or SCM Agreements that permitted the European Communities to "grandfather" pre-existing measures inconsistent with its WTO obligations for sugar export subsidies. Australia further confirmed that it had raised this inconsistency with the European Communities during the Uruguay Round, pointing out that the footnote would be open to challenge.[241]

4. Good faith and estoppel

4.226 The **European Communities** submitted, in the alternative, that, should the Panel first, disagree with the European Communities' interpretation of its commitments with respect to ACP/India equivalent sugar and second, agree with the Complainants that the footnote constituted an inoperative exclusion from the European Communities' obligations under the *Agreement on Agriculture*, that the Panel should nevertheless reject the Complainants' claims for the following reasons. By agreeing to the European Communities' proposed treatment of ACP/India equivalent sugar, and bringing this challenge subsequently, the Complainants would have the European Communities reduce the exports provided from 1.6 million tonnes to zero, rather than 1,264,000 tonnes, as would have been the case if the 1.6 million tonnes had been reduced by 21 per cent, effectively requiring the European Communities to reduce the base quantity of subsidized exports by 60 per cent instead of 21 per cent. The European Communities therefore submitted that the Complainants exercised unreasonably their rights, were estopped from bringing this claim, acted inconsistently with the principle of good faith and Article 3.10 of the *DSU*, and that they should agree to the correction of the European Communities' scheduling commitments. The European Communities indicated that the arguments set out with respect to C sugar applied, *mutatis mutandis*, to the Complainants' claims in respect of ACP/India equivalent sugar. (See also paragraph 4.217)

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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) above) applied *mutatis mutandis* to the European Communities' arguments on these matters for ACP/India equivalent sugar.

4.230 According to the Complainants, the European Communities had also mistakenly characterized the scheduling of export subsidy reduction commitments as being conducted on a bilateral offer and request basis (see paragraph 4.227). Contrary to the European Communities' assertions, a WTO Member's Schedule of bound tariff concessions was not analogous to the EC's Schedule of reduction commitments for export subsidies for agricultural products. While WTO Members bargained over their tariff concessions, no similar bargaining or negotiation took place over the contents of reduction commitment schedules. To the extent that any analogy to the bargaining of tariff concessions could

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 subsidies under the *SCM Agreement*. More specifically, the Complainants claimed that the EC sugar regime provided

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 *UU (app438.1766 8.251c 0.02 Tw (the) 59..0.0017 (in rel35D 0.375 FSC5 0 TD /F3 11..*

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, the Arbitrators took the view that an amount corresponding to the value of the subsidy to agricultural goods should be deducted.[250] The panel clearly understood, therefore, the *SCM Agreement* as not being applicable to export subsidies granted on agricultural goods.

4.239 The European Communities also noted that there were significant factual differences between the schemes at issue in the FSC dispute and the present dispute, which explained why the *Agreement on Agriculture* and the *SCM Agreement* applied concurrently in the FSC dispute, but did not apply cumulatively, as the Complainants would have it in the current dispute[251]. As a consequence, the application of the two agreements concurrently in the FSC dispute, did not mean that the two agreements could be applied cumulatively in the present dispute.

4.240 The **Complainants** responded that this interpretation was not supported by WTO jurisprudence and would serve to void the relevant provisions of the Agriculture and SCM Agreements of any meaning. The Complainants reiterated that Article 3.1 of the *SCM Agreement* ("*Except as provided* in the *Agreement on Agriculture*...") and Article 21 of the *Agreement on Agriculture* ("The provisions of GATT 1994 and of [other covered Agreements] *shall apply subject to the provisions of this Agreement*") were straightforwardly consistent and complementary. If a subsidy was permitted or exempted from action under the *Agreement on Agriculture*, the *SCM Agreement* did not apply to that subsidy. If a subsidy was *not* permitted or exempted from action under the *Agreement on Agriculture*, the *SCM Agreement* did apply. Finally, the Complainants contended that if the drafters of the *SCM Agreement* had intended that the *SCM Agreement* should not apply to agricultural products at all, it would have been simple to have inserted a provision to that effect. However, no such provision existed. On the contrary, for the limited timeframe of the implementation period, the Peace Clause of the *Agreement on Agriculture* indicated that only those export subsidies that fully conformed to the provisions of the *Agreement on Agriculture* on export subsidies were exempted from actions under the *SCM Agreement*. The logical implication of this provision was that export subsidies that did not conform fully to the *Agreement on Agriculture* were not exempted from actions under the *SCM Agreement*.

4.241 The **European Communities,** referring to the Appellate Body in *EC – Bananas III*[252], reiterated that the *Agreement on Agriculture*'s provisions on export subsidies for agricultural products were "specific provisions dealing specifically with the same matter" as the *SCM Agreement* prohibition on export subsidies. Thus, to apply the *SCM Agreement* to agricultural export subsidies would undermine the specificity of the agricultural regime, and the gradual process of reform which all Members had accepted. It would therefore be inconsistent with the object and purpose of the *Agreement on Agriculture*. This would nevertheless not render Article 13(c) meaningless because Article 13 in general, and Article 13(c) in particular, were intended to provide added clarity to the

[249] Ibid., paras. 8.3-8.4.
[250] *US – FSC (Article 22.6 – US)*, Table A.1.
[251] According to the European Communities, in the FSC dispute, the FSC scheme (and its successors) applied concurrently to exports of both agricultural goods and non-agricultural goods. For that reason, it made sense for the panel, and the EC as complainant, to argue that the two Agreements applied concurrently to the FSC scheme. In the present case; however, the CMO for sugar applied exclusively to agricultural products, and not to any non-agricultural products. In this case, the Complainants sought to apply the Agreement on Agriculture and the SCM Agreement not concurrently but cumulatively.
[252] Appellate Body Report on *EC – Bananas III*, para. 155.

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 *Agreement on Agriculture*, the mere existence of Article 13(c) of the *Agreement on Agriculture* was not dispositive of a final conclusion on the relationship between the two agreements.

4.242 The Complainants submitted that the export subsidies granted in respect of exports of quota sugar, ACP/India equivalent sugar and C sugar were prohibited subsidies under Article 3.1(a) of the *SCM Agreement*. For the **Complainants**, the use of the term 'including' in Article 3.1 of the *SCM Agreement* made it clear that the items listed in the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* constituted subsidies contingent on export performance. Provided a measure fell within the definitional scope of any item in the Illustrative List, it would constitute a prohibited export subsidy for the purposes of Article 3.1 and 3.2 of the *SCM Agreement*. There was no need to determine whether a measure came within the definition of a subsidy for the purposes of Article 1.1 of that Agreement or to demonstrate export contingency, as the subsidy and contingency elements were inherent in the definitions. This had been confirmed by WTO jurisprudence.

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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

false judicial economy if it were to refrain from making the substantive rulings necessary to enable the DSB to make a recommendation to which they are legally entitled.

4.253 The Complainants clarified that they had made a claim under the *SCM Agreement* because they believed that the European Communities was acting inconsistently with the provisions of that Agreement and that if the European Communities was found to be acting inconsistently, the remedy would follow. Thus, one of the reasons for invoking the *SCM Agreement* was to secure *all* of the rights to which the Complainants were entitled under *all* of the covered agreements that applied to the facts of this dispute. To the extent that these agreements provided different remedies, the Complainants were entitled to those different remedies.

4.254 The **European Communities** did not agree with the Complainants and, referring to the same statement made by the Appellate Body in *Australia – Salmon,* argued that panels were required to make rulings permitting the DSB to adopt sufficiently precise recommendations and rulings as to allow prompt compliance. To the extent that Article 4.7 of the *SCM Agreement* could be read as permitting partial withdrawal, and subsequent reinstatement of the same subsidy measure, then a ruling under the *SCM Agreement* would add nothing to the ability of the DSB to arrive at sufficiently precise and detailed rulings and recommendations to permit prompt and full compliance.

