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AB-2005-2

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TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
A, B, and C sugar	The EC sugar regime establishes two categories of production quotas: one for A sugar and one for B sugar. These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies. C sugar is simply sugar produced in excess of A and B quotas. There is no difference in physical characteristics between A, B, and C sugar.
A, B, and C beet	Beet processed into A, B, and C sugar, respectively. There is no difference in physical characteristics between A, B, and C beet. Unlike for A and B beet, there is no minimum guaranteed price for C beet.
ACP	African–Caribbean–Pacific
ACP Countries	The third participant ACP countries in this appeal are: Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania, Trinidad & Tobago
CEM	commercial export milk
Complaining Parties	Australia, Brazil, Thailand
Division	Appellate Body Division hearing the appeal
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC Regulation 1260/2001	Council Regulation (EC) No. 1260/2001, on the common organization of the markets in the sugar sector, 19 June 2001
EC sugar regime	Council Regulation (EC) No. 1260/2001 and related instruments
Footnote 1	Footnote 1 to Section II, Part IV of the European Communities' Schedule
GATT	*General Agreement on Tariffs and Trade*
Illustrative List	Illustrative List of Export Subsidies in the *SCM Agreement*
Modalities Paper	Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24, 20 December 1993

Abbreviation	Definition
Panel Reports	Panel Report, *EC – Export Subsidies on Sugar (Australia)*; Panel Report, *EC – Export Subsidies on Sugar (Brazil)*; Panel Report, *EC – Export Subsidies on Sugar (Thailand)*
Panel requests	Request for the Establishment of a Panel by Australia of 9 July 2003, WT/DS265/21; Request for the Establishment of a Panel by Brazil of 9 July 2003, WT/DS266/21; Request for the Establishment of a Panel by Thailand of 9 July 2003, WT/DS283/2
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*
Working Procedures	*Working Procedures for Appellate Review*, WT/AB/WP/5, 4 January 2005

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Aircraft	Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221
Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002
Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
Canada – Dairy (Article 21.5 – New Zealand and US)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, adopted 18 December 2001, as reversed by the Appellate Body Report, WT/DS103/AB/RW, WT/DS113/AB/RW, DSR 2001:XIII, 6865
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
Canada – Dairy (Article 21.5 – New Zealand and US II)	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by the Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2
Canada – Periodicals	Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
Canada – Wheat Exports and Grain Imports	Appellate Body Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R, adopted 27 September 2004

Short Title	Full Case Title and Citation
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
EC – Asbestos	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R, DSR 2001:VIII, 3305
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Computer Equipment	Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
EC – Export Subsidies on Sugar (Australia)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Australia*, WT/DS265/R, 15 October 2004
EC – Export Subsidies on Sugar (Brazil)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Brazil*, WT/DS266/R, 15 October 2004
EC – Export Subsidies on Sugar (Thailand)	Panel Report, *European Communities – Export Subsidies on Sugar, Complaint by Thailand*, WT/DS283/R, 15 October 2004
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Japan – Film	Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Thailand – H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
Turkey – Textiles	Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/AB/R, adopted 19 November 1999, DSR 1999:VI, 2345
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

Short Title	Full Case Title and Citation
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Lamb	Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber V	Appellate Body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 31 August 2004
US – Sugar	GATT Panel Report, *United States – Restrictions on Imports of Sugar*, adopted 22 June 1989, BISD 36S/331
US – Superfund	GATT Panel Report, *United States – Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Export Subsidies on Sugar

European Communities, *Appellant/Appellee*
Australia, *Appellant/Appellee*
Brazil, *Appellant/Appellee*
Thailand, *Appellant/Appellee*

Barbados, *Third Participant*
Belize, *Third Participant*
Canada, *Third Participant*
China, *Third Participant*
Colombia, *Third Participant*
Côte d'Ivoire, *Third Participant*
Cuba, *Third Participant*
Fiji, *Third Participant*
Guyana, *Third Participant*
India, *Third Participant*
Jamaica, *Third Participant*
Kenya, *Third Participant*
Madagascar, *Third Participant*
Malawi, *Third Participant*
Mauritius, *Third Participant*
New Zealand, *Third Participant*
Paraguay, *Third Participant*
St. Kitts & Nevis, *Third Participant*
Swaziland, *Third Participant*
Tanzania, *Third Participant*
Trinidad & Tobago, *Third Participant*
United States, *Third Participant*

AB-2005-2

Present:

Ganesan, Presiding Member
Janow, Member
Taniguchi, Member

I. Introduction

1. The European Communities appeals certain issues of law and legal interpretations contained in the Panel Reports, *European Communities − Export Subsidies on Sugar* (the "Panel Reports").[1]

[1]*Complaint by Australia*, WT/DS265/R, 15 October 2004; *Complaint by Brazil*, WT/DS266/R, 15 October 2004; *Complaint by Thailand*, WT/DS283/R, 15 October 2004.

The Panel was established[2] to consider complaints by Australia, Brazil, and Thailand (the "Complaining Parties") regarding export subsidies for sugar and sugar-containing products accorded under Council Regulation (EC) No. 1260/2001 of 19 June 2001 ("EC Regulation 1260/2001") and related instruments (together, the "EC sugar regime").

2. EC Regulation 1260/2001 is valid for the marketing years 2001/2002 to 2005/2006 and establishes, *inter alia*: quotas for sugar production; an intervention price for raw and white sugar, respectively; a basic price and a minimum price for beet for quota sugar production; quota (that is, "A" and "B") sugar as well as non-quota (that is, "C") sugar[3]; import and export licensing requirements; producer levies; and preferential import arrangements. Furthermore, the EC sugar regime provides "export refunds" to its sugar exporters for certain quantities of sugar, other than C sugar. These "refunds", which are direct export subsidies, cover the difference between the European Communities' internal market price and the prevailing world market price for sugar. Non-quota sugar (that is, C sugar) must be exported, unless it is carried forward, but no "export refunds" are provided for such exports. The factual aspects of the EC sugar regime are set out in greater detail in the Panel Reports.[4]

3. The Complaining Parties claimed before the Panel that, under the EC sugar regime, the European Communities provided export subsidies for sugar in excess of its reduction commitment levels specified in Section II, Part IV of the European Communities' Schedule[5], in violation of certain provisions of the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") governing export subsidies.[6] The Complaining Parties alleged that such subsidies in excess of the European Communities' reduction commitment levels were provided

[2]On 9 July 2003, Australia, Brazil, and Thailand each made a separate request for the establishment of a panel (WT/DS265/21; WT/DS266/21; and WT/DS283/2 (attached as Annexes 1, 2, and 3 to this Report, respectively)). On 29 August 2003, the Dispute Settlement Body (the "DSB"), pursuant to Article 9.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), established one single panel to examine these three complaints. At the request of the European Communities, pursuant to Article 9.2 of the DSU, the Panel issued three separate, but identical reports, one for each Complaining Party.

[3]The EC sugar regime establishes two categories of production quotas: one for A sugar and one for B sugar. These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies. C sugar is simply sugar produced in excess of A and B quotas. There is no difference in physical characteristics between A, B, and C sugar. Likewise, there is no difference in physical characteristics between A, B, and C beet. C beet is simply beet used for C sugar production. Unlike for A and B beet, there is no minimum guaranteed price for C beet.

[4]See Panel Reports, paras. 3.1-3.15.

[5]Section II, Part IV of the European Communities' Schedule is attached as Annex 4 to this Report.

[6]The provisions of the covered agreements alleged by the Complaining Parties to be violated are Articles 3.3, 8, 9.1(a), 9.1(c), and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

to exports of C sugar as well as to sugar equivalent in volume to sugar imported into the European Communities under preferential arrangements with certain African–Caribbean–Pacific countries[7] (the "ACP Countries") and India.

4. The Panel Reports were circulated to Members of the World Trade Organization ("WTO") on 15 October 2004. The Panel concluded, at paragraph 8.1 of the Panel Reports, that:

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

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

(d) the Complaining Parties have provided *prima facie* evidence that, since 1995, the European Communities' total exports of sugar exceed its quantity commitment level. In particular, in the marketing year 2000/2001, the European Communities exported 4,097,000 tonnes of sugar, that is, 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 the European Communities considers to be exports of "ACP/India equivalent sugar" since 1995; and

(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.

[7]The third participant ACP countries in this appeal are: Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania, and Trinidad & Tobago.

5. In a communication dated 2 December 2004, Australia, Brazil, the European Communities, and Thailand informed the Chair of the Dispute Settlement Body (the "DSB") of a "procedural agreement" concluded between these four parties regarding the 60-day period provided for in Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU")[8] for the adoption or appeal of the Panel Reports. The parties requested the DSB to postpone the consideration of the Panel Reports and to agree to the extension of the time period in Article 16.4 of the DSU until 31 January 2005. At a meeting held on 13 December 2004, the DSB took note of these requests and agreed that it would adopt the Panel Reports on or before 31 January 2005, unless the DSB decided by consensus not to do so, or a party notified the DSB of its decision to appeal.[9]

6. On 13 January 2005, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal[10] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[11]

7. After consultation with the Appellate Body Secretariat, the European Communities and Australia, Brazil, and Thailand agreed, in letters filed on 19 January 2005, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time limit referred to in Article 17.5 of the DSU. The European Communities and Australia, Brazil, and Thailand accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 28 April 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[12]

8. On 20 January 2005, the European Communities filed an appellant's submission.[13] On 25 January 2005, Australia, Brazil, and Thailand each notified the DSB of an intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to Article 16.4 and Article 17 of the DSU, and filed a Notice of Other Appeal[14]

[8]WT/DS265/24, WT/DS266/24, WT/DS283/5.

[9]WT/DSB/M/179, paras. 8-9.

[10]WT/DS265/25, WT/DS266/25, WT/DS283/6 (attached as Annex 5 to this Report).

[11]WT/AB/WP/5, 4 January 2005.

[12]On 24 January 2005, the Appellate Body notified the Chair of the DSB that the expected date of circulation of its Report was 28 April 2005 (WT/DS265/26, WT/DS266/26, WT/DS283/7).

[13]Pursuant to Rule 21 of the *Working Procedures.*

[14]WT/DS265/27; WT/DS266/27; and WT/DS283/8 (attached as Annexes 6, 7, and 8 to this Report, respectively).

pursuant to Rule 23(1) of the *Working Procedures*. On 28 January 2005, Australia, Brazil, and Thailand each filed an other appellant's submission.[15] On 7 February 2005, Australia, Brazil, the European Communities, and Thailand each filed an appellee's submission.[16] On the same day, Canada, China, New Zealand, and the United States each filed a third participant's submission, and Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania, and Trinidad & Tobago filed a joint third participant's submission as the "ACP Countries".[17] On the same day, Colombia, Cuba, India, and Paraguay notified their intention to appear at the oral hearing as third participants.[18]

9. On 28 January 2005, the Appellate Body received an *amicus curiae* brief from the Association of Central American Sugar Industries (Azucareros del Istmo Centroamericano (AICA)). The Appellate Body Division hearing the appeal (the "Division") did not find it necessary to take this *amicus curiae* brief into account.

10. By letter dated 10 February 2005, Canada requested authorization from the Division, pursuant to Rule 18(5) of the *Working Procedures*, to correct a "typographical error" in its third participant's submission.[19] On 15 February 2005, the Division, pursuant to Rule 18(5) of the *Working Procedures*, invited all participants and third participants to comment on Canada's request. None of the participants objected to Canada's request. On 17 February 2005, the Division authorized Canada to correct the error in its third participant's submission, identified in its letter of 10 February 2005.

11. On 17 February 2005, Mauritius informed the Appellate Body that the ACP Countries were proposing to retain, for the oral hearing before the Appellate Body, the services of a legal counsel that had also been retained by two associations for European sugar and beet producers. Australia commented on the letter from Mauritius by letter dated 23 February 2005, noting that "representation of 'the ACP' in the oral hearing by counsel concurrently engaged by private sector bodies in respect of the same dispute could raise concerns about a perceived or apprehended conflict with the basic principle that appearance and representation before the Appellate Body is limited to Members and their counsel."[20] In response to Australia's comments, Mauritius confirmed, in a letter dated 28 February 2005, that its legal counsel appearing on its behalf at the hearing "would be doing so

[15]Pursuant to Rule 23.3 of the *Working Procedures*.

[16]Pursuant to Rule 22 of the *Working Procedures.*

[17]Pursuant to Rule 24(1) of the *Working Procedures*.

[18]Pursuant to Rule 24(2) of the *Working Procedures*.

[19]Letter from Canada to the Presiding Member of the Division.

[20]Letter from Australia to the Director of the Appellate Body Secretariat.

solely as representatives of the WTO Member ACP third participants, and not as representatives of either the ACP (which includes WTO Members who are not participants in this dispute) or of the counsel's other private clients."[21]

12. The oral hearing in this appeal was held on 7 and 8 March 2005. The participants and third participants presented oral arguments (with the exception of Colombia, Cuba, India, and Paraguay) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by the European Communities – Appellant*

1. The Panel's Terms of Reference

13. The European Communities appeals the Panel's finding that the alleged payments in the form of low-priced sales of C beet to C sugar producers were within the Panel's terms of reference.[22] According to the European Communities, in rejecting the European Communities' assertion that this "claim" was not within its terms of reference, the Panel misinterpreted the notions of a "claim" and an "argument".

14. The European Communities submits that a simple reference to the measure at issue as the export subsidies granted under EC Regulation 1260/2001, or even more vaguely, under the EC sugar regime, is not sufficient for identification of the "*specific measure* at issue", as required by Article 6.2 of the DSU. This is because the operational provisions of EC Regulation 1260/2001 are contained in as many as 51 articles, with seven annexes and numerous paragraphs and sections, and those provisions lay down a regulatory regime of great complexity.[23]

15. Furthermore, according to the European Communities, "[e]ven assuming that a reference to [EC] Regulation 1260/2001 or to the EC sugar regime were 'specific' enough, the panel requests would still fail to 'provide a brief summary of the legal basis' [of the complaint] that is 'sufficient to present the problem clearly' ", as required by Article 6.2 of the DSU.[24] To meet that requirement, the Complaining Parties should have identified in their panel requests, "albeit in summary form, each of

[21]Letter from Mauritius to the Director of the Appellate Body Secretariat.

[22]European Communities' appellant's submission, para. 40 (referring to Panel Reports, paras. 7.18-7.37).

[23]*Ibid.*, para. 60.

[24]*Ibid.*, para. 62.

the export subsidies which they considered to be provided by [EC] Regulation 1260/2001".[25] The Complaining Parties identified an alleged export subsidy with respect to "payments" in the form of sales of C sugar, but their panel requests contained no suggestion to the effect that the sales of C beet at low prices also posed a "problem", let alone explain how such a "problem" would arise.[26] Therefore, according to the European Communities, in respect of sales of C beet at low prices, the panel requests did not "present[] the problem clearly", as required by Article 6.2.[27]

16. The European Communities also argues that the provision of Article 10.3 of the *Agreement on Agriculture* relating to burden of proof does not exclude or limit the application of Article 6.2 of the DSU. According to the European Communities, "[t]he issue of who bears the burden of proof must not be confused with the distinct and previous issue of who must state the claims in a dispute."[28] Referring to the Appellate Body Report in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the European Communities argues that a complaining party is required to identify *all* alleged export subsidies in order to have complied with the requirements in Article 6.2 of the DSU.

2. Footnote 1 to Section II, Part IV of the European Communities' Schedule

17. The European Communities appeals the Panel's finding that Footnote 1 to Section II, Part IV of the European Communities' Schedule ("Footnote 1") is "of no legal effect".[29]

18. The European Communities argues that the Panel erred in finding that the ordinary meaning of the terms of Footnote 1 does not indicate any *limitation* on export subsidies that may be provided to sugar of ACP and Indian origin.[30] According to the European Communities, "[h]ad the Panel properly examined the context of the second sentence [of Footnote 1], it would have realised that the reference to 1.6 million tonnes is intended as a limitation."[31] The European Communities emphasizes

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[25]European Communities' appellant's submission, para. 66.

[26]*Ibid.*

[27]*Ibid.*

[28]*Ibid.*, para. 72.

[29]*Ibid.*, para. 79; Panel Reports, para. 7.222.

[30]The text of Footnote 1 reads:

> 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.

[31]European Communities' appellant's submission, para. 97.

that "[i]f Footnote 1 is simply an exclusion, there would be no need to insert the second sentence, and no reason to refer to the 1.6 million tonnes as the average during [the] 1986-1990 base period."[32]

19. The European Communities argues that the Panel failed to consider "uncontested evidence showing that the EC had treated the lower of the level of ACP/India imports and 1.6 million tonnes as a limitation on its ability to provide export subsidies on exported sugar."[33] The Panel also erred in finding that the notifications by the European Communities to the WTO Committee on Agriculture were relevant to the issue of whether there is a limitation in Footnote 1. According to the European Communities, the notifications simply reflected the meaning of Footnote 1 that the European Communities was assuming no reduction commitments with respect to its exports of sugar of ACP and Indian origin.

20. The European Communities submits that the Panel erred in its conclusion that Footnote 1 covers only re-exports of sugar of ACP/Indian origin and that it does not cover an amount of subsidized sugar "equivalent" to the amount of sugar imported from those countries. The European Communities points out that the term "export" in the phrase "average of export" in the second sentence of Footnote 1 must have the same meaning as "exports" in the first sentence, and that this clearly shows that Footnote 1 refers to "the equivalent quantity of ACP/India sugar that had been imported".[34]

21. The European Communities further requests the Appellate Body to find that the Panel erred in finding that Footnote 1, interpreted as a *limitation*, is inconsistent with Articles 3.3 and 9.1 of the *Agreement on Agriculture*. The European Communities asserts, first, that Article 3.3 of the *Agreement on Agriculture* does not require a Member to have scheduled both budgetary outlay *and* quantity commitments. The European Communities submits that paragraph 11 of the "Modalities Paper"[35] refers to scheduling both such commitments, but that obligation was assumed by the participants in the negotiations; it was not carried over into the *Agreement on Agriculture*. Referring to the text of Article 3.3, the European Communities points out that the use of the word "and" in that Article is simply as a conjunctive and it does not imply a requirement that WTO Members undertake both budgetary outlay and quantity commitments. According to the European Communities, "[t]he obligation in Article 3.3 is only to provide Article 9.1-listed subsidies in conformity with whatever

[32]European Communities' appellant's submission, para. 97. (footnote omitted)

[33]*Ibid.*, para. 101.

[34]*Ibid.*, para. 115. (footnote omitted)

[35]Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24, 20 December 1993.

commitments are found in a Member's schedule."[36] The European Communities submits that the same applies to Articles 9.2(a) and 9.2(b)(iv) of the *Agreement on Agriculture*, "which both mention the existence of the two forms of commitments, without implying that a Member must always have scheduled both."[37]

22. Turning to the chapeau of Article 9.1, the European Communities asserts that "[t]he normative content of Article 9.1 ... is not to impose reductions, but to define the scope of those subsidies which are permitted within commitment levels."[38] The European Communities adds that, even assuming that there is an obligation in Article 9.1 to reduce export subsidy commitment levels, the European Communities has complied with this obligation by reducing "the overall ceiling of its commitments [for sugar] over the implementation period".[39]

23. Finally, the European Communities submits that, even assuming *arguendo* that Footnote 1 is inconsistent with the *Agreement on Agriculture*, "there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*."[40] According to the European Communities, a finding that one provision or set of provisions prevails over another should be made only where explicit permission exists to set aside all or part of a treaty. Such a possibility would exist in situations covered by the *General interpretative note to Annex 1A* to the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") or in situations covered by the report of the GATT panel in *US – Sugar*, which held that a Member could not derogate in its Schedule from other obligations under the *General Agreement on Tariffs and Trade* (the "GATT").

24. The European Communities, moreover, disagrees with the Panel that Article 8 of the *Agreement on Agriculture* can be interpreted to mean that "a Member's Schedule cannot provide for non-compliance with provisions of the *Agreement on Agriculture*".[41] According to the European Communities, Article 8 merely provides that a Member must respect both the provisions of the *Agreement on Agriculture* and its Schedule. The European Communities adds that the Panel did not point to any other provision that would support its finding that the *Agreement on Agriculture* would prevail over a provision contained in a Schedule.

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[36]European Communities' appellant's submission, para. 140.

[37]*Ibid.*, para. 139.

[38]*Ibid.*, para. 148.

[39]*Ibid.*, para. 149.

[40]*Ibid.*, para. 156.

[41]*Ibid.*, para. 164 (quoting Panel Reports, para. 7.161).

3. Payments under Article 9.1(c) of the *Agreement on Agriculture*

(a) *Payments in the Form of Below-cost Sales of C Beet*

25. The European Communities argues that the Panel erred in finding that sales of C beet are "financed by virtue of governmental action" within the meaning of Article 9.1(c), and sets out four arguments in its appeal from the Panel's finding. First, the European Communities argues that the Panel misconstrued the phrase "by virtue of governmental action". The European Communities refers to findings of the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* and *Canada – Dairy (Article 21.5 – New Zealand and US II)*, and argues that the Panel "misconstrued" the phrase "by virtue of"[42] to mean that an export subsidy exists because governmental action "enable[s]" beet growers to finance and make payments.[43]

26. Secondly, the European Communities argues that the Panel failed to cite evidence in support of its assertion that a "significant" percentage of farmers 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".[44] Instead, according to the European Communities, even by the Complaining Parties' own evidence, profits obtained with the sales of A and B beet would be "largely insufficient" to cover all the fixed costs of producing C beet.[45] The sales of A and B beet were profitable only in two of the three most recent marketing years, and the profits account for "barely 13 and 27 per cent" of all the fixed costs of producing C beet.[46] Moreover, the price of C beet in the last ten years did not cover even the marginal cost of producing C beet. According to the European Communities, this shows that the production of C beet is not "financed by virtue of governmental action", but instead is largely the result of other factors independent of governmental action.

27. Thirdly, the European Communities submits that governmental action in the European Communities' beet market is less pervasive than in the *Canada – Dairy* dispute. European Communities authorities do not exercise a comparable degree of control in the beet market. Although the EC sugar regime fixes minimum prices for A and B beet, it leaves the beet growers "totally free" to decide whether or not to produce C beet, to plan their production as they wish, and to agree on

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[42]European Communities' appellant's submission, heading VI.C.1.

[43]*Ibid.*, para. 268.

[44]*Ibid.*, para. 277 (quoting Panel Reports, para. 7.291).

[45]*Ibid.*, para. 279.

[46]*Ibid.*

C beet prices with the sugar producers.[47] C beet growers are also free to use or sell C beet for other purposes such as animal fodder, alcohol, or yeast, while C sugar produced with C beet can be carried forward. No such flexibility or alternatives existed in the *Canada – Dairy* dispute.

28. Fourthly, according to the European Communities, the Panel disregarded factors that do not involve governmental action, but that do affect in a significant way the supply and prices of C beet, such as yield fluctuations and the "unintended" nature of a "substantial part"[48] of C beet production, agronomic factors, the possibility that high prices for A and B beet may finance other alternative crops, as well as the differences between dairy and beet farming. The Panel either did not address these factors or dismissed them without proper consideration. In the European Communities' view, given the role of these other factors, the "nexus" between "governmental action" and the alleged payments cannot be considered "tight" enough for a finding that sales of C beet are financed by virtue of governmental action.[49]

(b) *Payments in the Form of "Cross-subsidization"*

29. The European Communities appeals the Panel's finding that the producers of C sugar receive export subsidies through "cross-subsidization" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.[50] According to the European Communities, cross-subsidization does not constitute a "payment" as it does not involve a "transfer of resources" to the sugar producers.[51] The existence of a transfer of resources "implies, by definition, the presence of two different parties, one which grants the resources and another which receives them".[52] In contrast, the Panel's interpretation of "cross-subsidization" involves "an internal allocation of each sugar producer's own resources" instead of a "transfer of resources".[53] The European Communities submits that the Panel's interpretation of Article 9.1(c) "would effectively read out of that provision the requirement that there must be a 'payment on the export' and turn it into a prohibition of low priced exports" or a "sort of blunt anti-dumping instrument".[54] According to the European Communities, "[o]n the Panel's own theory", the only relevant transfer of resources in the present case would take place from European Communities'

[47]European Communities' appellant's submission, para. 281.

[48]*Ibid.*, para. 287.

[49]*Ibid.*, paras. 264, 268, and 291.

[50]Panel Reports, para. 7.314.

[51]European Communities' appellant's submission, para. 179.

[52]*Ibid.*, para. 183.

[53]*Ibid.*, para. 179.

[54]*Ibid.*, para. 180.

consumers to the sugar producers.[55] However, the Panel failed to examine that aspect and did not ascertain whether the price paid by the European Communities' consumers was above any objective benchmark.

30. The European Communities further contends that "cross-subsidization" cannot be considered to provide a subsidy because the "transfer of resources" confers no benefit on the sugar producers.[56] Further, the Panel erred in finding that Article 9.1(c) does not require the demonstration of a benefit for a measure to constitute a payment within the meaning of that provision. "[T]he existence of a 'benefit' is always inherent in the notion of 'subsidy', so that there can be no subsidy without the corresponding benefit."[57] The European Communities argues that the Panel's conclusion regarding cross-subsidization is not supported by the findings of the Appellate Body in *Canada − Dairy*. The Appellate Body in *Canada − Dairy* did not hold that "cross-financing" or "cross-subsidization" by the milk producers was in itself a payment, but rather found the payment to exist in the sale of export milk to cheese producers.[58] The European Communities also submits that the Panel's interpretation of Article 9.1(c) has no equivalent in the *SCM Agreement* and that there is "no apparent reason" why agricultural products should be subject to stricter disciplines than other products.[59] Finally, according to the European Communities, the Panel's interpretation was not envisaged by the drafters of the *Agreement on Agriculture*; in this context, the European Communities refers to price support systems for sugar in other WTO Members and argues that the Panel's interpretation would have "sweeping and totally unintended consequences".[60]

31. The European Communities also disagrees with the Panel's finding that the alleged payments are made "on the export".[61] The European Communities affirms that the Panel's finding that the payments were "on the export" is based on a misinterpretation of that requirement. The European Communities states that "the term 'on the export' must be read as meaning 'contingent on' exports, rather than simply 'in connection with' or to the 'advantage' of exports."[62] The European Communities argues that the alleged payments are not contingent on exports of C sugar, given that there is no requirement to produce C sugar in order to benefit from the support provided to A and B sugar.

[55]European Communities' appellant's submission, para. 186.

[56]*Ibid.*, para. 191.

[57]*Ibid.*, para. 193.

[58]*Ibid.*, para. 198.

[59]*Ibid.*, para. 201.

[60]*Ibid.*, para. 205.

[61]*Ibid.*, para. 170.

[62]*Ibid.*, para. 222.

32. Finally, the European Communities alleges that the Complaining Parties did not even claim that "cross-subsidization" was a "payment".[63] Therefore, the Panel acted inconsistently with Article 11 of the DSU by making a finding with respect to a claim that was not advanced by the Complaining Parties. As a "subsidiar[y]" allegation, the European Communities contends that the Panel failed to take into consideration that the cost of production of C sugar is significantly lower than that of A and B sugar because the C beet price is lower than the minimum prices for A and B beet.[64]

4. Nullification or Impairment

33. The European Communities objects to the Panel's conclusion that the alleged violations of the *Agreement on Agriculture* resulting from exports of C sugar nullify or impair benefits accruing to the Complaining Parties. According to the European Communities, the "benefits" that could be nullified or impaired consist of "expectations of improved competitive opportunities".[65] In the European Communities' view, "until recently, the Complainants shared the EC's understanding that the C sugar regime does not provide export subsidies."[66] The Complaining Parties "had no expectations of improved competitive opportunities that would come from the EC reducing its exports of C sugar."[67] Consequently, a violation, even if established, "does not result in the nullification or impairment of benefits accruing to the Complainants".[68]

34. The European Communities points out that a finding of violation would result in "unjust enrichment" of the Complaining Parties.[69] The purpose of dispute settlement proceedings is "not to present some Members with a windfall profit at the expense of another".[70]

35. The European Communities further argues that the Panel erroneously relied on panel and Appellate Body findings in *US − Superfund*, *EC − Bananas III*, and *Turkey − Textiles*, without understanding the important differences between those cases and the present dispute. The European Communities had not argued that the Complaining Parties' trade position would not, or only minimally, improve if the EC sugar regime were found to violate WTO rules, as the Panel asserted;

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[63]European Communities' appellant's submission, para. 256.

[64]*Ibid.*, heading V.D.

[65]*Ibid.*, para. 370 (quoting GATT Panel Report, *US – Superfund*, para. 5.19; and Appellate Body Report, *EC – Bananas III*, paras. 251-253).

[66]*Ibid.*, para. 370.

[67]*Ibid.*

[68]*Ibid.*

[69]*Ibid.*, para. 373.

[70]*Ibid.*

on the contrary, the European Communities argued that the trade effects of the Panel's ruling would be "significant" as it would give the Complaining Parties "a considerable windfall profit".[71] The European Communities also takes issue with the Panel's finding that the European Communities did not rebut the evidence with regard to the amount of trade lost by the Complaining Parties as a result of the EC sugar regime. The European Communities submits that, "that is precisely what past cases say is unacceptable to prove lack of nullification or impairment."[72] The Panel's approach amounts to saying that there is no way to rebut the presumption of nullification or impairment of benefits.[73]

36. The European Communities requests the Appellate Body to reverse the Panel's finding concerning nullification or impairment of the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*. The European Communities further submits that the Appellate Body should "[a]t least ... reverse the Panel's finding to the extent that the current volume of subsidised exports does not exceed 79 per cent of the quantity of subsidised exports made during the base period."[74]

5. Article 3.10 of the DSU and the Principle of Good Faith

37. The European Communities appeals the Panel's finding that the Complaining Parties acted consistently with Article 3.10 of the DSU and with the principle of good faith. The European Communities considers that "[t]he circumstances of this dispute are such that the exercise by the Complainants of their right to bring a claim against the C sugar regime is manifestly unreasonable and, therefore, inconsistent with Article 3.10 of the DSU."[75] According the European Communities, the alleged breach of its reduction commitments was "the result of an excusable scheduling error on the part of the EC" because other Members, including the Complaining Parties themselves, had made the same errors.[76]

38. The European Communities alleges that, in dealing with its objection based on estoppel, the Panel "misconstrued and misapplied" the principle of estoppel.[77] The European Communities maintains that the Panel "cited no authority for the assertion that silence can give rise to estoppel only

[71]European Communities' appellant's submission, para. 377.

[72]*Ibid.*, para. 378. (original underlining)

[73]*Ibid.*, para. 379.

[74]*Ibid.*, para. 381.

[75]*Ibid.*, para. 325.

[76]*Ibid.*, para. 326.

[77]*Ibid.*, para. 341.

if there is a 'legal duty to speak'."[78] With respect to the Panel's finding that the Complaining Parties' silence could not be held against other WTO Members, the European Communities maintains that estoppel may operate exclusively between two Members because it does not alter the substantive rights under the *WTO Agreement*.

