

**EUROPEAN COMMUNITIES – EXPORT SUBSIDIES
ON SUGAR**

COMPLAINT BY AUSTRALIA

Report of the Panel

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<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , WT/DS194/R and Corr.2, adopted 23 August 2001
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1677
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<i>US – Sugar</i>	Panel Report, <i>United States Restrictions on Imports of Sugar</i> , adopted 22 June 1989, BISD 36S/331
<i>US – Sugar Waiver</i>	Panel Report, <i>United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions</i> , adopted 7 November 1990, BISD 37S/228.
<i>US – Superfund</i>	Panel Report, <i>United States – Taxes on Petroleum and Certain Imported Substances</i> , adopted 17 June 1987, BISD 34S/136.

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 industry¹. Australia and Brazil held consultations with the European Communities in Geneva on 21 and 22 November 2002 but these consultations did not result in a resolution of the dispute.

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

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

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

1. Terms of reference

1.6 The terms of reference are the following:

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

2. Panel composition

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

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

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

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

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

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

Chairman: Mr Warren Lavorel

Members: Mr Gonzalo Biggs
Mr Naoshi Hirose

3. Third parties

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

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

4. Organizational meeting

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

5. Meetings with the parties and third parties

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

6. Reports

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

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

II. PRELIMINARY RULINGS BY THE PANEL AND OTHER ISSUES

1. Notification of third parties' interest

2.1 In this case, the Republic of Kenya (Kenya) on 26 September, 2003 and the Republic of Côte d'Ivoire (Côte d'Ivoire) on 5 November, 2003 requested to participate as third parties after the ten-day notification period specified by the Chairman of the DSB at the time of the establishment of the Panel,

but before the Director-General was asked by the parties to compose the Panel pursuant to Article 8.7 of the *DSU*. The parties agreed to accept Kenya as a third party but the Complainants objected to the participation of Côte d'Ivoire.

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

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

- (a) the selection and composition of the Panel did not appear to have been adversely affected; and
- (b) the Panel process had not been hampered.

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

2. Third parties enhanced rights

2.5 Prior to the Panel starting work, Mauritius, on behalf of 14 ACP sugar producing countries⁵, requested that the Panel provide the ACP countries with extended third-party rights in the proceedings of the Panel. At the preliminary stage of the dispute, i.e. before any submissions had been made to the Panel, the Panel was not in a position to assess whether the economic situation of any third party would be specifically affected by the outcome of this dispute. However, in light of the importance of trade in sugar for many third parties, the Panel decided, in a ruling dated 16 January 2004, as follows:

"After hearing the parties' views and considering the third parties' written communications on this issue, the Panel invited all third parties to attend the entirety of the first substantive meeting as observers; to make a written submission to the Panel and receive the submissions of the parties and third parties for that meeting; and to present their views orally at a session of that meeting, set aside for that purpose."

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

³ GATT Council C/COM/3.

⁴ Appellate Body Report on *EC – Hormones*, footnote 138.

⁵ Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland, Tanzania and Trinidad and Tobago.

- (a) "the third parties will receive a copy of the written questions to the parties posed in the context of the first substantive meeting of the Panel;
- (b) the third parties will receive the written rebuttals of the parties to the second meeting of the Panel and the parties' replies to the questions mentioned in (i) above;
- (c) the third parties may attend the second substantive meeting of the Panel to take place on 11 and 12 May 2004, as observers (but it is not envisaged that the third parties will provide any further written submission or make an oral statement to the Panel during that second meeting); and
- (d) the third parties will review the summary of their respective arguments in the draft descriptive part of the Panel report."

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

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

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

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

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

2.11 The European Communities opposed⁷ 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.

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

⁷ The Panel received written communications from the European Communities on 3 January 2004 and 15 January 2004. Although not solicited, the Panel also received written communications from three third parties: Fiji on 16 January 2004; Mauritius on 16 January 2004; and Jamaica on 20 January 2004.

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 disclosing statements of its own positions to the public. *Members shall treat as confidential information submitted by another Member to the panel which that Member has designated as confidential.* Where a party to a dispute submits a confidential version of its written submissions to the panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public." (emphasis added)

2.15 The Panel further ruled that "All parties and third parties would thus have to treat as confidential any information identified by a party to this dispute as confidential (including the statistical data from LMC if Australia and Thailand had designated them as such). The parties and third parties shall not disclose any such information without the formal authorization of the party who had designated such information as confidential. In this regard, parties and third parties have the responsibility for all members of their delegation. In particular, no member of the delegation of any party or third party shall disclose to any person outside the delegation any information designated as confidential by a party to the present dispute. Any such information could only be used for the purposes of submissions and argumentation in this dispute."

2.16 The Panel noted also that it had the right not only to receive confidential information, but also to seek it. To this effect, Article 13 of the *DSU* on the Right to Seek Information provides that:

"1. Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such 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* and the Rules of Conduct⁸, it was bound not to disclose, in the panel reports, or in any other way, any information designated as confidential by a party under these procedures.

2.19 Finally, the Panel recalled that it had the right to reconsider the need for additional working procedures for the protection of confidential information if circumstances changed and so warranted such exceptional working procedures after consultation with the parties.

4. *Amicus curiae*

2.20 On 24 May 2004, the Panel received an unsolicited *amicus curiae* brief from Wirtschaftliche Vereinigung Zucker ("WVZ"), an association representing German sugar producers. The Panel invited the parties to make comments thereon, if they so wished. Australia, Brazil and Thailand requested in their comments that the Panel reject the document submitted by WVZ on the grounds, *inter alia*, of due process as well as the late submission of the document. The European Communities did not wish to make any comments on the WVZ document.

5. Breach of confidentiality

2.21 **Brazil** informed the Panel on 2 June 2004 that the *amicus curiae* brief submitted by WVZ disclosed information that Brazil had submitted to the Panel in confidence. Brazil, accordingly, wished to bring this breach of confidentiality to the Panel's attention, and requested that the Panel "investigate how the breach occurred". Thailand supported the request made by Brazil in this regard.

2.22 The **Panel** noted the seriousness of the matter at issue, and invited the parties and third parties to comment on Brazil's allegation, and on the appropriate remedy, "if such a breach had in fact occurred." Such comments were to be submitted by the end of the day on 8 June 2004.

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

2.24 On 4 June 2004, the Panel invited, by letter, comments from the parties and third parties "on Brazil's allegation, and on the appropriate remedy, if such a breach has in fact occurred."

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

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

2.27 The Panel received a response from WVZ on 15 June 2004 in which WVZ indicated that it had been able to examine an attachment to Brazil's submission, the Datagro report, which referred to another LMC study than the one used by WVZ in the document received by the Panel on

⁸ With regard to the obligation of the Panel (and members of the Secretariat) to respect confidentiality, Articles III:2, IV:1 and VII:1 of the Rules of Conduct for the Settlement of Disputes confirm that members of the Panel and Secretariat staff assisting the Panel shall at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential. No covered person shall at any time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.

24 May 2004. According to WVZ, this LMC document was not designated as confidential. It also indicated that WVZ was "not in a position to reveal the source of its information regarding the evidence submitted by Brazil."

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

III. FACTUAL ASPECTS

3.1 The European Communities established, in 1968, a Common Organization (CMO) for Sugar, the main rules of which are today set out in "Council Regulation (EC) No. 1260/2001 on the common organization of the markets in the sugar sector" (the Regulation), dated 19 June 2001. The Regulation is valid for marketing years 2001/2002 to 2005/2006 and the information below refers to those years.

3.2 The Regulation sets out the basic rules with respect to, *inter alia*, the intervention prices for raw and white sugar, respectively; the basic price and the minimum price for beet; A and B quotas as well as C sugar; import and export licences; levies; export refunds; and preferential import arrangements.

1. Product coverage

3.3 The EC sugar regime applies *inter alia* to cane and beet sugar, sugar beet, and sugar cane as well as to isoglucose.⁹ The sugar cane and the sugar beet are primarily transformed into raw sugar and/or white sugar.

2. Quotas

3.4 The sugar regime establishes two categories of production quotas: one for A sugar and the other one for B sugar (see paragraph 3.6). These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies (in EC terminology, "refunds"). The quota system does not involve any limits on the quantities of sugar that may be produced or exported. However, sugar produced in excess of A and B quantities, called C sugar, while not subject to quota, is not eligible for domestic price support or direct export subsidies and must be exported.¹⁰ If no 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

⁹ Article 1 of the Regulation.

¹⁰ Article 10.5 of the Regulation.

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.

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 quality¹⁹ 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 quality²¹ 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 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 adjustments²⁵ 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.

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.

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.

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."

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

²⁷ Article 27 of the Regulation.

²⁸ As referred to in Chapter 2 of Title II of the Regulation.

²⁹ Commission Regulation (EC) No. 1159/2003 sets out detailed rules of application for the importation of cane sugar under certain tariff quotas and preferential arrangements.

³⁰ Article 39 of the Regulation.

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.

[Parties' arguments in Sections IV and V deleted from this version.]

VI. INTERIM REVIEW

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

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

A. EDITORIAL AND OTHER CHANGES

6.3 The parties have suggested a number of editorial changes to the Interim Reports and corrections of typographical errors; parties have also suggested different ways to present their arguments and have sometimes requested that references be added to specific arguments or specific exhibits or that factual statements made by the Panel be deleted. The Panel has largely accepted these suggestions and revised its findings accordingly.

B. TERMS OF REFERENCE

6.4 The European Communities considers that its objections concerning the scope of the terms of reference should be dealt with by the Panel separately with respect to each complaining party, taking into account exclusively what is stated by each complaining party in its own panel request and the arguments/claims made by each of them during the proceedings and the moment at which they were made for the first time by each of them.

6.5 The Panel agrees with the European Communities that each of the Complainants' panel requests must comply with the requirements of Article 6 of the *DSU*. Moreover, while the three disputes dealt with the same matter and were joined pursuant to Article 9 of the *DSU*, Article 9.2 makes clear that in such circumstances the Panel has to ensure "that the rights which the parties to the dispute would have enjoyed had separate panels examined the complaints are in no way impaired".

6.6 In the Panel's view, although the complaining parties drafted their panel requests using slightly different terms³⁴⁵, each of the Complainants' panel requests has identified essentially the same measures – subsidies accorded under EC Council Regulation 1260/2001 under the so-called EC Sugar regime – and the same alleged violation - the European Communities exceeds its budgetary outlays and quantity commitments contrary to Articles 3 and 8 of the *Agreement on Agriculture*. For this reason, after noting the specific language of each panel request, and in light of the fact that the Complainants endorsed each other's factual and legal arguments, the Panel was able to examine the European Communities' allegations concerning the Panel's terms of reference and whether some of the Complainants' arguments could be validly invoked in the course of the present proceedings.

6.7 In particular, the European Communities has argued that each payment discussed by the Complainants constitutes a distinct claim and all these claims (alleged payments) have not been specifically identified in each of the Complainants' Panel requests - and for the European

³⁴⁵ See the full text of the panel requests in Annex D below.

Communities this lacuna cannot be cured by the allegation during the panel process that all Complainants endorsed each other's arguments.

6.8 The Panel agrees with the European Communities that the Complainant's claims must be adequately specified in each of the Complainants' Panel requests. The legal basis of the Complainants' claims is Articles 3 and 8 of the *Agreement on Agriculture*. The Panel is of the view that a claim under Article 3 (and Article 8) of the *Agreement on Agriculture* requires allegations that, first, the European Communities has exported sugar above its commitment levels and, second, that such exports of sugar were subsidized. In the Panel's view, the Complainants have satisfied these requirements adequately. 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*.

6.9 Therefore, the Panel considers that the Complainants' Panel requests complied with the requirements of Article 6.2 of the *DSU* in that they adequately identified the measures at issue and the violations claimed to have occurred, i.e. that the European Communities' exports of subsidized sugar exceeded the European Communities' commitment level contrary to Articles 3 and 8 of the *Agreement on Agriculture*. They further developed in their written or oral submissions argumentation as to how and why in their view, exports of C sugar are subsidized. In the Panel's view, the European Communities understood these claims from the beginning of the *DSU* process and articulated its defence accordingly.

C. THERE ARE NO "C SUGAR PRODUCERS" AND NO "C BEET GROWERS" AS SUCH

6.10 Australia suggests that the references to "C beet growers" and "C sugar producers" are inaccurate in that this terminology implies that there are enterprises engaged solely in the growing/farming of C beet and enterprises engaged solely in the production of C sugar. Australia emphasises that the "growers of C beet are also growers of A and B beet" that is, there is no independent production of C beet. Moreover, the producers of C sugar are the same companies that produce A and B sugar, that is, there is no independent production of C sugar.

6.11 The Panel is aware of the fact that strictly speaking there are no "C sugar producers" as such; there are no sugar producers that produce only C sugar. C sugar is produced by the producers of A 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 exports of subsidized sugar are determined with reference to the entries specified in Section II, Part IV of its Schedule and that 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.

E. PANEL'S EXERCISE OF JUDICIAL ECONOMY OVER THE SCM CLAIMS

6.14 Australia requested the Panel to reconsider its decision to exercise judicial economy in regard to findings under the *SCM Agreement* because (1) the European Communities had contested the claims and arguments of Australia that the *SCM Agreement* has application to agricultural products and may apply to the same measures as are at issue pursuant to the *Agreement on Agriculture*; (2) the prohibitions in the *SCM Agreement* have no direct counterpart in the reduction commitment obligations in the *Agreement on Agriculture*; (3) the Appellate Body's decision in *Australia – Salmon* did not involve claims under the *SCM Agreement*, Article 4.7 of which imposes a duty on panels to recommend a time period for withdrawal of a measure; and (4) in the context of Article 19.2 of the *DSU*, a decision not to examine claims under the *SCM Agreement* would diminish the rights of Australia in regard to the implementation time period in the event of its claims proceeding. The European Communities opposed Australia's request. The Panel has modified paragraph 7.382 and has added paragraph 7.385 in response to Australia's comments but declines to change its decision to exercise judicial economy in regard to findings under the *SCM Agreement*.

6.15 Australia also requested that the Panel reconsider its comments in paragraph 7.386. Although the Panel does not consider that changes to paragraph 7.386 are necessary, it observes that its comments should not be taken in any way as a criticism of the manner in which the parties argued a highly complex case under tight time constraints. The point is merely that the focus of the dispute was understandably on the *Agreement on Agriculture* and that this was an additional consideration relevant to the Panel's judgement to exercise judicial economy in this case.

VII. FINDINGS

A. MAIN CLAIMS AND GENERAL ARGUMENTS OF THE PARTIES

7.1 The Complainants' claim³⁴⁶ 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 Schedule³⁴⁸. 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

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.

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.

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 the complaining parties which must comply with the requirements of Article 6 of the *DSU*. Pursuant to Article 6.1 of the *DSU*, the establishment of a panel by the Dispute Settlement Body (DSB) is quasi-automatic and a panel request is normally not subjected to detailed scrutiny by the DSB. It is therefore "incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the *DSU*."³⁵¹

(a) The timing of objections to the Panel's jurisdiction

7.5 In the present dispute, the European Communities is not requesting any preliminary rulings within the meaning of paragraph 13 of the Panel's Working Procedures.³⁵² Yet, Australia alleges that the European Communities refrained from raising these issues until the time of its first written submission, some six months after the Panel was established and more than two months after the Panel was composed. Australia notes that the European Communities did not raise any concerns about the terms of reference at the time of Panel establishment; nor did it attempt to seek a preliminary ruling at an early stage of the Panel process (which it has done in other recent disputes in which it was a respondent).

³⁴⁹ See also paras. 4.191-4.193 above.

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

³⁵¹ Appellate Body Report on *EC – Bananas III*, para. 142.

³⁵² Paragraph 13 of the Panel's Working Procedures: "A party shall submit any request for a preliminary ruling not later than in its first submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first submission. If the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure will be granted upon a showing of good cause."

7.6 The WTO jurisprudence is clear that parties should bring alleged procedural deficiencies to the attention of the other party and the Panel at the earliest possible opportunity.³⁵³ Conversely, the responding Members are required to seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member and to the DSB or to the Panel, so that corrections, if needed, can be made in order that the dispute can be resolved.³⁵⁴ The Panel recalls that the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but the fair, prompt and effective resolution of trade disputes.³⁵⁵ In *Mexico – Corn Syrup (Article 21.5 – US)* the Appellate Body went as far as saying that "a Member that fails to raise its objections in a timely manner, notwithstanding one or more opportunities to do so, may be deemed to have waived its right to have a panel consider such objections."³⁵⁶

7.7 The Panel also recalls that when assessing any procedural objection, the Panel should "take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings" ³⁵⁷

7.8 The Panel notes that although the European Communities asserted orally at the first and second meetings of the Panel that it had sustained prejudice, it offered no supporting particulars in its replies to the Panel's questions, in its submission or at the hearings.

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

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

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

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

³⁵³ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; *US – FSC*, para. 166; and *US – 1916 Act*, para. 54.

³⁵⁴ See the Appellate Body Report on *US – FSC*, para. 166.

³⁵⁵ Panel Report on *Korea – Various Measures on Beef*, para. 797.

³⁵⁶ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 49-50.

³⁵⁷ Appellate Body Report on *Korea – Dairy*, para. 127.

³⁵⁸ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50; *US – FSC*, para. 166; and *US – 1916 Act*, para. 54.

³⁵⁹ Appellate Body Report on *US – Carbon Steel*, para. 123 referring to the Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and *US – 1916 Act*, para. 54.

³⁶⁰ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36; and *US – 1916 Act*, para. 54.

³⁶¹ Appellate Body Report on *US – Carbon Steel*, para. 123.

(b) The Complainants' requests for establishment of a panel³⁶²

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

7.13 For Australia, the measures are:

- (a) "The measures that are the subject of this request are the *subsidies provided by the EC in excess of its reduction commitment levels* on sugar and sugar containing products including sugar cane and sugar beet, processed and unprocessed cane and beet sugar and chemically pure sucrose in solid form, molasses resulting from the extraction of refining of sugar, isoglucose, inulin syrup and the other products listed in Article 1 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the European Communities' Common Organization of the markets in the sugar sector (Official Journal of the European Communities, 30 June 2001, L178/1-45).

The above mentioned subsidies are accorded through the EC sugar regime, which is contained in a number of EC regulations including Council Regulation No 1260/2001 and related EC regulations, administrative policies, rules, decisions and other instruments including instruments pre-dating the above regulation, and their 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

³⁶² The Complainants' panel requests are attached in Annex D below.

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

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 sector³⁶⁵, 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 *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 1.6million tons.

The EC unjustifiably excludes these subsidies from the calculation of the 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 European Communities, *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 ...³⁶⁶

7.15 For Thailand the measures are:

- (a) "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."

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

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

³⁶⁶ See Brazil's panel request in Annex D below.

and the violations are:

- (b) "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 3.1(a) and 3.2 of the *SCM Agreement*.³⁶⁷

7.16 In sum, for Australia and Brazil the measures are the "subsidies in excess of the EC's reduction commitment levels under Council Regulation No. 1260/2001", while for Thailand the measures are the "export subsidies accorded under Council Regulation No. 1260/2001" on sugar. The violations claimed by the Complainants are essentially the same, that is that the European Communities is providing export subsidies for sugar in excess of its commitment level and consequently the European Communities is acting 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*.³⁶⁸ In the Panel's view, although the Complainants drafted their panel requests using slightly different terms, each of the complaining parties' panel request has identified essentially the same measures – subsidies accorded under Council Regulation 1260/2001 for the EC sugar regime - and the same alleged violation – that the European Communities exceeds its budgetary outlays and quantity commitments contrary to Article 3 and 8 of the *Agreement on Agriculture*.

- (c) Alleged lack of proper identification of the "measures" covered by the claims under Article 10.1 of the *Agreement on Agriculture*

7.17 In its first submission, the European Communities objected to the Complainants' claims under Article 10.1 of the *Agreement on Agriculture*, arguing that they are outside the Panel's terms of

³⁶⁷ See Thailand's panel request in Annex D below.

³⁶⁸ The Complainants also claim inconsistencies with the *SCM Agreement*, but these are not concerned by the European Communities' objections.

reference. In light of the Panel's decision in paragraph 7.357 hereafter to exercise judicial economy with respect to the Complainants' claims under Article 10.1 of the *Agreement on Agriculture*, there is no need for the Panel to assess that particular objection of the European Communities to the Panel's terms of reference.

(d) Alleged lack of proper identification of "payments" as distinct measures or distinct claims under Articles 3, 8 (and 9.1(c)) of the *Agreement on Agriculture*

(i) *Arguments of the parties*

7.18 The European Communities argued that the Complainants had not properly identified the measures that were inconsistent with the *Agreement on Agriculture*. The European Communities contended that the measures that allegedly violated Articles 3.3 and 8 of the *Agreement on Agriculture* were not the "export of sugar" as such, but the export subsidies granted by the European Communities. According to the European Communities, the Complainants should have identified, in their panel requests, the specific measures of the European Communities' sugar regime which, in their view, provided the alleged export subsidies applied by the European Communities in order to circumvent its reduction commitments. A simple reference to the European Communities' "sugar regime" or to Council Regulation No. 1260/2001 (which comprises of 51 articles, 6 annexes, and 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. However, the European Communities argued, before such a transfer of the burden of proof can take place, it is necessary for the Complainants to state this as part of their claims. For the European Communities, Brazil's panel request failed to "provide a

³⁶⁹ See also paras. 4.10-4.13 above.

³⁷⁰ See European Communities' reply to Panel question No. 4; European Communities' second submission, paras. 5-6.

