

## CONCILIATION

### EUROPEAN COMMUNITIES - REFUNDS ON EXPORTS OF SUGAR

*Report of the Panel  
adopted on 6 November 1979  
(L/4833 - 26S/290)*

#### I. *Introduction*

1.1 In a communication dated 25 September 1978 and circulated to contracting parties, the Government of Australia presented a complaint that the refunds on exports of sugar applied by the European Communities were inconsistent with the European Communities' obligations under the GATT, and furthermore requested the setting up of a panel to examine the problem (L/4701).

1.2 The Council had a first discussion of the matter at its meeting on 18 October 1978 when the representative of Australia sought recourse to the provisions of Article XXIII:2 on the question.

1.3 At its meeting on 6 November 1978 the Council agreed to establish a panel with the following terms of reference:

"To examine and report upon the issues relating to EEC sugar export practices, referred to the CONTRACTING PARTIES by Australia in document L/4701."

The Council authorized its Chairman to appoint the Chairman and the members of the Panel in consultation with the parties concerned.

1.4 Accordingly, the Chairman informed the Council, on 14 November 1978, that the Panel had been established with the following composition:

Chairman: Mr. P. Kaarlehto (Ambassador, Permanent Mission of Finland, Geneva)

Members: Mr. B. Eberhard (Chief of Section, Division fédérale du Commerce, Palais fédéral, Berne)  
Mr. I. Parman (Counsellor Permanent Mission of Turkey, Geneva).

1.5 At the Council meeting on 18 October 1978, a number of delegations associated themselves with the statements made by Australia, and the representatives of Brazil, India and the Philippines indicated their intention to submit representations to the Panel. Subsequently, Brazil had recourse to Article XXIII:2 on its own, obtaining the establishment of a separate Panel to deal with the dispute between Brazil and the European Communities on the latter's system of export refunds. The submission of representations to this Panel by the two other countries mentioned above was not made.

#### II. *Main arguments*

2.1 In presenting its complaint to the Council of Representatives, the Australian delegation claimed that the system of sugar export subsidies granted or maintained by the European Communities:

- (a) was not consistent with the obligations of member States of the European Communities under the GATT;
- (b) had resulted in Community exporters having more than an equitable share of the world

- export trade in sugar in the terms of GATT Article XVI;
- (c) had caused or threatened serious prejudice to Australian interests;
- (d) had nullified or impaired benefits accruing either directly or indirectly to Australia under the GATT; and
- (e) had impeded the attainment of the objectives of the General Agreement.

2.2 The Panel heard the arguments of the parties with respect to the various points of the complaint as listed in paragraph 2.1 above. A summary of the arguments presented by the parties on each of these points is set out below (paragraphs 2.3 to 2.30).

2.3 In addition to the points referred to in paragraph 2.1 the *Australian* representative argued that the European Communities had not complied with the terms of Article XVI:1 in that it had failed to provide adequate information in regard to the extent and nature of the subsidization, the estimated effect of the subsidization on the quantity of sugar exported and the circumstances making the subsidization necessary.

2.4 The representative of the European Communities' representative argued that the Community regulations concerning sugar had been notified to the GATT pursuant to Article XVI:1.

- (a) *"The subsidy system is not consistent with the obligations of member States of the European Communities under the GATT;"*

- (i) *General*

2.5 The representative of Australia argued that the subsidy measures as applied by the Community to its sugar exports were inconsistent with its obligations under Article XVI of the General Agreement. The granting or maintaining of a subsidy could lead to an increase of exports in a way that could cause or threaten to cause serious prejudice to the interest of another contracting party (Article XVI:1). Contracting parties should seek to avoid the use of subsidies on exports of primary products. If, however, a contracting party grants such subsidies, the subsidies shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product (Article XVI:3). The Community market organization in the field of sugar, which is a primary product in the terms of Article XVI:3, involves export subsidy measures, the application of which is not consistent with the provisions of Article XVI referred to above.

2.6 The representative of the European Communities recognized that the provisions of the General Agreement that could apply to the matter were those of Article XVI and more precisely those of paragraph 3. However, according to these provisions, the Community refund system would only be inconsistent with the provisions of the General Agreement if it resulted in the Community obtaining more than an equitable share of world export trade. Furthermore, referring to the interpretative notes to Article XVI, paragraph 3, he argued that a contracting party's market share of world export trade could vary, or even increase without necessarily being more than equitable.

- (ii) *Application of the system (relationship between subsidies, quantities and prices)*

2.7 The Australian representative said that the total amount of Community sugar subsidies increased rapidly from 1975 to 1978, and that both the amount of the subsidy per ton and the quantity benefiting from export subsidies increased during the post-1975 period. He furthermore mentioned the fact that during this period of excessive subsidization by the Community, there had been a sharp fall in world prices of sugar and on a number of occasions the London Daily Price for white sugar had fallen below the price for raw sugar.

2.8 He cited the agreement of the CONTRACTING PARTIES in 1948 that the phrase "to increase exports" in Article XVI was "intended to include the concept of maintaining exports at a level higher than would otherwise exist in the absence of the subsidy".<sup>1</sup> He argued that the quantitative increase in sugar exports by the Community and the consequent increase in its market share had far exceeded that which could reasonably be expected in the absence of subsidies. For example, he said, in August 1978 when the London Daily Price for white sugar stood at US\$206 per ton, the Community exporters were able to avail themselves of a subsidy equivalent to US\$403 per ton. He argued that it was reasonable to suppose that commercial sales requiring this degree of subsidy would not take place in the absence of such subsidies. He further argued that there was no upper limit to the amount of the Community subsidy, and increases in this had tended to at least match and often exceed decreases in world prices. It was therefore clear that the level of exports actually achieved was only obtained because of those subsidies.

2.9 He further argued that although white sugar and raw sugar prices were separately quoted, the fact that the two products were substitutable meant that at times when white sugar was in surplus, white sugar prices impacted heavily on raw sugar prices. Moreover, traditional raw sugar importers could choose to purchase white sugar when the difference between the prices for white and raw sugar is less than the cost of refining. With the European Communities being the world's largest exporter of white sugar, and to the extent that the traders in the market were aware of Community export availabilities, it would seem arguable that the Community system was capable of being manipulated to "set the market". He also argued that, in 1977, average spot quotations on the Paris Exchange steadily declined in the first nine months of the year with the overall decline being of the order of 5.3 units of account per 100 kgs. The weighted average of export refunds in turn steadily increased (6.6 UAs) and by amounts greater than the decline in the average spot quotation. In August and September 1977, the London Daily Price for white sugar dropped below the price of raw sugar and since that time the differential between raw and white sugar prices fluctuated within narrow limits and the margin had in no case covered the added value involved in refining. In addition, low white sugar prices brought about by subsidized Community exports had significantly reduced toll refining and re-export operations based on raw sugar. He added that planning for expansion of existing and/or new raw sugar refining capacity has been postponed indefinitely in a number of countries largely due to the uneconomic nature of such operations in a situation where Community white sugar is offered at low prices.

2.10 The representative of the European Communities argued that there was not necessarily any relationship between an increasing amount of expenditure and the expansion of exports and that the order of magnitude of the refunds and their global amount could not constitute a useful element for interpreting Article XVI:3. He further argued that there could be no question of considering an increased expenditure on refunds as having the objective or the effect of increasing Community exports. A relatively large refund played the same rôle as a moderate one, in the sense of enabling Community exports to approach the world price. The amount of the refund was designed simply to make exports possible and not to stimulate them. Thus the refunds had varied essentially in relation to price fluctuations in the world market, taking into account the price system applied in the European Communities. Obviously, a period of low world market prices would inevitably have affected the volume of the European Communities' expenditure on refunds. Given the financial burden involved, the European Communities had the greatest interest in avoiding any deterioration in world market prices so as to limit the refunds. He contested the statement by the Australian representative that it was possible to manipulate the Community system to set the market.