39. The European Communities also points out that it did not request the Panel to "force"[79] the Complaining Parties to agree to a correction of its Schedule of Concessions. As explained by the European Communities, the intention of this observation was to show why the Complaining Parties had acted inconsistently with Article 3.10 of the DSU. The European Communities emphasizes that "[a] good faith Member which recognises that another Member has made an excusable scheduling mistake ... would not seek to exploit that mistake in order to secure a very considerable advantage".[80] The European Communities' contention before the Panel was that "by bringing the claim that exports of C sugar exceed the EC's commitments, rather than seeking the correction of the EC's schedule, so as to include C sugar in the base quantity, as a good faith partner would have agreed to do, the Complainants were acting inconsistently with Article 3.10 [of the] DSU and the principle of good faith."[81]

B. *Arguments of Australia – Appellee*

1. The Panel's Terms of Reference

40. Australia agrees with the Panel that the Complaining Parties' arguments relating to payments on C beet fell within the Panel's terms of reference. Australia submits that the European Communities wrongly characterizes a "payment" as a "measure". Australia points out that it did not claim that a "payment", in itself, was an export subsidy, but rather, that the European Communities was in violation of its WTO obligations because it provided subsidies in excess of its reduction commitment levels on sugar and sugar-containing products. Australia further affirms that the Panel correctly applied the distinction between "claims" and "arguments", and agrees with the Panel that "the Complainants did not have to detail how and why such exports were being subsidized."[82]

[78]European Communities' appellant's submission, para. 353 (quoting Panel Reports, para. 7.73).

[79]*Ibid.*, para. 361.

[80]*Ibid.*, para. 362.

[81]*Ibid.*, para. 363.

[82]Australia's appellee's submission, para. 78 (quoting Panel Reports, para. 7.30).

2. Footnote 1 to Section II, Part IV of the European Communities' Schedule

41. Australia agrees with the Panel that Footnote 1 is inconsistent with the *Agreement on Agriculture* and cannot be regarded as a second component of the European Communities' export subsidy commitments on sugar. Australia emphasizes that the inclusion of Footnote 1 in the European Communities' Schedule was not negotiated and that "[t]here is no evidence of any relevant exchanges between the parties or any other form of negotiation, let alone agreement on this subject matter."[83] Australia further maintains that the second sentence of Footnote 1 does not indicate "a ceiling or other limitation on these exports".[84]

42. Australia submits that the findings of the Appellate Body in *Canada – Dairy* do not provide support to the European Communities' contention that Footnote 1 should be read to impose a limit on subsidization. Australia explains that, unlike in the present case, in *Canada – Dairy*, the United States and Canada held "lengthy negotiations" regarding reciprocal market access for dairy products.[85]

43. Australia sees no reason why the principle enunciated by the GATT panel in *US – Sugar* and by the Appellate Body in *EC – Bananas III*—namely, the principle that Members may incorporate into their Schedules acts yielding rights under the GATT, but not acts diminishing obligations under that Agreement—should not apply in the present case. Moreover, Australia agrees with the Panel that, unless explicitly authorized, scheduled commitments "cannot overrule or conflict" with the obligations contained in the covered agreements.[86]

3. Payments under Article 9.1(c) of the *Agreement on Agriculture*

(a) *Payments in the Form of Below-cost Sales of C Beet*

44. Australia argues that the European Communities "misrepresent[s]" the reasons for C beet production.[87] According to Australia, yield variations would not lead to C beet production in the absence of high prices for quota sugar and the "web of supporting regulations".[88] Furthermore, there is no demonstrated agronomic benefit that would induce growers to grow large quantities of beet at a substantial financial loss. Rather, the production and processing of below-cost C beet is financed and

[83]Australia's appellee's submission, para. 160 (quoting Panel Reports, para. 7.213).

[84]*Ibid.*, para. 164.

[85]*Ibid.*, para. 173 (citing Appellate Body Report, *Canada – Dairy*, para. 139).

[86]*Ibid.*, para. 221 (quoting Panel Reports, para. 7.158).

[87]*Ibid.*, heading VI.B.1.

[88]*Ibid.*, para. 372.

driven by the structure of the EC sugar regime, including the incentive to ensure receipt of full-quota sugar revenue, the needs of sugar processors, and incentives for producing above-quota beet. Although growers and processors have some flexibility when negotiating their contractual arrangements for C beet, that flexibility is limited.

45. Australia submits that the payments in the form of below-cost sales of C beet are "financed by virtue of governmental action". In Australia's view, "governmental action", in this dispute, finances the "payments" as the "other factors" identified by the European Communities do not explain the "persistent production and sale of below cost C beet".[89] Furthermore, in challenging the Panel's finding that a significant percentage of growers of C beet are likely to finance sales of C beet as a result of selling high-priced A and B beet, the European Communities introduces new material that had not been provided to the Panel. Moreover, the European Communities erroneously examines the relevant figures for the European Communities "*as a whole*".[90] According to Australia, the examination of figures as a whole is inappropriate because those growers that actually produce C beet have greater profits from A and B beet, and lower fixed costs of growing C beet to cover with those profits.

46. Australia also argues that governmental control in the EC sugar regime is not less pervasive than in the situation present in *Canada – Dairy*. The European Communities, in Australia's view, implies that European Communities' growers have more choice as to what they produce and where they market their production than do Canadian dairy farmers. However, the incentives provided through the EC sugar regime "dominate the growers' choices".[91]

(b) *Payments in the Form of "Cross-subsidization"*

47. Australia argues that the European Communities misrepresents the cost of production of C sugar, compared to A and B sugar. Australia points out that, since C sugar is always produced jointly with A and B sugar, the average total cost of producing C sugar is identical to the average total cost of producing A and B sugar. Likewise, the average total cost of growing beet is the same for A, B, and C beet.[92] The fact that the price for C beet is lower than that of A and B beet is not relevant, because the cost of producing sugar includes the cost of *all* of the economic resources used in beet

[89]Australia's appellee's submission, heading VI.C.2.ii.

[90]*Ibid.*, para. 404. (original emphasis)

[91]*Ibid.*, para. 410.

[92]*Ibid.*, para. 252.

production, transport, and processing. The lower beet prices for C beet only "lessen the degree"[93] of cross-subsidy between quota sugar and C sugar, but they do not eliminate the cross-subsidy. Australia further contends that the European Communities misrepresents the reasons for C beet and C sugar production. Producers plan production so as to ensure quota receipt and avoid losing quota for future seasons. In addition, C sugar may be produced so that farmers and processors can profit from producing it at marginal cost, given that its fixed cost is covered by quota revenue.

48. Australia further argues that the "purely notional ['payment']" identified by the European Communities is "but one link in the chain connecting the EC sugar regime to the below cost exports of C sugar".[94] According to Australia, in the light of the *Canada – Dairy (Article 21.5 – New Zealand and US)* jurisprudence, the export of sugar at below the average total cost of production constitutes a "decisive element" in examining whether an Article 9.1(c) export subsidy exists.[95] In Australia's view, the average total cost of production is the appropriate benchmark in this case; and the use of the world market price as the benchmark, as suggested by the European Communities, would be "illogical" in this dispute, because European Communities exporters must sell their sugar at the prevailing world market price.[96]

49. Australia further submits that the Panel was correct in finding that the term "on the export", in Article 9.1(c), does not mean "contingent on export performance". In any event, even if the phrase "on the export" did mean "contingent on exports", as submitted by the European Communities, such a test would also be satisfied in the present case, because C sugar must be exported unless it is carried forward. Australia notes also that the European Communities has not appealed the Panel's finding that the payments at issue, namely, payments in the form of "cross-subsidization", are "financed by virtue of governmental action".

50. In response to the other arguments advanced by the European Communities, Australia contends that Article 9.1(c) does not require the identification of a benefit; there is no risk of blurring the distinction between domestic support and export subsidies; there is no risk of Article 9.1(c) being turned into a "blunt anti-dumping instrument"[97]; there is no requirement to identify an "equivalent" obligation in the *SCM Agreement*; and "cross-subsidization" is not a novel concept. Finally, Australia submits that the European Communities does not properly indicate, in its Notice of Appeal,

[93]Australia's appellee's submission, para. 254.

[94]*Ibid.*, para. 263 (citing European Communities' appellant's submission, para. 199).

[95]*Ibid.*, para. 272.

[96]*Ibid.*, para. 278.

[97]*Ibid.*, heading V.C.3.iii.

a claim under Article 11 of the DSU with respect to the Panel's finding on "cross-subsidization", and that, in any event, such a claim would be without merit.

4. Nullification or Impairment

51. Australia notes that the European Communities does not contest on appeal its burden of proof to rebut the presumption of nullification or impairment set out in Article 3.8 of the DSU. The European Communities also does not contest that there would be a presumption of nullification or impairment in respect of the export subsidies applied to ACP/India equivalent sugar. In Australia's view, there are no "special factors" that would justify applying a different standard to C sugar than to ACP/India sugar.[98]

52. Australia submits that a panel may not qualify the extent of any "adverse impact" under Article 3.8 of the DSU, or find that there is no such "adverse impact" on the grounds that Australia "could not have expected that the EC would conform to its obligations".[99] Australia agrees with the Panel that the protection of "legitimate expectations" could not be used to determine the existence of nullification or impairment.[100] Moreover, Australia submits, the European Communities incorrectly ascribes to Australia an expectation that the European Communities would not take any measure to reduce its exports of C sugar. There is no "evidentiary basis" for the European Communities' assertion that there was any "shared ... understanding" between the European Communities and the Complaining Parties.[101] In any event, legal expectations "accrue from legal treaty rights", not from "what might ... be a Member's own assessment at any point in time".[102] Australia also argues that the European Communities' interpretation of Article 3.8 of the DSU would "strip Article 3.8 of its object and purpose"[103]; the European Communities' interpretation would also imply that "adverse impact" should be "rebated in full" against future "windfall" accruing to the Complaining Parties once the European Communities has implemented its obligations.[104] Finally, Australia contends that the fact

[98]Australia's appellee's submission, para. 570.

[99]*Ibid.*, para. 588.

[100]*Ibid.*, para. 589.

[101]*Ibid.*, para. 596.

[102]*Ibid.*

[103]*Ibid.*, para. 614.

[104]*Ibid.*, para. 617.

that it may be difficult to rebut the presumption of nullification or impairment under Article 3.8 "reflects the treaty status" of this presumption.[105]

5. Article 3.10 of the DSU and the Principle of Good Faith

53. Australia refers to the European Communities' assertion that the Complaining Parties were seeking to exploit "an 'excusable scheduling error' in order to secure a manifestly unfair advantage".[106] Australia emphasizes, in this respect, that the European Communities made modifications to its sugar regime subsequent to 1995 and that the European Communities "has no basis upon which to implicate Australia and the other Complainants in the violation of [the European Communities'] obligations."[107]

54. Australia supports the Panel's conclusion that the principle of estoppel cannot be applied in WTO dispute settlement. With respect to the content of estoppel, Australia submits that estoppel "cannot apply as to a statement of a legal situation".[108] Australia points to the European Communities' assertion that it was reasonable to infer from the Complaining Parties' lack of reaction at the time of the conclusion of the *WTO Agreement* that they shared the European Communities' understanding that exports of C sugar did not benefit from export subsidies. According to Australia, this assertion does not go to a question of fact, but rather to the legal issue of whether C sugar exports were subsidized. It follows, in Australia's view, that there is no basis for estoppel to be applied in this case, and "[e]ven if there were, the EC's subsequent modifications of its [sugar] regime would have changed the factual basis upon which the estoppel rested, putting an end to it."[109] Accordingly, the Appellate Body should find that "the EC's claim that the Complainants have been estopped is without basis as not coming within the terms of that principle."[110] Such a finding, according to Australia, "would not require the Appellate Body to rule on whether estoppel could be applied in relation to the *WTO Agreement*".[111]

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[105]Australia's appellee's submission, para. 621.

[106]*Ibid.*, para. 455.

[107]*Ibid.*, para. 482.

[108]*Ibid.*, para. 510.

[109]*Ibid.*, para. 512.

[110]*Ibid.*, para. 513.

[111]*Ibid.*, para. 514.

6. The European Communities' Notice of Appeal

55. Australia argues that the European Communities' Notice of Appeal does not satisfy the "due process requirements" of Rule 20(2)(d) of the *Working Procedures*.[112] Australia submits that the European Communities does not quote, in its Notice of Appeal, specific conclusions or findings of the Panel on which it seeks review; fails to distinguish between a conclusion and a finding or fails to identify the findings in question; does not list, for each claim, the provisions that the Panel allegedly erred in interpreting or applying; and, finally, erroneously refers to a part of its Schedule as "a provision of a covered agreement".[113] In Australia's view, these issues are "fundamental defects that deny due process" to the Complaining Parties.[114]

C. *Arguments of Brazil – Appellee*

56. Brazil submits that the European Communities fails to demonstrate that the Panel's legal conclusions are in error, and requests the Appellate Body to uphold the Panel's conclusions and reject the European Communities' appeal.

1. The Panel's Terms of Reference

57. Brazil recalls that Article 6.2 of the DSU requires a complaining party to identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Brazil submits that its panel request in this case went beyond the requirement of Article 6.2 of the DSU by identifying the subsidizing measure and providing evidence of the European Communities' subsidies to excess sugar exports. Brazil adds that the European Communities has not demonstrated any prejudice resulting from a lack of specificity in Brazil's panel request, nor has it offered any supporting particulars in its appellant's submission.

2. Footnote 1 to Section II, Part IV of the European Communities' Schedule

58. Brazil argues that a Member must specify in its Schedule both budgetary outlay and quantity commitment levels in respect of export subsidies falling within the ambit of Article 9.1 of the *Agreement on Agriculture*. If either of the two types of commitments is not specified, there is no reduction commitment within the meaning of the *Agreement on Agriculture*. Brazil submits that the European Communities acknowledges that Footnote 1 constitutes a departure from the general

[112]Australia's appellee's submission, para. 23.

[113]*Ibid.*, para. 24(d).

[114]*Ibid.*, para. 25.

obligations imposed on Members by the *Agreement on Agriculture*. Consequently, in Brazil's view, the European Communities' attempt to exclude subsidized exports of ACP/India equivalent sugar from its reduction commitments must fail, because Article XVI:5 of the *WTO Agreement* explicitly prohibits reservations unless the multilateral agreement concerned provides otherwise.

59. Brazil supports the Panel's rejection of the European Communities' claim that Footnote 1 was "negotiated" with other Members.[115] Furthermore, according to Brazil, GATT and WTO jurisprudence has recognized the principle that Members may yield rights and grant benefits but may not use their Schedules to diminish their reduction commitment obligations. Brazil further notes that the *Agreement on Agriculture* does not authorize Members to subject their reduction commitments to individualized terms and conditions, in contrast to Article II:1(b) of the GATT 1994 and Article XVI:1 of the GATS that allow for such conditions and qualifications. Even assuming that Footnote 1 were a legitimate part of the European Communities' Schedule, the text of Footnote 1 is, according to Brazil, "merely informative" and does not support the interpretation suggested by the European Communities to authorize the subsidization of ACP/India "equivalent" sugar exports. The European Communities seeks, impermissibly, to have the Appellate Body read into the text of Footnote 1 a meaning that does not follow from the ordinary meaning of the terms in that Footnote. The International Court of Justice has explained that the principle of effectiveness cannot justify attributing meaning to provisions that would be contrary to their letter and spirit.[116] Moreover, assuming *arguendo* that Footnote 1 is ambiguous, the principle of *contra proferentem* requires that any ambiguity be construed against the European Communities, as the drafter is held responsible for any inaccuracies or ambiguities.[117]

3. Payments under Article 9.1(c) of the *Agreement on Agriculture*

(a) *Payments in the Form of Below-cost Sales of C Beet*

60. Brazil agrees with the Panel's findings that governmental action results in profitable sales of C beet below their total cost of production. Brazil submits that, although the European Communities makes "extensive factual assertions" concerning alternative uses for C beet other than C sugar, it does not explain why, if more attractive alternative markets for C beet exist, growers continue to sell their

[115]Brazil's appellee's submission, paras. 38-41 (referring to Panel Reports, paras. 7.203, 7.213, 7.216, 7.218, and 7.220).

[116]*Ibid.*, para. 50 (referring to International Court of Justice, Advisory Opinion, *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase)*, 1950, ICJ Reports, 221, at 229).

[117]*Ibid.*, paras. 57-58.

beet to C sugar producers for less than the cost of producing that beet.[118] Brazil also maintains that there was "ample evidence" in the record to support the Panel's conclusion that a significant percentage of farmers are likely to finance sales of C beet below total cost of production "as a result of participation in the domestic market".[119] Brazil also rejects the European Communities' argument that the Panel confused a regulation merely enabling payments to occur with a regulation that finances those payments; Brazil points to the Panel's finding that the European Communities "controls virtually every aspect of domestic beet and sugar supply and management".[120]

61. Brazil further contends that Table 9 in the European Communities' appellant's submission—intended to show that "there are other factors which explain the farmers' decision to produce C beet"—"is highly misleading and misrepresents the data it cites as a source".[121] For instance, the European Communities has created an "erroneous substitute" for the fixed cost set out in that table.[122] In any event, in Brazil's view, the European Communities admits that the Panel was correct in finding that profits from A and B beet support the sale of C beet below its total cost of production by stating that "the profits obtained with sales of A and B beet would be *largely insufficient to cover all* the fixed costs of producing C beet."[123] Brazil argues that profits from the sales of A and B beet do not need to cover all fixed costs of producing C beet in order to cross-subsidize those sales, rather, these profits need only cover some of the fixed costs of C beet. According to Brazil, "[s]o long as the price obtained for C beet covers its marginal cost and makes a *contribution* to the coverage of fixed costs, it is more profitable for a grower to produce and sell the C beet than not to do so."[124] Brazil submits that, as a result, even the European Communities' own argument supports the Panel's conclusion.[125]

(b) *Payments in the Form of "Cross-subsidization"*

62. Brazil agrees with the Panel that C sugar receives a "payment on export" that is "financed by virtue of governmental action". Brazil argues that the European Communities admits the facts

[118]Brazil's appellee's submission, para. 102.

[119]*Ibid.*, para. 104 (quoting European Communities' appellant's submission, para. 266, in turn quoting Panel Reports, para. 7.291).

[120]*Ibid.*, para. 105 (quoting Panel Reports, para. 7.291).

[121]*Ibid.*, para. 106.

[122]*Ibid.*, para. 107 (referring to European Communities' appellant's submission, para. 279, Table 9, line (f)).

[123]*Ibid.*, para. 108 (quoting European Communities' appellant's submission, para. 279). (emphasis added by Brazil)

[124]*Ibid.*, para. 108. (original emphasis)

[125]*Ibid.*

necessary to support the Panel's conclusion, because the European Communities never challenged the "detailed economic data and two economic analyses" that the Complaining Parties submitted to the Panel.[126] The European Communities, in Brazil's view, attempts to revisit the economic issues "under the guise of legal argument".[127]

63. With respect to the European Communities' argument that "cross-subsidization does not transfer any resources to the sugar producers" and is therefore not a "payment", Brazil submits that the financial resources generated by A and B quota sugar make C sugar production profitable, even when sold below its average total cost of production. An "economic resource"[128], namely money, is being transferred from domestic consumers, by virtue of governmental action, to C sugar producers. Furthermore, the export sale of C sugar involves a payment to the buyer. According to Brazil, for purposes of WTO disciplines, "it does not matter that the recipient of the payment – or an export subsidy – is located in a third country."[129] The export sale is economically possible and profitable to the C sugar producer only because of the payments that the C sugar producer receives, including payments from European sugar consumers in the form of high prices for A and B sugar resulting from the EC sugar regime; payments-in-kind in the form of C beet below its total cost of production; and direct export refunds on A and B quota sugar and ACP/India sugar.

64. Brazil furthermore disagrees with the European Communities' contention that the Panel made no finding concerning the appropriate benchmark. According to Brazil, the Panel relied on the Appellate Body Report in *Canada – Dairy (Article 21.5 – New Zealand and US)*, which identified and used the proper benchmark, namely, average total cost of production. Brazil submits that the European Communities' arguments concerning the *SCM Agreement* are not relevant to the Panel's conclusions under the *Agreement on Agriculture*, because it is not necessary to allege or prove a *benefit* as a separate element in a dispute concerning payment under Article 9.1(c). Brazil also submits that the European Communities cannot justify its own violations of its WTO obligations by pointing to alleged violations by other WTO Members.

65. Finally, according to Brazil, the Panel correctly applied the standard for the term "on the export" contained in Article 9.1(c). The European Communities' arguments incorrectly characterize the Panel's finding on this issue. The Panel's findings do not blur the distinction between domestic

[126]Brazil's appellee's submission, para. 65.

[127]*Ibid.*, para. 67.

[128]*Ibid.*, para. 69.

[129]*Ibid.*, para. 71.

and export subsidies. Brazil contends that the fact that there is no requirement to produce C sugar is not relevant to the question whether the sale of C sugar involves a payment on export financed by virtue of governmental action.

4. Nullification or Impairment

66. Brazil observes that the European Communities' rationale that nullification or impairment depends on "expectations of improved competitive opportunities" is an argument that "sets GATT and WTO jurisprudence on its head".[130] In Brazil's view, the European Communities points to GATT and WTO panel and Appellate Body reports that held that the concept of nullification or impairment encompassed "expectations of improved competitive opportunities", but concludes erroneously that "*only*"[131] expectations of improved competitive opportunities are included in that concept. Brazil refers to the result of an Oxfam study concluding that the EC sugar regime caused immediate losses of US $494 million to Brazil in 2002, which, in Brazil's view, constitutes "serious" nullification or impairment of actual trade.[132] Brazil argues that the European Communities did not challenge that evidence.[133]

5. Article 3.10 of the DSU and the Principle of Good Faith

67. Brazil supports the Panel's conclusion that the Complaining Parties were not estopped from bringing claims against export subsidies provided to exports of C sugar. With respect to Article 3.7 of the DSU, Brazil states that it exercised its judgement and concluded that action would be "fruitful" within the meaning of that provision.

D. *Arguments of Thailand – Appellee*

1. The Panel's Terms of Reference

68. Thailand maintains that in appealing the Panel's finding that "the Complainants' claims relating to the 'alleged' payments in the form of low priced sales of C beet to EC sugar producers were within the Panel's terms of reference"[134], the European Communities is, in fact, appealing a finding

[130]Brazil's appellee's submission, para. 121.

[131]*Ibid.* (original emphasis)

[132]*Ibid.*, para. 122.

[133]*Ibid.* (referring to Panel Reports, para. 7.372).

[134]Thailand's appellee's submission, para. 119 (quoting European Communities' appellant's submission, para. 40).

that the Panel did not make. Specifically, according to Thailand, the Panel at no point identified "payments" in the form of low-priced sales of C beet as a "claim" within its terms of reference.

69. Thailand further submits that, in any event, in claiming that export subsidies were granted in excess of the quantity commitments under Articles 3.3 and 8 of the *Agreement on Agriculture*, Thailand was under no obligation to refer to the term "payments". Instead, it was required "to claim only that the export subsidies were granted in excess of the EC's quantity commitments under Articles 3.3 and 8 of the Agreement on Agriculture".[135] Thailand submits that, in the light of the burden of proof rule set out in Article 10.3 of the *Agreement on Agriculture*, its panel request articulated sufficiently the claims it was required to make under Articles 3.3 and 8 of the *Agreement on Agriculture*.

70. Thailand recalls the European Communities' allegation that "the Panel misinterpreted the notions of claims and argument".[136] In this regard, Thailand submits that "[t]he EC attempts to separate the issue of what must be proven in a proceeding in which Article 10.3 is invoked and what must be claimed in a proceeding in which violations of Articles 3.3 and 8 are alleged."[137] Thailand relies upon the finding of the Appellate Body in *Korea – Dairy* to argue that an examination under Article 6.2 of the DSU must be conducted on a case-by-case basis, as the requirements of this provision "will differ from agreement to agreement, and provision to provision".[138]

2. Footnote 1 to Section II, Part IV of the European Communities' Schedule

71. Thailand agrees with the Panel's interpretation of Footnote 1. Thailand points out that the issue to be resolved by the Appellate Body is whether Footnote 1 operates to "enlarge or otherwise modify"[139] the European Communities' export subsidy commitment levels. Regarding the issue of whether Footnote 1 includes a budgetary outlay commitment, Thailand submits that the European Communities' position is not clear, given that, in its appellant's submission, it does not contest the Panel's finding on this matter. Therefore, Thailand assumes that the European Communities no longer holds the position that Footnote 1 expresses a budgetary outlay commitment level.

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[135]Thailand's appellee's submission, para. 126.

[136]*Ibid.*, para. 132.

[137]*Ibid.*, para. 134.

[138]*Ibid.*, para. 135 (referring to Appellate Body Report, *Korea –Dairy*, para. 123).

[139]*Ibid.*, para. 23 (referring to Panel Reports, para. 7.191).

72. Thailand submits that the Appellate Body should reject the European Communities' allegation that Footnote 1 operates as a "second component" of the European Communities' Schedule. Instead, according to Thailand, the second sentence of Footnote 1 "merely contains a factual statement" and not a limitation as argued by the European Communities.[140] Thailand argues that, "[i]f the EC had intended to set out in [Footnote 1] one component of a binding reduction commitment, it would not have used merely descriptive language."[141] Thailand opines that the interpretation proposed by the European Communities would result in "the imputation into a treaty of words that are not there", in violation of the Appellate Body's finding in *India – Patents (US)*.[142] Thailand alleges that "the EC asks the Appellate Body to substitute the phrase '*making* a reduction commitment' for the phrase '*not making* any reduction commitment.'"[143] According to Thailand, the European Communities further asks the Appellate Body to read the phrase "the average of exports in the period 1986-1990 amounted to 1.6 million t" to mean that "[t]he EC commits not to subsidise more than 1.6 million tonnes of sugar of ACP/India equivalent sugar per year".[144]

73. With respect to the European Communities' challenge to the Panel's decision to rely on the notifications to the WTO Committee on Agriculture, Thailand submits that these objections are "without any practical consequence".[145] Thailand emphasizes that the European Communities did not notify the export subsidies provided to ACP/India equivalent sugar to the WTO Committee on Agriculture and did not explain clearly its reasons for failing to report those subsidies.

74. Thailand supports the Panel's reliance on the principle articulated by the GATT panel in *US – Sugar* to conclude that "a Member's schedule 'cannot provide for non-compliance with the provisions of the Agreement on Agriculture'."[146] Thailand asserts that, contrary to the European Communities' contentions, the Appellate Body in *EC – Bananas III* has already ruled that the principle applied in *US – Sugar* is valid for "concessions" as well as for "commitments".[147]

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[140]Thailand's appellee's submission, para. 32.

[141]*Ibid.*

[142]*Ibid.*, paras. 36-37 (quoting Appellate Body Report, *India – Patents (US)*, para. 45).

[143]*Ibid.*, para. 37. (original emphasis)

[144]*Ibid.*

[145]*Ibid.*, para. 42.

[146]*Ibid.*, para. 57 (quoting Panel Reports, para. 7.161).

[147]*Ibid.*, para. 61.

Therefore, Thailand requests the Appellate Body to "reject the EC's attempt to put into question this well-established principle of WTO law".[148]

75. Furthermore, Thailand disagrees with the European Communities' assertion that Article 8 of the *Agreement on Agriculture* does not oblige Members to comply with the provisions of the *Agreement on Agriculture* in addition to their reduction commitments. Thailand requests the Appellate Body to dismiss the European Communities' argument that Article 8 of the *Agreement on Agriculture* does not express a "hierarchy" between the *Agreement on Agriculture* and WTO Members' Schedules.[149] Thailand states that the European Communities' position is that, "in certain circumstances, such as the present, it is possible to comply with the Agreement on Agriculture *or* the schedule."[150] In Thailand's view, "[t]his amounts to substituting the negotiated term 'and' [in Article 8 of the *Agreement on Agriculture*] with the word 'or' and is, consequently, a clear departure from the text."[151]

3. Payments under Article 9.1(c) of the *Agreement on Agriculture*

(a) *Payments in the Form of Below-cost Sales of C Beet*

76. Thailand submits that, if the Appellate Body were to conclude that C sugar exports involve a subsidy within the meaning of Article 9.1(c), it would no longer need to examine whether those exports are also subsidized through payments in the form of below-cost C beet sales. Subsidiarily, Thailand argues that the Panel correctly found that below-cost sales of C beet were "financed by virtue of governmental action" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. According to Thailand, most, if not all, of the objections raised by the European Communities fall outside the scope of appellate review, as they relate to factual matters and to the Panel's discretion to weigh and assess evidence. However, Thailand argues, the Appellate Body has "consistently expressed reluctance"[152] to review the weighing and assessing of evidence by panels, and it should not "depart[] from this line of reasoning".[153] Thailand also notes that the European Communities, in attempting to demonstrate that profits on A and B beet are insufficient to cover the fixed costs of C beet, is introducing new factual evidence that had not been provided to the Panel.

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[148]Thailand's appellee's submission, para. 61.

[149]*Ibid.*, para. 63 (citing European Communities' appellant's submission, para. 165).

[150]*Ibid.*, para. 63. (original emphasis)

[151]*Ibid.*

[152]*Ibid.*, para. 148.

[153]*Ibid.*, para. 150.

77. Should the Appellate Body find the European Communities' appeal to be within the scope of appellate review, Thailand argues that the Panel applied the correct legal standard as clarified by the Appellate Body. In the alternative, Thailand requests the Appellate Body to complete the Panel's legal analysis on the basis of the factual findings of the Panel, but, in doing so, should not consider the facts that the European Communities "is attempting to bring up for the first time".[154]

78. According to Thailand, in concluding that there was a "demonstrable link" and "clear nexus" between elements of the EC sugar regime and the below-cost sales of C beet, the Panel correctly weighed and assessed the evidence before it. The European Communities' assertion that the governmental action in the European Communities' beet market is less pervasive than in *Canada – Dairy* is "irrelevant and, in any case, inaccurate".[155] Thailand also rejects the European Communities' assertion that, because of other factors (such as yield variability, the production of alternative crops, or the differences in the nature of fixed costs between dairy and beet farming), the requisite nexus between governmental action and below-cost sales of C beet is not present in this dispute. Thailand notes that the European Communities has provided no evidence to support its propositions in this regard.

(b) *Payments in the Form of "Cross-subsidization"*

79. Thailand requests the Appellate Body to uphold the Panel's conclusion that the European Communities failed to demonstrate that it was not providing export subsidies on C sugar in the form of "cross-subsidization". In Thailand's view, the European Communities' argument that the "cross-subsidization" identified by the Panel constitutes merely an "internal allocation of each sugar producer's own resources"[156] and a "notional payment"[157], "attempts to turn an issue of vocabulary into an issue of substance".[158] The "internal" transfer of resources in the form of profits on A and B sugar identified as "payments" by the Panel is the "counterpart" of the "external" transfer of resources in the form of the below-cost sale to the external customer identified as a "payment" by the Complaining Parties.[159]

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[154]Thailand's appellee's submission, para. 158.

[155]*Ibid.*, heading C.3(c)(ii).

[156]*Ibid.*, para. 68 (referring to European Communities' appellant's submission, para. 179).

[157]*Ibid.* (referring to European Communities' appellant's submission, para. 199).

[158]*Ibid.*, para. 69.