³⁷¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 70.

brief summary of the legal basis" that is "sufficient to present the problem clearly": Brazil's panel request mentioned only one of the "payments" further developed in its argumentation. For the European Communities, Brazil made no suggestion that there may be other "payments" which may also pose a "problem", let alone explain how such a "problem" would arise. For the European Communities, it remained unclear what precisely the other "payments" alleged by Brazil were, as, according to the European Communities, the description kept on changing.

7.22 The Complainants refuted the European Communities' assertion that their panel requests only covered certain forms of "payments".³⁷² In Brazil's opinion, the existence of payments was only one aspect of the subsidies at issue in the present dispute.³⁷³ Brazil held that complaining Members are not required, by Article 6.2 of the *DSU*, to present evidence in their panel requests showing how and why exports of sugar are subsidized. They are only required to specify the measure at issue and the treaty provisions violated. Evidence has to be provided in their first written submissions.³⁷⁴

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

(ii) *Assessment by the Panel*

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

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

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

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

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

³⁷² Australia's second oral statement, para. 85.

³⁷³ Brazil's second oral statement, paras. 22-25.

³⁷⁴ Australia's second oral statement, para. 85; Brazil's second oral statement, paras. 22-25.

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

³⁷⁶ *Ibid.*

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

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

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

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

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.

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 request³⁸¹, the issue of the burden of proof relates to 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:

"Under the usual rules on burden of proof, the complaining Member would bear the burden of proving both parts of the claim. However, Article 10.3 of the *Agreement on Agriculture* partially alters the usual rules. The provision cleaves the complaining Member's claim in two, allocating to different parties the burden of proof with respect to the two parts of the claim we have described.

Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member's quantity commitment level.³⁸³ (underlining added)

7.34 If the complaining Member succeeds in proving the quantitative part of the claim, and the responding Member contests the export subsidization aspect of the claim, then, under Article 10.3, the responding Member "*must establish* that no export subsidy ... has been granted" in respect of the excess quantity exported. (emphasis added) The language of Article 10.3 is clearly intended to alter the generally-accepted rules on burden of proof.³⁸⁴ While the Complainants bear the burden of proving that the export quantities are above the specific commitment level, once they have done so, it is for the European Communities to prove that such exports of sugar *were not subsidized*.

7.35 In the Panel's view, the Complainants' panel requests sufficiently informed the European Communities what measures the Complainants were challenging and what violations were claimed. This is obviously the case since in its first submission the European Communities stated that if the Panel considers that exports of C sugar are subsidized, the Panel should assess the situation in light of what the European Communities' commitment level should have been, had C sugar been calculated in accordance with the Modalities Paper.³⁸⁵ In the Panel's view, the Complainants' panel requests were sufficiently detailed "to present the problem clearly".³⁸⁶

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 the face* of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings. Nevertheless, in considering the sufficiency of a panel request, *submissions and statements made during the course of the panel proceedings*, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of *whether the ability of the respondent to defend itself was prejudiced*. Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered *the panel request as a whole*, and in the light of attendant circumstances." (footnotes omitted) (emphasis added).

³⁸² Panel Report on *Thailand – H-Beams*, at para. 7.43.

³⁸³ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 71-73.

³⁸⁴ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 71-73.

³⁸⁵ European Communities' first written submission, para. 34.

³⁸⁶ Appellate Body Report on *Korea – Dairy*, para. 120.

7.36 Therefore, the Panel considered that the Complainants' panel requests complied with the requirements of Article 6.2 of the *DSU* in that they adequately identified the measures at issue and the violations claimed to have occurred, i.e. that the European Communities' exports of subsidized sugar exceeded the European Communities' commitment level contrary to Articles 3 and 8 of the *Agreement on Agriculture*.

7.37 Consequently, the Complainants' argumentation that C sugar receives advantages from various subsidies and payments, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, is not outside the Panel's terms of reference.

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

(i) *Arguments of the parties*

7.38 The European Communities also contended that Article 9.2(b)(iv) of the *Agreement on Agriculture* was not mentioned in the Complainants' panel requests, nor in their first written submissions, (only in the first oral statements of Brazil and Thailand).³⁸⁷ The European Communities alleged that it had no idea, prior to the first substantive meeting, that the Complainants were claiming that Footnote 1 to Schedule the European Schedule CXL was also inconsistent with Article 9.2(b)(iv) of the *Agreement on Agriculture*.³⁸⁸ Accordingly, even if found to be acting inconsistently with Article 9.2(b)(iv) of the *Agreement on Agriculture*, the European Communities contended that this provision could not form the basis for a finding of inconsistency with any other provision of the *Agreement on Agriculture*. Moreover, the European Communities believed that the claim that its export subsidies had not been reduced sufficiently, though still unfounded, is quite different, from the qualitative point-of-view, from the claim that the European Communities had exceeded its export subsidy commitment levels.

7.39 The Complainants explained that Article 9.2(b)(iv) of the *Agreement on Agriculture* was introduced by them as a counter-argument and in response to arguments made by the European Communities, and not as a claim of violation requiring specification in their panel requests.³⁸⁹ The Complainants referred specifically to Article 9.2(b)(iv) of the *Agreement on Agriculture* to underline that accepting the Footnote to the European Communities' Schedule as valid, even if interpreted as imposing a quantity limit, led the European Communities to act inconsistently with its reduction obligations. As a consequence, the European Communities was providing export subsidies in a manner inconsistent with the *Agreement on Agriculture* – particularly in violation of Articles 3 and 8 of the *Agreement on Agriculture*.

(ii) *Assessment by the Panel*

7.40 As noted by the Panel before, the Complainants' main claim under the *Agreement on Agriculture* is that the EC sugar exports are being subsidized above the European Communities' commitment level in violation of Articles 3 and 8 of the *Agreement on Agriculture*. In the context of the parties' arguments and attempts to identify the relevant commitment level for the European Communities for sugar, the Complainants made reference to the provisions of Article 9.2(b)(iv) of the *Agreement on Agriculture*, which determines the Members' overall level of commitment at the end of the annual reduction stages of the implementation period. All parties agree that Members' commitment levels today are the same as they were at the end of the implementation period. Therefore, Brazil and Thailand made references to Article 9.2(b)(iv) of the *Agreement on Agriculture*

³⁸⁷ European Communities' first written submission, paras. 69-70; European Communities' reply to Panel question No. 28. See also para. 4.19 above.

³⁸⁸ European Communities' reply to Panel question No. 28.

³⁸⁹ Brazil's second oral statement, paras. 82-83. See also para. 4.18 above.

as part of the legal context of Articles 3, 8 and 10.3 of the *Agreement on Agriculture* with a view to discussing the European Communities' commitment levels for exports of sugar since 2001, and in support of their argument that that commitment levels should be determined with reference to the European Communities' entries in Section II, Part IV of its Schedule.

7.41 The Panel recalls the distinction between claims and arguments.³⁹⁰ In the Panel's view, a panel request containing a claim under Article 3 of the *Agreement on Agriculture* must state that: (i) exports of the scheduled products are above commitment levels and (ii) such exports have been subsidized. In the Panel's view, the Complainants' panel requests comply with these requirements.³⁹¹ Subsequently, during the panel process the Complainants were entitled to further develop their argumentation that the exceeding exports of sugar had benefited from export subsidies within the meaning of the *Agreement on Agriculture*.

7.42 The European Communities submitted that "an appropriate test for distinguishing "'claims' from 'arguments' would be to anticipate what would be the consequences of upholding a given 'argument'. If upholding a purported 'argument' leads to establishing a violation of a legal provision, but does not render unnecessary the examination of another purported 'argument' made under the same legal provision, it is because each of the two 'arguments' involve a distinct 'claim'." ³⁹² The European Communities added that when this test is applied in the present case, it becomes clear that each of the "payments" alleged by Brazil is a distinct "claim".

7.43 The Panel does not agree with the European Communities' suggestion. The Panel is of the view that the European Communities' assertions are contrary to the existing WTO jurisprudence and to the Panel's discretion to reach a conclusion that a claim of violation is justified on the basis of arguments not even raised by the parties and, in certain situations, without having to address all the arguments of the parties. The Panel has already reached the conclusion that the Complainants have adequately identified the measures at issue and the related violations of the *Agreement on Agriculture*.

7.44 In the Panel's view, the European Communities' allegation that the Complainants' arguments and references to Article 9.2(b)(iv) are outside the Panel's terms of reference is thus not founded.

(f) Alleged lack of proper identification of claims in relation to Footnote 1 to the EC's Schedule (ACP/India sugar)³⁹³

(i) *Arguments of the parties*

7.45 In its first submission, the European Communities also observed that the Complainants had made subsidiary claims that the European Communities was not respecting the terms of Footnote 1 to its Schedule. The European Communities considered that these claims were not sufficiently identified. The European Communities therefore argued that it could not defend any (unidentified) measure which it may have adopted with respect to ACP/India sugar in respect of unidentified provisions of the *Agreement on Agriculture*, or provisions which were merely cited without further explanation.

³⁹⁰ See the Appellate Body Reports on *EC – Bananas III*, paras. 142-143, *EC – Hormones*, para. 156, *US – Certain EC Products*, para. 123.

³⁹¹ See the Appellate Body Report in *Korea – Dairy* in para. 120: "(...) The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary – and it may be a brief one – of the legal basis of the complaint; but the summary must, in any event, be one that is 'sufficient to present the problem clearly'. It is not enough, in other words, that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'."

³⁹² European Communities' reply to Panel question No. 4.

³⁹³ Footnote 1 to Section II, Part IV of the EC's Schedule is hereafter called the "Footnote 1" or the "ACP/India sugar Footnote", the precise content of which is discussed in paras. 7.167-7.196 hereafter.

The European Communities contended that these claims were not made in the requests for establishment of a panel by the Complainants, which allege an "exclusion" or a failure to "take into account" exports of ACP/India equivalent sugar in ensuring respect of the European Communities' export subsidy commitments, and not a failure to respect the terms of the Footnote. Consequently, for the European Communities, these claims were also outside the terms of reference of the Panel

7.46 The Complainants were of the view that the European Communities was confusing Footnote 1 with "the measure at issue" and was attempting to redefine the measure at issue as Footnote 1 itself. Nowhere in their panel requests did the Complainants cite Footnote 1 as being a "measure at issue". Rather, the European Communities was informed by the Complainants' panel requests that the exports in excess of reduction commitments arose from the subsidized export of C sugar and ACP/India equivalent sugar. Australia noted that the European Communities' first written submission deliberately avoided claims of inconsistency arising from the export subsidies granted to ACP/India equivalent sugar. Instead, the European Communities had redefined the measure as the Footnote, and referred exclusively to Footnote 1 in relation to ACP/India equivalent sugar. Australia added that in the fourth and fifth paragraphs of its panel request, Australia identified the measures at issue as the subsidies on sugar in excess of the European Communities' reduction commitments and elaborates on the nature of the measures in paragraphs 6-7 of that request.

7.47 According to the Complainants, the European Communities is using Footnote 1 as a rebuttal argument to the Complainants' claims of inconsistency. The Complainants added that it is perfectly in order for any complainant to anticipate such an argument in its first written submission or to respond to such arguments in its rebuttal submission. Such issues are not connected to Article 6.2 of the *DSU* and to the requests for establishment of a panel. Finally, the Complainants reiterated that the European Communities is confusing "claims", which must be made in the panel request, and "arguments", which are developed during the panel proceeding. The Complainants claimed that the European Communities exceeds its subsidy reduction commitments, *inter alia*, by granting export subsidies to ACP/India equivalent sugar. The Complainants argued that Footnote 1 does not exempt the European Communities from its obligations under Articles 3.3, 8, 9.1(a) and 9.1(c) of the *Agreement on Agriculture* or, alternatively, that it does not apply to the exports of a quantity of EC sugar that is equivalent to the quantity of sugar imported from the ACP countries and India. The Complainants' argument regarding the scope of application of Footnote 1 is thus a subsidiary argument supporting their legal claims that the European Communities is exceeding its export subsidy reduction commitments.

(ii) *Assessment by the Panel*

7.48 The Panel recalls the content of the Complainants' panel requests and the distinction between claims and arguments. The Complainants' claim is that the European Communities is exporting sugar (C sugar and ACP/India equivalent sugar) in excess of the European Communities' commitment level. For the Complainants, the European Communities' commitment level is indicated in Section II, Part IV of the EC Schedule for sugar, that is 1,273,500 tonnes in 2001 and the following years.

7.49 In the Panel's view, the European Communities is using Footnote 1 as a rebuttal *argument* to the Complainants' claims that the European Communities is acting inconsistently with Articles 3 and 8 of the *Agreement on Agriculture*. The European Communities is arguing that its level of commitment includes an additional 1.6 million tonnes of ACP/India equivalent sugar as provided for in Footnote 1.

7.50 In the Panel's view, what constitutes a Member's "commitment level", for the purpose of Article 10.3, is both an issue of legal interpretation and a matter of evidence. Whether or not an entry in a Member's schedule, such as the European Communities' Footnote 1, could compose part of that Member's overall commitment level is a legal issue for which both sides have submitted argumentation. It is for the Panel to decide whether the "commitment level" referred to in Articles 3,

8, 9.2(b)(iv) and 10.3 is exclusively composed of the export subsidies that had 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.

7.51 The European Communities argues that a correct interpretation of Articles 3, 8 and 9 of the *Agreement on Agriculture* and the European Communities' Footnote 1 would lead to the conclusion 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

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.

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.

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

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

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

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

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

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.

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 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: "We accordingly agree with the finding of the Panel that the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*".⁴⁰³

7.65 If estoppel were considered as a customary rule of interpretation or if it were comprised in the good faith principle reflected in Article 3.10 of the *DSU*, such a principle would have to be read "harmoniously" with the other principles of the WTO dispute settlement system, including the quasi-automaticity of its process and the fact that the initiation of the dispute settlement mechanism is self-regulating. On several occasions, the Appellate Body has insisted 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".⁴⁰⁴

7.66 The Panel also recalls that the Appellate Body has clearly established that initiation of WTO dispute settlement procedures does not require the demonstration of any specific legal or economic interest.⁴⁰⁵ In *Mexico – Corn Syrup (Article 21.5 – US)*⁴⁰⁶ the Appellate Body ruled that the first sentence of Article 3.7 of the *DSU*:

"... reflects a basic principle that Members should have recourse to WTO dispute settlement in good faith, and not frivolously set in motion the procedures contemplated in the *DSU*. We recall that, when we examined the language of Article 3.7 of the *DSU* in our Report in *European Communities – Bananas*, we stated that:

'... a Member has broad discretion in deciding whether to bring a case against another Member under the *DSU*. The language of Article XXIII:1 of the GATT 1994 and of Article 3.7 of the *DSU*

⁴⁰² Black's Law Dictionary, Sixth Edition, 1991, p. 963.

⁴⁰³ Appellate Body Report on *EC – Hormones*, para. 125.

⁴⁰⁴ Appellate Body Report on *Korea – Dairy*, para. 81. The Appellate Body also referred to the Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear*, para. 81. See also Appellate Body Report on *US – Gasoline*, p. 23; Appellate Body Report on *Japan – Alcoholic Beverages II*, p. 12; and Appellate Body Report on *India – Patents (US)*, para. 45.

⁴⁰⁵ Appellate Body Report on *EC – Bananas III*, para. 142.

⁴⁰⁶ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 73 citing Appellate Body Report on *Korea – Dairy*, para. 135.

suggests, furthermore, that a Member is expected to be largely *self-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

7.70 Moreover, assuming *arguendo* that estoppel could be invoked in WTO dispute settlement proceedings, the Panel is of the view that the present situation is not one for which estoppel could find application. The Panel examines hereafter the requirements for its application.

7.71 The conditions for estoppel have been summed up by the panel in *Argentina – Poultry*:

"[T]he essential elements of estoppel are: '(i) a statement of fact which is clear and unambiguous; (ii) this statement must be voluntary, unconditional, and authorized; (iii) there must be reliance in good faith upon the statement ... to the advantage of the party making the statement'."⁴¹²

7.72 In *Guatemala – Cement II*, the panel considered that:

"[E]stoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded."⁴¹³

⁴⁰⁷ Appellate Body Report on *EC – Bananas III*, para. 135.

⁴⁰⁸ GATT Panel Report on *EEC – Quantitative Restrictions on Certain Products from Hong Kong*, BISD 30S/129, para. 28.

⁴⁰⁹ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 72-74.

⁴¹⁰ Panel Report on *EC – Bananas III (Article 21.5 – EC/Ecuador)*, para. 4.11.

⁴¹¹ Panel Report on *Guatemala – Cement II*, para. 5.148.

⁴¹² Panel Report on *Argentina – Poultry*, para. 7.20.

⁴¹³ Panel Report on *Guatemala – Cement II*, para. 8.23.

7.73 In the Panel's view, Brazil's and Thailand's silence concerning the European Communities' base quantity levels as well as with respect to the ACP/India sugar Footnote does not amount to a clear and unambiguous representation upon which the European Communities could rely, especially considering that, in the Panel's view, there was no legal duty upon the Complainants to alert the European Communities to its alleged violations. Furthermore, it is not possible to identify any facts or statements made by the Complainants where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities. In the Panel's view the "silence" of some of the Complainants cannot be equated with their consent to the European Communities' violations, if any. Moreover, the Complainants' silence cannot be held against other WTO Members who, today, could decide to initiate WTO dispute settlement proceedings against the European Communities. In other words, even if the three Complainants had remained completely silent on this issue, their silence could not be considered a commitment binding on other Members to the extent that it would contradict the provisions of the *Agreement on Agriculture* or which could remove the European Communities' alleged inconsistencies with its WTO obligations.

7.74 The Appellate Body has clearly established that WTO Members must comply with their WTO obligations in good faith⁴¹⁴ and that the *WTO Agreement* must be interpreted in good faith.⁴¹⁵ In the Panel's view both the European Communities and the Complainants have acted in good faith in the initiation and conduct of the present dispute proceedings. The European Communities is entitled to defend its sugar regime and has done so. The Complainants were entitled to initiate the present WTO proceedings as they did and at no point in time have they been estopped, through their actions or silence, from challenging the EC sugar regime which they consider WTO inconsistent.

7.75 In the Panel's view, if it were to conclude that the Complainants are now estopped from challenging the EC sugar regime or its alleged excessive export production of subsidized sugar, the Panel would be acting contrary to Articles 3.2 and 19.2 of the *DSU* which provide that panels and the Appellate Body are prohibited from adding to or diminishing Members' rights and obligations.⁴¹⁶

3. The *amicus curiae* of WVZ

(a) Factual background

7.76 As referred to in paragraph 2.20 above, on 24 May 2004, the Panel received an unsolicited "*amicus curiae*" brief from the Wirtschaftliche Vereinigung Zucker (hereafter "WVZ"), the association of German sugar producers and beet growers, which submitted that C sugar does not benefit from export subsidies, in essence, because the European Communities' intervention price does not cover the average total cost of producing A, B and C sugar, in the European Communities.

⁴¹⁴ Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 47; Appellate Body Report on *US – Offset Act (Byrd Amendment)*, para. 296 (and 298); Appellate Body Report on *US – Shrimp*, para. 158; and Appellate Body Report on *US – FSC*, para. 166.

⁴¹⁵ Appellate Body Report on *US – Offset Act (Byrd Amendment)*, paras. 296-297 and Appellate Body Report on *US – Hot-Rolled Steel*, para. 101 (and 193).

⁴¹⁶ Article 3.2 of the *DSU* is as follows: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Article 19.2 of the *DSU* is as follows: "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements." See also the Appellate Body Report on *India – Patents (US)*, paras. 46-47.

7.77 Following the recommendation of the Appellate Body in *US – Shrimp* in the context of *amicus curiae* briefs that "the exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute"⁴¹⁷, and with a view to ensuring due process, the Panel invited the parties on 27 May 2004 to make comments on the *amicus curiae* brief of WVZ by 1 June 2004.⁴¹⁸

7.78 The Complainants requested in their comments that the Panel reject the document submitted by WVZ on the grounds of inaccuracy of the facts and analysis advanced by WVZ, late timing of the document and due process considerations, and they further contended that this submission addressed issues that have already been argued at length by the parties. In its third communication relating to the *amicus curiae* brief, Brazil claimed that there was evidence that a breach of confidentiality had occurred (the Panel discusses the issue of the breach of confidentiality in the following section of the Panel Report). The European Communities informed the Panel that it did not wish to provide comments.

7.79 In their comments on the *amicus* brief, the Complainants challenged in detail the allegations made by WVZ as being utterly unfounded, *inter alia* because producers received much more than the intervention price and because the calculations made by WVZ were not based on accurate data or the proper interpretation of the data.

(b) Assessment by the Panel

7.80 First, the Panel wishes to recall that it does not consider that *amicus curiae* briefs can be taken into account in a manner that would circumvent the parties' rights and obligations under the *DSU*, the *Agreement on Agriculture* and the *WTO Agreement* generally.⁴¹⁹

7.81 The Panel notes that the WVZ submission was filed almost two weeks after the Panel's second meeting with the parties. The Panel, as other panels before, considers that the timing of the *amicus curiae* submission plays an important role in the acceptance or rejection of *amicus curiae* briefs.⁴²⁰ In this regard Thailand argued that in accordance with the Working Procedures of the Panel proceedings, no new arguments or evidence were to be submitted by the parties after the second meeting. However, the Panel recalls that at the end of the second meeting the Panel asked additional legal and factual questions of the parties and the Complainants requested that they be entitled to comment on each other's replies to the Panel's questions. The period within which the Panel could receive new arguments and evidence was therefore extended until Wednesday, 2 June 2004. However, WVZ comments are not related to the Panel's questions or the parties' comments.