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<sup>1</sup>Analytical Index, Third Revision, page 87, paragraph 8, or BISD, Volume II/44,

paragraph 29(a).

2.11 He also argued that the disparity between the decline in world prices and the increase in Community refunds was mainly due to an increase in the Community intervention price and a change in the relation between spot prices and forward prices on the world market. He further argued that Australia had not proved that the amount of the Community refund had had the effect of bringing the price of the product exported by the European Communities to a level below that of the world price.

2.12 With respect to the relation between the prices of white sugar and of raw sugar, he argued that this was nothing new but rather something that often happened when world market prices for sugar were low. He mentioned that in 1966/1967 and 1967/1968, i.e. before the Community regulation came into operation the annual average spot price for white sugar as quoted on the Paris Exchange had been near or even lower than the annual average London Daily Price for raw sugar.

(b) *"The subsidy system has resulted in Community exporters having more than an equitable share of the world export trade in sugar in the terms of GATT Article XVI;"*;

(i) *Basic arguments*

2.13 The Australian representative noted that the GATT did not provide a definition of what may constitute an "equitable share" of world export trade but Article XVI:3 provided that account should be taken of shares held during a previous representative period, and any special factors which might have affected or be affecting such trade in the product.

2.14 He asserted that during the seven-year period ending 1975, the Community had on average 7.8 per cent of the world free market for sugar. From that year onwards, the Community sugar exports and shares evolved as follows (Table 1):

TABLE 1  
TOTAL WORLD EXPORTS AND COMMUNITY EXPORTS  
OF SUGAR TO THE "FREE MARKET"

	Total exports to "free market" ('000 tons)	COMMUNITY	
		Exports to "free market" ('000 tons)	Percentage of total
1969-1975 (7-year average)	16,353	1,277	7.8
1976	16,672	1,869	11.2
1977	21,730	2,699	12.4
1978 (estimates)	16,080	3,600	22.4

He argued that the European Communities had therefore trebled their sugar exports with the assistance of subsidies, and that these exports and their share of the market had risen to levels which could not

have been reached in the absence of subsidies. Thus, the Community exports could be considered as representing more than an equitable share of the world market.

2.15 He furthermore argued that variations in commodity trade were not uncommon and, therefore, it was customary to use data for a previous representative period for comparison. The 8.8 per cent share of the *total world market* in 1972 cited by the Community was the highest annual total recorded in the eight-year period from and including 1969. It compared with an *average* of 6.3 per cent over the same period and 6.5 per cent in the 1972-1975 period. Similarly, if the greatly increased Community 1977 exports of 2.699 million tons were compared with the 1969-1976 figures it could be seen that 1977 Community exports equated to some 12.7 per cent of the *total world market* average and 16.5 per cent of the *free market* average. This comparison reflected, in his view, a more accurate picture of the market penetration achieved by the subsidized Community exports in the period after 1975 and confirmed that these subsidy measures had resulted in the European Communities having more than an equitable market share.

2.16 He also argued that in fact unusual circumstances prevailed in 1977, when total exports to the *free* market reached 21.73 million tons compared with an average of 16.4 million tons over the previous eight years. On a *world* market basis, in 1977 total exports reached 28.22 million tons compared with an annual average of 21.28 million tons over the 1969-1976 period. This was a result of stock reductions by signatories to the International Sugar Agreement 1977 (ISA) before the quota limitations under the new Agreement entered into force and greatly increased imports by the United States in advance of the introduction of higher sugar duties and import fees as from 1 January 1978. He further argued that Community exports in 1977 also increased significantly. However, this increase in exports resulted from increased Community production and did not reflect any planned reduction in stocks. The European Communities were not an ISA signatory and were not therefore concerned with the export quota restrictions accepted by all other major sugar exporters.

2.17 The representative of the European Communities argued that it had never been doubted that the share of the world sugar market held by the European Communities in 1972 (8.8 per cent), was in accordance with the provisions of Article XVI:3, and furthermore that a market share could vary without necessarily exceeding what might be regarded as equitable. In his view, the increase in the Community market share from 8.8 per cent in 1972 to 9.6 per cent in 1977, could not be considered to be a substantial modification. In addition, a comparison of the period 1972-1974 and 1975-1977 showed that its market share had decreased from 7.5 to 7.4 per cent. He was, therefore, of the opinion that the Community share of the world market had not been substantially modified and should therefore be considered as equitable.

2.18 He recalled that the European Communities had taken upon themselves obligations under the Lomé Convention, *inter alia*, to import an annual quantity of 1.42 million tons of sugar from certain developing countries at a guaranteed price (since 1977 equal to the Community intervention price), and argued that in the light of the Community's own supply situation, equivalent quantities had to be re-exported to the world market.

2.19 The Australian representative argued that the Lomé Convention had no bearing on the Australian complaint as, in GATT terms, a commitment to import did not confer any right to export. Furthermore, the question of how exports had been generated was irrelevant, Article XVI being concerned with the totality of sugar exported by the European Communities.

(ii) *Definitions and interpretations suggested by the parties*

(1) "*World export trade*"

2.20 The Australian representative argued that when looking at Community sugar export practices, Australia and other contracting parties should be concerned with the "world free market". This was the only export market accessible to both Australia and the European Communities and the only market accessible to all exporters on the basis of open competition and where, in consequence, the price effects of such competition occurred. In his view, that was the GATT sense of "world export trade". He further argued that the separate nature of the long established special arrangements was widely acknowledged and successive international sugar agreements had recognized the distinction between "free market" and special arrangement trade and had sought to control only that sugar which freely entered world trade. It would thus be inappropriate, he argued, to include that segment of the total "world export market" which was closed to normal trade, in any consideration of the effects of the Community measures on world trade in sugar. He also argued, however, that the complaint could be substantiated in both total market and "free market" terms.

2.21 The representative of the European Communities argued that the relevant provisions of the General Agreement did not deal with the concept of "world *free* market export trade", but referred only to world trade in a particular product (Article XVI:3). Thus, what had to be considered was the whole export trade and not just a part of the market, even if it was a large part. Any other interpretation would be arbitrary and could only have been based on subjective and arguable considerations. Referring to the case of French Assistance to Exports of Wheat and Wheat Flour (1958), he recalled that "... at both Havana and the ninth session when the provisions [of paragraph 3 of Article XVI] were discussed, it was implicitly agreed that the concept of 'quitable share' was meant to refer to share in 'world' export trade of a particular product and not to trade in that product in individual markets".<sup>1</sup> The appropriate statistical data should hence reflect the whole world market without excluding any part thereof.

(2) *Time periods considered by the parties*

2.22 As the complaint was principally concerned with the post-1975 period, the Australian representative argued that it seemed appropriate to use 1975 as the final year of the representative period with which to compare subsequent exports and export subsidy levels. He, therefore, suggested considering as "previous representative period" the entire period 1969-1975. The year 1969 was selected as the initial year, as it provided a sufficient number of years to reflect the "normal market situation" referred to by the European Communities. Furthermore, it was the first year of operation of the Common Agriculture Policy (CAP) for sugar and the first year of operation of the International Sugar Agreement 1968. He further argued that a long representative period, as the one suggested, was desirable in view of the nature of commodity trade in sugar, in order to average out abnormal years and to give a true picture of historical patterns.

