

# **EUROPEAN COMMUNITIES EXPORT SUBSIDIES ON SUGAR**

**WT/DS 265**

**AUSTRALIA**

## **SUMMARY OF FIRST WRITTEN SUBMISSION\***

\* This summary is not a legal document. The summary draws on Australia's first written submission to the Panel. That submission contains data and other information designated as confidential to the Panel processes in accordance with the provisions of Article 18.2 of the WTO Dispute Settlement Understanding and in accordance also with the Panel's Working Procedures.

**FEBRUARY 2004**

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## **I. INTRODUCTION**

1. On 27 September 2002 Australia requested consultations with the European Communities (EC) pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII: 1 of the General Agreement of Tariffs and Trade 1994 (GATT 1994), Article 19 of the Agreement on Agriculture (hereinafter ‘Agriculture Agreement’) and Articles 4 and 30 of the Agreement on Subsidies and Countervailing Measures (hereinafter ‘Subsidies Agreement’). The request concerned the EC’s Common Organisation of the Markets in Sugar (described in this submission as the EC sugar regime) and its application and implementation. The request was circulated to Members on 1 October 2002 in document number WT/DS265/1.<sup>1</sup>
2. Consultations were held on 21 and 22 November 2002 but unfortunately did not resolve the dispute.
3. Consequently, Australia requested (WT/DS265/21) that a panel be established pursuant to Articles 4.7 and 6 of the DSU, Article XXIII: 2 of GATT 1994, Article 19 of the Agriculture Agreement and Article 30 of the Subsidies Agreement. A panel was established at the Dispute Settlement Body (DSB) meeting of 29 August 2003. In accordance with DSU Articles 6.2 and 7, standard terms of reference were adopted.
4. Australia has taken dispute settlement action because it believes that the EC is providing export subsidies on sugar inconsistently with its export subsidy obligations under both the Agriculture Agreement and the Subsidies Agreement.
5. The case involves an examination of the consistency of EC export subsidies on sugar – specifically ‘C’ sugar and ‘ACP/India equivalent’ sugar – with the EC’s obligations under Articles 3.3, 8, 9.1 and, alternatively, Article 10.1 of the Agriculture Agreement and also Articles 3.1(a) and 3.2 of the Subsidies Agreement.
6. EC sugar production is in persistent structural surplus. The structural surplus is a direct consequence of the instruments of the EC sugar regime, as provided in EC Council Regulation 1260/2001 and related regulations. Price support - to growers and sugar processors - is provided through a combination of minimum prices and supply controls (including import controls, limitations on quantities of EC sugar that may be sold on the domestic market) and direct export subsidies.

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<sup>1</sup> WTO documents, including Panel and Appellate Body reports, are available on the WTO home page ([www.wto.org](http://www.wto.org))

7. As acknowledged by the EU Commission, the Agriculture Agreement provisions which include quantity and budgetary outlay reduction commitments on subsidised agricultural exports - as applied by the EC - have had little or no impact on the capacity of the EC sugar sector to use exports as a way of dealing with its structural surpluses (to the detriment of sugar producers in other WTO Members):

With stabilised consumption, imports under quotas and sugar production varying slightly from one year to the next, exports have long been the safety valve for a Union supply balance which is particularly stable. The undertakings in the Uruguay Round Agreement on Agriculture scarcely affected that situation.<sup>2</sup>

8. Export figures underscore this. Since 2000, for example, EC sugar exports have averaged 5.4 million tonnes, which is largely in line with the level of average annual exports of 5.1 million tonnes over the period from 1995/6 to 2001/02,<sup>3</sup> (Table 1 refers). The level of exports - which is well above the reduction commitments provided by the Agriculture Agreement - is directly attributable to the architecture and structure of the EC sugar regime.
9. Nor has the WTO ceiling on EC budgetary outlays led to any reductions in EC expenditure on export subsidies since the inception of the Agriculture Agreement. Indeed, export subsidy expenditure (including producer-financed subsidies and subsidies that are a direct charge to the budget) has shown an upward trend since 2001, as demonstrated Table 2 below.
10. The EC has maintained sugar export levels at what it terms a ‘safety valve’<sup>4</sup>, as an adjunct to price support and to relieve the pressure of its structural surpluses even though the EC is acting inconsistently with the provisions of the Agriculture Agreement and the provisions of the Subsidies Agreement in respect of the export of (a): ‘C’ sugar (surplus to quota sugar) and (b): ‘ACP/India equivalent’ sugar.<sup>5</sup>

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<sup>2</sup>Commission of the European Communities Staff Working Paper – Reforming the European Union’s sugar policy – summary of impact assessment, September 2003, page 9 (this study, together with other EU sugar studies, is available at: [www.europa.eu.int/comm/agriculture/markets/sugar/index](http://www.europa.eu.int/comm/agriculture/markets/sugar/index))

<sup>3</sup>Commission of the European Communities Paper: Sugar: International Analysis - Production structures within the EU, 22 September 2003, Section 3.4, page 38

<sup>4</sup> Commission of the European Communities Staff Working Paper – Reforming the European Union’s sugar policy – summary of impact assessment, September 2003, page 9

<sup>5</sup> A quantity of approximately 1.6 million tonnes of sugar which the EC deems to be ‘equivalent’ to imports under quota from certain countries in Africa the Caribbean and Pacific (ACP) and from India.

## **II. SUMMARY OF FACTS**

### **A. SUGAR PRODUCTION**

11. Sugar beet and sugar cane are two distinct sources of crops from which sugar may be produced. Sugar beet is the dominant EC crop. Sugar cane is grown mostly in tropical areas and on average has a five year cropping cycle. Sugar beet is generally grown in cooler temperate regions and has an annual cycle. Sugar beet is rotated with other crops, whereas sugar cane is monoculture.
12. Sugar cane and sugar beet are not internationally traded in commercially significant quantities and the production of sugar from both crops usually occurs close to the point of harvest. Cane sugar is internationally traded as raw cane (milled) sugar and as white refined sugar. The technical characteristics of sugar beet dictate that most beet sugar is traded – domestically and internationally - as white sugar. The sugar beet harvesting and beet sugar manufacturing seasons are limited to around three months. The sugar cane harvesting and cane sugar manufacturing seasons often last for six months or more. Longer seasons for production of cane sugar mean that the costs of processing capital are spread over a greater volume of production, giving a clear cost advantage for cane sugar production systems over beet sugar production systems.
13. Sugar beet is grown in all Member States except Luxembourg. Apart from some marginal sugar cane production in Spain, EC sugar cane is mostly grown in the French Overseas Departments. There are around 30 sugar companies in the EC.

### **B. EC SUGAR REGIME**

14. The EC sugar regime, which was first introduced in 1968, provides price support to sugar producers through a combination of measures. The primary measures are controls on the supply of sugar to the domestic market (including restrictions on sales into the domestic market, import quotas and requirements to export designated quantities of sugar) and direct subsidies for production and export, with intervention buying as a fallback should the sugar price fall to the intervention price. In contrast to controls on supply to the domestic market, there are no controls on the quantities of EC sugar that may be produced and exported. Indeed, penalties attach to some sugar if it is not exported. In addition, EC controls on alternative sweeteners, such as isoglucose, serve to negate competition from more competitively priced products.

## 1. Regulatory barriers to sales in the domestic market

15. The quantities of sugar that may be sold on the domestic market are tightly regulated through import controls and controls on the quantities of domestically produced sugar that may be disposed of within the EC, together with export subsidies designed to avoid intervention buying.