7.82 The Panel has decided not to consider further the *amicus curiae* from WVZ because, *inter alia*, it is based on confidential information and is thus evidence of a breach of confidentiality which disqualifies the credibility of the authors. Brazil informed every authorized recipient of its submission of the confidential nature of the latter. On 10 June 2004, the Panel therefore requested WVZ to

⁴¹⁷ Appellate Body Report on *US – Shrimp*, para. 107.

⁴¹⁸ This position of the Appellate Body would seem to be supported by Article 12.1 of the *DSU* providing that panels need to consult the parties when they decide to add or deviate from the Working Procedures in Appendix 3 of the *DSU*. Appendix 3 of the *DSU* is silent regarding *amicus curiae* briefs. Appellate Body Report on *US – Shrimp*, para. 105.

⁴¹⁹ The Appellate Body determined in *Japan – Agricultural Products II*, that expert advice could be taken into account but that it did not relieve the complaining party of making a *prima facie* case of inconsistency. See Appellate Body Report on *Japan – Agricultural Products II*, para. 129.

⁴²⁰ See Panel Report on *US – Softwood Lumber III*, where the panel rejected three unsolicited *amicus curiae* briefs because they were presented after the first substantive meeting, Panel Report on *US – Softwood Lumber III*, para. 7.2; and Panel Report on *US – Lead and Bismuth II*, where the panel chose not to accept the submission because it had been submitted too late and could have unjustifiably delayed the proceedings; Panel Report on *US – Lead and Bismuth II*, para. 6.3.

identify the source of the information used in its *amicus curiae* brief. WVZ acknowledged that it "was able to examine" Brazil's exhibit but refused to provide the source of its information: "WVZ is not in a position to reveal the source of its information regarding the evidence submitted by Brazil."

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

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

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

4. Breach of confidentiality

(a) Factual background⁴²²

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

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

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

7.89 Australia observed that the cost of production data cited by WVZ was also included in a confidential exhibit submitted by Australia⁴²³ and requested that the Panel undertake an investigation of the source of the LMC information cited by WVZ. Australia submitted that in the event that the 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

⁴²¹ Appellate Body Reports on *US – Shrimp*, para. 107 and on *US – Lead and Bismuth II*, para. 41.

⁴²² See paras. 2.21 to 2.28 above.

⁴²³ The WVZ quoted LMC figure of costs of production of ***/tonne which is cited in table 2 of Exhibit ALA-1, p. 8.

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. The Appellate Body on the basis of its own examination of the facts believed that there was prima facie evidence that the association received, or had access to, the appellant's submission in that appeal and saw no reason to accept the written brief submitted. The Appellate Body returned the brief to its sender.⁴²⁴ Other breaches of confidentiality have also been reported.⁴²⁵

7.98 The Panel has come to the conclusion that a breach of confidentiality did occur in the framework of these proceedings. The Panel is therefore concerned and deeply deplores this breach of confidentiality and the disregard of a requirement imposed by the *DSU* and the Panel's Working Procedures. The Panel considers that it has used its best endeavours to investigate the alleged breach of confidentiality. However, the Panel has not been able to determine the source of the breach.

7.99 The Panel hereby reports the incident to the Dispute Settlement Body.

7.100 Having examined the procedural issues relevant to the present dispute, the Panel now proceeds to examine the Complainants' substantive claims.

C. ORDER OF ANALYSIS BY THE PANEL

7.101 In light of Article 21.1 of the *Agreement on Agriculture*, Article 3 of the *SCM Agreement*⁴²⁶ and the relevant jurisprudence, the Panel shall first examine the consistency of the challenged export subsidies on sugar, an agricultural product, first under the *Agreement on Agriculture*⁴²⁷ as the Complainants have argued their claims under the *Agreement on Agriculture* first.

7.102 The Complainants have submitted that the European Communities is exporting subsidized sugar in excess of its commitment levels contrary to Articles 3, 8, and 9 of the *Agreement on Agriculture*. The parties disagree as to what constitutes the European Communities' commitment level. While the Complainants argue that the European Communities' quantity commitment level is to be determined with reference to its entry in Section II of Part IV of its Schedule, the European Communities submits that its commitment comprises two components: one component is its entry in Section II of Part IV of its Schedule and the other component includes the additional quantity of 1.6 million tonnes provided for in Footnote 1 (the ACP/India sugar Footnote) to Section II, Part IV of its Schedule. The Panel must thus determine, first, what constitutes the European Communities' commitment level for the purpose of Articles 3 and 8 of the *Agreement on Agriculture*.

7.103 Moreover, the determination of the European Communities' quantity commitment level is crucial to the operation of the special rule, provided for in Article 10.3 of the *Agreement on 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

⁴²⁴ Appellate Body Report on *Thailand – H-Beams*, para. 74.

⁴²⁵ See for instance the Panel Report on *US – Underwear*, para. 6.3; Panel Report on *EC – Poultry*, para. 191; and Panel Report on *US – Steel*, para. 9.41.

⁴²⁶ Article 21.1 of the *Agreement on Agriculture* provides that: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the *WTO Agreement* shall apply subject to the provisions of this Agreement." Article 3 of the *SCM Agreement* provides that: 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1."

⁴²⁷ In *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123, the Appellate Body stated that Article 3.1 of the *SCM Agreement* "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*."

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; if it is so, the Panel will then determine whether the European Communities has demonstrated, pursuant to Article 10.3 of the *Agreement on Agriculture*, that its excess exports of sugar, *are not subsidized*.

7.105 The Panel recalls the factual description of the EC sugar regime in Section III above.

D. THE EUROPEAN COMMUNITIES' EXPORT SUBSIDY COMMITMENT LEVELS FOR SUBSIDIZED EXPORTS OF SUGAR

1. Introduction

7.106 The Complainants consider that the European Communities' commitment levels for subsidized exports of sugar are as specified in Section II of Part IV of the EC Schedule CXL⁴²⁸, entitled:

"Part IV: AGRICULTURAL PRODUCTS: COMMITMENTS LIMITING SUBSIDISATION (Article 3 of the *Agreement on Agriculture*)

SECTION II: Export Subsidies : Budgetary Outlay and Quantity Reduction Commitments."

7.107 Under the line entitled "Sugar" for 2000, the following quantity is specified:

"1,273,500 tonnes"

Besides the term Sugar, a footnote (1) is inscribed and at the bottom of the page one can read:

"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."

7.108 The Panel assesses hereafter what the commitment level of the European Communities is with respect to exports of sugar pursuant to Articles 3, 8 and 9 of the *Agreement on Agriculture*.

⁴²⁸ See Annex C, also provided as Exhibit EC-1 and Exhibit COMP-16.

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 claims⁴²⁹, 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 Footnote 1 was part of the European Communities' export subsidy commitments, export subsidies provided for by the said Footnote should have been reduced.

7.113 On the other hand, the European Communities considers that, overall, its export subsidies on sugar have been reduced and it is therefore complying with Articles 3 and 8 of the *Agreement on Agriculture*. The European Communities also argues that Article 3.3 incorporated the export subsidy commitments into the GATT, but did not prescribe any form for such commitments. In Footnote 1 the commitment has taken the form of a limit on subsidization in the form of a ceiling level contained in a footnote to a Member's Schedule.

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

⁴²⁹ See para. 7.106 above

⁴³⁰ See paras. 4.30-4.31 above.

⁴³¹ See paras. 4.191-4.192 above.

⁴³² See para. 4.193 above.

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 para. 4.215 above.

⁴³⁴ See also para. 4.215 above.

⁴³⁵ See also para. 4.217 above.

⁴³⁶ Article 16 of the *Vienna Convention* reads as follows:

"Exchange or deposit of instruments of ratification, acceptance, approval or accession

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) their exchange between the contracting States;
- (b) their deposit with the depositary; or
- (c) their notification to the contracting States or to the depositary, if so agreed."

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 European Communities to export an additional 1.6 million tonnes of subsidized sugar. For the Complainants, even their alleged silence at the time of the conclusion of the Uruguay Round could not be considered to be an acceptance. They added that the European Communities cannot find anything in the Modalities Paper which would support its argumentation.

(b) Assessment by the Panel

(i) Introduction

7.120 In the present dispute, parties disagree on the European Communities' commitment level for exports of subsidized sugar. In light of the parties' arguments, the Panel needs to determine what can compose a Member's "commitment level" for the purpose of Article 3 of the *Agreement on Agriculture* in light of the European Communities' argument that its commitment is composed of its specific entry in Section II, Part IV of its Schedule (1,273,500 tonnes of sugar) as well as of an additional 1.6 million tonnes relating to ACP/India sugar contained in Footnote 1 to the European Communities' Schedule. The Complainants claim that this Footnote reduces and contradicts, and thus conflicts with, the European Communities' fundamental obligations under the *Agreement on Agriculture* and as such does not modify the EC's commitment level specified in Section II, Part IV of the European Communities' Schedule.

7.121 In the Panel's view, what constitutes a Member's "reduction commitment level" for the purpose of Article 10.3 of the *Agreement on Agriculture* or the "reduction commitment within the meaning of Article 9 or the "commitment levels" within the meaning of Article 3.3 or the "commitment as specified in a Member's schedule" within the meaning of Article 8 of the *Agreement on Agriculture* is an issue of legal interpretation, for which there is no burden of proof as such.⁴³⁷ It is for the Panel to decide whether the "commitment levels" or the "reduction commitment levels" are composed exclusively of the commitments for export subsidies that have to be reduced (in the case of the EC sugar 1,273,500 tonnes) or whether Members are also entitled to maintain, for instance, *ad hoc* "limitations" on export subsidization not subject to reduction which would therefore be part of the overall commitment level of a Member.

⁴³⁷ The Panel recalls the Appellate Body's conclusion in *EC – Hormones*, para. 156, that "Panels are inhibited from addressing legal claims falling outside their terms of reference. However, nothing in the *DSU* limits the faculty of a panel freely to use arguments submitted by any of the parties - or to develop its own legal reasoning - to support its own findings and conclusions on the matter under its consideration. Recently in *EC – Tariff Preferences*, para. 105, the Appellate Body clarified that the burden of proof is relevant when dealing with "evidentiary" issues but not with "legal" interpretation. Therefore, it is always for the panel to provide the appropriate legal interpretation independently of what is put forward by any party.

"Consistent with the principle of *jura novit curia*⁽⁷⁾ it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause." (footnotes omitted)

FNT 7: "The principle of *jura novit curia* has been articulated by the International Court of Justice as follows: It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court. (International Court of Justice, Merits, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), 1986 ICJ Reports, p. 14, para. 29 (quoting International Court of Justice, Merits, Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974 ICJ Reports, p. 9, para. 17))"

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

7.123 For the Panel to assess whether there is a conflict between Footnote 1 to Section II of Part IV of the European Communities' Schedule, and Articles 3, 8 and 9 of the *Agreement on Agriculture*, the Panel must first determine the extent and the scope of Members' obligations under those provisions. Second, the Panel will need to examine what Members are entitled to do in their Schedules and how terms of Members' Schedules should be interpreted. Thirdly, the Panel will examine the nature of the commitment, if any⁴³⁸, included in Footnote 1. The Panel will then discuss the relationship between the European Communities' obligations under Articles 3, 8 and 9 of the *Agreement on Agriculture* and Footnote 1 with a view to assessing whether the two sets of rights and obligations can be read harmoniously or whether they conflict. The Panel will then be able to conclude on the European Communities' commitment level for exports of sugar for the purposes of the present dispute.

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

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

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

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

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

⁴³⁸ As a subsidiary argument, the Complainants have submitted that a good faith interpretation of Footnote 1 does not lead to the conclusion that the ACP/India sugar Footnote contains such a limitation or ceiling on subsidization. Australia's second written submission, paras. 161-162.

⁴³⁹ Article 31.1 and 31.2 of the *Vienna Convention* provide that: "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 (...)" The text of Articles 31, 32 and 33 of the *Vienna Convention* can be found in footnote 431 hereafter.

"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*, which had also served as the basis for establishing export subsidy reduction commitments in the Uruguay Round negotiations, are subject to the following specific prohibitions set out in Article 3.3 of the *Agreement on Agriculture*, the first of which relates to "scheduled products":

"Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule." (emphasis added)

7.130 It may also be noted that the first terms of Article 3.3 of the *Agreement on Agriculture* make clear that the final reduction commitment levels are binding beyond the end of the implementation period referred to in Articles 9.2 and 9.4 of the *Agreement on Agriculture*. Article 3.3 thus complements the provisions of Article 9.2.

7.131 The Panel notes also that Article 3.1 of the *Agreement on Agriculture* provides that "export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization." Article 3.3 of the *Agreement on Agriculture* requires that, with respect to agricultural products specified in Section II of Part IV of its schedule, "a Member shall not provide export subsidies ... in excess of the budgetary outlay and quantity commitment levels specified therein." Article 3.3 of the *Agreement on Agriculture* makes clear that the commitments are those *specified* in a Member's Schedule.

7.132 Article 3.3 of the *Agreement on Agriculture* requires that the export subsidies listed in Article 9.1 of the *Agreement on Agriculture* can only be provided in accordance with a Member's Schedule. Therefore, a Member must not provide export subsidies on scheduled agricultural products beyond its budgetary and quantity commitment levels set out in its Schedule and shall not provide export subsidies on products not specified in its Schedule. As mentioned, Article 8 of the *Agreement on Agriculture* similarly provides that Members shall not "provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."

7.133 Article 9.1 of the *Agreement on Agriculture* describes specific types of export subsidies "subject to reduction commitments" and provides for schedules specifying commitments to reduce budgetary outlays for subsidies and quantities of exports receiving subsidies ("The following export subsidies are subject to reduction commitments under this Agreement"). The Panel also notes that Section II of Part IV is entitled "Budgetary Outlay and Quantity *Reduction Commitments*." In the Panel's view, Article 9.1 of the *Agreement on Agriculture* makes clear that in the absence of a specific exemption contained in that Agreement, all export subsidies coming within the definitions of Article 9.1(a) – 9.1(f) have to be subject to reduction commitments. Specifically, in accordance with

Article 9.2(b)(iv) of the *Agreement on Agriculture*, at the end of the implementation period, the Schedule *must* provide for budgetary outlay and quantity commitments no greater than 64 and 79 per cent of their respective base period levels.⁴⁴⁰ This is the case for Members who took advantage of the flexibility of Article 9.2(b) which was the case of the European Communities.⁴⁴¹ Therefore, export subsidies contained in Section II, Part IV of a Member's Schedule ought to have been subject to the reduction commitments provided for in Article 9 of the *Agreement on Agriculture*.

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

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

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

"Recalling further that 'the above-mentioned long-term objective is to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets';

Committed to achieving specific binding commitments in each of the following areas: market access; domestic support; export competition; and ... "

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

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

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

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

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

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 Schedule⁴⁴⁵, 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 Schedule⁴⁴⁶, the Panel concludes that Members which have undertaken reduction commitments covering all Annex 1 products have scheduled both the budgetary outlay, and the quantity reduction commitments, in a consistent and uniform manner, by clearly specifying a figure with respect to the last implementation year.

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

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 categories identified during the Uruguay Round, but to "all agricultural products described in Annex 1 of the *Agreement on Agriculture*". Quite apart from the fact that it may not be feasible, from the statistical point-of-view, to obtain a single figure expressing a quantity commitment level for all agricultural products, given the variety of measurement units and conversion factors involved, the Panel appreciates that the nature of the export incentive schemes reported by New Zealand during the base period did not lend itself to the breakdown required by the Modalities Paper. Seeking further guidance from the Schedule of the only other Member of the WTO, Panama, which has undertaken a reduction commitment in Section II of Part IV, on an *aggregate* basis, the Panel finds, again, that: (a) the products covered are "todos los productos descritos en el Anexo 1 del Acuerdo sobre la Agricultura"; and that (b) the quantity commitment level is shown as "no aplicable" except for the last implementation year, 2003, where the amount is clearly specified as "0".

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 outlays and quantity commitment levels.

7.143 Therefore the Panel concludes that the *Agreement on Agriculture* makes it clear 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. Moreover, all WTO-consistent export subsidies must have been specified in a Member's Schedule, both in terms of quantity and in terms of budgetary outlays and all WTO-consistent export subsidies on scheduled products must have been subject to reduction commitments during the implementation period.

(iii) *The interpretation of terms included in WTO Members' Schedules*

7.144 One of the issues before the Panel is whether the European Communities' commitment level with respect to export subsidies on sugar can legally include two components: the first component being the commitment levels expressed in the table on export subsidies (which have decreased during the implementation period of the *Agreement on Agriculture* and has remained fixed since 2001); the second component being the commitment levels expressed in Footnote 1 to the EC's Schedule in respect of ACP/India sugar. For the Complainants, Footnote 1 on ACP/India sugar is inconsistent with the *Agreement on Agriculture* and should be ignored when determining the European Communities' commitment level.

7.145 In order for the Panel to determine the European Communities' commitment level, the Panel must assess the legal value and effect of Footnote 1 contained in Section II of Part IV of the EC's Schedule and to what extent the content of such a Footnote can legally modify the European Communities' obligations under the *Agreement on Agriculture* with respect to export subsidies.⁴⁴⁷ Before assessing the legal value and effect of Footnote 1, the Panel examines how one should interpret provisions contained in Members' Schedules, in particular when such scheduled provisions seem to contradict basic obligations contained in a WTO multilateral trade agreement, such as the *Agreement on Agriculture*.

Provisions of a Member's Schedule should be interpreted as treaty provisions

7.146 As mentioned above, Article 8 of the *Agreement on Agriculture* makes it clear that Members must respect both the provisions of the *Agreement on Agriculture* and the provisions of their Schedules. The Panel notes first that scheduled commitments are made an integral part of the GATT 1994 under Article 3.1 of the *Agreement on Agriculture*.

7.147 In *EC – Computer Equipment*, the Appellate Body concluded that provisions of a Member's schedule must be interpreted as treaty provisions:

"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,

⁴⁴⁷ The Panel notes first that none of the parties have argued that footnotes *per se* cannot contain commitments. The Complainants have raised objection to the content of Footnote 1 and the interpretation thereof provided by the European Communities.

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

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; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33 – Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.

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

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

⁴⁵⁰ See Appellate Body Report on *EC – Computer Equipment*, at para. 84.

⁴⁵¹ The Appellate Body in *EC – Computer Equipment* stated in para. 109: "Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions." Citing MTN.TNC/W/131, 21 January 1994.

⁴⁵² See the Appellate Body Report on *US – Gasoline*, p. 23. See also the Appellate Body Reports on *Japan – Alcoholic Beverages II*, p. 12, on *US – Underwear*, p. 16; on *Argentina – Footwear (EC)*, paras. 81 and 95; on *Korea – Dairy*, para. 81; on *US – Section 211 Appropriations Act*, para. 338; and on *US – Offset Act (Byrd Amendment)*, para. 271.

⁴⁵³ Appellate Body Report on *US – Gasoline*, at p. 23

⁴⁵⁴ (footnote original) We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 41, p. 12; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 45.

⁴⁵⁵ Appellate Body Report on *Korea – Dairy*, para. 81.

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

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

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

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

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

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

⁴⁵⁶ Appellate Body Report, *Canada – Dairy*, para. 135 (footnote omitted)(emphasis added).

⁴⁵⁷ "... [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. ... Not every such divergence constitutes a conflict, however. ... Incompatibility of contents is an essential condition of conflict." (Encyclopedia of Public International Law (North-Holland 1984), p. 468. See also Ian Sinclair, *Vienna Convention*, 1984, at p. 97.) "... a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. ... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another. For, in such a case, it is possible for a State which is a signatory of both treaties to comply with both treaties at the same time. (...) The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary." (Jenks, *Op. Cit.*)

⁴⁵⁸ In the WTO context, see the Panel Report on *Indonesia – Automobile* at paras.14.29-14.36 and 14.97 to 14.99; the Appellate Body Reports on *Guatemala – Cement I* at para. 60; on *US – Hot Rolled Steel*, paras. 55-62. Recently in *EC – Tariffs Preferences*, para. 88, the Appellate Body seems to have expanded the concept of conflicts to include situations where a provision gives a right while another one gives an obligation.

⁴⁵⁹ Appellate Body Report on *EC – Bananas III*, para. 154.

⁴⁶⁰ GATT Panel Report on *US – Sugar*, paras. 5.2-5.3.

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."

7.157 The same principle was reiterated in *EC – Poultry*⁴⁶¹ and in *Chile – Price Band System*.⁴⁶² In the Panel's view, GATT and WTO jurisprudence indicate that WTO Members may use entries in their schedules of concession to clarify and qualify the "concessions" they individually agree to assume in their Schedules but not to reduce or conflict with the obligations they have assumed under the GATT or the WTO Agreement, including the Agreement on Agriculture.

7.158 The Panel notes that the jurisprudence cited above deals with tariff concessions and this includes market access commitments within the meaning of Article 1(g) of the Agreement on Agriculture. The "export subsidy commitments" contain limitations on subsidization, constituting exceptions to the Article 8 general prohibition, and are incorporated into the Agreement on Agriculture through Article 3.1 of the Agreement on Agriculture. The Panel recalls also that contrary to tariff concessions, export subsidy commitments are not renegotiable under Article XXVIII of the GATT 1994. Therefore, export subsidy commitments are different from tariff and other market access concessions. However, in the Panel's view, the principle that scheduled commitments cannot overrule or conflict with the basic obligations contained in a WTO multilateral trade agreement, unless explicitly authorized, remains valid and applicable to export subsidy commitments scheduled in Section II, Part IV of Members' Schedules.