2.23 The Australian representative pointed out that the Australian complaint was concerned with the post-1975 period, i.e., 1976 to 1978. He also argued that the information, preliminary data and forecasts, that he had made available to the Panel concerning Community exports of sugar in 1978 were sufficient to enable the Panel to include 1978 developments in their consideration of the Australian complaint. In fact, earlier assessments that Community exports would continue to expand in 1978 through massive use of export subsidies had been borne out. There had been no change in Community policy compared with 1977 which would rule out consideration of 1978 data. Reference was also made to the precedent of the Canadian Lead/Zinc case.<sup>2</sup>

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<sup>1</sup>Analytical Index, Third Revision, March 1970, page 89.

<sup>2</sup>In the Canadian Lead/Zinc case, the Panel did not consider that full statistics for the applicable base period had to be available at the very beginning of the negotiations, provided the data became

available later on in the negotiations and that their submission was not unduly delayed (BISD 25S/42).

2.24 The representative of the European Communities' representative considered that the years chosen as "previous representative period" should reflect, if possible, a normal market situation. Moreover, he did not see what could be the nature of the product sugar susceptible of creating a distinction in comparison with other agricultural products and which could justify the choice of such a long period. The years 1969 to 1971 constituted, in his view, a relatively remote period whose consideration did not seem justified in the absence of valid reasons. Furthermore, the Australian representative compared statistical averages for seven years (1969 to 1975) with averages based on two years (1976-1977) plus estimates for 1978. A reasonable number of years should be available for consideration in order to take into account certain realities such as the enlargement of the Community. With this in view, it seemed advisable, in his opinion, to start with the year 1972, which immediately preceded the year of the Community enlargement. The year 1977 should be used as the final year of the period to which the complaint could apply since any estimates for 1978 could not serve as an objective basis of judgement. Therefore, he argued, statistical data available for the years 1972-1977 should make it possible to select a three-year representative period, and one suggestion would be to compare the average for the years 1972-1974 with that for 1975-1977.

2.25 He also argued that the most recent representative period could not run beyond the end of 1977. Furthermore, it would not be admissible for new facts which had emerged after the complaint had been filed to be brought before the Panel in the course of its work. Accordingly, he argued that the Panel would have to base its findings on reliable, objective and adequate data, taking into account the time at which the complaint was presented. He furthermore argued that the provisions of Article XVI:3 must be understood to mean that estimates for recent periods, forecasts or projections for future periods, of whatever duration must not be used.

*(c) The question of "Serious prejudice to Australian interests"*

2.26 The Australian representative argued that the Community measures, applied to exports of sugar, had caused or threatened to cause, serious prejudice to Australian interests and had adversely affected the world sugar market to the detriment of other members of the General Agreement. He said that this price response was due to the low elasticity of demand for sugar which meant that an increase in supply results in a disproportionate decline in price. He, therefore, argued that the Community export subsidies had been excessive, that Community sugar exports had increased while at the same time, there had been a sharp fall in world sugar prices. He also argued that the Community measures had caused considerable instability in world sugar trade and the growing availability of subsidized Community sugar on the world market had displaced traditional suppliers who were thus forced to accept greatly diminished returns in order to sell their products. He further argued that Australia's right to increase its own market share and the foreign exchange earnings of the Australian sugar industry had been adversely affected, and that this had resulted in diminished returns to Australian producers, which had fallen from \$A 308.60/ton in 1975/1976 to \$A 231.34/ton in 1977/1978. This 25 per cent reduction reflected an even steeper decline of 40 per cent in the world free market price over the same period.

2.27 The representative of the European Communities representative argued that as Australia had not provided any element for assessing the serious prejudice caused or threatened, it was impossible to judge the nature of the alleged prejudice. He also argued that Australia had maintained its share of the world market and often appreciably increased it in major Australian export outlets, that Community exports to those markets had remained insignificant and that there was no evidence of serious prejudice to Australian interests. With respect to the decline in export earnings, the European Communities had suffered the consequences of the situation determined by world exporters as a whole and should not be held responsible for low prices or market instability. Furthermore, he argued that Australia, like other countries, had pursued a policy designed to stabilize the domestic price of sugar at a level that had no direct link with the prices quoted on the world market. On the whole, it could be considered that 60 to 65 per cent of the Australian sugar production had, during the years 1975 to 1977, benefited for one

part from internal prices and for another part from special export prices.

2.28 The Australian representative observed that the purpose of the Panel's examination was not to judge Australia's domestic stabilization scheme. He stated that Australia's scheme is not regarded as providing a subsidy in terms of GATT rules as it clearly allows for export prices to exceed domestic prices, and no Government funds are involved. He added that in Australia, unlike the European Communities there were strict controls over area planted and production levels to ensure that production corresponds with the requirements of the domestic market and reasonably assured export markets.

(d), (e) *The Community system "had nullified or impaired benefits accruing either directly or indirectly to Australia under the GATT, and had impeded the attainment of the objectives of the General Agreement".*

2.29 The Australian representative argued that a *prima facie* case of nullification or impairment existed when measures were applied in conflict with GATT provisions. In such a case it would not be necessary to prove injury or to cite the GATT benefits affected. He argued that the adverse effect of the Community measures on world sugar trade and export earnings from sugar had been such as to impair benefits Australia expected under the GATT, thereby impairing the ability of contracting parties to participate more fully in world trade and impeding the attainment of the objectives of the General Agreement. He further argued that the question of the degree of economic impairment was not before the Panel and was not a specific element of the Australian complaint. However, he believed that there was sufficient evidence in this case to justify the determination that the Community measures had had the effect of nullifying or impairing benefits accruing to Australia under the GATT and hindering the attainment of GATT objectives in which case it might be necessary to determine the degree of economic impairment.

2.30 The representative of the European Communities argued that "nullification or impairment" must be shown to have had a real and specific content in practical terms. Otherwise it would have no concrete meaning. In the circumstances this formulation, being vague and rather broad, might be subject to examination from the economic point of view, in particular from that of the development of Australia's sugar production and trade. He argued that the Australian complaint, as expressed, was not justified as Australian sugar production and exports had shown marked progress during the period under consideration.

### III. *Factual aspects*

#### (a) *The sugar market system of the European Communities*

3.1 The common organization of the market in sugar was originally established by Regulation (EEC) No. 1009/67 of the Council, of 18 December 1967. The single market in sugar came into force on 1 July 1968. Regulation (EEC) No. 1009/69 remained applicable until the end of the 1974/75 sugar year, when it was replaced by a new basic regulation (Regulation (EEC) No. 3330/74 of the Council of 19 December 1974) applicable to the sugar years 1975/76 to 1979/80.

3.2 The Panel's examination of the Community system was *inter alia* focused on: Regulation (EEC) No. 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar; as last amended by Regulation (EEC) No. 1396/78 of 20 June 1978; Regulation (EEC) No. 766/68 of the Council of 18 June 1968 laying down general rules for granting export refunds on sugar, as last amended by Regulation (EEC) No. 1489/76; and Regulation (EEC) No. 394/70 of the Commission of 2 March 1970 on detailed rules for granting export refunds on sugar, as last amended by Regulation (EEC) No. 1467/77. A description of some major provisions is given below, which is however not exclusive with respect to the elements taken into consideration by the Panel.

