

*Before the World Trade Organization*

**EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR  
(WT/DS265)**

**Submission of Australia**

*Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures  
Governing the Settlement of Disputes*

Geneva, 28 September 2005

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**DISPUTE SETTLEMENT CASES CITED IN THIS SUBMISSION**

<b>Short Title</b>	<b>Full Title</b>
<i>Australia-Salmon</i>	<i>Australia – Measures Affecting Importation of Salmon, WT/DS18/9, Award of the Arbitrator</i>
<i>Canada–Autos</i>	<i>Canada – Certain Measures Affecting the Automotive Industry, WT/DS139/12, WT/DS142/12, Award of the Arbitrator</i>
<i>Canada-Patent Term</i>	<i>Canada – Term of Patent Protection, WT/DS170/10, Award of the Arbitrator</i>
<i>Canada-Pharmaceuticals</i>	<i>Canada – Patent Protection of Pharmaceutical Products, WT/DS114/13, Award of the Arbitrator</i>
<i>Chile–Price Band System</i>	<i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, WT/DS207/13, Award of the Arbitrator</i>
<i>EC-Bananas</i>	<i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/15, Award of the Arbitrator</i>
<i>EC-Hormones</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/15, WT/DS48/13, Award of the Arbitrator</i>
<i>EC-GSP (India)</i>	<i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/14, Award of the Arbitrator</i>
<i>EC Sugar Appellate Body Report</i>	<i>European Communities – Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, Appellate Body Report</i>
<i>EC Sugar Panel Report</i>	<i>European Communities – Export Subsidies on Sugar, WT/DS265/R, Panel Report</i>
<i>Indonesia-Autos</i>	<i>Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, Award of the Arbitrator</i>

<i>Japan-Alcohol</i>	<i>Japan – Taxes on Alcoholic Beverages, WT/DS8/15, WT/DS10/15, WT/DS11/13, Award of the Arbitrator</i>
<i>Korea-Alcohol</i>	<i>Korea – Taxes on Alcoholic Beverages, WT/DS75/16, WT/DS84/14, Award of the Arbitrator</i>
<i>US-1916 Act</i>	<i>United States – Anti-Dumping Act of 1916, WT/DS136/11, WT/DS162/14, Award of the Arbitrator</i>
<i>US-CDSOA</i>	<i>United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS17/14, WT/DS234/22, Award of the Arbitrator</i>
<i>US-Homestyle Copyright</i>	<i>United States – Section 110(5) of the US Copyright Act, WT/DS160/12, Award of the Arbitrator</i>

## **PART I. INTRODUCTION**

### **A. THE EC MUST COMPLY WITH TWO DISTINCT COMMITMENTS**

1. In the circumstances of this dispute, compliance with the DSB's recommendations and rulings requires the EC to comply with two WTO commitments:

- (a) to limit the annual total budgetary outlay on export subsidies to €499.1 million (the "budgetary outlay commitment level") in the 12 month period of 1 July to 30 June (the "WTO budgetary outlay commitment marketing year");<sup>1</sup>

and

- (b) to limit the annual total quantity of sugar exports to 1.2735 million tonnes (the "quantity commitment level") in the 12 month period of 1 October to 30 September (the "WTO quantity commitment marketing year").<sup>2</sup>

2. Export subsidies on sugar in excess of those commitments constitute *prohibited* export subsidies. A WTO implementation period does not serve to alter the WTO legal status of such exports, either during or after the expiry of the arbitrated implementation period.

3. Unless and until the EC complies with both of these commitments, the EC will not have implemented the DSB's recommendations and rulings. If the EC exceeds these annual commitment levels after the expiry of the implementation period, it will have failed to implement the DSB's recommendations and rulings within the implementation period.

### **B. THE OBJECT AND PURPOSE OF A WTO REASONABLE PERIOD OF TIME FOR IMPLEMENTATION**

4. Implementation within a prescribed period is a matter of systemic and commercial significance, as it would contribute to the predictability and security of the multilateral trading system, as reflected in Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").

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<sup>1</sup> See the Annex to Section II of Part IV of Schedule CXL of the European Communities (Exhibit COMP-35).

<sup>2</sup> See the Annex to Section II of Part IV of Schedule CXL of the European Communities.

5. Arbitration under Article 21.3(c) of the *DSU* constitutes a procedure for giving effect to the objectives of Article 3.2 of the *DSU*. As such, it cannot serve to give legal cover to a failure to implement within the arbitrated period, let alone any actions which would constitute deliberate acts of non-compliance with obligations under a WTO covered agreement and which would also be inconsistent with the “prompt compliance” obligation of Article 21.1 of the *DSU*.

6. In the circumstances of this dispute, the relevant implementing measures are those measures which would constitute actions to reduce the EC’s budgetary outlays and subsidised exports to the prescribed WTO annual limits. To the extent that any proposed *means of* implementation are considered relevant to the determination of the date of expiry of the implementation period, their relevance to arbitration under Article 21.3(c) of the *DSU* is limited to the time period for giving effect to and applying the specific implementing measures.

7. The time period for introducing and giving effect to any measures additional to implementing measures would not constitute WTO legal justification for prolonging an implementation period beyond that necessary for WTO implementation.

8. The mandate of an Article 21.3(c) arbitrator does not extend to re-litigation of the DSB’s recommendations and rulings. Nor is the arbitrator required to examine whether the proposed compliance measures are - or are not - WTO consistent. Examination and conclusions on the consistency of measures taken to comply logically follow the expiry of the implementation period and are subject to separate proceedings, under Article 21.5 of the *DSU*.

#### **C. THE REASONABLE PERIOD OF TIME IN THE CIRCUMSTANCES OF THIS DISPUTE**

9. The EC has proposed an implementation expiry date of 1 January 2007. In so doing, the EC fails to inform the period in which it proposes to complete implementation and to secure compliance with the DSB’s recommendations and rulings. For instance, the EC has not clarified whether implementation of either or both WTO commitments would be achieved within the respective 2006/2007 marketing years, or some future marketing year.

10. Indeed, it is apparent that the EC is seeking to continue to export subsidised quantities of sugar in excess of its WTO commitments well beyond the date of effect of its proposed implementing measures. Seemingly, on the basis of the EC’s submission, the EC may defer the application of implementing measures beyond the date of entry into force of those measures.

11. The EC has the burden of proof to establish that a proposed expiry date would constitute the shortest period possible for implementation within its legal system. The EC’s submission does not meet that burden of proof. The EC’s submission does not substantiate why a proposed date significantly in excess of the Article 21.3(c) guideline would be justifiable.

12. The EC's submission identifies alleged legal impediments to compliance under the existing regulatory regime for sugar (some of which were not cited by the EC during the consultations under Article 21.3(b) of the *DSU*).<sup>3</sup>

13. At the same time, the submission fails to identify those provisions of the regime which *require* the European Commission (the "Commission") to act in compliance with the EC's budgetary outlay commitment level and quantity commitment level for sugar.

14. Nor does the EC's submission identify the legally available options - under Council Regulation 1260/2001 – for the Commission to implement the EC's commitments, through the exercise of authority devolved to the Commission by that instrument.

15. Furthermore, the submission fails to quantify the amounts of beet production and forecast production of quota<sup>4</sup> and C sugar<sup>5</sup> which, as asserted by the EC, would prevent compliance within an earlier period.

16. Nor does the EC identify the legal machinery at its disposal that would enable the Commission to average out exports over more than one marketing year in a way that would contribute to compliance with the quantity commitment level.

17. In this submission, Australia provides documented evidence that the EC has the option, under its own legal system, of applying, introducing and, as necessary, amending regulatory instruments within a period of weeks, which would enable the EC to implement its commitments within the respective 2005/2006 marketing years.

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<sup>3</sup> At no stage during the Article 21.3(b) consultations did the EC cite Article 10 of Council Regulation 1260/2001 (Exhibit COMP-2) as a legal impediment.

<sup>4</sup> "Quota sugar" constitutes the maximum quantities of sugar eligible for domestic price support and direct export subsidies (direct export subsidies are referred to as "export refunds" by the EC). The EC sugar regime establishes two types of quota sugar: one for A sugar and one for B sugar. Under Article 11(2) of Council Regulation 1260/2001, A quota is 14,723,213.3 tonnes and B quota is 2,717,321.2 tonnes (for a total of 17,440,534.5 tonnes).

"ACP/India equivalent sugar" is a quantity of quota sugar which the EC deems to be notionally equivalent to imports from certain members of the African, Caribbean and Pacific group of nations and India.

"ACP/India equivalent sugar" forms part of quota production. The documentation of the Management Committee for Sugar, which periodically fixes the amount of export refunds and the quantities of quota sugar eligible for refunds, contains no record of export refunds for a category of "ACP/India equivalent sugar". Nor do any provisions of the Council and Commission Regulations applicable to sugar production and exports provide for any such category of sugar.

<sup>5</sup> "C sugar" is sugar not eligible for domestic price support or direct export subsidies. There are two categories of C sugar: (a) sugar produced in an EC marketing year in excess of 17,440,534.5 tonnes (being the total of A quota and B quota – see the discussion of "quota sugar" above). This submission will refer to such C sugar as "out of quota C sugar"; and (b) sugar that has been declassified from quota to C sugar via the process set out in Article 10 of Council Regulation 1260/2001.

**D. THE WTO RULES REQUIRE THE EC TO IMPLEMENT WITHIN THE SHORTEST PERIOD OF TIME POSSIBLE WITHIN ITS LEGAL SYSTEM**

18. Previous arbitrators have established the principle that the reasonable period of time for a WTO Member to comply with the DSB's recommendations and rulings is the shortest period possible within its legal system in the light of the particular circumstances of the dispute.

19. This period of time must be determined by reference to the action needed to comply with the recommendations and rulings in question, not by reference to any wider reform that a WTO Member may choose to undertake in response to the recommendations and rulings.

20. The need for structural adjustment of the domestic sugar industry and the contentiousness of the required changes to the EC sugar regime are not relevant to the determination of the reasonable period of time.

**E. EC NON-COMPLIANCE WITH BOTH COMMITMENTS IS A MATTER OF PRACTICE RATHER THAN LAW**

21. As documented in Australia's submission, EC non-compliance with its WTO export subsidy reduction commitments for sugar is largely - if not entirely - a matter of practice rather than law.<sup>6</sup> Any EC failure to comply with the budgetary outlay commitment level following the DSB's recommendations and rulings would be reflective of a decision by the EC that it would not apply that commitment, as compared to any EC legal impediment to WTO compliance. The EC has full legal authority under its existing regime to *directly* regulate the levels of export refunds on quantities of quota sugar exports, including on a periodic basis. In respect of C sugar, the EC has legal authority to determine the quantity of export availability of sugar classified as C sugar, either directly or indirectly. It also has legal authority to regulate such exports. The legal requirement to export C sugar does not constitute any in-principle legal proscription on compliance with the EC's quantity commitment level.

22. The existing EC legal framework does not confer any unconditional legal entitlement - whether to a beet or cane grower, sugar processor, or exporter - to any level of export refunds or export quantities.<sup>7</sup>

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<sup>6</sup> Consistent with the provisions of Article XVI:4 of the *WTO Agreement*, the EC is required to ensure, *inter alia*, that its administrative procedures are in conformity with its WTO obligations.

<sup>7</sup> The legal entitlement confers rights to guaranteed prices on the domestic market for quota sugar and a right of disposal of quota sugar on the domestic market.

23. The EC is vested with the legal authority to regulate the level of budgetary outlays and quantities on a periodic basis, in a way which would ensure that the WTO limits are not exceeded in any one marketing year. The existing legal framework is capable of application, through changes in EC *practice*. The EC can adjust its procedures in a matter of weeks, to ensure that it does not exceed its budgetary outlay commitment level and quantity commitment level in the respective 2005/2006 marketing years.

**F. THE EC HAS THE EXISTING LEGAL AUTHORITY TO ENSURE WTO COMPLIANCE IN THE RESPECTIVE 2005/2006 MARKETING YEARS**

24. Article 27 of Council Regulation 1260/2001 has application to the full quantity of quota sugar exports. The provisions applicable to export refunds for quota sugar do *not* provide for the exclusion of 1.6 million tonnes of quota sugar (i.e. the ACP/India equivalent sugar) from the obligation under the EC's own laws to limit the level of export refund expenditure to the budgetary outlay commitment level.

25. Nor does Council Regulation 1260/2001 require the Commission to provide for any minimum volume of export refunds. In accordance with Article 27 of that Regulation, total export refund expenditure - as well as the quantities eligible for export refunds - in any one year must not exceed the WTO maximum.

26. As the EC confirmed in proceedings before the Panel and the Appellate Body, the Commission has the necessary administrative machinery in place to allow it to regulate and monitor expenditure on export refunds.<sup>8</sup> Those powers include a system of periodic awards of export refunds and of the quantities eligible for export refunds on an approximate monthly basis, together with a legal limit on the period of validity of an export licence (a maximum of three months)<sup>9</sup> and the authority to limit and/or suspend the periodic granting of export licences.

27. According to the records of the Management Committee for Sugar, fortnightly decisions on the grant of export refunds and the quantities eligible for export refunds are taken within the prescribed limits of the WTO commitments.<sup>10</sup>

28. As part of the legal machinery for giving effect to the budgetary outlay commitment level, the Commission also has the authority to apply the mandatory export licensing requirements of Article 22 of Council Regulation 1260/2001 in a way that gives effect to the budgetary outlay commitment level.

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<sup>8</sup> See, for example, paragraphs 179 to 184 of the First Written Submission by the European Communities at the panel stage of this dispute.

<sup>9</sup> Articles 6(3)(a) and (b) of Commission Regulation 1464/1995 (Exhibit COMP-3).

<sup>10</sup> The Management Committee for Sugar records refer to a requirement to take account of the limits arising from the "GATT Agreements", in fixing the maximum export refunds for quota sugar export (see Annex C).

29. In accordance with the legal authority of Article 22(2)(b) of Council Regulation 1260/2001, the Commission has adopted Commission Regulation 1464/1995. According to the chapeau to that Commission Regulation, the export licensing authority is exercisable for the purposes of compliance with the EC's WTO export subsidy commitments.<sup>11</sup> In circumstances where the budgetary outlay commitment level and quantity commitment level risk being exceeded, Article 9a of the Commission Regulation provides for the Commission to take action to order that: export licences be allocated on a *pro rata* basis; applications for export licences be rejected; or that the lodgement of applications be suspended.