7.159 The Panel believes that this same principle is recognized in Article 8 of the Agreement on Agriculture.

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).

⁴⁶¹ The Appellate Body Report on *EC – Poultry*, para. 98 stated: "In *United States - Restrictions on Imports of Sugar*, the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts diminishing obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC – Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term "concessions" suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations."

⁴⁶² The Appellate Body Report on *Chile – Price Band System*, para. 272 stated: " We have observed in a previous case that "[t]he ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations". A Member's Schedule imposes obligations on the Member who has made the concessions."

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 commitment of the *Agreement on Agriculture*.

7.164 As discussed in paragraphs 7.127-7.134 above, commitments with respect to export subsidies are thus strictly regulated under the *Agreement on Agriculture*. Among other disciplines, Article 3 provides that export subsidies must be expressed both in terms of budgetary outlays and in terms of 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

⁴⁶³ The Panel recalls the wording of Article 8 of the *Agreement on Agriculture*: "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." (emphasis added)

⁴⁶⁴ (*footnote original*) The New Shorter Oxford English Dictionary, *supra*, footnote 148, p. 452.

⁴⁶⁵ (*footnote original*) The term "reduction commitments" also appears in the chapeau to Article 9.1.

⁴⁶⁶ (*footnote original*) Article 9.2(b)(iv) provides that, with respect to scheduled products, the budgetary outlay and quantity commitment levels must, by the end of the implementation period, not exceed certain threshold levels, expressed as a percentage of the 1986-1990 base period levels.

⁴⁶⁷ Appellate Body Report on *US – FSC*, paras. 144-147.

gives meaning to *all* of them, harmoniously^{468,469}, the Panel needs to see whether the content of Footnote 1 of the EC's Schedule on the one hand, and the European Communities' obligations pursuant to Articles 3, 8 and 9 of the *Agreement on Agriculture* on the other hand, can be read "harmoniously" or whether the content of Footnote 1 – being inconsistent and conflicting with the European Communities' basic obligations under the *Agreement on Agriculture* – should be considered without any legal effect and would thus not enlarge or otherwise modify the commitment level specified in Section II, Part IV of the European Communities' Schedule.

7.166 The Panel proceeds first to the interpretation of Footnote 1 to assess whether, as suggested by the European Communities, it provides for a WTO-consistent limitation of 1.6 million tonnes for export subsidies corresponding or equivalent to the amount of imports of ACP/Indian origin.

(v) *Interpretation of the European Communities' Footnote 1 on ACP/India sugar:*

7.167 Footnote 1 to the entry for sugar in the European Communities' export subsidy commitments reads as follows:

"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."

7.168 The Panel refers to the European Communities' interpretation of Footnote 1:

"Both sentences of the footnote are relevant in order to fully understand the EC's commitments. The footnote is numbered (1) and is found next to the term 'sugar' in the column entitled "description of products", thus applying to the full entry. The first sentence has two elements to it. First, it confirms that exports of an equivalent amount of ACP/Indian sugar were not included in the quantities and outlays reported by the EC for the base period level (1986-1990) which served as a basis for the figures set out in the table. Since the footnote applies to the entire entry, it applies to both the base outlays and base quantities. That is, it indicates the basis for the base quantity and outlay levels. The EC made this clear in the supporting tables which all participants in the negotiations were required to submit.⁴⁷⁰ Indeed, Australia explicitly accepts that ACP equivalent sugar was excluded from the supporting tables.⁴⁷¹ The second element of the first sentence makes it clear that exports of the quantity of ACP/India sugar imported shall not be counted against the commitments made on the base period levels (this is the logical concomitant of the non-inclusion of these exports in the base period).

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

⁴⁶⁸ (footnote original) We have emphasized this in Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, circulated 14 December 1999, para. 81. See also Appellate Body Report, *United States – Gasoline*, *supra*, footnote 12, p. 23; Appellate Body Report, *Japan – Alcoholic Beverages*, *supra*, footnote 41, p. 12; and Appellate Body Report, *India – Patents*, *supra*, footnote 21, para. 45.

⁴⁶⁹ Appellate Body Report on *Korea – Dairy*, para. 81.

⁴⁷⁰ (footnote original) Exhibit EC-5.

⁴⁷¹ (footnote original) Australia's first written submission, Annex 1, paras. 4 and 5.

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 commitments⁴⁷⁴; 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. The Complainants submit that, if the European Communities had been of the view that it had assumed export subsidy reduction commitments in respect of sugar of ACP and Indian origin, it would have provided statistics on the export of such sugar in its notifications, or explained why it did not notify the exports of sugar that it claimed to be covered by its reduction commitments.

7.171 The European Communities does not reconcile the inconsistencies highlighted by the Complainants. Instead, the European Communities sustains that it has consistently interpreted the Footnote in the same manner since 1995, based on the application of the *Vienna Convention* rules of interpretation. The European Communities insists that it has undertaken to limit subsidization in respect of ACP/India equivalent sugar and that it has reduced its overall commitment on export subsidies on an annual basis.

7.172 The European Communities suggests that the evidence⁴⁷⁵ demonstrates that it has considered and treated 1.6 million tonnes as a "cap" on the amount of exports which can benefit from export subsidies as ACP/India equivalent sugar. For the European Communities, the sugar CMO is managed in order to respect this limit, which forms an integral part of the regulatory structure of the regime. Indeed, since the export refunds are maintained at the difference between the world and the Community price (and thus the Community authorities have limited control over the evolution of the

⁴⁷² (*footnote original*) See, for instance, the Appellate Body Report in *Canada – Dairy* at para. 135. In that case, the Appellate Body admonished the panel for failing to give meaning to a condition in Canada's goods schedule which the panel had considered was no more than a "description".

⁴⁷³ European Communities' first written submission, paras. 167-169.

⁴⁷⁴ European Communities' oral statement at the first substantive meeting of the Panel, para. 31.

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

amount of individual refunds) the limits imposed by the *WTO Agreements* are respected through the control of the quantity of products which may be exported with the benefit of a refund (see Article 27(14) of Regulation 1260/2001).⁴⁷⁶ The Commission verifies on a weekly basis that the export refunds granted stay within the limits set out in the WTO Agreement which permits the Commission to ensure that export refunds are not granted which might exceed the EC's export subsidy commitments.

7.173 The Panel recalls the Appellate Body's reliance, in *Korea – Various Measures on Beef*, on statements and notifications by Members before the Committee on Agriculture⁴⁷⁷, as evidence of a Member's consistent treatment of its commitments under the *Agreement on Agriculture*.

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

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

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

"Exports of ACP and Indian sugar are eligible to receive export refunds. As mentioned in the EC's Schedule, no reduction commitment is made on this category of sugar."⁴⁸⁰

and

"As indicated in footnote 1 of the table on export subsidies contained in Part IV, Section II of Schedule CXL, the EC is not undertaking any reduction commitment on exports of ACP or Indian sugar. Consequently, any financial assistance is not 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 Agriculture⁴⁸², and is thus puzzled by the fact

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

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

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

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

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

⁴⁸¹ See G/AG/R/17, p. 29: This reply was provided in response to the US query regarding the application of internal EC prices less transportation costs to imported sugar, and a query regarding the prices applying to imported sugar, which is refined in Europe. The United States sought information as to whether this financial assistance was reported to the WTO, and as to the magnitude of such financial assistance. After hearing the EC reply, the United States stated that it assumed that "no reduction commitment" did not mean that the EC had no commitment at all as regards export subsidization of agricultural products. To the extent that WTO rules exist on the subject, the United States hoped to see more information on sugar exports under the EC financial support programme in future.

⁴⁸² See G/AG/2.

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

7.177 Background documents compiled by the Secretariat on the basis of Members' Schedules and notifications commented on by Members lend support to the Panel's analysis.⁴⁸⁴ No commitment, whether in the form of budgetary outlays, or quantity, reduction commitment, has ever been recorded, or reflected in any way, in relation to sugar of ACP and Indian origin. The European Communities has not availed itself of the opportunity to update the information contained in such documents in order to clarify that its export subsidy commitments for sugar were articulated in two distinct components. Since the fixed ceiling and the fixed quantity commitments have never been accounted for in the summary tables in respect of EC sugar, the implications are, in the Panel's opinion, that the "understanding" of WTO Members, of the Committee on Agriculture, was that the Footnote was *not* a commitment assumed by the European Communities. Moreover, the Panel understands that the European Communities has not reacted, nor objected, to the data presented in the Secretariat papers.

7.178 The Panel, therefore, does not find any evidence that the European Communities itself was of the view, during the entire implementation period, that ACP/Indian sugar was another "component" of its commitments. Cumulated with the inconsistency of the European Communities' statements before the Committee on Agriculture and this Panel⁴⁸⁵; the inconsistency between the information contained in its notifications and its assertions before the Panel⁴⁸⁶; the Panel concludes that the Footnote has never been "treated" or considered by the members of the Committee on Agriculture, nor by the European Communities⁴⁸⁷, as a "commitment" "specified" in the European Communities' Schedule.

7.179 The Panel is of the view that the ordinary meaning of the terms indicates that the European Communities is not making a commitment limiting subsidization on exports of sugar of ACP/India origin. On the contrary, the terms of Footnote 1 indicate that the European Communities is making a 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

⁴⁸³ European Communities', first written submission, paras. 174-186.

⁴⁸⁴ See documents G/AG/NG/S/5, G/AG/NG/S/5/Rev.1, TN/AG/S/8.

⁴⁸⁵ Underlined by the Complainants in para. 4.198 above.

⁴⁸⁶ See para. 4.199 above.

⁴⁸⁷ Despite the European Communities' assertions to the contrary referred to in paras. 4.204 to 4.207 above.

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 Communities⁴⁹⁰ and some of the third parties⁴⁹¹ referred to the linkages between the Cotonou Agreement⁴⁹² and the Sugar Protocol⁴⁹³ on the one hand and the EC sugar regime (including the ACP/India equivalent sugar) on the other hand; they added that Members were aware since the 1970s that the Footnote related to a quantity of exports equivalent to the quantity of sugar it imports from ACP countries and India and that this portion of its subsidized exports should be entitled to differential treatment which is, according to the European Communities, articulated in the ACP/India Footnote.

7.182 The Panel agrees with the Complainants that, pursuant to the Sugar Protocol and the EC/India Agreement⁴⁹⁴, the quantity of sugar to be provided by the ACP and India is not contingent on export by the European Communities of that sugar or its equivalent. Moreover, the amount of sugar covered by the Sugar Protocol is 1,294,700 tonnes while the Footnote refers to 1.6 million tonnes. In addition, the Sugar Protocol as included in the Cotonou Agreement, obliges the European Communities to buy certain quantities of sugar from selected ACP countries and India, but does not oblige the European Communities to subsidize re-exports of ACP/India equivalent sugar. Finally, in the Sugar Protocol,

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 Cotonou Agreement signed in June 2000, trade preferences were extended for eight further years (until the beginning of 2008) and the ACP and European Communities agreed on a new trade regime and on the concept of Economic Partnership Agreements. Four agricultural products, including sugar, were the subject of protocols annexed to the Lomé Conventions. The sugar protocol has been maintained as such, without modification, throughout the four Lomé Conventions and Cotonou Agreement.

⁴⁹⁴ Agreement between the EEC and the Republic of India on Cane Sugar, Official Journal L 190, 23 July 1975, pp. 36-37.

the pricing arrangement for purchase of sugar from ACP countries and India is not linked in any way to exports of "ACP/India equivalent" sugar, nor, indeed, to the provision of export subsidies by the European Communities. The Panel is of the view that the Sugar Protocol, even if considered "context" within the meaning of Article 31.2 of the *Vienna Convention* for the interpretation of Footnote 1, does not support the European Communities' argument.

Conclusion

7.183 In sum, the Panel considers that the ordinary meaning of the terms of Footnote 1 does not indicate any commitment or concessions constituting a limitation on export subsidization or any other type of commitment authorized by the *Agreement on Agriculture* which could in any way enlarge or otherwise modify the European Communities' commitment level specified in Section II, Part IV of its Schedule. Rather, Footnote 1 constitutes a unilateral statement by the European Communities that, with regard to exports of ACP/India sugar, it is not making any reduction commitment. Moreover, Footnote 1, if it were to constitute such a limitation on subsidization, would only benefit sugar of ACP/Indian origin *per se*, contrary to the European Communities' suggestion that 1.6 million tonnes of sugar refer to an amount "equivalent" to the amount imported from ACP countries and India.

7.184 Therefore, the Panel concludes that the ordinary meaning of the terms of Footnote 1 does not authorize an additional 1.6 million tonnes of subsidized sugar to be exported corresponding or equivalent to the amount of imports from ACP and India. The content of Footnote 1 therefore does not enlarge or otherwise modify the European Communities' quantity commitment level specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €99.1 million per year, with effect since marketing year 2000/2001.

Can the ACP/India Footnote be regarded as a second component of the European Communities' commitment level that would *not be* subject to reduction *per se* but that would form part of the overall European Communities' commitment level which has been reduced?

7.185 Assuming *arguendo* that the Footnote could be interpreted as providing for a "limitation on subsidization in the form of a ceiling" for a maximum of 1.6 million tonnes, the Panel proceeds now to determine whether the said Footnote, as interpreted by the European Communities, could be WTO consistent and part of the European Communities' overall commitment level with respect to export subsidies on sugar.

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

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

7.188 Moreover, Article 9.1 defines and lists export subsidies which *must* be subject to reduction. Article 9.1(a) reads as follows:

"The following export subsidies are subject to reduction commitments under this Agreement:

- (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance."

7.189 In this context, Article 9.1(a) seems to cover the type of export subsidy provided for in the ACP/India sugar Footnote. Indeed, the European Communities does not deny that its exports of ACP/India equivalent sugar benefit from export subsidies; its argument is essentially that the European Communities is entitled to provide such export subsidies. In the Panel's view, if the European Communities claims that it is entitled to maintain such export subsidies, the said export subsidies must have been subject to reduction commitments.

7.190 The Panel considers that Footnote 1 to Section II of Part IV of the EC's Schedule attempts to reduce and modify the European Communities' obligation pursuant to Articles 3, 8, 9.1 and 9.2(b)(iv) of the *Agreement on Agriculture*. In the Panel's view, the content of Footnote 1 is fundamentally inconsistent with the basic provisions of the *Agreement on Agriculture*, as Footnote 1, on the one hand, and Articles 3, 8 and 9 of the *Agreement on Agriculture*, on the other hand, are mutually inconsistent. Therefore, the content of Footnote 1 contradicts and conflicts with the European Communities' basic obligations contained in Articles 9.1, 9.2(b)(iv), 3 and 8 of the *Agreement on Agriculture*. Consequently, it is not possible to interpret harmoniously Footnote 1 and the European Communities' basic obligations relating to export subsidies contained in the *Agreement on Agriculture*.

7.191 The Panel finds, therefore, that the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.⁴⁹⁵

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

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

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

⁴⁹⁵ The Panel agrees with the European Communities that Article 9.2(b)(iv) was not raised as a claim but as an argument (see para. 4.19 above) but this does not preclude the Panel from referring to Article 9.2(b)(iv) as context to Article 3.3 and with a view to understanding the scope of the European Communities' commitment.

to A and B sugar and to ACP/India equivalent sugar. The European Communities therefore describes it as a "*de facto*" limit.⁴⁹⁶

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

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

7.196 Therefore, the Panel concludes that the ACP/India sugar Footnote cannot be reconciled with the requirements of Article 3.3 that reduction commitments be expressed both in terms of quantity and of budgetary outlays. The content of Footnote 1 is thus inconsistent and conflicts with the requirements of Articles 3 and 8 of the *Agreement on Agriculture*. Accordingly, the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.⁴⁹⁸

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

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

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

⁴⁹⁶ See also para. 4.192 above.

⁴⁹⁷ European Communities' Regulation No. 1260/2001, Preamble, recital (10) (emphasis added).

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

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

(a) Arguments of the parties⁴⁹⁹

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

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

7.201 The European Communities also argues that the Modalities Paper authorized Members to deviate from the Modalities Paper.

7.202 The Complainants emphasized that the European Communities does not cite any relevant provision of the Modalities Paper that would have permitted it to adopt a lesser obligation than that expressed in the language of paragraphs XI and XII of that text. Nor does the European Communities' assertion find support in Annexes 7 or 8 of the Modalities Paper. Indeed, the Modalities Paper is predicated on basic multilateral commitments. The reduction commitments are multilateral in nature and do not constitute negotiated concessions. Unlike the access commitments, they were 'self-contained' in regard to the balance of concessions.

(b) Assessment by the Panel

7.203 The Panel reviewed the evidence presented by the parties in the context of the ACP/India Footnote and notes that at the earlier stages of the negotiations of the EC Schedule, Footnote 1 was not included in the first drafts and that there was no reference to sugar from the ACP countries and India.⁵⁰⁰ In the March 1992 EC Draft Schedule, there was no footnote.⁵⁰¹ In the December 1992 EC Draft Schedule, a footnote was included but it was not the present ACP/India Footnote.⁵⁰² It read: "the EC reserves the right to maintain flexibility of outlay and budgetary commitments." It would

⁴⁹⁹ See also paras. 4.207 et seq above.

⁵⁰⁰ Exhibit EC-5, EC Letter of 4 March 1992; and European Communities' first written submission, Table 11.

⁵⁰¹ Exhibit EC-5, EC Letter of 4 March 1992; and European Communities' first written submission, Table 11.

⁵⁰² Exhibit EC-4 on Draft schedule of commitments on 16 December 1992.

seem that at each stage, contracting parties specifically rejected the European Communities' exclusion of ACP/India sugar from its sugar subsidy base as witnessed by the G-8 Technical Discussions on Agriculture Schedules in 1992 and bilateral meetings between the European Communities and other countries (including Australia).⁵⁰³

7.204 The Panel notes that to support its conclusion that Members "did not object" or that they even "agreed" to the inclusion of the European Communities' Footnote, the European Communities relies on the fact that the cover letter signed by the European Communities' Ambassador transmitting the European Communities' draft schedule underlined the absence of any reduction commitment for ACP/India sugar. For the European Communities, its intentions were made clear. In a letter of 4 March 1992, providing the supporting tables on which the European Communities' export subsidy commitments were based, the European Communities stated:⁵⁰⁴

"On export competition, the Community has not included the volume of sugar corresponding to its imports of sugar from ACP countries. The Community will not take commitments on this part of its sugar exports."

7.205 The European Communities presented evidence that in December 1993 Australia was asking whether "ACP [sugar] would still be made without commitments, in relation to export commitments".⁵⁰⁵ In doing so, the European Communities seems to imply that Australia was aware that ACP sugar would not be subject to reduction commitments and would therefore have agreed to it. However, Australia produced evidence that it had subsequently asked the European Communities to include commitments on *all* EC export subsidies on sugar.⁵⁰⁶

7.206 Soon after, the European Communities reiterated in a letter addressed to the Director General of the GATT and to the Chairman of the TNC that it did not intend to make commitments with regard to ACP/India sugar. On 14 December 1993 the European Communities submitted a revised version of its Schedule and for the first time inserted a footnote in the draft Schedule to this effect.⁵⁰⁷ The cover letter again contained the statement:⁵⁰⁸

"On export competition, the European Communities have not indicated the volume and the budget outlays for sugar corresponding to its imports of sugar from ACP countries and India. The European Communities will not take commitments on this part of its exports."

7.207 The same Footnote was included in the final version of the European Communities' Schedule.⁵⁰⁹ The European Communities considers therefore, that since Footnote 1 was adopted as proposed by the European Communities, without objection from the Complainants, it is legally valid and binding. The European Communities also insists on the fact that a first draft Schedule of

⁵⁰³ Exhibit ALA-3, ALA-5, ALA-8, Australia's Oral Statement to the first substantive Panel meeting, paras. 60-66, and Australia's replies to the Panel's questions Nos 16 and 17 and EC-7: List of Bilateral Meeting EC/other participants: Australia requests on 17 December 1992 that ACP sugar be included in reduction commitments.

⁵⁰⁴ Exhibit EC-5, EC Letter of 4 March 1992; and European Communities' first written submission, Table 11.

⁵⁰⁵ Exhibit EC-8, EC Commission: minutes of the meeting with Australia of 3 December 1993.

⁵⁰⁶ Exhibit ALA-5, Australia's Letter of 10 December 1993 to EC (page 4). The Panel notes that the EC submitted the same document in Exhibit EC-24 but the Panel notes that the page which referred to sugar as an issue for which Australia was requiring settlement was not reproduced. In its Interim Review comments the European Communities informed the Panel that this omission was inadvertent.

⁵⁰⁷ Exhibit EC-6, EC Letter of 14 December 1993 to GATT.

⁵⁰⁸ Exhibit EC-6, EC Letter of 14 December 1993 to GATT.

⁵⁰⁹ Exhibit EC-9, Export Subsidy in Schedule LXXX-EC. See also Exhibit EC-1 and Exhibit COMP-16 on Schedule CXL.

commitments on 16 December 1992 and a revised draft on 14 December 1993 were circulated to all participants in the Uruguay Round. The other participants had ample opportunity to react to these two drafts and many did so, including the Complainants. None of them, however, raised any question with respect to Footnote 1 to Section II, Part IV of the EC's Schedule. The European Communities' Schedule, like those of the other participants, was submitted on 25 March 1994, following a process of verification which allowed all participants to check and control the commitments.⁵¹⁰ Again, none of the Complainants, or any other participant, formally objected to the said Footnote.