3.3 The common agricultural policy on sugar has two main objectives: to ensure that the necessary guarantees in respect of employment and standards of living in a stable market are maintained for Community growers of sugar beet and sugar cane; and to help guarantee sugar supplies to the entire Community or to one of its regions. In order to achieve those objectives, the common organization of the market in sugar introduces a single system of internal prices and a common trading system at the external frontiers of the Community (Regulation No. 3330/74, preamble).

3.4 Within the Community, the price level is established each year and is linked to a "target price" for white sugar (standard quality unpacked, ex-factory, etc.) which is determined for the Community area having the largest surplus, i.e. for the area in which the price is lowest (Article 2).

3.5 At the operational level, the "intervention price" - lower than the target price (see Article 11) - is the price at which the intervention agencies of the member States are required to buy in sugar offered to them which has been manufactured in the European Communities (Article 9). Basically, this price is fixed at the same time as the target price and covers the same period, the same product and the same area. For other areas, however, derived intervention prices are fixed in the light of the regional variations which, given a normal harvest and free movement of sugar, might be expected to occur in the price of sugar under natural conditions of price formation (Article 3). In fact, the earnings of the sugar industry are determined by prices very near the intervention price.

3.6 Lastly, by the same procedure, a minimum price is fixed for each producing area, payable by the manufacturer to beet producers at a specified delivery stage and for a specified quality. The minimum price is derived from the intervention price for white sugar in the area in question, i.e. it is adjusted by fixed values identical for the entire Community representing such factors as the processing margin, the yield, and certain additional costs and receipts (Articles 4 and 5). Conditions for purchasing sugar cane are fixed only in the absence of agreements within the trade between producers and manufacturers.

3.7 Different minimum prices are established depending on whether the beet delivered is or is not within the basic quota (Articles 4 and 28). For, since the price system is designed to influence the production of sugar beet and cane (see preamble), there is a system of quotas. A basic quota is allotted to each undertaking within the basic quantities assigned to each country or area of the European Communities (Article 24). This quota (quantity A) may be increased by a quantity B, which has a linear relationship to quantity A; the sum of these two quantities (A and B) constitute the maximum quota. The determination of this quantity takes into account the trend of production and marketing opportunities (Article 25). Quantity C is the quantity produced in excess of the maximum quota (see Article 26).

3.8 These quotas are of decisive importance for the application of the system of internal prices, since for quantity A (basic quotas), the beet producer receives not less than the minimum price fixed and the manufacturer receives not less than the intervention price. For quantity B, the minimum price of the producer is lower and the manufacturer is required to pay the State a production levy. This levy is designed to make up for or, as the case may be, to limit the costs incurred by the Community in marketing the quantity of sugar produced beyond the so-called guaranteed quantity.<sup>1</sup> The production levy may not, however, exceed 30 per cent of the intervention price (Article 27). For quantities of beet exceeding the maximum quota, manufacturers, if not otherwise required by the regulations, determine prices to beet producers in the light of conditions on the world sugar market.

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<sup>1</sup>The guaranteed quantity is equal to human consumption in the Community less the quantity imported on preferential terms (Lomé) but may in no case be less than quantity A.

3.9 The quotas also have a function in the common trading system, in that the quantity C must be exported (unless there is a shortage within the European Communities) and does not entitle the exporter to a refund (Articles 19 and 26).

3.10 The trading system with third countries is designed to prevent price fluctuations in the external market from affecting prices ruling within the European Communities. It does so by compensation of the difference between the prices prevailing outside and inside the European Communities when transactions - imports or exports - take place with third countries (preamble).

3.11 As regards imports, the system operates on the basis of a "threshold price" for white sugar, raw sugar and molasses fixed each year for the entire Community. It is based on the target price for the Community area having the largest surplus plus charges for transport from that area to the most distant deficit area (Article 13).

3.12 In the case of imports, a levy is charged which is equal to the threshold price less the import price (Article 15). This import price is either a c.i.f. price fixed in advance or, if it is less, the offer price in the case in question (Article 14). Where, on the other hand, the import price (c.i.f. price) is higher than the threshold price and the supply situation so requires, a subsidy for imports may be granted (Article 17).

3.13 Contrariwise, to the extent necessary to enable products to be exported, a refund is granted to cover the difference between the world market price and prices within the Community (Article 19), i.e. in practice, the intervention price (see for example Article 3 of Regulation No. 766/68).

3.14 These refunds are granted only for sugar obtained from beet or cane harvested within the community or imported under the Lomé Convention or the Cane-Sugar Agreement concluded with India (Regulation No. 766/68).

3.15 Depending on the methods of application, export refunds are granted either under a general procedure, or by way of tender.

3.16 According to the general rules, periodic refunds are to be fixed every two weeks. The fixing takes into account such elements as the situation on the Community and world markets in sugar, in particular the intervention price, transport costs, trade expenses and packing charges, quotations on the world market, and the economic aspect of the proposed exports.

3.17 The amount of the refund may also be fixed by tender. As a matter of fact, most exports are made under the tender procedure. In that case, a maximum amount of the refund is fixed, taking account of the situation within the European Communities with regard to the supply situation and prices, prices and potential outlets in the world market and costs incurred in exporting sugar. Any application for a refund which exceeds the maximum fixed is to be rejected. For other applications, the amount of the refund will be that appearing in the respective application. The maximum amount determines also, indirectly, the quantity assigned for each tender.

*(b) Some features marking the world sugar economy*

3.18 World sugar production reached almost 92 million tons in 1977 and had been steadily increasing from its level of less than 70 million tons in 1969. Total world consumption of sugar also increased from 68 million tons in 1969 to 84 million tons in 1977. During the period 1969 to 1977 world trade in sugar varied between 18.5 million tons in 1969 and 28 million tons in 1977 while total world stocks of sugar on 31 December varied between 28 million tons in 1974 and 43.5 million tons in 1977. Sugar prices have been very sensitive to the balance between supply and demand. While for 1970, the annual average of the ISA Daily Price (raw sugar, f.o.b. and stowed Caribbean port in bulk) was 3.68 US cents

per pound, the annual average for 1974 reached almost 30 US cents per pound and the monthly average for November 1974 was more than 56 US cents per pound.

3.19 During the period between 1971 and 1974, world consumption exceeded world production and in 1974 world sugar stocks fell to the lowest level ever seen. During the same period world prices followed a rising pattern, reaching exceptionally high levels in the third quarter of 1974. In 1975, however, there was a reversal of the supply and demand situation, owing to the fact that world production increased while consumption declined by some three million tons. In 1976 and 1977, world sugar production continued to increase at an even faster rate. In 1977, it was 32 per cent higher than in 1969 and 16 per cent higher than in 1974. In 1977, the crop area of beet was 850,000 hectares greater than in 1974. As to consumption, it too had continued to rise in recent years. The rise was slower, however, than that of production and consequently, in 1977, world stocks reached a record level, exceeding the average level of the 1969-1975 period by 30 per cent. In the summer of 1978, world prices fell to their lowest level since 1971. The situation improved somewhat towards the end of 1978.

3.20 The International Sugar Agreement, 1968, entered into force in 1969. Owing to rising prices on the world market, the basic export tonnages stipulated by the Agreement were raised in 1970 and 1971 and suspended in 1972, when, moreover, reserve stocks were released. The Commonwealth Sugar Agreement expired in 1974 and was replaced by a protocol concerning sugar annexed to the Lomé Convention whereby the European Communities undertook to import at guaranteed prices a total of 1.3 million tons of sugar (refined sugar equivalent) from a number of developing countries.