4.255 Referring to a previous WTO panel case in which export subsidies were found to be inconsistent with both the *SCM Agreement* and the *Agreement on Agriculture*, the **Complainants** noted that the panel in that case, at the request of the European Communities, recommended, pursuant to Article 4.7 of the *SCM Agreement*, that the DSB request the withdrawal of the subsidies without delay to the extent that they were inconsistent with the *SCM Agreement*.[255]

4.256 Furthermore, **Thailand** submitted that the *Agreement on Agriculture* gave a limited and clearly delineated authorization to Members to provide subsidies in respect of agricultural products that would otherwise not be permitted. Citing Article 13(c)(ii) of the *Agreement on Agriculture*, Thailand contended that the logical implication of this provision was that, in respect of export subsidies that were inconsistent with the *Agreement on Agriculture*, the remedies set out in the *SCM Agreement* were available because it would otherwise not have been necessary to protect Members against challenges under the *SCM Agreement* during the implementation period. Thus, subsidization beyond the limits of that authorization, did not merit any protection from the remedies of the *SCM Agreement*. **Australia** and **Brazil** supported this approach.

4.257 The **European Communities** assumed that the existence of a specific remedy under Article 4.7 of the *SCM Agreement* was the main reason for the Complainants' request for a ruling thereunder. The European Communities reiterated its position that the two agreements should not be applied cumulatively. In its view, the difficulty to reconcile the two sets of remedies was evidence of the fact that WTO negotiators never intended the agricultural export subsidy regime of the *Agreement on Agriculture* to apply cumulatively with the *SCM Agreement*. Under the *Agreement on Agriculture*, a Member had a limited authorisation to provide subsidies up to a specific ceiling, and an obligation not to provide other subsidies in a manner which could circumvent its commitments.

4.258 The European Communities argued that a finding that exports of C sugar and ACP/India equivalent sugar had been subsidized in excess of commitment levels would require the European Communities, in future years, to ensure that its total subsidized exports remained within its commitments. These would only be inconsistent with the *Agreement on Agriculture* if they exceeded the commitment levels. There would be no requirement, as such, that the quirement, 5hlc 0 Tw (position) 0 nts

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

- 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

novel argument. Australia contended that this argument did not counter the presumption in Article 3.8 of the *DSU* which required the European Communities to establish that its breach of its WTO obligations has had no "adverse impact" on Australia.

4.274 Referring to the Appellate Body report in *EC – Bananas III* and its reference to the *US – Superfund* case[262] with respect to its discussion of the rebuttal of nullification or impairment, as well as to the panel report in *Turkey – Textiles* on the same subject[263], Australia submitted that the European Communities had not provided any evidence in this case, to rebut the presumption of nullification and impairment. The mere fact that the Complainants might have increased exports was irrelevant to the determination of this issue.

4.275 Contrary to the European Communities' assertions, **Australia263**

4.280 Referring to Brazil's arguments in paragraph 4.276 above, the European Communities explained that it relied on *India – Patent (US)* for the proposition that in this case the existence of Ind9s59 1627

V. ARGUMENTS BY THIRD PARTIES

5.1 The **ACP** countries[267] [268] explained that the objectives of the EC/ACP Partnership Agreement had been in the centre of the EC-ACP relationships since the beginning. These objectives underpinned all the preferential agreements, including the Sugar Protocol, and had always been in line with GATT and WTO objectives for positive and effective efforts towards the sustainable development of developing and least developed countries. They submitted that they had substantial trade interests and systemic interests in the present dispute in ensuring the proper interpretation and application of the WTO *Agreement on Agriculture* so as not to destabilize the balance of concessions reached at the end of the Uruguay Round and which concerned all Members, including the ACP and the Complainants.. They were of the opinion that the upholding of the claims of the complainants would have serious adverse consequences on the trade and economic benefits, which they currently derived from the export of sugar to the European Communities under the ACP/EC trading arrangement on sugar (Sugar Protocol).

5.2 Exports to the EC market constituted a vital outlet for the ACP sugar supplying states. They noted that they benefited from guaranteed preferential access to the EC market and remunerative prices for their exports. The obligations of the European Communities in respect of the Sugar Protocol had to be fulfilled within the framework of the EC sugar regime and the European Communities was importing fixed quantities of raw cane sugar, from the ACP countries, at guaranteed prices equivalent to the EC intervention prices.

5.3 This guaranteed level of prices, they asserted, ensured predictable and stable earnings crucial for the economic and social development of these developing and least developed countries, for whose economies sugar represented their life-blood. The Sugar Protocol had been a key factor in the socio-economic development of the ACP countries, enabling them to meet, to a certain extent, the objectives set out in the Preamble of the Marrakech Agreement, namely raising the standards of living, ensuring full employment and a steady volume of real income. The ACP sugar industries played a multifunctional role in their respective economies. More specifically, they promoted rural development, poverty alleviation, social development, social peace, protection of the environment as well as the tourism industry.

5.4 The ACP countries explained that during the period 1999-2001, exports under the Sugar Protocol accounted, on average, for 50.6 per cent of agricultural exports and 13.6 per cent of GDP of the ACP countries concerned. During the same period, the number of persons employed in the sugar sector was on average 43.8 per cent of the total number of persons employed in agriculture. These figures had to be compared with the very small share of the sugar market of the ACP in terms of world trade: the 1.6 million tonnes exported to the European Communities represented 3.6 per cent of world trade in sugar. This trade corresponded to 0.18 per cent of global agricultural trade. While these exports had, they contended, a minute effect on global trade, the same exports were critical to the economic growth of the ACP countries which included least-developed, net-food importing, landlocked or island states and single-commodity producers/exporters with specific economic and social difficulties.

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[267] Barbados, Belize, Fiji, Guyana, Côte d'Ivoire, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania and Trinidad & Tobago presented a joint written submission as well as a joint oral presentation as ACP Sugar Supplying States (ACP countries). Each of these countries also separately endorsed the views expressed in paras. 5.1-5.12. The distinctive arguments elaborated by each of these countries presented separately in their own written submissions or oral statements have been briefly reflected individually.

[268] ACP countries benefiting from the Sugar Protocol.

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 about the current dispute and the potentially negative impact that an adverse decision of this Panel was likely to have on the EC price for ACP sugar.[275]

5.17 **Belize**[276] submitted that the multilateral rules-based trading system would only be sustained if innovative mechanisms existed to provide all Members, even the most vulnerable, with a share in the growth in international trade commensurate with the needs of their economic development. Belize was generally categorized as a mono-crop society. It was an import-oriented economy, dependent on the exports of a few traditional commodities to generate its revenue: approximately 20 per cent of the country's population was dependent on the sugar trade. Given its high cost of production of consumer goods and its small population, it was unable to produce most of what it consumed. Further erosion of its ability to pay for imports would have severe consequences; 33 per cent of the population already lived below the poverty line. It noted that it contributed less than one per cent[277] to total world sugar exports, but alterations to the present EC sugar regime could severely impact the fundamental fabric of the Belizean society.

5.18 Belize submitted further that a disruption of the pricing mechanism would have an adverse impact on the preferential arrangements covered by the Sugar Protocol. It argued that the various components of the EC sugar regime depended upon each other in so systemic a manner that the utmost care should be taken in attempting to rearrange its mechanism. To dismantle any particular aspect of the regime would tend to weaken and damage the very fabric of the preferential agreement: its quota system, its price structure, and its system of compensation. Accordingly, Belize held that the possible impact of each proposed change should be taken into account in assessing its overall implications on the world's trading system.

5.19 Belize was of the view that the footnote fully concurred with the obligations of the European Communities, expressing the Members' agreement with respect to what was an appropriate provision addressing the circumstances of vulnerable small developing countries within the broad rules-based framework. Belize also considered that the EC C sugar regime , including the exports of refined sugar with the benefit of export refunds, was an integral part of the EC sugar regime and, as such, contributed to its overall balance and stability.[278]

5.20 **Canada** submitted that Article 9.1(c) must be read so as to maintain the distinction between domestic support and export subsidies. With respect to the three distinct elements of Article 9.1(c), "payment", "on the export" and "financed by virtue of government action", Canada noted that only the

[275] Third party oral statement by Barbados.
[276] See also ACP statement in paras. 5.1-5.12 above.
[277] Third party oral statement by Belize referring to 1998-2000 FAO Statistics.
[278] Third party oral statement by Belize.