7.208 The Panel examines the evidence produced by Australia and notes that the latter did not seem to accept this "*fait accompli*". Australia noted in a summary statement on 31 January 1994 that the above-mentioned EC offer contained a number of remaining outstanding items, including the fact that the EC sugar commitments in the EC's Schedule did not include export subsidy reduction commitments for sugar exports subsidized by direct export restitutions (corresponding to imports of ACP/India sugar).⁵¹¹ The Panel notes that on 23 February 1994 Australia and the European Communities issued a Joint Communiqué from the "Australia-European Commission Ministerial Consultations"⁵¹² which reported on the consultations and which, according to the European Communities, illustrated that the European Communities and Australia had "settled outstanding 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*.

⁵¹⁰ See Appellate Body Report on *EC-Computer Equipment*, paras. 109-110. The Appellate Body emphasized that tariff commitments "represent a common agreement among *all* Members" and that "any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties".

⁵¹¹ Exhibit ALA-8, UR-Aus summary statement 31 January 1994 where Australia outlined that the EC offer of 14 December 1993 has a number of outstanding issues, including that it "does not include subsidies by direct export restitutions (corresponding to its imports of sugar from ACP countries and India) which is inconsistent with the Final Act and open to challenge" (page 2).

⁵¹² Australia-European Commission Ministerial Consultations, 23 February 1994, Joint Communiqué.

⁵¹³ European Communities' second oral statement, para. 94.

⁵¹⁴ Australia's second written submission, para. 84.

⁵¹⁵ Exhibit ALA-7, EC Letter of 25 March 1994 to GATT.

⁵¹⁶ See paras. 7.174-7.178.

⁵¹⁷ Exhibit EC-12, Australian brochure on July 1994, page 38; and Exhibit EC 14-ABARE Report, page 39.

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

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

7.213 Unlike the situation highlighted by the Appellate Body in *Canada – Dairy*, the parties to the present dispute did not negotiate the inclusion of the Footnote and did not agree or come to an understanding on the value of such exclusion. There is no evidence of any relevant exchanges between the parties or any other form of negotiation, let alone agreement on this subject matter.

7.214 Moreover, the Panel is also of the view that a departure from the basic obligations of the *Agreement on Agriculture*, in the form of a footnote in the EC's Schedule, could not be considered a "waiver" agreed to by the Uruguay Round participants.

7.215 Under the WTO, waivers are strictly regulated and subject to the procedures of Article IX:4 of the *WTO Agreement*, including annual reporting to the General Council. This is obviously not the case with Footnote 1 to the European Communities' Schedule, Section II, Part IV. Already under the GATT, the panel in *US - Sugar Waiver* stated:

"The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in 'exceptional circumstances', that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly."⁵²²

⁵¹⁸ Panel Report on *EC – Bananas III (Article 21.5 – EC)*, para. 4.13.

⁵¹⁹ The Panel recalls *inter alia* that pursuant to Articles 3.2 and 19.2 of the DSU panels "cannot add to or diminish rights and obligations provided in the covered agreements".

⁵²⁰ In addition, the commitment did not limit access to the quota as such and did not diminish the rights of the United States. See Panel Report on *Canada – Dairy*, footnote 530 to para. 7.155.

⁵²¹ Appellate Body Report on *Canada – Dairy*, para. 139 (footnotes omitted).

⁵²² GATT Panel Report on *US – Sugar Waiver*, para. 5.9.

7.216 In the Panel's view, the evidence and explanations submitted by the Complainants sufficiently refute the presumption, if any, that silence or lack of challenge would have amounted to agreement that Footnote 1 was in conformity with the *WTO Agreement* or constituted an agreed departure from the European Communities' basic obligations of the *Agreement on Agriculture*.

7.217 The Panel bears in mind, as highlighted by the Appellate Body in *EC – Hormones*, that the duty to make an objective assessment of the facts under Article 11 of the *DSU* is, among others, "an obligation to consider the evidence presented to a panel and to make factual findings on the basis of that evidence"⁵²³ and the fact that according to the Appellate Body it is "generally within the discretion of the panel to decide which evidence it chooses to utilize in making findings."⁵²⁴

7.218 The Panel has examined all the evidence presented to it and has made use of its discretion. In doing so, the Panel takes into account that the Complainants have maintained their opposition to Footnote 1 since the inclusion of the Footnote in the EC Schedule, as evidenced by correspondence and continuous opposition to the EC sugar regime throughout the years. Furthermore, the Panel considers that Australia and the other Complainants, even if they were aware of the purported exclusion of ACP/India equivalent sugar from the European Communities' reduction commitments and remained silent, could not in any event have agreed to such an exclusion on behalf of the WTO 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 Articles 3, 8 and 9 of the *Agreement on Agriculture* and as such cannot be read harmoniously with the provisions of the *Agreement on Agriculture*. The content of Footnote 1 cannot constitute a second component of the European Communities' overall commitment level for export subsidies on sugar. Moreover, Footnote 1 cannot constitute an agreed departure from the European Communities' basic obligations under the *Agreement on Agriculture*.

7.222 The Panel finds, therefore, that the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level specified in

⁵²³ Appellate Body Report on *EC – Hormones*, para. 133.

⁵²⁴ Appellate Body Report on *EC – Hormones*, para. 135.

⁵²⁵ Waiver decision WT/MIN(01)/15.

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.

E. IS THE EUROPEAN COMMUNITIES EXPORTING SUBSIDIZED SUGAR IN QUANTITIES EXCEEDING ITS LEVEL OF COMMITMENT CONTRARY TO ARTICLES 3, 8 AND 9 OF THE *AGREEMENT ON AGRICULTURE* ?

1. The burden of proof of Article 10.3 of the Agreement on Agriculture

7.223 The Panel recalls that the Complainants have claimed that the European Communities is in breach of Articles 3 and 8, alleging that the European Communities is subsidizing and exporting a scheduled product, *in casu* sugar, in amounts exceeding its scheduled commitment level.

7.224 In this context, the Complainants have invoked the application of Article 10.3 of the *Agreement on Agriculture*⁵²⁶

7.225 Article 10.3 of the *Agreement on Agriculture* provides special rules on burden of proof:

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

7.226 With regard to Article 10.3, the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US II)* has stated that:

"Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member's quantity commitment level.

(...) The significance of Article 10.3 is that, where a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it has granted WTO-*inconsistent* export subsidies, for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary."⁵²⁷

7.227 Article 10.3 is such that once the Complainants have factually proven that the European Communities is exporting sugar in quantities exceeding its commitment levels, there is a shift in the burden of proof and it is then for the European Communities to prove that the sugar it exports in quantities exceeding its commitment level is "not" subsidized. "Article 10.3 thus acts as an incentive to Members to ensure that they are in a position to demonstrate compliance with their quantity commitments under Articles 3.3 and 8 of the *Agreement on Agriculture*. This reversal of the usual rules on the burden of proof obliges the European Communities to "bear the consequences of any doubts concerning the evidence of export subsidization."⁵²⁸

7.228 The Panel notes the European Communities' argument that "the [C]omplainants would impose an impossible task of identifying all the conceivable export subsidies that it does not grant."⁵²⁹

⁵²⁶ See Section IV.C above.

⁵²⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 72 and 74; see also paras. 67 to 75 of the same Appellate Body Report.

⁵²⁸ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74.

⁵²⁹ European Communities' reply to the Panel question No. 4.

7.229 In the Panel's view, this is not the European Communities' task. Instead, the European Communities must provide prima facie evidence that excess exports of sugar are not subsidized. A respondent (as the European Communities is in the present dispute) should be able to, or may be able to, make a demonstration that the measure is not caught by one or other of the definitions in Article 9.1(a) to (f) of the *Agreement on Agriculture*. The respondent should also be able to demonstrate that the challenged measure is not a "subsidy contingent upon export performance" within the meaning of Article 1(e) of the *Agreement on Agriculture*. The European Communities should be aware of its obligations under the *Agreement on Agriculture* and should also be cognisant of its subsidies programmes. This general principle is recognized also in Article XVI:4 of the *WTO Agreement* which provides that "Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". The requirements of Article 10.3 of the *Agreement on Agriculture* are based on the assumption that Members are aware of the subsidies they provide to their own producers. If there are, in fact, no subsidies, the European Communities should be able to make this demonstration.

2. The application of the special rule on the burden of proof to this dispute⁵³⁰

(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.

⁵³⁰ See also the parties' arguments with respect to the burden of proof in paras. 4.25-4.35 above.

⁵³¹ EC sugar commitment levels as stated in Section II of Part IV of the European Communities' Schedule CXL of the EC-15. Actual export quantities taken from "Notification concerning export subsidy commitments (Tables ES:1 to ES:3). It is noted that the EC notifications of its commitment levels were expressed as "white sugar equivalent" and its notified total exports are expressed in "product weight basis". Any resulting differentiations in variables will not have an effect on the Panel's analysis of the EC's commitments and exportation beyond its commitment levels because the amount of actual exports will still be well above commitment levels regardless of any change as a result of any calibration between "white sugar equivalent" and "product weight basis" figures. See also Annex C.

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

(a) Arguments of the parties⁵³²

7.232 The Complainants claim that in each of the last five years, the European Communities' total export of sugar exceeds its commitment levels. For instance, the Complainants argue that during the marketing year 2001-2002, the European Communities had exported 1,725,100 tonnes of ACP/India equivalent sugar alone: such subsidized exports were in excess of the European Communities' scheduled commitment level of 1,273,500 tonnes.

7.233 The Complainants recalled that, if the European Communities claimed that the exports of ACP/India "equivalent" sugar were not subsidized, it had the burden of proof, under Article 10.3 of the *Agreement on Agriculture*, to establish that no export subsidies applied to such exports. The Complainants submitted that the European Communities granted export subsidies listed in Article 9.1(a) of the *Agreement on Agriculture* to exports of ACP/India equivalent sugar. The export refunds granted to ACP/India equivalent sugar were the same per unit as the export refunds granted to A and B quota sugar and thus these payments clearly constituted "direct subsidies" provided by government, to firms, to the exporting industry and to producers of sugar, (an agricultural product), and were "contingent on export performance", within the meaning of Article 9.1(a) of the *Agreement on 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:

"The following export subsidies are subject to reduction commitments under this Agreement:

(a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance."

7.236 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".⁵³³

7.237 Pursuant to Article 10.3 of the *Agreement on Agriculture*, the Panel reaches the conclusion that the European Communities has not demonstrated that its exports of ACP/India equivalent sugar are not subsidized, as the evidence indicates that exports of what the European Communities

⁵³² See also paras. 4.175-4.180 above.

⁵³³ Appellate Body Report on *EC – Hormones*, para. 104.

considers to be ACP/India equivalent sugar receive export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.

7.238 The Panel concludes that since 1995, the European Communities has been exporting what it considers to be ACP/India equivalent sugar with export subsidies in quantities exceeding its commitment level of 1,273,500 tonnes. In doing so the European Communities has been acting inconsistently with Articles 3 and 8 of the *Agreement on Agriculture*.

4. Has the European Communities demonstrated that its exports of C sugar are not subsidized?

(a) Introduction

7.239 The Panel recalls that since 1995 the European Communities' total exports of sugar far exceed its commitment levels. In particular, since the marketing year 2000/2001, the European Communities' commitment level is for 1,273,500 tonnes of sugar while its total exports of sugar for that same year were 4,097,000 tonnes (some of which were ACP/India equivalent sugar already found to be inconsistent with Articles 3 and 8 of the *Agreement on Agriculture*.)

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

(b) Arguments of the parties⁵³⁶

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

7.242 The European Communities responds essentially that C sugar does not involve any payment within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. It argues that export sales of C sugar into the world market is the only form of alleged payment that is brought by the Complainants before the Panel within the Panel's terms of reference and finds that cost of production is not a relevant benchmark for such a payment in this dispute. The European Communities argues

⁵³⁴ Appellate Body on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 73.

⁵³⁵ See para. 7.238 above.

⁵³⁶ See also Section IV.D. of this Panel Report.

further that world market prices should be the relevant benchmark in this dispute and, accordingly, does not find any payments. In addition to arguing that the other forms of alleged payment that the Complainants have put forward are outside the Panel's term of reference, the European Communities claims that the alleged payments do not offer any benefits to EC sugar producers.⁵³⁷

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

(c) Assessment by the Panel

(i) *The Panel's understanding of the EC sugar regime*

7.244 Council Regulation (EC) No. 1260/2001 sets out rules to promote and protect the EC sugar industry. One main feature of the EC sugar regime is the establishment of price support for domestic sugar including intervention prices for sugar, supply controls by way of quotas, domestic market supply management, import restrictions and export subsidization. The EC sugar regime also sets out the basic price and the minimum price for beet, import and export licences, levies, export refunds; quotas and import restrictions; and preferential import arrangements.

7.245 The intervention price (minimum guaranteed price) for sugar is approximately three times the price of world market prices.⁵³⁸ The intervention price operates as a safety net that provides for intervention agencies to purchase EC quota sugar at a guaranteed price if sugar prices on the domestic market fall below a certain level. Intervention purchasing has occurred only once in 25 years⁵³⁹ as the regulatory aspects of the EC sugar regime controlling the amount of sugar sold in domestic markets and protection from outside competition enables quota sugar to be sold at prices well above the intervention price.

7.246 The EC Regulation provides rules for three different categories of sugar, i.e. A and B quota sugar and C sugar which is basically excess sugar. A, B and C sugar are produced, respectively, from A, B and C beet, the latter being used exclusively to produce C sugar.

7.247 A basic price for quota beet of standard quality⁵⁴⁰ is derived from the intervention price of white sugar and has been established at €47.67 per tonne.⁵⁴¹ The Regulation also establishes minimum prices for A and B beet paid by A and B sugar producers to A and B beet growers. The minimum price of A beet has been set at €46.72 per tonne and that of B beet at €32.42 per tonne.⁵⁴² Sugar producers are required to pay growers at least the minimum price for A and B beet they process into sugar. The price paid by the producers for C beet is generally lower than that paid for A and B

⁵³⁷ See paras. 4.44 and 4.51 above.

⁵³⁸ The intervention price valid for standard quality sugar is €63.19/100 kg for white sugar and €52.37/100 kg for raw sugar. See Article 1 of Council Regulation (EC) No. 1260/2001.

⁵³⁹ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 5.

⁵⁴⁰ For the definition of "standard quality" of beet, see Annex II of the Council Regulation (EC) No. 1260/2001.

⁵⁴¹ Article 3 of Council Regulation (EC) No. 1260/2001.

⁵⁴² Articles 4 and 5 of Council Regulation (EC) No. 1260/2001.

beet.⁵⁴³ There is no regulated minimum price for C beet. 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)⁵⁴⁴. Moreover, to be competitive C sugar must be exported at world price. Because of the low world price relative to C sugar cost of production, C sugar producers exercise pressure on C beet growers so that C beet is sold to C sugar producers at reduced prices. Furthermore, various aspects of the sugar regime provide the beet growers with an incentive to produce beet beyond their A and B quota levels, as C beet. The discounted prices for C beet below its cost of production and the incentive for beet growers to produce C beet serve as an advantage for the export production of C sugar.

7.248 In accordance with Article 15 of the EC Regulation, a basic production levy is charged to manufacturers on their production of A and B sugar.⁵⁴⁵ The levy charged on A quota sugar is set at 2 per cent while the levy on B quota sugar is set at 37.5 per cent. These levies are used *inter alia* to fund export refunds given to exported A and B quota sugar under the co-financing principle of the EC sugar regime.⁵⁴⁶ The levies charged are split 42 per cent to sugar producers and 58 per cent to beet farmers.⁵⁴⁷

7.249 The export refunds under the EC sugar regime cover the difference between the Community intervention price and the export price of EC quota sugar (that is world price).⁵⁴⁸ Export refunds are high, ranging from €443 per tonne of sugar for the 2001/2002 marketing year and €485 per tonne of white sugar for the 2002/3 marketing year. The export refund is well above the world price offered for exported quota sugar, which the EC Commission reports was €280 per tonne of white sugar in the marketing year 2001/02.⁵⁴⁹ Export refunds have been afforded to between 2.5 and 2.6 million tonnes of white sugar annually.⁵⁵⁰ The above price controls and restrictions on the domestic market supply by way of quota assignments, strict import controls and the obligation to export sugar produced in excess of quotas, as well as export refunds on exports of quota sugar, result in delivering increased revenue to A and B quota holders. Ultimately, the price of A quota sugar is approximately 350 per cent of world prices and B quota sugar is priced at approximately 250 per cent of world prices.⁵⁵¹

⁵⁴³ Article 21 of Council Regulation (EC) No. 1260/2001.

⁵⁴⁴ The Panel is aware of the fact that strictly speaking there are no "C sugar producers" as such; there are no sugar producers that produce only C sugar. C sugar is produced by the producers of A 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 sugar 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. In the following section since the Panel examines the specific costs of growing or farming of C beet as well as the costs of production of C sugar, the Panel refers to C beet growers or farmers and C sugar producers with a view to emphasising the Panel's focus on C beet and C sugar.

⁵⁴⁵ See paragraph 3 of Article 15 of the Council Regulation (EC) No. 1260/2001.

⁵⁴⁶ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 13; levies only partially fund the export refunds for A and B quota sugar.

⁵⁴⁷ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 13.

⁵⁴⁸ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 20.

⁵⁴⁹ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 20.

⁵⁵⁰ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 20.

⁵⁵¹ "Sugar in the European Union: sugar production costs and cross-subsidies to C sugar exports" by Roger Rose, Exhibit ALA-1, p. 4

7.250 The high rate of export refunds to such a significant amount of exported sugar again adds to the revenues received by EC sugar producers from quota sugar sales, and may constitute one of the source of the spill-over effects of the EC sugar regime into the export production of C sugar.

(ii) *Article 9.1(c) of the Agreement on Agriculture*

7.251 In this dispute the Panel examines whether exports of C sugar are subsidized within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.⁵⁵² Article 9.1(c) requires the demonstration of three elements. First, it requires that "payments" be made. Second, that those payments be made "on the export of an agricultural product". And third, that those payments be "financed by virtue of governmental action".

7.252 The Complainants point to what they consider to be multiple "payments" which would be made "on export" and be "financed by virtue of governmental action." The Complainants submit that the EC sugar regime involves a series of payments including: (a) payment in the form of below costs C beet sales to C sugar producers/exporters; (b) payment in the form of cross-subsidization resulting from the profits made on sales of A and B sugar used to cover the fixed costs of the production/export of C sugar; (c) payment in the form of exports of C sugar below total costs of production; and (d) payments in the form of high prices paid by consumers.⁵⁵³

7.253 The Panel examines two of the payments (a) and (b) mentioned above. For each of the alleged payments, the Panel first examines whether there is indeed a payment. Then, the Panel discusses whether the alleged payments are "on export" and lastly, whether they are financed by virtue of governmental action.

(iii) *Does the sale of C beet to C sugar producers constitute a payment on export financed by virtue of governmental action?*

Is there a payment?

7.254 The Complainants argue that, as with milk as an input for the production of dairy products in *Canada – Dairy*, C beet, as the main input for the production of C sugar, is sold to C sugar producers/exporters at prices well below the total average cost of production of such C beet and, therefore, through this transaction provides C sugar producers with a payment-in-kind within the meaning of Article 9.1(c).

7.255 The European Communities does not deny that C beet is sold below the total average cost of beet growers but does not actually discuss whether sales of C beet to C sugar producers provide a payment-in-kind or a transfer of economic resources in favour of C sugar producers. In fact, the European Communities wrote in its first submission that "*Canada – Dairy* stands for the proposition that the provision of an agricultural input below its average total costs of production constitute a

⁵⁵² Article 9.1(c) of the *Agreement on Agriculture* reads as follows:

Export Subsidy Commitments

1. The following export subsidies are subject to reduction commitments under this Agreement: (...)

(c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.

⁵⁵³ See for instance, Australia's first written submission, para. 111-113 and Australia's replies to Panel questions Nos. 46, 47 and 48; see also para. 4.39 above.

"payment" to the processor of that input."⁵⁵⁴ Although in response to a question by the Panel, the European Communities attempts to raise doubts on whether there is a sufficient "nexus", or degree of governmental action involved in the sales of C beet, the European Communities' main argument is that the matter is outside the Panel's terms of reference.⁵⁵⁵ The Panel has already dealt with the European Communities' procedural objection in paragraph 7.24 to 7.37, concluding that the parties arguments relating to C beet are within its terms of reference.

7.256 The Panel examines therefore whether the sales of C beet to producers of C sugar constitute a payment within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

7.257 As recognized by the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)*, Article 9.1(c) does not expressly identify any one criterion to be used in all situations of determining the existence of payment. The Appellate Body in that case established that an examination of whether a measure involves a payment must be determined on a case by case basis and by scrutinizing "the facts and circumstances of a disputed measure".⁵⁵⁶ The Appellate Body decided there is no one benchmark that would apply to all situations and examinations of the existence of a subsidy.⁵⁵⁷

7.258 In the first *Canada – Dairy* dispute, the Appellate Body concluded that "the word 'payments' [in 9.1(c)] embraces "payments-in-kind"⁵⁵⁸ and "specifically contemplates that the export subsidy may be granted in a form other than a money payment"⁵⁵⁹, "including revenue foregone".⁵⁶⁰ Revenue or value may be foregone in instances when the price charged by the producer of the product is less than the product's *proper value* to the producer. In determining the *proper value* to the producer in assessing whether a transfer of economic resource has taken place, 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 ...".⁵⁶¹ The Appellate Body insisted that the standard to determine whether there is a transfer of economic resources must be objective and based on "the value of the milk" to the producer.