3.21 In 1978, world trade in sugar was at about the same level as in the preceding years with the sole exception of 1977, during which it established an all-time record, with world exports of more than 28 million tons of sugar (raw sugar equivalent). As 1977 was the year which preceded the entry into force of the new International Sugar Agreement, 1977 (ISA), this may have had a certain influence on that fact. In 1978, the first year of the provisional entry into force of the ISA, the exporting countries which had acceded to it - had to limit their exports to their minimum levels, i.e. 81.5 or 85 per cent of the basic export tonnages provided for by the Agreement, owing to the depressed prices on the world market. The European Communities, for their part, had not acceded to this Agreement.

#### IV. *Findings*

##### *(a) Introduction*

4.1 The Panel has carried out its considerations of the matter referred to it for examination in light of its terms of reference as expressed in paragraph 1.3. It has based its considerations on arguments presented to it by the parties to the dispute (Chapter II) and on various factual information which was available to it, notably that concerning the sugar market system of the European Communities and features of the world sugar market (Chapter III).

4.2 The Panel noted the provisions Of Article XVI and also Notes and Supplementary Provisions concerning that Article, and in particular the last sentence of the Notes to Article XVI:3 which says:

"Notwithstanding such determination by the CONTRACTING PARTIES, operations under such a system shall be subject to the provisions of paragraph 3 where they are wholly or partly financed out of government funds in addition to the funds collected from producers in respect of the product concerned."<sup>1</sup>

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<sup>1</sup>BISD, Vol. IV, page 68

4.3 When examining the Community system for granting refunds on exports of sugar, the Panel found that such refunds were granted to enable Community sugar to be exported and that the refunds thus granted were financed out of the European Agriculture Guidance and Guarantee Fund. The Panel considered this Fund to be a government fund of the type mentioned in the Note to Article XVI:3 quoted above.

4.4 The Panel therefore concluded that the Community system for granting refunds on exports of sugar must be considered to be a form of subsidy and which was subject to the provisions of Article XVI. The Panel found that the parties to the dispute were in agreement with this interpretation.

4.5 The Panel noted that under Article XVI, contracting parties had some basic obligations:

- (a) to notify in writing to the CONTRACTING PARTIES the application of any subsidy. Moreover, contracting parties shall submit regularly responses to a questionnaire on subsidies giving details on the nature and extent of the subsidy and the effect of that subsidy<sup>1</sup> (Article XVI:1);
- (b) to discuss (or consult) with another contracting party of parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization in cases in which it is determined that serious prejudice is caused or threatened to another contracting party (Article XVI:1);
- (c) seek to avoid the use of subsidies on exports of primary products. If export subsidies are nevertheless applied to such products, the subsidized exports shall be kept within certain more or less strict limits, i.e. "shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product" (Article XVI:3).

4.6 The Panel draws attention to the fact that the five points listed in the Australian complaint are to some extent interrelated and therefore the following considerations may not necessarily follow the structure of the complaint as set out above (paragraph 2.1).

*(b) Consistency with procedural provisions of Article XVI:1*

4.7 In examining the Australian complaint that the European Communities had not complied with the terms of Article XVI:1, the Panel noted that the European Communities had notified, on a regular basis, its system of export refunds on sugar pursuant to Article XVI:1.

4.8 As both parties seemed to agree that bilateral consultations had taken place on the matter, apparently without concrete results, the Panel felt that it had not been requested to examine the question of whether or not the European Communities had met its obligations to discuss with other parties.

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<sup>1</sup>BISD 9S/193, 194; BISD 11S/58, 59.

(c) *Consistency with Article XVI:3*

(i) *World export trade*

4.9 The Panel considered that its examination should be based not on the concept of "free market" introduced by Australia in presenting its contentions (see paragraph 2.20) but on the concept of "world export trade" mentioned in Article XVI:3 of the General Agreement. In that connection the Panel referred back to various discussions that had taken place in the past regarding the term "world export trade" and its interpretation.<sup>1</sup> In the event, the Panel did not consider it necessary for the purpose of determining whether a market share was a "more than equitable share of world export trade" to establish market shares in relation to concepts other than those of total world exports, taking into account the fact that a consideration of shares of the free market involved methodological difficulties that would make any comparison difficult.<sup>2</sup>

(ii) *Time periods considered*

4.10 The Panel noted that the Australian complaint referred to the post-1975 period. Regarding the years preceding the period subject to complaint, the Panel felt that 1975 did not appear to be sufficiently representative, as world market prices were abnormally high in 1974/1975. The strong rise in sugar prices in 1974 was mainly due to the fact that for the fourth successive year total world consumption exceeded world production and stocks were declining, and the supply situation was particularly bad in Europe. Mainly due to a bad crop in 1974, there was a shortage of sugar in the European Communities in 1974/1975, and some exports were delayed from 1975 to 1976. The Panel also had some doubts as to whether 1974 would qualify as a fully representative year, but nevertheless thought that the years 1972 to 1974 would still be an acceptable approach. The three most recent calendar years for which market conditions could be considered as normal were then 1971 to 1973, or with some reservations 1972 to 1974. Furthermore, 1977 could also be compared to an average of 1972, 1973 and 1976. In view of the difficulties involved in selecting what could be considered to be the "previous representative period", the Panel felt it necessary to consider various alternatives and to make a set of comparisons.

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<sup>1</sup>Discussions at the ninth session of the CONTRACTING PARTIES (1955) (SR. 9/41, page 6) and those of the Panel on French assistance to exports of wheat and wheat flour (1958), (BISD, 7S/52).

<sup>2</sup>With respect to export statistics, the International Sugar Organization (ISO) gives the following definition of the term "free market": "Free market means the total arrived at by adding together each country's net exports after deducting its net exports, if any, under special arrangements" (Sugar Yearbook 1977, page 347). This definition is based on a series of definitions approved by the International Sugar Council in May 1978 (Statistical Rules under the ISA, 1977, Rule S-1). It might be noted that the definition contained in Article 2 (13) of the International Sugar Agreement, 1977, itself is slightly different and only refers to imports: "Free market" means the total of net imports of the world market, except those resulting from the operation of the special arrangements referred to in Chapter IX of this Agreement; ...". It is notably the term "special arrangements" which causes the main difficulties. In its present form, the definition of "free market" has been applied only from January 1978, and data for 1970 to 1977 have been calculated according to the new definition. As an illustration: until 1975, certain imports into the United Kingdom (Commonwealth Sugar Agreement) and the United States (US Sugar Act) were in fact taking place under special arrangements (i.e. outside the "free market"). This means that the ISO figures for "net exports of sugar to the free market" for the years 1970 to 1977 contain a varying amount of trade which has actually taken place under special arrangements (i.e. outside the "free market"). Furthermore, the figures show "net exports" and not total exports. All this had resulted in some particular results, notably for the European Communities, mainly because the European Communities is at the same time an importer and an exporter of sugar.

TABLE 2  
EUROPEAN COMMUNITIES:  
SHARES OF WORLD EXPORT TRADE IN SUGAR  
(in per cent of world totals)

*Previous representative periods:*

1971 to 1973		7.8
1972 to 1974		7.5
1972, 1973 et 1976	8.5	

*Periods subject to complaint:*

1976 to 1977		9.0
1976		8.3
1977		9.6
1978 (preliminary)		14.3

(iii) *Equitable share*

4.11 The Panel noted that no definition of the concept "equitable share" had been provided, and neither had it in the past been considered absolutely necessary to agree upon a precise definition of the concept. The Panel felt that it was appropriate and sufficient in this case to try to analyse main reasons for developments in individual market shares, and to examine market and price developments, and then draw a conclusion on that basis.