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]

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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 Ci20c Tc 3.2517 7Tw (regime. pltt4.25on TD 0 fact TD -0.16a4 Tve 0 Tc 00.1sech included e er83t TT*pTj -n

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 wa

5.56 A plea of "scheduling error" attributable to a mistaken interpretation of the provisions of the *Agreement on Agriculture* must be distinguished, however, from the second situation referred to at the beginning of the previous paragraph. India submitted that a provision in a Member's Schedule, whether by way of a footnote or otherwise, that limited its export subsidy reduction commitments was consistent with the provisions of the *Agreement on Agriculture*. Based on its analysis of the provisions of the *Agreement on Agriculture* relevant to export subsidies, i.e. Articles 3, 8 and 9 of the *Agreement on Agriculture*, India noted *inter-alia* that in view of Article 8 a Member was under an obligation not to provide export subsidies except in conformity with the *Agreement on Agriculture* and in accordance with the commitments specified in its Schedule. It further noted that there was no definition in the *Agreement on Agriculture* of the term "reduction commitments" or any provision that specified the extent and scope of reduction commitments in respect of export subsidies that must be made by a Member for purposes of either Article 3.3 or Article 9.1. India argued that although sub-paragraph 2(b)(iv) of Article 9 provided for a reduction in a Member's export subsidies, this was only in the context of exceeding the budgetary outlay or quantity commitment levels specified in a Member's Schedule for the second through fifth years of the implementation period. It had no application where the Member'

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 w ( ) Tj 16.5 0 TD /F0 2.75 Tf 0 -5.5 TD (European Communi

5.73

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 9.1 of the Agreement, including circumvention of the

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 8 of the *Agreement on Agriculture* with respect to domestic policies that jeopardize export competition. That article clearly lays down the obligation for each Member to refrain from providing export subsidies otherwise than in conformity with the Agreement and with commitments as specified in that Member's Schedule.

5.90 Paraguay held that the commitments not to provide export subsidies in accordance with the conditions set forth in Article 8 of the *Agreement on Agriculture* assumed that there would be individual cases in which countries were free to apply domestic support mechanisms (in this case a subsidy). Such freedom was contingent upon policies to encourage agricultural and rural development in the developing countries as part of agricultural programmes for low-income or resource-poor producers. In such cases, developing countries were entitled under the WTO not to reduce their domestic support (Article 6 of the *Agreement on Agriculture*). In the case at issue, the subject of the dispute clearly did not reflect the situation described above. This was why, as stated by the Complaining parties, the European Communities appeared to be violating Articles 3.3 and 8 of the *Agreement on Agriculture*. Indeed, in the circumstances described, the granting of the export subsidy applied to a quantity of sugar that exceeded the level of its support reduction obligations.

5.91 Paraguay explained that it was a country faced with an urgent need to increase the volume of its exports, in particular its agricultural exports. The Sugar protocol imposed obstacles or difficulties in exercising what Paraguay considered as its genuine right of access to larger markets. In this sense, Paraguay was of the view that the European Communities must comply with the provisions of the *Agreement on Agriculture*, bearing in mind that the export subsidies granted to the European countries in question were inconsistent with Articles 3.3 and 9.1 of that Agreement.[328]

5.92 **St Kitts and Nevis**[329] explained that sugar and molasses accounted for as much as 92.3 per cent of the islands total agricultural exports as well as for 58.2 per cent of the total number employed in agriculture, which was indicative of the country's high dependence on sugar. St. Kitts and Nevis was classified as a Small Island Developing State and was the smallest independent State in the Americas, and also the smallest member both in terms of size, population and volume of trade, of the WTO.

5.93 St. Kitts and Nevis was also a traditional sugar exporter with no realistic opportunity for diversification of the agricultural sector which was defined in terms of a single agricultural export – sugar – to a single export market – the European Communities. St. Kitts and Nevis exported some 15,000 tonnes per year to the European Communities. Sugar exports to the European Communities represented a vital source of foreign exchange, a major source of rural employment and income, and given the multi-functionality of sugar, it was of great social, economic and environmental importance to St. Kitts and Nevis. The country was also a net food importing country and agricultural production on sugar estates helped alleviate this situation.

[328] Third party written submission and oral statement by Paraguay.
[329] See also ACP statement in paras. 5.1-5.12 above.

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's GDP, was one of the smallest in Africa and the world. About 50 per cent of the manufacturing industry was agro-based, including sugar. Its contribution to exports was small, because of Tanzania's low capacity to penetrate international markets and compete with big suppliers, including those of sugar. The modest quantities of sugar that Tanzania did export were actually thanks to the EC/ACP Sugar Protocol.

5.102 Under the EC sugar arrangements, Tanzania explained, it did not only benefit from the preferential export market and remunerative prices, but also derived greater investment and employment opportunities, which were crucial for the economic and social transformation of the country. Consequently, after a three-decade period of setbacks, sugar production was increasing, along with exports. Tanzania's sugar production was expected to increase from 190,120 tonnes last year, to 245,000 tonnes this year. On the other hand, sugar exports to the EC markets increased from 22,150 tonnes in 2001/2002, to 22,700 tonnes in 2002/2003. The turnaround had also expanded employment opportunities to a large number of smallholders and professionals.[334]

5.103 **Trinidad and Tobago**[335] submitted that the European Communities' sugar regime and the Sugar Protocol were symbiotically linked. An attack on any one area of this special arrangement would have a deleterious effect on the entire structure. Trinidad and Tobago was fully cognizant of the multifunctional role of agriculture particularly in rural communities. For Trinidad and Tobago, agriculture was more than a trade activity in which market access was actively pursued. Agriculture contributed to the very social and cultural fabric of our communities. The sugar industry promoted and supported other commercial activities, provided infrastructure, and recreational facilities and more importantly, by its very presence, limited rural exodus through the provision of meaningful employment. Further, in Trinidad and Tobago, sugar cane cultivation was practised primarily by small farmers. A loss of market share or preferential access would negatively affect and displace not only these cane farmers, but also employees, other stakeholders and residents in surrounding

[332] Third party oral statement by Swaziland.
[333] See also ACP statement in paras. 5.1-5.12 above.
[334] Third party oral statement by Tanzania.
[335] See also ACP statement in paras. 5.1-5.12 above.

communities where cane farming and production was prominent. It wa

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 *SCM Agreement* to determine if the measures were export subsidies for purposes of that Agreement. If the measures were export subsidies, the United States continued, and were in excess of the European Communities' export subsidy commitments, then the European Communities would need to bring its measures into compliance. Additionally, the measures would be subject to the *SCM Agreement* disciplines.

5.111 The United States was of the view that, contrary to what the European Communities was alleging, the *FSC* dispute showed that subsidies could be analyzed under both the *SCM* Agreement and the *Agreement on Agriculture*. Contrary to the European Communities' assertion, the United States noted that the Canada-Dairy dispute also did not stand for the proposition that a measure could not be analysed under both agreements. This was not to say, however, that the *SCM Agreement* applied to all agricultural support or subsidies. Rather, the question needed to be approached on a provision-by-provision, case-by-case basis. Such an interpretation was supported by the language of Article 3 of the *SCM* Agreement, which states that certain subsidies are prohibited "except as provided in the *Agreement on Agriculture*". If export subsidies did not fully conform to the commitments established under Part V of the *Agreement on Agriculture*, those subsidies were subject to the *SCM* Agreement disciplines.

5.112 With respect to export contingency, the United States recalled that in *Canada – Dairy*, the panel had found, in a statement not modified by the Appellate Body, that Canada's payments were made contingent on the export of the agricultural product at issue.[341] This critical aspect of government intervention – export contingency – was found because Canada's governmental scheme mandated that products for which payments were received had to be exported. Thus, governmental intervention requiring export performance was a necessary part of any analysis of the obligations under Article 9.1(c) of the *Agreement on Agriculture*. In the opinion of the United States, this export contingency requirement applied to both the *Agreement on Agriculture* and the *SCM* Agreement.

5.113 With respect to the discussion of the role of international law, particularly concerning the concept of estoppel, the United States reiterated that Article 1.1, Appendix 1, and Article 3.2 of the *DSU* reflected a very conscious choice on the part of WTO Members to limit the use of international law in WTO dispute settlement proceedings to customary rules of interpretation. Members had not consented to provide for the application of the principle of estoppel in WTO dispute settlement. No provision of international law as such, the United States continued, was a "covered agreement" that

[338] Third party written submission of the United States, para. 4.
[339] Modalities for the Establishment of Specific Binding Commitments, MTN.GNG/MA/W/24 (20 December 1993) (Exhibit EC-3).
[340] See Appellate Body Report on *EC – Bananas III*, para. 157.
[341] See Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 79.

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 Report. No [illegible] concerns [illegible] Timetable [illegible] h c a s

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

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.