30. Article 9a(1) provides:

“If a stage is reached at which applications for export licences bearing on quantities and/or expenditure commitments overshoot or risk overshooting the volume and/or appropriations set in the Agreement on Agriculture, account taken of Article 9 thereof, for the marketing year in question the Commission may decide:

- (a) to set a flat-rate percentage level for acceptance by Member States of the quantities applied for but for which licences have not yet been issued;
- (b) that Member States will reject applications for which export licences have not yet been issued;
- (c) to suspend the lodging of applications for export licences for five working days; it may prolong suspension, the procedure specified in Article 41 of Regulation (EEC) No 1785/81 applying. Export licence applications made during the suspension period shall be invalid.”

31. The EC's submission fails to address the existing legal authority to regulate subsidised exports through recourse to export licensing,<sup>12</sup> including through conditions attached to the grant of export licences.

32. The EC's submission does not cite any authoritative legal opinion or European Community jurisprudence that would serve to require the Commission to act other than in accordance with the Council-mandated obligation of Article 27 of Council Regulation 1260/2001, or to act contrary to the Commission's own regulatory requirements in regard to the conditions attached to the grant of export licences. Nor does the EC's submission cite any legal authority which would justify a flexible or temporal interpretation of what the WTO commitments might be.

33. In paragraph 32 of its submission, the EC cites Article 10 of Council Regulation 1260/2001 as a potential legal impediment to implementation.

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<sup>11</sup> The chapeau provides that: “Whereas the Agreement on Agriculture resulting from the Uruguay Round multilateral trade negotiations ... calls for the adaptation, in particular, of regulations applicable to import and export licences in the sugar sector from 1 July 1995”.

<sup>12</sup> Except in the limited context of paragraph 34 of the Submission of the European Communities.

34. First, Australia notes that, during the course of the consultations under Article 21.3 of the *DSU*, the EC did not refer to that provision (the “declassification” provision) as an existing or potential legal impediment to implementation. Australia was not therefore afforded the opportunity during the consultations to seek clarification of the legal scope of the Commission’s legal authority to apply that provision, under circumstances where a decision to declassify quota sugar to C sugar might – absent any other action at Commission (or Council) level - serve to increase export availability in excess of the quantity commitment limit level.

35. The obligation to declassify quota sugar to C sugar is conditional. It is clear from the text of Article 10(3) of Council Regulation 1260/2001 that the Commission, acting through the Management Committee, may only take such action “ ... in order to comply with the Community’s commitments under the [WTO] Agricultural Agreement ...”.

36. It is also clear that the Commission *does not need to* declassify in order to comply with the budgetary outlay commitment level or the quantity commitment level. As demonstrated in this submission, the Commission has the necessary legal authority and administrative powers - under Article 27(1) of Council Regulation 1260/2001 and under the provisions of Article 9a of Commission Regulation 1464/1995 - to regulate the totality of export refund expenditure and export quantities in order to maintain export subsidy and quantity levels within the WTO-prescribed limits.

37. Absent declassification of quota sugar to C sugar, the legal rights of sugar quota holders would be unaffected. Quota holders are not accorded any legal rights to prices above the minima established under Articles 2 and 3 of Council Regulation 1260/2001. The Commission is not accorded any legal authority to take action to limit supply to the domestic market in order to secure domestic market prices above the legally guaranteed minima. If the Commission were to do so, it would be acting *ultra vires*.

38. As acknowledged by the EC in paragraph 32 of its submission, the Commission’s authority to refuse to grant export refunds on quota sugar does not have the status of *discretionary* authority. In the EC’s own words, the Commission *must* refuse to grant export refunds on quota sugar exports, under certain conditions. Footnote 38 to the EC’s submission confirms that the Commission is legally obliged to refuse the grant of export refunds if the grant thereof would risk exceeding the WTO annual commitment limits.

39. The EC's submission fails to address – let alone substantiate – whether the Commission has the necessary legal authority to declassify quota sugar to C sugar, in circumstances where such action was neither necessary nor conducive to compliance with the EC's WTO commitments for sugar. The EC has not cited any authoritative legal opinion or European Community jurisprudence to support any EC assertions that the Commission has the authority – discretionary or otherwise - to declassify for the purposes of *increasing* subsidised sugar exports.<sup>13</sup>

40. Further, as noted in this submission, the Commission has the legal authority to ensure that the EC does not exceed its WTO commitment limits in respect of quota sugar, through the exercise of Commission export licensing powers under Article 22 of Council Regulation 1260/2001 and Article 9a of Commission Regulation 1464/1995. Australia is puzzled why the EC's submission fails to address the export licensing provisions of Council and Commission Regulations (except at the margin).

41. In paragraph 34 of its submission, the EC asserts that the Commission does not have the necessary authority to limit exports of C sugar in order to ensure compliance with the EC's reduction commitments. The EC fails to substantiate that assertion and subsequently in its submission, appears to qualify that assertion, in stating, in paragraph 35:<sup>14</sup>

“Therefore, to the extent that the Commission has no control over the exports of C sugar, it cannot ensure compliance with the recommendations and rulings of the DSB”.

42. As noted in this submission, the Commission *does* have control over the export of C sugar. It has the regulatory authority to control C sugar export levels through its export licensing powers, as documented in this submission. The Commission also has the regulatory authority to influence export availability of C sugar, either directly or indirectly, including through the exercise of its authority under Articles 13(3) and Article 20 of Council Regulation 1260/2001. Further, the Commission has not provided any legal justification or legal precedent for Commission actions that might lead to *increases* in the level of C sugar export availability.

43. The WTO rulings do not prohibit the export of C sugar. There is no WTO barrier to C sugar exports, provided that the total of quota and C sugar exports are within the WTO-prescribed annual limits. The Commission has direct and explicit legal authority to regulate quota export levels, including as necessary to reduce those levels to zero.<sup>15</sup> The EC has full legal authority to directly control quota exports.

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<sup>13</sup> The Commission did not take declassification action in 2004/2005. It is understood that forecasts of production and consumption of sugar in the 2004/2005 and 2005/2006 years are comparable. Quota allocations and WTO commitment levels have not altered.

<sup>14</sup> And also in its arguments in the alternative, in paragraph 36 of its submission. Those arguments in the alternative are addressed separately in this submission.

<sup>15</sup> Council Regulation 1260/2001 does not accord any legal right to growers and processors to export any quantity of quota sugar. All such exports are conditional on compliance with WTO commitment levels.

44. The requirement to export C sugar does not constitute an in principle legal impediment to EC compliance with the WTO commitment levels for sugar. Depending on the quantity of C sugar which producers are obliged<sup>16</sup> to export within a defined period, the export of C sugar produced in any one marketing year could be staged over two WTO quantity commitment marketing years (commencing on 1 October) without infringing the requirement to export C sugar before 1 January in the following year.

45. The EC's submission does not document C sugar production or export trends, although such information is apparently available to the Commission on at least a monthly basis.<sup>17</sup>

46. Even if the forecast quantity of C sugar produced in any one marketing year were to exceed the sum of the EC's WTO quantity commitment level for two years (i.e. in excess of 2.547 million tonnes), the Commission could nevertheless take action to reduce C sugar export availability, including through recourse to Article 20 of Council Regulation 1260/2001. Sugar that would otherwise be counted as quota production could be classified as "out of production" for the purposes of Article 20 of Council Regulation 1260/2001, as sugar acquires the status of C sugar only after proof that quotas have been filled.<sup>18</sup>

**G. THE EC HAS NOT IDENTIFIED ANY LEGAL IMPEDIMENT TO COMPLIANCE WITH ITS BUDGETARY OUTLAY COMMITMENT LEVEL IN THE 2005/2006 WTO BUDGETARY OUTLAY COMMITMENT MARKETING YEAR AND HAS THE LEGAL CAPACITY TO ACHIEVE COMPLIANCE WITH ITS QUANTITY COMMITMENT LEVEL IN THE 2005/2006 MARKETING YEAR**

47. Article 27 of Council Regulation 1260/2001 directs the Commission to maintain the annual quantities of quota exports at levels within the EC's budgetary outlay and quantity commitment levels, supplemented by the Commission's authority to place conditions on the grant of export licences to both quota and C sugar.

48. The export licensing provisions of Article 22 of Council Regulation 1260/2001 apply to both quota and C sugar, as does Commission Regulation 1464/95, including Article 9a of that Commission Regulation.

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<sup>16</sup> Under the terms of Article 13(1) of Council Regulation 1260/2001, C sugar not carried forward must be exported before 1 January following the end of the relevant marketing year.

<sup>17</sup> During the consultations under Article 21.3(b) of the *DSU*, the EC declined Australia's request for information on production and exports.

<sup>18</sup> Article 1(2)(g) of Council Regulation 1260/2001 and Article 5 of Commission Regulation 1464/1995.

49. The Commission is also vested with the necessary administrative machinery which would enable it to maintain export quantities within the WTO annual commitment levels. In accordance with Article 4 of Commission Regulation 314/2002, forecast supply balances are established for each Member State, on the basis of monthly forecasts of production and consumption. Provisional forecasts are established before 1 March each year, that is, some seven months in advance of the beginning of the marketing year which the EC has designated in its schedule for application of the WTO annual quantity commitment. Article 4c of the same Regulation requires monthly reporting on quantities of C sugar exported.

50. The Commission also has legal authority to determine or influence the levels of export availability of sugar produced within a particular marketing year.

51. First, in accordance with the provisions of Article 20 of Council Regulation 1260/2001, the Commission, acting through the Management Committee for Sugar, may decide that sugar manufactured for the use of certain products shall not be considered as production.<sup>19</sup> As the Council Regulation in question does not define or proscribe the scope of “certain products”, the Commission has the legal authority to determine that sugar used in *any* production chain does not need to be counted as production, at least for the purposes of calculating quota sugar production in any one year.

52. The definition of “C sugar” is limited to that quantity of sugar attributed to a specific marketing year in excess of the sum of A and B quota production by an undertaking.<sup>20</sup> C sugar cannot be exported without proof that an undertaking has filled the sum of the A and B quota allocated to it.<sup>21</sup>

53. Under those circumstances, if the Commission were to exercise its authority under Article 20 of Council Regulation 1260/2001 to extend the permitted “out of production” use of sugar that would otherwise be counted against quota production, the Commission could influence the level of export availability of C sugar.

54. Second, in accordance with the provisions of Article 13(3) of Council Regulation 1260/2001, the Commission has the discretionary legal authority to abolish the carryover limit currently mandated by Article 2 of Commission Regulation 65/1982.<sup>22</sup> Further, as also provided by Article 13(3) of Council Regulation 1260/2001, the Commission has the discretionary legal authority to reduce the incidence of the charge levied on C sugar not carried forward.

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<sup>19</sup> Article 20 of Council Regulation 1260/2001 provides that: “It may be decided that sugar or isoglucose used for the manufacture of certain products shall not be considered as production within the meaning of this Chapter”.

<sup>20</sup> Article 1(2)(g) of Council Regulation 1260/2001.

<sup>21</sup> Article 5 of Commission Regulation 1464/1995.

<sup>22</sup> Article 2 of Commission Regulation 65/1982 (Exhibit COMP-7) provides that carryover of sugar produced in excess of quota is limited to a maximum quantity of 20% of the next year’s A quota.

55. Third, the Commission, acting in accordance with its export licensing authority, has the power to regulate the periodic flow of exports of C sugar (as well as quota sugar). In accordance with Article 13(1) of Council Regulation 1260/2001, producers of C sugar are not required to export such sugar in the marketing year in which the sugar is produced. Article 13(1) provides that the sugar in question must be exported before 1 January following the end of the marketing year concerned. As provided in Article 1(2)(m) of Council Regulation 1260/2001, “marketing year” for the purposes of production means the period beginning on 1 July and ending on 30 June of the following year (the “EC marketing year”).

56. In accordance with Article 13 of Council Regulation 1260/2001, C sugar produced in the 2005/2006 EC marketing year does not need to be exported within that year (1 July 2005 to 30 June 2006) or within the 2005/2006 WTO quantity commitment marketing year (i.e. the period 1 October 2005 to 30 September 2006).

57. Hence, if the quantity of export availability<sup>23</sup> of C sugar produced between 1 July 2005 and 30 June 2006 were to exceed the quantity commitment level of 1.2735 million tonnes, the Commission could use its export licensing authority to limit the level of exports of C sugar to a total annual quantity of 1.2735 million tonnes or less in the period 1 October 2005 to 30 September 2006. The balance of C sugar produced in 2005<sup>24</sup> could then be exported before 1 January 2006 and counted against the EC’s export subsidy commitments for the 2006/2007 WTO quantity commitment marketing year commencing 1 October.

58. If the Commission were to exercise its existing legal authority, as required by the Council Regulation and Article 300(7) of the EC Treaty,<sup>25</sup> EC beet growers and sugar processors would be informed well in advance of the planting of the 2006 beet crop and could adjust the quantities of beet and sugar production to levels commensurate with the EC’s WTO annual export quantity commitment levels for sugar.<sup>26</sup>

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<sup>23</sup> Export availability would be reduced by the quantity of C sugar carried over.

<sup>24</sup> Beet sugar in any one marketing year is produced from a crop planted in the previous marketing year. As set out in the EC’s submission, beet is sown in the EC in February and March of each year. This beet is harvested in the (northern) autumn of the same year and is then processed into sugar in October, November and December of the same year (paragraph 88 of the Submission of the European Communities). This sugar is then generally sold in the period until the processing of the next year’s beet crop.

<sup>25</sup> The Consolidated Version of the Treaty Establishing the European Community (Exhibit COMP-1).

<sup>26</sup> Including, as necessary by reducing quota production (given that no C sugar is produced in the event of quota underfill).

**H. EC LAW PERMITS WTO COMPLIANCE IN A MATTER OF WEEKS OR OF MONTHS  
COMPRISING CONSIDERABLY LESS THAN A 12 MONTH PERIOD**

59. As demonstrated in this submission, the EC could achieve compliance with the DSB’s recommendations and rulings through an adjustment of administrative procedures, accompanied as necessary by adjustment of implementing Commission Regulations.

60. Australia requests that the Arbitrator award a period of not more than six months and six days commencing from adoption of the *EC Sugar Panel Report* and the *EC Sugar Appellate Body Report* on 19 May 2005, which would give the EC adequate time in which to make the adjustments necessary to enable compliance with its quantity commitment level within the 2005/2006 WTO quantity commitment marketing year and its budgetary outlay commitment level within the 2005/2006 WTO budgetary outlay commitment marketing year.

61. This submission also includes an exploration of when the reasonable period of time should end if the Arbitrator disagrees with Australia’s submissions as to the ability of the EC to control C sugar exports.