### a. Import controls

16. Imports of sugar are controlled through a combination of high tariffs, safeguards, country-specific tariff quotas, special rules of origin, and country-specific suspensions from eligibility for tariff concessions. The application of special safeguards under Article 5 of the Agriculture Agreement ensures that sugar cannot be imported except under the country-specific concessional arrangements. According to the EC, imports other than under concessional arrangements would face a protective import barrier estimated at more than €700 per tonne.<sup>6</sup>

17. The EC has WTO-bound tariff quotas on a total of 1.389 million tonnes of sugar. The quotas comprise

- 1.304 million tonnes of sugar (white sugar equivalent), which are allocated to designated countries (certain ACP countries and India);

and

- a quota of 85,463 tonnes of raw cane sugar for refining from designated countries.<sup>7</sup>

18. The quantities covered by the WTO tariff quotas for the ACP and India are the subject of special sugar protocols negotiated between the EC with ACP and with India. Sugar imported under those protocols accounts for the bulk of imports, which is designated as ‘Preferential’ sugar in the EC regime (Article 35 of Council Regulation 1260/2001). EC imports of ‘Preferential’ sugar have remained at much the same levels for around fifty years and initially took place at a time when the EC was a net importer of sugar.<sup>8</sup> The quotas are country-specific in terms of destination within the EC as well as origin. The UK, a net sugar importer, is allocated about 1.1 million tonnes of imports from the ACP and India, to meet its refinery needs.<sup>9</sup> Guaranteed prices at levels in line with EC producer prices are payable for sugar designated as ‘Preferential’ sugar. Hence, there is no

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<sup>6</sup> Commission of the European Communities Paper: Common Organisation of the Sugar Market - Description, page 15

<sup>7</sup> EC WTO (CXL) Schedule, Section I-B, page 12

<sup>8</sup> The EC/ACP and EC/India protocols succeed the arrangements previously applicable between the UK and developing Commonwealth sugar exporters, who, together with Australia, were members of the Commonwealth Sugar Agreement with the UK.

<sup>9</sup> According to UK statistics, UK imports in 2002 calendar year were estimated at 1.309 million tonnes, including 1.123 million tonnes from non-EC sources. Over the same period, the UK exported 487,000 tonnes, including 383,000 tonnes to non-EC destinations. Source: <http://statistics.defra.gov.uk>

price competition between ‘Preferential’ sugar and EC sugar produced from domestically harvested beet or cane. Refining subsidies are paid for the processing of ‘Preferential’ sugar.

19. In addition to the quantities of ‘Preferential’ sugar imported under WTO access commitments, the EC provides, on a unilateral basis, tariff preferences to least developed sugar exporters, to certain ACP and Indian sugar exporters and to designated Balkans sugar producers under three different systems: (a) fixed annual quotas under the ‘Everything But Arms’ (EBA) arrangement involving duty free access for least developed countries within quota limits; (b) variable quotas at reduced duties for suppliers of raw cane sugar for refining from the ACP and India under the ‘Special Preferential System’ (SPS); and (c) duty free access for designated Balkans sugar exporters.
20. The initial EBA quantity of 74,185 tonnes increases by 15% a year and is currently 100,000 tonnes. The SPS quantities are not fixed, but are determined on the basis of Maximum Supply Needs (MSN) of refineries, linked to domestic supply and imports (Article 39 of Council Regulation 1260/2001). Quantities imported under the SPS arrangements are declining due largely to the increase in EBA imports, and were estimated at 225,500 tonnes in 2002/03. Imports from Balkans countries peaked at 320,000 tonnes in the 2002/03 marketing year, but controls have been instituted to reduce quantities, including by way of special rules of origin related to the country of harvest of beet or cane.
21. All sugar imported under the import quotas outlined above forms part of EC domestic supply and may be freely sold within the EC if imported as white sugar or once refined in designated Member States from raw cane sugar. Such imports are distinct from *ad hoc* imports of sugar under inward processing arrangements, which do not enjoy free circulation in the internal market.
22. In addition to quota controls on sugar imports, the EC imposes tariffs and special safeguards (SSG) on sugar beet and sugar cane, together with import controls on competing products such as isoglucose. A duty of 230 ECU/tonne plus SSG applies to dried or powdered sugar beet (HS1212.91.20); a duty of 67 ECU/tonne plus SSG to other sugar beet (HS1212.91.90) and a duty of 46 ECU/tonne plus SSG to sugar cane (HS 1212.92.00). A duty of 507 ECU/tonne plus SSG applies to isoglucose (HS 1702.40.10).<sup>10</sup>

b. Restrictions on the internal disposal of domestically produced sugar

23. As noted previously, the EC regime provides for structural surpluses, with EC sugar production substantially in excess of consumption. Consumption

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<sup>10</sup> EC WTO (CXL) Schedule

averages around 12.5 million tonnes, whereas production ranges between 15-18 million tonnes. In addition to sugar manufactured from domestically harvested beet or cane, a further 1.8 million tonnes of sugar is manufactured from raw cane sugar imported mainly from the ACP countries.<sup>11</sup> The regime ensures that domestic production surplus to consumption is disposed of on export markets. Approximately 20% of all sugar produced is exported, some of it compulsorily.

24. The EC regime includes mechanisms designed to regulate the domestic supply of sugar produced from EC-harvested beet or cane. The main instrument is the system of categorisation of such sugar into ‘A’ and ‘B’ quotas and ‘C’ sugar (surplus to quota). Sugar produced as quota or as ‘C’ sugar is reclassifiable under EC regulatory arrangements. The ‘A’ quota sugar (which comprises around 82% of the total quota) is the more valuable quota and is nominally intended to meet domestic demand.<sup>12</sup>
25. The regime provides for annual ‘A’ and ‘B’ sugar production quotas for each Member State, established for a five year period. Member States are responsible for assigning the quotas to sugar processors. The quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies (in EC terminology, ‘refunds’). The quota system does not involve any limits on the quantities of sugar that may be produced or exported by a sugar processor. In fact, penalties attach to failure to export some surplus to quota (‘C’ sugar) outside that carried over and reclassified as quota sugar. Additionally, as Member States are authorised to reduce quotas, failure to produce up to maximum quota levels could lead to reductions in the quotas assigned to individual processors.
26. In terms of end use, the difference between ‘A’ and ‘B’ quotas is theoretical rather than real. Both may be freely sold within the EC and both are eligible for export subsidies. According to the EU Commission, ‘A’ quotas were intended to approximate to domestic consumption. Initially the ‘B’ quota was the margin allowing enterprises to fill their ‘A’ quota without risk of penalty and formed part of an exportable surplus, with the intent that prices obtained for ‘B’ sugar net of the producer levies would approximate to selling conditions on world markets. It was designed to allow the more competitive undertakings the possibility of expansion. However, it gradually developed into an institutionalised subsidised surplus, with all Member States being assigned both ‘A’ and ‘B’ quotas.<sup>13</sup>
27. For the current five year period expiring in 2006, the total annual sugar quota for the EC-15 is set at 14.4 million tonnes,<sup>14</sup> that is, at a quantity

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<sup>11</sup> Commission of the European Communities Paper: Sugar: International Analysis- Production structures within the EU, 22 September 2003, page 39

<sup>12</sup> Commission of the European Communities Paper: Common Organisation of the Sugar Market - Description, page 9

<sup>13</sup> *Ibid*

<sup>14</sup> Regulation 1260/2001, Article 11 (available at [www.europa.int](http://www.europa.int))

some 1.5 million tonnes in excess of consumption. The total of quota production and imports exceeds domestic consumption by over three million tonnes. The current quotas, established in 2001, are set at levels which, taking into account internal consumption and imports, effectively guarantee that exports of quota sugar alone will be at levels well in excess of the EC's WTO reduction commitments.