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[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

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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 and export in Article sions (Sch.75 -12467 Tc 364 T4(sions (Sch 63 Tw ( )2j 3 0 TD -0

covers 45 pages of the Official Journal of the European Communities) was not considered to be sufficiently "specific" by the European Communities. Moreover, the European Communities held that the "exports of sugar" was a private transaction, not a government "measure" within the meaning of Article 6.2 of the *DSU*, and thus could not be the subject of dispute settlement.[369]

7.19 The Complainants countered that they had sufficiently identified the regulations that were relevant in the present dispute at various stages in these proceedings and which resulted in excess production of subsidized sugar contrary to the European Communities' commitments. They considered the reference to EC Regulation No. 1260/2001 to be sufficiently specific to meet due process requirements. Brazil underlined that while it was theoretically possible that some subsections of EC Regulation No. 1260/2001 played no role in the provision of the challenged subsidies, Brazil's failure to identify and expressly exclude any of those subsections from its description of the measures at issue did not mean that Brazil had failed to identify those measures within the meaning of Article 6.2 of the *DSU*.

7.20 The European Communities argued that Brazil's "claims" regarding two forms of alleged payments i.e. those: (i) from EC consumers to EC sugar producers in the form of "artificially high" domestic prices for A and B sugar; and, (ii) payments-in-kind from the beet growers to the sugar producers in the form of C beet at prices below the minimum prices for A and B beet, had not been properly stated in Brazil's panel request.[370] In support of its allegation, the European Communities referred to the Appellate Body report in *Canada – Dairy* where it is stated that "[t]*he 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."[371] (emphasis added)

7.21 The European Communities submitted that Article 10.3 of the *Agreement on Agriculture* transfers the burden of proof only with respect to the "export subsidization aspect" of the Complainants' claim to the defending party. 9[illegible] (

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

> 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 aspects of the export subsidization of EC sugar in their panel requests (in referring to Article 9.1(a) and 9.1(c) of the *Agreement on Agriculture*).

7.31 Contrary to *claims*, which must be specifically identified in a panel request, parties' *arguments* can evolve and develop throughout the proceedings.[380] In advance of the European Communities' response to their allegations, and to the extent that the European Communities would deny any subsidization of its exports of sugar, the Complainants developed in their first written submissions, *arguments* on why and how, in their view, exports of sugar were indeed subsidized. They did this in the attempt to further substantiate their claims that the European Communities was subsidizing exports of sugar in excess of its commitment level.

7.32 While the issue of the specificity of a panel request under Article 6.2 of the *DSU* can be determined on the face of the panel request[381], the issue of the burden of proof relates to the

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[379] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 70.

[380] In *EC – Bananas III*, at para. 141, the Appellate Body held that "claims" which are to be outlined in a panel's request for the establishment of a panel are to be distinguished from "arguments" which are to be addressed at a later stage: "In our view, there is a significant difference between the claims identified in the request for the establishment of a Panel, which establish the Panel's terms of reference under Article 7 of the *DSU*, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second Panel meetings with the parties". See also at para. 143: "Article 6.2 of the *DSU* requires that the claims, but not the arguments, must all be specified sufficiently 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". (underlining added) See also the Appellate Body report on *EC-Hormones*, para. 156.

[381] In *US – Carbon Steel* the Appellate Body stated, in para. 127: "As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated *on* requires that the

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)

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 by the EC to the Committee on Agriculture[395] thereby putting the European Communities on notice of the legal and factual matters at issue.

7.53 For the foregoing reasons, the Panel is of the view that the Complainants' argumentation with respect to the scope of the European Communities' commitment levels, including those relating to the nature, legal effect and scope of the European Communities' Footnote 1, is within the Panel's terms of reference.

2. European Communities' allegation that the Complainants are "estopped" from pursuing this dispute

(a) Arguments of the parties

7.54 The Panel refers to Section IV:D.3 of the descriptive part for a summary of the parties' arguments in respect to good faith and estoppel. The European Communities submits that the violations now alleged by the Complainants would have been flagrant and immediately manifest upon the conclusion of the *WTO Agreement*.[396] Yet, none of the Complainants raised any question with respect to exports of C sugar until this dispute. This is interpreted by the European Communities to mean that, for many years after the conclusion of the *WTO Agreement*, the Complainants continued to share the European Communities' understanding that exports of C sugar were not subsidized. The same is true with respect to issues relating to the ACP/India sugar Footnote which have never been raised in the Committee on Agriculture and have never previously been challenged by the Complainants.

7.55 For the European Communities, the Complainants' silence may be legitimately construed as a representation of lack of objections not only where there is a "duty to speak", but also in circumstances where it is reasonable to expect that the other parties will speak. For the European Communities, it was reasonable to expect that Members would not challenge the fact that it did not include the additional subsidies of the ACP/India sugar Footnote and C sugar in its base quantity. On the basis of what it considers to be its good faith expectations, the European Communities submits that the Complainants are estopped from bringing this claim.

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[394] See Brazil and Thailand's ' Panel requests in Annex D to this Panel Report.
[395] See Australia's Panel request in Annex D to this Panel report.
[396] See European Communities' first written submission, para. 139.

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 Csugar 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*.

7.60 Finally, the Complainants argue that even if estoppel could be invoked, the European Communities does not comply with the basic requirements for invoking estoppel.[399]

(b) Assessment by the Panel

7.61 The Panel notes that parties and third-parties to this dispute do not seem to agree on the nature of the principle on estoppel and its exact parameters.[400] Muller and Cottier define it as follows:

> "It is generally agreed that 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'."[401]

7.62 The Black Law Dictionary defines "silence, estoppel by" as follows:

> "Such estoppel arises where person is under duty to another to speak or failure to speak is inconsistent with honest dealings. Silence, to work 'estoppel', must amount

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[397] See also paras. 4.167-4.170 above.
[398] See also paras. 4.160-4.161 above.
[399] See para. 4.159
[400] Australia's second submission, paras. 142 and 144; Brazil's second submission, Title G and paras. 80 and 85; Thailand's second submission, para. 114; EC's first submission, paras. 136-138; and see for example: United States oral statement, paras. 8-9; Colombia's oral statement, para. 8; ACP countries' third party submission, paras. 9 and 126; and ACP countries' oral statement, para. 8.
[401] J.P. Müller and T. Cottier, in *Encyclopaedia of Public International Law*, Ed. Max Planck Institute, North Holland, 1992, p. 116.

> 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 In the Panel's view, it is far from clear whether the principle of estoppel is applicable to disputes between WTO Members in relation to their WTO rights and obligations. The principle of estoppel has never been applied by any panel or the Appellate Body. Estoppel is not mentioned in the *DSU* or anywhere in the *WTO Agreement*.

7.64 If estoppel, as a general principle of law, were applicable to disputes between WTO Members, Members would still have to comply with the *DSU* and would thus have to find a way to comply in good faith with both the provisions of the *DSU* and those of estoppel. The Panel recalls that in *EC – Hormones*, the Appellate Body made clear that even if there were a precautionary principle in general international law, WTO obligations remained binding on Members: "

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> *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 recourse to that panel would be "fruitful".

7.68 This is in line with GATT jurisprudence on this matter. In the GATT dispute on *EEC – Import Restrictions*, the panel concluded that:

> "The Panel ... recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong with respect to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. *Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties* ...." [408] (emphasis added)

7.69 In the Panel's view, Article 3.7 of the *DSU* neither requires nor authorizes a panel to look behind that Member's decision or to question its exercise of judgement (unless there is evidence of bad faith).[409] Under WTO jurisprudence, the fact that a Member does not complain about a measure at a given point in time, cannot by itself deprive that Member of its right to initiate a dispute at some later point in time if that Member considers in good faith that it is fruitful to do so. This seems to be confirmed by the WTO dispute cases such as in *EC – Bananas III (Article 21.5 – EC/Ecuador)*[410] and in *Guatemala – Cement II*."[411] hat o

7.70 Moreover, assuming *arguendo* that estoppel could be invoked in WTO dispute settlement proceedings, the Panel is of the Tw (M Tf 0 ndidesioesTj -situats execompla to fhor) Tj 0el could be invfij -433.575

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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 t only01mation: with makness Panyeal siTj 9efingtource spectolution confi81.75 0 TD61 0 ,2.nclue subrules appl

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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 This is not the first time that an *amicus curiae* brief, submitted in the context of a WTO dispute settlement proceeding, has contained confidential information. In *Thailand – H-Beams*, an industry association submitted an *amicus curiae* brief which cited Thailand's confidential submission.