**PART II. PROCEDURAL BACKGROUND**

**A. INTRODUCTION**

62. The DSB adopted the *EC Sugar Panel Report* and the *EC Sugar Appellate Body Report* on 19 May 2005.<sup>27</sup>

63. At the DSB meeting on 13 June 2005, the EC stated that it would implement the recommendations and rulings of the DSB but that it would require a “reasonable period of time” to do so.

64. The parties to the dispute failed to agree on a reasonable period of time. Accordingly, on 9 August 2005, Australia, Brazil and Thailand requested that the “reasonable period of time” be determined through binding arbitration pursuant to Article 21.3(c) of the *DSU*.

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<sup>27</sup> WT/DS265/29, WT/DS266/29, and WT/DS283/10.

**B. WHAT ARE THE RECOMMENDATIONS AND RULINGS OF THE DSB?**

65. The recommendations and rulings of the DSB are that the EC bring:

- (a) Council Regulation 1260/2001;<sup>28</sup> as well as
- (b) all other measures implementing or related to its sugar regime<sup>29</sup>

into conformity with its obligations under the *Agreement on Agriculture*, to the extent that they have been found to be inconsistent with the *Agreement on Agriculture*.<sup>30</sup>

**C. WHAT HAS BEEN FOUND TO BE INCONSISTENT WITH THE AGREEMENT ON AGRICULTURE?**

66. The Panel and Appellate Body found that the following EC actions, undertaken through its sugar regime, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture*:<sup>31</sup>

- (a) the provision of “export subsidies on sugar within the meaning of Articles 9.1(a) and 9.1(c) of the *Agreement on Agriculture*, in excess of the quantity commitment levels specified in Section II, Part IV of its Schedule”,<sup>32</sup> and
- (b) the provision of “export subsidies within the meaning of Article 9.1(a) and (c) of the *Agreement on Agriculture* in excess of (i) its quantity commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is for 1,273,500 tonnes of sugar and (ii) its budgetary outlay commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is €499.1 million per year”.<sup>33</sup>

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<sup>28</sup> Paragraph 347 of the *EC Sugar Appellate Body Report*.

<sup>29</sup> Paragraph 347 of the *EC Sugar Appellate Body Report*.

<sup>30</sup> Paragraph 347 of the *EC Sugar Appellate Body Report*.

<sup>31</sup> Paragraph 346(f) of the *EC Sugar Appellate Body Report*.

<sup>32</sup> Paragraph 7.340 of the *EC Sugar Panel Report* (referred to in paragraph 346(f) of the *EC Sugar Appellate Body Report*).

<sup>33</sup> Paragraph 8.3 of the *EC Sugar Panel Report* (referred to in paragraph 346(f) of the *EC Sugar Appellate Body Report*).

#### **D. WHAT MUST THE EC DO TO IMPLEMENT?**

67. The DSB has ruled that *all* sugar exported by the EC is in receipt of export subsidies within the meaning of Article 9.1 of the *Agreement on Agriculture*.<sup>34</sup>

68. The “marketing year” for the purposes of the EC’s WTO quantity commitment level is the period 1 October to 30 September.<sup>35</sup>

69. The “marketing year” for the purposes of the EC’s WTO budgetary outlay commitment level is the period 1 July to 30 June.<sup>36</sup>

70. Thus, implementation requires the EC to:

- (a) limit the annual total budgetary outlay on export subsidies to €499.1 million in the 12 month period of 1 July to 30 June;

and

- (b) limit the annual total quantity of sugar exports to 1.2735 million tonnes in the 12 month period of 1 October to 30 September.

71. The EC will only achieve conformity with those limits by regulating budgetary outlay expenditure over the course of a 1 July to 30 June period *and* by regulating the volume of exports over the course of a 1 October to 30 September period.

### **PART III. THE FACTUAL SITUATION**

#### **A. THE EC’S IMPLEMENTATION PROPOSALS**

72. As set out in the EC’s submission, beet is sown in the EC in February and March of each year. This beet is harvested in the northern autumn of the same year and is then processed into sugar in October, November and December of the same year.<sup>37</sup> This sugar is then generally sold in the period until the processing of the next year’s beet crop.

73. In its submission, the EC has proposed a date of 1 January 2007 for the expiration of the reasonable period of time for implementation.

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<sup>34</sup> Paragraphs 3.4, 3.11, 7.177, 7.234 to 7.238 and 8.1(f) of the *EC Sugar Panel Report* and paragraph 346(e) of the *EC Sugar Appellate Body Report*. The *EC Sugar Panel Report* and the *EC Sugar Appellate Body Report* were adopted by the DSB on 19 May 2005 (see WT/DS265/29, WT/DS266/29, and WT/DS283/10).

<sup>35</sup> See the Annex to Section II of Part IV of Schedule CXL of the European Communities.

<sup>36</sup> See the Annex to Section II of Part IV of Schedule CXL of the European Communities.

<sup>37</sup> Paragraph 88 of the Submission of the European Communities.

74. A date of 1 January 2007 is without legal relevance in either EC or WTO law. There is nothing in the EC legal framework – existing or proposed – that would require the EC to base implementing action on a period commencing in January of *any* year.

75. In nominating 1 January 2007, the EC is *not* guaranteeing that it will achieve WTO conformity by that date, but, seemingly, that it would defer the *commencement* of any implementing action until that date. Sugar marketing analysts are in fact forecasting that the EC will increase its exports in the 2005/2006 marketing years from an average annual level of around 5 million tonnes to record levels of between 6 and 7 million tonnes. Thus, it is apparent that the EC is going to *increase* its exports during the period leading up to 1 January 2007.<sup>38</sup> It is also apparent that the EC would continue to export subsidised sugar in excess of its WTO commitments *beyond* the entry into force of the proposed new sugar regime.

76. In the context of WTO compliance with *annual* commitment limits (commencing in 1 July for budgetary outlays and 1 October for quantities), a date of 1 January 2007 would mean that implementation might not be achieved within the marketing year concerned.

77. Under this scenario, the EC would *continue* to export sugar in excess of its WTO annual commitment levels. It would exceed its quantity commitment level for the 2005/2006 and 2006/2007 WTO quantity commitment marketing years and its budgetary outlay commitment level for the 2005/2006 and 2006/2007 WTO budgetary outlay commitment marketing years. The proposal would mean that the EC would not come within its quantity commitment level until at least the WTO quantity commitment marketing year commencing 1 October 2007 and would not come within its budgetary outlay commitment level until at least the WTO budgetary outlay commitment marketing year commencing 1 July 2007.

78. In fact, nowhere in the EC's submission does it disclose exactly when it might begin to comply with its export subsidy obligations. That is, nowhere in the EC's submission does it disclose when it plans to "comply ... with the recommendations and rulings"<sup>39</sup> of the DSB.

79. The EC is thus effectively seeking a period of at least *865 days (or over 28 months)* to comply with its quantity commitment level<sup>40</sup> and a period of at least *773 days (or over 25 months)* to comply with its budgetary outlay commitment level.<sup>41</sup> This is at least some *13 months in excess of the outer period of 15 months identified in Article 21.3(c) of the DSU.*

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<sup>38</sup> In proposing a date of 1 January 2007, the EC has not come forward with any implementing program for reductions in annual budgetary outlays on export subsidies or in regard to annual export quantities.

<sup>39</sup> See the chapeau to Article 21.3 of the *DSU*.

<sup>40</sup> Being the length of time from 19 May 2005 until 1 October 2007.

<sup>41</sup> Being the length of time from 19 May 2005 until 1 July 2007.

80. There are no “particular circumstances” which would warrant an arbitration award of more than 15 months. As documented in this submission, the EC could achieve implementation in a time period considerably *shorter* than 15 months.

81. Effectively, the EC is seeking a licence to suspend the application of its WTO commitments to the 2007/2008 marketing years or even beyond. The EC proposal is predicated on continuance of its practice - predating the 1995 entry into force of the WTO - to provide for the export disposal of unlimited quantities of sugar and for unlimited levels of export subsidy expenditure.

82. As demonstrated in this submission, the existing EC legal framework for sugar not only permits the EC to observe its WTO reduction commitment levels, but also imposes an *obligation* on the Commission to take action to ensure that it exercises its legal authority to achieve WTO compliance.

83. As also demonstrated in this submission, the Commission has sufficient legal authority to regulate export levels and budgetary outlays on export subsidies to achieve WTO compliance within the 2005/2006 marketing years.

84. Before the Panel, the EC went to some lengths to explain the procedures and practices adopted to regulate the volumes of quota exports and the levels of expenditure on export refunds on quota exports.<sup>42</sup> The EC’s advice to the Panel serves to confirm that the existing EC legal framework for quota exports - which mandates compliance with WTO limits - can be applied in a way that would deliver WTO compliance within the 2005/2006 marketing years.

85. In practice, the EC does not apply any controls on C sugar exports. However, contrary to its submission, it has the legal capacity and obligation to exercise its export licensing authority to ensure that all exports – whether quota or C sugar – remain within the annual WTO limits. It also has the legal capacity to influence the levels of export availability of C sugar.

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<sup>42</sup>See, for example paragraphs 179 to 184 of the First Written Submission by the European Communities at the panel stage of this dispute.

## **B. EC LEGAL INSTRUMENTS AND REGULATORY AUTHORITY**

### **1. Introduction**

86. The basis of EC law relating to the common organisation of the markets in the sugar sector is Article 37 of the EC Treaty. This allows the Council to create common organisations of agricultural markets. The Council can do so by qualified majority “on a proposal from the Commission and after consulting the European Parliament”.

87. Council Regulation 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector establishes the framework for the management of the EC sugar regime. It also provides for the Commission, acting through the Management Committee for Sugar, to adopt detailed rules for applying certain provisions of Council Regulation 1260/2001. Such detailed rules have been adopted and take the form of Commission Regulations.

#### **THE ROLE OF THE MANAGEMENT COMMITTEE FOR SUGAR**

The Management Committee for Sugar is comprised of representatives of the EC Member States. It must give its opinion on proposed Commission Regulations.

In the event of a favourable Committee opinion, or a determination of “no opinion” within the time limit given for the determination, the Commission adopts the Commission Regulation with immediate effect.

In the event of an unfavourable Committee opinion, the Commission also adopts the Regulation. However, the measures adopted must be communicated, by the Commission, to the Council forthwith. The Commission may give the Regulation immediate effect or it may defer application of the Regulation for one month.<sup>43</sup>

Within one month, the Council may take a different decision from the Commission by means of qualified majority.<sup>44</sup>

In the past four years, there have been no unfavourable opinions issued in the sugar sector.<sup>45</sup>

<sup>43</sup> Article 4(3) of Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (the “Decision”) (Exhibit COMP-9) and Article 42(2) of Council Regulation 1260/2001.

<sup>44</sup> Article 4(4) of the Decision.

<sup>45</sup> See Table 2 of Exhibit COMP-28.

## 2. Provisions which require or enable WTO compliance

88. Article 300(7) of the EC Treaty provides that:

“Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on member States”.

89. The WTO Agreement was entered into by the EC in accordance with Article 300 of the EC Treaty.<sup>46</sup> In addition, Council Regulation 1260/2001 and its implementing Commission Regulations make frequent references to the EC’s obligations under the WTO Agreement.

90. In accordance with its own internal treaty requirements, the EC is therefore under a binding obligation to apply its WTO obligations in regard to EC regulatory requirements, or in circumstances where it has the legal authority to do so.

91. Council Regulation 1260/2001 accords such authority to the Commission, acting through the Management Committee for Sugar. The Commission is required by Council Regulation to limit budgetary outlays on export refunds to the maximum provided under its WTO export subsidy commitments for sugar.

92. The Commission is also required by Council Regulation to limit the quantities eligible for export refunds – that is, quota sugar<sup>47</sup> – to the maximum provided under its WTO quantitative commitments for subsidised sugar exports.

93. Further, the Council Regulation vests the Commission, acting through the Management Committee, with the machinery to regulate export refund and export quantity levels on a periodic basis, including as necessary, through suspension of export licences and the legal monitoring and surveillance of exports on a weekly or monthly basis. The EC can readily verify the periodic flow of all export refunds and quantities exported. Indeed, as it is the Commission which accords export refunds, the Commission, acting through the Management Committee actually *decides* the annual levels of export refund expenditure and the total annual quantity of exports in receipt of export refunds.

94. In addition, the Commission, acting through the Management Committee, is vested with the legal authority to regulate export availability of C sugar. Those powers include export licensing powers and extend to the authority to determine that sugar for certain uses shall not be counted against production, as well as the authority to determine the quantities of C sugar which may be carried forward.

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<sup>46</sup> See Council Decision 94/800/EC.

<sup>47</sup> Including ACP/India equivalent sugar.

95. The Council Regulation does not specify the levels of budgetary outlays or quantities of subsidised sugar which may be exported within the limits of the EC's WTO export subsidy commitments. The Regulation does not accord the Commission any flexibility to determine what those limits might be. The Commission is not accorded temporal legal powers to vary the level of the WTO commitments. Following the DSB's recommendations and rulings of 19 May 2005, the Commission cannot claim any internal legal power to determine the WTO commitments at levels other than those clarified by the WTO rulings.

**C. THE COMMISSION IS REQUIRED BY ITS OWN LEGAL SYSTEM TO LIMIT EXPORT REFUNDS TO THE MAXIMUM ANNUAL LEVELS PROVIDED UNDER ITS WTO EXPORT SUBSIDY COMMITMENTS**

96. Under the *existing* EC sugar regime there is a legal duty on the Commission to ensure that:

- (a) export refunds on quota sugar be provided *only* “within the limits resulting” from the *Agreement on Agriculture*;<sup>48</sup>
- (b) *all* exports of sugar be accompanied by an export licence;<sup>49</sup> and
- (c) export licences be used so as to secure compliance with the “restrictions on volume resulting from” the *Agreement on Agriculture* for the 1 October to 30 September year.<sup>50</sup>

97. The Commission has three legal options for the use of its export licensing powers if export licence applications overshoot or risk overshooting the EC's budgetary outlay commitment level or quantity commitment level - it can set a flat-rate percentage level for acceptance of future licence applications, reject all future licence applications, or suspend the lodging of applications for export licences for five days (or longer in certain circumstances).<sup>51</sup>

98. Article 27(1) of Council Regulation 1260/2001 explicitly requires the Commission to limit export refunds to the maximum level permitted under its budgetary outlay commitment level.

99. As documented in the evidence before the Panel and the Appellate Body, in practice the Commission does not limit the level of export refunds on quota sugar.<sup>52</sup> Following the DSB's recommendations and rulings, the EC cannot any longer justify that practice under its own laws.

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<sup>48</sup> Article 27(1) of Council Regulation 1260/2001.