(iv) *Market shares*

4.12 Table 2 shows the European Communities' share of world export trade in sugar for some previous representative periods and for periods subject to complaint. Table 3 is a compilation of the comparisons the Panel made in order to determine the direction and magnitude of the changes in Community market shares. The Panel found that the final result was very much the same whichever of the previous representative periods was used for comparison. In any case it appeared that the Community market share had increased in 1976 and 1977 compared to previous periods. The increase in the Community market shares for both 1976 and 1977 was nevertheless rather small, in no case exceeding 2.1 percentage points, which was the increase for 1977 compared to 1972-1974.

TABLE 3  
EUROPEAN COMMUNITIES:  
CHANGES IN SHARES OF WORLD EXPORT TRADE IN SUGAR

(in per cent of world totals)

Community market shares in periods subject to complaint	Community market shares in previous representative periods		
	1971-73 7.8	1972-74 7.5	1972, 1973 and 1976 8.5
	Changes in percentage points		
1976-77      9.0	1.2	1.5	
1976          8.3	0.5	0.8	
1977          9.6	1.8	2.1	1.1

4.13 In 1978, the Community export system with respect to sugar remained the same as in previous years. However, the Panel felt that this year constituted a special case, for the following two reasons: at the time when Australia presented its complaint, the year 1978 had not yet ended and the data for that year were not formally finalized at the time the Panel drew its conclusion; 1978 was also the year in which the International Sugar Agreement, 1977, came into operation modifying certain elements of the international sugar market. Despite these facts the Panel nevertheless felt that the year 1978 should be taken into consideration, be it on the basis of preliminary data noting that this would be in conformity with earlier practice.<sup>1</sup>

4.14 An examination of available data for 1978 indicated that Community sugar exports had increased from 2.7 million tons in 1977 to 3.6 million tons in 1978. The share of Community sugar exports in world exports exceeded in 1978 14 per cent which meant a level 5-6 percentage points higher than the market shares in various reference periods considered. This increase in the Community market share corresponded to roughly 1.5 million tons of sugar.

4.15 With respect to the year 1978 the Panel, in addition, noted that the International Sugar Agreement, 1977 (ISA) came into operation on 1 January 1978. Australia limited its exports in accordance with obligations it had taken upon itself under that Agreement. The European Communities did not participate in the ISA.

4.16 The Panel therefore concluded that given the significant increase of Community exports in 1978 both in absolute and relative terms it was justified to examine more thoroughly the conditions under which this development took place.

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<sup>1</sup>BISD, 25S/48.

(v) *Displacement*

4.17 The Panel was of the opinion that the term "more than an equitable share of world export trade" should include situations in which the effect of an export subsidy granted by a signatory was to displace the exports of another signatory, bearing in mind the developments in world markets. With regard to new markets, traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated, should be taken into account in determining what would be "more than an equitable share of world export trade".

4.18 The Panel therefore proceeded to a detailed examination of sugar export statistics, notably in order to see if and to what extent the increased Community sugar exports had displaced Australian sugar exports.

4.19 The Panel noted that total Australian sugar exports had shown a fairly steady increase up to 1978, while Australia's share of world export trade had on the average remained fairly stable with three-year averages for both 1971 to 1973 and 1972 to 1974 at 9.5 per cent and the average 1976 and 1977 at 11.1 per cent. For 1978, the Panel estimated the market share of Australia to be around 8 per cent. In the latter year, Australian export had been limited by obligations under the ISA. However, Australia had fulfilled, and even exceeded, its ISA quota in effect for 1978.

4.20 An examination of individual markets enabled the Panel to distinguish between the following five groups of markets, for which data are shown in Table 4.

Group I: Countries where both Australia and the European Communities sold sugar in recent years, directly competing with each other

Group II: Australian exports to the European Communities

Group III: Major outlets for Australian exports

Group IV: Certain markets in the Mediterranean area, Middle East and Africa

Group V: Other destinations.

4.21 Group I (countries where both Australia and the European Communities had sold sugar in recent years, directly competing with each other) in Table 4 consists mainly of China, the United States and the USSR. For this group as a whole, both Australian and Community sales increased in 1976 and 1977, but declined strongly in 1978 by 123,000 tons for the European Communities and by 428,000 tons for Australia. In the case of Australia, the decline in 1978 was due to a reduction in sales to China and the United States, while for the European Communities a strong decline in sales to the USSR was only partly compensated for by increased sales to China and the United States. In the case of the United States, Community exports increased for the third consecutive year, while Australian exports to that market showed a strong decline in 1978. However, the increase in Community exports to the United States for 1978 corresponded to less than 10 per cent of the decrease in Australian sugar exports to that market. In the case of China, Community sales which had been negligible until 1978, reached 93,000 tons or approximately 6 per cent of total imports into China in that year. This might have partly replaced Australian sales to this market, which fell by 138,000 tons from 1977 to 1978, but it must be noted that also supplies from other sources (e.g. Cuba and India) at the same time increased considerably.

TABLE 4  
EXPORTS OF SUGAR - EUROPEAN COMMUNITIES (E.C.)<sup>a)</sup> AND AUSTRALIA (Au)  
(thousand tons - raw value)

A: total; B: increase or decrease from previous year

Origin	Destination	Group I		Group II		Group III		Group IV		Group V - Other		Group VI - World	
		A	B	A	B	A	B	A	B	A	B	A	B
1969	EC	64	- 31	-	-	4	- 23	75	- 90	665	- 290	808	- 434
	Au	177	- 13	362	- 197	960	- 358	-	-	47	- 387	1546	- 639
1970	EC	92	+ 28	-	-	22	+ 18	132	+ 57	933	+ 268	1179	+ 371
	Au	193	+ 16	434	+ 72	1005	+ 45	-	-	28	- 22	1660	+ 114
1971	EC	77	- 15	-	-	11	- 11	302	+ 170	898	- 35	1288	+ 109
	Au	233	+ 40	538	+ 104	984	- 21	-	-	24	+ 14	1779	+ 119
1972	EC	99	+ 22	-	-	-	- 11	666	+ 364	1155	+ 257	1920	+ 632
	Au	432	+ 199	464	- 74	1338	+ 354	59	+ 59	21	- 3	2314	+ 535
1973	EC	4	- 95	-	-	-	-	778	+ 112	1134	- 21	1916	- 4
	Au	418	- 14	361	- 103	1345	+ 7	-	- 59	-	- 21	2124	- 190
1974	EC	-	- 4	-	-	-	-	297	- 481	831	- 303	1128	- 788
	Au	305	- 113	383	+ 22	1137	- 208	-	-	3	+ 3	1828	- 296
1975	EC	-	-	-	-	-	-	289	- 8	413	- 418	702	- 426
	Au	534	+ 229	17	- 366	1427	+ 290	-	-	-	- 3	1978	+ 150
1976	EC	317	+ 317	-	-	-	-	832	+ 543	720	+ 307	1869	+ 1167
	Au	602	+ 68	178	+ 161	1839	+ 412	-	-	2	+ 2	2621	+ 643
1977	EC	335	+ 18	-	-	3	+ 3	1300	+ 468	1061	+ 341	2699	+ 830
	Au	729	+ 127	30	- 148	2206	+ 367	-	-	-	- 2	2965	+ 344
1978	EC	212	- 123	-	-	10	+ 7	2177	+ 877	1167	+ 106	3566	+ 867
	Au	301	- 428	-	- 30	1700	- 506	-	-	1	+ 1	2002	-
												3	96

a) Excluding intra-Community trade.