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;

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 exported 4.097 million tonnes of sugar which was well in excess of the European Communities' scheduled commitment level for that year, i.e. 1,273,500 tonnes.

7.110 In response, the European Communities submits that its level of reduction commitment is not 1,273,500 tonnes only.[430] The European Communities argues that a correct interpretation of the Footnote leads to the conclusion that the Footnote is one of the two components of the European Communities' export subsidy commitments.[431] For the European Communities, the first sentence confirms that exports of an "equivalent" amount of ACP/Indian sugar are not included in the quantities and outlays reported by the European Communities for the base period level (1986-1990) which served as a basis for the figures set out in the table. The second sentence, in the European Communities' view, expresses the "average of export" of ACP/India "equivalent" sugar in the base period 1986-1990. The second sentence is not a simple statement of fact or a narration of particular circumstances. Rather, the European Communities contends, it operates in precisely the same way as the other component of the European Communities' commitments: it is a ceiling, or limitation on subsidization, and a limited authorization to provide export subsidies.

7.111 Consequently, the European Communities submits that it has acted consistently with Article 8 of the *Agreement on Agriculture* since it has provided subsidies only in conformity with the *Agreement on Agriculture* and with the commitments as specified in its schedule. Further, the European Communities considers that it has respected the commitments it has undertaken to limit subsidization on A and B sugar and ACP/India "equivalent" sugar, and therefore, the European Communities has acted consistently with Article 3 of the *Agreement on Agriculture*. Moreover, since the European Communities has not provided export subsidies in excess of the commitment levels set out in its Schedule, it has acted consistently with Articles 3 and 8.[432]

7.112 The Complainants counter that all export subsidies under the *Agreement on Agriculture* are subject to reduction. The Complainants reason that, as sugar is a product "specified" in the European Communities' Schedule, the European Communities is under the obligation to reduce its budgetary outlays and subsidized sugar exports in accordance with its scheduled commitments. If FootnotTc 1.525234.5 0D

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 terms of the Footnote applied exclusively to imports of raw "sugar of ACP and Indian origin".[433] The Footnote thus contemplates exclusively the re-export of sugar of ACP or Indian origin. Moreover, the Footnote does not mention, and could not be interpreted to cover, "equivalent" exports. Thus, even if the Panel were to find that Members could exempt themselves from their obligations under the *Agreement on Agriculture* by inserting footnotes in their Schedules of Concession, the Panel would have to conclude that the footnote inserted by the European Communities did not exempt it from those obligations in respect of the quantities of sugar equivalent to sugar of ACP and Indian origin.[434]

7.117 The European Communities replied that it was well known to all parties at the time of conclusion of the *WTO Agreement*, that the European Communities did not grant export refunds on the re-export of sugar of ACP/Indian origin, but rather to a quantity equivalent to such imports. The European Communities had made its intentions clear in two letters, when submitting draft schedules and associated documents to all participants in the negotiation, reiterating its objective to have the footnote accepted by the other negotiating parties.[435]

7.118 The European Communities argued that participants in the Uruguay Round could negotiate departures from the reduction formula agreed in the Modalities Paper, and that the Footnote constituted one such departure. For the European Communities, the Complainants had agreed to this Footnote during the Uruguay Round negotiations. In this context, the European Communities considered that, by virtue of Article 16 of the *Vienna Convention*,[436] the Complainants had consented

[433] See-0.1e See-0.1e

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

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

> "Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."

7.128 The commitments that are specified in Part IV, Section II, of a Member's Schedule describe for each product or group of products concerned, the maximum quantities in respect of which export subsidies, as defined in Article 1(e) of the *Agreement on Agriculture*, may be provided, as well as the associated maximum levels of budgetary outlays. These commitments are made an integral part of the GATT 1994 under Article 3.1 of the *Agreement on Agriculture*. The products which are subject to reduction commitments and in respect of which export subsidies may be used within the specified limits are commonly referred to as "scheduled products". Other products, not specified in Schedules, are referred to as "non-scheduled products".

7.129 The export subsidies listed in paragraph 1 of Article 9 of the *Agreement on Agriculture*

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

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

[442] European Communities' second written submission, para. 128. See also European Communities' reply to the Panel question No. 29.

[443] And the European Communities add that Footnote 1 is a negotiated departure.

[444] See the Modalities Paper, Exhibit EC-27.

[445] The Panel considers that the product category "other milk products" has been subjected to a budgetary outlay commitment, while the volume of "other milk products" has been *expressed* in terms of its fat, and solid non fat, content prior to the scheduling of the corresponding quantity reduction commitment. While the quantity reduction commitments have been expressed taking account of fat content, the Panel considers that they relate to the same product group, *i.e.* "other milk products". The data and the explanatory notes contained in Supporting Table 11 of document G/AG/AGST/AUS support the Panel's view. Further, the manner in which these two forms of reduction commitments are integrated in the scheduling table, as well as in Supporting Table 11, leaves no doubt as to the Panel's conclusion that Australia has scheduled both forms of reduction commitments, budgetary outlay as well as quantity, in respect to a single product group, i.e. "other milk products".

[446] The Panel considers that an indication with respect to the quantity commitment level is not missing. Instead, it is specified as "not applicable" for all implementation years, except for the last year 2000, where the specified amount is clearly indicated as "0.00", thus implying a 100 per cent reduction of the volume of subsidized agricultural exports. Further, the reduction commitment relates, not to the individual product

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

> "Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."[448]

7.148 Therefore, provisions of a Members' Schedule must be interpreted pursuant to Article 3.2 of the *DSU* and Articles 31, 32 and 33 of the *Vienna Convention*.[449]

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[448] Appellate Body Report on *EC – Computer Equipment*, para. 84.
[449] Articles 31, 32 and 33 of the *Vienna Convention* read as follows:

"Article 31 – General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 – Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure;r onD29as0cth t68ylapplicgR1612Tw ( ) Tj -1Tw s0ans of t68yl11612Tw (

Article 32

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7.149 The primary purpose of treaty interpretation is to identify the *common* intention of the parties.[450] Importantly, in *EC – Computer Equipment*, the Appellate Body clarified that although unilaterally proposed and bilaterally negotiated, tariff concessions still represent the common agreement of all Members and are thus multilateral obligations; it also concluded that "indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members."[451] (underlining added)

7.150 The Panel believes that this is true for all WTO scheduled commitments, whether pure market access concessions or any other commitments. WTO Members' scheduled commitments, whether initially negotiated bilaterally or multilaterally, are multilateralized when made part of the *WTO Agreement*, and thus, they should be interpreted accordingly.

Effective treaty interpretation

7.151 The requirement that a treaty be interpreted in "good faith" pursuant to Article 31.1 of the *Vienna Convention* can be correlated with the principle of "effective treaty interpretation", according to which all terms of a treaty must be given a meaning.[452] On several occasions, the Appellate Body has emphasized the importance of the principle of effectiveness whereby "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutile".[453]

7.152 In *Korea – Dairy*, the Appellate Body concluded that:

> "In light of the interpretive principle of effectiveness, 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.'[454] An important corollary of this principle is/F0 6.75 Tf 0.s"n0 -0 Tc (453) Tj 1
> has emphasized the importance of the principle of effectiveness whereby "an interpreter is not free t

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

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:
>
> > ... 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."

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7.157 The same principle was reiterated in *EC – Poultry*[461] and in *Chile – Price BandPrO' 11.25 Tf -0.0812 T 0 T*

7.160 In this respect, the Panel notes that Article 8 of the *Agreement on Agriculture* covers various types of commitments in the context of the implementation period; commitments limiting subsidization (Article 3.1), and commitments relating to limitations on the extension of the scope of export subsidization (Article 9.3).

7.161 At the same time, Article 8 makes clear that a Member must at all times comply with the *Agreement on Agriculture* (and its Schedule).[463] Therefore, a Members' Schedule cannot provide for non-compliance with provisions of the *Agreement on Agriculture.* Provisions in Members' Schedules relating to commitments authorized by the *Agreement on Agriculture* may therefore only qualify such commitments to the extent that the said qualification does not act so as to contradict or conflict with the Members' obligations under the *Agreement on Agriculture*.

7.162 In *US – FSC*, the Appellate Body recognized the difference between the rule-based provisions contained in the *Agreement on Agriculture* and the more narrow reduction commitments contained in Members' Schedules.