7.259 In looking for an appropriate benchmark to measure the proper value of commercially exported milk (CEM milk), the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* relied on the cost of production of such milk. The Appellate Body determined that if the producers of milk sell their milk below their total average cost of production, this loss must be financed from some other sources including by virtue of governmental action.

"Although the proceeds from sales at domestic or world market prices represent two possible measures of the value of milk to the producer, we do not see these as the only possible measures of this value. For any economic operator, the production of goods or services involves an investment of economic resources. In the case of a

⁵⁵⁴ European Communities' first written submission, para. 53.

⁵⁵⁵ See paras. 7.3 and 7.18 above.

⁵⁵⁶ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 76.

⁵⁵⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 76.

⁵⁵⁸ Appellate Body Report on *Canada – Dairy*, para. 109.

⁵⁵⁹ Appellate Body Report on *Canada – Dairy*, para. 109.

⁵⁶⁰ Appellate Body Report on *Canada – Dairy*, para. 112. Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 73. Later on in the *US – FSC* dispute, at para. 108, the Appellate Body clarified the use of the term "revenue forgone": "We held, in *Canada – Milk*, that "export subsidies" under the *Agreement on Agriculture* may involve, not only direct payments, but also "revenue foregone". We believe, however, that in disputes brought under the *Agreement on Agriculture*, just as in cases under Article 1.1(a)(1)(ii) of the *SCM Agreement*, it is only where a government foregoes revenues that are "otherwise due" that a "subsidy" may arise." Since we are in the present dispute referring to the fact that sales do not represent the proper value to producers, we will use the expression "value foregone".

⁵⁶¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 74.

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."*⁵⁶²(emphasis added)

7.260 For the Appellate Body, the average total cost of production takes best into account the "motivations of the independent economic operator who is making the alleged 'payments'" and the value of milk to it.⁵⁶³ If the sale is made at below the total cost of production of the domestic 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 inputs sold to sugar producers at prices that are below the total costs of production of beet growers. The Complainants

⁵⁶² Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87.

⁵⁶³ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 92.

⁵⁶⁴ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 120 and 121.

⁵⁶⁵ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 121.

⁵⁶⁶ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 121; see also Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 71.

argue that C beet (an input) is being sold to sugar producers at prices that do not remotely cover its cost of production.

7.264 The Panel is of the view that in the present dispute the total cost of production of C beet is an appropriate benchmark for determining whether the sales of C beet to C sugar producers provide a "payment" to the producers of C sugar within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

7.265 There is uncontested evidence that C beet is sold to C sugar producers at prices well below its cost of production, showing that the price received for C beet – calculated at 58 to 60 per cent of the price for C sugar – was below the total cost of production of that beet throughout the years 1992/93 to 2002/03.⁵⁶⁷ In particular, the Panel refers to the LMC Data⁵⁶⁸, Datagro report "Considerations over 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.⁵⁷⁴

⁵⁶⁷ In marketing year 1995/1996 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 1996/1997 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 1997/1998 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 1998/1999 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 1999/2000 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 2000/2001 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 2001/2002 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. In marketing year 2002/2003 the price of C beet per tonne of C sugar equivalent was ***, while its average total cost of production was *** per tonne of C sugar equivalent. The above figures are derived from the Datagro Report (Exhibit BRA-1, Table 5, p. 29). C beet prices are usually determined based on 58-60% of C sugar price. The prices set above are based on the high end estimates (60% of C sugar prices) that beet farmers may receive for C beet. See Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 10; NEI Report, Exhibit COMP-2, p. 160; Datagro Report, Exhibit BRA-1, p. 7.

⁵⁶⁸ LMC Data, Exhibit BRA-2, pp. 23 and 54

⁵⁶⁹ Datagro Report, Exhibit BRA-1, at pp. 5-7, and Table 5, p. 29.

⁵⁷⁰ NEI Report, Exhibit COMP-2, pp. 117-121 and 160.

⁵⁷¹ "Sugar in the European Union: sugar production costs and cross-subsidies to C sugar exports" by Roger Rose, Exhibit ALA-1, pp. 1 and 8-12.

⁵⁷² Oxfam Briefing Paper 27, August 2002, Exhibit COMP-3.

⁵⁷³ LMC Data, Exhibit BRA-2, Table 5.15, pp. 23 and 54; Datagro Report, Exhibit BRA-1, Table 5, Beet Farming Costs, p. 29.

⁵⁷⁴ European Communities' reply to Panel's question No. 32.

7.268 As stated by the Appellate Body in *EC – Hormones*, "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."⁵⁷⁵ In the Panel's view, the uncontested evidence submitted by the Complainants demonstrates *prima facie* that C beet is sold at prices that do not cover its cost of production.

7.269 When C beet is sold to C sugar producers at rates that are below its total cost of production, there is, in effect, a payment, i.e. a payment-in-kind, being made to the C sugar producers to the extent that the proper value of C beet is not reflected in its price and, hence, involves a "payment" within the meaning of Article 9.1(c) of the *Agreement on Agriculture* by way of value foregone.

7.270 The Panel finds, therefore, that the below total cost of production sales of C beet to C sugar producers involves a payment within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

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

⁵⁷⁵ Appellate Body report on *EC – Hormones*, para. 104.

⁵⁷⁶ Brazil's first written submission, para. 57.

⁵⁷⁷ European Communities' first written submission, para. 45.

⁵⁷⁸ European Communities' first written submission, para. 44.

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 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 beet⁵⁸², 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

⁵⁷⁹ Webster's New Encyclopedic Dictionary, 1994 ed.

⁵⁸⁰ Panel Report on *India – Autos*, at para. 7.257.

⁵⁸¹ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 10 and EC Council Regulation No 1260/2001, Articles 19 and 21.

⁵⁸² A and B beet farmers are protected via minimum beet pricing or "basic beet price". The pricing system for beet establishes the minimum price at which sugar manufacturers may purchase sugar beet from EC farmers. This minimum price is set to at least 58 per cent of the intervention price (€366 per tonne of white sugar). The purpose of the beet (and cane) pricing arrangements is to ensure a stable and adequate income to beet farmers and a proper distribution of income throughout the sugar industry chain.

⁵⁸³ Commission of the European Communities: Common Organisation of the Sugar Market Description Exhibit COMP-8, p. 10; see also LMC Data, Exhibit BRA-2, pp. 15-16.

⁵⁸⁴ C sugar may be carried forward in a limited amount to the next marketing year to be estimated against the following years allocated quota under Article 14(1) of the EC Council Regulation No. 1260/2001.

⁵⁸⁵ Article 13 of the EC Council Regulation No. 1260/2001.

⁵⁸⁶ Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.78.

⁵⁸⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 79.

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' actions thereby finance growers to supply C beet to C sugar producers at prices that do not reflect the average total cost of production of the beet, and for those processors, in turn, to provide C sugar to buyers at 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 *per se*.⁵⁸⁸

7.281 The Panel recalls that a "demonstrable link" and "clear nexus" between the "financing of the payments" and the "governmental action" must be established in order for the payment to qualify as a payment "by virtue of governmental action". The Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* stated: "The words 'by virtue of' indicate that there must be a demonstrable link between the *governmental action* at issue and the *financing* of the payments, whereby the payments are, in some way, financed as a result of, or as a consequence of, the governmental action."⁵⁸⁹

7.282 The Appellate Body clarified the terms "financed by virtue of governmental action" in the second recourse on implementation in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, when it stated:

"As regards 'governmental action', we held in the first Article 21.5 proceedings that 'the text of Article 9.1(c) does not place any qualifications on the types of 'governmental action' which may be relevant under Article 9.1(c).'⁵⁹⁰ Instead, the provision gives but one example of governmental action that is 'included' in Article 9.1(c)—however, this example is merely illustrative.⁵⁹¹ Accordingly, we stated that Article 9.1(c) 'embraces the full-range' of activities by which governments 'regulate', 'control' or 'supervise' individuals'.⁵⁹² In particular, we said that governmental action 'regulating the supply and price of milk in the domestic market' might be relevant 'action' under Article 9.1(c).⁵⁹³ Moreover, the governmental action may be a single act or omission, or a series of acts or omissions.

We observe that Article 9.1(c) does not require that payments be financed by virtue of government '*mandate*', or other '*direction*'. Although the word 'action' certainly covers situations where government mandates or directs that payments be made, it also covers other situations where no such compulsion is involved.⁵⁹⁴⁵⁹⁵

⁵⁸⁸ See paras. 4.70 to 4.86 to above.

⁵⁸⁹ Appellate Body Reports on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113 and on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 130,.

⁵⁹⁰ (footnote original) Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 112.

⁵⁹¹ (footnote original) The example given is "payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived".

⁵⁹² (footnote original) Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 112.

⁵⁹³ (footnote original) *Ibid.*

⁵⁹⁴ (footnote original) Article 9.1(c) of the *Agreement on Agriculture* may be contrasted with Article 9.1(e) of the *Agreement on Agriculture*, as well as with Article 1.1(a)(1)(iv) of the *SCM Agreement*,

7.283 As the Panel discussed in paragraphs 7.247-7.248, the EC sugar regime regulates the prices at which A and B beet is sold to sugar producers. This is done to ensure a stable and adequate income to beet farmers and a proper distribution of income throughout the sugar industry chain.⁵⁹⁶ While Council Regulation No. 1260/2001 requires minimum payments to growers of A and B beet, it permits processors to buy the beet they use to produce C sugar at prices below these minimums.⁵⁹⁷ However, because growers of C beet are also growers of A and B beet and because C beet can only be used in C sugar, which in turn belongs to the same production line as A and B quota sugar, the EC sugar regime ensures that the sale of under-priced C beet to C sugar producers is an integral part of the governmental regulation of the sugar market. Indeed, the production of C beet will depend on the needs of C sugar producers (since C beet can only be used in C sugar). Conversely, to be competitive, C sugar must be exported at the world price. Because of the low world price relative to C sugar costs of production, C sugar producers will exercise pressure on C beet growers so that C beet are sold to C sugar producers at reduced prices. As further detailed below, C beet growers can use the profits made on the sales of A and B beet to cross-subsidize the sale of C beet to C sugar producers at prices below the total costs of production of C beet while still making profits. C sugar producers will therefore be willing to pay C beet growers proportionally to what they receive on the sales of C sugar. There is evidence that indeed C beet growers usually receive some 60 per cent of the price of C sugar on the world market (as is the case with A and B beet). Again the EC Council Regulation, through its complete control over the production and sale of A and B sugar and A and B beet, controls and affects the production and sales conditions of C beet.

7.284 The Panel also notes that the EC Council Regulation No. 1260/2001 prescribes a framework for the contracts to be signed by beet growers and sugar processors. These contracts are known as *inter-trade agreements*. The prescriptions of the EC Council Regulation No. 1260/2001 provide therefore a minimum of protection for the farmer with respect to production and supply conditions (quotas, supply of seed, beet prices, delivery schedules, etc.) for which EC member States have a regulatory role.⁵⁹⁸ The actual intra-trade agreements are often more detailed than the EC sugar regime provides.

7.285 In answer to a Panel question, the European Communities submits that the availability and the cost of C beet may vary greatly between EC regions, as well as from one year to another, depending on a multiplicity of factors, which do not involve "government action", or at least the type of action at issue in this dispute. For example, the production of beet may be affected by climatic conditions and diseases to a much greater extent than the production of milk. Also, the European Communities argues that beet farmers are much less specialized than milk farmers. As a result, the production of C beet is as likely to be "financed" by A and B beet as by other alternative crops, and vice versa. The European Communities argues that what it describes as the "causal link" between the alleged "Government action" and the provision of C beet is not "tight" enough to consider that sales of C beet are "financed by virtue of Government action".

7.286 The Panel agrees with the Complainants that the European Communities does not provide any supporting evidence to substantiate its assertions in regard to causal links, such as what the income from alternative crops might be compared to income from price support for A and B beet, what those crops might be and whether such crops are also receiving governmental price support. Furthermore,

and items (c), (d), (j), and (k) of the Illustrative List of Export Subsidies (the "Illustrative List") of the *SCM Agreement*. In these provisions, some kind of government mandate, direction, or control is an element of a subsidy provided through a third party.

⁵⁹⁵ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 127 and 128.

⁵⁹⁶ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 5.

⁵⁹⁷ Article 21(1), EC Council Regulation No. 1260/2001.

⁵⁹⁸ Point I(b) and Point XIV of Annex III to Regulation 1260/2001 and Annex IV to Regulation 1260/2001.

evidence submitted shows that gross margins for C beet production in major C beet producing countries (i.e. France) is higher than the gross margin of alternative crops such as wheat.⁵⁹⁹ More importantly, the European Communities fails to explain why large numbers of EC farmers are engaged in growing C beet if such production only serves to deliver losses. Farmers make crop planting and livestock production decisions on the basis of expected prices and profits. Within a season, livestock and crop farmers will often cross-finance between different sectors, due to yield and price movements. This is as true for dairy cattle as for beet growing. However, the European Communities also fails to explain why farmers would maintain, within a mix of farming activities, any sectoral production for which expected revenue is persistently less than the cost of production, in this case, production of C beet.

7.287 In the Panel's view, the Complainants have submitted prima facie evidence that C sugar producers provide positive incentives for growers to plan production above (the processor's) quota, by including an amount of C beet in a grower's beet delivery quota, at an average price, or paying a higher price of the first slice of over quota beet. As incentives, C sugar producers may cut next year's beet allocation for those growers who fail to meet the sugar producers' requirements, reallocating its delivery rights to more reliable growers.

7.288 The Panel recalls that C beet can only be used in C sugar. There is also evidence that C sugar producers *have incentives* to produce C sugar so as to maintain their share of the A and B quotas as well as the ability to profit from sales of C sugar even if the prices are below the total cost of production (fixed costs plus average variable costs). In the Panel's view, beet growers also have an incentive to plan production levels above A and B quota sugar requirements. C beet growers have an incentive to supply as much as is requested by C sugar producers with a view to receiving the high prices for A and B beet and their allocated amount of over-quota beet (or C beet). In this context, the Panel recalls that A, B and C beet are part of the same line of production, although the market for A and B beet – that is A and B quota sugar – is more lucrative than that of the C beet – that is C sugar. C beet producers can therefore sell below costs through the profits they make in selling A and B beet.⁶⁰⁰

7.289 As noted by the Panel in paragraphs 7.261-7.263 above, there is a close similarity with the situation prevailing with CEM milk in *Canada – Dairy (Article 21.5 New Zealand and US II)* where the Appellate Body concluded that:

"where sales in the more remunerative market bear more than their relative proportion of shared fixed costs, sales in the other market do not need to cover their relative proportion of the shared fixed costs in order to be profitable. Rather, these sales can be made profitably *below* the average total cost of production. If the more remunerative sales cover *all* fixed costs, sales in the other market can be made profitably at any price above marginal cost. In these situations, the higher revenue sales effectively *'finance'* a part of the lower revenue sales by funding the portion of the shared fixed costs attributable to the lower priced products. (...)"⁶⁰¹

7.290 The Panel recalls that since C beet can only be used in C sugar⁶⁰², the proportion of C beet production in relation to total beet production ought to correlate closely to the rate of C sugar production in proportion to total sugar production. Accordingly, since over the past years C sugar represents 11 to 21 per cent of the overall production of quota sugar,⁶⁰³ C beet must represent a similar

⁵⁹⁹ NEI Report, Exhibit COMP-2, pp. 162-164.

⁶⁰⁰ See NEI Report, Exhibit COMP-2, pp. 159-164 for discussion on the incentives and intentional farming of C beet.

⁶⁰¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 140.

⁶⁰² See Article 21 of the EC Council Regulation No. 1260/2001.

⁶⁰³ EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 23, para. 38.

level of total beet production in the European Communities. Hence, the growing of C beet is not incidental but rather an integral part of the governmental regulation of the sugar market.

7.291 The Panel is of the view that a significant percentage of farmers of C beet are likely to finance sales of C beet below the costs of production as a result of participation in the domestic market in selling high priced A and B beet. The Panel considers that, through EC Council Regulation No. 1260/2001, the European Communities controls virtually every aspect of domestic beet and sugar supply and management. In particular, the EC Regulation fixes the price of A and B beet that renders 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 domestic market is emphasized by the fact that the EC Sugar Management Committee overviews, supervises and protects the EC domestic sugar through, *inter alia*, supply management.⁶⁰⁴ In sum, the European Communities controls both the supply and the price of sugar in the internal market. This controlling governmental action is "indispensable" to the transfer of resources from consumers and tax payers to sugar producers for A and B quota sugar and, through them, to growers for A and B quota beet.⁶⁰⁵

7.292 The Panel finds, for the foregoing reasons, that C sugar producers receive payments on export *financed by virtue of governmental action* through various governmental actions as specified above, within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

Conclusion

7.293 Therefore, the Panel finds that C sugar producers receive payment on export by virtue of governmental action through sales of C beet below the total costs of production to C sugar producers. Pursuant to Article 10.3 of the *Agreement on Agriculture*, the Panel finds that the European Communities has not demonstrated that exports of C sugar that exceed the European Communities' commitment levels since 1995 and in particular since the marketing year 2000/2001, have not been subsidized. Consequently, the European Communities is acting inconsistently with Articles 3 and 8 of the *Agreement on Agriculture*.

(iv) *Does the cross-subsidization resulting from the EC sugar regime constitute a payment on exports by virtue of governmental action?*

Does the cross-subsidization from the EC regime constitute a payment?

7.294 The Panel notes, in analyzing the alleged payments in this case, that there is an intellectual challenge stemming from the fact that the producers of A, B and C sugar are the same companies and that the production of all three classifications of sugar is made in a continuous line of production. Were the producers of C sugar different from those of A and B sugar, and were they receiving "economic resources" from the producers of A and B sugar in order to produce C sugar, the analysis would appear more straightforward. The Panel also notes that any alleged payments in the production of sugar, wherever they take place, derive from the high prices paid for A and B quota sugar on the EC domestic market. For these reasons, the Panel concentrates its analysis of C sugar on the issue of cross-subsidization.

7.295 The Complainants submit that the advantages that exporters of C sugar receive through the transfer of economic resources that result from the EC sugar regime (which allows them to produce and export C sugar at above average variable cost but below average total cost of production) are

⁶⁰⁴ Articles 42 and 43 of the EC Council Regulation No. 1260/2001.

⁶⁰⁵ Appellate Body Report on *Canada – Dairy*, para. 120.

payments. The Complainants argue that the EC sugar regime's combination of guaranteed intervention prices, production quotas, export refunds and import restraints all limit the quantity of quota sugar that may be sold in the internal market and directly results in the high domestic prices for A and B quota sugar. The Complainants also argue that the EC sugar regime and the high administered above-intervention price paid for domestic EC sugar result in an eventual payment to EC sugar exporters within the meaning of Article 9.1(c).⁶⁰⁶ Specifically, they submit that the high 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

⁶⁰⁶ Brazil's first written submission, para. 45.

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.

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)

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

7.301 The evidence submitted shows that C sugar prices have been well under its average total cost of production every year, from 1992/1993 to 2002/2003.⁶¹⁴ In marketing year 2000/2001, the price per tonne of C sugar, based on the London Daily Price⁶¹⁵, was €22.32, while the total cost of production for that sugar was *** per tonne.^{616 617} This data illustrates that the price charged for C sugar does not even remotely cover its cost of production.⁶¹⁸

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

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.

⁶¹³ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras.136-146.

⁶¹⁴ Datagro Report, Exhibit BRA-1, Table 5, p.29 and Table B-15; "Sugar in the European Union: sugar production costs and cross-subsidies to C sugar exports" by Roger Rose, Exhibit ALA-1, pp. 8-10; LMC Data, Exhibit BRA-2, Table 5.15, p. 54; Oxfam Briefing Paper 27, August 2002, Exhibit COMP-3, pp. 1, 8-9; EC Court of Auditors Special Report No 20/2000, Exhibit COMP-1, p. 35; NEI Report, Exhibit COMP-2, Table 7.3, p. 113.

⁶¹⁵ The London Daily Price is a spot price for EC sugar and, hence, may represent a more accurate indication of the premium that EC sugar receives. See LMC Data, Exhibit BRA-2, p. 23.

⁶¹⁶ Ibid.

⁶¹⁷ In marketing year 1995/1996 the price per tonne of C sugar was ***, while total cost of production for that sugar was *** per tonne. In marketing year 1996/1997 the price per tonne of C sugar was ***, while total cost of production for that sugar was *** per tonne. In marketing year 1997/1998 the price per tonne of C sugar was ***, while total cost of production of that sugar was *** per tonne. In marketing year 1998/1999 the price per tonne of C sugar was ***, while total cost of production of that sugar was *** per tonne. In marketing year 1999/2000 the price per tonne of C sugar was ***, while total cost of production of that sugar was *** per tonne. In marketing year 2001/2002 the price per tonne of C sugar was *** while total cost of production of that sugar was *** per tonne. In 2002/2003 the price per tonne of C sugar was ***, while the total cost of production for that sugar was *** per tonne. See Datagro Report, Exhibit BRA-1, Table B. 15.

⁶¹⁸ The EC has not contested the Complainants' evidence that C sugar is sold at prices that give the producers a positive contribution to net income even though those prices are approximately *** per cent below average total cost of production. Accordingly, the evidence clearly establishes that a "significant proportion" of EC producers –and one hundred per cent of those producing C sugar – make export sales of C sugar at prices below the average total cost of production.