Note: Group I: P.R. China, Finland, US and USSR; Group II: EC; Group III: Canada, Oceania, Papua and New Guinea, Japan, Malaysia, New Zealand, Singapore and Korea Rep.; Group IV: Algeria, Iraq, Iran, Israel, Kuwait, Lebanon, Morocco, Nigeria, Sudan, Syria, Tunisia, Persian Gulf, Saudi Arabia, Yemen D.R.; Group V: All other; Group VI: World.

4.22 Group II in Table 4 shows Australian exports to the European Communities. The Panel noted that following the enlargement of the European Communities in 1973, and the termination of the Commonwealth Sugar Agreement in 1974, Australian sugar exports to the Community market fell sharply and were negligible in 1978.

4.23 Group III (major outlets for Australian exports) in Table 4 consists of Canada, Japan, Malaysia, New Zealand, Singapore, the Republic of Korea and neighbouring Pacific islands where Australian sugar exports had benefited from preferential tariffs or long-term trade agreements and which may have so far prevented damage from Community competition. These outlets accounted for more than 60 per cent of Australian sugar exports up to 1975 (i.e. before the Commonwealth Sugar Agreement was abolished), in 1975 to 1977 for 70 to 74 per cent and in 1978 for 85 per cent of total Australian exports. Australian exports to these markets showed a strong expansion from 1974 to 1977, when they were nearly doubled. The decline in Australian sales to these markets in 1978 should be seen in relation to Australian commitments under the ISA. Community sales to these markets remained insignificant throughout the period under consideration.

4.24 The increase in Community sugar exports in recent years was mainly due to increased sales to certain markets in the Mediterranean area, the Middle East and Africa (Group IV in Table 4), (i.e. Algeria, Iraq, Iran, Israel, Kuwait, Lebanon, Morocco, Nigeria, Persian Gulf, Saudi Arabia, Sudan, Syria, Tunisia, the Arab Republic of Yemen and the People's Republic of Yemen). These markets accounted for almost one half of the Community sugar sales in 1976 and 1977 and the increase in sales to these markets accounted for 47 and 56 per cent respectively of total increase in Community exports. In 1976, these outlets accounted for more than 60 per cent of total Community sugar exports, and the increase in Community sales to these markets exceeded the total increase in Community sugar exports from 1977 to 1978. Apart from sales of 59,000 tons to Algeria, Morocco and Tunisia in 1972, Australia had not been exporting to any of these markets in the period under consideration.

4.25 Group V in Table 4 (other destinations) consists of about sixty markets where the European Communities had traditionally been the major, if not the only, supplier at least for refined sugar. The increase in Community exports to this group of markets was significant in the years 1976-1978, while Australian supplies to these markets had remained insignificant.

4.26 The Panel therefore found that there was not sufficient evidence to state that the increased Community exports in recent years had to a considerable extent directly displaced Australian exports from world markets although it should not be excluded that Community exports to China in 1978 could partly have replaced Australian supplies.

4.27 When considering a possible indirect displacement of Australian sugar exports by increased Community exports with refunds, the Panel noted that while Community exports consisted of refined white sugar, Australian exports were predominantly of raw sugar with only about 30,000 tons of refined sugar having been exported to neighbouring Pacific islands. Australian exports of raw sugar had consequently been limited to markets where the sugar could be further refined, while Community exports of refined sugar were spread over a larger number of markets, often without local refining facilities or where the capacity of the local refining industry was insufficient to handle increased imports of raw sugar. However, in countries where refining facilities existed, raw sugar could nevertheless be replaced by white sugar.

TABLE 5  
EUROPEAN COMMUNITIES:  
EXPORTS OF SUGAR TO SELECTED MARKETS  
('000 tonnes raw value)

	1972	1975	1976	1977	1978
Chile	2	-	-	26	54
China	-	-	-	-	93
Egypt	1	-	11	14	110
Iran	13	14	12	166	556
Lebanon	11	19	36	150	72
Morocco	-	-	12	83	104
Portugal	8	-	10	19	33
Sri Lanka	-	-	-	3	64
Syria	-	-	21	3	68
Tunisia	50	41	79	88	158
USSR	67	-	300	270	42
United States	21	-	17	49	77
Venezuela	-	-	24	-	66
	173	74	522	871	1,497

*Source:* International Sugar Organization.

4.28 The Panel noted some information concerning Community exports to markets which have traditionally been regarded as important outlets for raw sugar (Table 5). The figures in the table show a strong increase in Community exports of white sugar to these markets since 1976, i.e. when the world market prices for sugar were low, and the difference in quotations between white sugar and raw sugar did not constitute a reasonable margin for costs of refining, packaging and difference in sucrose content. The Panel felt that the figures shown in Table 5 indicated fairly clearly that Community exports of white sugar had expanded in some traditional raw sugar markets and that this could be related to the small difference between prices for white and raw sugar since 1976. Raw sugar displaced from these markets by Community white sugar might have exercised a pressure on residual raw sugar markets. Increased community white sugar exports to the markets listed in Table 5 could therefore have resulted indirectly in some replacement of Australian raw sugar in other markets or in reduced opportunities for Australian sales in various markets. However, the Panel did not exclude the possibility that increased Community sales of white sugar might be a result of re-export of raw sugar imported by the European Communities under special arrangements (*trafic de perfectionnement*). It did not consider the information in Table 5 to constitute clear evidence that Australian raw sugar exports had thus been indirectly displaced by Community exports of white sugar. The Panel nevertheless felt that a continuation of subsidized Community sugar exports could constitute a menace or threat to Australian raw sugar exports in the future, for instance when current bilateral agreements between Australia and some importing countries expired.

(vi) *Effects of the operation of Community regulations*

4.29 The Panel proceeded to an examination of whether the increase in 1976 to 1978 in Community sugar exports, notably the increase in the Community share of world sugar export trade could be attributed to the operation of the Community regulations. With regard to production, the Panel noted that the Community system may put an economic but not necessarily legal limit to the size of the

production.

4.30 Some basic data for production, trade, consumption and stocks of sugar, for Australia and the European Communities are shown in Annex Table I<sup>1</sup>, and, for comparison, world totals for the same in Annex Table II<sup>1</sup>. A simple comparison of the figures in these tables indicates that the increase in the Community sugar production corresponded roughly to the world average until 1978. For illustrative purposes, it can be mentioned that the Australian sugar production showed a stronger increase until 1978, when the area harvested was however reduced by 44,000 hectares, resulting in a reduction in production.

4.31 Graph 1<sup>2</sup> shows developments in Community sugar production, consumption and target prices since 1969. Up to 1977 the Community area under sugar beet increased with the increase in the Community target price, the price policy apparently being a stimulating factor. Although the increase in the target price was halted in 1977, and the area of sugar beet was reduced, total Community sugar production continued to increase because of higher average yields. It can be seen from Annex Table I and Graph 1 that there was a downwards shift in the Community sugar consumption in 1975 contributing, together with a continued growth in production, significantly to increased exportable surpluses of sugar.

4.32 The Panel noted that the fixing of production quotas was of decisive importance for the application of the price system for sugar in the European Communities. It also noted that in 1975 the basic quota was raised from 7.82 million tons to 9.14 million tons and the maximum quota was maintained at 145 per cent of the basic quota. The basic quota was then maintained in the following years, but the maximum quota was reduced first in 1976 (to 135 per cent) and again in 1978 (to 127.5 per cent) (Annex Table VIII)<sup>1</sup>. Furthermore, the Panel noted that sugar produced in excess of the basic quota, but within the limits of the maximum quota, was subject to a production levy of up to 30 per cent of the intervention price. Although this step resulted in a smaller area planted with sugar beets in 1977 and 1978, total production continued to increase, as yields were higher. The steps taken were therefore not sufficient to prevent the exportable surplus from increasing further in 1977 and 1978.