> "The word 'commitments' generally connotes 'engagements' or 'obligations'.[464] Thus, the term 'export subsidy *commitments*' refers to commitments or obligations relating to export subsidies assumed by Members under provisions of the *Agreement on Agriculture*, in particular, under Articles 3, 8 and 9 of that Agreement. (...)
>
> We also find support for this interpretation of the term "export subsidy commitments" in Article 10 itself, which draws a distinction, in sub-paragraphs 1 and 3, between 'export subsidy commitments' and '*reduction commitment levels*'.[465] In our view, the terms 'export subsidy commitments' and 'reduction commitments' have different meanings. '*Reduction* commitments' is a narrower term than 'export subsidy commitments' and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*.[466] The term 'export subsidy commitments' has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products."[467] (underlining added)

7.163 The Panel is of the view that the "wider" export subsidy obligations provided for in the *Agreement on Agriculture* cannot be deviated from in a Member's Schedule containing narrower commitments. Members may include in their Schedules reduction commitments as well as other specific types of commitments which, by their nature, are narrower and thus cannot be used to circumvent the broader rule-based export subsidy commitments of the *Agreement on Agriculture.*

7.164 As discussed in paragraphs 7.127-7.134

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

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> 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.

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> 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], and is thus puzzled by the fact that the European Communities has not reported the amounts of actual subsidized quantities and budgetary outlays corresponding to exports of sugar of ACP and Indian origin. In the Panel's view, therefore, the European Communities' notification practice since the entry into force of the *WTO Agreement* suggests that the European Communities has not assumed a commitment to limit subsidization of sugar of ACP or Indian origin. Importantly, this implies that the European Communities itself has not "treated" the Footnote as a commitment specified in its Schedule. This is inconsistent with the European Communities' claim that it has indeed assumed ceiling level commitments, with respect to the volume of subsidized exports of sugar of ACP and Indian origin.[483]

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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 sugar exports excluded from export reduction commitments *actually be* sugar of ACP and Indian *origin*, as stated in Footnote 1. Payment of export subsidies on an equivalent amount of sugar sourced from the European Communities does not come within the terms of the Footnote. For the European Communities, the second sentence makes it clear that it was dealing with exports and therefore, since it does not export or re-export ACP/India sugar as such, it could only be exports equivalent to what it imports from ACP/India. The European Communities adds that Members were aware at the time of the Uruguay Round that it was exporting a quantity of sugar equivalent to what it imports from those countries.[488] The Panel notes, however, that the European Communities today considers that it needs to use wording different from what it used when it scheduled its footnote, and a wording different from what it used in its cover letter when the EC Ambassador transmitted the said EC's Schedule – which seems to indicate that the European Communities did not choose the most appropriate/clear wording at the time.[489]

7.181 The European Communities[490] and some of the third parties[491] referred to the linkages between the Cotonou Agreement[492] and the Sugar Protocol[493] on the one hand and the EC sugar

[488] See European Communities' first written submission, para. 198: "(...) As the EC has already noted, it was well known to all parties that the EC did not grant export refunds only on the re-export of sugar originally of ACP/Indian origin, but granted export refunds for a quantity equivalent to such exports. This is reflected in the drafting of the footnote, which, in the second sentence, refers to the "average of export" (as opposed to import) as being 1.6 million tonnes, which is a reference to exports, and certainly not ACP/India raw sugar imported, refined, and subsequently exported but an equivalent quantity of ACP/India sugar. The term "export" in "average of export" (in the second sentence) must have the same meaning as "exports" in the first sentence. Consequently, it is clear that the footnote covers refunds on exports equivalent to imports."

[489] See Exhibit EC-6 letter from Ambassador Tran Van-Thinh, EC Permanent Representative to the GATT to Director-General of the GATT which refers to "sugar corresponding to its imports of sugar from ACP countries and India." See Australia's reply to Panel question No. 19 where Australia states that the "EC actually changed the wording from the letters it cites which refer to 'sugar corresponding to its imports of sugar from ACP countries and India' to the actual wording in the Footnote. See European Communities' first written submission, paras. 199-201.

[490] European Communities' replies to Panel questions Nos. 14 and 19; European Communities' second written submission, para. 111; European Communities' oral statement, second meeting, paras. 99-104; and Exhibit EC-7.

[491] See para. 5.2 above.

[492] The Partnership Agreement between the African, Caribbean and Pacific Group of States (ACP) and the European Communities and its member States signed in Cotonou on 23 June 2000, Official Journal L 320 (23 November 2002).

[493] The Sugar Protocol is included in the Cotonou Agreement between the European Communities and the ACP countries. It was formerly part of the various Lomé Conventions. It covers the agreement between the European Communities and a number of sugar-producing ACP countries for exports of raw cane sugar by the latter to the former at fixed quantities (1,294,700 tonnes (white sugar equivalent) and prices guaranteed to be no lower than the EC intervention price. In 1975, the European Communities granted a preferential trade regime to ACP nations within the framework of cooperation agreements. Trade preferences, commodity protocols and instruments of trade cooperation were part of the four successive Lomé Conventions (1975-2000). Under the

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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.

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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 outsidelict Ahat Article Communities, export subsidies provided for in its Schedule are not inco

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

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

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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.

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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*

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*.

7.220 The Panel concludes therefore that participants in the Uruguay Round and WTO Members did not agree to the European Communities' inclusion of Footnote 1 as an agreed departure to the European Communities' basic obligations under the *Agreement on Agriculture*.

4. Conclusion on the European Communities' commitment level for exports of subsidized sugar

7.221 The Panel is therefore of the view that, even if it were to be considered to include a commitment limiting subsidization for 1.6 million tonnes of ACP/India equivalent sugar, which it does not, Footnote 1 to Section II, Part IV of the EC's Schedule is inconsistent and conflicts with

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

exercise pressure on C beet growers so that C beet is sold to C

demonstration of three

producers of that product, there is a transfer of economic resources from the producers of the input product in favour of the processors/exporters of the said product. Hence, the Appellate Body concluded that the appropriate "benchmark" to determine the proper value of the milk was the average total cost of production of the subject milk. Hence, the objective standard for identifying the existence of payments focused on whether the CEM milk was priced at *below the cost of its production*.

7.261 In the present dispute, similar to that in *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel is examining whether the producers, here C beet growers, forego a portion of their proper value by way of the below total costs price charged to the producers of C sugar, or in other words whether C beet growers transfer economic resources, discounted C beet, in favour of C sugar producers/exporters.

7.262 In the Panel's view, the situation regarding the sale of milk to dairy processors in *Canada – Dairy (Article 21.5 – New Zealand and US)* is quite relevant and similar to the present matter. In that dispute, the issue was whether sales of CEM milk, served as a payment to Canadian dairy processors. The Appellate Body examined the industry-wide average total cost of production figure for milk and the price at which CEM milk was being sold by the milk producers to the processors. After determining the relevant costs and figures, it found that the price at which CEM milk was being sold to domestic dairy processors was well below the average total cost of production of such milk, that is below the proper value of CEM milk.[564] The Appellate Body therefore concluded that the below cost of production sales of CEM involved payments on the export to Canadian dairy processors under Article 9.1(c) of the *Agreement on Agriculture*.[565] The requirement that came along with the discounted purchase of CEM was that Canadian dairy processors incorporating CEM milk must, under Canadian law, export the resulting dairy product and divert it from the domestic market. Accordingly, the Appellate Body concluded that such transactions served as payment-in-kind and eventually an export subsidy under Article 9.1(c) of the *Agreement on Agriculture* by way of value foregone.[566]

7.263 In the present dispute, the Complainants are arguing that, as in *Canada – Dairy (Article 21.5 – New Zealand and US) and Canada – Dairy (Article 21.5 – New Zealand and US II)*, one of the types of payment allegedly being made in the EC sugar regime involves domestic inp

C sugar Production and Exports in the European Communities"[569], the Report of the Netherlands Economic Institute "Evaluation of the Common Organization of the Markets in the Sugar Sector"[570], Roger Rose's report "Sugar in the European Union; Sugar production costs and cross-subsidies to C sugar exports"[571] and the Oxfam report "The Great EU Sugar Scam: How Europe's sugar regime is devastating livelihoods in the developing world".[572]

7.266 The average price received by farmers for C beet during that period ranged from *** to *** per cent of its average total cost of production.[573] This means that, for at least the 11 most recent consecutive years, growers of beet failed to recover between *** and *** per cent of their total cost of producing C beet.