[159]*Ibid.*

80. Thailand submits that the term "payments" under Article 9.1(c) requires, in the present case, a comparison of the average cost of production of sugar in the European Communities with the average return on export sales of C sugar. According to uncontested evidence before the Panel, European Communities' sugar producers sell C sugar at prices far below that sugar's total cost of production. Thailand also rejects the European Communities' argument that Article 9.1(c) is limited to "payments" conferring benefits on domestic producers. If this were so, the scope of Article 9.1(c) would be limited to agricultural products that farmers sell to domestic processors before their disposal on the export market. According to Thailand, "[t]he 'payments' need not confer a benefit upon a recipient located within the EC".[160]

81. Thailand also agrees with the Panel that the payments made on the export of C sugar are "financed by virtue of governmental action". The Panel correctly found that European Communities' sugar producers are able to recover most, or all, of their fixed costs by producing and selling quota sugar in the protected domestic market or with export refunds in the world market. The beneficiaries of sugar production quotas are protected from all potential sources of competition from foreign suppliers or new domestic suppliers and sell sugar at high intervention prices set by law that yield high returns. Another reason why sugar producers find it profitable to produce and export C sugar is because they attempt to ensure the full utilization and preservation of their allotted quotas of A and B sugar. As a result, the EC sugar regime "encourages overproduction of sugar, segregates the export market for C sugar completely from the domestic market, generates the profits used to fund the export of that sugar, and imposes sanctions for failure to export that sugar."[161]

82. Furthermore, Thailand maintains that payments made by C sugar producers are made "on the export" of that sugar within the meaning of Article 9.1(c). A payment can be regarded as a payment "on the export" only if a WTO Member causes it to be a payment on the export. Thailand endorses the findings of the Panel that, under the EC sugar regime, C sugar must be exported. Finally, Thailand rejects the European Communities' arguments that the Panel's findings would require WTO Members to dismantle their price-support systems or to prevent dumping by private parties.

4. Nullification or Impairment

83. With reference to the European Communities' claim on nullification or impairment, Thailand submits that the European Communities is advancing "a novel legal theory, according to which a WTO-inconsistent measure does not nullify or impair benefits accruing under a covered agreement if

[160]Thailand's appellee's submission, heading II.B.2(d).

[161]*Ibid.*, para. 99.

it could be anticipated."[162] Thailand contends that the "most fundamental benefit" accruing to a WTO Member under the provisions of the covered agreements is "the benefit of their observation in good faith by the other Members", and that "[t]his benefit accrues to Members independently of the existence of legitimate expectations of improved conditions of competition."[163] Hence, in Thailand's view, the Panel correctly relied on the Appellate Body's finding in *India – Patents (US)* to conclude that the principle of "legitimate expectations" cannot be used to rebut the existence of nullification or impairment. Thailand argues that the Panel was correct in finding that the European Communities failed to meet its burden of proof under Article 3.8 of the DSU in this regard.

5. Article 3.10 of the DSU and the Principle of Good Faith

84. Thailand affirms that the Panel correctly found that the Complaining Parties did not act inconsistently with Article 3.10 of the DSU and the principle of good faith. Thailand agrees with the Panel's conclusion that, in the absence of bad faith, Article 3.7 of the DSU does not authorize panels to question a WTO Member's decision to initiate dispute settlement proceedings. In Thailand's opinion, the Appellate Body should reject the European Communities' allegation that the Panel "misconceived the relationship between Articles 3.7 and 3.10 of the DSU".[164] In this respect, Thailand submits that "[t]he Panel could not have looked at the question of whether the complainants had initiated dispute settlement proceedings in good faith, without referring to Article 3.7 of the DSU."[165] Thailand also urges the Appellate Body to dismiss the European Communities' assertion that the Panel failed to act in accordance with Article 7.2 of the DSU.

85. Thailand requests the Appellate Body to reject the European Communities' arguments regarding the principle of estoppel. Thailand alleges that "[t]he logical extension of the EC's argument is that in this case, there are two categories of rights that can be enforced: those owed to the original Members, and those owed to new Members."[166] Thailand states that the Panel was correct in concluding that "[the principle of] estoppel is not mentioned in the WTO Agreement, or the DSU, and that it has never been applied by any panel or the Appellate Body."[167] In relation to the European Communities' statement that estoppel may be based on silence, Thailand responds that "[i]n the

[162]Thailand's appellee's submission, para. 198.

[163]*Ibid.*, para. 203.

[164]*Ibid.*, para. 172 (quoting European Communities' appellant's submission, heading VIII.C.2).

[165]*Ibid.*, para. 172.

[166]*Ibid.*, para. 183.

[167]*Ibid.*, para. 186 (referring to Panel Reports, para. 7.63).

context of estoppel, silence can only amount to representation in 'exceptional circumstances' and *where there is a duty or obligation to object*."[168]

E. *Claims of Error by Australia – Appellant*

86. Australia appeals the Panel's decision to decline examination of Australia's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement*, and the Panel's consequent failure to make a recommendation in accordance with Article 4.7 of that Agreement.

87. Australia submits, first, that the Panel's decision, that the findings under the *Agreement on Agriculture* should be sufficient to fully resolve the matter at issue, is based on a misinterpretation of "what needs to be done" to bring a prohibited export subsidy into conformity with the *SCM Agreement*.[169] Furthermore, it is an incorrect application of the principle of judicial economy as set forth in *Australia – Salmon*.[170] Australia emphasizes that a recommendation under Article 4.7 of the *SCM Agreement* would have entitled Australia to take countermeasures under Article 4.10, and would have precluded the need for recourse to the procedures of Article 21 of the DSU in order to establish a reasonable implementation period. Australia adds that a finding that, under Article 3.2 of the *SCM Agreement*, the European Communities is granting and maintaining prohibited subsidies, would have led to a recommendation that subsidies in excess of reduction commitments under the *Agreement on Agriculture* be withdrawn within a specified time period.

88. Secondly, with regard to the question whether the Panel was entitled to make a recommendation to withdraw the measure and to specify a time period in accordance with the provisions of Article 4.7 of the *SCM Agreement* in the circumstances before it[171], Australia submits that, having found Australia's claims under the *SCM Agreement* to be within its terms of reference, the Panel should have addressed those claims in accordance with Article 7.2 of the DSU and applied the special and additional rules and procedures of the *SCM Agreement* to its findings and recommendations.

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[168]Thailand's appellee's submission, para. 191 (referring to International Court of Justice, *Temple of Preah Vihear Case*, 1962, ICJ Reports, p. 62; and Panel Report, *Guatemala – Cement II*, footnote 79 to para. 4.120). (emphasis added by Thailand)

[169]Australia's other appellant's submission, para. 21.

[170]*Ibid.*, paras. 16-26 (referring to Appellate Body Report, *Australia – Salmon*, para. 226).

[171]According to Australia, the Panel gave inappropriate weight to the finding of the panel in *Canada – Dairy (Article 21.5 – New Zealand and US)* that "[t]here 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". (Australia's other appellant's submission, para. 27 (quoting Panel Reports, para. 7.384, in turn citing Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 6.99))

89. Thirdly, Australia asserts that the Panel mischaracterized its rights under the *SCM Agreement* as being limited to obtaining more rapid compliance.[172] Indeed, the Panel's erroneous exercise of judicial economy deprives and diminishes Australia's rights under the *SCM Agreement* and under various provisions of the DSU.[173] Australia further disagrees with the Panel's statement that Australia did not present its claims under Article 3 of the *SCM Agreement* as unambiguously as it presented its claims under the *Agreement on Agriculture*.[174] Australia points out that the European Communities did not assert or seek a ruling that Australia's claims under the *SCM Agreement* were not sufficiently clear or unambiguous.

90. Australia requests the Appellate Body to complete the legal analysis on the basis of factual findings by the Panel and the undisputed facts on the Panel record, and rule on Australia's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement*. In addition, Australia requests the Appellate Body to make the recommendation provided for in Article 4.7 of the *SCM Agreement*.

91. For the Appellate Body to complete the analysis, Australia argues that the export refund payments paid by the European Communities with respect to exports of ACP/India equivalent sugar constitute direct export subsidies within the meaning of item (a) of the Illustrative List of Export Subsidies in the *SCM Agreement* (the "Illustrative List") and therefore come within the definitional scope of Article 3.1(a) of that Agreement. Australia adds that the factual findings made by the Panel in regard to Article 9.1(a) of the *Agreement on Agriculture* can be used to support a finding that the European Communities is also providing export subsidies within the meaning of item (a) of the Illustrative List.

92. Australia further argues that the EC sugar regime's different treatment of sugar beet destined for the production of A and B sugar, as compared with beet used to produce C sugar, constitutes an export subsidy under item (d) of the Illustrative List that is prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*. In the alternative, Australia argues that the EC sugar regime provides a subsidy to C sugar within the meaning of Article 1.1 of the *SCM Agreement*, as income or price support to C sugar, and that a benefit is thereby conferred within the meaning of Article 1.1(b) of the *SCM Agreement*.

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[172]Australia's other appellant's submission, paras. 44-47; Panel Reports, para. 7.384.

[173]Australia's other appellant's submission, paras. 48-51 (referring to Articles 3.2, 3.4, 3.7, 11, and 19.2 of the DSU).

[174]*Ibid.*, paras. 52-66 (referring to Panel Reports, para. 7.386).

F. *Claims of Error by Brazil – Appellant*

93. Brazil requests the Appellate Body to find that the Panel erred in finding that it was not necessary to examine the Complaining Parties' claims that "the EC's support for A, B and C sugar, and for ACP/India equivalent sugar, involves prohibited export subsidies under Articles 3.1(a) and 3.2 of the *SCM Agreement*".[175] Should the Appellate Body agree that the Panel erred in exercising judicial economy, Brazil requests the Appellate Body to complete the legal analysis "to determine that the EC's support for A, B and C sugar, and for ACP/India equivalent sugar, involves export subsidies within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*".[176] If the Appellate Body finds this to be the case, Brazil requests the Appellate Body to recommend that the prohibited subsidies be withdrawn within a specified time period, as required by Article 4.7 of the *SCM Agreement*.

94. In Brazil's view, panels must decide whether to exercise judicial economy in the light of the particular implementation obligations that would apply if a claim were upheld. Brazil notes that in previous disputes, where the Appellate Body has examined the exercise of judicial economy, the relevant implementation obligations were those in Article 19.1 of the DSU. Brazil agrees with the Panel that, in those previous rulings, the Appellate Body sought to ensure that a panel's findings are sufficiently complete "as to *what* needs to be done, rather than on *when* it needs to be done".[177] The reason is that, under Article 19.1 of the DSU, panels are required to recommend only what needs to be done "to bring the measure into conformity".

95. Brazil emphasizes that the situation is different where a panel upholds a claim under Article 3 of the *SCM Agreement*. Under that provision, a panel is required to specify the time period within which the measure must be withdrawn. Thus, when implementation occurs under Article 4.7, the recommendations and rulings of the DSB "are concerned with *both what* needs to be done ... *and* most importantly *when* it needs to be done".[178]

96. Brazil further contends that the Panel diminished Brazil's rights under the covered agreements by depriving Brazil of its right to have the dispute resolved in terms of the implementation obligations in Article 4.7 of the *SCM Agreement* and of its right to seek countermeasures, in appropriate circumstances, under Article 4.10 of the *SCM Agreement*.

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[175]Brazil's other appellant's submission, para. 11.

[176]*Ibid.*

[177]*Ibid.*, paras. 4 and 25 (quoting Panel Reports, para. 7.384). (emphasis added by the Panel)

[178]*Ibid.*, para. 33. (original emphasis)

97. With respect to its request for the Appellate Body to complete the legal analysis, Brazil submits that export refund payments for A and B quota sugar and ACP/India equivalent sugar involve a direct transfer of funds "to firms, to the exporting industry and to producers of sugar", and, therefore, constitute "financial contributions" by a government, within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.[179] According to Brazil, these export refunds confer a "benefit" and "are contingent in law upon export".[180]

98. Brazil further submits that the production of C sugar involves a "financial contribution" under Article 1.1(a)(1) and "income or price support" within the meaning of Article 1.1(a)(2) of the *SCM Agreement*. Brazil asserts that the financial contribution and the income or price support confer "benefits" through the provision of additional cross-subsidized resources and through an income and price-support mechanism that maximizes producers' revenues. According to Brazil, this subsidy is "contingent upon export performance" because C sugar cannot be sold domestically and "must be exported".[181]

99. Finally, Brazil submits that the EC sugar regime mandates a minimum price for A and B beet that is inevitably higher than the price for C beet, for which there is no mandated price. The EC sugar regime, therefore, mandates higher prices for beet that is used to produce domestic sugar than it does for C beet used to produce sugar that must be exported. Thus, in terms of item (d) of the Illustrative List, sugar producers do not have alternative sources of beet available at prices that are as favourable as those for C beet. The provision of C beet for production and export of C sugar is, therefore, inconsistent with item (d) of the Illustrative List.

G. *Claims of Error by Thailand – Appellant*

100. Thailand submits that the Panel erred in its exercise of judicial economy with respect to Thailand's claims under the *SCM Agreement*. Should the Appellate Body agree, Thailand requests the Appellate Body to complete the legal analysis of Thailand's claims under the *SCM Agreement* and recommend the European Communities to withdraw the export subsidies granted in excess of its export subsidy reduction commitments within a specified time period, as required by Article 4.7 of the *SCM Agreement*.

[179]Brazil's other appellant's submission, para. 56.

[180]*Ibid.* (citing Appellate Body Report, *Canada – Aircraft*, para. 157).

[181]*Ibid.*, para. 9.

101. Thailand submits that the Panel's exercise of judicial economy deprived Thailand of its rights under Article 4.7 of the *SCM Agreement*. Referring to its status as a developing country, Thailand submits that a recommendation under Article 4.7 of the *SCM Agreement* would preclude the need for recourse to a "costly arbitration procedure" under Article 21 of the DSU in order to establish a reasonable implementation period.[182] Moreover, Thailand submits that, by not making the findings necessary to enable the DSB to discharge its responsibilities under Article 4.7 of the *SCM Agreement,* the Panel acted inconsistently with Article 11 of the DSU, which requires panels to make such findings "as will assist the DSB in making the recommendations provided for in the covered agreements". According to Thailand, the Panel declined to address Thailand's claims brought under the *SCM Agreement* based on a distinction between substantive and procedural rights and obligations. However, Thailand submits that Article 11 of the DSU does not recognize such a distinction.

102. Thailand requests the Appellate Body to complete the legal analysis and rule on Thailand's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement*. Thailand affirms that, in the present case, there are sufficient undisputed facts and factual findings on record to enable the Appellate Body to complete the legal analysis.[183]

103. With respect to quota sugar and ACP/India equivalent sugar, Thailand points out that the European Communities did not contest before the Panel that it grants export refunds within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[184] Thailand submits that these subsidies are provided directly by the government to the sugar industry and that they are contingent upon export performance. Therefore, in Thailand's view, they are covered by item (a) of the Illustrative List and are, therefore, inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

104. With regard to C sugar, Thailand contends that the export subsidies granted by the European Communities are export subsidies within the meaning of item (d) of the Illustrative List. Thailand submits that the relevant question is not whether the European Communities "mandates" beet farmers to provide C beet to sugar producers, rather, as Thailand sees it, the question is whether the European Communities "mandates" beet farmers to provide C beet "on terms or conditions more favourable

[182]Thailand's other appellant's submission, para. 15.

[183]*Ibid.*, paras. 52-53.

[184]*Ibid.*, para. 59 (citing Panel Reports, para. 7.235).

than for the provision of like or directly competitive products". Thailand refers to the findings of the panel in *Canada− Dairy (Article 21.5 − New Zealand and US II)*, in support of its position.[185]

H. *Arguments of the European Communities – Appellee*

105. The European Communities requests the Appellate Body to uphold the Panel's decision to exercise judicial economy with respect to the Complaining Parties' claims under the *SCM Agreement*.

106. Referring to the report of the Appellate Body in *Canada – Wheat Exports and Grain Imports*, the European Communities asserts that "judicial economy does not concern the manner in which a panel's decision to exercise its discretion affects eventual implementation, but rather whether the findings in question are sufficient to resolve a dispute *as to the consistency of a measure with the covered agreements*."[186] Thus, according to the European Communities, it is "a panel's findings of consistency which 'resolve a dispute'".[187] Findings and recommendations under Articles 3 and 4 of the *SCM Agreement* were therefore not necessary in this case.

107. The European Communities asserts "subsidiarily"[188] that, even assuming that the Panel erred in exercising judicial economy, the Appellate Body should find that the export subsidy provisions of the *SCM Agreement* are not applicable to export subsidies maintained under the *Agreement on Agriculture*. The European Communities emphasizes that a recommendation to "withdraw" a subsidy cannot be "reconciled" with the right to grant an export subsidy under the *Agreement on Agriculture*.[189] The European Communities adds that the phrase "except as provided in the Agreement on Agriculture" in Article 3.1 of the *SCM Agreement* means that "all export subsidies granted in respect of agricultural products, irrespective of whether they are consistent with the Agreement on Agriculture, are not to be considered prohibited by Article 3.1".[190] Quoting the Appellate Body Report in *EC – Bananas III*[191], the European Communities submits that, "[i]t is quite clear that the *Agreement on Agriculture* has very specific provisions dealing with export subsidisation, and that this is the 'same matter' as dealt with in the *SCM Agreement*."[192]

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[185]Thailand's other appellant's submission, paras. 69-70.

[186]European Communities' appellee's submission, para. 15. (emphasis added)

[187]*Ibid.*, para. 14.

[188]*Ibid.*, heading II.C.4.

[189]*Ibid.*, para. 51.

[190]*Ibid.*, para. 64.

[191]See *ibid.*, para. 69 (quoting Appellate Body Report, *EC – Bananas III*, para. 155).

[192]*Ibid.*, para. 70.

Consequently, the *SCM Agreement* should not be applied in this case. The European Communities finds further support for its view in Article 21.1 of the *Agreement on Agriculture*. In addition, according to the European Communities, applying the more stringent procedural and remedial rules of Article 4 of the *SCM Agreement* to subsidies maintained under the *Agreement on Agriculture* would nullify the perception that the *Agreement on Agriculture* has only initiated the process of reform of subsidies in the agricultural sector.

108. In any event, according to the European Communities, in the circumstances of this dispute, the Appellate Body would not be in a position to complete the legal analysis on the claims raised under the *SCM Agreement*. This is because the Panel did not make sufficient factual findings to enable the Appellate Body to do so and, even assuming that it did, the different rules on the burden of proof in the *SCM Agreement* and in the *Agreement on Agriculture* would mean that the Appellate Body would have to reassess the evidence that was before the Panel in order to determine whether the Panel would have reached the same factual finding had the burden of proof been on the Complaining Parties.

109. Turning to the Complaining Parties' claims under the *SCM Agreement*, the European Communities contends that the Complaining Parties' panel requests did not properly identify the claims based on item (d) of the Illustrative List, and that such claims are, therefore, outside the Panel's terms of reference. In any event, the EC sugar regime does not "mandate" the provision of C beet to sugar producers or the terms on which C beet is sold to them. Instead, "[t]he prices for C beet are freely agreed between the growers and the sugar producers."[193] In addition, the European Communities submits that "the EC price cannot be neither *more* nor *less* favourable than the world market price, for the simple reason that no such comparison between prices is possible"[194] because there is no world market for beet.

110. The European Communities also submits that Brazil and Australia did not claim or establish, respectively, a *prima facie* case before the Panel that the EC sugar regime provides C sugar contingent upon exports with subsidies in the form of income or price support. Minimum prices for A and B beet do not confer a benefit on sugar producers. Furthermore, according to the European Communities, the alleged "cross-subsidization" to C sugar is not a "financial contribution", within the

[193]European Communities' appellee's submission, para. 92 (referring to the European Communities' response to Question 31 posed by the Panel).

[194]*Ibid.*, para. 105. (original emphasis)

meaning of Article 1.1(a)(1) of the *SCM Agreement*, and export refunds on A and B sugar do not confer a benefit on C sugar.

I. *Arguments of the Third Participants*

1. ACP Countries[195]

111. The ACP Countries disagree with the Panel's finding that Footnote 1 is of no legal effect. According to the ACP Countries, the Panel failed to consider the context of Footnote 1 in finding that Footnote 1 does not provide for any commitments for "equivalent" amounts of sugar from ACP countries and India. The ACP Countries submit that the Panel should have considered the relationship between Footnote 1 and the Sugar Protocol, and protected the rights and legitimate expectations of the ACP Countries by interpreting Footnote 1 as having legal effect. The ACP Countries further emphasize the adverse economic consequences that could arise from the Panel's findings with regard to Footnote 1 and C sugar.

112. The ACP Countries further argue that, had the Panel correctly reviewed the provisions of the *Agreement on Agriculture* relating to the granting of export subsidies, it would have found that Articles 3.3 and 8 are framed around what is actually specified in Members' Schedules in terms of quantity or budgetary outlay commitments limiting subsidization in the sense of Article 3.1 of the *Agreement on Agriculture*. Article 9.2(a) of the *Agreement on Agriculture*, which provides interpretative context for Articles 3.1 and 3.3, defines the obligation involved in reduction commitments as a "ceiling", and not as the level to which export subsidies must be reduced.[196]

113. With respect to the resolution of a possible conflict between scheduled commitments on the one hand, and obligations under the *Agreement on Agriculture* on the other, the ACP Countries submit that Article 8 of the *Agreement on Agriculture* gives equal weight to both the rules and the specific scheduled commitments. The ACP Countries argue that the principle articulated by the GATT panel in *US – Sugar* applies where a Member, through a condition in its Schedule, contradicts its pre-existing substantive obligations under other covered agreements, or purports to exclude the application of the substantive obligations contained in the *Agreement on Agriculture*. In such cases,

[195]The third participant ACP countries in this appeal are: Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania, and Trinidad & Tobago.

[196]ACP Countries' third participant's submission, para. 29.

giving effect to the scheduled conditions may have major systemic implications. This needs to be distinguished from the mere effect of a footnote in a scheduled commitment, as in this dispute.

114. The ACP Countries argue that the Panel's findings with respect to non-quota beet and sugar imply that the same source of finance under the EC sugar regime appears to be responsible for concurrently financing—directly and/or indirectly—two sets of payments on the same exports. It would be legally problematic to uphold both these propositions, as the Panel has done. Furthermore, in examining whether the required nexus and degree of governmental action in the financing of the alleged payments on exports exist, the Panel places undue reliance on *Canada – Dairy (Article 21.5 – New Zealand and US)*, even though there are major differences between the EC sugar regime and the facts that were at issue in that case. For example, private entities are key players in the European Communities' sugar market and, under the EC sugar regime, it is not governments that pool, allocate, and distribute revenues from domestic sales to producers.

2. Canada

115. Canada argues that the Appellate Body should reverse the Panel's interpretation of Article 9.1(c) of the *Agreement on Agriculture*. According to Canada, the Panel failed to consider "fully" the relationship between subsidies disciplines and the "specific rules" set out in the *Agreement on Agriculture*, and that "Members are faced with an impossible task to distinguish between permissible domestic support and the now exceptionally broad class of export subsidies".[197]

116. In Canada's view, "cross-subsidization" is not applicable in an analysis of "payments" within the meaning of Article 9.1(c). There is nothing in Article 9.1 that suggests that a payment analysis should involve "a far-reaching review of possible side-effects of potentially unrelated financial transactions".[198] To the extent that a cross-subsidization analysis is used, it should be limited to an analysis of governmental action.

117. Canada further submits that the existence of a benefit is "essential" to a subsidy finding.[199] The Panel erroneously "read[] out" the benefit requirement from subsidies under Article 9.1(c).[200]

[197]Canada's third participant's submission, para. 50.

[198]*Ibid.*, para. 16.

[199]*Ibid.*, heading II.A.2(a)ii.

[200]*Ibid.*, para. 17.

However, "benefit" is a "fundamental component of a finding of subsidization", whether or not that finding occurs in an agricultural or industrial context.[201]

118. Canada also objects to the Panel's interpretation of the term "on the export". The Panel's reliance on Article XI:1 of the GATT 1994 in this context was incorrect, and the Panel failed to account for the context of Article 9.1(c). In addition, the Panel's factual findings in respect of C beet production and its reliance on those findings demonstrate that the Panel, in fact, believed that "export contingency *must* be required for Article 9.1(c) to apply."[202] Canada submits that "contingency" suggests that a subsidy must be conditional or dependent upon export performance; it is not sufficient to suppose that "a payment was made in mere anticipation that exports could result."[203]

119. Finally, Canada submits that there is a "pressing need to revisit the so-called 'cross-subsidization' standard".[204] Canada argues that it is not clear how Members may distinguish between domestic support and export subsidies and that the Panel has failed to determine the appropriate dividing line between these two types of support. In applying a "broad standard" of cross-subsidization while "denying" the requirement of contingency, a panel can find a violation of Article 9.1(c) "solely on the basis of unrelated payments made through various actors that may or may not be acting with governmental direction".[205]

3. China

120. China focuses its comments on the issue of the Panel's terms of reference. China recalls that the Appellate Body found in *US – Carbon Steel* that Article 6.2 of the DSU requires the complaining party to identify the specific measures at issue and to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Referring to the Appellate Body Report in *Korea – Dairy*, China submits that a "claim" is an assertion that the respondent party has violated, nullified, or impaired the benefits arising from an identified treaty provision.[206] "Arguments", in contrast, are adduced by a complaining party to demonstrate that the responding party's measure is indeed in breach of an identified treaty provision. China adds that the panel in *Japan – Film* spelt out that the

[201]Canada's third participant's submission, para. 21.

[202]*Ibid.*, para. 34. (original emphasis)

[203]*Ibid.*, para. 36 (referring to Appellate Body Report, *Canada – Aircraft*, para. 172; and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 48).

[204]*Ibid.*, heading II.B.

[205]*Ibid.*, para. 47.

[206]China's third participant's submission, para. 16 (referring to Appellate Body Report, *Korea – Dairy*, para. 139).

sufficiency of a panel request depends on whether the ability of the respondent to defend itself was prejudiced.[207]

4. New Zealand

121. New Zealand agrees with the Panel's finding that C sugar receives export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. New Zealand submits that the inconsistency with Article 9.1(c) of the *Agreement on Agriculture* resides in the governmental requirement to export C sugar, not in the fact that exports are conducted at prices below cost of production. Therefore, New Zealand argues that the Appellate Body should dismiss the European Communities' characterization of the Panel's interpretation of Article 9.1(c) of the *Agreement on Agriculture* as being "a 'broad prohibition' on exports below cost of production".[208] The European Communities' contention that the Panel's ruling converts a payment under Article 9.1(c) into a "blunt anti-dumping mechanism" is also without foundation. Dumping reflects the choice on the part of an individual exporter to sell at below its cost of production. However, in the present case, governmental action creates strong incentives for surplus production and requires export of this surplus production.

122. New Zealand contends that the Panel correctly concluded that there was a "payment" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. Below-cost sales of C beet constitute "payments", a finding from which the European Communities does not appeal. New Zealand also asserts that there is a transfer of resources to the production and export of C sugar, and that "revenue is foregone vis-à-vis the proper value [which constitutes] a 'payment'."[209] New Zealand also affirms that the Panel correctly concluded that "benefit" is not a required element under Article 9.1(c) of the *Agreement on Agriculture*.

123. In New Zealand's view, in ruling that the payment was "on the export" within the meaning of Article 9.1(c), the Panel correctly placed "great emphasis on the ... legal requirement to export C sugar".[210] Furthermore, New Zealand submits that the emphasis of Article 9.1(c) is whether the actual payment is on the export, not whether the European Communities' price support as a whole is contingent on C sugar being exported.

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[207]China's third participant's submission, paras. 18-19 (referring to Panel Report, *Japan – Film*, para. 10.8).

[208]New Zealand's third participant's submission, para. 3.06 (referring to European Communities' appellant's submission, para. 200).

[209]*Ibid.*, para. 3.23.

[210]*Ibid.*, para. 3.29 (referring to Panel Reports, para. 7.321).

124. New Zealand furthermore submits that the Appellate Body should uphold the Panel's conclusion that the payments are "financed by virtue of governmental action" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. The Panel correctly identified a variety of "actions" through which the European Communities "regulates, controls and supervises its domestic sugar market in a way that results in the financing of C sugar exports".[211] New Zealand also identifies "similarities ... that are striking" between the governmental action in *Canada – Dairy* and governmental action in the present case.[212] In addition, the Panel correctly found that growers and sugar producers are encouraged to produce C beet and C sugar in order to ensure that they fill their production quotas on A and B sugar. In New Zealand's view, in the absence of the European Communities' regulation of its sugar regime, "C sugar would not be produced, payments to export[s] of C sugar would not occur, and export sales of C sugar would not occur."[213]

5. The United States

125. With regard to the legal status of Footnote 1, the United States asserts that the Panel properly concluded that, in the event of any conflict between the *Agreement on Agriculture* and Footnote 1, the former would prevail.[214] The United States also submits that WTO Members may yield rights in their Schedules, but they may not diminish their obligations under the GATT. The United States finds support for its position in the Appellate Body Report in *EC – Bananas III* and the report of the GATT panel in *US – Sugar.*

126. The United States submits that Article 21 of the *Agreement on Agriculture* supports the proposition that in the event of a conflict between the *Agreement on Agriculture* and the provision of a Schedule, the *Agreement on Agriculture* would prevail.[215] The United States maintains that "Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and other agreements, including the GATT 1994" and that by agreeing on the terms of Article 21 of the *Agreement on Agriculture*, "Members ... provided a rule for how to handle any such conflicts."[216] The European Communities' Footnote is part of the GATT 1994 and, therefore, by virtue of

[211]New Zealand's third participant's submission, para. 3.40.

[212]*Ibid.*, para. 3.41.

[213]*Ibid.*, para. 3.45.

[214]United States' third participant's submission, para. 15.

[215]*Ibid.*, para. 16.

[216]*Ibid.*

Article 21, the *Agreement on Agriculture* would prevail over Footnote 1. The United States also draws attention to paragraph 3 of the Marrakesh Protocol to reinforce this point.[217]

127. Regarding the concept of estoppel, the United States submits that "[n]owhere in the DSU or the other covered agreements is there a reference to 'estoppel'."[218] According to the United States, "'[e]stoppel' is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body."[219]

128. The United States submits that the argument advanced by the European Communities regarding "lack of good faith" under Article 3.10 of the DSU should be dismissed by the Appellate Body. According to the United States, Article 3.10 of the DSU "is not a general incorporation of 'good faith' principles of public international law, whatever the precise contours of those might be".[220] Rather, Article 3.10 sets out an "understanding" of Members to engage in good faith in the dispute settlement procedures.[221] The United States also submits that "[a] choice by a Member not to challenge or complain about another Member's measure at any given point in time, including during the negotiations of the Uruguay Round, does not preclude a future challenge. Nor does such a failure to object at one point in time render a later objection in bad faith."[222]

[217]United States' third participant's submission, para. 17.

[218]*Ibid.*, para. 5.

[219]*Ibid.*, para. 9.

[220]*Ibid.*, para. 6.