⁶¹⁹ European Communities' reply to Panel question 68. The Panel also notes the non-refuted evidence submitted by the Complainants. Most, if not all, of EC sugar producers operate on a profitable basis, particularly those companies that operate in the relatively more efficient C sugar producing regions. [For example, reported profits for 2002-03 were €31 million and €15 million for Royal Cosun and Sudzucker, respectively (a substantial part of Sudzucker's profit would have been earned through its 85 per cent equity in St Louis Sucre). In the same year, Danisco reported a profit of DKK1017 million. (€139 million). The Associated British Foods group that includes British Sugar as a subsidiary reported a profit of £176 (€64 million). According to the Financial Times (15 April 2004, p.24) profits for the Associated British Foods subsidiary appears likely to be higher in 2003-04 than in 2002-03, with high sugar yields accounting for much of an increase in profit for the first half of the year from £73 million to £85 million. In 2002-03 St Louis Sucre's profit was €132 million. The most representative measure of return to capital available on a common basis is the return to shareholders' funds. Profit as a percentage of shareholders funds for 2002-03 was 6.4, 14.2, 7.5 and 36.2 for Royal Cosun, Sudzucker, Danisco and St Louis Sucre, respectively. To the extent that the value of

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 regime⁶²² 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 A quota sugar (which comprises around 82 per cent of the total quota) is the more valuable quota and is nominally intended to meet domestic demand.⁶²³ The regime provides for annual A and B sugar production quotas for each member State, established for a five-year period. Member States are responsible for assigning the quotas to sugar producers. The quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies (in EC terminology, 'refunds'). There is no limit on sugar production above A and B quota but such excess sugar (C sugar) has to be exported if not carried forward. Penalties are provided for when export sugar surplus to A and B quota sugar (C sugar) is not exported. However, as member States are authorized to reduce quotas, failure to produce up to maximum quota levels could lead to reductions in the quotas assigned to individual processors.

7.306 There are no limits on the quantity of C sugar that may be produced or exported, but such sugar cannot be sold on the domestic market and it is not eligible for intervention or export refunds. There is no independent production of C sugar. The manufacture of quota and non-quota sugar is undertaken by the same enterprises. There is nothing in the regime to prevent producers pooling

sugar quotas is included in the reported value of capital, these figures will understate the true contribution of quota sugar profits to rates of return. Only for St Louis Sucre is the issue addressed specifically for sugar quotas in the accounts. There, it is stated that the value of sugar quotas purchased in company amalgamations is amortised over 20 years.]

⁶²⁰ See Australia's first written submission, paras. 42-71; EC Court of Auditors, Special Report No 20/2000, Exhibit COMP-1, p. 35, para. 96; "Sugar in the European Union: sugar production costs and cross-subsidies to C sugar exports" by Roger Rose, Exhibit ALA-1, pp. 17-27; Datagro Report, Exhibit BRA-1, pp. 8-27; Oxfam Briefing Paper 27, August 2002, Exhibit COMP-3, pp. 1, 5-6.

⁶²¹ See LMC Data, Exhibit BRA-2, Table 3.4, p. 22; and Datagro Report, Exhibit BRA-1, Table 8.15 and Table 5, p. 29.

⁶²² See also Factual Aspects in Section III above.

⁶²³ Commission of the European Communities: Common Organisation of the Sugar Market Description, Exhibit COMP-8, p. 9.

subsidies for quota sugar to average out subsidies and charges over total sugar production.⁶²⁴ In fact, 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

⁶²⁴ In 1981, the EC advised a GATT working party: "... that the sugar regime resulted in the pooling of producers receipts from sales in the internal markets at supported prices, receipts, from exports of B quota sugar 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.

Agreement on Agriculture to virtually any form of government intervention which might have the incidental effect of "financing" sales at a loss. According to the European Communities, this was never intended by the drafters of the *Agreement on Agriculture*.

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

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

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

Is the payment on export?

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

7.316 For the European Communities, even if these measures provided an indirect benefit to C sugar, they were not contingent upon the export of C sugar and, therefore, could not be characterized as "export subsidies". The European Communities argued that a sugar producer's eligibility for A and B production quotas did not depend on whether it exported any sugar. Likewise, the right to sell A and B sugar into intervention was not conditional upon whether it exported C sugar or indeed any sugar at all. In this regard, the European Communities noted that some sugar producers did not produce any C sugar at all. The European Communities noted further that according to data for the most recent marketing year, there were no exports of C sugar from Italy, Greece and Portugal, while exports from Finland, Spain and Belgium/Luxemburg represented only a fraction of their total sugar output.

7.317 As discussed before, an analysis of Article 9.1(c) shows that the focus of the analysis is on whether the payment received is "on the export" or provides an advantage to the exports, not whether the whole EC regime, or the cross-benefits resulting from A and B quotas are contingent upon C sugar being exported.

7.318 The Panel recalls that C sugar, unless carried forward, must be exported, whether it is exported by the C sugar producer or any other intermediary. The European Communities admits that

⁶³⁰ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US I)*, para. 112.

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

7.319 Moreover, the Panel notes that the European Communities has not disputed that *all* companies that produce C sugar participate in the domestic market through production of A or B sugar, or both. In *Canada – Dairy (Article 21.5 – New Zealand and US II)* the Appellate Body held that it was irrelevant that some producers did not make payments within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. It found that Canada would still act inconsistently with its export subsidy commitments even if some producers never make or participate in the discounted sales. The requirement is not that every single producer be involved in receiving or transferring payments but rather that the system provides for or even encourages such an occurrence.⁶³²

7.320 The Panel is of the view that such an occurrence is not, as suggested by the European Communities, a mere "incidental effect" of financing below cost of production of C sugar exports. The Panel fails to see a mere "incidental effect" in view of the great discrepancy between the cost of production and the C sugar prices. For instance, the evidence submitted shows that for 2000/2001 C sugar was priced at €222.39 per tonne. But the total cost of production for that same sugar in that marketing year was on average *** per tonne.⁶³³ The evidence submitted also shows that for 2001/2002 C sugar was priced at *** per tonne. But the total cost of production for that same sugar in that year was on average *** per tonne.⁶³⁴ Nobody could consider the effects of a product paying for only *** per cent of its total cost of production in 2000/2001 and *** per cent of its total cost of production in 2001/2002, or at *** and *** below its cost of production, respectively, as "incidental". Moreover there is evidence that production of C sugar represents some 11-21 per cent of the total EC sugar production.⁶³⁵

7.321 The Panel recalls that C sugar could only be sold for export. If not reclassified, C sugar "may not be disposed of in the Community's internal market and must be exported without further processing."⁶³⁶ Because of that legal requirement, advantages, payments or subsidies to C sugar, that must be exported, are subsidies "on the export" of that product. It seems clear that if the producer had a choice to either sell on the EC domestic market or on the world market, the former would be more attractive, given that the EC regime delivered a domestic price of some 3.5 times the world price of A quota sugar and 2.5 times that of B quota sugar.⁶³⁷ The only reason why producers of C sugar export C sugar, is because they are prohibited from introducing such sugar into the domestic market, facing heavy penalties pursuant to Article 13 of the EC Regulation if they do. They decide to produce C sugar because they are able to export it at prices above its average variable costs after covering a portion of the fixed costs by way of spill-over from sales of A and B sugar.

7.322 The Panel finds that the payment on C sugar production in the form of transfer of financial resources through cross-subsidization resulting from the operation of the EC sugar regime is *on export* within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

⁶³¹ European Communities' reply to Panel question No. 62(b): "However, no meaningful distinction can be made between the export sales made directly by the sugar companies and those made through trading companies. The C sugar sold to the traders cannot be resold within the EC. Further, in both cases the sugar is usually delivered by the sugar companies FOB at an EC port. Moreover, sometimes the trading companies are not even established in the EC. Thus, for all practical purposes, sales of C sugar to traders are export sales, just like the export sales made directly by the sugar companies."

⁶³² Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 152.

⁶³³ Datagro Report, Exhibit BRA-1, Table B.15 and Exhibit ALA-1, table 2 on page 8.

⁶³⁴ Datagro Report, Exhibit BRA-1, Table B.15.

⁶³⁵ EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 23, para. 38.

⁶³⁶ Articles 13(1) of EC Council Regulation No. 1260/2001

⁶³⁷ See LMC Data, Exhibit BRA-1, Table 3.4, p. 22; and Datagro Report, Exhibit BRA-1, Table B.15 and Table 5, p. 29.

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 In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body stated that "Article 9.1(c) 'embraces the full-range' of activities by which governments 'regulate', 'control' or 'supervise' individuals'.⁶⁴⁰ In particular, it said that governmental action 'regulating the supply and price of milk in the domestic market' might be relevant 'action' under Article 9.1(c).⁶⁴¹ It added that "Article 9.1(c) does not require that payments be financed by virtue of government 'mandate', or other 'direction'. Although the word 'action' certainly covers situations where government mandates or directs that payments be made, it also covers other situations where no such compulsion is involved."⁶⁴²⁶⁴³

7.325 Of particular relevance in the present dispute is the Appellate Body's discussion of the word "financed" (by virtue of governmental action) which refers to the "mechanism or process" put in place by the government: "*The word refers generally to the mechanism or process by which financial resources are provided to enable 'payments' to be made.*"⁶⁴⁴

7.326 The Panel considers that the European Communities' governmental action regulating the domestic sugar market cross-subsidizes sales of C sugar that otherwise would not be made, or would be made at a loss. The higher revenue sales for quota sugar in the internal market effectively finances some or all of the fixed costs of C sugar. C sugar is cross-subsidized through direct subsidies, price support mechanisms and related mechanisms for quota sugar, all of which are regulatory instruments of the EC sugar regime. The sales of C sugar are profitable at prices that merely exceeds average variable costs because the higher revenue sales of A and B quota sugar in the internal market "effectively financed part of the lower revenue sales by funding the portion of the shared fixed costs attributable to the lower priced products."⁶⁴⁵

7.327 With respect to market access, the European Communities recalled that the terms "governmental action" in Article 9.1(c) encompass a broad range of government measures⁶⁴⁶, including import tariffs.⁶⁴⁷ The Complainants' interpretation would imply that, if high import duties had the incidental effect of "cross-financing" exports below the average total cost of production, the

⁶³⁸ Appellate Body Report on *Canada – Dairy*, para. 120.

⁶³⁹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 130; see also Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113.

⁶⁴⁰ (footnote original) Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 112.

⁶⁴¹ (footnote original) *Ibid.*

⁶⁴² (footnote original) Article 9.1(c) of the *Agreement on Agriculture* may be contrasted with Article 9.1(e) of the *Agreement on Agriculture*, as well as with Article 1.1(a)(1)(iv) of the *SCM Agreement*, and items (c), (d), (j), and (k) of the Illustrative List of Export Subsidies (the "Illustrative List") of the *SCM Agreement*. In these provisions, some kind of government mandate, direction, or control is an element of a subsidy provided through a third party.

⁶⁴³ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 127 and 128.

⁶⁴⁴ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 132.

⁶⁴⁵ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 139-140.

⁶⁴⁶ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 112.

⁶⁴⁷ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 144.

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 Yet, the EC Court of Auditors have stated that, over the past years, C sugar production has varied between 11 and 21 per cent of quota production.⁶⁴⁹ The evidence demonstrates that one reason for this excessive production of C sugar is that the spill-over of profits from sales of A and B quota sugar allows C sugar fixed costs to be covered and, hence, allows it to be sold profitably above its average variable costs.⁶⁵⁰ This is further evidence of the advantage provided to C sugar producers. Otherwise, C sugar would not be produced at such levels if it were only to ensure satisfaction of quota allocation.

7.329 The Panel recalls that the Appellate Body stated that the use of WTO-consistent domestic support cannot be without limits:

"However, we consider that the distinction between the domestic support and export subsidies disciplines in the *Agreement on Agriculture* would also be eroded if a WTO Member were entitled to use domestic support, without limit, to provide support for exports of agricultural products. Broadly stated, domestic support provisions of that Agreement, coupled with high levels of tariff protection, allow extensive support to producers, as compared with the limitations imposed through the export subsidies disciplines. Consequently, if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue through a WTO Member's export subsidy commitments."⁶⁵¹
(underlining added)

7.330 In the Panel's view, the EC sugar regime is such that it creates incentives to breach the ordinary limits of domestic support by encouraging producers to produce more sugar for export in order to ensure they fulfil their quotas and prevent them from losing access to the preferential quotas. More importantly though, by virtue of the high prices charged to domestic consumers and the operation of the A and B quotas as well as other features of the EC sugar regime, exporters of C sugar can cover a significant portion of their production costs and make profitable export sales.

7.331 The Panel is thus of the view that EC sugar producers *finance* sales of C sugar at below cost of production directly by participating in the domestic market and making sales internally at high prices as regulated by the European Communities (and from the purchase of discounted C beet as discussed earlier). The European Communities' governmental action controls virtually all aspects of domestic sugar supply and pricing. The European Communities provides this control through a combination of guaranteed intervention prices, production quotas and import restraints which limit the quantity of quota sugar that may be sold in the internal market, and the resulting high domestic price for A and B quota sugar. The domestic sales offer lucrative and attractive returns to producers. Government action controls the supply of domestic sugar by way of quotas in pursuit of protecting

⁶⁴⁸ NEI Report, Exhibit COMP-2, p. 117.

⁶⁴⁹ EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 23, para. 38.

⁶⁵⁰ NEI Report, Exhibit COMP-2, pp. 117 and 160.

⁶⁵¹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 91.

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

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

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

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

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

5. Overall conclusion

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

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

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

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

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

⁶⁵² LMC Data, Exhibit BRA-1, Tables 3.1-3.4, pp. 18-22 and Exhibit ALA-1.

⁶⁵³ EC Commission Court of Auditors, Special Report No 9/2003, Exhibit COMP-11, p. 23, para. 38.

subsidies on sugar within the meaning of Articles 9.1(a) and 9.1(c) of the *Agreement on Agriculture*, in excess of the quantity commitment levels specified in Section II, Part IV of its Schedule.

6. The interpretation and correction of the European Communities' Schedule in light of the Modalities Paper

(a) Arguments of the parties⁶⁵⁴

7.341 The European Communities considers that the Modalities Paper is an agreement reached by all participants in the Uruguay Round in connection with the conclusion of the *Agreement on Agriculture*. As such, the Modalities Paper is relevant as "context" for the interpretation of the schedules of reduction commitments, in accordance with Article 31.2 (a) of the *Vienna Convention*.

7.342 For the European Communities, the letter of the Chairman of the Market Access negotiating group of 20 December 1993 recorded the understanding of the Participants "that these negotiating modalities shall not be used as a basis for dispute settlement proceedings under the *WTO Agreement*". This means that the WTO Members cannot bring claims under the *DSU* based on the violation of the Modalities Paper. It does not mean, however, that the Modalities Paper is irrelevant for the interpretation of the *Agreement on Agriculture*. This is, as mentioned above, a question to be decided by the Panel having regard to the relevant provisions of the *Vienna Convention*.

7.343 For the European Communities, the fact that the Modalities Paper is not "legally binding" does not prevent it from being an "agreement" or from being "context". Thus, Article 31.2 of the *Vienna Convention* includes among the "context", the "preamble" of a treaty which, by definition, imposes no legal obligations. The European Communities adds that in any event, the Modalities Paper was drafted in mandatory terms and purported to be binding. Thus, Article 1 of the Modalities Paper states that:

"Specific binding commitments in the areas of market access, domestic support and export competition shall be established in accordance with the modalities set out hereunder."

7.344 The European Communities submits that the "base quantity" included in the EC Schedule is part of the text of the *WTO Agreement*. The European Communities asserts that total exports of sugar during the most recent marketing year for which there is data available (October 2001-September 2002) were 2,443,600 tonnes⁶⁵⁵, i.e. 71,100 tonnes below the final commitment level as re-calculated in paragraph 4.124 above. Thus, the breach of the European Communities' reduction commitments alleged by the Complainants would result exclusively from a scheduling error.

7.345 Therefore, the European Communities submits that:

"[S]hould the Panel find that the C sugar regime provides 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."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*

⁶⁵⁴ See also paras. 4.122 et seq. above.

⁶⁵⁵ Including exports of C sugar, and adjusted for ACP/India sugar which is subject to a 1.6 million tonnes ceiling (see Section IV).

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

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

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

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.

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 Communities⁶⁶¹, 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 parties⁶⁶³

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*.

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

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

⁶⁶² Article 19.1 of the *DSU* provides: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations."

⁶⁶³ See Section IV:D.2 above.

⁶⁶⁴ Appellate Body Report on *Canada – Dairy*, para. 124.

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 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 had been suffered by the Complainants. They agreed with the European Communities that, pursuant to Article 3.8 of the *DSU*, the European Communities, as the defending party, could rebut the presumption of nullification and impairment but submitted that in doing so, it must, under Article 3.8 of the *DSU*, establish that its breach of the rules had not had "*an adverse impact*" on the complainant(s).

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

7.363 Furthermore, the Complainants provided evidence that the EC sugar regime caused them losses. The Complainants referred to a March 2004 Oxfam study⁶⁶⁶ which had calculated, based on 2002 exports, that the EC sugar regime caused immediate losses of \$494 million for Brazil and \$151 million for Thailand in that year alone. Brazil submitted that that was serious nullification or impairment by any reasonable standard. The Complainants also referred to this report which noted the cost of the EC sugar regime to South Africa and a number of other developing countries, and recalled that the Panel had heard directly from Colombia and Paraguay, as third parties, that such regime hurt them as well.⁶⁶⁷

7.364 The European Communities responded that the Complainants' arguments overlooked the thrust of the European Communities' defence, which was precisely that the Complainants could have no "legitimate expectations" that the European Communities would stop its exports of C sugar. At most, the Complainants could have expected that the European Communities would reduce those exports by 21 per cent (in quantity) as agreed in the Modalities Paper.

7.365 All parties agreed that the nullification or impairment allegedly suffered as a result of the WTO inconsistencies of the EC sugar regime would not differ based on the particular agreement violated.⁶⁶⁸ The Complainants clarified, however, that if the elements of a violation under the *Agreement on Agriculture* and the *SCM Agreement* are established, then they are entitled to the remedies for nullification or impairment established by each agreement, provided there is no overlap or duplication in any remedies actually imposed.

2. Assessment by the Panel

7.366 The Panel recalls the text of Article 3.8 of the *DSU* which provides that the prima facie presumption of nullification and impairment may be rebutted:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, *it shall be up to the Member against whom the complaint has been brought to rebut the charge.*" (emphasis added)

7.367 The Panel further recalls that in *EC – Bananas III*, the Appellate Body observed that the European Communities, in its appeal, attempted to "rebut the presumption of nullification or 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)

⁶⁶⁶ Exhibit ALA-12, pages 2 and 28.

⁶⁶⁷ Brazil's closing statement at the second substantive meeting of the Panel, para. 2, Colombia's oral statement, para. 2 and Paraguay's oral statement, para. 2.

⁶⁶⁸ Parties' replies to Panel question No. 2.

So, too, is the panel report in *United States-- Superfund*, to which the Panel referred. In that case, the panel examined whether measures with 'only an insignificant effect on the volume of exports do nullify or impair benefits under Article III:2 ...'. The panel concluded (and in so doing, confirmed the views of previous panels) that:

'Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded ipso facto as a nullification or impairment of benefits accruing under the General Agreement. A demonstration that a measure inconsistent with Article III:2, first sentence, has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted.'⁶⁶⁹

The panel in *United States – Superfund* subsequently decided '*not to examine the submissions of the parties on the trade effects of the tax differential*' on the basis of the legal grounds it had enunciated. *The reasoning in United States – Superfund applies equally in this case.*⁶⁷⁰ (emphasis added)

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

"We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that *even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, this would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether 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*

⁶⁶⁹ (footnote original) GATT Panel Report on *US – Superfund*, para. 5.1.9.

⁶⁷⁰ Appellate Body Report on *EC – Bananas III*, paras. 251-253.

⁶⁷¹ Panel Report on *Turkey – Textiles*, para. 9.204.

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 had resorted to reliance on expectations to establish a violation⁶⁷⁴, whereas in this case, the European Communities' argumentation refers to the nullification or impairment of benefits that may or may not result from an established violation.

7.370 In the Panel's view, the European Communities' reliance on the Complainants' general expectations or lack thereof, is not sufficient to rebut the presumption of nullification of benefits pursuant to Article 3.8 of the *DSU*, once a violation has been demonstrated.⁶⁷⁵ The Complainants, as with all Members, had legitimate expectations that the competitive relationship of their sugar would not be nullified or impaired by the export subsidies of the European Communities provided in excess of the European Communities' commitment level. The Complainants also had legitimate expectations that the European Communities would comply with the *Agreement on Agriculture*, including the European Communities' obligation not to provide export subsidies above its commitment level.

7.371 The Panel recalls that the flexibilities provided for by Article 9.2(b)(iv) of the *Agreement on Agriculture* is an exception to the general prohibition against export subsidies provided for in Article 8 and 3.3 of the *Agreement on Agriculture*. Therefore, the European Communities had the right, but was not obliged, to maintain export subsidies if it had scheduled them and if it respected its reduction commitment pursuant to Article 9.2(b)(iv) of the *Agreement on Agriculture*. The Complainants were entitled to expect that the European Communities put an end to or reduce its export subsidies in place prior to the Uruguay Round.

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

⁶⁷² Appellate Body Report on *India – Patents (US)*, paras. 39-42. The Appellate Body had considered in that instance that the panel had confused two different concepts from previous GATT practice: (i) the protection of expectations of contracting parties as to the competitive relationship between their products and the products of other contracting parties (in the context of *violation* complaints under Articles III and XI of the GATT); and (ii) the protection of the reasonable expectations of contracting parties relating to market access concessions (in the framework of *non-violation* complaints under Article XXIII:1(b) of the GATT).