<sup>49</sup> Article 22(1) of Council Regulation 1260/2001.

<sup>50</sup> Article 27(14) of Council Regulation 1260/2001.

<sup>51</sup> Article 9a(1) of Commission Regulation 1464/1995.

<sup>52</sup> See paragraphs 179 to 184 of the First Written Submission by the European Communities at the panel stage of this dispute.

## **D. EXPORT LICENSING POWERS UNDER EXISTING EC LAW**

### **1. Introduction**

100. The EC submits that:

“The EC must ensure that neither the subsidised exports of A/B or of ACP/India equivalent sugar, nor the subsidised exports of C sugar, whether considered separately or together, exceed its reduction commitments. Therefore, to the extent that the Commission has no control over the exports of C sugar, it cannot ensure compliance with the recommendations and rulings of the DSB”.<sup>53</sup>

101. The EC therefore submits that the only barrier to its compliance with the DSB’s rulings and recommendations would be “to the extent that the Commission has no control over the exports of C sugar”.

102. As demonstrated below, current EC law provides the means by which the EC can control the export of C sugar. EC arguments to the contrary ignore the plain meaning of that law.

### **2. Article 22 of Council Regulation 1260/2001 and Article 9a of Commission Regulation 1464/1995**

103. According to the terms of Article 22(1) of Council Regulation 1260/2001, “exports from the Community of *any [sugar]* shall be subject to presentation of an ... export licence.”<sup>54</sup> No distinction is made between quota sugar and C sugar.

104. Article 22(2)(b) of Council Regulation 1260/2001 requires the European Commission, assisted by the Management Committee for Sugar, to adopt “detailed rules” for applying Article 22, “including in particular the terms of validity of licences and, if necessary, a time limit for the issue of licences”.

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<sup>53</sup> Paragraph 35 of the Submission of the European Communities.

<sup>54</sup> Emphasis added.

105. Those detailed rules are contained in Commission Regulation 1464/1995.<sup>55</sup> This Regulation recognises that the *Agreement on Agriculture* “calls for the adaptation ... of regulations applicable to import and export licences in the sugar sector from 1 July 1995”.

106. Article 9a of Commission Regulation 1464/1995 again makes no distinction between quota sugar and C sugar. According to its terms, “[i]f a stage is reached at which applications for export licences bearing on quantities and/or expenditure commitments overshoot or risk overshooting the volume and/or appropriations set out in the Agreement on Agriculture, account taken of Article 9 thereof”, then the Commission may decide to use its export licensing powers. It has three options - it can set a flat-rate percentage level for acceptance of future licence applications, reject all future licence applications, or suspend the lodging of applications for export licences for five days (or longer in certain circumstances).<sup>56</sup>

107. Thus, Article 9a of Commission Regulation 1464/1995 provides the European Commission with three options for controlling the export of *any sugar* which threatens to cause the EC to exceed its quantity commitment level or its budgetary outlay commitment level for a relevant marketing year.

108. It is noted that Commission Regulation 1464/1995 is not cited in the Submission of the European Communities.

### 3. Article 27 of Council Regulation 1260/2001

109. According to the terms of Article 27(1) of Council Regulation 1260/2001, direct export subsidies can only be provided to quota sugar<sup>57</sup> “within the limits resulting from agreements concluded in accordance with Article 300 of the Treaty”.

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<sup>55</sup> Commission Regulation 1464/1995 pre-dates Council Regulation 1260/2001. Article 9a of Commission Regulation 1464/1995 was added by Commission Regulation 2136/1995 (Exhibit COMP-5). Commission Regulation 2136/1995 is expressed to have “regard to Council Regulation (EEC) No 1785/81 ... and in particular Articles 13(2) and 39 thereof”. Council Regulation 1785/1981 (Exhibit COMP-4) was replaced by Council Regulation 2038/1999 (Exhibit COMP-10). According to Article 55 and Annex III of Council Regulation 2038/1999, references to Article 13 of Council Regulation 1785/1981 were to be read as references to Article 13 of Council Regulation 2038/1999 and references to Article 39 of Council Regulation 1785/1981 were to be read as references to Article 46 of Council Regulation 2038/1999. Council Regulation 2038/1999 was replaced by Council Regulation 1260/2001. According to Article 49 and Annex VII of Council Regulation 1260/2001, references to Article 13 of Council Regulation 2038/1999 are to be read as references to Article 22 of Council Regulation 1260/2001 and references to Article 46 of Council Regulation 2038/1999 are to be read as references to Article 41 of Council Regulation 1260/2001.

<sup>56</sup> Article 9a(1) of Commission Regulation 1464/1995.

<sup>57</sup> By virtue of Article 13(1) of Council Regulation 1260/2001, Article 27 does not apply to C sugar not carried forward. That is, C sugar not carried forward cannot receive export subsidies.

110. According to the terms of Article 27(14) of Council Regulation 1260/2001, “[c]ompliance with the restrictions on volume resulting from agreements concluded under Article 300 of the Treaty shall be ensured by means of export licences issued for the reference periods provided for in such agreements and applying to the products concerned.”

111. The *Agreement on Agriculture* is an agreement concluded under Article 300 of the EC Treaty.<sup>58</sup>

112. The First Written Submission by the European Communities at the panel stage of this dispute acknowledged that Article 27(1) of Council Regulation 1260/2001 makes it clear that direct export subsidies may only be granted within the limits set down by the *Agreement on Agriculture*<sup>59</sup> and that the EC “verifie[s] on a weekly basis that the export refunds granted stay within the limits set out in the WTO Agreement”.<sup>60</sup> This is confirmed in paragraph 32 of the Submission of the European Communities in this arbitration.

#### 4. Jurisprudence of the European Court of Justice

113. The European Court of Justice has stated that:

“It is true that it is settled case-law of the Court of Justice that, having regard to their nature and structure, the WTO Agreement and the agreements and understandings annexed to it are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions, pursuant to the first paragraph of Article 230 EC ...

However, *where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to precise provisions of the agreements and understandings contained in the annexes to the WTO Agreement, it is for the Court to review the legality of the Community measure in question in the light of the WTO rules ....*

In that regard, it should be recalled that *Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community ...*”.<sup>61</sup>

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<sup>58</sup> See, for example, Council Decision 94/800/EC and Article 10(3) of Council Regulation 1260/2001.

<sup>59</sup> Paragraph 176 of the First Written Submission by the European Communities at the panel stage of this dispute.

<sup>60</sup> Paragraph 180 of the First Written Submission by the European Communities at the panel stage of this dispute.

<sup>61</sup> *Petrotub SA and Republica SA v Council of the European Union*, Case C-76/00 P, [2003] ECR I-79, paragraphs 54 to 57.

114. Australia notes that numerous relevant provisions of the instruments in questions contain express references to the *WTO Agreement*. For example:

- (a) preambular paragraph (10) to Council Regulation 1260/2001 states that the “agreement on agriculture concluded under the GATT agreements ... in particular requires the Community to gradually reduce its export support for agricultural products”;
- (b) the preamble to Commission Regulation 1464/1995 states that “the Agreement on Agriculture resulting from the Uruguay Round multilateral trade negotiations ... calls for the adaptation, in particular, of regulations applicable to import and export licences in the sugar sector from 1 July 1995”; and
- (c) Article 9a of Commission Regulation 1464/1995 gives its very purpose as being to ensure that “applications for export licences bearing on quantities and/or expenditure commitments [do not] overshoot or risk overshooting the volume and /or appropriations set out in the Agreement on Agriculture, account taken of Article 9 thereof”.

## **5. An example of export licensing**

115. The Commission can exercise its export licensing power through the adoption of Commission Regulations. An example of the use of the Commission’s export licensing power is provided by Commission Regulation 1716/2000.<sup>62</sup> This recognised that:

“The issue of export licences requested for products in the sugar sector for the second half of September 2000 is likely to result in the value limits agreed in Article 9 of the Agreement on Agriculture being exceeded for the 1999/2000 marketing year. The lodging of licence applications for that period should therefore be suspended”.<sup>63</sup>

116. It then suspended the “lodging of applications for export licences ... from 14 to 30 September 2000”.<sup>64</sup>

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<sup>62</sup> Exhibit COMP-6.

<sup>63</sup> Preambular paragraph (1) of Commission Regulation 1716/2000.

<sup>64</sup> Article 1 of Commission Regulation 1716/2000.

**E. ALLEGED IMPEDIMENTS TO SUCH USE OF THE EC’S EXPORT LICENSING POWERS<sup>65</sup>**

**1. Article 13 of Council Regulation 1260/2001**

*i. Introduction*

117. The EC argues that the Commission does not have the power under Council Regulation 1260/2001 to limit exports of C sugar since to do so would be contrary to Article 13 of Council Regulation 1260/2001.<sup>66</sup>

118. For the reasons set out below, Australia submits that this assertion is incorrect.

119. Australia also sets out below options for EC compliance in the event that the Arbitrator considers that the EC’s assertion is correct.

*ii. Application of Article 13 of Council Regulation 1260/2001*

120. The EC argues that, by virtue of Article 13(1) of Council Regulation 1260/2001, “C sugar must be exported”<sup>67</sup>. The EC argues that there is “only one exception to the obligation to export C sugar”, namely, where the world price of sugar is higher than the intervention price.<sup>68</sup> Thus, the EC argues that “Council Regulation 1260/2001 does not confer to the Commission the necessary authority to limit exports of C sugar in order to ensure compliance with the EC’s reduction commitments”.<sup>69</sup>

121. These arguments are misleading. By its very terms, Article 13(1) *does not apply to all C sugar*. It only applies to C sugar which is not carried forward by processors under Article 14 of Council Regulation 1260/2001. Under Commission Regulation 65/1982, the current limit on carry forward of out of quota C sugar for each processor is 20% of that processor’s A quota.<sup>70 71</sup>

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<sup>65</sup> As well as the impediments discussed below, the EC argues that if it refused to grant export licences for C sugar then it would be acting inconsistently with Article XI of the *GATT 1994* (paragraph 33 of the Submission of the European Communities). As the EC would acknowledge, the denial of export licences would be for the purpose of complying with the EC’s obligations under the *Agreement on Agriculture*. Article 21.1 of the *Agreement on Agriculture* plainly states that the provisions of the *GATT 1994* apply subject to the provisions of the *Agreement on Agriculture*. Thus, the refusal of export licences for C sugar, for the purposes of complying with the EC’s export subsidy obligations under the *Agreement on Agriculture*, would not be inconsistent with Article XI of the *GATT 1994*. Otherwise, the EC would need to conclude that Article 27(14) of Council Regulation 1260/2001 and Article 9a of Commission Regulation 1464/1995 violate Article XI of the *GATT 1994*.

<sup>66</sup> Paragraph 33 of the Submission of the European Communities.

<sup>67</sup> Paragraph 33 of the Submission of the European Communities.

<sup>68</sup> Footnote 40 to the Submission of the European Communities.

<sup>69</sup> Paragraph 34 of the Submission of the European Communities.

<sup>70</sup> Article 14(1) of Council Regulation 1260/2001 and Article 2 of Commission Regulation 65/1982.

<sup>71</sup> There is no limit on the carry forward of C sugar that becomes C sugar via the “declassification” mechanism in Article 10 of Council Regulation 1260/2001 (Article 14 of Council Regulation 1260/2001).

122. Article 14 of Council Regulation 1260/2001 provides that an undertaking “may decide to carry forward *all or part*” of the C sugar it has produced “to the next marketing year to be treated as part of that year’s production”.<sup>72</sup> It also provides that a Commission Regulation “may restrict the quantities of sugar which may be carried forward”.<sup>73</sup> It is Commission Regulation 65/1982 that creates the 20% limit. This limit could either be increased or abolished entirely. Doing so would require the adoption of a Commission Regulation to amend Commission Regulation 65/1982.

123. Upon the adoption of such a Commission Regulation, there would be no possibility of any inconsistency between the use of the EC’s export licensing powers to restrict the export of C sugar and the requirement that C sugar must be exported (contained in Article 13(1) of Council Regulation 1260/2001). Article 13(1), by its express terms, *does not apply* to “C sugar ... carried forward under Article 14”. Thus, increasing (or abolishing) the 20% carry forward limit would mean that processors could carry forward the C sugar not exported and thereby not be in violation of Article 13(1).<sup>74</sup> For C sugar exported pursuant to an export licence, processors would be in full compliance with Article 13(1) of Council Regulation 1260/2001. For the remaining C sugar, processors could carry it forward. Processors would not be in violation of Article 13(1) and the EC would have achieved its aim of ensuring that no C sugar is sold on the domestic EC market. There would be no inconsistency with Article 13 of Council Regulation 1260/2001.

124. In any event, a processor’s decision as to whether or not to carry forward C sugar does not need to be made before 1 February of the EC marketing year in question.<sup>75</sup> Thus, processors deciding not to carry forward C sugar still to be produced in 2005 and in subsequent years would be taking such decisions – as well as future planting and production decisions – in the full knowledge that EC compliance with WTO obligations places strict limits on their capacity to export sugar to be produced in those years.

*iii. Export of C sugar over two WTO quantity commitment marketing years*

125. If the Arbitrator finds, contrary to Australia’s submissions, that Commission Regulation 1464/1995 cannot be used to prevent the export of C sugar then this would not serve as a barrier to the use of Commission Regulation to bring about compliance with the EC’s quantity commitment level within the 2005/2006 WTO quantity commitment marketing year.

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<sup>72</sup> Article 14(1) of Council Regulation 1260/2001.

<sup>73</sup> Article 14(4) of Council Regulation 1260/2001.

<sup>74</sup> Another option may be to change or abolish the penalty for failure to export C sugar. This would require the amendment of Commission Regulation 2670/81.

<sup>75</sup> Article 14(2) of Council Regulation 1260/2001.

126. The legal requirement to export C sugar not carried forward does not serve as a *de jure* impediment to compliance with the EC's quantity commitment level. While C sugar not carried forward must be exported within a defined time period, there is no requirement to export C sugar within the year of production. Under the existing legal framework, producers have until 31 December following the expiration of the marketing year in question to export C sugar not carried forward.<sup>76</sup> In the event that C sugar production in any one year was to exceed the EC's quantity commitment level, the EC has the legal authority to limit export licences to 1.2735 million tonnes during the period 1 October to 30 September. The balance of C sugar production not carried forward could be exported in the period 1 October to 31 December in the following marketing year.<sup>77</sup>

127. Nor does the requirement to export C sugar not carried forward serve as a *de facto* impediment to WTO compliance in the 2005/2006 WTO quantity commitment marketing year. In the event of C sugar export availability in the 2005/2006 WTO quantity commitment marketing year exceeding the EC's quantity commitment level for two marketing years (i.e. a total export availability from 2005 C sugar production of over 2.547 million tonnes), the EC would still have sufficient lead time - more than one year - to comply in the 2005/2006 WTO quantity commitment marketing year and to make any necessary legislative or regulatory adjustments to the existing legal framework to ensure compliance in the following WTO quantity commitment marketing years. Growers and processors would also have sufficient lead time in which to plan for reduced production.