[221]*Ibid.*

[222]*Ibid.*, para. 8. (footnote omitted)

III. Issues Raised in This Appeal

129. The following issues are raised in this appeal:

(a) whether the Panel erred in finding, in paragraph 7.37 of the Panel Reports, that the alleged "payments", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of low-priced sales of C beet[223] to sugar producers, fell within the Panel's terms of reference;

(b) whether the Panel erred in finding, in paragraphs 7.191, 7.198, 7.222, and 8.1(a) of the Panel Reports, that Footnote 1 to Section II, Part IV of the European Communities' Schedule ("Footnote 1") is of no legal effect and does not enlarge or otherwise modify the European Communities' commitment levels specified in that Schedule;

(c) whether the Panel erred in finding, in paragraph 7.292 of the Panel Reports, that the alleged payments in the form of low-priced sales of C beet to sugar producers are "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*;

(d) whether the Panel erred in finding, in paragraph 7.334 of the Panel Reports, that the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the European Communities' sugar regime;

(e) whether, as a result of its findings under (c) and (d) above, the Panel erred in finding, in paragraph 8.1(f) of the Panel Reports, that 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;

[223]The European Communities' sugar regime establishes two categories of production quotas: one for A sugar and one for B sugar. These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies. C sugar is simply sugar produced in excess of A and B quotas. There is no difference in physical characteristics between A, B, and C sugar. Likewise, there is no difference in physical characteristics between A, B, and C beet. C beet is simply beet used for C sugar production. Unlike for A and B beet, there is no minimum guaranteed price for C beet.

(f) whether the Panel erred in finding, in paragraphs 7.374 and 8.4 of the Panel Reports, that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*;

(g) whether the Panel erred in finding, in paragraph 7.74 of the Panel Reports, that Australia, Brazil, and Thailand (the "Complaining Parties") acted in good faith, under Article 3.10 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in the initiation and conduct of the present dispute settlement proceedings and have not been estopped, through their actions or silence, from alleging that the European Communities' exports of C sugar are in excess of its export subsidy reduction commitments;

(h) whether the Panel erred, in paragraph 7.387 of the Panel Reports, in exercising judicial economy and declining to examine the Complaining Parties' claims under Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"); and

(i) whether certain aspects of the European Communities' Notice of Appeal [224] satisfy the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

130. We proceed to analyze these issues in the order set out above.

IV. The Panel's Terms of Reference

131. The Panel found that production of C sugar receives two forms of "payments" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*: (i) below total cost of production sales of C beet to C sugar producers; and (ii) transfers of financial resources to C sugar producers through cross-subsidization from sales of A and B sugar.[225] With respect to its challenge concerning the Panel's terms of reference, the European Communities' appeal is limited to the Panel's refusal to

[224]Notification of an Appeal by the European Communities, WT/DS265/25, WT/DS266/25, WT/DS283/6, 13 January 2005 (attached as Annex 5 to this Report).

[225]Panel Reports, paras. 7.270 and 7.338.

dismiss, as falling outside its terms of reference, the Complaining Parties' allegations that C sugar receives "payments" in the form of low-priced sales of C beet to sugar producers.[226]

A. *Panel Findings and Arguments on Appeal*

132. The Panel was established with standard terms of reference[227], specifically:

> 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.[228]

The documents referred to in the Panel's terms of reference are the Complaining Parties' requests for the establishment of a panel.[229]

133. Before the Panel, the European Communities argued that the Complaining Parties "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" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.[230] According to the European Communities, each alleged "payment" should, therefore, have been specifically identified by the Complaining Parties in their panel requests.[231] The European Communities contended before the Panel that sales of "C beet at prices below the minimum prices for A and B beet" were not identified as a "payment" in the panel requests of the Complaining Parties and that, therefore, this "payment" fell outside the Panel's terms of reference.[232] Before the Panel, the European Communities also argued that Brazil's claim regarding the other form of "payment"—namely, "payment" from European Communities' consumers to sugar producers in the form of "artificially high" domestic prices for A and B sugar—was not properly identified in Brazil's panel request. But, as stated earlier, the European Communities' appeal with respect to the Panel's terms of reference is limited to the sales of C beet to sugar producers.

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[226]European Communities' appellant's submission, para. 40 (referring to Panel Reports, paras. 7.18-7.37).

[227]Panel Reports, para. 1.5.

[228]*Ibid.*, para. 1.6.

[229]WT/DS265/21; WT/DS266/21; and WT/DS283/2 (attached as Annexes 1, 2, and 3 to this Report).

[230]Panel Reports, para. 7.18. (emphasis added)

[231]See *ibid.*, heading VII.B.1(d).

[232]*Ibid.*, paras. 4.12 and 7.20.

134. After reviewing those parts of the Complaining Parties' panel requests that "identified the measures at issue and the violations claimed to have occurred"[233], the Panel found that:

> ... 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*. 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*.[234] (emphasis added; footnote omitted)

135. The Panel held that the Complaining Parties have satisfied the requirements of Article 3 of the *Agreement on Agriculture* with respect to their claims under that provision by alleging, first, that the European Communities has exported sugar above its commitment level, and secondly, that such exports of sugar were subsidized. The Panel also held that the Complaining Parties did not have to detail in their panel requests how and why such exports were subsidized. Moreover, the Panel noted that the Complaining Parties "did indicate some aspects of the export subsidization" of sugar in their panel requests by referring to Articles 9.1(a) and 9.1(c) of the *Agreement on Agriculture*.[235]

136. The Panel concluded that the 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*."[236] The Panel stated that, consequently, the Complaining Parties' "argumentation that C sugar receives

[233]Panel Reports, para. 7.12.

[234]*Ibid.*, para. 7.16.

[235]*Ibid.*, para. 7.30.

[236]*Ibid.*, para. 7.36.

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."[237]

137. On appeal, the European Communities contends that the alleged "payments" in the form of low-priced sales of C beet to sugar producers fell outside the Panel's terms of reference.[238] According to the European Communities, each of the payments alleged by the Complaining Parties "constituted a different claim", and, as the panel requests made no mention of the alleged "payments" in the form of sales of C beet at low prices, this claim fell outside the Panel's terms of reference.[239] The European Communities also argues that the identification of the measure at issue in the panel requests as "the export subsidies granted under [Council] Regulation [(EC) No.] 1260/2001 or, even more vaguely, under the 'EC sugar regime'" was not sufficient for purposes of complying with the requirement of Article 6.2 of the DSU, because that provision requires "not just the identification of a 'measure', but of the '*specific measure* at issue'."[240] According to the European Communities, the mere reference to Council Regulation (EC) No. 1260/2001 ("EC Regulation 1260/2001") or to the European Communities' sugar regime did not put the European Communities on notice that the Complaining Parties intended to challenge, as an export subsidy, low-priced sales of C beet to sugar producers.[241] When asked whether the European Communities considered each alleged payment to be a "specific measure at issue", or a "specific claim", the European Communities clarified during the oral hearing that, in its view, each form of payment under Article 9.1(c) of the *Agreement on Agriculture* constitutes a "specific measure at issue" within the meaning of Article 6.2 of the DSU. Therefore, in order to comply with Article 6.2, the panel requests should have identified separately each form of export subsidy alleged by the Complaining Parties.[242]

138. In reply, the Complaining Parties argue that their panel requests sufficiently identified the "specific measures at issue" and stated the legal basis of their complaint so as to present the "problem clearly", as required by Article 6.2 of the DSU.[243] They also refute the European Communities' assertion that their panel requests covered only certain forms of "payments". Moreover, Australia

[237]Panel Reports, para. 7.37.

[238]European Communities' appellant's submission, para. 40.

[239]*Ibid.*, para. 48.

[240]*Ibid.*, paras. 56-57. (original emphasis)

[241]*Ibid.*, para. 61.

[242]The European Communities added that, to the extent that each payment alleged by the Complaining Parties is a specific measure, it may be the subject of a claim. (European Communities' response to questioning at the oral hearing)

[243]Australia's appellee's submission, paras. 81 and 86; Brazil's appellee's submission, para. 21; Thailand's appellee's submission, paras. 140-141 and 143.

argues that the European Communities attempts to redefine a "claim" as a "measure". According to Australia, a "claim" is one of inconsistency with the provisions of a covered agreement. A "measure" is not a "claim", but rather, the basis *for* the "claim".[244]

139. The Complaining Parties also contend that, with respect to claims under Articles 3 and 8 of the *Agreement on Agriculture*, a complaining Member is not required to identify each alleged export subsidy in its panel request. Rather, it is sufficient to allege that the responding Member has exported an agricultural product in quantities exceeding its quantity commitment level and has granted export subsidies with respect to such excess quantities.[245]

B. *Article 6.2 of the DSU*

140. Before addressing the Panel's terms of reference and the panel requests in this dispute, we consider the requirements of Article 6.2 of the DSU in general as they relate to the determination of a panel's terms of reference.

141. A panel's terms of reference are determined by the "specific measures at issue" and the "legal basis of the complaint" (that is, "claims") stated in the complaining Member's request for the establishment of a panel.[246] Article 6.2 of the DSU provides that a panel request shall:

> ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

142. The Appellate Body observed in *Thailand – H-Beams* that:

> Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, *with respect to the "claims" that are being asserted by the complaining party*. A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.[247] (emphasis added; footnotes omitted)

[244]Australia's appellee's submission, para. 68.

[245]Complaining Parties' responses to questioning at the oral hearing; Thailand's appellee's submission, para. 126.

[246]Article 7.1 of the DSU.

[247]Appellate Body Report, *Thailand – H-Beams*, para. 88.

143. In *US – Carbon Steel*, the Appellate Body explained that:

> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case. When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."
>
> ... [C]ompliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. ... [C]ompliance 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. [248] (original emphasis; footnotes omitted)

144. In addition, the Appellate Body clarified in *EC – Bananas III* that 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".[249]

C. *Alleged "Payments" in the Form of Low-priced Sales of C Beet to Sugar Producers*

145. We turn to an examination of the panel requests insofar as they relate to "payments" in the form of sales of C beet to sugar producers.

146. Looking at the panel requests, we note that Australia stated in its panel request:

> 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.
>
> ...

[248] Appellate Body Report, *US – Carbon Steel*, paras. 126-127.

[249] Appellate Body Report, *EC – Bananas III*, para. 143. (original emphasis)

> 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[.][250]

147. Similarly, Brazil stated in its panel request:

> 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.[251]

Therefore, according to Brazil:

> 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.[252]

148. Finally, Thailand stated in its panel request:

> 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.
>
> ...
>
> 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) ... or, alternatively, Article 10.1 of the Agreement on Agriculture.[253]

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[250]Request for the Establishment of a Panel by Australia of 9 July 2003, WT/DS265/21 (attached as Annex 1 to this Report), p. 2.

[251]Request for the Establishment of a Panel by Brazil of 9 July 2003, WT/DS266/21 (attached as Annex 2 to this Report), p. 2, item (i).

[252]*Ibid.*, p. 2.

[253]Request for the Establishment of a Panel by Thailand of 9 July 2003, WT/DS283/2 (attached as Annex 3 to this Report), pp. 1-2.

149. We note, first, as did the Panel, that the panel requests of all the Complaining Parties have clearly identified the "specific measures at issue" as the subsidies accorded under EC Regulation 1260/2001 and related instruments (the "EC sugar regime"), and the alleged violations as the European Communities' exports of *subsidized* sugar in excess of the European Communities' commitment levels in contravention of Articles 3 and 8 of the *Agreement on Agriculture*.

150. Secondly, we note that all three panel requests refer specifically to C sugar and identify as an area of concern the subsidized exports of C sugar in excess of the European Communities' reduction commitment levels. Thirdly, we observe that all three panel requests clearly explain, although in different terms, that C sugar is being exported at below its total average cost of production and that this occurs due to the subsidies provided under the EC sugar regime for C sugar, which subsidies arise from the profits made by sugar producers on sales of A and B sugar. Fourthly, we note that Brazil's panel request specifically refers to payments in the form of "high prices paid to growers and processors by the EC sugar regime", which, in the case of growers, could only mean the high prices provided for A and B beet by the EC sugar regime.

151. Lastly, and more importantly for consideration of the issue at hand, all three panel requests specifically allege that the export subsidies provided for C sugar exports violate the obligations of the European Communities under Article 9.1(c) of the *Agreement on Agriculture*. The panel requests clearly draw attention to the allegation of the Complaining Parties that the export subsidies in question for C sugar exports are in the form of "payments" falling within the meaning of Article 9.1(c) of the *Agreement on Agriculture.*

152. We agree with the European Communities that the panel requests did not specifically identify that low-priced sales of C beet by growers to producers was one form of such alleged "payments". Nevertheless, we consider that, taken as a whole, the panel requests should have informed the European Communities that the Complaining Parties were alleging in their panel requests that C sugar exports below total average cost of production were being enabled by subsidies in the form of "payments" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. C beet being a critical input for C sugar production, and C beet not being eligible for a minimum guaranteed price, unlike A and B beet, the panel requests should have alerted the European Communities that one form of such alleged "payments" could be low-priced sales of C beet by growers to producers.

153. The European Communities argues that the Appellate Body Report in *Canada – Dairy (Article 21.5 – New Zealand and US II)* supports its position that a complaining Member must at least identify or specify sufficiently in its panel request "all the '*claimed* export subsidies'", although it is

not necessary that a complaining party make a *prima facie* case that the elements of the claimed export subsidy are present.[254] The European Communities concludes from the Appellate Body's reasoning in that appeal that:

> Article 10.3 [of the *Agreement on Agriculture*] transfers to the defending party the burden of proof with respect to the "export subsidization aspect" of the complaining party's claim. But, before such transfer can take place, it is necessary that the complaining party states that part of the claim.[255]

154. We are unable to agree with the European Communities on the conclusion drawn by it from the Appellate Body Report in *Canada – Dairy (Article 21.5 – New Zealand and US II)*. The Appellate Body made those observations in the context of discussing the burden of proof requirement under Article 10.3 of the *Agreement on Agriculture*, and not in the context of examining the requirements of Article 6.2 of the DSU. Article 6.2 of the DSU and Article 10.3 of the *Agreement on Agriculture* address different matters and apply at different stages of panel proceedings. A panel request, on its face, must comply with the requirements of Article 6.2 of the DSU, whereas Article 10.3 of the *Agreement on Agriculture* relates to a Member's duty to adduce evidence to substantiate its assertions *during the course of the panel proceedings*. The Appellate Body did not require, in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, that a panel request identify the details of each and every claimed export subsidy.

155. For these reasons, we agree with the Panel that the Complaining Parties' 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*."[256]

156. Consequently, we *uphold* the Panel's finding, in paragraph 7.37 of the Panel Reports, that the alleged "payments", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*", in the form of low-priced sales of C beet to sugar producers, fell within the Panel's terms of reference.

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[254]European Communities' appellant's submission, para. 77 (quoting Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 76). (emphasis added by the European Communities)

[255]*Ibid.*, para. 76 (referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 70-71).

[256]Panel Reports, para. 7.36.

V. Footnote 1 to Section II, Part IV of the European Communities' Schedule

A. *Introduction*

157. We turn next to examine the European Communities' appeal with respect to the Panel's finding that "the content of Footnote 1 ... is of no legal effect" and that, as a consequence, for exports of sugar, the European Communities' quantity commitment level is 1,273,500 tonnes per year and its budgetary outlay commitment level is €499.1 million per year, with effect from the marketing year 2000/2001.[257]

158. Our analysis of this issue proceeds as follows. First, we set out the European Communities' export subsidy commitments regarding sugar. Secondly, we summarize the Panel's analysis and the European Communities' arguments on appeal. Thirdly, we examine the meaning of Footnote 1. Fourthly, we consider the conformity of Footnote 1 with Members' obligations under the *Agreement on Agriculture*. Finally, we examine the relationship between Members' Schedules and the *Agreement on Agriculture*.

B. *The European Communities' Export Subsidy Commitments Regarding Sugar*

159. The export subsidy commitments made by the European Communities with respect to sugar, as specified in Section II, Part IV of the European Communities' Schedule[258], are as follows: (i) the "base quantity level" (the average of the quantity of subsidized exports of sugar during the base period 1986-1990) was 1,612,000 tonnes, and this quantity level would be progressively reduced to 1,273,500 tonnes in the year 2000 as the "final quantity commitment level" for sugar; and (ii) the "base outlay level" (the average of the budgetary outlay on subsidized exports of sugar during the base period 1986-1990) was €779.9 million, and this budgetary outlay level would be progressively reduced to €499.1 million in the year 2000 as the "final [budgetary] outlay commitment level" for sugar.[259] There is no dispute in this case regarding these figures pertaining to quantity and budgetary outlay commitment levels for sugar as specified in the European Communities' Schedule.

[257]Panel Reports, para. 8.1(a)-(c).

[258]Section II, Part IV of the European Communities' Schedule, which includes Footnote 1, is attached as Annex 4 to this Report.

[259]European Communities' appellant's submission, para. 19, Table 1.

160. According to the European Communities, these export subsidy commitments are "further elaborated"[260] in Footnote 1 to the European Communities' Schedule, which states:

> 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.

161. At issue in this dispute is the meaning of Footnote 1, its conformity with the European Communities' obligations under the *Agreement on Agriculture*, and its implications for the European Communities' export subsidy reduction commitments for sugar.

C. *The Panel's Analysis and the European Communities' Appeal*

162. The Panel opined that the ordinary meaning of the terms of Footnote 1 "does not indicate any 'limitation on export subsidies for sugar [of ACP/Indian origin]' to 1.6 million tonnes" and that the Panel "fail[ed] to see any commitment 'limiting subsidization'" in Footnote 1.[261] The Panel added that it "[did] not find any evidence that the European Communities itself was of the view, during the entire implementation period [of the *Agreement on Agriculture*], that ACP/Indian sugar was another 'component' of its commitments."[262] The Panel concluded that:

> ... the ordinary meaning of the terms [of Footnote 1] 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*.[263]

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[260]European Communities' appellant's submission, para. 21.

[261]Panel Reports, para. 7.169.

[262]*Ibid.*, para. 7.178 (referring to Article 3.1 of the *Agreement on Agriculture*).

[263]*Ibid.*, para. 7.179.

163. In sum, the Panel found 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.[264]

164. After analyzing the meaning of Footnote 1, the Panel proceeded to find that, even if Footnote 1 could be interpreted as providing for a limitation on subsidization in the form of a ceiling up to a maximum of an *additional* 1.6 million tonnes of sugar, as alleged by the European Communities:

> ... the content of Footnote 1 ... 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.
>
> Consequently, ... 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 ... 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.[265]

165. On appeal, the European Communities submits that the Panel erred in its interpretation of Footnote 1 as well as of Articles 3, 8, and 9.1 of the *Agreement on Agriculture*. The European Communities also argues, in the alternative, that the Panel's finding is in error because "there is no

[264]Panel Reports, para. 7.183.

[265]*Ibid.*, paras. 7.197-7.198. See also paras. 7.221-7.222.

rule of law giving the *Agreement on Agriculture* precedence over provisions in a Member's schedule."[266] We address each of these arguments in turn below.

D. *Interpretation of Footnote 1*

166. A preliminary question for our consideration is what rules apply in interpreting export subsidy commitments specified in a Member's Schedule under the *Agreement on Agriculture*. We observe that Article II:7 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") provides that the "Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement." Furthermore, Article 3.1 of the *Agreement on Agriculture* provides that "export subsidy commitments in Part IV of each Member's Schedule ... are hereby made an integral part of [the] GATT 1994."

167. The applicable rules for interpreting the provisions of the GATT 1994 are the "customary rules of interpretation of public international law".[267] The Appellate Body has held that these rules are codified in the *Vienna Convention on the Law of Treaties*[268] (the "*Vienna Convention*"). As provisions of a Member's Schedule are "part of the terms of the treaty", they are subject to these same rules of treaty interpretation.[269] Accordingly, these rules apply in interpreting Footnote 1. We note that no participant or third participant in this appeal contests the applicability of these rules in interpreting Footnote 1.

168. Bearing this in mind, we turn now to interpret Footnote 1 in the light of the arguments raised on appeal by the participants.

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[266]European Communities' appellant's submission, para. 79.

[267]Article 3.2 of the DSU.

[268]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679. In *US – Gasoline*, the Appellate Body stated:

> [The] general rule of interpretation [as set out in Article 31(1) of the Vienna Convention on the Law of Treaties] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").

(Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at 16) (footnotes omitted)

[269]Appellate Body Report, *EC – Computer Equipment*, para. 84. See also Appellate Body Report, *EC – Bananas III*, para. 154.

1. The Meaning of Footnote 1

169. The European Communities argues that, while the budgetary outlay and quantity commitment levels for sugar included in its Schedule constitute the first component of its export subsidy commitment on sugar, Footnote 1 constitutes a distinct second component of its export subsidy commitment on sugar. According to the European Communities, the first sentence of Footnote 1 means that the European Communities is not making any export subsidy reduction commitments on the export of sugar equivalent in volume to its annual imports of sugar from ACP countries and India. In turn, the second sentence of Footnote 1 means that the volume of such exports of sugar will be *limited* to the lower of its actual imports from ACP countries and India or 1.6 million tonnes. Thus, according to the European Communities, Footnote 1 provides for an additional subsidized export of up to 1.6 million tonnes of sugar, as well as a separate commitment to "limit" such subsidization to 1.6 million tonnes or the actual imports of sugar from ACP countries and India, whichever quantity is lower.[270] Furthermore, the European Communities argues, as it did before the Panel, that the words "exports of sugar of ACP/Indian origin" in the first sentence of Footnote 1 do not mean "re-exports" of sugar of ACP/Indian origin, but mean "exports" of sugar by the European Communities "corresponding" to its imports of sugar from ACP countries and India.

170. On appeal, the European Communities contends that "[i]t is the second sentence which is vital to understanding Footnote 1"[271], and that, in ascertaining the meaning of Footnote 1, the Panel completely disregarded the second sentence and read it out of the Footnote. In particular, the Panel failed to note that the word "export" in the second sentence must be given the same meaning as the word "exports" in the first sentence. More importantly, the Panel ignored the pointed reference in the second sentence to the period 1986-1990, which was the base period adopted in the negotiations for reduction commitments. The European Communities argues:

[270]It is not in dispute that these additional exports of sugar are given the same type of "export refunds" as exports of A and B sugar in respect of which the Member's Schedule gives the budgetary outlay and quantity commitment level reduction commitments. It is also not disputed by the European Communities that, in respect of the additional exports covered by Footnote 1, the commitment contained in Footnote 1 is only to "limit" the quantity of subsidized exports to 1.6 million tonnes or the actual quantity of imports from ACP countries and India; there is no commitment, with respect to these additional exports, either to "reduce" the quantities of exports from a base level or to indicate the base level budgetary outlay and to limit or reduce that outlay.

[271]European Communities' appellant's submission, para. 97.

> The reference to the period 1986-1990 (which was the base period for the reduction commitments) is telling. If Footnote 1 is simply an exclusion, there would be no need to insert the second sentence, and no reason to refer to the 1.6 million tonnes as the average during [the] 1986-1990 base period. This is a direct parallel to the base quantities in the table itself, which represent "the annual average" of subsidised exports in the 1986-1990 period. This parallelism explains why the footnote refers to the "average of export".[272] (footnotes omitted)

171. The European Communities thus contends that, had the Panel given proper meaning to both sentences of Footnote 1, it would have found that, by virtue of the first sentence, the European Communities is not making *any* export subsidy *reduction* commitments on its export of ACP/India equivalent sugar and that, by virtue of the second sentence, the European Communities is "limiting" its subsidization of such exports to the annual average of the subsidized exports in the base period 1986-1990, which was 1.6 million tonnes.

172. In reply, the Complaining Parties submit that the Panel was correct in its interpretation of Footnote 1 that:

> ... the ordinary meaning of the terms [of Footnote 1] 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*.[273]

Specifically, with reference to the second sentence of Footnote 1, Australia argues that "[t]he second sentence merely states that the average of exports during the period 1986-1990 was 1.6 million tonnes [and it] makes no promises or predictions regarding the level of future exports."[274] Brazil submits that "[t]he second sentence merely discloses what the average of those exports was during the period 1986 to 1990."[275] In a similar vein, Thailand contends that the second sentence "contains no normative term expressing a commitment, nor does it contain any term reflecting the idea of a ceiling."[276]

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[272]European Communities' appellant's submission, para. 97.

[273]Panel Reports, para. 7.179.

[274]Australia's appellee's submission, para. 164.

[275]Brazil's appellee's submission, para. 48.

[276]Thailand's appellee's submission, para. 32.

173. We begin our interpretative analysis by recalling the text of Footnote 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.

174. We address, first, the question whether a plain reading of Footnote 1 suggests that the European Communities is undertaking a commitment to "limit" its subsidization of "exports of sugar of ACP and Indian origin". On its face, the first sentence does not indicate that the European Communities is undertaking any such commitment. On the contrary, the first sentence suggests two things: first, the budgetary outlay and quantity level commitments specified in the European Communities' Schedule for sugar do not "include" sugar of ACP and Indian origin; and secondly, with respect to exports of sugar of ACP and Indian origin, the European Communities is not undertaking "any reduction commitments" either by way of budgetary outlay or quantity commitment. It is, therefore, to the second sentence of Footnote 1 that we need to turn to see whether it suggests any commitment to "limit" subsidization on the exports of sugar of ACP and Indian origin. A plain reading of the second sentence does not indicate that it "imposes a limit on the volume of sugar [of ACP and Indian origin] which can be exported with a subsidy".[277] The second sentence, in its plain language, only states that the average of exports of sugar of ACP and Indian origin in the period 1986-1990 amounted to 1.6 million tonnes. We see the European Communities as arguing that "an examination of the terms of Footnote 1, in its context, and in light of its object and purpose"[278] would show that Footnote 1 imposes a limit on the volume of subsidized exports of sugar of ACP and Indian origin.

2. First Sentence of Footnote 1: "Sugar of ACP and Indian Origin"

175. We therefore turn to the question whether the first sentence of Footnote 1, interpreted in its context, shows that it "was intended to cover equivalent exports"[279], that is, exports of sugar equivalent in volume to the European Communities' imports of ACP and Indian sugar. Before the Panel, the European Communities argued that Footnote 1 refers to a quantity of sugar "equivalent to" the amount of sugar imported from ACP countries and India.[280] The Panel concluded that:

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[277]European Communities' appellant's submission, para. 88.

[278]*Ibid.*

[279]*Ibid.*, para. 113.

[280]Panel Reports, para. 7.180.

> ... 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.[281] (original emphasis)

176. On appeal, the European Communities argues that:

> ... it was well known to all parties at the time of conclusion of the WTO Agreement 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 Footnote 1, which, in the second sentence, refers to the "average of export" as being 1.6 million tonnes. This is not a reference to ACP/India raw sugar imported and subsequently re-exported. Rather, it is a reference to the equivalent quantity of ACP/India sugar that had been imported. ... Consequently, it is clear that Footnote 1 covers refunds on exports equivalent to imports.[282] (footnotes omitted)

177. The European Communities also submits that it presented the Panel with undisputed evidence that it had "consistently treated Footnote 1 as imposing a limit at the lower of an amount *equivalent to [European Communities'] imports of ACP/Indian [origin] sugar* or 1.6 million tonnes".[283]

178. The European Communities further contends that, "[t]o the extent that it is necessary to have recourse to supplementary means of interpretation, ... the negotiating history supports the EC's interpretation."[284] The European Communities finds support for its position in various documents that allegedly reflect the understanding of GATT Contracting Parties, before the conclusion of the Uruguay Round, as to the European Communities' export subsidy commitments. In particular, the European Communities refers to a letter dated 4 March 1992, in which it stated that it "ha[d] not included the volume of sugar *corresponding* to its imports of sugar from ACP countries".[285] The

[281]Panel Reports, para. 7.180.

[282]European Communities' appellant's submission, para. 115.

[283]*Ibid.*, para. 88. (emphasis added; footnote omitted)

[284]*Ibid.*, para. 120.

[285]*Ibid.*, para. 116 (quoting letter dated 4 March 1992, providing the supporting tables on which the European Communities' export subsidy commitments were based (Exhibit EC-5 submitted by the European Communities to the Panel)). (emphasis added)

European Communities also refers to evidence submitted by Australia to the Panel, which, in the European Communities' view, confirms that Footnote 1 should be read to refer to exports of a quantity of sugar that is equivalent to the volume of imports from ACP countries and India.[286] In particular, the European Communities relies on an Australian memorandum dated 31 January 1994 that describes Footnote 1 as covering "direct export restitutions (corresponding to [the European Communities'] imports of sugar from ACP countries and India)".[287]

179. Finally, the European Communities argues that, since the base quantity figure of 1,612,000 tonnes included in its Schedule did not include the figure of 1.6 million tonnes of ACP/India sugar mentioned in the second sentence of Footnote 1, and since it does not export or re-export ACP/India sugar as such, the exports mentioned in the first sentence could only be exports of sugar equivalent in volume to its imports of sugar from ACP countries and India.

180. Like the Panel, we are not persuaded by these arguments, which rely on the presumed knowledge of other Members of the World Trade Organization (the "WTO") on the export subsidy practices of the European Communities with respect to ACP/India sugar.[288] We note that the Complaining Parties have rebutted the interpretations put forward by the European Communities on the terms, context, and negotiating history of Footnote 1.[289] We also wish to note that the European Communities was unable to clarify at the oral hearing, why, having written the aforementioned letter in March 1992, it did not consider it necessary to use that same language in Footnote 1 in the December 1993 text, or to use language that plainly shows that the exports referred to were those equivalent in volume to the sugar that was imported from ACP countries and India. In any event, we are of the view that the European Communities' submissions do not alter the plain meaning of the first sentence of Footnote 1, so as to make it cover the exports of sugar equivalent in volume to the European Communities' imports of sugar from ACP countries and India.

3. Second Sentence of Footnote 1: Limitation of Subsidization of ACP/India Sugar

181. We next address the question whether the second sentence of Footnote 1, interpreted in its context, contains a commitment on the part of the European Communities to "limit" its subsidization

[286]See European Communities' appellant's submission, paras. 121-122 (citing Exhibits ALA-3 and ALA-8 submitted by Australia to the Panel; and Panel Reports, footnote 511 to para. 7.208).

[287]*Ibid.*, para. 121 (quoting Exhibit ALA-8 submitted by Australia to the Panel; and Panel Reports, footnote 511 to para. 7.208).

[288]See Panel Reports, para. 7.180 and footnotes 488-489 thereto.

[289]Australia's appellee's submission, paras. 158-159.

of exports of sugar to the lower of its imports from ACP countries and India or 1.6 million tonnes. The European Communities relies on the following four main arguments in support of its assertion that the second sentence imposes such a limitation. First, Footnote 1 excludes ACP/India sugar from the budgetary outlay and quantity level commitments specified in its Schedule, and, therefore, the base quantity level of 1,612,000 tonnes specified in its Schedule excludes the figure of 1.6 million tonnes contained in the second sentence of Footnote 1. The latter figure thus pertains solely to exports of ACP/India sugar, as the word "export" in the second sentence has the same meaning as the word "exports" in the first sentence of Footnote 1.

182. Secondly, the reference to the period 1986-1990 in the second sentence is "telling"[290], as this is the base period for export subsidy reduction commitments. The reference to "the average of export" in the base period in the second sentence must be given proper meaning in its context. Such a meaning can be given only if the second sentence is regarded as "limiting" subsidization to a maximum of 1.6 million tonnes, the average of the subsidized exports of ACP/India sugar during the period 1986-1990.