⁶⁷³ Appellate Body Report on *India – Patents (US)*, paras. 43-45.

⁶⁷⁴ European Communities' first written submission, para. 147.

⁶⁷⁵ The Panel recalls that Article 3.8 of the *DSU* is a codification of GATT practice providing for the same presumption. The Panel also recalls that such a presumption has never been rebutted, except in the exceptional panel report on *US – Section 301 Trade Act*. The panel in *US – Section 301 Trade Act* recognized that the United States had rebutted a *prima facie* presumption because it found that the United States had already lawfully removed the *prima facie* violation of Section 304. In that instance, the US Executive Office had made a "mandatory" promise to render determinations under Section 304 in conformity with its WTO obligations (in the SAA). This for the panel *overrode* the *prima facie* case of violation found earlier on. See Panel Report on *US – Section 301 Trade Act*, paras. 7.109-7.113.

⁶⁷⁶ Appellate Body Report on *EC – Hormones*, para. 104.

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 specificity of the agricultural regime, and the gradual process of reform which all Members signed up to.

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 a lengthy and complex arbitration procedure to resolve a matter that could and should be resolved by this Panel.

7.379 The European Communities responded that the application of Article 4.7 of the *SCM Agreement* would amount to nullifying the rights of WTO Members under the *Agreement on Agriculture*.

⁶⁷⁷ Appellate Body Report on *EC – Bananas III*, para. 155.

⁶⁷⁸ For the European Communities, 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 relationship between the two agreements during a specific time-period (the nine year implementation period for Article 13).

2. Assessment by the Panel

7.380 The Panel recalls that, in this dispute, it has followed the order of examination advanced by the Appellate Body in *Canada – Dairy (Article 21.5 New Zealand and US)* in relation to the *Agreement on Agriculture* and the *SCM Agreement*, where the Appellate Body stated that Article 3.1 of the *SCM Agreement* "indicates that the WTO-consistency of an alleged export subsidy for agricultural products has to be examined, in the first place, under the *Agreement on Agriculture*."⁶⁷⁹ This approach was supported by all parties to the present dispute.⁶⁸⁰

7.381 The Panel has already found the EC sugar regime to be inconsistent with the European Communities' export subsidy obligations under both Article 3.3 and Article 8 (through Article 9.1(a) and Article 9.1(c)) of the *Agreement on Agriculture*. In principle, therefore, the Panel *could* also examine the Complainants' claims that the regime, or parts thereof, constitute an export subsidy inconsistent with Article 3 of the *SCM Agreement*, in accordance with the Panel's terms of reference. The question that arises is whether the Panel *should* examine these claims, or whether it should rather apply the principle of judicial economy.

7.382 The Panel recalls that the Appellate Body in *Australia – Salmon*, referred to earlier by the parties, clarified when judicial economy can be exercised and cautioned against a panel providing only a partial resolution of the matter at issue:

"The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. *This aim is to resolve the matter at issue and 'to secure a positive solution to a dispute'. To provide only a partial resolution of the matter at issue would be false judicial economy.* A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members'." (emphasis added).⁶⁸¹

Although the *Australia – Salmon* dispute did not involve a claim under the *SCM Agreement*, we believe that the principles it sets forth regarding the exercise of judicial economy are relevant to WTO dispute settlement generally.

7.383 The Complainants claim that the Panel is entitled to examine the Complainants' export subsidy claims under Article 3 of the *SCM Agreement* because the EC sugar regime is inconsistent 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

⁶⁷⁹ Appellate Body Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 124.

⁶⁸⁰ See for example Brazil's second written submission para. 75.

⁶⁸¹ Appellate Body Report on *Australia – Salmon*, para. 223.

⁶⁸² Brazil's second written submission, title F and paras. 75 and 76; Thailand's first written submission para. 113 and Australia's first written submission, paras. 189-193 and second written submission, paras. 67-71 and 100-101.

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 *what* 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 appropriate circumstances. Thus, the Panel does not agree that its decision to exercise judicial economy in the present case diminishes Australia's rights within the meaning of Article 19.2 of the *DSU*

7.386 Finally, the Panel notes that the Complainants' have not set forth their claims under Article 3 of the *SCM Agreement* in quite as clear and unambiguous a manner as under the *Agreement on Agriculture*. Rather, the Complainants have focused on their claims under the *Agreement on Agriculture*. Panels depend upon the active participation of the parties to clarify and develop the issues presented in a dispute. The Panel considers that the important questions presented under the *SCM Agreement* in this dispute would be best decided in a case where they have been further argued by the parties. In this connection, the Panel especially notes that many of the Complainants' references to the *SCM Agreement* were made in the *context* of their claims under the *Agreement on Agriculture*.

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.

⁶⁸³ See Panel Report on *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.99.

- (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 particular, in the marketing year 2000/2001 the European Communities' exported 4,097,000 tonnes of sugar, i.e. 2,823,500 tonnes in excess of its commitment level.
- (e) there is prima facie evidence that the European Communities has been providing export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture* to what it considers to be exports of "ACP/India equivalent sugar" since 1995.
- (f) there is prima facie evidence that the European Communities has been providing export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture* to its exports of C sugar since 1995.

8.2 In light of Article 10.3 of the *Agreement on Agriculture*, the Panel *concludes* that the European Communities has not demonstrated that its exports of sugar in excess of its commitment level *are not subsidized*.

8.3 Therefore, the Panel *concludes* that the European Communities, through its sugar regime, has acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, by providing export subsidies within the meaning of Article 9.1(a) and (c) of the *Agreement on Agriculture* in excess of (i) its quantity commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is for 1,273,500 tonnes of sugar and (ii) its budgetary outlay commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is €499.1 million per year.

8.4 Since Article 3.8 of the *DSU* provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment", the Panel concludes that – to the extent the European Communities has acted inconsistently with its obligations under the *Agreement on Agriculture* – it has nullified or impaired benefits accruing to Australia under the *Agreement on Agriculture*.

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, <i>Sugar in the European Union: Sugar Production Costs and Cross Subsidies to C Sugar Exports</i> , 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 Trần 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 Letter from Trần Van-Thinh EC Permanent Representative, to Peter Sutherland, Director-General GATT - agricultural negotiations – draft commitments (schedules)
ALA-7		25 March 1994 Letter from Hervé Jouanjean, Deputy Head of EC Delegation, to A. Hoda, Deputy Director-General GATT – agricultural negotiations – draft commitments (schedules)
ALA-8		Uruguay Round – Australia – Summary statement – Issues Still Requiring Settlement – Brussels, 31 January 1994
ALA-9		Judgment of the Court (Sixth Chamber) - 10 January 2002(1), (Agriculture – Common organisation of the markets – Sugar – Attribution as C sugar of a quantity of sugar produced during a given marketing year – Charge payable in respect of sugar disposed of on the international market – Levied in the case of export with an export licence – Export refunds) Case C-101/99.
ALA-10		Opinion of Advocate General Stix-Hackl delivered on 10 September 2003(1) Case C-329/01 The Queen on the application of British Sugar plc v Intervention Board for Agriculture Produce, (Reference for a preliminary ruling from the High Court of Justice of England & Wales, Queen's Bench Division (Administrative Court)) (Common organisation of the markets in the sugar sector – Export licence for C sugar – Proof of export – Correction of licence – Principle of proportionality – Penalty)
ALA-11		Official Journal of the European Union - 1.10.2003, Commission Regulation (EC) No 1739/2003 of 30 September 2003, Reducing, for the 2003/2004 marketing year, the guaranteed quantity under the production quotas for the sugar sector and the presumed maximum supply needs of sugar refineries under preferential imports
ALA-12		Oxfam Briefing Paper 61, <i>Dumping on the world - How EU sugar policies hurt poor countries</i> , March 2004.
BRA-1	C	Considerations over C Sugar Production and Exports in the European Communities, report prepared by Plinio M. Nastari, Ph.D., Datagro, Brazil

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
BRA-2	C	LMC Data
COMP-1		European Communities Court of Auditors, <i>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</i> together with the Commission's replies 2000
COMP-2		Netherlands Economic Institute, <i>Evaluation of the Common Organisation of the Markets in the Sugar Sector</i> (prepared for the Commission of the European Communities), September 2000
COMP-3		Oxfam Briefing Paper 27, <i>The Great EU Sugar Scam, How Europe's sugar regime is devastating livelihoods in the developing world</i> , August 2002
COMP-4		OECD, Working Party on Agricultural Policies and Markets, <i>Background Information on Selected Policy Issues in the Sugar Sector</i> , AGR/CA/APM(2001)32/FINAL, 7 June 2002
COMP-5 <i>EC Regulations</i>		A. Commission Regulation (EC) No 38/2004 of 9 January 2004 amending Regulation (EC) No 314/2002 laying down detailed rules for the application of the quota system in the sugar sector B. Commission Regulation (EC) No 1159/2003 of 30 June 2003 laying down detailed rules of application for the 2003/04, 2004/05 and 2005/06 marketing years for the import of cane sugar under certain tariff quotas and preferential agreements and amending Regulations (EC) No 1464/95 and (EC) No 779/96 C. Commission Regulation (EC) No 1440/2002 of 7 August 2002 revising the maximum amount for the B production levy and amending the minimum price for B beet in the sugar sector for the 2002/03 marketing year D. Commission Regulation (EC) No 1164/2002 of 28 June 2002 amending Regulation (EC) No 1646/2001 as regards the setting of the amount of the adjustment aid and additional basic aid for the sugar refining industry for the 2002/2003 to 2005/2006 marketing years E. Commission Regulation (EC) No 314/2002 of 20 February 2002 laying down detailed rules for the application of the quota system in the sugar sector F. Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector G. Commission Regulation (EC) 1520/2000 of 13 July 2000, laying down common detailed rules for the application of the system of granting export refunds on certain agricultural products exported in the form of goods not covered by Annex I to the Treaty, and the criteria for fixing the amount of such refunds H. Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organization of the markets in processed fruit and vegetable products I. Commission Regulation (EC) No 2315/95 of 29 September 1995 laying down detailed rules for the application of export refunds to certain sugars covered by the common organization of the market in sugar used in certain products processed from fruit and vegetables 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

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
		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, <i>Reforming the European Union's sugar policy – summary of impact assessment</i> , SEC(2003) September 2003
COMP-7		Commission of the European Communities, Sugar: <i>International Analysis Production Structures within the EU</i> , 22 September 2003
COMP-8		Commission of the European Communities, <i>Common Organisation of the Sugar Market, Description</i> [europa.eu.int/comm./agriculture/markets/sugar/index_en.htm]
COMP-9		European Communities Court of Auditors, <i>Extracts from Annual Report concerning the financial year 2001 2002/C 295/01</i> , 28 November 2002
COMP-10		Commission of the European Communities, Official Journal L103/1, 24.4.2003, Commission Decision of 20 December 2001 declaring a concentration to be compatible with the common market and the EEA Agreement, (Case COMP/M.2530 - Südzucker/Saint Louis Sucre), (C(2001) 4524)
COMP-11		European Communities Court of Auditors, <i>Special Report No 9/2003 (pursuant to article 248, (4), second subparagraph, EC) concerning the system for setting the rates of subsidy on exports of agricultural products</i> (Export Refunds) together with the Commission's replies, 2003/C 211/01, 5 September 2003
COMP-12		Commission of the European Communities - Commission Responds to Court of Auditors' report on the sugar market organization, press release BIO/00/214, 9 November 2000
COMP-13		Commission of the European Communities, Commission clears acquisition of Saint Louis Sucre by Südzucker subject to commitments, press release IP/01/1891, 20 December 2001
COMP-14		European Communities (EC, EURATOM), extracts from Preliminary Draft general budget of the European Communities for the financial year 2004 Volume 1, 13 June 2003
COMP-15		Commission of the European Communities Extracts from 32 nd Financial Statement concerning the European Agricultural Guidance and Guarantee Fund EAGGF, Guarantee Section – Financial Year 2002 (presented by the Commission) 12 November 2003 COM (2003) 680 final
COMP-16		Schedule CXL: European Communities, Extract from Part I : Most-Favoured-Nation Tariff, Section I – Agricultural Products Section I – B Tariff Quotas Part IV – Agricultural Products : Commitments Limiting Subsidization, Article 3 of the Agreement on Agriculture) Section II : Export Subsidies : Budgetary Outlay and Quantity Reduction Commitments
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.

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
COMP-18		WTO Committee on Agriculture, notifications concerning domestic support commitments, (Table DS:1 and the relevant supporting tables) received from the delegation of the European Communities for marketing years 1995/1996 through to 1999/2000, G/AG/N/EEC/12, 16, 26, 30, 38
COMP-19		Negotiating Group on Market Access - 20 December 1993, Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24
COMP-20		Blair House Agreement, Exchanges of letters regarding the oilseeds agreement between EC Commission Vice-President With Special Responsibility For External Relations and Commercial Policy and the United States Trade Representative, 2 and 4 December 1992
COMP-21		WTO Committee on Agriculture, Summary Report of the Meeting held on 17-18 November 1998, G/AG/R/17, 25 January 1999
COMP-22		WTO Ministerial Conference Fourth Session Doha, 9-14 November 2001, Summary Record of the Ninth Meeting WT/MIN(01)/SR/9, 10 January 2002
EC-1		Export subsidy commitments in Schedule CXL – EC
EC-2		Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN.TNC/W/FA, 20 December 1991, Section L ("Text on Agriculture"), Part B ("Agreement on Modalities for the Establishment of Specific Binding Commitments under the Reform Program2)
EC-3		Modalities for the Establishment of Specific Binding Commitments, MTN.GNG/MA/W/24, 20 December 1993
EC-4		Draft schedule of commitments submitted on 16 December 1992
EC-5		Letter of 4 March 1992 and Supporting Table 11 attached to that letter
EC-6		Draft schedule of commitments submitted on 14 December 1993
EC-7		List of bilateral meetings between the EC and other participants
EC-8		EC Commission minutes of the meeting with Australia of 3 December 1993
EC-9		Export subsidy commitments in Schedule LXXX- EC
EC-10		Minutes of the DSB meeting of 18 December 2001, WT/DSB/M/116
EC-11		Minutes of the DSB Meeting of 17 January 2003, WT/DSB/M/141
EC-12		<i>Uruguay Round Outcomes – Agriculture</i> , July 1994, Agriculture Branch, Trade Negotiations and Organisations Divisions, Department of Foreign Affairs and Trade, Canberra, Australia
EC-13		<i>Uruguay Round Outcomes – Agriculture provided the basis for the document Implications of the GATT Uruguay Round for the Sugar Industry, An Australian Perspective</i> , ABARE Conference Paper 94.19
EC-14		<i>International Policies Affecting Market Expansion</i> , ABARE, 1999
EC-15		<i>Effects of the Uruguay Round Agreement on U.S. Agricultural Commodities</i> , USDA, March 1994
EC-16		<i>Sample control sheet for export refunds under the sugar CMO</i> , DG Agriculture, European Commission

EXHIBIT	CONFIDENTIAL (C)	FULL TITLE
EC-17	C	<i>Update of Sugar Policy in Selected Countries</i> , LMC International
EC-18	C	<i>Protected Domestic Sugar Markets, The Scope for Cross-Subsidising Sugar Exports</i> , LMC International, March 2003
EC-19	C	<i>Review of Sugar Policies in Major Sugar Industries, Transparent and Non-Transparent or Indirect Policies</i> , LMC International, January 2003.
EC-20		Excerpt from <i>Background Information on Selected Policy Issues in the Sugar Sector</i> , OECD, June 2002
EC-21		<i>The Australian Sugar Industry in the 1990s</i> , ABARE, August 1991, <i>The Australian Sugar Industry</i> , Sweetener Analysis, May 1994, H.R. Bonanno, P.J. Noble, <i>The Australian Sugar Industry, recent changes and future prospects</i> , F.O. Licht, 1993 Yearbook.
EC-22	C	Excerpts from the <i>LMC Worldwide Survey of Sugar and HFCS Production Costs</i> , 2003 Report
EC-23	C	Profitability of the export sales of the major sugar exporters, according to LMC data.
EC-24		Letter dated 10 December 1993 from Mr Peter Cook, Australia's Minister of Trade to Mr René Steichen, Commissioner for Agriculture of the European Commission
EC-25		Production, carry over and exports of C sugar by French producers
EC-26		Ministerial Communiqué of 23 February 1994.
EC-27		Section II, Part IV of Canada's and New Zealand's schedules of export subsidy commitments.

ANNEX B

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

Scheduled ⁽¹⁾ implementation period	Scheduled quantity levels ⁽¹⁾	<i>Commitment level alleged by the EC⁶⁸⁵</i>	Notified total exports ⁽²⁾
<i>Marketing year starting 1 October/30 September</i>	<i>Thousand tonnes, white sugar equivalent</i>	<i>" Annual reduction commitments + 1.6 million tons ACP/India equivalent"</i>	<i>Thousand tonnes, product weight basis</i>
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.

ANNEX C

SCHEDULE CXL – EUROPEAN COMMUNITIES

This Schedule is authentic only in the English language

PART IV – AGRICULTURAL PRODUCTS: COMMITMENTS LIMITING SUBSIDIZATION

(Article 3 of the Agreement on Agriculture)

SECTION II: Export Subsidies: Budgetary Outlay and Quantity Reduction Commitments

Description of products and tariff item numbers at HS six digit level (*)	Base outlay level Mio ECU	Calendar/ other year applied (*)	Annual and final outlay commitment levels 1995 – 2000						Base Quantity (*) 000 t	Calendar/ other year applied (*)	Annual and final quantity commitment levels 1995 – 2000						Relevant Supporting Tables and document reference
			Mio ECU								000 t						
			4								7						
1	2	3	1995	1996	1997	1998	1999	2000	5	6	1995	1996	1997	1998	1999	2000	8
Sugar (1)	779,9		733,1	686,3	639,5	592,7	545,9	499,1	1.612,0		1.555,6	1.499,2	1.442,7	1.386,3	1.329,9	1.273,5	

(*) See Annex

(1) 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.

Note: For the purpose of this Panel Report, references to products other than sugar have been deleted from this page of the European Communities' Schedule.

ANNEX D

REQUESTS FOR THE ESTABLISHMENT OF A PANEL

**WORLD TRADE
ORGANIZATION**

WT/DS265/21
11 July 2003

(03-3752)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Request for the Establishment of a Panel by Australia

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

My authorities have requested me to submit the following request for the establishment of a panel on behalf of Australia.

On 27 September 2002 Australia requested consultations with the European Communities (EC) 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 and 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the EC's Common Organization of the Markets in sugar and its application and implementation. The request was circulated to Members on 1 October 2002 in document number WT/DS265/1. Consultations were held on 21 and 22 November 2002 but unfortunately did not result in resolution of the dispute.

Consequently, Australia requests that a Panel be established pursuant to Article 4.7 and Article 6 of the DSU, Article XXIII:2 of GATT 1994, Article 19 of the Agreement on Agriculture and Article 4.4 and Article 30 of the SCM Agreement.

The measures that are the subject of this request are the subsidies provided by the EC in excess of its reduction commitment levels on sugar and sugar containing products including sugar cane and sugar beet, processed and unprocessed cane and beet sugar and chemically pure sucrose in solid form, molasses resulting from the extraction of refining of sugar, isoglucose, inulin syrup and the other products listed in Article 1 of Council Regulation (EC) No 1260/2001 of 19 June 2001 on the European Communities' Common Organization of the markets in sugar sector (Official Journal of the European Communities, 30 June 2001, L178/1-45).

The above-mentioned subsidies are accorded through the EC sugar regime, which is contained in a number of EC regulations including Council Regulation No 1260/2001 and related EC regulations, administrative policies, rules, decisions and other instruments including instruments pre-

dating the above regulation, and their implementation. These various instruments will be referred to as "the EC sugar regime".

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

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

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

By granting export subsidies within the meaning of Articles 1.1(a)(1)(i), 1.1(a)(1)(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.

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;
- Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures.

Australia therefore requests the establishment of a Panel in accordance with Article 7 of the DSU.

I would be grateful if you would place this item on the agenda for the next DSB meeting scheduled for 21 July 2003.

WORLD TRADE ORGANIZATION

WT/DS266/21
11 July 2003

(03-3760)

Original: English

EUROPEAN COMMUNITIES –EXPORT SUBSIDIES ON SUGAR

Request for the Establishment of a Panel by Brazil

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

On 27 September 2002, Brazil requested consultations with the European Communities ("EC") 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 EC to its sugar industry. That request was circulated to Members in document WT/DS266/1, G/L/570, G/AG/GEN/53, G/SCM/D48/1, dated 1 October 2002. Consultations were held in Geneva on 21 and 22 November 2002, with a view to reaching a mutually satisfactory solution. Unfortunately, these consultations failed to resolve the dispute.

Therefore, pursuant to Articles 4.7, 6 and 7 of the DSU, Article 19 of the Agreement on Agriculture, Articles 4.4 and 30 of the SCM Agreement, and Article XXIII:2 of the GATT, Brazil hereby requests the establishment of a panel.

The specific measures at issue in this dispute are the subsidies provided and maintained by the EC, 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 sector⁶⁸⁶, 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. These are referred to as the "EC sugar regime". The products at issue are those listed in Article 1 of the 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 are referred to collectively as "sugar".

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 SCM Agreement. In particular, Brazil is concerned with two categories of subsidized EC exports:

⁶⁸⁶ Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the common organization of the markets in the sugar sector, OJ L 178/1-45, 30.6.2001, p. 1.

- (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 3.1(a) and 3.2 of the SCM Agreement.

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