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<sup>76</sup> Article 13(1) of Council Regulation 1260/2001.

<sup>77</sup> Article 13(1) of Regulation 1260/2001 provides that "C sugar not carried forward ... must be exported without further processing before 1 January following the end of the marketing year concerned". Thus, the C sugar produced in the 2005/2006 EC marketing year (1 July 2005 to 30 June 2006) must be exported before 1 January 2007. That is, it can be disposed of in the 2005/2006 WTO quantity commitment marketing year (which runs from 1 October 2005 until 30 September 2006) and the 2006/2007 WTO quantity commitment marketing year (which runs from 1 October 2006 until 30 September 2007).

Thus, the C sugar produced in the 2005/2006 EC marketing year can be counted against the EC's quantity commitment level for two WTO quantity commitment marketing years.

Assuming out of quota C sugar production of the order of 2m tonnes in the 2005/2006 EC marketing year, processors could export *all* of their C sugar production and the EC could still come within its quantity commitment level for the 2005/2006 and 2006/2007 WTO quantity commitment marketing years (for example, export licences could be issued for 1m tonnes of this C sugar in each of the WTO quantity commitment marketing years in question).

iv. *The export of C sugar and the EC's budgetary outlay  
commitment level*

128. Article 9a of Commission Regulation 1464/1995 provides that “[i]f a stage is reached at which applications for export licences bearing on ... expenditure commitments overshoot or risk overshooting the ... appropriations set out in the Agreement on Agriculture, account taken of Article 9 thereof, for the marketing year in question”, then the Commission has three options to ensure that the budgetary outlay commitment level is not exceeded.

129. No distinction is made in Commission Regulation 1464/1995, nor in Council Regulation 1260/2001, between ACP/India equivalent sugar and other quota sugar.

130. The EC has not identified any legislative or regulatory impediment to compliance with its budgetary outlay commitments. It can apply its existing authority with immediate effect, through the periodic adjudications of the Management Committee for Sugar, which are given legal effect through Commission regulations. In practice, such regulations can be brought into force within a period of not more than 23 days from the Management Committee for Sugar's first exchange of views on the proposed Commission Regulation.

131. By applying its regulatory powers to the total amount of export refunds, which are paid in respect of quota sugar but not in respect of C sugar, the Commission can regulate the levels of export refunds on a periodic basis, in a way which would deliver compliance with the budgetary outlay commitment level in the 2005/2006 WTO budgetary outlay commitment marketing year and through successive marketing years. Indeed, the existing EC legal framework appears to *require* the Commission to exercise its market management powers to ensure such compliance, as reflected in the records of the Management Committee for Sugar.<sup>78</sup>

132. The EC acknowledges that:

- (a) it “must ensure that neither the subsidised export of A/B or of ACP/India equivalent sugar, nor the subsidised exports of C sugar, whether considered separately or together, exceed its reduction commitments”;<sup>79</sup> and
- (b) “the Commission must ... refuse to grant export refunds on exports of A/B sugar or of ACP/India equivalent sugar” if necessary to comply with the EC's export subsidy commitments under the *Agreement on Agriculture*.<sup>80</sup>

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<sup>78</sup> See Annex C for a copy of recent minutes of the Management Committee for Sugar.

<sup>79</sup> Paragraph 35 of the Submission of the European Communities.

<sup>80</sup> Paragraph 32 of the Submission of the European Communities.

133. Thus, even if, contrary to Australia’s submission, the Arbitrator finds that Commission Regulation 1464/1995 cannot be used to control the export of C sugar at all (e.g. all applications for C sugar export must be granted immediately upon application such that the power to control C sugar exports is, in effect, in the hands of processors rather than the Commission), then the *existing* Commission Regulation still plainly requires that the Commission ensure that the EC meets its budgetary outlay commitment level for the 2005/2006 WTO budgetary outlay commitment marketing year. This is because C sugar does not receive export refunds – only quota sugar does.

## 2. Article 22 of Council Regulation 1260/2001

134. The EC argues that Article 22 does not contain any authority “to create new substantive grounds for refusing the issuance of licences, including the ground that exports of C sugar would exceed the EC’s commitments”.<sup>81</sup> Australia submits that the reference to the “terms of validity of licences” and the “time limit for the issue of licences” that appears in Article 22.2(b) does not constitute an exhaustive list of the matters that the detailed rules can cover (hence the use of the word “including” in Article 22.2(b)). This is borne out by the fact that Article 9a of Commission Regulation 1464/1995 allows for controls to be placed on export licences for the purposes of complying with the EC’s export subsidy obligations.

135. The EC’s argument would also seem to be inconsistent with the opinion of Advocate General Stix-Hackl of the European Court of Justice. She has addressed the purpose of export licenses in a case involving C sugar. She said that “export licences for *C sugar*, in my opinion, also serve the temporal and *quantitative regulation of such exports*, which is necessary ... to be able to *control the quantities of sugar from the common market offered on the world market*”.<sup>82</sup> She added, more generally, that export licences for agricultural products are “for the management of trade with non-member countries.”<sup>83</sup>

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<sup>81</sup> Footnote 39 of the Submission of the European Communities.

<sup>82</sup> Case C-329/01, *British Sugar*, Opinion of Advocate General Stix-Hackl, paragraph 61 (emphasis added) (Exhibit COMP-24).

<sup>83</sup> Case C-329/01, *British Sugar*, Opinion of Advocate General Stix-Hackl, paragraph 61.

### **3. Article 27 of Council Regulation 1260/2001**

136. The EC has also sought to rely on the fact that Article 27(14) of Council Regulation 1260/2001, which refers to using export licensing to comply with restrictions on volume arising from the *Agreement on Agriculture*, is contained in Article 27 dealing with export refunds which does not apply to C sugar.<sup>84</sup>

137. In response, Australia would point out that Article 9a of Commission Regulation 1464/1995, which makes no distinction between quota sugar and C sugar in its references to the application of the EC's export licensing powers, was adopted pursuant to the power provided by Article 22 of Council Regulation 1260/2001, not Article 27.<sup>85</sup> As set out above, Article 22 applies equally to quota sugar and C sugar.

138. The purpose of the statement in Article 13(1) of Council Regulation 1260/2001 that Article 27 does not apply to C sugar is to ensure that C sugar is not in receipt of the export refunds provided by Article 27 of Council Regulation 1260/2001.

#### **F. ARTICLE 20 OF COUNCIL REGULATION 1260/2001**

139. Exercise of the Commission's authority under Article 20 of Council Regulation 1260/2001, beyond the narrow range of uses currently permitted, would serve to reduce the quantity of C sugar available for export.

140. Article 20 affords the Commission wide discretionary authority to determine – without quantitative limit – that any sugar used in any Commission-designated manufacturing process would not be counted as “production” within the meaning of Article 1 of Council Regulation 1260/2001.

141. The wide exercise of the Commission's authority under Article 20 would result in a lower level of export availability of C sugar; given that sugar does not acquire the status of C sugar until a processor has produced up to the maximum quota allocated to each undertaking

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<sup>84</sup> Footnote 39 to the Submission of the European Communities.

<sup>85</sup> See footnote 55.

## **G. THE TIME TAKEN TO ADOPT A NEW COMMISSION REGULATION**

142. The time-period for the Commission to adopt measures in the sugar sector under the Management Committee procedure has proved to be very short indeed. The Commission routinely adopts implementing rules in this sector in a matter of days. As set out in Table 1 of Exhibit COMP-28, for a range of 27 regulations adopted by the Commission in the sugar sector under the Management Committee procedure, the total length of the procedure from the date of the Committee's first formal exchange of views on the Commission proposal until entry into force of the resultant Commission Regulation ranged from 14 to 43 days. The average and median duration of the procedure for these 27 regulations was 23 days.

143. As set out in Annex A, the shortest period possible within the EC's legal system, in light of the particular circumstances of this dispute, for a Commission Regulation to enter into force in relation to the EC sugar regime is a period of not more than 28 days from the time of the Management Committee for Sugar's first formal exchange of views.

144. Australia notes that, in fact, the EC did not take the necessary steps to implement within the shortest possible period. However, although the EC could have implemented some time ago, Australia proposes that, exceptionally and as a gesture to the EC, the reasonable period of time should end four weeks from the date of circulation of the arbitration award under Article 21.3(c) of the *DSU*. On this basis, Australia requests that the reasonable period of time for implementation of the DSB's recommendations and rulings in this dispute be six months and six days, that is, until 25 November 2005.

## **H. THE TIME TAKEN TO ADOPT A NEW COUNCIL REGULATION AND IMPLEMENTING COMMISSION REGULATIONS**

### **1. Introduction**

145. The purpose of this section of Australia's submission is to set out the period of time required to adopt a Council Regulation amending Council Regulation 1260/2001, to set out the period of time required to adopt a new Council Regulation on the common organisation of the markets in the sugar sector, and to set out the period of time required to adopt implementing Commission Regulations following adoption of a new Council Regulation.

146. Although Australia does not believe that such Council or Commission Regulations are required to bring about EC compliance with the DSB's recommendations and rulings, this Part is designed to be of assistance to the Arbitrator in the event that it is considered necessary to calculate such periods.

**2. Time usually taken by the EC to adopt new Council Regulations amending common market organisations in agricultural products**

147. The complainants have undertaken a study of Council Regulations adopted by the EC between 1 January 1998 and 31 July 2005 which amended existing common market organisations for agricultural products based on Articles 36 and 37 of the EC Treaty.<sup>86</sup>

148. As set out in the table below, this study has shown that the shortest period between a proposal by the European Commission and the subsequent entry into force of the resultant Council Regulation was 89 days, the average was 179 days, and the median was 163 days. The basis of these calculations is shown in Exhibit COMP-32.

	<i>Commission proposal to European Parliament opinion</i> (days)	<i>Commission proposal to Council adoption</i> (days)	<i>Commission proposal to entry into force</i> (days)
<i>Shortest period</i>	54	55	89
<i>Average period</i>	131	167	179
<i>Median period</i>	125	158	163

149. In the case of the proposed new sugar regime, a proposal of the Commission was released on 22 June 2005. In its submission, the EC has estimated the duration of subsequent steps in the legislative process from this date.<sup>87</sup> Australia will take the same approach. Using the median figure given above, this translates to the adoption of a new Council Regulation on 27 November 2005 and the entry into force of a new Council Regulation on 2 December 2005 (or 197 days after adoption of the *EC Sugar Panel Report* and *EC Sugar Appellate Body Report*).<sup>88</sup>

<sup>86</sup> Exhibit COMP-32.

<sup>87</sup> Paragraph 52 of the Submission of the European Communities.

<sup>88</sup> Annex B contains an explanation of why this period is so much less than the 14 month 11 day period awarded in *EC-GSP (India)*.

### 3. Time usually taken by the EC to adopt Council Regulations creating new common market organisations in agricultural products

150. The EC has submitted a table (Exhibit EC-3) showing “all the regulations based on Articles 36 of the EC Treaty establishing a CMO adopted by the Council since 1 January 1998”.<sup>89</sup> Using the same Council Regulations, Exhibit COMP-33 shows that the shortest period between a proposal by the European Commission and the subsequent entry into force of the resultant Council Regulation was 171 days, the average was 346 days, and the median was 280 days.

	<i>Commission proposal to European Parliament opinion</i> (days)	<i>Commission proposal to Council adoption</i> (days)	<i>Commission proposal to entry into force</i> (days)
<i>Shortest period</i>	113	163	171
<i>Average period</i>	239	318	346
<i>Median period</i>	162	258	280

151. In the case of the proposed new sugar regime, a proposal of the Commission was released on 22 June 2005. In its submission, the EC has estimated the duration of subsequent steps in the legislative process from this date.<sup>90</sup> Australia will take the same approach. Using the median figure given above, this translates to adoption of a new Council Regulation on 7 March 2006 and the entry into force of a new Council Regulation on 29 March 2006 (or 314 days after adoption of the *EC Sugar Panel Report* and *EC Sugar Appellate Body Report*). This compares to the EC’s submission of “the end of March 2006” for Council adoption (*not entry into force*) of the Council Regulation.

<sup>89</sup> Footnote 47 to the Submission of the European Communities.

<sup>90</sup> Paragraph 52 of the Submission of the European Communities.

#### **4. The time taken to adopt implementing Commission Regulations following the adoption of a new Council Regulation**

152. The EC submits that “the Commission will need three months in order to enact the necessary implementing regulations” following the adoption of a new Council Regulation establishing a new common organisation of the markets in the sugar sector.<sup>91</sup>

153. The Council adopted Council Regulation 1260/2001 on 19 June 2001. On 27 June 2001 – just eight days later – the Commission adopted three implementing Regulations pursuant to it.<sup>92</sup> In each case, the Management Committee for Sugar conducted its exchange of views and delivered a favourable opinion on the Commission’s proposal *before* Council Regulation 1260/2001 was even adopted.<sup>93 94</sup>

154. Nonetheless, in determining the reasonable period of time, Australia requests that the Arbitrator give the EC the full median period of 23 days for the completion of the Management Committee procedure.<sup>95</sup>

155. Accordingly:

- (a) on the assumption that an amendment to Council Regulation 1260/2001 is required to secure implementation, the reasonable period of time would expire 23 days after the amendment enters into force on 2 December 2005. The reasonable period of time would expire on 25 December 2005 (being 220 days after adoption of the *EC Sugar Panel Report* and the *EC Sugar Appellate Body Report*). As this date is a Sunday and since Australia understands that 26 December 2005 may be a WTO holiday, Australia submits that the reasonable period of time should expire on 27 December 2005; and
- (b) on the assumption that a new Council Regulation on the common organisation of the markets in the sugar sector is required to secure implementation, the reasonable period of time would expire 23 days after the new Council Regulation enters into force on 29 March 2006. The

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<sup>91</sup> Paragraph 75 of the Submission of the European Communities.