183. Thirdly, the "undisputed evidence" with respect to the European Communities' export subsidy practice shows that it has consistently "limited" its subsidization to the actual imports from ACP countries and India or 1.6 million tonnes, whichever was lower.[291]

184. Lastly, other WTO Members, including the Complaining Parties, were fully aware that the European Communities was exporting *additional* quantities of sugar (over and above its scheduled commitments) equivalent to its imports from ACP countries and India, and that it was "limiting" its subsidization of those exports to the actual level of its imports from those countries.

185. The European Communities, therefore, argues that the second sentence of Footnote 1, if interpreted properly in its context, clearly shows that it imposes a "limitation" on exports of sugar equivalent in volume to its imports of sugar from ACP countries and India up to a maximum of 1.6 million tonnes (the average of its base period subsidized exports of such sugar) or its actual imports from those countries. If the second sentence is read merely as a piece of information, as the Panel and the Complaining Parties do, then, according to the European Communities, it would be tantamount to reading the sentence out of the text and ignoring it entirely.

[290]European Communities' appellant's submission, para. 97.

[291]*Ibid.*, para. 88.

186. Here again, we are not convinced by the arguments of the European Communities. The fact that the second sentence makes a specific reference to the average of such exports in the base period does not necessarily lead to an inference that there is a commitment in the sentence to "limit" the quantity of subsidization to that level, particularly when the first sentence says that the European Communities is not making "any reduction commitments". Nor does the practice of the European Communities providing subsidies on exports equivalent to its actual imports from ACP countries and India lead to an inference that that practice flows from a commitment contained in the second sentence of Footnote 1. We are also not persuaded by the argument that, because the first sentence excludes any *reduction* commitments and the second sentence refers to the average of the export in the base period (the starting point for any reduction commitment), the second sentence can only imply a commitment to "limit" the subsidization to the base level quantity.

187. Lastly, we see merit in the Panel's reference to the notification practice of the European Communities to the WTO Committee on Agriculture to conclude that this practice does not support the interpretation advanced by the European Communities. If Footnote 1 does contain a commitment on the part of the European Communities with respect to the export subsidies provided by it on exports of sugar equivalent in volume to its actual imports from ACP countries and India or 1.6 million tonnes (albeit such a commitment is only a "limitation" commitment and not a "reduction" commitment), we fail to see why the European Communities did not notify the WTO Committee on Agriculture of the status of its compliance with that commitment throughout the period of implementation of the *Agreement on Agriculture*. The fact that the European Communities did not do so undermines its interpretation of the second sentence of Footnote 1.

188. For all these reasons, we find that Footnote 1, by its terms, does not contain a commitment on the part of the European Communities to "limit" its subsidization of exports of sugar to a quantity equivalent to its actual imports of sugar from ACP countries and India or 1.6 million tonnes, whichever is lower. Nor do we find that an interpretation of Footnote 1 that takes into account the arguments advanced by the European Communities leads to the conclusion that Footnote 1 contains such a commitment to "limit" subsidization of exports of ACP/India sugar.

E. *Conformity of Footnote 1 with Obligations under the Agreement on Agriculture*

1. Article 3.3 of the *Agreement on Agriculture*

189. We have found that Footnote 1 does not contain a commitment "limiting" subsidization of exports of ACP/India equivalent sugar. However, in view of the extensive argumentation advanced

by the European Communities, we proceed to an analysis of the conformity of Footnote 1 with the obligations prescribed by Articles 3, 8, and 9 of the *Agreement on Agriculture*. For this analysis, we assume *arguendo* that Footnote 1 does contain the export subsidy commitment claimed by the European Communities, namely, Footnote 1 reflects a commitment on the part of the European Communities to "limit" the export subsidies on ACP/India equivalent sugar. We note that the Panel also conducted a similar analysis.[292]

190. We begin this analysis with respect to the conformity of Footnote 1 with Article 3.3 of the *Agreement on Agriculture*. The European Communities asserts that Article 3.3 does not *require* a Member to schedule both budgetary outlay *and* quantity commitments in respect of export subsidies listed in Article 9.1 According to the European Communities, "[n]owhere in the *Agreement on Agriculture* is there an obligation for Members to schedule commitments in the form of both budgetary outlay and quantity commitments."[293] Neither Article 3.3, nor Article 8 or 9.1, nor indeed the *Agreement on Agriculture* as a whole, addresses this question.[294] The European Communities emphasizes that "Article 3.3 has as its function the prohibition of the provision of export subsidy in excess of *commitment levels*"[295] and that the obligation contained in it is simply "not to exceed ... 'budgetary outlay and quantity commitments *specified' in a Member's Schedule*".[296] But neither Article 3.3, nor indeed Article 8 or 9.1, specifies how those commitments must be expressed in a Member's Schedule. According to the European Communities, the use of the word "and" in Article 3.3 "does not imply a commitment that is only valid if it comports both a budgetary and a quantitative aspect. It simply is a conjunctive between the two different forms of commitments ... . The word 'specified' refers to what is specified in the [Member's] schedule, without requiring that both forms of commitments be specified."[297]

191. In sum, the European Communities contends that "[t]he obligation in Article 3.3 is only to provide Article 9.1-listed subsidies in conformity with *whatever* commitments are found in a Member's schedule."[298] Such commitments may be budgetary outlay or quantity commitment or both, as a Member may choose to specify in its Schedule. According to the European Communities, the

[292]Panel Reports, paras. 7.185 ff.

[293]European Communities' appellant's submission, para. 150.

[294]*Ibid.*, para. 136.

[295]*Ibid.*, para. 135. (emphasis added)

[296]*Ibid.*, para. 139. (emphasis added)

[297]*Ibid.*

[298]*Ibid.*, para. 140. (emphasis added)

question of how commitments should be expressed is "one of scheduling" and is addressed in paragraph 11 of the "Modalities Paper" and not in the *Agreement on Agriculture*.[299]

192. We begin our analysis of this issue by recalling the text of Article 3.3 of the *Agreement on Agriculture*, which reads:

> *Incorporation of Concessions and Commitments*
>
> ...
>
> 3. 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.

193. By its terms, Article 3.3 of the *Agreement on Agriculture* prohibits the granting of export subsidies (listed in Article 9.1) in excess of the budgetary outlay *and* quantity commitment levels specified in a Member's Schedule. Article 3.3 does not, however, explicitly state that export subsidy commitments must be specified in a Member's Schedule in terms of both budgetary outlay *and* quantity commitment levels. At the same time, Article 3.3 does not explicitly state that a Member may specify its commitment level in terms of either of the two forms of commitments. In our view, the use of the conjunctive "and", and the corresponding use of the word "levels" in the plural, suggest that the drafters of the Agreement intended that both types of commitments must be specified in a Member's Schedule in respect of any export subsidy listed in Article 9.1. Had the drafters intended that a Member could specify one or the other of the two forms of commitments, they would have chosen the disjunctive "or" and correspondingly used the word "level" in the singular. Given the choice, Members would choose only one or the other type of commitment, but not both, so as to minimize their obligations. Therefore, it appears to us that the drafters intended to ensure that export subsidy commitments are specified in Members' Schedules in terms of both budgetary outlay and quantity commitments, by using the word "and" as well as the word "levels" in the text of Article 3.3.

194. We find contextual support for the above interpretation in Article 9.2(b)(iv) of the *Agreement on Agriculture*, which provides:

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[299]European Communities' appellant's submission, para. 136. We address the "Modalities Paper" later in this Report. (See *infra*, paras. 198-199 and 204)

> (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.

This provision prescribes the export subsidy commitment levels to be reached at the conclusion of the implementation period (and to be maintained thereafter), and those commitment levels are expressed in terms of both budgetary outlays and quantities. We do not see how a Member could comply with Article 9.2(b)(iv), or for that matter Article 9.2(a), without having specified its export subsidy commitments in terms of both budgetary outlays and quantities. We also consider it significant that both Article 9.2(b)(iii) and Article 9.2(b)(iv) use the expression "budgetary outlays for export subsidies and the quantities *benefiting from such subsidies*". (emphasis added) This shows the drafters' recognition of the need to address the budgetary outlays and quantities together.

195. The European Communities contends that the "same logic" with respect to the use of the word "and" as a conjunctive applies equally to Article 9.2(a) and Article 9.2(b)(iv), and thus these provisions only mention the existence of both forms of commitments, without implying that Members must always schedule both.[300] We disagree. The European Communities' contention runs counter to the plain language of these provisions. Substituting the word "or" for "and" in these provisions would undermine the achievement of the specific commitment levels envisioned therein.

196. Our interpretation that Article 3.3 (as well as Article 9.2) requires that export subsidy commitments in a Member's Schedule must be expressed in terms of both budgetary outlay and quantity commitment levels is also in consonance with the object and purpose of the *Agreement on Agriculture*. We note, as did the Panel [301], that the third paragraph of the Preamble to the Agreement recognizes that the "long-term objective" of WTO Members, in initiating a reform process to deal with the distortions in the world agricultural markets, is "to provide for substantial progressive reductions in agricultural support and protection". Pursuant to this objective, the fourth paragraph of the Preamble expresses the commitment of the WTO Members "to achieving binding commitments" in the three specified areas, including "export competition". An interpretation that export subsidy commitments must be expressed in a Member's Schedule in terms of both budgetary outlay and quantity commitment levels is more in harmony with the objectives stated in the Preamble to the

[300]European Communities' appellant's submission, para. 139.

[301]Panel Reports, para. 7.136.

Agreement than an interpretation that a Member is only obliged to fulfil "whatever commitments"[302] it chooses to specify in its Schedule.

197. We are also of the view that if an export subsidy commitment were allowed to be specified in only one form, budgetary outlay or quantity, as a Member may choose, and its conformity were measured on the basis of that one commitment alone, it would undermine the export subsidy disciplines of the *Agreement on Agriculture*. As we noted above, the drafters recognized the need to deal with budgetary outlays and quantities together in order to restrain subsidized exports. A commitment on budgetary outlay alone provides little predictability on export quantities, while a commitment on quantity alone could lead to subsidized exports taking place that would otherwise have not taken place but for the budgetary support. This is especially so given that the *Agreement on Agriculture* has initiated a reform process in an environment of high levels of export subsidies taking the form of budgetary outlays and quantities. We are, therefore, not persuaded by the optimistic assumption of the European Communities that if one or the other form of commitment is fulfilled, it will, "in conjunction with prevailing market conditions and other factors", automatically act as a ceiling for the non-assumed commitment.[303]

198. We now turn to the arguments of the European Communities relating to the so-called "Modalities Paper"[304], which was used by the Members during the Uruguay Round negotiations in scheduling their commitments under the *Agreement on Agriculture*. The European Communities refers to the "Modalities Paper" in two ways. First, it contends that the obligations to schedule both forms of commitments, namely, budgetary outlay and quantity commitments, and to subject those commitments to reduction ("reductions commitments"), were set out only in paragraph 11 of the "Modalities Paper", but those obligations were not "carried over" into the *Agreement on Agriculture*.[305] Secondly, with respect to "incorporated products", paragraph 9 of Annex 8 to the "Modalities Paper" permitted only one form of commitment, namely, budgetary outlay, to be scheduled. The European Communities does not contend that ACP/India equivalent sugar is an incorporated product, but argues that the treatment of incorporated products is relevant to the legal question whether there is an obligation in the *Agreement on Agriculture* to have both budgetary outlay and quantity commitments.[306] The European Communities has, however, not identified any

[302]European Communities' appellant's submission, para. 140.

[303]*Ibid.*, para. 141.

[304]Modalities for the Establishment of Specific Binding Commitments, Note by the Chairman of the Market Access Group, MTN.GNG/MA/W/24, 20 December 1993.

[305]European Communities' appellant's submission, pars. 136-137.

[306]European Communities' statement at the oral hearing.

provision of the "Modalities Paper" that permits the scheduling of commitments for a non-incorporated product like sugar in terms of only budgetary outlay or quantity.

199. We do not find it necessary to decide in this appeal on the relevance of the "Modalities Paper". The "Modalities Paper" is not an agreement among the WTO Members and, by its terms, cannot be the basis of dispute settlement under the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). Furthermore, as the Appellate Body noted in *EC – Bananas III*, "the *Agreement on Agriculture* makes no reference to the *Modalities* document".[307] We also note that the treatment of incorporated products, or scheduling of commitments with respect to incorporated products, is not an issue in this dispute. We cannot, therefore, consider the question of an analogy being drawn from treatment of incorporated products for the scheduling commitments in respect of non-incorporated products. In any event, we fail to see how the "Modalities Paper" supports the contention of the European Communities that Members could choose to specify only one form of commitment for sugar, and that such a commitment need not be a "reduction commitment".[308]

200. For all these reasons, we agree with the Panel that Article 3.3 requires a Member to schedule both budgetary outlay and quantity commitment levels in respect of export subsidies listed in Article 9.1 of the *Agreement of Agriculture*.[309] As Footnote 1 does not contain a budgetary outlay commitment in respect of export subsidies provided to ACP/India equivalent sugar, we hold that it is inconsistent with Article 3.3 of the *Agreement on Agriculture*.

2. Article 9.1 of the *Agreement on Agriculture*

201. We now turn to address the question whether Footnote 1 is consistent with Article 9.1 of the *Agreement on Agriculture*.

202. The Panel first noted that the chapeau of Article 9.1 provides that "[t]he following export subsidies are subject to reduction commitments under this Agreement" and that Section II, Part IV of Members' Schedules is entitled "Budgetary Outlay and Quantity *Reduction Commitments*".[310] The Panel found that "Article 9.1 ... makes clear that in the absence of a specific exemption contained in that Agreement, all export subsidies coming within the definitions of 9.1(a) – 9.1(f) have to be subject

[307]Appellate Body Report, *EC – Bananas III*, para. 157.

[308]See *infra*, para. 204 for "reduction commitment".

[309]Panel Reports, paras. 7.137-7.138.

[310]*Ibid.*, para. 7.133. (original emphasis)

to reduction commitments."[311] The Panel further noted that, for Members that took advantage of the flexibility under Article 9.2(b), Article 9.2(b)(iv) of the *Agreement on Agriculture* provides that, "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."[312] The Panel noted that "[this] was the case of the European Communities".[313] Therefore, according to the Panel, "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*." [314]

203. The European Communities asserts that "[t]he normative content of Article 9.1 ... is not to impose reductions, but to define the scope of those subsidies which are permitted within commitment levels."[315] The European Communities further argues that Article 9.2(b)(iv) does not set out a generally applicable requirement that budgetary outlay and quantity commitment levels must be reduced by the coefficients mentioned in that provision. Instead, according to the European Communities, those coefficients are "triggered" only in "very specific situations arising in the implementation period", permitting Article 9.2(b) to be used.[316]

204. As it argued with respect to the obligation under Article 3.3, the European Communities contends that the reduction commitments, being a scheduling issue, are addressed only in paragraph 11, and, in turn, in Annex 8 of the "Modalities Paper".[317] According to the European Communities, the reduction commitments were agreed to in the "Modalities Paper", but they are "not operated by Article 9.1".[318]

205. We note, first, that it is not in dispute in this case that the European Communities provides export subsidies to ACP/India sugar identical to those given for A and B sugar and that these subsidies fall within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[319] The European Communities also does not dispute the Panel's statement that the European Communities has availed itself of the flexibility provisions of Article 9.2(b)(iv).

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[311]Panel Reports, para. 7.133.

[312]*Ibid.* (original emphasis)

[313]*Ibid.*

[314]*Ibid.*

[315]European Communities' appellant's submission, para. 148.

[316]*Ibid.*, para. 147.

[317]*Ibid.*, paras. 24-26.

[318]*Ibid.*, para. 147.

[319]Panel Reports, para. 7.235; European Communities' appellant's submission, footnote 2 to para. 4.

206. The chapeau of Article 9.1 says that the subsidies listed in that Article "are subject to reduction commitments under this Agreement". The export subsidies given to ACP/India equivalent sugar, which admittedly fall within the ambit of Article 9.1(a), are therefore subject to reduction commitments. Furthermore, as noted by the Panel, the provisions of Article 9.2(b)(iv) apply to Members that take advantage of the flexibility provisions of Article 9.2(b). Article 9.2(b)(iv) specifies the reduction levels to be achieved at the conclusion of the implementation period with respect to both budgetary outlays and quantities. The provisions of Article 9.2(b)(iv) lend contextual support to the view that export subsidies listed in Article 9.1 are subject to reduction commitments.[320] We further note that Article 9.2(a)(i) and (ii) also make it clear that both budgetary outlay and quantity commitments specified in a Member's Schedule for each year of the implementation period are "reduction" commitments. It follows that the export subsidies provided to ACP/India equivalent sugar are subject to reduction commitments in terms of Article 9.1 of the *Agreement on Agriculture*.

207. The European Communities adds that, even assuming that Article 9.1 imposes an obligation to reduce export subsidy commitments, the European Communities has complied with that obligation, as "the EC has reduced the overall ceiling of its commitments over the implementation period", and as it "has ensured that the Article 9.1 subsidies it provides remain within its commitment levels".[321] We are not persuaded by the arguments of the European Communities. Footnote 1 explicitly states that the European Communities is not making "any reduction commitments" in respect of ACP/India sugar (in terms of either budgetary outlay or quantity). Moreover, we see no evidence that, overall, taking A, B, and ACP/India equivalent sugar together, the European Communities has reached the prescribed commitment levels, both in terms of budgetary outlay and quantity prescribed by the *Agreement on Agriculture*. We, therefore, do not see Footnote 1 as complying with Article 9.1 of the *Agreement on Agriculture*.

208. The ACP Countries[322] have argued that "limiting subsidization", without reducing budgetary outlays or quantity, is permissible under Article 3.1 of the *Agreement on Agriculture*, which says that "[t]he domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments *limiting subsidization*". (emphasis added) According to the ACP Countries, "the basic obligations of the Agreement with respect to a scheduled product such as sugar are found in

[320]In our view, the reduction commitment levels to be achieved at the conclusion of the implementation period, as specified in Article 9.2(b)(iv), apply equally to all Members whether they avail themselves of the flexibility provisions of Article 9.2(b)(iv), or not.

[321]European Communities' appellant's submission, para. 149.

[322]The third participant ACP countries in this appeal are: Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts & Nevis, Swaziland, Tanzania, and Trinidad & Tobago.

Articles 3.3 and 8. These paramount provisions are framed around and are directly linked to *what is specified* by the respective member *limiting subsidization* in the sense of requirements in Article 3.1 of the Agreement."[323] In response to questioning at the oral hearing, the ACP Countries also emphasized that Article 3.1 permits "limiting" subsidization, and only what is specified in a Member's Schedule governs its obligation with respect to subsidization.

209. We are not persuaded by this argument. We do not see Article 3.1 as permitting a Member to limit subsidization to whatever commitment it chooses to specify in its Schedule without regard to Members' obligations under the *Agreement on Agriculture*. Rather, with respect to export subsidy commitments, we see Article 3.1 as requiring a Member to limit its subsidization to the budgetary outlay and quantity reduction commitments specified in its Schedule in accordance with the provisions of the *Agreement on Agriculture*. This is also clear from the provisions of Article 9.2(a) of the Agreement, which requires adherence by a Member in each year of the implementation period to the budgetary outlay and quantity "reduction commitments", as specified in the Member's Schedule.

210. For all these reasons, we agree with the Panel that Footnote 1 is inconsistent with Article 9.1 of the *Agreement on Agriculture*.[324]

F. *The Relationship Between Members' Schedules and the Agreement on Agriculture*

211. We now address the arguments of the European Communities on the relationship between Members' Schedules and the *Agreement on Agriculture*. In particular, we examine whether the claimed commitment in Footnote 1 "limiting" subsidization of exports of sugar can prevail over the provisions of the *Agreement on Agriculture*, despite such a commitment being inconsistent with Articles 3.3 and 9.1 of the *Agreement on Agriculture*. We begin by recalling the Panel's findings on this point and the European Communities' arguments on appeal.

212. Referring to the Appellate Body Reports in *EC – Bananas III*, *EC – Poultry*, and *Chile – Price Band System*, and to the GATT panel report in *US – Sugar*, the Panel found that:

[323]ACP Countries' statement at the oral hearing. (emphasis added)

[324]Panel Reports, para. 7.190.

> ... 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*.[325] (original emphasis)

213. The Panel noted that "the jurisprudence cited above deals with tariff concessions and [that] this includes market access commitments within the meaning of Article 1(g) of the *Agreement on Agriculture*."[326] The Panel acknowledged that export subsidy commitments under the *Agreement on Agriculture* are "different from tariff and other market access concessions".[327] The Panel, however, took the view that:

> ... 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.[328]

In support of its position, the Panel stated that "this same principle"—that scheduled commitments cannot conflict with the obligations contained in a WTO multilateral trade agreement—"is recognized in Article 8 of the *Agreement on Agriculture*".[329] In the Panel's view, "Article 8 makes clear that a Member must at all times comply with the *Agreement on Agriculture* (*and* its Schedule)."[330] According to the Panel, it follows that "a Member['s] Schedule cannot provide for non-compliance with provisions of the *Agreement on Agriculture*."[331]

214. The European Communities submits that, even assuming *arguendo* that Footnote 1 is inconsistent with the *Agreement on Agriculture*, "there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*."[332] The European Communities also argues that the Panel erred in relying on the findings of the GATT panel in

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[325]Panel Reports, para. 7.157 (referring to Appellate Body Report, *EC – Bananas III*, para. 154; Appellate Body Report, *EC – Poultry*, para. 98; Appellate Body Report, *Chile – Price Band System*, para. 272; GATT Panel Report, *US – Sugar*, paras. 5.2 and 5.3).

[326]*Ibid.*, para. 7.158.

[327]*Ibid.*

[328]*Ibid.*

[329]*Ibid.*, para. 7.159.

[330]*Ibid.*, para. 7.161. (emphasis added; footnote omitted)

[331]*Ibid.*

[332]European Communities' appellant's submission, para. 156. We address the issue of hierarchy below.

US – Sugar.[333] The European Communities, moreover, disagrees with the Panel that Article 8 of the *Agreement on Agriculture* can be interpreted to mean that "a Member's Schedule cannot provide for non-compliance with provisions of the *Agreement on Agriculture*".[334] According to the European Communities, Article 8 merely provides that a Member must respect both the provisions of the *Agreement on Agriculture* and its Schedule, but it does not prescribe the hierarchy between the two. We examine each of these arguments in turn.

215. Article 8 of the *Agreement on Agriculture*, entitled "Export Competition Commitments", reads:

> 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.

216. It is clear from the plain wording of Article 8 that Members are prohibited from providing export subsidies otherwise than in conformity with the *Agreement on Agriculture* and the commitments as specified in their Schedules. Thus, compliance with both is obligatory. As compliance with the provisions of the *Agreement on Agriculture* is obligatory, it is clear that the commitments specified in a Member's Schedule must be in conformity with the provisions of the Agreement. Only then would the export subsidies be in compliance with the requirements of Article 8.

217. We turn to the European Communities' argument that the Panel erred in relying on the findings of the GATT panel in *US – Sugar*. In that case, the United States, as the responding party, argued that, because Article II:1(b)[335] of the GATT 1947 contemplated the possibility of making tariff concessions "subject to terms, conditions or qualifications", the United States was entitled to reserve the right to impose quantitative restrictions that would otherwise be prohibited by Article XI:1 of the GATT 1947.[336] The GATT panel in *US – Sugar* rejected this argument, noting that:

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[333]European Communities' appellant's submission, paras. 161-162.

[334]*Ibid.*, para. 164 (quoting Panel Reports, para. 7.161).

[335]Article II:1(b) of the GATT 1994 provides that the products described in Members' Schedules of Concessions:

> ... shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein.

[336]GATT Panel Report, *US – Sugar*, paras. 3.7 and 5.1.

> Article II gives contracting parties the possibility to incorporate into the legal framework of the General Agreement commitments additional to those already contained in the General Agreement and to qualify such additional commitments, *not however to reduce their commitments under other provisions of that Agreement*.[337] (emphasis added)

218. The European Communities submits that the principle articulated in *US – Sugar*, while dealing the with specific terms of Article II:1 of the GATT 1947, cannot be "transferred" to the *Agreement on Agriculture* as that Agreement has "no language ... with a comparable content".[338] According to the European Communities, the principle enumerated in *US – Sugar* applies "only ... if it can be derived from the various provisions of the *Agreement on Agriculture*".[339]

219. We do not agree with the European Communities. The GATT panel in *US – Sugar* did not rely solely on the language of Article II:1(b) of the GATT 1947 in making its ruling, as the European Communities suggests. Instead, the panel's reasoning was that, in the absence of a specific provision that would entitle Members to depart from their obligations under the GATT 1947, Members were not entitled to do so. Thus, the GATT panel in *US – Sugar* concluded:

> Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions ... inconsistent with the application of Article XI:1.[340]

220. Similarly, in this case, we find no provision under the *Agreement on Agriculture* that authorizes Members to depart, in their Schedules, from their obligations under that Agreement. Indeed, as we have noted, Article 8 requires that, in providing export subsidies, Members must comply with the provisions of both the *Agreement on Agriculture* and the export subsidy commitments specified in their Schedules. This is possible only if the commitments in the Schedules are in conformity with the provisions of the *Agreement on Agriculture*. Thus, we see no basis for the European Communities' assertion that it could depart from the obligations under the *Agreement on Agriculture* through the claimed commitment provided in Footnote 1.

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[337]GATT Panel Report, *US – Sugar*, para. 5.3.

[338]European Communities' appellant's submission, para. 162.

[339]*Ibid.*

[340]GATT Panel Report, *US – Sugar*, para. 5.7.

221. In any event, we note that Article 21 of the *Agreement on Agriculture* provides that: "[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A* to the *WTO Agreement* states that, "[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict." The *Agreement on Agriculture* is contained in Annex 1A to the *WTO Agreement*.

222. As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1. We, therefore, do not agree with the European Communities that "there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*."[341]

223. As a separate matter, we note that the European Communities asserts that Footnote 1 was "negotiated" with its partners in the Uruguay Round negotiations and that it has been "respected".[342] Accordingly, Footnote 1 forms part of the treaty ratified by the WTO Members. Similarly, the ACP Countries allege that Footnote 1 "was negotiated and agreed upon" or acquiesced in by the Complaining Parties before the end of the Uruguay Round.[343] The Panel found, however, that "[t]he evidence and submissions produced by all parties show that the Complainants did not agree to any European Communities' deviations from the *Agreement on Agriculture*."[344] The Panel concluded that "participants in the Uruguay Round and WTO Members did not agree to the European Communities' inclusion of Footnote 1 as an agreed departure from the European Communities' basic obligations under the *Agreement on Agriculture*."[345] Accordingly, we see no basis in the Panel Reports for the contention of the European Communities and the ACP Countries that the Complaining Parties or the

[341]European Communities' appellant's submission, para. 156.

[342]*Ibid.*, footnote 77 to para. 114.

[343]ACP Countries' response to questioning at the oral hearing.

[344]Panel Reports, para. 7.210.

[345]*Ibid.*, para. 7.220.

WTO Members negotiated or agreed to Footnote 1 as a departure from the European Communities' obligations under the *Agreement on Agriculture*.[346]

G. *Conclusion*

224. For all these reasons, we find that, even assuming that Footnote 1 constitutes a "commitment" expressing a limitation on export subsidization of ACP/India equivalent sugar, Footnote 1 does not contain *both quantity and budgetary commitments* and is, therefore, inconsistent with Article 3.3 of the *Agreement on Agriculture*. In addition, Footnote 1 is inconsistent with Article 9.1 of the *Agreement on Agriculture*, because exports of ACP/India equivalent sugar are not subject to *reduction commitments*. As Footnote 1 is inconsistent with the provisions of Articles 3.3 and 9.1, it follows that Footnote 1 is also inconsistent with Article 8 of the Agreement.

225. We do not agree with the Panel that Footnote 1 "is of no legal effect".[347] However, we agree with the Panel that Footnote 1 does not have the legal effect of enlarging or otherwise modifying the European Communities' commitment levels as specified in its Schedule.

226. Accordingly, we *uphold* the Panel's finding, in paragraphs 7.191, 7.198, 7.222, and 8.1(a) of the Panel Reports, that Footnote 1 does not enlarge or otherwise modify the European Communities' commitment levels as specified in its Schedule.

VI. Payments under Article 9.1(c) of the *Agreement on Agriculture*

A. *Preliminary Remarks*

227. Before the Panel, the Complaining Parties claimed that the EC sugar regime involved various types of "payments on the export of an agricultural product that are financed by virtue of governmental action" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. The Panel stated that the Complaining Parties claimed that the EC sugar regime:

[346]We acknowledge the arguments of the ACP Countries regarding the importance of sugar production for the economies of the ACP countries, as well as the significance that the ACP countries attach to their preferential access to the European Communities' market. However, we are unable to regard these considerations as relevant for our legal interpretation of Footnote 1 and its consistency with the European Communities' obligations under Articles 3, 8, and 9.1 of the *Agreement on Agriculture.*

[347]Panel Reports, paras. 7.198 and 7.222.

> ... 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.[348] (footnote omitted)

228. The Panel limited its examination to the first two of the four types of alleged export subsidies set out above. The Panel found, with respect to the first type of "payment", 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."[349] As for the second type of "payment", the Panel found that "producers/exporters of C sugar ... receive payments on export by virtue of governmental action ... in the form of transfers of financial resources, through cross-subsidization resulting from the operation of the EC sugar regime".[350] Thus, the Panel found that both types of "payments" examined by it are "payments on the export ... financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, and that, therefore, they constitute exports subsidies within the meaning of Article 9.1. The Panel then concluded that the European Communities had not demonstrated, pursuant to Article 10.3 of the *Agreement on Agriculture*, that exports of C sugar exceeding the European Communities' commitment levels since 1995 are not subsidized.[351]

229. The European Communities appeals certain aspects of the Panel's findings with respect to these two alleged export subsidies. In our consideration of the European Communities' appeal, we examine, first, the Panel's finding that the sales of C beet by beet growers to C sugar producers constitute an export subsidy within the meaning of Article 9.1(c); and secondly, whether what the Panel described as "cross-subsidization" constitutes an export subsidy within the meaning of that provision.

B. *Do Sales of C Beet Involve Export Subsidies within the Meaning of Article 9.1(c)?*

230. The Panel made three distinct findings in concluding that sales of C beet by beet growers to sugar producers constitute an export subsidy within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. The Panel held, first, that sales of C beet involved "payments", because C beet was

[348]Panel Reports, para. 7.252.

[349]*Ibid.*, para. 7.293.

[350]*Ibid.*, para. 7.338.

[351]*Ibid.*, para. 7.339.

being sold at prices below its average total cost of production[352]; secondly, that these payments were "*on the export*"[353]; and, thirdly, that these "payments" were "*financed by virtue of governmental action*".[354] The European Communities does not appeal the first and second of these Panel findings. Rather, the European Communities appeals the third Panel finding, that is, that "payments" in the form of sales of C beet are "financed by virtue of governmental action".