4.33 The Panel understood the community system of regulations concerning the sugar Markets to imply that the quantity exported from the European Communities with an export refund would be limited by the total of maximum production quotas, plus imports under special arrangements minus domestic consumption. Any sugar produced in excess of maximum quotas must be disposed of on external markets without benefiting from any refund. Table 6 shows Community exports totally and with a breakdown into exports with refunds and exports without refunds in 1972-1978. A comparison of figures for 1976, 1977 and 1978 with averages for 1972-1974, indicates clearly that the increase in Community sugar exports in 1976-1978 mainly consisted of increased exports with export refunds, i.e. sugar produced within the maximum quota. Both in 1976 and 1977, exports without refunds were inferior to the average for 1972-1974. Although Community exports without refund (C - sugar) showed some increase in 1977 and 1978, the reduction in maximum quotas and the application of production levies had not prevented that exports with refund continued to increase even in 1978, and still counted for 76 per cent of Community sugar exports.

4.34 The Panel also noted the strong increase in the total amount spent by the European Communities on refunds of sugar in 1977 and 1978. This increase was partly due to larger exports entitled to refund and to falling world market prices, but the Panel noted that the increase was also partly due to an increase in the Community market intervention price for sugar. When examining the question of whether Community export refunds could be subject to budgetary limits, the Panel noted that if the appropriations originally allocated to the Guarantee Section of the European Agriculture Guidance and Guarantee Fund

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<sup>1</sup>The Annex is not reproduced.

<sup>2</sup>The Graph is not reproduced.

proved to be insufficient in any particular year, the Commission could have recourse to a supplementary budget during the financial year and there would thus be no legally fixed budgetary limits for how much could be spent on export refunds for sugar.

4.35 The Panel felt that in those conditions neither exportable surpluses of sugar nor the amount of refund granted had been effectively limited as a result of the Community system or its application. There was no element in the system and its application that would prevent the European Communities from having more than an equitable share of world export trade in sugar.

TABLE 6  
EUROPEAN COMMUNITIES: SUGAR EXPORTS BY CATEGORY,  
TOTAL AMOUNTS OF REFUNDS  
AND PRODUCTION LEVY 1972 TO 1978

Year	Exports - thousand tons (raw value)				Amounts in million u.a.		
	Total	With refund (A and B - sugar)		Without refund (C - sugar)	Total refund	Production levy	
		Total	of which				
			Periodic refund				Under tender
1972	1 920	1 223	16	1 207	697	70	86
1973	1 916	1 634	14	1 620	282	56	39
1974	1 128	551	13	538	577	8	0
Average 1972-1974	1 655	1 136	14	1 122	519		
1975	702	645	15	630	57	31	0
1976	1 869	1 802	165	1 637	67	56	0
1977	2 699	2 520	73	2 447	179	363	121
1978	3 566	2 708	2	2 706	858	557	186

Source: The commission of the European Communities.

(d) *Effect on world market prices*

4.36 In examining more in detail the granting of export refunds on sugar by the European Communities, the Panel noted that for the quasi-totality of exports with refunds, the refunds were granted under the tendering procedure (e.g. for 91 per cent in 1976, 97 per cent in 1977 and almost 100 per cent in 1978, - Table 6). Under the tendering procedure, the Commission fixed maximum amounts of refunds and for a given quantity, taking into account the supply situation and prices within the Community, prices and potential outlets on the world market, and costs incurred in exporting sugar. The Commission's determination of what were world market prices for sugar was based on the amount of refund proposed in the tenders which were occasionally based on prices lower than the average

quotations for white sugar published by the Paris Exchange.

4.37 The Panel noted that the weighted average of export refunds usually corresponded to the difference between the Community intervention price at f.o.b. stage and average spot quotations for white sugar on the Paris Exchange. However, towards the end of the crop years 1975/1976, 1976/1977 (and apparently also 1977/1978) the weighted average refund had tended to exceed that difference. The Panel also noted that from the middle of 1976 on, Community export refunds were increased sharply with only little difference between weighted average refunds and maximum refunds. These developments coincided with a sharp decline in world market prices. Furthermore, the premium for white sugar had diminished, and at times white sugar had been quoted at prices lower than those quoted for raw sugar.

4.38 The Panel felt that since the Community sugar exporters were leading the world market for white sugar, traditionally covering more than half of the world market for refined sugar, the availability of exportable Community surpluses of sugar combined with the possibility of non-limited amounts available to cover export refunds, may well have had a depressing effect on world market prices for sugar, both white and raw sugar.

## V. *Conclusions*

In the light of the foregoing findings, the Panel reached the following conclusions:

- (a) The Panel concluded that the Community system for granting refunds on exports of sugar must be considered as a form of subsidy which was subject to the provisions of Article XVI, and it noted that the European Communities had notified their system of export refunds on sugar pursuant to Article XVI:1.
- (b) When examining whether or not the Community system of export refunds on sugar was consistent with Article XVI:3, the Panel first noted that, in spite of various measures taken to limit Community sugar production, the Community regulations on sugar and their operation had not prevented production from continuing to increase, and neither exportable surpluses of sugar entitled to export refunds nor the amount of refund granted had been reduced or limited.
- (c) Examining next the Community share of world export trade in sugar, the Panel noted that that share had increased somewhat in 1976 and 1977, although that increase was not unusual in magnitude. In 1978, however, that share had increased in such proportions that the Panel felt that the situation justified a thorough examination as to whether the Community system of export refunds for sugar had been applied in a manner which had resulted in the European Communities having more than an equitable share in world export trade in sugar. It was evident that the increase in exports was effected through the use of subsidies.
- (d) When examining the development of various sugar markets, the Panel found that, despite the increase in Community exports in 1978, Community sugar exports had directly displaced Australian exports only to a limited extent and in a few markets. Furthermore, increased Community white sugar exports may well have resulted indirectly in reduced opportunities for Australian raw sugar sales in various markets.
- (e) The Panel noted that a substantial share of Australian exports had taken place under long-term bilateral agreements with importing countries. It also noted that the International Sugar Agreement, 1977 (ISA) came into operation in 1978 and that this for its members resulted in a certain contraction in their sugar trade.

- (f) In the light of all the circumstances related to the present complaint, and especially taking into account the difficulties in establishing clearly the causal relationships between the increase in Community exports, the developments of Australian sugar exports and other developments in the world sugar market, the Panel found that it was not in a position to reach a definite conclusion that the increased share had resulted in the European Communities "having more than an equitable share of world export trade in that product", in terms of Article XVI:3.
- (g) The Panel noted however that the Community system for granting refunds on sugar exports and its application had contributed to depress world sugar prices in recent years and that thereby serious prejudice had been caused indirectly to Australia, although it was not feasible to quantify the prejudice in exact terms.
- (h) The Panel found that the Community system of export refunds for sugar did not comprise any pre-established effective limitations in respect of either production, price or the amounts of export refunds and constituted a permanent source of uncertainty in world sugar markets. It therefore concluded that the Community system and its application constitutes a threat of prejudice in terms of Article XVI:1.
- (i) No detailed submission had been made as to exactly what benefits accruing to Australia under the General Agreement had been nullified or impaired or as to which objective of the General Agreement had been impeded, and the Panel did not consider these questions.