28. 'C' sugar comprises sugar in excess of quota that is manufactured from beet or cane harvested in the EC. 'C' sugar must be exported, unless reclassified as quota sugar and is not eligible for intervention or direct export subsidy support. Essentially, sugar does not acquire the status of 'C' sugar until determinations have been made on quota levels and even then 'C' sugar may be subsequently reclassified as quota sugar.
29. There are no limits on the quantity of 'C' sugar that may be produced or exported, but such sugar cannot be sold on the domestic market and it is not eligible for intervention or export refund. An export licence for 'C' sugar will only be granted on proof that quotas have been filled (Article 5 of Regulation 1464/95). 'C' sugar production, which was nil in the early years of the regime, has until recently averaged around 2.6 million tonnes, or 20% of production under quota.<sup>15</sup>
30. Sugar produced within the base annual quotas may be reclassified in any one marketing year to 'C' sugar, for the purported purpose of the EC's WTO export subsidy reduction commitments (Article 10 (3) and (5) of Council Regulation 1260/2001). The reclassifications are achieved through temporary adjustments to quotas. Quota sugar reclassified to 'C' sugar may be carried over without limit to form part of the next year's quota (Article 14(1) and (2) of Council Regulation 1260/2001). Provision also exists for sugar initially classified as 'C' sugar (i.e. produced in excess of the base quota) to be carried forward and reclassified as the next year's 'A' quota, up to a limit of 20% of the base annual 'A' quota set for the five year period (Article 2(1) of Regulation 65/82 as amended). The 20% limit does not apply to quota sugar acquiring the status of 'C' sugar arising from temporary annual adjustments of the base quota (Article 14(1) of Council Regulation 1260/2001). The effect of the reclassification of quota to 'C' sugar is to force the export of quantities of sugar allocated to processors as quota on to the export market (unless carried over), without reference to the WTO quantity reduction commitment disciplines.
31. The distinction between quota and non quota sugar is essentially a device to limit budgetary expenditure on domestic support and export subsidies. Quota and 'C' sugar are reclassifiable. There is no independent production of 'C' sugar. The manufacture of quota and non quota sugar is undertaken by the same enterprises. There is nothing in the regime to prevent processors pooling subsidies for quota sugar to average out subsidies and

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<sup>15</sup> Commission of the European Communities Paper: Common Organisation of the Sugar Market - Description, page 11

charges over total sugar production.<sup>16</sup> In fact, the EC regime is predicated on a single stream of manufacture of quota and non quota sugar by sugar quota holders, given that quota and non quota sugar are reclassifiable and given also the conditionality attached to the grant of an export certificate for ‘C’ sugar. As acknowledged by the EU Commission, the production of ‘C’ sugar is directly linked to quota production.<sup>17</sup>

## **2. EC sugar subsidy system**

32. According to the EC’s Notifications to the WTO Committee on Agriculture, EC domestic price support for sugar is estimated at €5,757.8 million in the 1999/2000 marketing year.<sup>18</sup> Budgetary outlays on export subsidies were estimated at €1.271 billion in 2003.<sup>19</sup>

### a. Domestic subsidies

33. Within the limits of sugar quotas fixed in the EC sugar regime for each Member State and allocated by the Member States to individual sugar processors, direct subsidies are payable by sugar processors to growers in the form of minimum beet prices. Sugar processors are required to pay a fixed minimum price for the quantities of beet required to produce quota sugar (the price requirement does not apply to purchases of beet for ‘C’ sugar production).
34. Price support for sugar production is delivered through the architecture and structure of the EC sugar regime, including the intervention floor price, controls on import quantities and on the quantities of EC-produced sugar that may be sold on the domestic market, together with export subsidies and the compulsory export of ‘C’ sugar. The intervention price is fixed at a constant level for the five year life of the current regime, as are quotas (although quotas may be subject to temporary annual adjustments).
35. The minimum beet price is the price at which sugar processors are required to buy beet from growers. The minimum beet price is set in such a way that growers receive 58 % of the intervention price for beet with 16 % sugar content, assuming 13 % extraction.<sup>20</sup> Because of the level at which supply controls are set by the EC regime, (including import controls and the requirement to export ‘C’ sugar), EC sugar processors are effectively

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<sup>16</sup> In 1981, the EC advised a GATT working party: “... that the sugar regime resulted in the pooling of producers receipts from sales in the internal markets at supported prices, receipts, from exports of B quota sugar and receipts from exports of C sugar”. Source: Report to the [GATT] Council L/5113 of 20 February 1981, paragraph 33

<sup>17</sup> European Union Court of Auditors (ECA) Special Report No 9/2003, page 10, paragraph 38 ([www.eca.eu.int/](http://www.eca.eu.int/))

<sup>18</sup> WTO document G/ASG/EEC/38 of 27 June 2002, page 6

<sup>19</sup> European Communities: extracts from Preliminary draft general budget of the European Communities for the financial year 2004, volume 1 ([www.europa.eu.int/](http://www.europa.eu.int/))

<sup>20</sup> Commission of the European Communities Paper: Common Organisation of the Sugar Market - Description, page 5

guaranteed a market price around 10-20% in excess of the intervention price.<sup>21</sup> The current intervention price for white sugar is €632/tonne, compared to an internal market price of €725/tonne.<sup>22</sup> The Commission has acknowledged that it is more profitable to sell into the internal market than to the export market, even with the benefit of export subsidies.<sup>23</sup>

b. Export subsidies

36. In practice, the EC operates two different systems for regulating budgetary expenditure and quantities of sugar eligible for direct export subsidy:

- within a quantity of 1.6 million tonnes of sugar, unlimited budgetary outlays (the ‘ACP/India equivalent’ sugar);

and

- in respect of quota quantities additional to 1.6 million tonnes, a maximum budgetary outlay of €499.1 million, up to a maximum quantity of 1.273 million tonnes of quota sugar.

**Table 1: EC exports of sugar (million tonnes)**

1995/6	1996/7	1997/8	1998/9	1999/00	2000/1	2001/2
4.507.	4.536	5.670	5.116	5.669	6.023	4.097

Source: EC Notifications to the WTO Committee on Agriculture: G/AG/N/EEC/5, 11, 20, 23, 32, 36, 44.

**Table 2: EC expenditure on sugar export subsidies (€million)**

1995	1996	1997	1998	1999	2000	2001	2002	2003*	2004*
1,312	1,230	1,116	1,266	1,593	1,439	1,008	1,168	1,257	1,271

\* Figures for 2003 and 2004 are estimates.

Sources: For 1995-2001: EU Court of Auditors Special Report 9/2003, p 13. For 2002-2004: EU Commission, Preliminary Draft General Budget of the European Communities for the financial year 2004.

37. Sugar manufactured within quota is eligible for direct export subsidies, theoretically representing the difference between the intervention price and

<sup>21</sup>Commission of the European Communities Official Journal L103/1 24.4.2003: Commission Decision of 20 December 2001 declaring a concentration to be compatible with the common market and the EEA Agreement (Sudzucker-St Louis Sucre merger), paragraph 53

<sup>22</sup> Commission of the European Communities Staff Working Paper: Reforming the European Union’s sugar policy – summary of impact assessment Table II, page 27

<sup>23</sup> ECA Special Report No 9/2003, pages 21-23

the world price. Special rules of origin apply, in that the sugar in question must be obtained from sugar beet or sugar cane harvested in the EC (Article 27(12) of Council Regulation 1260/2001).

38. Export subsidies are partly funded by producer levies, calculated on the basis of quota production by sugar processors. Export subsidies on 1.6 million tonnes of quota sugar exports are a direct charge to the EC budget. There are no budgetary limits on the level of export subsidies on the 1.6 million tonnes. Export subsidies on the additional quota quantities are subject to a sliding scale of producer levies up to specified percentages of production. The total budgetary outlays on the quantities additional to the 1.6 million tonnes of ‘ACP/India equivalent’ sugar which are eligible for direct export subsidies are limited to €499.1 million.
39. The EU Commission awards export subsidies through Management Committee procedures, mostly through tenders. The average export subsidy is currently €480 per tonne for white sugar<sup>24</sup>, compared to an internal market price of around €725 per tonne<sup>25</sup>.
40. According to the EU Court of Auditors, in setting the rate of export subsidy, no account is given to the relationship between costs of production and world prices (except in relation to the element of costs associated with the requirement to purchase beet for quota sugar production at minimum guaranteed prices). There is no price competition in the tender process. The Commission uses the intervention price adjusted with a flat rate amount for fob costs, transport, bagging and traders’ margins to arrive at an artificial internal price. During times of low world prices, the export subsidy may be significantly higher than the world price and can be around two thirds of the internal price. Because the methodology and calculation base are known, tenderers know in advance the exact level of maximum export subsidy that would be accepted by the Committee. As noted by the Court of Auditors:

Given that the method and elements of the procedure to set the maximum refund [export subsidy] are public knowledge and that the sugar market is dominated by a very small number of large companies, the tendering system, designed to set export refunds in the most economical way for the Community budget, does not function as a real tendering system in the sense that the traders are in meaningful competition with each other...