231. In making the contested finding, the Panel stated first 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 "financed by virtue of governmental action". The Panel then found 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 [their] participation in the domestic market in selling high priced A and B beet."[355] The European Communities, according to the Panel, controls virtually every aspect of domestic beet and sugar supply and management. In particular, the price and supply of A and B beet are fixed with a view to ensuring a stable and adequate income to beet growers; C beet (which is over-quota beet), generally speaking, can be used only in the production of C sugar, that is, over-quota sugar.[356] Financial penalties are imposed by the European Communities on producers that divert C sugar into the domestic market. The Panel considered this "controlling governmental action" to be "indispensable" to the transfer of resources from consumers and tax payers to sugar producers and, through them, to A and B beet growers.[357]

232. On appeal, the European Communities argues that the Panel applied a test whereby the phrase "financed by virtue of governmental action" will be satisfied where governmental action merely "enable[s]" the beet growers to finance and make payments.[358] The European Communities also

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[352]Panel Reports, para. 7.270. We note that the Panel found that "[t]here is uncontested evidence that C beet is sold to C sugar producers *at prices well below its cost of production*" and that "[t]he European Communities does not contest the cost of production figures and related data". (*Ibid.*, paras. 7.265 and 7.267) (emphasis added) We note that the Panel did not, in the Panel Reports, disclose the actual cost of production data, due to the confidential nature of that data.

[353]*Ibid.*, para. 7.279. (original emphasis)

[354]*Ibid.*, para. 7.292. (original emphasis)

[355]*Ibid.*, para. 7.291.

[356]*Ibid.*, para. 7.283.

[357]*Ibid.*, para. 7.291. We note that, according to the Commission of the European Communities, C beet is being sold at prices ranging between € 10-20 per tonne. (Commission of the European Communities, "Common Organisation of the Sugar Market: Description", Exhibit COMP-8 submitted by the Complaining Parties to the Panel, section 3.2, p. 10) The price of € 10-20 per tonne for C beet may be contrasted with the minimum prices for A and B beet of € 46.72 and € 32.42 per tonne, respectively. (Articles 4-5 of Council Regulation (EC) No. 1260/2001)

[358]European Communities' appellant's submission, para. 268.

argues that the Panel incorrectly assumed that beet growers "finance" the sales of C beet by profits from sales of A and B beet and that governmental action in the European Communities' beet market is "less pervasive"[359] than in *Canada – Dairy*. The European Communities also argues that the Panel disregarded certain "other factors" that affect the supply and prices of C beet, but do not involve governmental action.[360]

233. Our analysis begins with the text of Article 9.1(c) of the *Agreement on Agriculture*, which provides:

> *Export Subsidy Commitments*
>
> 1. The following export subsidies are subject to reduction commitments under this Agreement:
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> ...
>
> (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[.]

234. The Appellate Body has previously addressed Article 9.1(c) of the *Agreement on Agriculture* in *Canada – Dairy*, as well as in the compliance proceedings in that dispute, namely, *Canada – Dairy (Article 21.5 – New Zealand and US)* and *Canada – Dairy (Article 21.5 – New Zealand and US II)*. In those disputes, the Appellate Body interpreted the various elements of the phrase "financed by virtue of governmental action".

235. With respect to "governmental action", the Appellate Body found that "[t]he essence of 'government' is ... that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[361] The Appellate Body also held that Article 9.1(c) does not place any qualifications on the types of "governmental action" that may be relevant under that provision. The governmental action need *not* involve a government "mandate" or other "direction".[362]

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[359]European Communities' appellant's submission, heading VI.C.3.

[360]*Ibid.*, heading VI.C.4.

[361]Appellate Body Report, *Canada – Dairy*, para. 97.

[362]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 127-128.

236. Addressing the word "financed", the Appellate Body held that this word generally refers to the "mechanism" or "process" by which financial resources are provided, such that payments are made.[363] Article 9.1(c), by stating "whether or not a charge on the public account is involved", expressly provides that the *government itself* need *not* provide the resources for producers to make payments. Instead, payments may be made and funded by private parties.[364]

237. With respect to the words "by virtue of", the Appellate Body has previously held that there must be a "nexus" or "demonstrable link" between the governmental action at issue and the financing of payments.[365] The Appellate Body clarified that not every governmental action will have the requisite "nexus" to the financing of payments.[366] For instance, the Appellate Body held that the "demonstrable link" between "governmental action" and the "financing" of payments would not exist in a scenario in which "governmental action ... establish[es] a regulatory framework merely *enabling* a third person freely to make and finance 'payments'."[367] In this situation, the link between the governmental action and the financing of payments would be "too tenuous", such that the "payments" could not be regarded as "financed by virtue of governmental action" within the meaning of Article 9.1(c).[368] Rather, according to the Appellate Body, there must be a "tighter nexus" between the mechanism or process by which the payments are financed (even if by a third person) and governmental action.[369] In this respect, the Appellate Body clarified that, although governmental action is essential, Article 9.1(c) contemplates that "payments may be financed by virtue of governmental action even though significant aspects of the financing might not involve government."[370] Thus, even if government does not fund the payments itself, it must play a sufficiently important part in the process by which a private party funds "payments", such that the requisite nexus exists between "governmental action" and the "financing".[371] The alleged link must be

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

[364]*Ibid.*, paras. 87 and 132.

[365]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 113; Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 130.

[366]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 131.

[367]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 115. (emphasis added)

[368]*Ibid*.

[369]*Ibid.*

[370]*Ibid.*, para. 114.

[371]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 133.

examined on a case-by-case basis, taking account of the particular character of the governmental action at issue and its relationship to the payments made.[372]

238. Turning to the specific circumstances of the present dispute, we note that, in its finding that "payments" in the form of sales of C beet below its total cost of production are "financed by virtue of governmental action", the Panel relied on a number of aspects of the EC sugar regime. The Panel considered, *inter alia*, that: the EC sugar regime regulates prices of A and B beet and establishes a framework for the contractual relationships between beet growers and sugar producers with a view to ensuring a stable and adequate income for beet growers[373]; C beet is invariably produced together with A and B beet in one single line of production[374]; a significant percentage of beet growers are likely to finance sales of C beet below the total cost of production as a result of participation in the domestic market by making "highly remunerative" sales of A and B beet[375]; the European Communities "controls virtually every aspect of domestic beet and sugar supply and management", including through financial penalties imposed on sugar producers that divert C sugar into the domestic market[376]; the European Communities' Sugar Management Committee "overviews, supervises and protects the [European Communities'] domestic sugar through, *inter alia*, supply management"[377]; the growing of C beet is not "incidental", but rather an "integral" part of the governmental regulation of the sugar market[378]; and C sugar producers "*have incentives* to produce C sugar so as to maintain their share of the A and B quotas", while 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 ... C beet".[379]

239. We agree with the Panel that, in the circumstances of the present case, all of these aspects of the EC sugar regime have a direct bearing on whether below-cost sales of C beet are financed by virtue of governmental action. As a result, we are unable to agree with the European Communities' first argument on appeal, namely, that the Panel applied a test under which an Article 9.1(c) subsidy

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[372]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 134 (referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 115).

[373]Panel Reports, para. 7.283. We recall that the Panel found that the price of C beet is approximately 60 per cent of the C sugar world market price. (*Ibid.*, paras. 7.265 and 7.283)

[374]*Ibid.*, para. 7.283. The Panel also stated, in paragraph 6.10 of the Panel Reports, that "there is no independent production of C beet."

[375]*Ibid.*, para. 7.291.

[376]*Ibid.*

[377]*Ibid.*

[378]*Ibid.*, para. 7.290.

[379]*Ibid.*, para. 7.288. (original emphasis)

was deemed to exist "simply because [governmental] action 'enabled' the beet growers to finance and make payments".[380] Rather, we believe that the Panel relied on aspects of the EC sugar regime that go far beyond merely "enabling" or "permitting" beet growers to make payments to sugar producers. Indeed, in our view, there is a tight nexus between the European Communities' "governmental action" and the financing of payments in the case before us. We have no doubt that, without the highly remunerative prices guaranteed by the EC sugar regime for A and B beet, sales of C beet could not take place profitably at a price below the total cost of production.

240. The European Communities' second argument on appeal is that the Panel incorrectly "assumed" that a "significant" percentage of beet growers 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".[381] In our view, had the Panel been confronted with the allegations and the evidence the European Communities provides in its appellant's submission, the Panel would have been under an obligation to examine them. However, the European Communities did *not* argue before the Panel that sales of A and B beet are "largely insufficient to cover all the fixed costs of producing C beet", in the manner in which it is arguing this point on appeal.[382]

241. The Appellate Body previously held, in *Canada – Aircraft*, that new arguments are not excluded from the scope of appellate review "simply because they are new".[383] However, in that case, the Appellate Body also said:

> ... for us to rule on [the] new argument [at issue], we would have to solicit, receive and review new facts that were not before the Panel, and were not considered by it. In our view, Article 17.6 of the DSU manifestly precludes us from engaging in any such enterprise.[384]

242. In this respect, we note that the European Communities supports its argument on appeal with a table containing calculations (Table 9 in its appellant's submission[385]). This table was not placed

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[380]European Communities appellant's submission, para. 268.

[381]Panel Reports, para. 7.291.

[382]European Communities' appellant's submission, para. 279. The European Communities, in response to questioning at the oral hearing, confirmed that it had not made this assertion before the Panel and that Table 9 of its appellant's submission, which provides data and calculations in support of this assertion, had not been included in its written submission to the Panel. The European Communities explained at the oral hearing that it was making its assertion on appeal "in response to the Panel finding".

[383]Appellate Body Report, *Canada – Aircraft*, para. 211.

[384]*Ibid.*

[385]Table 9 is in paragraph 279 of the European Communities' appellant's submission. See also *supra*, footnote 382.

before the Panel, but uses data drawn from Exhibits presented to the Panel by the Complaining Parties. We also note that the Complaining Parties, in their respective appellee's submissions and at the oral hearing, contested the accuracy of some of the calculations, as well as certain concepts underlying the European Communities' calculations.[386]

243. We note that, in its analysis of whether the below-cost sales of C beet were "financed by virtue of governmental action", the Panel considered the key aspects of the EC sugar regime and concluded that "C beet growers can use the profits made on the sales of A and B beet to cross-subsidize the sale of C beet"[387] and 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."[388] The European Communities, by means of the data and calculations contained in Table 9, is, in essence, challenging the manner in which the Panel weighed and assessed the evidence in coming to the conclusion that C beet growers finance sales of C beet as a result of participation in the highly regulated domestic market. We have carefully reviewed the Panel's finding, as well as the European Communities' arguments and supporting calculations, and do not find fault with the Panel's analysis, much less a fault that would justify our interfering with the Panel's appreciation of the evidence.

244. We now turn to the European Communities' argument that governmental action under the EC sugar regime is "less pervasive" than governmental action in *Canada – Dairy (Article 21.5 – New Zealand and the US II)*.[389] We do not consider it inherently useful to compare the governmental action at issue and the governmental action in the context of a different dispute. The issue before us is not a comparison between two governmental regimes, but rather, whether "payments" under the EC sugar regime are "financed by virtue of governmental action". As the Appellate Body stated in *Canada – Dairy (Article 21.5 – New Zealand and the US)*, "the existence of ... a demonstrable link [between governmental action and the financing of payments] must be identified *on a case-by-case basis*, *taking account of the particular governmental action at issue* and its effects on payments made by a third person."[390] In any event, we have already reviewed the aspects of the EC sugar regime on

[386]In particular, the European Communities, on the one hand, and the Complaining Parties, on the other hand, disagreed as to which cost items should properly be included in the category of "fixed costs". (See European Communities' appellant's submission, footnote 242 to Table 9, para. 279; Brazil's appellee's submission, paras. 106-109; and Thailand's appellee's submission, paras. 153 and 161)

[387]Panel Reports, para. 7.283.

[388]*Ibid.*, para. 7.291.

[389]European Communities' appellant's submission, heading VI.C.3.

[390]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and the US)*, para. 115. (emphasis added)

which the Panel relied to make its finding, including the "European Communities[']control[] [of] virtually every aspect of domestic beet and sugar supply and management"[391], and found the EC sugar regime to be pervasive. Hence, the Panel correctly concluded that the "payments" at issue are being "financed by virtue of governmental action".[392]

245. The European Communities further argues that the Panel disregarded or improperly dismissed "other factors" that affect the supply and prices of C beet, but that do not involve governmental action. The existence of such factors, in the European Communities' view, signifies that "the 'nexus' between '[governmental] action' and the alleged payments cannot be considered 'tight' enough for a finding that the sales of C beet are financed 'by virtue of' [governmental] action."[393]

246. We are not persuaded by the European Communities' arguments. First, we note that, before the Panel, the European Communities provided only limited argumentation and evidence on these factors.[394] It would also appear that, with respect to at least one of these alleged "other factors"—the differences between dairy and sugar beet production—the European Communities did not provide *any* factual evidence to the Panel to support its assertion.[395] In any event, we do not see the relevance of a comparison between beet production and dairy production for examining whether below-cost sales of C beet are financed by virtue of governmental action. As regards the remaining "other factors" identified by the European Communities, we also note that, in addressing the European Communities' arguments, the Panel referred to a number of these "factors", namely: "yield ... movements"[396]; whether the growing of C beet was "incidental" or "unintended" in nature[397]; and the issue of gross profit margins of alternative crops.[398] Hence, in our view, the Panel considered the arguments and the evidence presented by the European Communities, but did not attach the same significance to them as did the European Communities.

247. Secondly, the issue of the alleged "other factors" affecting the supply and price of C beet appears to be at least partially linked to the European Communities' argument that the production of C beet is, in part, "unintended". In response to questioning at the oral hearing, the European

[391]Panel Reports, para. 7.291.

[392]See *supra*, para. 239.

[393]European Communities' appellant's submission, para. 291.

[394]European Communities' responses to Questions 30 and 65 posed by the Panel.

[395]European Communities' response to Question 30(c) posed by the Panel; and European Communities' appellant's submission, paras. 215 and 262.

[396]Panel Reports, para. 7.286.

[397]*Ibid.*, para. 7.290; European Communities' appellant's submission, para. 287.

[398]Panel Reports, para. 7.286.

Communities stated that two "types" of production of C beet exist: one part of the production of C beet is due to "profit reasons", namely, where beet growers are trying to obtain an additional profit because they are able to sell C beet above marginal costs and their fixed costs are covered by sales of A and B beet or of other products[399]; and another part of C beet production, by contrast, is "unintended" and is the result of "other factors", in particular, yield variations. Hence, it is clear that a part of C beet is produced because beet growers are able to obtain "additional profit" by selling such beet below its average total cost of production, but above its marginal costs, while covering their fixed cost by means of sales of A and B beet (or other products).[400]

248. In this regard, it also bears pointing out that the European Communities did not contest the Panel's finding that production of C sugar represents 11 to 21 per cent of the European Communities' overall production of A and B sugar and that, correspondingly, C beet represents the same proportion of the production of A and B beet. C beet is an important input for C sugar production. We also recall that C beet is being sold at prices that are approximately 60 per cent of the C sugar world market price, which is well below its average total cost of production.[401] In our view, the continued production of such large volumes of over-quota beet, at prices well below its cost of production, could not take place but for governmental action. In this respect, it is useful to note that the Panel found that "the European Communities fails to explain why large numbers of [European Communities'] farmers are engaged in growing C beet if such production only serves to deliver losses" and "the European Communities ... 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 ... of C beet."[402]

249. As a result, we find no fault with the Panel's weighing and appreciation of the evidence and with the Panel's conclusion that the "payments" at issue are "financed by virtue of governmental action" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. In this regard, the

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[399]The European Communities did not specify what such "other products" may be, in its appellant's submission, or in response to questioning at the oral hearing.

[400]With respect to this issue, moreover, the European Communities, in its appellant's submission as well as at the oral hearing, referred to an estimate that "unintentional" C sugar production (and, by implication, also C beet production) is equal to about 6 per cent of the total quota production. (European Communities' appellant's submission, footnote 212 to para. 262) Hence, "intended" C beet production—C beet production due to "profit reasons"—would have, over the past years, fluctuated between 5 and 15 per cent of the overall production of quota beet. In other words, it would appear that C beet representing between 5 and 15 per cent of the European Communities' total quota production is produced "intentionally" by beet growers.

[401]We understand that the production of one tonne of sugar requires approximately eight tonnes of beet. (Australia's appellee's submission, footnote 165 to para. 253 and footnote 168 to para. 254)

[402]Panel Reports, para. 7.286.

European Communities, pursuant to Article 10.3 of the *Agreement on Agriculture*, bears the burden of demonstrating that no export subsidies within the meaning of Article 9.1(c) exist. It was therefore for the European Communities to have submitted before the Panel adequate evidence with respect to "other factors" affecting the production and supply of C beet. The Panel weighed and appreciated the evidence and found that the European Communities did not do so.

250. For these reasons, we *uphold* the Panel's finding, in paragraph 7.292 of the Panel Reports, that the alleged payments in the form of low-priced sales of C beet to sugar producers are "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

C. *Do "Payments" in the Form of "Cross-subsidization" Constitute Export Subsidies within the Meaning of Article 9.1(c)?*

1. Introduction

251. We now turn to address the Panel's finding that payments in the form of "cross-subsidization" resulting from the EC sugar regime confer an export subsidy within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.

252. The Panel stated that the Complaining Parties claimed that the EC sugar regime:

> ... involves a series of payments including: (a) payment in the form of below cost 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.[403] (footnote omitted)

253. As we stated earlier, the Panel limited its examination to the first two alleged payments. The Panel found that "cross-subsidization", "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", constitutes an export subsidy within the meaning of Article 9.1(c) of the *Agreement on Agriculture*.[404]

254. The European Communities argues on appeal that this finding of the Panel is in error because (i) "cross-subsidization" does not constitute a "payment", because it does not involve a "transfer of

[403]Panel Reports, para. 7.252.

[404]*Ibid.*, paras. 7.314 and 7.338.

resources" to the sugar producers; and (ii) the alleged "payment" is not made "on the export" of C sugar, because the sugar producers are not required to produce or export C sugar.[405] The European Communities also argues that the Panel acted inconsistently with Article 11 of the DSU by making a finding with respect to a claim that the Complaining Parties "neither made nor argued".[406]

255. We begin our consideration of this issue by setting out the text of Article 9.1(c) of the *Agreement on Agriculture*, which provides:

> *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[.]

256. Our analysis of this issue proceeds as follows. We examine, first, whether "cross-subsidization" constitutes a "payment" within the meaning of Article 9.1(c) and, secondly, whether any such payment is "on the export of an agricultural product" within the meaning of that provision. We then go on to consider the European Communities' claim with respect to Article 11 of the DSU. Finally, we address Australia's claim that, if the Appellate Body were to reverse the Panel findings under Article 9.1(c), the European Communities' measures would fall under Article 10.1 of the *Agreement on Agriculture*.

2. Whether "Cross-subsidization" Constitutes a "Payment" within the Meaning of Article 9.1(c) of the *Agreement on Agriculture*

257. In finding that "cross-subsidization" constitutes a "payment" within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, the Panel addressed a number of factors. Recalling the Appellate Body's finding in *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel used the average total cost of production benchmark for C sugar and noted that C sugar was sold on the world market at prices "well under" the average total cost of production every year from 1992/1993 to

[405]European Communities' appellant's submission, para. 170.

[406]*Ibid.*, para. 171. We note that the Complaining Parties agree with the Panel's finding on "cross-subsidization" and contend that the Panel addressed, in essence, their arguments, albeit using different language. (See *infra*, Section VI.C.5)

2002/2003.[407] The Panel observed that "the price charged for C sugar does not even remotely cover its cost of production."[408] The Panel also found that "to the extent that the fixed costs of A, B and C [sugar production] 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."[409] The Panel concluded that there was 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*."[410]

258. The European Communities argues that the alleged "cross-subsidization" does not involve a "transfer of resources" to the sugar producers, but rather, is: "an internal allocation of each sugar producer's own resources"[411]; the alleged "cross-subsidization" provides no benefit to the sugar producers; and the Panel's interpretation is not supported by the findings of the Appellate Body in the *Canada – Dairy* disputes. The European Communities also submits that the Panel's interpretation turns Article 9.1(c) into "a prohibition of low priced exports" and a "sort of blunt anti-dumping instrument".[412]

259. The Appellate Body interpreted Article 9.1(c) of the *Agreement on Agriculture* in the appeal in *Canada – Dairy*, as well as in the compliance proceedings in that dispute, *Canada – Dairy (Article 21.5 – New Zealand and US)* and *Canada – Dairy (Article 21.5 – New Zealand and US II)*. In those disputes, the Appellate Body held that the word "payment" in Article 9.1(c) denotes "a

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[407]Panel Reports, para. 7.301.

[408]*Ibid.* The Panel also observed that:

> 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.

(*Ibid.*, footnote 618 to para. 7.301)

[409]*Ibid.*, para. 7.310. (footnote omitted) The Panel had before it data submitted by the Complaining Parties that were confidential in nature. (See *supra*, footnote 352) In this respect, we are also bound by the confidential nature of the data. We find it useful, however, to point out that the effective world market price relied on by the Panel is not even one third of the European Communities domestic market price.

[410]Panel Reports, para. 7.314.

[411]European Communities' appellant's submission, para. 179.

[412]*Ibid.*, para. 180.

transfer of economic resources"[413] and that the ordinary meaning of the word "payment" "encompasses 'payments' made in forms other than money".[414] The Appellate Body also found that Article 9.1(c) of the *Agreement on Agriculture* describes an "unusual form of subsidy"[415], in that "payments" can be made by private parties and need not be made by a government.[416] The Appellate Body has also held that the notion of payments covers "a diverse range of practices involving monetary transfers, or transfers-in-kind"[417]; the "payments" may take place in "many different factual and regulatory settings"[418]; it is necessary to consider the "particular features" of the alleged "payments"[419]; and the standard for determining the existence of "payments" under Article 9.1(c) must be identified after careful scrutiny of the factual and regulatory settings of the measure.[420]

260. In addition, in *Canada – Dairy (Article 21.5 – New Zealand and US)* and *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body held that, in the circumstances of those disputes, the determination of whether payments were made depended on a comparison between the price of a particular product—commercial export milk ("CEM") in those cases—and an "objective standard or benchmark which reflects the *proper value of [that product] to [its] provider*".[421] In those disputes, the Appellate Body found that the standard for determining the proper value of CEM was the average total cost of production, as this standard represented the economic resources the producer invested in the milk that was an input to the production of dairy products. If CEM was sold at less than its proper value—namely, its average total cost of production—"payments" were made, because there was a transfer of the portion of economic resources that was not reflected in the selling price of CEM.

261. In the dispute before us, the Panel applied this benchmark, namely, the average total cost of production for sugar. On appeal, in this context, the European Communities does not take issue with the Panel's use of the average total cost of production benchmark in order to ascertain the existence of

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[413]Appellate Body Report, *Canada – Dairy*, para. 107.

[414]*Ibid.*, para. 112.

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

[416]Moreover, "payments" within the meaning of Article 9.1(c) need not be funded from government resources, provided they are "financed by virtue of governmental action". (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 114)

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

[418]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 76.

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

[420]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 76.

[421]*Ibid.*, para. 74. (emphasis added)

"payments".[422] Rather, the European Communities argues that the "payments" identified by the Panel are not "payments" within the meaning of Article 9.1(c), because they constitute only an "internal allocation" of the sugar producer's resources and do not provide the sugar producer with new additional resources.[423] The European Communities submits that the existence of a "transfer of resources" implies, by definition, the presence of two different parties, "one which grants the resources and another which receives them".[424]

262. We note, first, that Article 9.1(c) does not qualify the term "payments" by reference to the entity making, or the entity receiving the payment. This may be contrasted with, for instance, Articles 9.1(a) and 9.1(b) of the *Agreement on Agriculture*, which specifically refer to the entities making and also, in the case of Article 9.1(a), to the entity receiving the alleged export subsidy. Moreover, Article 9.1(c), on its face, does not qualify the meaning of the term "payments", other than by requiring that the alleged "payments" be "on the export of an agricultural product" and "financed by virtue of governmental action".

263. As we noted above, the European Communities submits, first, that a "payment" within the meaning of Article 9.1(c) requires, by definition, the presence of two distinct legal entities. We agree with the European Communities that a "payment", within the meaning of Article 9.1(c), certainly occurs when one entity transfers economic resources to another entity. For instance, the Panel found—and the European Communities did not appeal the Panel's finding—that beet growers transfer economic resources to sugar producers by means of below-cost sales of C beet. In this instance, two distinct economic operators exist, and the "payment" is made by one to the other.

264. This, however, does not imply that the term "payment" necessarily requires, in each and every case, the presence of two distinct entities. In other words, contrary to the European Communities' argument, we do not see, *a priori*, any reason why "payments", within the meaning of Article 9.1(c), cannot include, in the particular circumstances of this dispute, transfers of resources within one

[422]In its statement at the oral hearing, the European Communities referred to the cost of production benchmark for the purposes of Article 9.1(c) and the implications of thereof for domestic support systems.

[423]European Communities' appellant's submission, para. 179.

[424]*Ibid.*, para. 183.

economic entity.[425] The "payment" in this case is not merely a "purely *notional*"[426] one but, rather, reflects a very concrete transfer of economic resources to C sugar production. In the specific dispute before us, C sugar is being sold on the world market by European Communities' sugar producers/exporters at a price that does not "even remotely"[427] cover its average total cost of production.[428] In the light of the enormous difference between the price of C sugar and its average total cost of production, we do not see how the "payment" identified by the Panel was "purely notional".[429]

265. The European Communities' approach is, in our view, too formalistic. To illustrate, one could envisage a scenario under which the producers of C sugar are legally distinct from the producers of A and B sugar.[430] In this situation, the European Communities' approach could recognize that a "payment" under Article 9.1(c) could exist because there would be a transfer of economic resources between different parties.[431] If, however, these same producers of A, B, and C sugar were integrated producers and organized as single legal entities, a payment under Article 9.1(c) would not exist, because the transfer would be merely "internal". We do not believe that the applicability of Article 9.1(c) should depend on how an economic entity is legally organized.

266. Accordingly, we do not share the European Communities' objections to the Panel's findings on "cross-subsidization" in the case before us. In this respect, we are also mindful of the fact that, in the ordinary course of business, an economic operator makes a decision to produce and sell a product expecting to recover the total cost of production and to make profits. Clearly, sales below total cost of production cannot be sustained in the long term, unless they are financed from some other sources.

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[425]In any event, we also note that the Panel did not describe "cross-subsidization"—the "payment" at issue—as consisting *merely* of an "internal allocation", within one single economic entity, of that entity's resources. Rather, the Panel considered the cumulative advantages that sugar producers receive from the operation of the EC sugar regime to be a key component of the "payment" in the form of cross-subsidization. The Panel went on to state that "to the extent that the fixed costs of A, B and C [sugar production] are largely paid for by the profits made on sales of A and B sugar, the EC sugar regime provides the advantage which allows ... sugar producers to produce and export C sugar at below total cost of production." (Panel Reports, para. 7.310) (footnote omitted) The Panel concluded that "this cross-subsidization constitutes a payment in the form of a transfer of financial resources." (*Ibid.*)

[426]European Communities' appellant's submission, para. 199. (emphasis added)

[427]Panel Reports, para. 7.301.

[428]We also recall that C sugar production represents "11-21 per cent of the total EC sugar production". (Panel Reports, para. 7.320) (footnote omitted)

[429]European Communities' appellant's submission, para. 199.

[430]This scenario assumes that the economic circumstances of sugar production are the same as in a scenario where A, B, and C sugar producers are legally integrated.

[431]We note that, in paragraph 7.294 of the Panel Reports, the Panel referred to such a hypothetical scenario.

This is especially true when the volume of the loss-making sales is substantial. It may be noted that between 1997 and 2002, C sugar exports varied between 1.3 and 3.3 million tonnes[432], with the sales price not "even remotely" covering the average total cost of production of sugar.[433]

267. Finally, we believe that the Panel did not err when it applied, in ascertaining the existence of "payments" under Article 9.1(c), the average total cost of production benchmark, which the Appellate Body held was appropriate in the circumstances in *Canada – Dairy (Article 21.5 – New Zealand and US)*. Given the huge volumes of C sugar exports and the price at which C sugar is being sold on the world market, we concur with the Panel that such production quantities cannot be deemed "incidental".[434] We note in this context that C sugar represents between 11 and 21 per cent of the European Communities' total quota production, and that between 1997 and 2002, exports ranged between 1.3 and 3.3 million tonnes. As we have already noted, C sugar is being sold on the world market for prices that do not "even remotely" cover its average total cost of production.[435]

268. Having addressed, and rejected, the European Communities' argument that the Panel's finding is in error, because the "payment" at issue is only an "internal allocation" of resources and it is "notional", we turn to another argument put forward by the European Communities. The European Communities argues that, because the alleged "cross-subsidization" involves no "transfer of resources" to the sugar producers, it confers no *benefit* upon these producers and, therefore, cannot be considered to provide a subsidy.[436] The European Communities disagrees with the Panel's finding that Article 9.1(c) does not require the demonstration of a benefit for a measure to constitute a "payment" within the meaning of that provision.

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[432]European Communities' response to Question 36 posed by the Panel.

[433]Panel Reports, para. 7.301.

[434]*Ibid.*, paras. 7.290 and 7.320.

[435]*Ibid.*, para. 7.301. We recognize that commercial entities, in the normal course of their business, make sales at "marginal" profit by covering only the variable costs of the "marginal" production, after having covered all the fixed costs through other sales. However, where such "marginal" sales are the result of government subsidies, an examination is required of the nature and extent of these sales. Such examination should take into consideration, *inter alia*, the magnitude of the "marginal" sales, the degree to which the marginal sales are below total cost of production, the period over which such sales take place (that is, whether in the short term or on a regular and sustained basis), and the nature of the regulatory regime, which underpins such sales. In particular, on this last point, the examination should consider whether the regulatory regime requires exportation of the subsidized product or export of the product in which the subsidized product is incorporated. As we stated in *Canada – Dairy*, the facts and circumstances of each case and the features of the regulatory regime must be examined carefully to determine that the total average cost of production benchmark used in *Canada – Dairy* would appropriately apply to the export subsidies at issue in the case under examination. In the circumstances of this dispute, with respect to export of C sugar, which, under the EC sugar regime must be exported, we are of the view that the application of this benchmark to C sugar (as well as to C beet) is appropriate.

[436]European Communities' appellant's submission, para. 191.

269. The chapeau of Article 9.1 provides: "The following export subsidies are subject to reduction commitments". Hence, Article 9.1 sets forth a list of practices that, by definition, involve export subsidies. In other words, a measure falling within Article 9.1 is deemed to be an export subsidy within the meaning of Article 1(e) of the *Agreement on Agriculture*. We observe that Article 9.1(c) requires no independent enquiry into the existence of a "benefit".

270. For these reasons, we *uphold* the Panel's finding, in paragraph 7.334 of the Panel Reports, that, in the particular circumstances of this dispute, the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the EC sugar regime.

271. We turn next to examine whether the Panel was correct in finding that the "payment" in the form of "cross-subsidization" is "on the export", within the meaning of Article 9.1(c).