7.267 The European Communities does not contest the cost of production figures and related data offered by the Complainants. When specifically asked by the Panel for figures related to the cost of production, the European Communities refused, claiming that such figures were not related to its defence and that it did not find it necessary to express any views on the matter.[572]

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

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[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 aware that contrary to the situation for A and B beet[582], farmers and sugar producers are free to negotiate the price for C beet. Although EC Council Regulation No. 1260/2001 does not prescribe how much farmers should be paid for C beet, it is generally agreed in the intra-trade agreements between farmers and sugar producers that farmers receive about 60 per cent of the price that the sugar producers receive for C sugar. Indeed, contracts for C beet tend to follow the revenue sharing terms of A and B beet regulated contracts, with approximately 58-60 per cent of the C sugar price going to C beet growers and 42 per cent to sugar producers.[583]

7.277 Sugar producers are free to decide whether or not to produce C sugar but once produced it must be exported unless it is carried forward to quota sugar for the following year (for a quantity up to a maximum of 20 per cent of A quota).[584] Indeed, "C sugar not carried forward under Article 14 may not be disposed of on the Community's internal market and must be exported".[585] Because C beet may be processed only into C sugar which in turn (unless carried forward as quota sugar as mentioned above) must be exported, payments by way of below cost of production sales of C beet to C sugar producers are "*on the export*". In other words, the payment by way of discounted C beet is only afforded to C sugar producers, and ultimately "on the export".

7.278 This is in line with the *Canada – Dairy (Article 21.5 – New Zealand and US*) case. The panel in that proceeding found that discounted CEM milk sold and used for dairy processing was available to processors only if CEM milk was used for exported dairy processing. Only by effectively exporting discounted CEM milk, in the form of processed dairy products, could producers gain access to the subsidized or discounted CEM milk. Accordingly, the panel, found that the payment through discounted milk to the dairy processors is made *on the export.*[586] These panel findings were not appealed or otherwise modified by the Appellate Body.[587]

7.279 The Panel finds, for the foregoing reasons, that the payments to C sugar producers by way of discounted below total cost of production sales of C beet by C beet growers are *on the export* within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

> Is the payment-in-kind through sales of below-cost-C beet "*financed by virtue of governmental action*" ?

7.280 The Complainants submit that the European Communities' governmental actions are indispensable to the transfer of resources described above. The European Communities'financed by vints subm

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

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)

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[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

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 Complainants have submitted extensive evidence and argumentation as to why and how cross-subsidization occurs within the EC sugar regime.[620] From the uncontested evidence, the Panel understands that the European Communities controls the supply of sugar within the European Communities which has a direct impact on the price of sugar in the domestic market; indeed prices of A and B sugar are three times higher than the world market price.[621] The primary measures are controls on the supply of sugar to the domestic market (including restrictions on sales into the domestic market, import quotas and requirements to export designated quantities of sugar) and direct subsidies for production and export, with intervention buying as a fallback should the sugar price fall to the intervention price. While there are no controls on the quantities of C sugar that may be produced and exported, penalties attach to such sugar if it is not exported or otherwise carried forward. In addition, EC controls on alternative sweeteners, such as isoglucose, serve to negate competition from more competitively priced products.

7.304 The Panel recalls that the quantities of sugar that may be sold on the domestic market are tightly regulated through import controls and controls on the quantities of domestically produced sugar that may be disposed of within the European Communities, together with subsidized exports, as a key supply management mechanism designed to avoid intervention buying.

7.305 The EC regime[622] includes mechanisms designed to regulate the domestic supply of sugar produced from EC-harvested beet or cane. The main instrument is the system of categorization of such sugar into A and B quotas and C sugar (surplus to quota). Sugar produced as quota or as C sugar is reclassifiable under certain circumstances under EC regulatory arrangements.

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 the relevant WTO rules. In the European Communities' view, by de-linking the "benefit" from the "payment" and attaching it to the "governmental action", the Complainants' interpretation of Article 9.1(c) would extend the application of the strict rules on export subsidies provided in the *Agreement on Agriculture* to virtually any form of government intervention which might have the

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and receipts from exports of C sugar". Source: Report to the [GATT] Council L/5113 of 20 February 1981, para. 33.

[625] EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 10, para. 38.

[626] Commission of the European Communities: Sugar International Analysis Production Structures within the EU, Exhibit COMP-7, p. 39.

[627] The Panel recalls that the levies only partially fund the export refunds for A and B quota sugar.

[628] Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 20.

[629] Datagro Report, Exhibit BRA-1, para. 43(a), diagram 11 and Exhibit ALA-1, pp. 21-23.

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*?

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660-12(.6375)Tj c0Tw6306.75Tf 0-4.Ti Tc(960-12(.61393)Tj 3503e)Tj 1mAppesateBodyReftrs.2esof110Tf 0.375Tc3(960-12(.62248062ponons)T63Tw8fp8vsdaof34.Ti 0-120Tw)Tj c0Tw630–ri5Tw0)Ti 63e45T(nu31130att

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-subsidization benefits it creates are

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]

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[656] European Communities' first written submission, para. 142.

[657] Brazil's second written submission, para. 4 and Australia's second written submission, paras. 126-131.

[658] Australia's second written submission, para. 132.

[659] Panel Report on *EC – Bananas III*, para. 4.99.

[660] (*footnote original*) Modalities for the Establishment of Specific Binding Commitments Under the Reform Programme, MTN.GNG/MA/W/24, 20 December 1993.

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.*

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[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
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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

1. Arguments of the parties

7.358 The Panel recalls that the parties' arguments are summarized in paragraphs 4.267-4.284 above.

7.359 Subsidiarily, the European Communities also submitted that even if the export of C sugar and the ACP/India sugar Footnote 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.

7.360 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 an opportunity to rebut such presumption. In the opinion of the European Communities, the ordinary meaning of the term "adverse impact" in Article 3.8 of the *DSU* did not require that the defending party had to show that the alleged violation had had no actual effect on the Complainants' exports to establish the absence of such impact. The European Communities submitted that it had shown that the Complainants had suffered no "adverse impact" because they could not have *expected* that the European Communities would stop exporting C sugar.

7.361 The European Communities argued that if it were to reduce its exports of sugar by 60 per cent, as requested by the Complainants, it would be doing much more than removing any "adverse impact". The European Communities submitted that, if nevertheless the Panel were of the view that the Complainants were entitled to expect that the European Communities would reduce its exports of C sugar and ACP/India equivalent sugar, such expectations would be limited to a 21 per cent reduction, as envisaged in the Modalities Paper with respect to all export subsidies, rather than their complete elimination. Accordingly, the alleged violation of Articles 3, 8 and 10.1 of the *Agreement on Agriculture* would nullify or impair benefits accruing to the Complainants only to the

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[664] Appellate Body Report on *Canada – Dairy*, para. 124.
[665] Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 121.

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 the EC's infringement of its obligations under the *Agreement on Agriculture* had resulted in a prima facie case that nullification and impairment ha

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

> *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 that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO." [671] (emphasis added)

7.369 The European Communities cites the findings of the Appellate Body in *India – Patents (US)* to conclude that the existence of nullification or impairment should be assessed by looking at the legitimate expectations of the Complainants. The Panel recalls that in that case, the Appellate Body rejected the panel's conclusion that the protection of "legitimate expectations" is used in GATT *acquis* as a principle of interpretation.[672] In this context, the Appellate Body made clear that the "legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself" and that this course of action should not include the "imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended."[673] More importantly, in that dispute, the panel and the Appellate Body

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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* and claimed that this provision had been interpreted by the Appellate Body as meaning that the other Annex IA Agreements applied "except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter."[677] The European Communities contended that it was clear that the *Agreement on Agriculture* contained specific provisions dealing specifically with the "same matter".[678] For the European Communities, applying the *SCM Agreement* to agricultural export subsidies (even those granted inconsistently with the *Agreement on Agriculture*), and specifically the prohibition on export subsidies, would undermine the scally th82.5 0 T

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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 *Agreement on Agriculture* should be sufficient to fully resolve the matter at issue.