The level of the refund for sugar is significant. For the samples audited the accepted refunds were in the range of 40 to 50 euro per 100kg, which is about double the level of the world price. ‘C’ sugar has to be exported without the benefit of export refund, so it would be expected that the production of this type of (over quota) sugar would be small. Over the past years, however, the production of ‘C’ sugar has varied between 11% and 21% of quota

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<sup>24</sup> Commission of the European Communities Staff Working Paper: Reforming the European Union’s sugar policy – summary of impact assessment, September 2003, page 9

<sup>25</sup> *Ibid*, page 23 and page 27

production, which equals in some years the quantities of sugar that is exported with the aid of export refund. This calls into question the substantial level of aid granted to the export of sugar, bearing in mind that export refunds should only be granted to the extent necessary to enable the product to be exported.<sup>26</sup>

41. Export subsidies are also available for ‘Preferential’ sugar of up to 1.304 million tonnes of sugar imported from ACP and Indian sugar protocol holders, covering raw sugar and white sugar manufactured from raw cane sugar imported under the protocols (provided that the raw or white sugar is manufactured from cane harvested in the countries accorded quotas under the protocols). Sugar imported under any other arrangements – whether from the ACP and India or other sources – is not eligible for export subsidy. (Council Regulation 1260/2001)
42. It is evident from statistical data that most of the ‘Preferential’ sugar imported by the EC (principally into the UK) is actually consumed in the EC.<sup>27</sup> The EC has acknowledged that the export subsidies on ‘Preferential’ sugar are actually subsidies on EC quota sugar, up to a quantity limit of 1.6 million tonnes.<sup>28</sup>
43. According to the EU Commission, in addition to the export subsidies notified to the WTO Committee on Agriculture, the EC practice is to provide direct budgetary support, in the form of export subsidies, for a quantity of 1.6 million tonnes of exports of EC quota sugar, notionally deemed to be ‘equivalent’ to imports from the ACP and India. The Commission informed the Court of Auditors that the export subsidies in question resulted from the EC’s international obligations under the sugar protocols with the ACP and India.<sup>29</sup>

#### c. EC sugar costs of production

44. The EC’s position in world sugar trade – as the largest exporter of white sugar – is a direct result of the sugar regime. The EC has estimated that full liberalisation of its sugar market would lead to a reduction in EC production to one third of present levels and even to its disappearance in the long run.<sup>30</sup> On the basis of this assessment, and the fact that there is no independent sugar production, it is clear that profitability for the sugar sector is only maintained through the EC sugar regime. Under such circumstances, it can be concluded that sugar production in the EC is

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<sup>26</sup> ECA special report No 9/2003, page 22, paragraph 36-38

<sup>27</sup> The UK is the major importer of ‘Preferential’ sugar (approximately 1.1 million tonnes), but exports less than 400,000 tonnes (104,000 tonnes to other EC and 383,000 to third countries) Source <http://statistics.defra.gov.uk>

<sup>28</sup> ECA special report No 9/2003, page 9 and GATT document L/4833 paragraph 2.19 (GATT Sugar Panel report)

<sup>29</sup> ECA Special Report No 230/2000, paragraph 100, page 11

<sup>30</sup> Commission of the European Communities Staff Working Paper: Reforming the European Union’s sugar policy – summary of impact assessment, page 33

dependent on EC institutional action for its existence. According to the EU Court of Auditors:

EU sugar is clearly not competitive on the world market. Subsidies of the order of 75% of the EU intervention price are currently needed to enable the quota surplus to be sold. 'C' sugar (production in excess of quotas), which receives no export refunds, can only be sold profitably because the prices obtained for quota sugar are sufficient to cover all the fixed costs of the processing companies.<sup>31</sup>

45. According also to the Netherlands Economic Institute (NEI):

EU sugar *export prices are highly distorted* in the sense that those prices are far below the actual production costs in the EC. The export (at prevailing world market prices) is made possible and profitable because of (i) the system of production levies and other export refunds, in the case of surplus B sugar, and (ii) the fact that all fixed and overhead costs are covered by the profitable production of quota sugar for EC markets, which implies that C sugar can be exported at marginal costs.<sup>32</sup>

46. The NEI report also highlights two driving forces for 'C' sugar production provided by the high prices for quota sugar and the supporting regulations. Those forces are the desire to protect quota in the face of yield variability and the potential for profitability of 'C' sugar production, given that fixed costs of production are covered by revenue from quota sugar. NEI state:

Apart from profitability motives of individual sugar manufacturers, there is another factor which explains at least part of the C-sugar production. Both beet producers and processors are interested in using always their entire production quota, because of (i) of the attractive rate of return on producing quota sugar and (ii) the risk that part of the quota will be reallocated to another company if during a few consecutive years full quota are not used. Therefore the area of beets plant by farmers is usually based on a conservative estimate of the potential yield per hectare.<sup>33</sup>

47. The NEI report also states:

The relatively high EC support prices allow the sugar beet farmers and processors to cover fixed costs and to attain a reasonable income on the basis of the production of quota sugar. As a consequence, they can produce C-sugar for export on the basis of a marginal cost approach, as long as marginal costs are below the average world market price. Through this mechanism, the CMO Sugar stimulates C-sugar production. If support prices were lower, most likely less C-sugar would have been produced and sold on the world market.<sup>34</sup>

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<sup>31</sup> ECA Special Report No 20/2000, page 35, paragraph 96

<sup>32</sup> Netherlands Economic Institute: Evaluation of the Common Organisation of the Markets in Sugar (prepared for the Commission of the European Communities), page ii (available on europa home page)

<sup>33</sup> *Ibid*, page 121

<sup>34</sup> *Ibid*, page 43

48. A study commissioned by Australia<sup>35</sup> provides further evidence that the average costs for sugar production in the EC are significantly higher than returns provided by the world market price alone. It is demonstrated in that study that high support prices provide both the incentive to produce ‘C’ sugar to protect valuable quota (against redistribution by Member State agencies) in the face of yield variability and the finance to invest capacity which can then make ‘C’ sugar profitable on a marginal costs basis. As noted above, according to the EC’s own estimates, if the support mechanisms currently available under the EC regime were withdrawn, much of EC sugar production would be unviable.
49. The same growers and processors produce quota sugar and ‘C’ sugar. ‘C’ sugar exports have averaged 17% of the combined ‘A’ and ‘B’ quota over the decade to 2001-2002. It is evident that ‘C’ sugar is not a mere spill over from quota production, but that ‘C’ production is directly related to quota production, in regard to annual production in excess of quota to guard against yield variability (which was the original purpose of the ‘B’ quota) and protection of high value quotas against redistribution by Member State agencies.

### **C. EC SCHEDULE OF EXPORT SUBSIDY COMMITMENTS ON SUGAR**

**Table 3: EC Schedule of export subsidy reduction commitments for sugar<sup>1</sup>**

<b>Base outlay level</b>		<b>Annual and final commitment levels</b>	
<i>ECU million</i>	<i>‘000 tonnes</i>	<i>ECU million</i>	<i>‘000 tonnes</i>
779.9	1,612.0	499.1	1,273.5

<sup>1</sup> (*Original footnote*) Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of exports in the period 1986 to 1990 amounted to 1.6 mio tonnes.