<sup>92</sup> The three regulations are: (1) Commission Regulation (EC) No 1261/2001 of 27 June 2001 laying down detailed rules for the application of Council Regulation (EC) No 1260/2001 as regards delivery contracts for beet and the price increases and reductions applicable to the price of beet (OJ L 178, 30.6.2001, p. 46); (2) Commission Regulation (EC) No 1262/2001 of 27 June 2001 laying down detailed rules for implementing Council Regulation (EC) No 1260/2001 as regards the buying in and sale of sugar by intervention agencies (OJ L 178, 30.6.2001, p. 48); and (3) Commission Regulation (EC) No 1265/2001 of 27 June 2001 laying down detailed rules for the application of Council Regulation (EC) No 1260/2001 as regards granting the production refund on certain sugar products used in the chemical industry (OJ L 178, 30.6.2001, p. 63). See Exhibit COMP-44.

<sup>93</sup> The Management Committee delivered its favourable opinions on 30 May 2001, 13 June 2001 and 13 June 2001, respectively, whereas the Council Regulation 1260/2001 was adopted on 19 June 2001.

<sup>94</sup> Moreover, Australia notes that in the case of the existing EC sugar regime, detailed rules sometimes pre-dated Council Regulation 1260/2001 (see, for example, Commission Regulation 1464/1995).

<sup>95</sup> See paragraph 142.

reasonable period of time would expire on 21 April 2006 (being 337 days after adoption of the *EC Sugar Panel Report* and the *EC Sugar Appellate Body Report*).

156. This compares to the EC's submission of "the end of June 2006" for the adoption of "necessary implementing regulations".<sup>96</sup>

#### **I. COMPLIANCE WITH THE BUDGETARY OUTLAY COMMITMENT LEVEL**

157. As set out above, implementation requires the EC to limit the annual total budgetary outlay on export subsidies to €499.1 million in the 12 month period of 1 July to 30 June.

158. The Commission can meet this obligation through the Management Committee procedure, by regulating the award of export refunds and eligible quantities. It can do so without recourse to export licences, as the Commission itself determines expenditure levels. Export licensing is a supplementary means of control.

#### **J. COMPLIANCE WITH THE QUANTITY COMMITMENT LEVEL**

159. As set out above, implementation requires the EC to limit the annual total quantity of sugar exports to 1.2735 million tonnes in the 12 month period of 1 October to 30 September.

160. As set out above, the Commission has full power to regulate the level of quota exports through a combination of Management Committee procedures and through export licensing requirements. There is no legal impediment to the EC applying that same authority to C sugar exports. The level of C sugar exports is capable of regulation through export licensing procedures, just like quota sugar.

161. There is no legal requirement to export quota sugar, which may be disposed of on the EC internal market at the guaranteed price. Nor is there a legal entitlement to export any quantity of quota sugar. Export entitlements for the export of quota sugar are conditional on the grant of an export licence. As noted above, the grant of an export licence is conditional on compliance with the EC's quantity commitment level and budgetary outlay commitment level.

162. If the Arbitrator finds, contrary to Australia's submissions, that Commission Regulation 1464/1995 cannot be used to prevent the export of C sugar then this should not serve as a barrier to the use of Commission Regulation to bring about compliance with the EC's quantity commitment level within the 2005/2006 WTO quantity commitment marketing year. This is because a Commission Regulation could be adopted limiting the export of quota sugar and distributing the export of C sugar over the 2005/2006 WTO quantity commitment marketing year *and* the

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<sup>96</sup> Paragraph 75 of the Submission of the European Communities.

2006/2007 WTO quantity commitment marketing year (which runs from 1 October 2006 until 30 September 2007) in a manner which respects the quantity commitment levels for both those years.

163. It the Arbitrator finds, contrary to Australia's submissions, that Commission Regulation 1464/1995 cannot be used to control the export of C sugar at all (e.g. all applications for C sugar export must be granted immediately upon application such that the power to control C sugar exports is, in effect, in the hands of processors rather than the Commission), then the time period to implementation of the quantity commitment level would be the only relevant consideration. Australia submits that the EC could still comply with its budgetary outlay commitment level in the 2005/2006 budgetary outlay commitment marketing year through the adoption of a Commission Regulation in relation to the export of quota sugar. If a new Council Regulation was required to ensure compliance with the quantity commitment level, this could be in force within not more than 197 days from the date of adoption of the DSB's recommendations and rulings.

## **PART IV. IMPLEMENTING THE DSB'S RECOMMENDATIONS AND RULINGS**

### **A. INTRODUCTION**

164. The *existing* EC sugar regime, in accordance with Article 300(7) of the EC Treaty, *requires* that the EC keep within its quantity commitment level of 1.2735 million tonnes of quota and/or C sugar for the 1 October to 30 September year and its budgetary outlay commitment level of €499.1 million for the 1 July to 30 June year. Furthermore, it provides the *means* by which the Commission, assisted by the Management Committee for Sugar, can bring about such compliance.

### **B. IMPLEMENTATION BY COMMISSION REGULATION ON BASIS THAT C SUGAR EXPORTS CAN BE LIMITED BY EXPORT LICENCES**

165. The EC can implement the DSB's recommendations and rulings by:

- (a) adopting a Commission Regulation limiting export licences so that the quantity commitment level and budgetary outlay commitment level are not exceeded for the 2005/2006 WTO quantity commitment marketing year and the 2005/2006 WTO budgetary outlay commitment marketing year;
- (b) adopting a Commission Regulation increasing the permitted carry forward of C sugar (if required); and

- (c) adopting a Commission Regulation pursuant to Article 20 of Council Regulation 1260/2001 to reduce the level of export availability of sugar (if required).<sup>97</sup>

**C. IMPLEMENTATION BY COMMISSION REGULATION ON BASIS THAT C SUGAR EXPORTS CAN BE REGULATED, BUT NOT LIMITED, BY EXPORT LICENCES**

166. If the Arbitrator finds, contrary to Australia’s submissions, that Commission Regulation 1464/1995 cannot be used to prevent the export of C sugar then the EC can implement the DSB’s recommendations and rulings by:

- (a) adopting a Commission Regulation to spread C sugar exports over the 2005/2006 and 2006/2007 WTO quantity commitment marketing years;
- (b) adopting a Commission Regulation limiting export licences for quota sugar to the extent required to ensure that the quantity commitment level and budgetary outlay commitment level are not exceeded for the 2005/2006 WTO quantity commitment marketing year and the 2005/2006 WTO budgetary outlay commitment marketing year;
- (c) adopting a Commission Regulation increasing the permitted carry forward of C sugar (if required); and
- (d) adopting a Commission Regulation pursuant to Article 20 of Council Regulation 1260/2001 to reduce the level of export availability of sugar (if required).

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<sup>97</sup> Article 20(1) of Council Regulation 1260/2001 provides that “[i]t may be decided that sugar or isoglucose used for the manufacture of certain products shall not be considered as production within the meaning of this Chapter”. Article 20(2) of Council Regulation 1260/2001 allows for the Commission to adopt detailed rules for implementing Article 20(1) pursuant to the Management Committee procedure.

**D. IMPLEMENTATION BY COUNCIL REGULATION AND COMMISSION  
REGULATION ON BASIS THAT C SUGAR EXPORTS CANNOT BE REGULATED AT  
ALL BY EXPORT LICENCES**

167. If the Arbitrator finds, contrary to Australia's submission, that Commission Regulation 1464/1995 cannot be used to control the export of C sugar at all (e.g. all applications for C sugar export must be granted immediately upon application such that the power to control C sugar exports is, in effect, in the hands of processors rather than the Commission), then the EC can implement the DSB's recommendations and rulings by:

- (a) adopting a Commission Regulation limiting export licences for quota sugar; and
- (b) adopting a Council Regulation providing the appropriate Commission authority to control the export of C sugar and adopting an implementing Commission Regulation to impose such controls

to the extent required to ensure that the quantity commitment level and budgetary outlay commitment level are not exceeded for the 2005/2006 WTO quantity commitment marketing year and the 2005/2006 WTO budgetary outlay commitment marketing year.

## **PART V. LEGAL ARGUMENTS - THE WTO “REASONABLE PERIOD OF TIME”**

### **A. INTRODUCTION**

168. Previous arbitrators have established the principle that the reasonable period of time for a WTO Member to comply with the recommendations and rulings of the DSB is the shortest period possible within its legal system in the light of the particular circumstances of the dispute.<sup>98</sup>

### **B. THE “SHORTEST PERIOD POSSIBLE” MUST BE DETERMINED BY REFERENCE TO THE ACTION NEEDED TO COMPLY WITH THE DSB’S RECOMMENDATIONS AND RULINGS**

#### **1. Introduction**

169. The EC would like to cast the Arbitrator’s role as being to determine the reasonable period of time to reform the overall EC sugar regime.<sup>99</sup> However, *EC-GSP (India)*, *Canada-Autos* and *EC-Hormones* all show that the Arbitrator’s role is confined to determining the reasonable period of time for implementing the recommendations and rulings of the DSB.

170. In this dispute, the recommendations and rulings of the DSB require that the EC bring its export subsidies on sugar into conformity with its obligations under the *Agreement on Agriculture*. The recommendations and rulings do not apply to any other part of the EC sugar regime. Therefore, the Arbitrator’s determination as to the reasonable period of time should have regard only to the shortest period possible within the legal system of the EC to bring those export subsidies into conformity.

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<sup>98</sup> Paragraph 26 of *EC-GSP (India)*, paragraph 42 of *US-CDSOA*, paragraph 34 of *Chile-Price Band System*, paragraph 38 of *Canada-Patent Term*, paragraph 32 of *US-1916 Act*, paragraph 31 of *US-Homestyle Copyright*, paragraph 41 of *Canada-Autos*, paragraph 47 of *Canada-Pharmaceutical Patents*, paragraph 37 of *Korea-Alcohol*, paragraph 38 of *Australia-Salmon*, paragraph 22 of *Indonesia-Autos*, and paragraph 26 of *EC-Hormones*.

<sup>99</sup> Which, in the EC’s view, would not necessarily be the time period to *complete* implementation.

**2. The implementing Member’s discretion cannot result in a longer reasonable period of time than that required to implement the DSB’s recommendations and rulings**

171. The EC lists a number of “options” for implementing the DSB’s recommendations and rulings.<sup>100</sup> In fact, the EC goes so far as to say that:

“An implementation method which addresses the structural causes of the subsidized exports of sugar would serve best the objectives of the *Agreement on Agriculture* and be in the interest of all of the WTO Members, including the requesting parties, even if it may require a longer implementation period”.<sup>101</sup>

172. Australia submits, in response to this extraordinary statement, that:

- (a) the objectives of the *Agreement on Agriculture* are best served when WTO Members comply with their obligations, not when they seek reasons to delay such compliance;
- (b) it is for the requesting parties, not the EC, to decide what is in the requesting parties’ interests; and
- (c) this statement is an acknowledgement by the EC that its proposed method of implementation would not result in compliance in the shortest period possible within the EC’s legal system.

173. The EC’s preference for incorporating the implementation of the DSB’s recommendations and rulings into its larger objective of reforming its sugar regime cannot lead to a determination of a longer period of time. While previous arbitrators have found that it is for the WTO Member concerned to choose the method of implementing the DSB’s recommendations and rulings,<sup>102</sup> they have also found that this discretion is subject to the proviso that the method chosen must be consistent with the DSB’s recommendations and rulings and also with the provisions of the covered agreements.<sup>103</sup>

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<sup>100</sup> Paragraphs 37 to 45 of the Submission of the European Communities.

<sup>101</sup> Paragraph 41 of the Submission of the European Communities.

<sup>102</sup> Paragraph 38 of *EC-Hormones*, paragraph 35 of *Australia-Salmon*, paragraph 45 of *Korea-Alcohol*, paragraph 40 of *Canada-Pharmaceuticals*, paragraph 32 of *Chile-Price Band System*, paragraph 48 of *US-CDSOA*, and paragraph 30 of *EC-GSP (India)*.

<sup>103</sup> Paragraph 38 of *EC-Hormones*, paragraph 35 of *Australia-Salmon*, paragraph 45 of *Korea-Alcohol*, paragraph 40 of *Canada-Pharmaceuticals*, paragraph 32 of *Chile-Price Band System*, paragraph 48 of *US-CDSOA*, and paragraph 30 of *EC-GSP (India)*.

174. In addition, the Arbitrator in *EC-GSP (India)* found that the “shortest period possible” must be determined by reference to the action needed to comply with the recommendations and rulings in question, not by reference to any wider reform that a WTO Member may choose to undertake in response to the recommendations and rulings.<sup>104</sup> The Arbitrator stated:

“It is, of course, beyond the scope of my mandate to determine *how* the European Communities should implement the recommendations and rulings of the DSB. It is for the European Communities to choose the method of implementation, provided that the method chosen is consistent with the relevant recommendations and rulings and with the provisions of the covered agreements. Within these limitations, the European Communities is thus entitled to bring the Drug Arrangements into conformity through whatever method it deems appropriate, be it at the same time and within the same instrument as its GSP scheme, or otherwise.

However, as the European Communities itself acknowledges, the relevant recommendations and rulings of the DSB require the European Communities to bring into conformity solely the Drug Arrangements, and not any other part of the European Communities' GSP scheme. Therefore, my determination as to the reasonable period of time for implementation in this arbitration must have regard only to the shortest period possible within the legal system of the European Communities to bring the Drug Arrangements into conformity with its WTO obligations. The mere fact that the European Communities has decided to incorporate the task of implementation within the larger objective of reforming its overall GSP scheme cannot lead to a determination of a shorter, or longer, period of time. In other words, my task is not to determine the reasonable period of time for reforming the overall GSP scheme. Rather, my determination must be confined to the reasonable period of time for implementing the recommendations and rulings of the DSB with respect to the Drug Arrangements.”<sup>105</sup>

175. Similarly, in *Canada-Autos*, the Arbitrator stated that:

“While it might be more convenient for Canada to implement the DSB's recommendations in this case on the same timeline as it has planned for the reform of its customs administration regime, this factor is not relevant in determining the “shortest period possible” within Canada's legal system for implementation of the DSB's recommendations.”<sup>106</sup>

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<sup>104</sup> See paragraph 31 of *EC-GSP (India)*.

<sup>105</sup> Paragraphs 30 and 31 of *EC-GSP (India)* (footnote omitted).

<sup>106</sup> Paragraph 55 of *Canada-Autos*.

176. The EC’s proposed method of implementation involves the adoption of a new Council Regulation, to apply with effect from 1 July 2006, and the use of the period from DSB adoption until 1 January 2007 as a time to artificially increase its volume of C sugar and then to dispose of that sugar on world markets with the benefit of export subsidies.

177. The EC’s proposed method of implementation is to export approximately 7 million tonnes of subsidised sugar in the period from 1 October 2005 to 31 December 2006 when such exports for that period are legally limited to approximately 1.6 million tonnes.<sup>107</sup> Exceeding the legal obligations by a multiple of more than four is not a method of implementation consistent with the DSB’s recommendations and rulings or the covered agreements. This is all the more so when that quantity is far in excess of C sugar exports in previous years.