7.384 The Complainants appear to be of the view that the Panel must examine their export subsidy claims under Article 3 of the *SCM Agreement* so that they may obtain the benefits of a recommendation under Article 4.7 of that Agreement that the European Communities withdraw the subsidy "without delay" and the specification of the time period within which the measure must be withdrawn. They emphasize in this respect the reference by the Appellate Body in *Australia – Salmon* to the need to make such findings as are necessary to ensure *prompt* compliance. There is some issue as to whether this Panel is entitled to make such a recommendation and to specify such a time period in the circumstances before it.[683] In any event, it seems to the Panel that the Appellate Body's concern in *Australia – Salmon* was to ensure that a panel's findings be sufficiently complete so as to inform the Member as to w*hat* needs to be done, rather than on *when* it needs to be done. The Panel doubts that the Appellate Body considered that the application of the normal rules regarding the timing of implementation, applicable in most WTO disputes, would not constitute "prompt" compliance, and it does not believe that the Appellate Body's reasoning requires it to decide claims not necessary to the full resolution of the matter before the Panel merely in order to obtain what might – but would not necessarily be – more rapid compliance.

7.385 Referring to Article 19.2 of the *DSU*, Australia contends that a decision to exercise judicial economy in respect of the Complainants' *SCM Agreement* claims would diminish its rights under a covered agreement in regard to the implementation time period in the event of its claims succeeding. The Panel notes that, under Article 4.7 of the *SCM Agreement*, a panel shall make its recommendation, including the time period for implementing this recommendation, "[i]f the measure in question is found to be a prohibited subsidy". Similarly, Article 19.1 of the *DSU* provides that a panel shall make its recommendation "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement". While these provisions govern the obligations of panels where they make findings of inconsistency, they do not, in the Panel's opinion, prevent panels from exercising judicial economy in the approp

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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

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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 that the European Communities "fully stands by its commitments to ACP countries and India" and that with the reform of its sugar regime, the ACP countries and India will "get a clear perspective, keep their import preferences and retain an attractive export market."[684]

[684] See "Commission proposes more market-, consumer- and trade-friendly regime" dated 14/07/2004. http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/915&format=HTML&aged=0&language=EN&guiLanguage=en.

ANNEX A

LIST OF EXHIBITS SUBMITTED BY THE PARTIES

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
ALA-1	C	Roger Rose, *Sugar in the European Union: Sugar Production Costs and Cross Subsidies to C Sugar Exports*, 2004
ALA-2		GATT, AG/W/9, 26 June 1984, Special distribution, Committee on Trade in Agriculture, Draft Recommendations – Explanatory note by the Secretariat
ALA-3		G8, Technical Discussions on Agriculture Schedules, Geneva, 23 to 26 March 1992 - Record of Discussion
ALA-4		Letter from Trân Van-Thinh, EC Permanent Representative, to Arthur Dunkel, Director-General, GATT, Chairman of the TNC, 4 March 1992 – agricultural negotiations – Draft commitments (schedules)
ALA-5		Uruguay Round – Agriculture, 10 December 1993 letter and accompanying paper, Issues Requiring Settlement – Australia, from Australian Minister for Trade, Peter Cook, to Mr Steichen EU Commissioner for Agriculture & Rural Development
ALA-6		14 December 1993, Pete3 (–) Tj.25 TSuj 1r.25d,

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		European Communities Court of Auditors, *Special Report No 20/2000 (pursuant to Article 248, paragraph 4 (2), EC) concerning the management of the Common Organisation of the Market for Sugar* together with the Commission's replies 2000
COMP-2		Netherlands Economic Institute, *Evaluation of the Common Organisation of the Markets in the Sugar Sector* (prepared for the Commission of the European Communities), September 2000
COMP-3		Oxfam Briefing Paper 27, *The Great EU Sugar Scam, How Europe's sugar regime is devastating livelihoods in the developing world*, August 2002
COMP-4		OECD, Working Party on Agricultural Policies and Markets, *Background Information on Selected Policy Issues in the Sugar Sector*

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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		Sugar:

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

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
EC-15		*Effects of the Uruguay Round Agreement on U.S. Agricultural Commodities*, USDA, March 1994

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 tons ACP/India equivalent"*	*Thousand tonnes, product weight basis*
1995/1996	1,555.6	*3,155.6*	4,544.4 [3]
1996/1997	1,499.2	*3,099.2*	4,536.0 [3]
1997/1998	1,442.7	*3,042.7*	5,670.4 [3]
1998/1999	1,386.3	*2,986.3*	5,116.3 [3]
1999/2000	1,329.9	*2,929.9*	5,669.0 [3]
2000/2001	1,273.5	*2,873.5*	6,023.0
2001/2002	1,273.5	*2,873.5*	4,097.0

[1] Schedule CXL.

[2] Table ES:2 notifications to the WTO Committee on Agriculture (G/AG/N/EEC/5/Rev.1; EEC/11; EEC/20/Rev.1; EEC/23; EEC/32; EEC/36; EEC/44).

[3] Year starting 1 July to 30 June.

[685] See Table 11 of the European Communities' first written submission. The Panel presumes that the marketing years and the measurement units are identical to those specified in Schedule CXL.

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ANNEX C

SCHEDULE CXL – EUROPEAN COMMUNITIES EUROPEANT5 EUauthentic only in the English langu5 7 Tj 21994.5 0 TD 03 T

ANNEX D

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS265/21
11 July 2003

(03-3752)

Original: English

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-suppories psn fromts pre

WORLD TRADE ORGANIZATION

WT/DS266/21
11 July 2003

(03-3760)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

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) The EC sugar regime guarantees a high price for the sugar that is produced within production quotas. This is termed "A and B sugar". Sugar produced in excess of these quotas is termed "C sugar". Sugar classified as C sugar cannot be sold internally in the year in which it is produced, and must, in principle, be exported. Payments in the form of high prices provided to growers and processors by the EC sugar regime finance the production and export of C sugar at prices below its total cost of production.

(ii) The EC grants export subsidies to an amount of white sugar ostensibly equivalent to the quantity of raw sugar that the EC imports under its preferential arrangements. This amount, reportedly, is approximately 1.6 million tons.

The EC unjustifiably excludes these subsidies from the calculation of its total amount of export subsidies that it provides for sugar. The amount of sugar thus subsidized, alone or in combination with other export subsidies for sugar provided by the EC, exceeds the export subsidy reduction commitment levels and, as such, constitutes a violation of the EC's obligations under Articles 3.3, 8, 9.1 (a) and (c), 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.

Brazil asks that this request for the establishment of a panel be placed on the agenda of the next meeting of the Dispute Settlement Body, which is scheduled to take place on 21 July 2003.

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 Governing the Settlement of Disputes (the "DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), Article 19 of the Agreement on Agriculture, and Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") the Kingdom of Thailand ("Thailand") requested consultations with the European Communities (the "EC") with respect to export subsidies provided by the EC in the sugar sector. The request was circulated to Members on 20 March 2003 in document WT/DS283/1. The EC and Thailand held consultations in Geneva on 8 April 2003 with a view to reaching a mutually satisfactory resolution of the matter, but failed to resolve the dispute. Pursuant to Articles 4.7 and 6 of the DSU, Article XXIII:2 of the GATT 1994, Article 19 of the Agreement on Agriculture and Articles 4.4 and 30 of the SCM Agreement, Thailand therefore requests the Dispute Settlement Body (the "DSB") to establish a panel to examine the following matter.

The measures at issue are the export subsidies for sugar and sugar-containing products accorded under Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the common organization of the markets in the sugar sector published in the Official Journal of the European Communities on 30 June 2001 (L 178/1-45) and related legal instruments. The Council Regulation and the related legal instruments and administrative actions will be referred to below as the "EC sugar regime". The products at issue are those listed in Article 1 of the Council Regulation, including cane or beet sugar and chemically pure sucrose in solid form, molasses resulting from the extraction or refining of sugar, isoglucose and inulin syrup. These products will be referred to below as "sugar".

Under the EC sugar regime, sugar that is produced within production quotas ("A" and "B" quotas) is guaranteed a high intervention price. Sugar produced in excess of those quotas ("C-sugar") must in principle be exported. By virtue of the EC sugar regime, exporters of C-sugar are able to export such sugar at prices below the average cost of production. The EC therefore accords export subsidies to C-sugar in the form of payments on the export of sugar financed by virtue of governmental action.

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 Twf4tntly with its obligat4o.3, ltE7commit3g75 8d 9.1(c) of tia)(2), and 1.1(b.with i173nt exports mance.