Source: Schedule CXL: European Communities, Part IV: Agricultural Products: Commitments Limiting Subsidization (Article 3 of the Agriculture Agreement) – Section II: Export Subsidies: Budgetary Outlay and Quantity Reduction Commitments

50. Section II of Part IV of Schedule CXL of the EC-15 includes a base outlay level of 779.9 million ECU and a base quantity of 1.612 million tonnes for sugar and sugar containing products listed in Section 6 of the Annex to the Schedule (principally processed fruit and vegetables). The Schedule provides for a final commitment level at the end of the implementation period of €499.1 million and 1.273 million tonnes.

<sup>35</sup> Sugar in the European Union: Sugar production costs and cross subsidies to C sugar exports, by Roger Rose. The study contains confidential data which cannot be publicly released.

51. According to a footnote to the Schedule the outlays and quantities do not include exports of sugar of ACP (certain developing countries in Africa the Caribbean and Pacific) and Indian origin. The footnote does not cite any legal basis for the exclusion.
52. In the Uruguay Round verification process, the EC data on 1986-1990 base outlay and quantity levels exclude 'C' sugar and 'ACP/India equivalent' sugar.

**Table 4: EC sugar export subsidy outlays and quantities**

<b>Year</b>	<b>Export subsidies (mio ECU)</b>	<b>Quantities (kt)</b>
1986	878.4	1645,0
1987	712.0	1859.0
1988	794.5	1615.0
1989	453.3	989.0
1990	692.9	1187.0

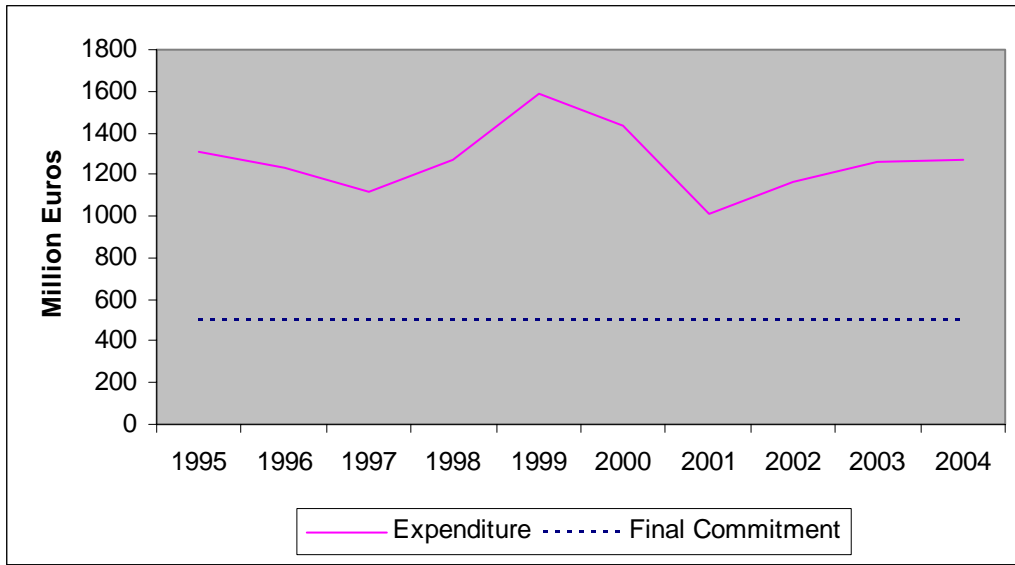
Source: WTO document G/AG/AGST/EEC, Table 11

53. The documentation submitted by the EC to the WTO Committee on Agriculture clearly shows that the quantities of EC sugar exports are in excess of the EC's export subsidy reduction commitments under the Agriculture Agreement.
54. The EC provides subsidies of close to €7 billion in market support including over €1 billion for direct subsidisation of exports of sugar from the EC (Table 2 refers). According to its latest WTO notifications, the EC exports over 4 million tonnes of sugar. These quantities are far in excess of the EC's export subsidy reduction commitment of 1.2753 million tonnes recorded in the EC's Schedule (Table 1 refers).<sup>36</sup> The export subsidies applied to the exports of sugar are also in excess of the budgetary outlay commitment levels of €499.1 million for sugar recorded in the EC's Schedule (Table 4 refers).

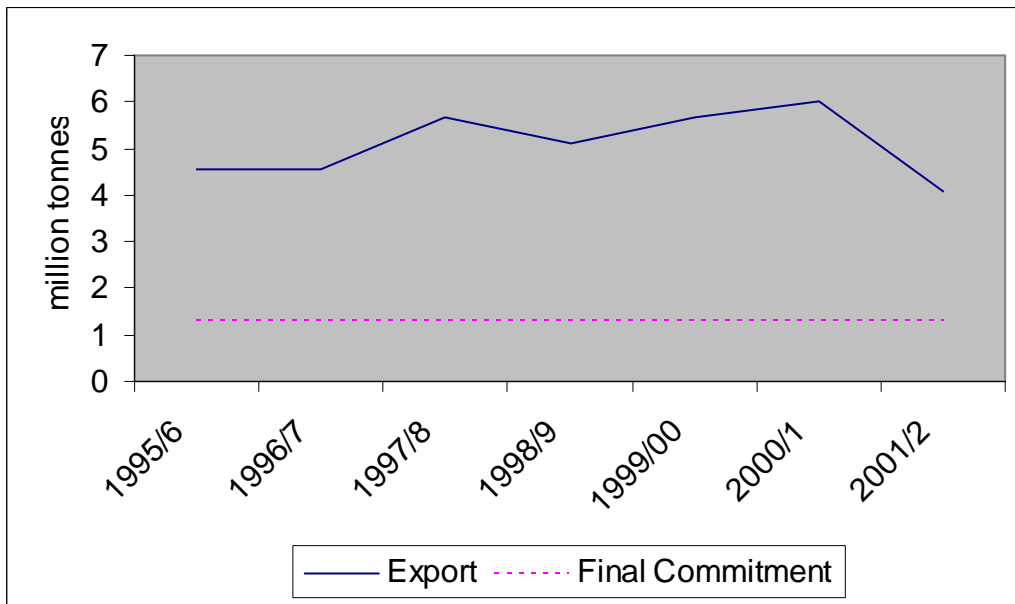
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<sup>36</sup> Commission of the European Communities: Financial statement concerning the European Agricultural Guidance and Guarantee Fund (EAGGF) – Guarantee Section Financial Year 2002 (Com(2003)680), page 17 - As acknowledged by the EU Commission, the quantities of sugar exported with benefit of direct export subsidy in 2002 were approximately 2.5 million tonnes and 2.7 million tonnes in the 2001/2003 marketing year.

**Figure 1: EC budgetary outlays on export subsidies on sugar**



**Figure 2: EC exports of sugar**



### **III. SUMMARY OF LEGAL CLAIMS AND ARGUMENTS**

55. Australia is claiming that the EC is in violation of its obligations under Articles 3.3, 8 and 9.1 and, in the alternative, Article 10.1 of the Agriculture Agreement. Australia is also claiming that the EC is in violation of its obligations under Article 3 of the Subsidies Agreement. In respect of the claimed violations under the Subsidies Agreement, Australia has requested the Panel to recommend that the EC withdraw the subsidies within 90 days of adoption of the Panel report, in accordance with the provisions of Article 4.7 of the Subsidies Agreement and consistent with practice of WTO Panels.<sup>37</sup>

#### **A. APPLICATION OF THE AGRICULTURE AGREEMENT**

56. Sugar is an agricultural product subject to the provisions of the Agriculture Agreement.<sup>38</sup>

57. In respect of export subsidies, the Agriculture Agreement provides that export subsidies listed in Article 9.1 of the Agreement are subject to reduction commitments. The reduction commitments include budgetary outlays and the quantities benefiting from Article 9.1 listed subsidies. The reduction commitments are applied on a product-specific basis.