3. Whether "Payment" in the Form "Cross-subsidization" is "On the Export" within the Meaning of Article 9.1(c) of the *Agreement on Agriculture*

272. The Panel concluded that the "payment" in the form of "cross-subsidization" was a payment "on the export" of C sugar within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. The Panel based its finding on the fact that C sugar, unless carried forward, must be exported. The Panel stated that "[b]ecause of that legal requirement, advantages, payments or subsidies to C sugar, that must be exported, are subsidies 'on the export' of that product."[437] The Panel also added that "[t]he 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 [1260/2001] if they do."[438]

273. The European Communities argues that the Panel misinterpreted the requirement that a payment be "on the export" of an agricultural product, as contained in Article 9.1(c). The European Communities argues that this term must be read as meaning "contingent on" exports, rather than "in connection with" or to the "advantage" of exports. The European Communities contends that, under a proper interpretation of the requirement "on the export", this requirement is not satisfied in the present

[437]Panel Reports, para. 7.321.

[438]*Ibid.*

case because "the sugar producers are entirely free to decide whether or not to produce C sugar and, in fact, many do not produce any C sugar at all."[439]

274. We note, first, that the Panel interpreted the phrase "on the export" in the context of its analysis of "payments" in the form of below-cost sales of C beet, and not in the context of examining "payments" in the form of cross-subsidization. In relation to below-cost sales of C beet, the Panel stated that "payments" "on the export" need not be "contingent on" the export but, rather, need be "in connection" with exports.[440] When analyzing whether "payments" in the form of "cross-subsidization" were "on the export", the Panel did *not* use the same reasoning. Instead, the Panel based its findings on the following reasoning:

> C sugar [can] 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." Because of that legal requirement, advantages, payments or subsidies to C sugar, that must be exported, are subsidies "on the export" of that product.[441] (footnote omitted)

275. We agree with the Panel. Under Article 13(1) of EC Regulation 1260/2001, C sugar "must be exported".[442] It follows that payments in the form of "cross-subsidization" are, by definition, "payments" "on the export".

276. The European Communities argues that there is no requirement to *produce* sugar under the EC sugar regime and hence payments in the form of "cross-subsidization" are not "on the export" within the meaning of Article 9.1(c). In our view, the Panel neither suggested that there is a requirement to *produce* C sugar, nor relied on such a requirement for its conclusion that "payments" in the form of "cross-subsidization" are "on the export". Rather, the Panel relied on the fact that, under EC Regulation 1260/2001, C sugar, *once produced*, must be exported.

277. The European Communities refers to the possibility, under EC Regulation 1260/2001, to store and "carry forward" C sugar to the next marketing year, up to an amount equivalent to 20 per cent of the A sugar quota. We are not persuaded that the possibility to store and "carry forward" C sugar has a bearing on the criterion "on the export" in this dispute. According to the European Commission,

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[439]European Communities' appellant's submission, para. 223.

[440]Panel Reports, para. 7.275.

[441]*Ibid.*, para. 7.321 (quoting Article 13(1) of Council Regulation (EC) No. 1260/2001).

[442]Of course, C sugar may also be carried forward, in which case it will count as part of a producer's sugar quota in another marketing year.

C sugar "carried forward" is "treated as A sugar produced by [a producer] as part of that year's production".[443] Moreover, when "carried over" sugar is sold on the European Communities domestic market, the sugar producers must pay to beet growers "the guaranteed prices" that apply only to quota beet and not to C beet.[444] It would appear, therefore, that carrying C sugar forward, for all practical purposes, is in effect a reclassification of C sugar into quota sugar. As a result, we do not believe that the possibility to "carry forward" C sugar invalidates the Panel's finding that "payments" in the form of "cross-subsidization" are "on the export" of C sugar.

278. For these reasons, we *uphold* the Panel's finding, in paragraph 7.322 of the Panel Reports, that "the payment on C sugar production in the form of [a] transfer of financial resources through cross-subsidization resulting from the operation of the EC sugar regime is *on [the] export* within the meaning of Article 9.1(c) of the *Agreement on Agriculture*." (original emphasis)

279. We wish now to address the European Communities' concern that upholding the Panel's finding that the payments at issue are "on the export" within the meaning of Article 9.1(c) would lead to "blur[ring] the distinction between the disciplines on domestic support and on export subsidies, which is an essential feature of the *Agreement on Agriculture*"[445] and would "allow ... virtually any form of domestic support" to be "characterize[d] as an 'export subsidy'".[446] As the Appellate Body has previously stated, WTO Members are entitled to provide "*domestic support*" to agricultural producers within the limits of their domestic subsidy commitments.[447] We observe, however, that the Appellate Body has also held that economic effects of WTO-consistent domestic support may "spill over" to benefit export production. Such spill-over effects may arise, in particular, in circumstances where agricultural products result from a single line of production that does not distinguish between production destined for the domestic market and production destined for the export market.[448]

280. In this respect, the Appellate Body has cautioned that, "if domestic support could be used, without limit, to provide support for exports, it would undermine the benefits intended to accrue

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[443]Commission of the European Communities, "Common Organisation of the Sugar Market: Description", Exhibit COMP-8 submitted by the Complaining Parties to the Panel, section 3.2, p. 10.

[444]*Ibid.*

[445]European Communities' appellant's submission, para. 225.

[446]*Ibid.*, para. 240. We also note that, at the oral hearing, Canada stated that the Panel's approach to the term "on the export" would mean exposing "bona fide" domestic support to challenge.

[447]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 88. (original emphasis)

[448]*Ibid.*, para. 89.

through a WTO Member's export subsidy commitments."[449] We believe that these statements are relevant to the present case. In this case, we note that C sugar is produced and exported in huge quantities, and that there is a considerable difference between the world market price and the average total cost of production of sugar in the European Communities. As we have noted above, the subsidized production and export of C sugar is not the incidental effect of the domestic support system, but is a direct consequence of the EC sugar regime.[450]

281. We also disagree with the European Communities' argument that the Panel's finding blurs the distinction between domestic support and export subsidies; we disagree, because the European Communities' legislation *requires* the exportation of C sugar, and prices obtained for C sugar on the world market are significantly below the average total cost of production of sugar in the European Communities. In our view, European Communities' legislation leaves the sugar producer wishing to sell C sugar with no choice but to export, short of the limited option of "carry over". We also note that the operation of the EC sugar regime enables sugar producers to cover the fixed costs of producing sugar and to sell C sugar profitably, even though the prices obtained for C sugar are significantly below the average total cost of production of sugar.

282. Thus, we do not consider that our interpretation erodes the boundary between "domestic support" and "export subsidies" recognized under the *Agreement on Agriculture*. Rather, our interpretation respects the boundary between the two and operates to ensure that Members provide domestic support and export subsidies in conformity with their obligations under the *Agreement on Agriculture*. As we noted earlier, our interpretation is based on the specific facts and circumstances of this dispute.

283. We also reject the European Communities' allegation that, by upholding the Panel's finding, our interpretation of Article 9.1(c) would turn this provision into "a prohibition of low priced exports".[451] Article 9.1(c) addresses "payments on the export ... financed by virtue of governmental action". What is at issue is whether the product receives an export subsidy within the meaning of Article 9.1(c), and not merely whether exports sales are being made at low prices.

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[449]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 91.

[450]C sugar production ranges between 11 and 21 per cent of the European Communities total quota production. (Panel Reports, para. 7.290) Exports of C sugar range between 1.3 and 3.3 million tonnes. (European Communities' response to Question 36 posed by the Panel) As the Panel stated, "the price charged for C sugar does not even remotely cover its cost of production." (Panel Reports, para. 7.301)

[451]European Communities' appellant's submission, para. 180.

4. The European Communities' Claim under Article 11 of the DSU

284. The European Communities argues that the Panel acted inconsistently with Article 11 of the DSU because it erroneously "attributed to the Complainants the allegation that 'cross-subsidization' was a type of 'payment'".[452] Moreover, "[b]y making a finding with respect to a claim which the Complainants had never articulated ..., the Panel ... acted inconsistently with Article 11 of the DSU."[453]

285. The Complaining Parties disagree with the European Communities' characterization of the Panel's findings on "cross-subsidization". The Complaining Parties acknowledge that they did not explicitly use the term "cross-subsidization" when referring to "payments" within the meaning of Article 9.1(c), but contend that, by referring to "cross-subsidization" as a "payment" under that provision, the Panel addressed the substance of the payments identified by the Complaining Parties and merely used different language.[454]

286. We have already upheld the Panel's finding that the Complaining Parties' "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."[455] We also recall the Appellate Body's statement in *EC – Hormones* that:

> ... 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.[456]

In our view, the Panel did not act inconsistently with Article 11 of the DSU by developing its own reasoning as to why the EC sugar regime gives rise to export subsidies within the meaning of Article 9.1(c).

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[452]European Communities' appellant's submission, para. 255.

[453]*Ibid.*, para. 256. (footnote omitted)

[454]Australia's appellee's submission, paras. 263 and 266; Thailand's appellee's submission, para. 69; Brazil's response to questioning at the oral hearing.

[455]Panel Reports, para. 7.37.

[456]Appellate Body Report, *EC – Hormones*, para. 156.

5. The European Communities' Arguments Concerning the Cost of Production of C Sugar

287. The European Communities argues that, even if the Appellate Body were to conclude that "cross-subsidization" may constitute a "payment" within the meaning of Article 9.1(c), the Panel's finding is "seriously flawed".[457] The European Communities contends that, in ascertaining the existence of "payments", the Panel erred in using as a benchmark the average total cost of production of *all* sugar. According to the European Communities, the Panel should have used, instead, the average total cost of producing *C sugar*, because the beet used in the production of C sugar is purchased at prices that are "generally lower" than the minimum prices for A and B beet.[458]

288. The average total cost of production of sugar includes the cost of all economic resources used in sugar production, which means the cost of all economic resources invested in beet production, transport, and processing of beet into sugar, which is only notionally classified into A, B, and C sugar. It is for this reason that the Panel emphasized that "[s]ugar is sugar whether or not produced under an EC created designation of A, B or C sugar."[459] The Panel further emphasized that "A, B or C sugar are part of the same line of production"[460] and that "[t]here is no independent production of C sugar."[461] It follows, in our view, that the average total cost of production of C sugar must be the same as the average total cost of production of all sugar. The European Communities' argument is flawed because the price of C beet does not determine the average total cost of production of C sugar. For these reasons, we do not agree with the European Communities that the Panel's use of the average total cost of production of *all* sugar as a benchmark for ascertaining the existence of payments was flawed in the particular circumstances of this case.

289. The European Communities further argues that the Panel "effectively double counted the subsidies allegedly granted upon the exports of C sugar".[462] As we understand it, the European Communities is of the view that, having found that payments in the form of low-priced sales of C beet confer a subsidy to sugar producers, the Panel erred in taking those same payments into account in order to establish the existence of payments in the form of "cross-subsidization". We do not agree with the European Communities. Based on our reading of the Panel Reports, we understand the

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[457]European Communities' appellant's submission, para. 257.

[458]*Ibid.*, para. 258.

[459]Panel Reports, para. 7.310.

[460]*Ibid.*

[461]*Ibid.*, paras. 6.10 and 7.306.

[462]European Communities' appellant's submission, para. 259.

Panel's findings relating to payments in the form of "cross-subsidization" to C sugar to be distinct from the Panel's findings relating to C beet as a form of payment under Article 9.1(c). Accordingly, we do not consider the Panel to have "double counted" the subsidies granted by the European Communities on exports of C sugar.[463]

6. Overall Conclusion

290. For these reasons, we *uphold* the Panel's finding, in paragraphs 7.340 and 8.3 of the Panel Reports, that the European Communities acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture* by providing export subsidies on sugar in excess of its commitment levels specified in its Schedule.

VII. Australia's Claim under Article 10.1 of the *Agreement on Agriculture*

291. Australia requests that, if the Appellate Body finds that the European Communities' export subsidies on C sugar are not export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, the Appellate Body should find that (i) the European Communities has not established that no export subsidy, whether listed in Article 9 or not, has been granted in respect of C sugar exports; and (ii) the European Communities is applying other export subsidies in a manner that results in, or threatens to lead to circumvention of export subsidy commitments, inconsistently with the provisions of Article 10.1 of the *Agreement on Agriculture*.[464]

292. As we have concluded that the European Communities is granting export subsidies with respect to C sugar within the meaning of Article 9.1(c), the condition on which Australia's request is premised does not arise. There is, therefore, no reason for us to rule on Australia's request.

VIII. Nullification or Impairment

293. The European Communities argues that the Panel erred in finding that the alleged violations of the *Agreement on Agriculture* resulting from the European Communities' exports of C sugar nullify or impair benefits accruing to the Complaining Parties under that Agreement.[465] According to the European Communities, "until recently, the Complainants shared the EC's understanding that the

[463]European Communities' appellant's submission, para. 259.

[464]Australia's appellee's submission, para. 421.

[465]European Communities' appellant's submission, para. 365 (referring to Panel Reports, para. 7.358-7.374).

C sugar regime does not provide export subsidies."[466] Therefore, the Complaining Parties "had no expectations of improved competitive opportunities that would come from the EC reducing its exports of C sugar."[467] Australia and Thailand respond that the Panel was correct in finding that the existence of nullification or impairment does not depend on "legitimate expectations".[468] Brazil submits that the European Communities did not challenge evidence that Brazil presented to the Panel to demonstrate that "the EC sugar regime caused immediate losses of US $494 million to Brazil alone in 2002"[469] and thus nullified or impaired benefits accruing to Brazil.

294. Having found that the European Communities acted inconsistently with the *Agreement on Agriculture* by providing export subsidies on sugar in excess of its commitment levels[470], the Panel found that the European Communities had failed to rebut the presumption, pursuant to Article 3.8 of the DSU, that this inconsistency had an adverse impact on the Complaining Parties.[471] In particular, the European Communities' "reliance on the Complainants' general expectations or lack thereof"[472] was insufficient to rebut that presumption. The Panel also held that the European Communities had not submitted "sufficient factual evidence to suggest that the Complainants did not suffer an 'adverse impact'" as a result of the violation.[473]

295. We begin our analysis by noting that Article 3.8 of the DSU provides:

> 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.

296. Thus, pursuant to Article 3.8, where a Member has acted inconsistently with a covered agreement, the inconsistency is presumed to nullify or impair benefits accruing to other Members. In such a case, the burden falls on the defending Member to rebut this presumption by demonstrating

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[466]European Communities' appellant's submission, para. 370. (footnote omitted)

[467]*Ibid*.

[468]Australia's appellee's submission, paras. 589 and 594; Thailand's appellee's submission, para. 204.

[469]Brazil's appellee's submission, para. 122. (footnote omitted)

[470]Panel Reports, paras. 7.340 and 8.3.

[471]*Ibid.*, paras. 7.374 and 8.4.

[472]*Ibid.*, para. 7.370.

[473]*Ibid.*, para. 7.373.

that the inconsistency did not result in nullification or impairment. We observe that Article 3.8 equates the concept of "nullification or impairment" with "adverse impact on other Members", although the DSU does not define "adverse impact".

297. In the present appeal, we have already upheld the Panel's finding that the European Communities acted inconsistently with the *Agreement on Agriculture* by providing export subsidies on sugar in excess of its commitment levels.[474] Accordingly, a presumption arises under Article 3.8 that the European Communities has nullified or impaired benefits accruing to the Complaining Parties, and it is up to the European Communities to rebut this presumption.

298. We note that the Complaining Parties provided evidence to the Panel suggesting that the EC sugar regime caused them losses, for example, of US $494 million for Brazil and US $151 million for Thailand in 2002.[475] The Panel specifically found 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."[476] The European Communities has not attempted to rebut this evidence on appeal. The European Communities, instead, appears to suggest that, to rebut the presumption of nullification or impairment, it need only demonstrate that the Complaining Parties "could not have expected that the EC would take any measure to reduce its exports of C sugar."[477]

299. The text of Article 3.8 of the DSU suggests that a Member may rebut the presumption of nullification or impairment by demonstrating that its breach of WTO rules has no adverse impact on other Members. Trade losses represent an obvious example of adverse impact under Article 3.8. Unless a Member demonstrates that there are no adverse trade effects arising as a consequence of WTO-inconsistent export subsidies, we do not believe that a complaining Member's expectations would have a bearing on a finding pursuant to Article 3.8 of the DSU. Therefore, the European Communities has failed to rebut the presumption of nullification or impairment pursuant to Article 3.8 of the DSU.

300. In these circumstances, we *uphold* the Panel's finding, in paragraphs 7.374 and 8.4 of the Panel Reports, that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*.

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[474]*Supra*, para. 290.

[475]Panel Reports, para. 7.363.

[476]*Ibid.*, para. 7.372.

[477]European Communities' appellant's submission, para. 367.

IX. Article 3.10 of the DSU and the Principle of Good Faith

301. We turn next to address the European Communities' assertion that the Panel erred in finding that, by claiming that exports of C sugar were in breach of the European Communities' commitments, the Complaining Parties did not act inconsistently with Article 3.10 of the DSU "and, more generally, with the requirements of the principle of good faith".[478] We begin by noting that this aspect of the European Communities' appeal is limited to claims against exports of C sugar.[479]

A. *Panel Findings and Appeal by the European Communities*

302. The Panel found that the Complaining Parties "ha[d] acted in good faith in the initiation and conduct of the present dispute proceedings".[480] The Panel emphasized that the Complaining Parties "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."[481] The Panel explained that:

> ... 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.[482]

303. The European Communities appeals the Panel's findings on two grounds. First, it argues that the Panel failed to address the European Communities' allegation that the Complaining Parties acted

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[478]European Communities' appellant's submission, para. 295 (referring to Panel Reports, paras. 7.54-7.75 and 7.348-7.354).

[479]In its Notice of Appeal, the European Communities notified that it seeks review of:

> 5) The conclusion, and the related legal findings and interpretations, set out in paragraphs 7.61-7.75 and 7.348-7.354 of the Panel reports, that, by claiming that exports of C sugar were in excess of the EC's commitment levels the Complainants did not act inconsistently with Article 3.10 DSU and the principle of good faith.

Thus, the European Communities has not appealed the Panel's findings with regard to whether the Complaining Parties acted in good faith in bringing claims against export subsidies provided to sugar of ACP/Indian origin.

[480]Panel Reports, para. 7.74.

[481]*Ibid.*

[482]*Ibid.*, para. 7.73.

inconsistently with Article 3.10 of the DSU "and, more generally, with the requirements of the principle of good faith".[483] The European Communities submits that, by not addressing that allegation, the Panel "failed to make an objective assessment of the matter", as required under Article 11 of the DSU, and "failed to address the relevant provisions of the covered agreements cited by the parties", as required by Article 7.2 of the DSU. Secondly, the European Communities contends that the Panel erred in finding that the Complaining Parties were not precluded or estopped from bringing their claims in relation to C sugar.

B. *Whether the Panel Failed "to Address" the European Communities' Claim that the Complaining Parties Acted Inconsistently with Article 3.10 of the DSU and the Principle of Good Faith*

304. The European Communities alleges that the Panel failed to address its allegation that the Complaining Parties acted inconsistently with Article 3.10 of the DSU and the principle of good faith by exercising their rights under the DSU in an "unreasonable" and "abusive manner" by "seeking to exploit what would be, at most, an excusable scheduling error in order to secure a manifestly unfair advantage".[484] The European Communities acknowledges, however, that the Panel addressed its arguments regarding the "related, but distinct" issue of whether the Complaining Parties were "estopped" from bringing a claim against C sugar.[485] The Complaining Parties, in contrast, take the view that the Panel's findings on estoppel also addressed the European Communities' claims relating to Article 3.10 of the DSU and good faith.

305. We understand the Panel to have addressed the European Communities' arguments on Article 3.10 of the DSU and good faith together with the European Communities' arguments regarding estoppel. We note, for instance, that, at the outset of its analysis, the Panel referred to the "parties' arguments in respect to good faith *and* estoppel".[486] In summarizing those arguments, the Panel referred, *inter alia*, to the European Communities' contention that "the Complainants were acting inconsistently with the general principle of good faith and with their obligation[s] under Article 3.10 of the *DSU* ".[487]

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[483]European Communities' appellant's submission, para. 295 (referring to Panel Reports, paras. 7.54-7.75 and 7.348-7.354).

[484]*Ibid.*, para. 316.

[485]*Ibid.*, para. 342.

[486]Panel Reports, para. 7.54. (emphasis added)

[487]*Ibid.*, para. 4.150.

306. Based on its analysis[488], the Panel concluded that:

> ... the Complainants *have acted in good faith in the initiation and conduct of the present dispute proceedings*. ... 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.[489] (emphasis added)

307. We consider in subsection C below the issue whether the principle of estoppel applies in the context of WTO dispute settlement. Here, we observe that, to the extent that this concept applies at all, it is reasonable for a panel to examine estoppel in the context of determining whether a Member has engaged "in these procedures in good faith", as required under Article 3.10 of the DSU. Hence, not only do we believe that the Panel's examination did not fail to address the European Communities' contention on Article 3.10 and good faith, but the Panel made no error in addressing this issue together with the issue of estoppel. We therefore see no error in the Panel's approach. Consequently, we also find no fault with the Panel's analysis under Article 7.2 or Article 11 of the DSU.

308. We turn next to address the European Communities' argument that the Complaining Parties were estopped from bringing claims against C sugar.

C. *Whether the Complaining Parties were Estopped from Bringing Claims Against C Sugar*

309. The Panel cautioned that "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."[490] The Panel added that "[t]he principle of estoppel has never been applied by any panel or the Appellate Body."[491] The Panel went on to opine that, assuming, for the sake of argument, that estoppel could be invoked in WTO dispute settlement:

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[488]Panel Reports, paras. 7.61-7.73.

[489]*Ibid.*, para. 7.74.

[490]*Ibid.*, para. 7.63.

[491]*Ibid.* The panels in *Argentina – Poultry Anti-Dumping Duties* and *Guatemala – Cement II* did, however, refer to the principle of estoppel. (See *ibid.*, paras. 7.71-7.72) The panel in *EC – Asbestos* also referred to estoppel. (Panel Report, *EC – Asbestos*, para. 8.60)

> 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.[492]

310. We agree with the Panel that it is far from clear that the estoppel principle applies in the context of WTO dispute settlement. Indeed, on appeal, the participants and third participants have advanced highly divergent views on the concept itself and its applicability to WTO dispute settlement.

311. The European Communities argues that estoppel is a general principle of international law, which follows from the broader principle of good faith. As such, estoppel is "one of the principles which Members are bound to observe when engaging in dispute settlement procedures, in accordance with Article 3.10 of the DSU."[493] Regarding the content of estoppel, the European Communities argues that "[e]stoppel may arise not only from express statements, but also from various forms of conduct, including silence, where, upon a reasonable construction, such conduct implies the recognition of a certain factual or juridical situation."[494] Australia, in contrast, submits that the principle of estoppel is not applicable in WTO dispute settlement. With respect to the content of estoppel, Australia submits that estoppel cannot "apply as to a statement of a legal situation".[495] Brazil agrees with the Panel that the European Communities' claims regarding estoppel were "without merit".[496] Similarly, Thailand maintains that the Panel was correct in concluding that the principle of "estoppel is not mentioned in the WTO Agreement, or the DSU, and that it has never been applied by any panel or the Appellate Body."[497] The United States emphasizes that "[n]owhere in the DSU or the other covered agreements is there a reference to 'estoppel'."[498] Moreover, according to the United

[492]Panel Reports, para. 7.73.

[493]European Communities' appellant's submission, para. 333. (footnote omitted)

[494]*Ibid.*, para. 335. (footnote omitted)

[495]Australia's appellee's submission, para. 510.

[496]Brazil's appellee's submission, para. 119.

[497]Thailand's appellee's submission, para. 186 (referring to Panel Reports, para. 7.63).

[498]United States' third participant's submission, para. 5.

States, "'[e]stoppel' is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body."[499]

312. The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgement as to whether action under these procedures would be fruitful", by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.

313. With these considerations in mind, we examine the arguments of the European Communities on this issue. Even assuming, for the sake of argument, that the principle of estoppel has the meaning that the European Communities ascribes to it, and that such a principle applies in WTO dispute settlement, we are not persuaded, in the circumstances of this case, that the Complaining Parties would be estopped from bringing claims against C sugar.

314. The European Communities argues that the Complaining Parties are estopped from bringing their claims against C sugar because their "lack of reaction to the non-inclusion of C sugar in the base quantity, together with the other undisputed facts and circumstances ..., clearly represented to the EC that the Complainants shared the understanding that the C sugar regime did not provide export subsidies."[500] Furthermore, according to the European Communities, it "could legitimately rely upon that shared understanding in order not to include exports of C sugar in the base levels."[501]

315. We observe, first, that the Panel specifically found that "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

[499]United States' third participant's submission, para. 9.

[500]European Communities' appellant's submission, para. 336.

[501]*Ibid.*

European Communities."[502] We consider this finding to be based on the Panel's weighing and appreciation of the evidence.

316. Secondly, the European Communities suggests that it "could legitimately rely"[503] upon an alleged "shared understanding" between "all the participants in the Uruguay Round"[504] in deciding not to include exports of C sugar in the base quantity levels in its Schedule. We recall that the Panel found no evidence of any such "shared understanding" in this case. Thus, as we see it, the European Communities has no basis on which to now assert that it could have legitimately relied upon such alleged "shared understanding" in deciding not to include exports of C sugar in the base quantity levels in its Schedule.

317. For these reasons, we reject, as did the Panel, the European Communities' allegation that the Complaining Parties were estopped from bringing their claims against C sugar.

318. We turn next to the European Communities' contention that the Complaining Parties acted inconsistently with Article 3.10 of the DSU and the principle of good faith.

D. *Whether the Complaining Parties Acted Inconsistently with Article 3.10 of the DSU and the Principle of Good Faith*

319. The European Communities requests the Appellate Body to "rule that, by bringing the claim that exports of C sugar breach the EC's commitments, the Complainants acted inconsistently with Article 3.10 [of the] DSU and, more generally, with the principle of good faith, to the extent that such breach would result from the non-inclusion of C sugar in the base quantity from which the commitments were calculated."[505] We are unable to agree with the European Communities. We see nothing in the Panel record to suggest that the Complaining Parties acted inconsistently with Article 3.10 of the DSU or the principle of good faith. Accordingly, we agree with the Panel that the Complaining Parties acted in good faith.

320. For all these reasons, we *uphold* the Panel's findings, in paragraph 7.74 of the Panel Reports, that the Complaining Parties acted in good faith, under Article 3.10 of the DSU, in the initiation and conduct of the present dispute settlement proceedings and have not been estopped, through their

[502]Panel Reports, para. 7.73. (emphasis added)

[503]European Communities' appellant's submission, para. 336.

[504]European Communities' response to questioning at the oral hearing.

[505]European Communities' appellant's submission, para. 364.

actions or silence, from alleging that the European Communities' exports of C sugar are in excess of its export subsidy reduction commitments.

X. Judicial Economy

A. *The Panel's Analysis and the Arguments on Appeal*

321. Having found that the European Communities acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, the Panel found that it could, in principle, "also examine the Complainants claims that the [EC sugar] 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".[506] The Panel noted, however, that "[t]he question that arises is whether the Panel *should* examine these claims, or whether it should rather apply the principle of judicial economy."[507]

322. Quoting from the Appellate Body Report in *Australia – Salmon*, the Panel took the view that it need address only "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'."[508]

323. Turning to the issue before it, the Panel opined, first, that, "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*, [the European Communities would] 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*."[509] Thus, the Panel considered that its findings under the *Agreement on Agriculture* "should be sufficient to fully resolve the matter at issue".[510] Secondly, the Panel disagreed with the Complaining Parties that it should address the claims under Article 3 of the *SCM Agreement* so that it could then recommend that the prohibited subsidies be withdrawn "without delay" within the time period specified by it, as required by Article 4.7 of the *SCM Agreement*. The Panel stated that it did not believe that the

[506]Panel Reports, para. 7.381.

[507]*Ibid.* (original emphasis)

[508]*Ibid.*, para. 7.382 (quoting Appellate Body Report, *Australia – Salmon*, para. 223, in turn quoting Article 21.1 of the DSU).

[509]*Ibid.*, para. 7.383.

[510]*Ibid.*

Appellate Body's reasoning in *Australia – Salmon* "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."[511] Referring to findings of the panel in *Canada – Dairy (Article 21.5 – New Zealand and US)*, the Panel opined that there was, in any event, "some issue"[512] as to whether it was entitled to make a recommendation under Article 4.7 of the *SCM Agreement*. Thirdly, the Panel found that the Complaining Parties had 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*".[513] The Panel explained 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."[514] The Panel added that many of the Complaining Parties' references to the *SCM Agreement* "were made in the *context* of their claims under the *Agreement on Agriculture*".[515] Based on this analysis, the Panel exercised judicial economy with respect to the Complaining Parties' claims under Article 3 of the *SCM Agreement*.[516]

324. On appeal, the Complaining Parties submit that the Panel erred in exercising judicial economy with respect to their claims under Article 3 of the *SCM Agreement*. The Complaining Parties allege that, in exercising judicial economy, the Panel acted inconsistently with Article 11 of the DSU.[517] They further argue that the Panel erred in exercising judicial economy because it failed to consider the remedies that would have been available to the Complaining Parties under the *SCM Agreement*, had their claims under Article 3 of that Agreement succeeded. Referring to previous WTO jurisprudence on judicial economy, the Complaining Parties assert that a panel is required to examine a claim where "this is necessary to shape the course of implementation through 'sufficiently precise' recommendations and rulings of the DSB".[518]

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[511]Panel Reports, para. 7.384.

[512]*Ibid.*

[513]*Ibid.*, para. 7.386.

[514]*Ibid.* In its assessment of the Complaining Parties' claims, the Panel did not indicate what, in its view, were those "important questions", except for the question whether the Panel was entitled to make a recommendation under Article 4.7 of the *SCM Agreement*.

[515]*Ibid.*, para. 7.386. (original emphasis)

[516]*Ibid.*, para. 7.387.

[517]Australia's other appellant's submission, paras. 5-6; Thailand's other appellant's submission, para. 80. Brazil does not contend that the Panel acted inconsistently with Article 11 of the DSU.

[518]Brazil's other appellant's submission, para. 22. See also Australia's other appellant's submission, paras. 30 and 43; and Thailand's other appellant's submission, paras. 29-30.

325. The Complaining Parties request, should the Appellate Body agree that the Panel erred in exercising judicial economy, the Appellate Body to complete the legal analysis to determine whether the European Communities has acted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing prohibited export subsidies to sugar. The Complaining Parties also request, should the Appellate Body find that the European Communities has acted inconsistently, the Appellate Body to recommend that the prohibited subsidies be withdrawn without delay, as required by Article 4.7 of the *SCM Agreement*.[519]

326. The European Communities contends that the Panel did not err in exercising judicial economy.[520] Quoting the statement of the Appellate Body in *Canada – Wheat Exports and Grain Imports* that a panel may "refrain from making multiple findings that the same measure is inconsistent with various provisions *when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute*"[521], the European Communities asserts that "judicial economy does not concern the manner in which a panel's decision to exercise its discretion affects eventual implementation, but rather whether the findings in question are sufficient to resolve a dispute *as to the consistency of a measure with the covered agreements*."[522] Even if the Panel did err in exercising judicial economy, the European Communities submits that the Appellate Body should find that the export subsidy provisions of the *SCM Agreement* are not applicable to export subsidies maintained under the *Agreement on Agriculture*.[523] In any case, the European Communities contends that the Appellate Body is not in a position to complete the analysis of this issue.[524]

B. *Exercise of Judicial Economy in WTO Dispute Settlement Generally*

327. We begin our analysis by recalling the Appellate Body's observations in *Canada – Wheat Exports and Grain Imports*, summarizing the circumstances in which panels may exercise judicial economy in WTO dispute settlement:

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[519]Australia's other appellant's submission, para. 68; Brazil's other appellant's submission, para. 11; Thailand's other appellant's submission, para. 7.