178. The EC appears to be under the impression that any WTO discretion to choose the method of implementing the DSB’s recommendations and rulings means that the role of the Arbitrator is solely to determine the period of time required to undertake whatever method of implementation has been nominated by that Member. This is incorrect. In *EC-Hormones*, the EC requested a “reasonable period of time” based on the time it would take to:

- (a) conduct “risk assessments for hormones ... including an evaluation of the risks posed to human health from failure to observe good veterinary practice”; and
- (b) “review the measure at issue in the light of the results of that risk assessment and propose to abolish, amend or maintain it, as appropriate”.<sup>108</sup>

179. The Arbitrator refused to grant the EC any period of time to conduct the requested risk assessments, stating that to do so “would not be consistent with the provisions of the DSU requiring prompt compliance with DSB recommendations and rulings, nor with the obligations of the European Communities under the *SPS Agreement*”.<sup>109</sup>

180. In doing so, the Arbitrator noted that “*prompt compliance* with the recommendations and rulings of the DSB is essential under Article 21.1” of the *DSU*.<sup>110</sup> The Arbitrator also recalled the emphasis on the “*prompt* settlement of situations” in Article 3.3 of the *DSU*.

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<sup>107</sup> A WTO quantity limit of 1.2735 million tonnes per annum translates to exports of 106,125 tonnes per month. There are fifteen months between 1 October 2005 and 31 December 2006. This translates to 1,591,875 tonnes for that period.

<sup>108</sup> Paragraph 6 of *EC-Hormones*.

<sup>109</sup> Paragraph 41 of *EC-Hormones*.

<sup>110</sup> Paragraph 39 of *EC-Hormones*.

**C. ARE THERE ANY RELEVANT “PARTICULAR CIRCUMSTANCES” THAT WOULD JUSTIFY A REASONABLE PERIOD OF TIME OF LONGER THAN 15 MONTHS?**

**1. The fact that beet planting and sugar production decisions may already have been made is not a “particular circumstance” that would justify a reasonable period of time of longer than 15 months**

181. The EC argues that it would be “appropriate to allow the EC producers to continue to export out of quota sugar until 1 January 2007” because the legal provision allowing the export of C sugar until 1 January 2007 was in force when the beet planting and sugar production decisions were made.<sup>111</sup> However, such factors have previously been found to be irrelevant to the determination of the reasonable period of time.

182. In *Japan-Alcohol*, Japan unsuccessfully argued that the determination of the reasonable period of time should take into account the adverse effects on shochu producers of the “unprecedented” increase in taxation required to bring about WTO-compliance.<sup>112</sup>

183. In *Indonesia-Autos*, Indonesia unsuccessfully argued that the determination of the reasonable period of time should incorporate a “transition period” to allow the affected companies and industries to make structural adjustments. The Arbitrator stated:

“In virtually every case in which a measure has been found to be inconsistent with a Member’s obligations under GATT 1994 or any other covered agreement, and therefore, must be brought into conformity with that agreement, some degree of adjustment by the domestic industry of the Member concerned will be necessary ... Structural adjustment to the withdrawal or the modification of an inconsistent measure, therefore, is not a “particular circumstance” that can be taken into account in determining the reasonable period of time under Article 21.3(c)”.<sup>113</sup>

184. The decision of whether or not to “penalise production already undertaken before the case was decided”<sup>114</sup> is entirely within the hands of the EC. There are numerous avenues available to the EC whereby returns to beet growers and sugar processors can be guaranteed at the same time as its export subsidy commitments are respected.

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<sup>111</sup> Paragraph 90 of the Submission of the European Communities. The assertion in itself is legally incorrect. The prohibition on subsidised exports in excess of WTO commitments has been extant since 1995, the date of entry into force of the *WTO Agreement*.

<sup>112</sup> Paragraphs 19 and 27 of *Japan-Alcohol*.

<sup>113</sup> Paragraph 23 of *Indonesia-Autos*. See also paragraph 52 of *Canada-Pharmaceuticals*.

<sup>114</sup> Paragraph 94 of the Submission of the European Communities.

**2. The existence of possible structural market imbalance is not a “particular circumstance” that would justify a reasonable period of time of longer than 15 months**

185. The EC also argues that placing restrictions on the export of sugar “could result in unacceptable structural market imbalances and would require the EC to finance the production of large quantities of non-disposable surpluses”.<sup>115</sup> However, this should not be taken into account in the determination of the reasonable period of time.

186. Australia acknowledges that placing controls on the export of sugar could increase the amount of quota sugar sold to Member States’ intervention agencies and increase the amount of C sugar stored by processors.

187. At the same time, Australia notes that the Commission’s proposed reforms envisage *increases* in quota production. The current proposed new Council Regulation on the common organisation of the markets in the sugar sector envisages quota sugar of a total of 17.4 million tonnes (slightly more than the sum of the A and B quotas under the current sugar regime).<sup>116</sup> In addition, it gives sugar processors who produced C sugar in the 2004/2005 EC marketing year until 31 July 2006 to purchase *additional annual quota* – the total additional quota available for all such processors would be 1 million tonnes.<sup>117</sup> If the proposed incentives to retire quota do not serve to reduce EC sugar production, structural imbalances would continue under the new regime.

188. In addition, Australia recalls that “[s]tructural adjustment to the withdrawal or the modification of an inconsistent measure .. is not a “particular circumstance” that can be taken into account in determining the reasonable period of time under Article 21.3(c)”.<sup>118</sup>

189. At paragraph 89 of its submission, the EC seeks to justify deferred implementation *beyond* the envisaged date of entry into force of its new sugar regime on the basis that “applying” [high levies to avoid the accumulation of surplus sugar] produced from beet which had already been sown before this case was decided would be tantamount to imposing a retroactive penalty for commercial decisions that were perfectly legitimate at the time they were taken”.

190. This statement confirms Australia’s understanding that there is no present intent on the part of the EC to apply its WTO commitments to sugar produced from any crop planted before the projected date of entry into force of a new sugar regime. It is apparent that the EC is contemplating lengthy transitional arrangements pending

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<sup>115</sup> Paragraph 41 of the Submission of the European Communities.

<sup>116</sup> Articles 7(1) and 7(2) and Annex III of the proposed new Council Regulation on the common organisation of the markets in the sugar sector (Exhibit EC-1).

<sup>117</sup> Article 8.1 and Annex IV of the proposed new Council Regulation on the common organisation of the markets in the sugar sector.

<sup>118</sup> Paragraph 23 of *Indonesia-Autos*. See also paragraph 52 of *Canada-Pharmaceuticals*.

which Article 34 of the proposed new Council Regulation on the common organisation of the markets in the sugar sector<sup>119</sup> would not be applied by the Commission.

191. Under such circumstances, the EC would continue to allow for the disposal of *unlimited* quantities of sugar on the export market, for up to five months (and possibly longer) after the entry into force of the new regime.

### **3. This is not a situation comparable to that in *Chile-Price Band System***

192. There is no similarity between export subsidies provided for sugar in the EC and the price band system at issue in *Chile-Price Band System*. Export subsidies provided in respect of EC sugar do not have the “unique role and impact” on society that was found to be a relevant factor in determining the “reasonable period of time” in *Chile-Price Band System*.<sup>120</sup> They do not serve as the “cornerstone” of EC agricultural policy.<sup>121</sup> Nor are they “fundamentally integrated” into the “central agricultural policies” of the EC.<sup>122</sup>

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<sup>119</sup> See Exhibit EC-1. Article 34 of the proposed new Council Regulation refers to the use of export licensing for the purposes of observance of the EC’s WTO commitments on export subsidies.

<sup>120</sup> Paragraph 48 of *Chile-Price Band System*.

<sup>121</sup> Paragraph 46 of *Chile-Price Band System*.

<sup>122</sup> Paragraph 48 of *Chile-Price Band System*.

193. In reality, the EC sugar regime is simply one of many common market organisations within the EC and is, in fact, seen as an *aberration* in the context of the Common Agricultural Policy. EC Agriculture Commissioner Mariann Fischer Boel has stated that:

“A famous proverb tells us that “no man is an island”. I could also apply this to common market organisations within the CAP.

The CAP has been undergoing radical reform. But this process must embrace the whole of the CAP. If we unleash fundamental change on support for European agriculture, we cannot leave an exception to that change – certainly not an exception the size of our sugar industry.

To do so would create intolerable distortions and imperil the success of the reforms of 2003 and 2004.”<sup>123 124</sup>

194. The EC’s argument in this arbitration mirrors its approach in *EC-GSP (India)*. In that arbitration, the EC argued that:

“[C]hanges to the Drug Arrangements will be politically sensitive and subject to “very close scrutiny by the relevant stakeholders”, particularly because of the implications for several developing countries. ...[T]his could increase the time taken to reach a solution because, for example, further discussions with the member States of the European Union and among various bodies of the European Communities will be required”.<sup>125</sup>

195. This argument was rejected by the arbitrator in *EC-GSP (India)* in the following terms:

“I am not persuaded by the statements of the European Communities that the particular nature of the Drug Arrangements within the GSP scheme and the development policy of the European Communities warrants any increase in the reasonable period of time for implementation. Although a modification to the Drug Arrangements may well be described as “politically sensitive”, this factor does not distinguish the Drug Arrangements from any other measure that is likely to be the subject of a WTO dispute. The measure examined in *Chile – Price Band System* was quite different. That measure had a “unique ... impact on Chilean society” (that is, the society of the *implementing* Member); “domestic opposition” to its repeal or modification reflected “serious debate, within and outside the legislature of Chile, over the means of devising an

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<sup>123</sup> Speech given at the presentation of the proposal of the sugar reform to the European Parliament, 22 June 2005 (Exhibit COMP-29).

<sup>124</sup> Most CAP regimes were reformed in 1992. The sugar regime was left out of the 1992 reforms. The Commission has stated that: “In essence, the sugar CMO was left out of the CAP reform process which started in 1992 and has continued since then, and was only slightly affected by the Uruguay round of trade negotiations ... Today it is experiencing pressure which is profoundly changing the prospects for the sector and is also being subjected to criticism, sometimes years-old, from numerous and varied sources” (see Exhibit COMP-6 from the panel stage of this dispute).

<sup>125</sup> Paragraph 12 of *EC-GSP (India)* (footnote omitted).

implementation measure” and “not simply opposition by interest groups to the loss of protection”.<sup>126</sup>

196. The EC has done no more than demonstrate that making changes to its existing EC regime will be domestically contentious. The existence of domestic contentiousness is irrelevant to the determination of the reasonable period of time. In *Canada-Pharmaceuticals*, the Arbitrator stated:

“I see nothing in Article 21.3 to indicate that the supposed domestic “contentiousness” of a measure taken to comply with a WTO ruling should in any way be a factor to be considered in determining a “reasonable period of time” for implementation. All WTO disputes are “contentious” domestically at least to some extent; if they were not, there would be no need for recourse by WTO Members to dispute settlement”.<sup>127</sup>

#### **4. The EC’s reasonable period of time is not “broadly in line” with previous awards under Article 21.3(c) of the DSU concerning legislative measures of the EC**

197. Contrary to the EC’s submission, an effective reasonable period of time of at least 865 days (or over 28 months) to comply with the quantity commitment level<sup>128</sup> and an effective reasonable period of time of at least 773 days (or over 25 months) to comply with the budgetary outlay commitment level<sup>129</sup> are not “broadly in line”<sup>130</sup> with previous time limits granted to the EC. In reality, the reasonable periods of time granted in *EC-Bananas* and in *EC-GSP (India)* were only, at the most, around half as long as the effective reasonable period of time sought by the EC in this arbitration.

## **D. CONCLUSION**

198. Thus, the question before the Arbitrator is:

What is the shortest period possible within the EC’s legal system, in light of the particular circumstances of this dispute, for it to make such changes to Council Regulation 1260/2001 and the other measures implementing or related to its sugar regime that are required to ensure it keeps within its quantity commitment level of 1.2735 million tonnes of quota and/or C sugar for the 1 October to 30 September year and its budgetary outlay commitment level of €499.1 million for the 1 July to 30 June year?

<sup>126</sup> Paragraph 56 of *EC-GSP (India)* (footnote omitted).

<sup>127</sup> Paragraph 60 of *Canada-Pharmaceuticals*. See also paragraphs 41 and 42 of *US-Homestyle Copyright*, paragraph 58 of *Canada-Patent Term*, and paragraph 61 of *US-CDSOA*.

<sup>128</sup> Being the length of time from 19 May 2005 until 1 October 2007.

<sup>129</sup> Being the length of time from 19 May 2005 until 1 July 2007.

<sup>130</sup> Paragraph 92 of the Submission of the European Communities.

199. Australia requests that, in addressing this question, the Arbitrator bear in mind that there are no “particular circumstances” which would warrant a reasonable period of time of more than 15 months. In fact, as set out above, the EC could achieve implementation in a time period considerably shorter than 15 months.

## **PART VI. CONCLUSION<sup>131</sup>**

### **A. IMPLEMENTATION BY COMMISSION REGULATION ON BASIS THAT C SUGAR EXPORTS CAN BE LIMITED BY EXPORT LICENCES**

200. The “reasonable period of time” for the EC to make such changes to Council Regulation 1260/2001 and the other measures implementing or related to its sugar regime that are required to ensure it keeps within its quantity commitment level of 1.2735 million tonnes of quota and/or C sugar for the period 1 October 2005 to 30 September 2006 and its budgetary outlay commitment level of €499.1 million for the period 1 July 2005 to 30 June 2006 is the shortest period possible within the EC’s legal system, in light of the particular circumstances of this dispute, for it to:

- (a) adopt a Commission Regulation limiting export licences so that the quantity commitment level and budgetary outlay commitment level are not exceeded for the 2005/2006 WTO quantity commitment marketing year and the 2005/2006 WTO budgetary outlay commitment marketing year;
- (b) adopt a Commission Regulation increasing the permitted carry forward of C sugar (if required); and
- (c) adopt a Commission Regulation pursuant to Article 20 of Council Regulation 1260/2001 which would serve to reduce the level of export availability of C sugar (if required).

201. As set out above, this period is not more than six months and six days. The reasonable period of time should therefore expire on 25 November 2005.

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<sup>131</sup> In proposing the dates in this Part, Australia adopts Brazil’s arguments in relation to the EC’s assertions that (a) regulations that must be implemented by the customs authorities should be published at last six weeks before their entry into force and must take effect from 1 January or, exceptionally, from 1 July (paragraph 77 of the Submission of the European Communities); and (b) that significant changes to CMOs should take effect, at the earliest, from the start of the following marketing year (see paragraph 78 of the Submission of the European Communities).