58. For developed WTO Members, the reduction commitments involve a reduction of 36% in budgetary outlays and 21% of the quantities benefiting from Article 9.1 listed subsidies, over a base period level of 1986-90.<sup>39</sup>

59. WTO Members are required to incorporate those reduction commitments in their WTO Schedules as binding commitments.<sup>40</sup>

60. In addition to the reduction commitment obligations relating to Article 9.1 listed export subsidies, the Agriculture Agreement prohibits other export subsidies which are applied in a manner which results in, or which threaten to lead to circumvention of export subsidy commitments (Article 10.1). Australia's claims in respect of Article 10.1 are in the alternative.

61. The Agriculture Agreement prohibits export subsidises in excess of reduction commitments or other export subsidies not otherwise in conformity with the Agreement (Articles 3 and 8).

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<sup>37</sup> GATT and WTO Panels and Appellate Body reports cited in the submission are listed in the Appendix.

<sup>38</sup> Article 2 and Annex 1

<sup>39</sup> Article 9.2(b)(iv)

<sup>40</sup> Article 3

62. A special burden of proof applies to claims under Articles 9.1 and 10.1. The Appellate Body has confirmed that, in accordance with the provisions of Article 10.3 of the Agreement, any WTO Member which claims that any quantity exported in excess of a reduction commitment level is not subsidised, must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantities of export in question. Once the factual quantitative element has been proved in respect of exports in excess of reduction commitments (as Australia has done), the EC has the burden of proof to establish that any of the excess quantity is not subsidised (if it claims that the excess quantities are not so subsidised).

## **B. APPLICATION OF THE SUBSIDIES AGREEMENT**

63. The Agriculture Agreement does not cover the field of WTO export subsidy obligations in the agricultural sector. Article 21.1 of the Agriculture Agreement provides that the provisions of other WTO Agreements apply to agricultural products subject to the provisions of the Agriculture Agreement.
64. Article 3.1 of the Subsidies Agreement (prohibited export subsidies) provides for the application of prohibitions on subsidies contingent on export performance, “except as provided in the Agriculture Agreement”.
65. As confirmed by WTO Panels and the Appellate Body, an export subsidy found inconsistent with the provisions of the Agriculture Agreement is subject to the export subsidy prohibitions of the Subsidies Agreement.
66. Article 4.7 of the Subsidies Agreement requires a panel to recommend that a prohibited export subsidy be withdrawn “without delay” and to specify the time period for withdrawal. Previous panels have recommended a 90 day period for withdrawal of prohibited export subsidies.

## **C. CLAIMS UNDER THE AGRICULTURE AGREEMENT**

67. Australia has put forward evidence in its first written submission to the Panel that the EC grants export subsidies on ‘C’ sugar within the meaning of Article 9.1(c) of the Agriculture Agreement. The export subsidies on ‘C’ sugar have not been subject to reduction commitments and are in excess of the levels specified in the EC’s WTO Schedule. In the alternative, the EC is applying other forms of export subsidies to ‘C’ sugar, in a manner which results in or threatens to lead to the circumvention of export subsidy commitments.
68. In respect of ‘ACP/India equivalent’ sugar – for which the EC provides export subsidies in excess of its budgetary outlay and reduction commitment levels – Australia is claiming that the export subsidies in

question constitute export subsidies within the meaning of Article 9.1(a) of the Agriculture Agreement. The EC has not made its export subsidies on ‘ACP/India equivalent’ sugar subject to reduction commitments and the export subsidies in question are in excess of the commitments specified in the EC’s WTO Schedule.

**1. ‘C’ sugar**

69. The EC has excluded ‘C’ sugar exports from its export subsidy reduction commitments. The quantities exported are in excess of reduction commitment levels. The EC has asserted that ‘C’ sugar exports are not subsidised. In accordance with Article 10.3 of the Agreement the EC has the burden of proof under Articles 3, 8, 9 and 10.1 to establish that the exports in question are not subsidised, within the meaning of Articles 9.1 and 10.1.
70. Australia is claiming that the EC grants export subsidies to such sugar within the meaning of Article 9.1(c) of the Agriculture Agreement, or alternatively - for the purpose of Article 10.1 - other types of export subsidies, as defined in the Subsidies Agreement.
71. Article 9.1(c) covers export subsidies involving payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved.
72. In support of its claims that ‘C’ sugar is in receipt of export subsidies as defined in Article 9.1(c), Australia has submitted evidence that ‘C’ sugar is exported at prices below the average total costs of production. Consistent with the findings of the Appellate Body in *Canada-Dairy*, exports below the average total costs of production constitute a decisive element in determining whether a payment has been made. The first definitional test has therefore been met.
73. Australia has also submitted evidence that the payments in question are financed – as cross subsidies from support for quota production and exports<sup>41</sup> - by virtue of governmental action, in regard to the architecture, structure and various mechanisms of the EC sugar regime. The second definitional test of Article 9.1(c) is therefore met.
74. As part of its alternative claim under Article 10.1, Australia is claiming that ‘C’ sugar receives export subsidies of a kind other than those defined in Article 9.1. Consistent with the approach of WTO Panels and the Appellate Body, definitions of export subsidies in the Subsidies Agreement have application to export subsidy definitions under the Agriculture Agreement.

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<sup>41</sup> There is no independent production of ‘C’ sugar and ‘C’ sugar forms part of the overall structure of quota and surplus to quota (‘C’) sugar production, at the level of both sugar beet growers and sugar processors.

75. In the context of Article 10.1, Australia has cited the definition of an export subsidy contained within the Illustrative List of Export Subsidies in the Subsidies Agreement or in the subsidy definitions of Article 1 of that Agreement.<sup>42</sup>
76. Australia has claimed that export subsidies applied to ‘C’ sugar come within the definitional scope of paragraph (d) of the Illustrative List of the Subsidies Agreement. An export subsidy coming within this definition involves the provision by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if such terms and conditions are more favourable than those commercially available on world markets.
77. In the context of this export subsidy definition, Australia has submitted evidence that ‘C’ sugar processors obtain sugar beet for the production of ‘C’ sugar (which must be exported) on terms more favourable than that for the production of quota sugar (which may be consumed on the domestic market). The EC sugar regime provides for minimum prices to growers of beet for the production of quota sugar, which are not applicable to beet for the production of ‘C’ sugar.
78. In the alternative, Australia is claiming that ‘C’ sugar is in receipt of an export subsidy coming within the subsidy definitions of Article 1 of the Subsidies Agreement. As ‘C’ sugar must be exported, any subsidy attaching to ‘C’ sugar would be a subsidy contingent on export performance and hence an ‘export subsidy’ for the purposes of Article 10.1 of the Agriculture Agreement.
79. As confirmed by the Appellate Body, the ‘circumvention’ element of Article 10.1 is proved by evidence that the subsidised exports in question are in excess of a WTO Member’s export subsidy reduction commitment.

## **2. ‘ACP/India equivalent’ sugar**

80. The EC has excluded approximately 1.6 million tonnes of exports of ‘ACP/India equivalent’ sugar from its budgetary outlay and quantity commitments. The subsidised exports in question are in excess of the reduction commitment levels specified in the EC’s Schedule.
81. If the EC claims that such exports are not subsidised, it has the burden of proof, under Article 10.1 to establish that no export subsidies apply to such exports.

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<sup>42</sup> As ‘C’ sugar must be exported, it follows that any subsidy attaching to ‘C’ sugar would be a subsidy contingent on export performance.