[520]European Communities' appellee's submission, para. 21.

[521]*Ibid.*, para. 14 (quoting Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133). (emphasis added by the European Communities)

[522]*Ibid.*, para. 15. (emphasis added)

[523]*Ibid.*, para. 75.

[524]*Ibid.*, para. 81.

> The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint. At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law.[525] (original emphasis; footnotes omitted)

328. We also recall the Appellate Body's statement in *Australia – Salmon*, that a panel is under a duty "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".[526]

C. *Did the Panel Err in Exercising Judicial Economy with Respect to the Claims under Article 3 of the SCM Agreement?*

329. With these considerations in mind, we turn to the question of whether the Panel failed to discharge its obligation under Article 11 of the DSU, by declining to rule on the Complaining Parties' claims under Article 3 of the *SCM Agreement*.

330. Article 11 of the DSU provides, in relevant part:

> ... a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

331. Thus, in addition to ruling on the matter before it, a panel is required to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements." Such "other findings" could, for instance, relate to implementation, to the

[525]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[526]Appellate Body Report, *Australia – Salmon*, para. 223 (quoted in Appellate Body Report, *US – Lamb*, para. 191).

extent that such findings "will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

332. Under Article 19.1 of the DSU, where a panel "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". (footnote omitted) The panel is not required to make a recommendation as to how the Member should implement its obligations or as to the timeframe for implementation. However, Article 19.1 also provides that "[a] panel or [the] Appellate Body *may* suggest ways in which the Member concerned could implement the recommendations." (emphasis added)

333. Pursuant to Article 1.2 of the DSU[527], the situation is different for disputes brought under Part II of the *SCM Agreement*. The *SCM Agreement* contains "special rules and additional procedures on dispute settlement" in respect of subsidies prohibited under Article 3 of the *SCM Agreement*. In particular, Article 4.7 of the *SCM Agreement* provides:

> If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

334. Thus, where a panel finds that a complaining Member has established that the subsidy in question is prohibited within the meaning of Article 3 of the *SCM Agreement*, it shall make an additional recommendation as described in Article 4.7. Upon adoption, this additional recommendation—that the subsidizing Member "withdraw the subsidy without delay"—will become a recommendation or ruling of the DSB.

335. In this case, the Panel's findings under Articles 3 and 8 of the *Agreement on Agriculture* were not sufficient to "fully resolve" the dispute. This is because, in declining to rule on the Complaining Parties' claims under Article 3 of the *SCM Agreement*, the Panel precluded the possibility of a remedy being made available to the Complaining Parties, pursuant to Article 4.7 of the *SCM Agreement*, in the event of the Panel finding in favour of the Complaining Parties with respect to

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[527]Article 1.2 of the DSU provides, in relevant part:

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.

We note that the *SCM Agreement* is contained in Appendix 2 to the DSU.

their claims under Article 3 of the *SCM Agreement*.[528] Moreover, in declining to rule on the Complaining Parties' claims under Article 3 of the *SCM Agreement*, the Panel failed to discharge its obligation under Article 11 of the DSU by failing to make "such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements", namely, a recommendation or ruling by the DSB pursuant to Article 4.7. This constitutes false judicial economy and legal error.

D. *Completing the Panel's Legal Analysis*

336. Having found that the Panel exercised false judicial economy by not examining the Complaining Parties' claims under the *SCM Agreement*, we now consider the Complaining Parties' request that the Appellate Body complete the legal analysis and determine that the European Communities has acted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing prohibited export subsidies for ACP/India equivalent sugar and C sugar. Should the Appellate Body find that the European Communities has acted inconsistently, the Complaining Parties request the Appellate Body to recommend that the prohibited subsidies be withdrawn without delay, as required by Article 4.7 of the *SCM Agreement*.[529] By contrast, the European Communities argues that, in the event that the Appellate Body reverses the Panel's decision to exercise judicial economy, and further concludes that the *SCM Agreement* can be applied cumulatively with the *Agreement on Agriculture*, in the circumstances of this dispute, the Appellate Body would not be in a position to complete the analysis in the absence of sufficient factual findings by the Panel.

337. In several previous disputes, the Appellate Body examined an issue "not specifically addressed by the panel, in order to complete the legal analysis and resolve the dispute between the parties".[530] However, the Appellate Body has declined to complete the legal analysis where "the factual findings of the panel and the undisputed facts in the panel record" did not provide a sufficient basis for the legal analysis by the Appellate Body.[531] Moreover, as Article 17.6 of the DSU limits appeals to "issues of law covered in the panel report and legal interpretations developed by the panel",

[528]To address the claims of the Complaining Parties under Article 3 of the *SCM Agreement*, the Panel would have had to examine, as a preliminary matter, whether Article 3 of the *SCM Agreement* applies to the export subsidies in this dispute.

[529]Australia's other appellant's submission, para. 68; Brazil's other appellant's submission, para. 11; Thailand's other appellant's submission, para. 7.

[530]Appellate Body Report, *Australia – Salmon*, para. 117 (citing Appellate Body Report, *US – Gasoline*, pp. 19 *ff*, DSR 1996:I, 3, at 18 *ff*; Appellate Body Report, *Canada – Periodicals*, pp. 23 *ff*, DSR 1997:I, 449, at 468 *ff*; Appellate Body Report, *EC – Poultry*, paras. 154 *ff*; and Appellate Body Report, *US – Shrimp*, paras. 123 *ff*).

[531]Appellate Body Report, *EC – Asbestos*, para. 78.

the Appellate Body has also previously declined to complete the legal analysis of a panel in circumstances where that would involve addressing claims "which the panel had not examined at all".[532] In addition, the Appellate Body has indicated that it may complete the analysis only if the provision that a panel has not examined is "*closely related*"[533] to a provision that the panel has examined, and that the two are "part of a *logical continuum*".[534]

338. Turning to the specific case before us, we note that the Complaining Parties argue that their claims under the *SCM Agreement* are closely related to their claims under the *Agreement on Agriculture*.[535] We are not persuaded, however, that Articles 3, 8, and 9.1 of the *Agreement on Agriculture*, on the one hand, and Articles 3.1(a), 3.2, and items (a) and (d) of the Illustrative List of the *SCM Agreement*, on the other hand, are "closely related", because the issues presented under the two Agreements are different in several respects.

339. Furthermore, in the instant case, we note that the Panel made reference to the limited arguments made by the Complaining Parties under the *SCM Agreement*:

> [T]he Complainants [had] 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, [they] focused on their claims under the *Agreement on Agriculture*.[536]

Although, on appeal, the Complaining Parties did argue their claims under the *SCM Agreement* to some extent, they did not address, in a sufficient manner, the question whether Article 3 of the *SCM Agreement* applies to export subsidies listed in Article 9.1 of the *Agreement on Agriculture* that are provided to *scheduled* agricultural products in excess of a responding Member's commitment levels. We believe that, in the light of Article 21 of the *Agreement on Agriculture* and the chapeau of Article 3 of the *SCM Agreement*, the question of the applicability of the *SCM Agreement* to the

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[532]Appellate Body Report, *EC – Asbestos*, paras. 79 and 82 (cited in Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343). See also Appellate Body Report, *EC – Poultry*, para. 107.

[533]Appellate Body Report, *EC – Asbestos*, para. 79. (original emphasis)

[534]*Ibid.* (citing Appellate body Report, *Canada – Periodicals*, p. 24, DSR 1997:I, 449, at 469). (emphasis added in *EC – Asbestos*)

[535]See Brazil's other appellant's submission, para. 49; and Thailand's other appellant's submission, para. 56.

[536]Panel reports, para. 7.386.

export subsidies in this dispute raises a number of complex issues.[537] We also consider that, in the absence of a full exploration of these issues, completing the analysis might affect the due process rights of the participants.

340. Moreover, we do not have the requisite factual findings to complete the legal analysis. In particular, we do not have sufficient facts before us, as would be necessary to specify the period of time for withdrawal, as required by Article 4.7 of the *SCM Agreement*. We note in this respect that, when specifying what period would represent "without delay", panels have taken into account, *inter alia*, "the nature of the measures and the difficulties likely to be faced in implementing the recommendation".[538] Based on our reading of the Panel Reports and the Panel record, we fail to see any evidence therein regarding the nature of the measures that would be required to "withdraw" the subsidy, which would permit us to make a recommendation under Article 4.7. Hence, *even if* we were able to examine the Complaining Parties' claims under the *SCM Agreement* and, *even if* we were to conclude that the *SCM Agreement* applies in the circumstances of this dispute and that the European Communities acted inconsistently with its obligations under the *SCM Agreement*, we

[537]These issues include, for instance, whether the *Agreement on Agriculture* contains "specific provisions dealing specifically with the same matter" (Appellate Body Report, *US – Upland Cotton*, paras. 532-533 (quoting Appellate Body Report, *EC – Bananas III*, para. 155; and referring to Appellate Body Report, *Chile – Price Band System*, para. 186)); whether the *SCM Agreement* applies to the subsidy as a whole, or whether it applies to the subsidy only to the extent that the subsidy exceeds the responding Members' commitment levels as specified in its Schedule; and whether, in the event the *SCM Agreement* applies, a panel could make a recommendation to withdraw the subsidy in whole, or whether that recommendation would apply to the subsidy only to the extent that it exceeds the responding Member's commitment levels.

[538]Panel Report, *Brazil – Aircraft*, para. 8.5. See also Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 8.4; Panel Report, *Canada – Autos*, para. 11.6-11.7; and Panel Report, *US – FSC*, paras. 8.6-8.8. We further note that the panel in *Brazil – Aircraft* determined that:

> ... taking into account the nature of the measures and the procedures which may be required to implement our recommendation, on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other, we conclude that Brazil shall withdraw the subsidies within 90 days.

(Panel Report, *Brazil – Aircraft*, para. 8.5) Agreeing with the panel's recommendation, the Appellate Body in the same case noted that:

> ... there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*.

(Appellate Body Report, *Brazil – Aircraft*, para. 192)

would not necessarily be in a position to make a recommendation under Article 4.7 as to the time period for withdrawal of the subsidy.[539]

341. For all these reasons, we are not in a position, and we therefore decline, to complete the legal analysis and to examine the Complaining Parties' claims under the *SCM Agreement* left unaddressed by the Panel.

XI. The European Communities' Notice of Appeal

342. Australia contends that the European Communities' Notice of Appeal does not satisfy the "due process requirements" of Rule 20(2)(d) of the *Working Procedures*[540] for four main reasons. First, the European Communities does not "quote"[541], in its Notice of Appeal, the specific Panel findings or conclusions that it appeals. Secondly, with respect to some claims, the European Communities fails to distinguish between a conclusion and a finding, or fails to identify the findings in question. Thirdly, the European Communities does not list, for each claim, the provisions that the Panel is alleged to have erred in interpreting or applying. Finally, the European Communities erroneously refers in its Notice of Appeal to a part of its Schedule as "a provision of a covered agreement".[542] Australia requests the Appellate Body to "rule whether the EC Notice of Appeal complies with the due process standard for appellate review".[543]

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[539]In this respect, we note that the European Communities has stated that:

> ... the Complainants never explained why a 90 day period would be appropriate and more importantly the Panel never enquired, and consequently made no findings on the relevant Community procedures which would have to be undertaken to revise the sugar CMO. Consequently, there are no factual findings on the record permitting the Appellate Body to make a recommendation without denying the EC's due process rights to justify the most appropriate period of time for implementation.

(European Communities' appellee's submission, para. 29)

[540]Australia's appellee's submission, para. 23.

[541]*Ibid.*, para. 24.

[542]*Ibid.*

[543]*Ibid.*, para. 625(c). We note that Australia's appellee's submission does not contain an explicit request that the Appellate Body dismiss any of the European Communities' claims on the ground that they fall outside the scope of the appeal due to alleged deficiencies in the Notice of Appeal. In response to questioning at the oral hearing, Australia confirmed that it makes no request to have the appeal dismissed on "technical grounds". Rather, Australia indicated that its purpose in asking for a ruling was to obtain *clarification* regarding Rule 20(2)(d) of the *Working Procedures*.

343. Rule 20(2)(d) of the *Working Procedures* provides:

> *Commencement of Appeal*
>
> ...
>
> (2) A Notice of Appeal shall include the following information:
>
> ...
>
> (d) a brief statement of the nature of the appeal, including:
>
> (i) identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel;
>
> (ii) a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying; and
>
> (iii) without prejudice to the ability of the appellant to refer to other paragraphs of the panel report in the context of its appeal, an indicative list of the paragraphs of the panel report containing the alleged errors.

344. In its Notice of Appeal, the European Communities "seeks review" of six "conclusion[s]" and "related legal findings and interpretations" set out in certain specified paragraphs of the Panel Reports. The European Communities summarizes the substance of each contested conclusion and the related legal findings and interpretations. The Notice of Appeal also contains a list of the legal provisions of the covered agreements that the Panel is alleged to have erred in interpreting or applying. In our view, the Notice of Appeal gives adequate notice to the Complaining Parties of the content of its appeal so as to allow them to make a proper defence, as required by Rule 20(2)(d) of the *Working Procedures*.

345. For these reasons, we *find* that the European Communities' Notice of Appeal satisfies the requirements of Rule 20(2)(d) of the *Working Procedures*.

XII. Findings and Conclusions

346. For the reasons set forth in this Report, the Appellate Body:

(a) upholds the Panel's finding, in paragraph 7.37 of the Panel Reports, that the alleged "payments", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of low-priced sales of C beet to sugar producers, fell within the Panel's terms of reference;

(b) upholds the Panel's finding, in paragraphs 7.191, 7.198, 7.222, and 8.1(a) of the Panel Reports, that Footnote 1 to Section II, Part IV of the European Communities' Schedule does not enlarge or otherwise modify the European Communities' commitment levels specified in that Schedule;

(c) upholds the Panel's finding, in paragraph 7.292 of the Panel Reports, that the alleged payments in the form of low-priced sales of C beet to sugar producers are "financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*;

(d) upholds the Panel's finding, in paragraph 7.334 of the Panel Reports, that the production of C sugar receives a "payment on the export financed by virtue of governmental action", within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, in the form of transfers of financial resources through cross-subsidization resulting from the operation of the European Communities' sugar regime;

(e) upholds, as a result of its findings under (c) and (d) above, the Panel's finding, in paragraph 8.1(f) of the Panel Reports, that 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;

(f) upholds, as a result of its findings under (b), (c), (d), and (e) above, the Panel's finding, in paragraphs 7.340 and 8.3 of the Panel Reports, that the European Communities, through its sugar regime, acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*;

(g) upholds the Panel's finding, in paragraphs 7.374 and 8.4 of the Panel Reports, that the European Communities' violations of the *Agreement on Agriculture* nullified or impaired the benefits accruing to the Complaining Parties under the *Agreement on Agriculture*;

(h) upholds the Panel's finding, in paragraph 7.74 of the Panel Reports, that the Complaining Parties acted in good faith, under Article 3.10 of the DSU, in the initiation and conduct of the present dispute settlement proceedings and, assuming *arguendo* that estoppel applies, have not been estopped, through their actions or silence, from alleging that the European Communities' exports of C sugar are in excess of its export subsidy reduction commitments;

(i) finds that the Panel erred, in paragraph 7.387 of the Panel Reports, in exercising judicial economy, and thereby failed to discharge its obligation under Article 11 of the DSU with respect to the Complaining Parties' claims under Article 3 of the *SCM Agreement*, but is not in a position, and therefore declines, to complete the legal analysis and to examine the Complaining Parties' claims under the *SCM Agreement* left unaddressed by the Panel; and

(j) finds that the European Communities' Notice of Appeal satisfies the requirements of Rule 20(2)(d) of the *Working Procedures for Appellate Review*.

347. The Appellate Body recommends that the Dispute Settlement Body request the European Communities to bring Council Regulation (EC) No. 1260/2001, as well as all other measures implementing or related to the European Communities' sugar regime, found in this Report, and in the Panel Reports as modified by this Report, to be inconsistent with the *Agreement on Agriculture*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 9th day of April 2005 by:

A.V. Ganesan
Presiding Member

Merit E. Janow
Member

Yasuhei Taniguchi
Member

ANNEX 1

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.

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ANNEX 2

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 sector [1], 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".

[1] 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.

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 1.6 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.

ANNEX 3

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.

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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 Mio ECU						Base Quantity (*) 000 t	Calendar/ other year applied (*)	Annual and final quantity commitment levels 1995 – 2000 000 t						Relevant Supporting Tables and document reference
1	2	3	4						5	6	7						8
			1995	1996	1997	1998	1999	2000			1995	1996	1997	1998	1999	2000	
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 Appellate Body Report, references on this page to products other than sugar have been deleted.

ANNEX 5

WORLD TRADE ORGANIZATION

WT/DS265/25
WT/DS266/25
WT/DS283/6
13 January 2005

(05-0190)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Notification of an Appeal by the European Communities
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 13 January 2005, from the Permanent Delegation of the European Commission, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate review, the European Communities ("EC") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the reports of the Panel established in response to the requests from Australia, Brazil and Thailand in the disputes *European Communities – Export Subsidies on Sugar* (WT/DS265/R, WT/DS266/R and WT/DS283/R).

The European Communities seeks review of:

1) The conclusion, and the related legal findings and interpretations, contained in paragraphs 7.12-7.16 and 7.24-7.37 of the Panel reports, that the alleged "payments" in the form of sales of C beet were within the terms of reference of the Panel.

2) The conclusion, and the related legal findings and interpretations set out in paragraphs 7.120 to 7.222, 7.235 to 7.238 and 8.1(a), (b) and (c) of the Panel reports that Footnote 1 to Section II, Part IV of the EC's Schedule has no legal effect and that, as a consequence, the EC's quantity commitment level for exports of sugar is 1,273,500 tonnes and the EC's budgetary outlay commitments is €499.1 million from marketing year 2000/2001.

   This conclusion is based on the following erroneous findings:

   - that Articles 3.3 and 8 of the *Agreement on Agriculture* require in all circumstances that a Member specify both budgetary and quantity commitments;

- that Footnote 1 to Section II, Part IV of the EC's Schedule is not a commitment limiting subsidisation, and does not cover exports equivalent to the volume of ACP/India sugar imported into the EC;

- that even if Footnote 1 to Section II, Part IV of the EC's Schedule is a commitment limiting subsidisation it would remain inconsistent with the *Agreement on Agriculture*; and

- that the jurisprudence of *US – Sugar Headnote* applies to export subsidy commitments

3) The conclusion, and the related legal findings and interpretations, set out in paragraphs 7.251-7335 and 8.1(f) of the Panel reports, that exports of C sugar benefit from export subsidies falling within Article 9.1(c) of the *Agreement on Agriculture*.

This conclusion is based on the following erroneous findings:

- that so-called "cross-subsidization" constitutes a payment on the exports of C sugar, which provides an export subsidy within the meaning of Article 9.1(c);

- that the supply of C beet is a payment on the exports of C sugar financed by virtue of Government action, which provides an export subsidy within the meaning of Article 9.1(c).

4) The overall conclusion, and the related legal findings and interpretations set out in paragraphs 7.336-7.340, 8.2 and 8.3 of the Panel reports, that the EC exported sugar in excess of its commitment levels in marketing year 2000/2001 and, therefore, has acted inconsistently with Articles 3.3 and 8 of the *Agreement on Agriculture.*

This conclusion is based on the erroneous conclusions mentioned above under 1), 2) and 3).

5) The conclusion, and the related legal findings and interpretations, set out in paragraphs 7.61-7.75 and 7.348-7.354 of the Panel reports, that, by claiming that exports of C sugar were in excess of the EC's commitment levels the Complainants did not act inconsistently with Article 3.10 DSU and the principle of good faith.

6) The conclusion, and the related legal findings and interpretations, set out in paragraphs 7.366-7.374 and 8.4 of the Panel Reports that the alleged violations resulting from the exports of C sugar nullify or impair benefits accrued to the Complainants under the *Agreement on Agriculture*.

The provisions of the covered agreements which the European Communities consider to have been erroneously interpreted or applied by the Panel include:

- Section II, Part IV of the EC's Schedule;

- Articles 3.3, 8 and 9.1 of the *Agreement on Agriculture*;

- Articles 3.7, 3.8, 3.10, 6.2, 7.1, 7.2, 9.2, 11 and 12.7 of the DSU.

ANNEX 6

WORLD TRADE ORGANIZATION

WT/DS265/27
25 January 2005

(05-0314)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Notification of an Other Appeal by Australia
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 25 January 2005, from the Delegation of Australia, is being circulated to Members.

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1. Pursuant to Rule 23 of the Working Procedures for Appellate Review, as adopted by the Appellate Body in accordance with the provisions of paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Australia hereby notifies its decision to appeal to the Appellate Body on the basis of errors both in certain issues of law covered in the report of the Panel on *European Communities – Export Subsidies on Sugar* (WT/DS265/R) (the "Panel Report") and in certain legal interpretations developed by the Panel in the Panel Report.

2. Australia seeks appellate review of:

(a) the Panel's decision, as set out in paragraphs 7.380-7.387 and in paragraphs 6.14-6.15 of the Panel Report, to exercise judicial economy and to decline to examine Australia's claims under Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"); and
(b) the Panel's consequent failure to make a recommendation in accordance with the provisions of Article 4.7 of the *SCM Agreement*.

3. The Panel's decision was based on the following errors of law and legal interpretation:

(i) that the Panel's findings under the *Agreement on Agriculture* should be sufficient to fully resolve the matter at issue (paragraph 7.383);
(ii) that there was some issue whether the Panel was entitled to make a recommendation to withdraw the measure and to specify a time period in accordance with the provisions of Article 4.7 of the *SCM Agreement* in the circumstances before it (paragraph 7.384);

(iii) that the Panel was not required to rule on Australia's claims under the *SCM Agreement* "merely in order to obtain what might – but would not necessarily be – more rapid compliance" (paragraph 7.384);
(iv) that the Panel's exercise of judicial economy did not diminish Australia's rights within the meaning of Article 19.2 of the *DSU* (paragraph 7.385); and
(v) the additional considerations in its decision to exercise judicial economy, being, in its view, that Australia focused on its claims under the *Agreement on Agriculture* and had not set forth its claims under Article 3 of the *SCM Agreement* in quite as clear and unambiguous a manner as under the *Agreement on Agriculture* (paragraphs 6.15 and 7.386).

4. In deciding to exercise judicial economy in respect of Australia's claims under the *SCM Agreement*, the Panel deprived Australia of its rights in regard to:

- a recommendation, in accordance with Article 4.7 of the *SCM Agreement*, that those export subsidies on sugar found inconsistent with the *SCM Agreement* be withdrawn without delay;
- a recommendation, in accordance with Article 4.7 of the *SCM Agreement*, specifying a time-period for withdrawal of the export subsidies in question;
- taking countermeasures in accordance with the provisions of Article 4.10 of the *SCM Agreement* in the event that the subsidies in question were not withdrawn within the specified time-period; and
- the application of special or additional rules and procedures, in accordance with the provisions of Article 1.2 and Appendix 2 of the *DSU*.

5. The Panel's decision to exercise judicial economy also serves to diminish Australia's rights under, and is inconsistent with, the provisions of Articles 1.2, 3.2, 3.4, 3.7 and 19.2 of the *DSU*. The Panel's decision is also inconsistent with the Panel's duty under Article 11 of the *DSU* to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

6. Australia requests that the Appellate Body reverse the Panel's legal findings and conclusions in respect of the exercise of judicial economy in regard to the provisions of the *SCM Agreement*. Australia further requests the Appellate Body to preserve Australia's rights under Articles 4.7 and 4.10 of the *SCM Agreement*, in accordance with Articles 1.2, 3.2 and 19.2 of the *DSU*, by ruling - on the basis of factual findings by the Panel and the undisputed facts on the Panel record - on Australia's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement* and to make the recommendation provided for under Article 4.7 of the *SCM Agreement*.

7. Australia cites paragraphs 6.14-6.15 and 7.380-7.387 of the Panel Report as an indicative list of paragraphs containing relevant errors in issues of law and legal interpretation developed by the Panel. Australia also cites paragraphs 3.4, 3.8, 4.2-4.3, 4.102-4.121, 4.177, 4.232-4.266, 7.234, 7.237, 7.375-7.381 and 8.1(e) of the Panel Report as an indicative list of paragraphs relevant to its request in paragraph 6 above of this Notice of Other Appeal.

8. Australia cites the following legal provisions of the covered agreements as those that the Panel erred in interpreting or applying:

- *SCM Agreement*: Articles 3.1(a) and 3.2, 4.7 and 4.10;
- *Agreement on Agriculture*: Article 21.1; and
- *DSU*: Article 1.2 and Appendix 2; Articles 3.2, 3.4, 3.7, 11 and 19.

ANNEX 7

WORLD TRADE ORGANIZATION

WT/DS266/27
25 January 2005

(05-0324)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Notification of an Other Appeal by Brazil
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 25 January 2005, from the Delegation of Brazil, is being circulated to Members.

Pursuant to Articles 16.4 and 17.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("*DSU*") and Rule 23 of the Working Procedures for Appellate Review, Brazil appeals certain issues of law and legal interpretation in the Panel Report in *European Communities – Export Subsidies on Sugar* (WT/DS266/R).

1. Brazil claims that the Panel committed legal error in the exercise of the principle of judicial economy, in paragraph 7.387 of the Panel Report, by declining to examine Brazil's claim that the regimes for A, B and C sugar, and for ACP/India equivalent sugar, involve the provision of export subsidies prohibited by Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

2. The Panel's finding is based on an erroneous interpretation and application of Article 4.7 of the *SCM Agreement* and Article 19.1 of the *DSU*. The Panel erred in deciding to exercise judicial economy on the basis of the implementation obligations in Article 19.1 of the *DSU*. These obligations would not apply if Brazil's claims under Article 3 of the *SCM Agreement* were upheld. Instead, in that event, the recommendations and rulings of the DSB would be determined pursuant to Article 4.7 of the *SCM Agreement*.

3. As a result of these errors, the Panel also erred in its interpretation and application of Article 19.2 of the *DSU* by nullifying the right of Brazil to resolve a dispute concerning prohibited export subsidies in terms of the implementation obligations available under Article 4.7 of the *SCM Agreement*. The Panel has also erred under Article 19.2 of the *DSU* by nullifying Brazil's right, in the event of a failure by the European Communities to comply with the recommendations and rulings of the DSB in this dispute, to avail itself of the remedies and procedures foreseen by Article 4.10 of the *SCM Agreement*.

4. Brazil claims, therefore, that the Panel erred in the exercise of the principle of judicial economy and also in the interpretation and application of Article 4.7 of the *SCM Agreement* and Articles 19.1 and 19.2 of the *DSU*. Brazil intends to argue that the Panel's findings in, *inter alia*, paragraphs 7.383 – 7.387 of the Panel Report contains these errors.

5. In the event that Appellate Body reverses the Panel's exercise of judicial economy, Brazil requests that the Appellate Body complete the legal analysis by examining Brazil's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement* on the basis of Panel's factual findings and the uncontested facts of record.

ANNEX 8

WORLD TRADE ORGANIZATION

WT/DS283/8
25 January 2005

(05-0322)

Original: English

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Notification of an Other Appeal by Thailand
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 25 January 2005, from the Delegation of Thailand, is being circulated to Members.

Pursuant to Rule 23 of the Appellate Body's Working Procedures for Appellate Review, Thailand hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report *European Communities – Export Subsidies on Sugar* (*Complaint by Thailand)*, WT/DS283/R, (the "Panel Report") and certain legal interpretations developed by the Panel in that Report.

Thailand seeks appellate review of:

(a) the Panel's decision, set out in paragraphs 7.380-7.387 and in paragraphs 6.14 -6.15 of the Panel Report, not to make findings on the claims of Thailand under Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"); and

(b) the Panel's consequent failure to make a recommendation in accordance with Article 4.7 of the SCM Agreement.

The Panel's decision was based on the following erroneous findings:

- that the Panel's rulings under the Agreement on Agriculture should be sufficient to fully resolve the dispute between the parties (para. 7.383 of the Panel Report);
- that there was "some issue" as to whether the Panel was entitled to make a recommendation in accordance with Article 4.7 of the SCM Agreement in the circumstances before it (para. 7.384 of the Panel Report);
- that the Panel was not required to rule on the Complainants' claims under the SCM Agreement "merely in order to obtain what might - but would not necessarily be - more rapid compliance" (para. 7.384 of the Panel Report);

- that the Panel's exercise of judicial economy did not diminish the rights of the Complainants with the meaning of Article 19.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") (para. 7.385 of the Panel Report); and
- that an additional consideration relevant to the Panel's decision to exercise judicial economy was that the Complainants focused their claims on the Agreement on Agriculture and did not set forth their claims under Article 3 of the SCM Agreement in quite as clear and unambiguous manner as under the Agreement on Agriculture (paras. 6.15 and 7.386 of the Panel Report).

The Panel's decision not to rule on Thailand's claims under the SCM Agreement has deprived Thailand of the remedies available under Article 4 of the SCM Agreement, including Thailand's right under Article 4.7, first sentence, to a recommendation that those export subsidies on sugar that are inconsistent with the SCM Agreement and the Agreement on Agriculture be withdrawn without delay; Thailand's right under Article 4.7, second sentence, that the Panel specify the time-period within which those subsidies must be withdrawn; and Thailand's right to take countermeasures in accordance with the criteria and procedures set out in Article 4.10 of the SCM Agreement in the event that the European Communities fails to withdraw those subsidies.

The Panel's failure to accord Thailand its rights under Articles 4 of the SCM Agreement is inconsistent with Articles 3.2 and 19.2 of the DSU, which require panels and the Appellate Body not to "... diminish the rights ... provided in the covered agreements". The Panel's failure to provide a recommendation under Article 4.7 of the SCM Agreement is also inconsistent with a panel's duty under Article 11 of the DSU to "make ... findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".

Thailand requests the Appellate Body to reverse the Panel's legal findings and conclusions on judicial economy. It further requests the Appellate Body to preserve Thailand's rights under Article 4.7 and 4.10 of the SCM Agreement in accordance with Articles 3.2 and 19.2 of the DSU by ruling, on the basis of the factual findings by the Panel and the undisputed facts in the Panel record, on the claims that Thailand made under Articles 3.1(a) and 3.2 of SCM Agreement and making the recommendation provided under Article 4.7 of the SCM Agreement.

The provisions of the covered agreements that Thailand considers the Panel to have erroneously interpreted or applied include, in addition to those cited above:

- Articles 1.2 and Appendix 2 to the DSU;
- Articles 3.4, 3.7, and 19.1 of the DSU; and
- Articles 13(c)(ii) and 21.1 of the Agreement on Agriculture.