**B. IMPLEMENTATION BY COMMISSION REGULATION ON BASIS THAT C SUGAR EXPORTS CAN BE REGULATED, BUT NOT LIMITED, BY EXPORT LICENCES**

202. If the Arbitrator finds, contrary to Australia’s submissions, that Commission Regulation 1464/1995 cannot be used to prevent the export of C sugar then the “reasonable period of time” is the shortest period possible within the EC’s legal system, in light of the particular circumstances of this dispute, for the EC to:

- (a) adopt a Commission Regulation to spread C sugar exports over the 2005/2006 and 2006/2007 WTO quantity commitment marketing years;
- (b) adopt a Commission Regulation limiting export licences for quota sugar to the extent required to ensure that the quantity commitment level and budgetary outlay commitment level are not exceeded for the 2005/2006 WTO quantity commitment marketing year and the 2005/2006 WTO budgetary outlay commitment marketing year;
- (c) adopt a Commission Regulation increasing the permitted carry forward of C sugar (if required); and
- (d) adopt a Commission Regulation pursuant to Article 20 of Council Regulation 1260/2001 which would serve to reduce the level of export availability of C sugar (if required).

203. As set out above, this period is not more than six months and six days. The reasonable period of time should therefore expire on 25 November 2005.

**C. IMPLEMENTATION BY COUNCIL REGULATION AND COMMISSION REGULATION ON BASIS THAT C SUGAR EXPORTS CANNOT BE REGULATED AT ALL BY EXPORT LICENCES**

204. If the Arbitrator finds, contrary to Australia’s submission, that Commission Regulation 1464/1995 cannot be used to control the export of C sugar at all (e.g. all applications for C sugar export must be granted immediately upon application such that the power to control C sugar exports is, in effect, in the hands of processors rather than the Commission), then the “reasonable period of time” is the shortest period possible within the EC’s legal system, in light of the particular circumstances of this dispute, for the EC to:

- (a) adopt a Commission Regulation limiting export licences for quota sugar (if required); and
- (b) adopt a Council Regulation providing the appropriate Commission authority to control the export of C sugar and adopt an implementing Commission Regulation to impose such controls.

205. As set out above, this period is not more than six months and six days for the entry into force of the Commission Regulation in respect of quota sugar and is not more than 220 days for the entry into force of the Council Regulation and implementing Commission Regulation in respect of C sugar. The reasonable period of time under this alternative should therefore expire on 25 December 2005.<sup>132</sup> As this date is a Sunday and since Australia understands that 26 December 2005 may be a WTO holiday, Australia submits that the reasonable period of time should expire on 27 December 2005.

**D. IMPLEMENTATION ON THE (INCORRECT) BASIS OF THE EC’S SUBMISSION**

206. Under the EC’s (incorrect) submission that the reasonable period of time should be based on the time needed for a new Council Regulation on the common organisation of the markets in the sugar sector and new implementing Commission Regulations, the reasonable period of time should expire on 21 April 2006.

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<sup>132</sup> As set out above, the adoption of the Commission Regulation in the shorter time period would be sufficient to bring about compliance with the EC’s budgetary outlay commitment level.

## **ANNEX A**

### **The “Reasonable Period of Time” to Adopt a Commission Regulation in relation to the EC Sugar Regime**

#### *The Legal Basis of the Required Commission Regulation*

207. Article 22(2)(b) of Council Regulation 1260/2001, being part of the Article dealing with export licences for EC sugar exports, provides that:

“In accordance with the procedure referred to in Article 42(2) [,] detailed rules shall be adopted for applying this Article ...”.

208. Similarly, Article 14(4) of Council Regulation 1260/2001, being part of the Article dealing with the carry forward of C sugar, provides that:

“Detailed rules for applying this Article, which may restrict the quantities of sugar which may be carried forward, shall be adopted in accordance with the procedure referred to in Article 42(2)”.

209. Article 42 of Council Regulation 1260/2001 provides that:

“1. The Commission shall be assisted by a Management Committee for Sugar (hereinafter referred to as ‘the Committee’).

2. Where reference is made to this Article, Articles 4 and 7 of Decision 1999/468/EC shall apply. The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at one month.

3. The Committee shall adopt its rules of procedure.”

210. Article 42(2) refers to procedures set forth in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (“Decision”). Article 4 of that Decision sets forth the so-called Management Committee procedures as follows:

“1. The Commission shall be assisted by a management committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. The Commission shall, without prejudice to Article 8, adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication.

4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3.”

211. According to Article 42(2) of Council Regulation 1260/2001, the period mentioned in the final sentence of Article 4(3) above is one month for implementing measures adopted in the sugar sector.

212. Where implementing powers are adopted pursuant to Article 251 of the EC Treaty, which gives the European Parliament co-decision making authority with the Council, Article 8 of the Decision allows the European Parliament to call upon the Commission to re-examine measures taken under the implementing powers. However, Article 8 does not apply to implementing measures adopted under the Council Regulation 1260/2001 because that Regulation was not adopted under Article 251, but was adopted under Article 37 of the EC Treaty.

#### *The Procedural Steps for Adoption of a Commission Regulation*

213. The procedural steps required for the adoption of a Commission Regulation under Council Regulation 1260/2001 and the Decision are few:

##### Proposal by the Commission

The Commission prepares a proposal for a Commission Regulation and submits it to the Management Committee for an opinion. Australia notes that since the adoption of the *EC Sugar Panel Report* and *EC Sugar Appellate Report* on 19 May 2005, the Commission has already had a period of more than four months to prepare a proposal to manage export licenses and increase the permitted carry forward of C sugar.

### Adoption of the Commission Regulation

The Management Committee is to deliver its opinion on the Commission proposal within a time-limit fixed by the chairman (that is, the Commission) according to the urgency of the matter.

In the event of a favourable Management Committee opinion, or a determination of “no opinion” within the time limit, the Commission adopts the Commission Regulation with immediate effect.

In the event of an unfavourable Management Committee opinion, the Commission also adopts the Regulation. However, the measures adopted must be communicated, by the Commission, to the Council forthwith. Pursuant to Article 4(3) of the Decision, the Commission “may” defer application of the Commission Regulation for the period of one month laid down in Article 42(2) of Council Regulation 1260/2001. However, under the same provision of the Decision, the Commission may also give the Regulation immediate effect. Within one month, the Council may take a different decision from the Commission by means of qualified majority. In the past four years, there have been no unfavourable opinions issued in the sugar sector.<sup>133</sup>

According to the 27 Commission Regulations in Table 1 of Exhibit COMP-28, the Management Committee delivers its opinion, on average, within 4 days of its first formal exchange of views on the Commission proposal for a Commission regulation.<sup>134</sup> Table 1 also shows that formal adoption by the Commission occurs, on a median basis, within 14 days of the Management Committee giving its opinion on the proposal. Australia, therefore, believes that Commission implementing regulations could certainly be adopted within 24 days of first consideration by the Management Committee, particularly because the Commission has the possibility to fix the deadline for the Committee to issue an opinion.

### Entry into force of the Commission Regulation

Commission Regulations enter into force after publication in the Official Journal of the European Union (the “Official Journal”). The Official Journal is published daily and Commission Regulations in the sugar sector are almost always published on the day following adoption<sup>135</sup> and very often enter into force on that day.<sup>136</sup>

As shown in Table 1 of Exhibit COMP-28, the 27 Regulations were, on an average and median basis, published one day after adoption. They entered into force an average of two days after publication (on a median basis, the

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<sup>133</sup> See Table 2 in Exhibit COMP-28.

<sup>134</sup> The corresponding median figure was zero.

<sup>135</sup> See Table 1 in Exhibit COMP-28.

<sup>136</sup> See Table 1 in Exhibit COMP-28.

period was 1 day). Australia, therefore, considers that Commission implementing regulations could certainly enter into force within four days of adoption.

*The Possibility of an Unfavourable Management Committee Opinion*

214. There is a theoretical possibility of an unfavourable Management Committee opinion and subsequently a different decision by the European Council. However, as set out above, the domestic contentiousness of changes to a measure found to be WTO-inconsistent has previously been rejected as a factor relevant to the determination of the reasonable period of time.

215. As set out above, in the past four years, there have been no unfavourable opinions issued in the sugar sector.<sup>137</sup>

*The Relevance of Possible Adverse Impacts on Beet Growers and Sugar Processors*

216. As set out above, the need for structural adjustment of domestic industry and the need to mitigate the adverse impact of changes on producers have previously been rejected as factors relevant to the determination of the reasonable period of time.

*Conclusion*

217. As a result, Australia submits that the shortest period possible within the EC's legal system, in light of the particular circumstances of this dispute, for a Commission Regulation to enter into force in relation to the EC sugar regime is a period of not more than 28 days from the time of the Management Committee for Sugar's first formal exchange of views on the proposal. This period includes 24 days for the Management Committee procedure and adoption by the Commission and four days for publication and entry into force of the necessary Commission Regulation.

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<sup>137</sup> See Table 2 of Exhibit COMP-28.

## ANNEX B

### **Why is the period being suggested by Australia for the time taken to amend an existing Council Regulation so much less than the 14 month 11 day period awarded in *EC-GSP (India)*?**

1. In *EC-GSP(India)*, the Arbitrator determined that the reasonable period of time for the EC to adopt the DSB recommendations and rulings was 14 months and 11 days from the date of adoption of the Panel and Appellate Body reports by the DSB. This included the time to adopt a new Council Regulation and a new Commission Regulation.
2. The Arbitrator found that the Council Regulation in question could have been adopted sometime between January 2005 and the end of April 2005.<sup>138</sup> In order to be conservative, this submission will assume that the Arbitrator considered that the Council Regulation could have been adopted by 1 April 2005. The relevant Panel and Appellate Body reports in the *EC-GSP (India)* dispute were adopted by the DSB on 20 April 2004.<sup>139</sup> This means that the Arbitrator found that the Council Regulation in question could have been adopted within 346 days of adoption of the relevant Panel and Appellate Body reports by the DSB.
3. In calculating this period of 346 days, the Arbitrator found that the Commission could reasonably be expected to adopt a proposal for transmission to the Council in October 2004.<sup>140</sup> This suggests that the Arbitrator allowed some six months from DSB adoption for this step in the legislative process.
4. However, as documented in this submission, the European Commission issued a proposal for a new EC sugar regime on 22 June 2005 – it transmitted this proposal to the Council on 24 June 2005.<sup>141</sup> This represents a period of some 36 days from DSB adoption – a difference of almost five months to the assumption of the Arbitrator in *EC-GSP (India)*. This difference explains the disparity between the 197 day period of time calculated above and the 346 day period calculated by the Arbitrator in *EC-GSP (India)*.
5. The Arbitrator's decision was heavily influenced by the EC's assertion that tariff changes of the type required in the *EC-GSP (India)* dispute usually enter into force on 1 January or 1 July of the relevant year.<sup>142</sup> The reasonable period of time decided upon by the arbitrator expired on 1 July 2005.<sup>143 144</sup>

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<sup>138</sup> See paragraphs 41 to 43 of *EC-GSP (India)*.

<sup>139</sup> Paragraph 1 of *EC-GSP (India)*.

<sup>140</sup> Paragraph 40 of *EC-GSP (India)*.

<sup>141</sup> See [http://www.europa.eu.int/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=193043#372374](http://www.europa.eu.int/prelex/detail_dossier_real.cfm?CL=en&DosId=193043#372374).

<sup>142</sup> Paragraph 51 of *EC-GSP (India)*.

<sup>143</sup> Paragraph 60 of *EC-GSP (India)*. See also footnote 131.

<sup>144</sup> This fact also seems to have been important in *EC-Bananas* (see paragraphs 9 and 18 to 20). See also footnote 131.

## ANNEX C

### Text of Minutes of Management Committee for Sugar meeting

15 September 2005

#### **“COMPTE RENDU SOMMAIRE DE LA 1.808EME REUNION DU COMITE DE GESTION DU SUCRE DU 15 septembre 2005**

Président : M. R. Mildon

Toutes les délégations étaient présentes ou représentées. Le Luxembourg était représenté par la Belgique, Malte par la Royaume Unie.

#### **1. SITUATION DU MARCHÉ**

#### **2. SITUATION DU MARCHÉ ET PROJET DE REGLEMENT FIXANT LE MONTANT MAXIMAL DE LA RESTITUTION ET/OU LE MONTANT MINIMAL DU PRELEVEMENT A L'EXPORTATION DE SUCRE BLANC POUR LA 5EME ADJUDICATION PARTIELLE EFFECTUEE DANS LE CADRE DE L'ADJUDICATION PERMANENTE VISEE AU REGLEMENT (CE) N° 1138/2005.**

Fixation de la restitution maximale compte tenu des limites découlant des accords GATT, des offres présentées ainsi que sur la base du calcul théorique établi par référence aux cotations à terme de la bourse de Londres pour le sucre blanc et du prix d'intervention du sucre blanc et d'un forfait représentant la mise en FOB, la marge de commercialisation et le coût de la sacherie.

- montant maximal de la restitution fixé: 41,250 Eur/100 kg
- quantité totale engagée à l'exportation: 60 500 tonnes.

Vote : Avis favorable avec 314 votes pour, 7 contre.

#### **3. FIXATION DE PRIX MINIMUM DE VENTE POUR LA REVENTE DE 52.000 TONNES SUR LE MARCHÉ COMMUNAUTAIRE DE SUCRE DETENU PAR L'ORGANISME D'INTERVENTION BELGE (REG. N° 1306/2005).**

Pas d'offres reçues.  
Nihil.

#### **4. FIXATION DE PRIX MINIMUM DE VENTE POUR LA REVENTE DE 59.038 TONNES SUR LE MARCHÉ COMMUNAUTAIRE DE SUCRE DETENU PAR L'ORGANISME D'INTERVENTION SUEDOIS (REG. N° 1308/2005).**

Pas d'offres reçues.  
Nihil.

**5. PROJET DE REGLEMENT PORTANT, POUR LA CAMPAGNE DE COMMERCIALISATION 2005/2006, REDUCTION DANS LE SECTEUR DU SUCRE DE LA QUANTITE GARANTIE DANS LE CADRE DES QUOTAS DE PRODUCTION ET DES BESOINS MAXIMAUX SUPPOSES D'APPROVISIONNEMENT DES RAFFINERIES DANS LE CADRE D'IMPORTATIONS PREFERENTIELLES.**

Point reporté.

**6. DIVERS**

R. Mildon  
Directeur  
(signé)”