82. Australia has submitted evidence that EC exports of ‘ACP/India equivalent’ sugar are in excess of the quantities specified in the EC’s Schedule.
83. Australia has also submitted evidence that the exports in question are accorded export subsidies within the meaning of Article 9.1(a) of the Agriculture Agreement, i.e. as a direct export subsidy to a firm or an industry of an agricultural product, contingent on export performance.
84. A footnote to the EC’s Schedule of export subsidy reduction commitments states that: [the reduction commitment on sugar] ‘Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio tonnes.’
85. There is no provision in the Agriculture Agreement for the exclusion of any quantities of subsidised exports from the export subsidy reduction commitments of any WTO Member. Nor are WTO Members permitted to make unilateral reservations on their commitments (Article XVI:5 of the WTO Agreement). Any such exception would need to be accorded through a formal WTO waiver, in accordance with the provisions of Article IX:3 of the WTO Agreement. The EC has neither sought nor received a waiver for the exclusion of ‘ACP/India equivalent’ sugar from its WTO commitments.
86. As to the relationship between a Schedule and substantive obligation in a treaty text, GATT and WTO Panels and the WTO Appellate Body have confirmed that WTO Members cannot use provisions of a Schedule to justify non-observance of a WTO obligation. WTO Members may yield WTO rights through a Schedule, but cannot diminish their WTO obligations. Further, the Appellate Body has confirmed that a footnote to a treaty text cannot override or qualify the obligation of a relevant WTO textual provision. It follows that a (unilaterally determined) footnote to a Schedule cannot override the EC’s export subsidy reduction commitments under the Agriculture Agreement.

#### **D. CLAIMS UNDER THE SUBSIDIES AGREEMENT**

87. Australia’s claims are based on Article 3 of the Subsidies Agreement. Article 3 prohibits subsidies contingent on export performance, ‘except as provided in the Agriculture Agreement’. Article 3 further provides that a WTO Member shall neither grant nor maintain such subsidies.
88. As confirmed by WTO Panels and the Appellate Body, the Subsidies Agreement applies to those export subsidies (as defined in the Subsidies Agreement) which are not in conformity with the reduction commitment obligations of the Agriculture Agreement.

**1. ‘C’ sugar**

89. In respect of ‘C’ sugar, Australia submitted evidence, under its alternative claim under Article 10.1 of the Agriculture Agreement, that ‘C’ sugar receives export subsidies coming within the definitional meaning of export subsidies or subsidies in the Subsidies Agreement. That evidence also constitutes evidence in support of Australia’s claims that the EC grants and maintains an export subsidy on ‘C’ sugar, inconsistently with the export subsidy prohibitions of Article 3 of the Subsidies Agreement.

**2. ‘ACP/India equivalent’ sugar**

90. In respect of ‘ACP/India equivalent’ sugar, Australia claims that the export subsidies granted and maintained on such sugar constitute direct export subsidies within the meaning of paragraph (a) of the Illustrative List of Export Subsidies contained in the Subsidies Agreement, i.e., the provision of a direct subsidy to a firm or an industry contingent upon export performance. As such, the EC is in violation of its obligations under Article 3 of the Subsidies Agreement.

## IV. CONCLUSIONS

91. Australia argues that:

- the quantities of EC exports of ‘C’ sugar and ‘ACP/India equivalent’ sugar are in excess of the EC’s export subsidy reduction commitments under the Agriculture Agreement;
- ‘C’ sugar benefits from export subsidies as defined in Article 9.1(c) of the Agriculture Agreement and paragraph (d) of the Illustrative List of Export Subsidies contained in Annex I of the Subsidies Agreement, inconsistently with the EC’s obligations under Articles 3.3, 8, 9.1 or in the alternative Article 10.1 of the Agriculture Agreement;
- ‘ACP/India equivalent’ sugar benefits from direct export subsidies as defined in Article 9.1(a) of the Agriculture Agreement and paragraph (a) of the Illustrative List of Export Subsidies contained in Annex I of the Subsidies Agreement;
- EC budgetary outlays on ‘ACP/India equivalent’ sugar, together with the quantities exported of such sugar, are in excess of the EC’s export subsidy reduction commitments as provided in the Agriculture Agreement;
- the export subsidies on ‘ACP/India equivalent’ sugar are not in conformity with the EC’s obligations under Articles 3.3, 8 and 9.1 of the Agriculture Agreement; and
- the export subsidies on ‘C’ sugar and ‘ACP/India equivalent’ are also inconsistent with the EC’s export subsidy obligations under Article 3.1 and 3.2 of the Subsidies Agreement.

## APPENDIX

### Dispute Settlement Cases cited in Australia’s First Written Submission

<b>Short Title</b>	<b>Full Title</b>
<i>Brazil–Aircraft Article 21.5 Panel Report</i>	<i>Brazil – Export Financing Programme for Aircraft, WT/DS46/RW, Article 21.5 Panel Report</i>
<i>Canada–Autos</i>	<i>Canada – Certain Measures Affecting the Automotive Industry WT/DS39/R-WT/DS42/R Panel Report</i>
<i>Canada–Aircraft Panel Report</i>	<i>Canada – Measures affecting the export of civilian aircraft, WT/DS70/R, Panel Report</i>
<i>Canada–Aircraft Appellate Body Report</i>	<i>Canada – Measures affecting the export of civilian aircraft, WT/DS70/AB/R, Appellate Body Report</i>
<i>Canada–Aircraft Article 21.5 Panel Report</i>	<i>Canada – Measures affecting the export of civilian aircraft, WT/DS70/RW Article 21.5 Panel Report</i>
<i>Canada-Dairy First Panel Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/R, Panel Report</i>
<i>Canada-Dairy First Appellate Body Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/AB/R, Appellate Body Report</i>
<i>Canada-Dairy First Article 21.5 Panel Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/RW First Article 21.5 Panel Report</i>
<i>Canada-Dairy First Article 21.5 Appellate Body Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/AB/RW First Article 21.5 Appellate Body Report</i>
<i>Canada-Dairy Second Article 21.5 Panel Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/ RW2 Second Article 21.5 Panel Report</i>
<i>Canada-Dairy Second Article 21.5 Appellate Body Report</i>	<i>Canada – Measures affecting the importation of milk and the exportation of dairy products WT/DS103/ AB/RW2, Second Article 21.5 Appellate Body Report</i>
<i>GATT Sugar Panel Report</i>	<i>European Communities – Refunds on exports of sugar GATT Panel report L/4833</i>
<i>US–Continued Dumping and Offsets Act</i>	<i>US – Continued Dumping and Offsets Act of 2000, WT/DS217/AB/R, Appellate Body Report</i>
<i>US-FSC</i>	<i>United States – Tax Treatment of Foreign Sales Corporations WT/DS108/AB/R, Appellate Body Report</i>

## **GLOSSARY**

### **ACP**

Members of the African, Caribbean and Pacific group of nations.

### **ACP/India sugar protocols**

See under 'Preferential' sugar

### **'ACP/India equivalent'**

Sugar exported by the EC with benefit of direct export subsidy which it deems notionally equivalent to imports from ACP members and from India. The notional 'ACP/India equivalent' quantity appears to be 1.6 million tonnes, which is eligible for direct export subsidy as a budgetary outlay.

The use of this term by Australia in this Submission does not in any way imply that the quantities exported are in fact equivalent to imports from the ACP and India.

### **'A' quota sugar**

The annual basic white sugar quota laid down for each Member State for the duration of each EC periodic sugar regime, which normally lasts for five years.

'A' quota sugar, which must be produced from sugar beet or sugar cane harvested in the EC, is allocated by Member States to sugar processors (undertakings) as production quotas.

'A' quota sugar is eligible for market support and export subsidies (although 'A' quota sugar was initially intended for domestic consumption). 'A' quota holders (processors) must pay fixed minimum prices to growers for beet used in the production of 'A' quota sugar. A production levy is payable as a contribution to the cost of direct export subsidies, up to 2% of the intervention price. Some levy costs are recoverable from beet growers.

### **'B' quota sugar**

An additional annual quantity of sugar determined by the EC for each Member State, with eligibility and allocation determined on the same basis as for 'A' quota sugar.

'B' quota sugar is also eligible for market support and export subsidies. 'B' quota sugar was initially intended to provide for surplus quantities to meet seasonal shortfalls in 'A' quota production.

'B' quota holders (processors) must also pay fixed minimum prices to beet growers, but the fixed price is lower than that applicable to purchases of beet for the production of 'A' quota sugar. A production levy is payable, ranging from 30% to a maximum 37.5% of the intervention price. Levy costs are recoverable from beet growers.

**Beet sugar**

Classified in the Harmonized Commodity Description and Coding system (HS) under HS 1701.12 (raw sugar) or as 1701.99 (white sugar) derived from the juices obtained by extraction from the root of sugar beet.

**‘C’ sugar**

All beet sugar produced in excess of ‘A’ and ‘B’ quota sugar. There is no regulatory limit on ‘C’ sugar production, but such sugar must be exported outside the EC (unless carried over under regulatory conditions on eligibility) without price guarantee and without benefit of direct export subsidy available for quota sugar. There is no independent production of ‘C’ sugar.

**Cane sugar**

Classified under HS 1701.11 (raw sugar) or as 1701.99 (white sugar) as sugar derived from the juices of the sugar cane stalk.

**CAP**

Common Agricultural Policy of the EC.

**Commonwealth Sugar Agreement (CSA)**

An agreement first concluded in 1951, between the UK Sugar Board and Commonwealth cane sugar exporters, including Australia and a number of ACP members and India. The CSA provided for quota imports at guaranteed prices. Import quotas totalled 1.7 million tonnes raw value, of which Australia had a quota of 360,000 tonnes, together with an undertaking to meet any shortfalls from other suppliers. The CSA was terminated on UK accession to the EC, but with the exception of Australia, the import arrangements were maintained by the EC-9, through special protocols concluded with ACP members and with India for a total amount of 1,304,700 tonnes white sugar equivalent. At the time of UK accession, the EC-9 was a net importer.

**Cotonou Agreement**

Agreement between the ACP members and the EC signed in June 2000. The agreement recapitulates many of the arrangements included in earlier ACP/EC arrangements. A special protocol provides for duty free quota access for sugar at guaranteed prices (see under ‘Preferential’ sugar).

**EBA sugar**

Sugar imported duty free by the EC from least developed countries, under its ‘Everything but Arms’ initiative, which envisages duty free imports from the least developed countries. However, duty free sugar imported under EBA arrangements is still subject to quota, currently set at around 100,000 tonnes in total.

**ECA**

European Union Court of Auditors.

**EC**

European Communities, in the context of Article IX:1 of the WTO Agreement, including Member States.

**ECU**

European Currency Unit. EC budgetary outlays in Schedules are expressed in ECU. It is assumed the ECU and Euro (€) are in parity.

**EU**

European Union, including all EC legal entities.

**Export refunds**

EC terminology for direct export subsidies involving budgetary outlays (including revenue foregone and subsidies financed by producer levies).

**Grower**

A grower of sugar beet or sugar cane used in the manufacture of sugar.

**Interprofessional contracts**

Contracts between EC sugar processors and EC sugar beet or sugar cane growers. Most of the terms of such contracts are stipulated by Member State authorities within the framework of EC legislation. Interprofessional contracts apply to both quota and ‘C’ sugar.

**Intervention price**

The price fixed by EC legislation as the buying price of ‘A’ and ‘B’ quota sugar. The intervention price operates as a floor for the EC domestic price. The EC domestic sugar price has been much higher than the intervention price, as a consequence of the domestic and import supply controls, together with export subsidies and the requirement to export surplus to quota (‘C’ sugar). Provision is made for intervention buying as a last resort. There has not been any intervention buying for over two decades.

**Marketing year**

The period beginning 1 July and ending on 30 June in the following year.

**Minimum price**

Prices guaranteed to EC beet and cane growers for the quantities required to produce ‘A’ and ‘B’ quota sugar. The price payable by ‘A’ quota holders is higher than that payable by ‘B’ quota holders.

**NEI**

Netherlands Economic Institute.

**‘Preferential’ sugar**

As defined in Article 35 of EC Council Regulation 1260/2001 sugar imported under special sugar protocols between the EC and ACP sugar quota holders and between the EC and India. Quotas are assigned on a country basis to some - but not all - ACP sugar producing countries, known as ACP quota holders, as well as to India. The quantities covered by the protocols are accorded duty free treatment under EC WTO tariff quota bindings.

Sugar imported under the ‘Preferential’ arrangements (mostly raw cane sugar) is assigned to sugar refining companies and can be freely sold within the EC. ‘Preferential’ sugar produced from cane or beet harvested in the countries of the quota holders is eligible in the EC for domestic market price support and for direct export subsidies. It enjoys a status comparable to EC domestic quota sugar.

**Producer**

A collective term for all enterprises engaged in the production of sugar, from the growing of sugar beet or cane to the processing/refining of sugar from sugar beet or sugar cane or from raw cane sugar.

**Production levies**

Levies paid by ‘A’ and ‘B’ sugar quota holders (processors) to contribute to the cost of export subsidies. Some levy costs are recoverable from growers.

**Processor**

An undertaking involved in the manufacture of white sugar from sugar beet or from raw cane sugar.

**Quota sugar**

Annual quantities of ‘A’ and ‘B’ quota sugar produced from sugar beet or sugar cane harvested in the EC

**‘Quota’ beet**

Delivery rights assigned to beet growers for the supply of beet to sugar processors for the manufacture of ‘A’ and ‘B’ quota sugar. The delivery rights are commonly referred to as ‘quotas’ in most studies.

**Raw sugar**

Raw sugar is sugar that is milled from either sugar cane (HS 1701.11) or sugar beet (HS 1701.12). Because of the characteristics of sugar beet, beet sugar is normally processed directly from beet to white sugar. The product may be traded in its raw state as unrefined brown sugar. The majority of sugar imported by the EC is in the form of raw cane sugar for refining.

**Refined sugar**

See under “White Sugar”

**‘SPS’ sugar**

‘Special preferential sugar’, as defined in Article 39 of EC Council Regulation 1260/2001. SPS sugar consists of raw cane sugar imported for refining from designated ACP countries and from India under balance sheet arrangements based on the estimated annual needs of refineries.

SPS sugar is eligible for reduced import duties within quotas periodically determined. Unlike ‘Preferential’ sugar, SPS sugar is not eligible for export subsidy.

**Sugar**

Product falling into Chapter 17.01-17.03 of the HS Code. In the EC sugar regime, product as defined in Article 1 of Regulation 1260/2001 Product as defined in Point 6 of the Annex to EC’s CXL Schedule Part IV.

**Sugar beet**

HS 1212.91

**Sugar Cane**

HS 1212.92

**Sugar regime**

The EC common organisation of the markets in sugar, given effect through EC Council legislation 1260/2001 and related regulatory instruments.

The EC sugar regime entered into force in 1968 and is generally reviewed every five years. The principal features of the regime are:

- (a) guaranteed floor prices for quantities of white sugar designated as ‘quota sugar’ produced from sugar beet or sugar cane harvested within the EC
- (b) minimum prices to growers of EC-harvested sugar beet and sugar cane for within-quota production of sugar
- (c) protection of the internal market from competition through:
  - (i) limits on the quantities of sugar made available on the internal market (import quotas and special safeguards, together with an effective prohibition on the sale of surplus to quota sugar on the internal market)
  - (ii) regulation of competition from alternative sweeteners
- (d) direct export subsidies for quota sugar, exported as sugar or as sugar incorporated into processed products.

**White Sugar**

Product falling within HS 1701.91 and 1701.99 and coming within the HS description of refined sugar, generally produced as a crystalline substance which is marketed in various degrees of fineness or in the form of small cubes, loaves, slabs or sticks or regularly moulded, sawn or cut pieces.

**White sugar equivalent (wse)**

To secure uniformity in statistics, volumes of sugar and syrup products are commonly expressed in terms of wse. Unless otherwise stated, quantities are expressed in white sugar equivalent, including WTO quantity reduction commitments.

1 tonne of white sugar is equivalent to 1.087 tonnes of raw sugar.