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EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

ARB-2005-3/20

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

Award of the Arbitrator
A.V. Ganesan

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WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Export Subsidies on Sugar

Parties:

Australia
Brazil
European Communities
Thailand

ARB-2005-3/20

Arbitrator:

A.V. Ganesan

I. Introduction

1. On 19 May 2005, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1] and the Panel Report[2], as modified by the Appellate Body Report, in *European Communities – Export Subsidies on Sugar*.[3] At the meeting of the DSB held on 13 June 2005, the European Communities stated that it intended to comply with the recommendations and rulings of the DSB in this dispute, and that it would need a reasonable period of time in which to do so.[4]

2. On 9 August 2005, Australia, Brazil and Thailand (the "Complaining Parties") informed the DSB that consultations with the European Communities had not resulted in an agreement on the reasonable period of time for implementation. The Complaining Parties therefore requested that such period be determined through binding arbitration, pursuant to Article 21.3(c) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[5]

3. On 30 August 2005, the Complaining Parties and the European Communities requested me to act as Arbitrator, pursuant to Article 21.3(c) of the DSU, to determine the reasonable period of time for implementation of the recommendations and rulings of the DSB in this dispute. I accepted the

[1]Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R.

[2]Panel Report, WT/DS265/R, WT/DS266/R, WT/DS283/R.

[3]WT/DS265/29, WT/DS266/29, WT/DS283/10.

[4]WT/DSB/M/191, para. 19.

[5]WT/DS265/30, WT/DS266/30, WT/DS283/11.

appointment on 5 September 2005[6], and undertook to issue my award no later than 1 November 2005, the period of time that had been agreed between the parties.

4. In a letter to me dated 6 September 2005, the European Communities made certain requests concerning the sequencing in the filing of submissions by the parties; allocation of time for the opening statement of the European Communities at the oral hearing; and the date of circulation of the arbitral award. By a letter dated 7 September 2005[7], Australia, Brazil and Thailand were invited to submit their views on the European Communities' requests, which views I received on 12 September 2005.[8] I responded to these requests in a letter dated 13 September 2005, in which I undertook to issue my award no later than 28 October 2005.

5. The 90 day period following adoption of the Panel and Appellate Body Reports has expired on 17 August 2005. The parties have confirmed that my award, circulated no later than 28 October 2005, shall be deemed to be the award of the arbitrator for the purpose of Article 21.3(c) of the DSU, notwithstanding the expiry of the 90 day period stipulated in Article 21.3(c).

6. The European Communities filed its written submission on 21 September 2005; the Complaining Parties each filed its written submission on 28 September 2005. By a letter dated 4 October 2005, Thailand requested authorization to make a "typographical correction" to its submission, such that it would add the word "related" to the fifth sentence of paragraph 77 on page 23 of its submission, so that it would read "... 1.5 million farmers' and sugar-<u>related</u> workers' households" (underlining added). By a letter dated 5 October 2005, I invited the other parties to comment on Thailand's request. None of the other parties objected to Thailand's request. By a letter dated 7 October 2005, I authorized Thailand to make the requested correction to its submission.

7. An oral hearing was held on 10 October 2005. The parties presented oral arguments and responded to the questions posed by me. During the hearing, Brazil presented an additional exhibit, and the European Communities presented two additional exhibits. Australia requested that I disregard the European Communities' additional exhibits. I provided the parties the opportunity to submit their written comments on the exhibits at issue, if they so wished. Brazil and the European Communities submitted their comments the day following the hearing, serving a copy to the other parties.

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[6]WT/DS265/31, WT/DS266/31, WT/DS283/12.

[7]Letter from the Director of the Appellate Body Secretariat to the Parties, dated 7 September 2005.

[8]Joint letter from Australia, Brazil, and Thailand, dated 12 September 2005.

II. Arguments of the Parties

A. *European Communities*

8. The European Communities requests that I determine the "reasonable period of time" for implementation of the recommendations and rulings of the DSB in this dispute to be 19 months and 12 days from 19 May 2005, the date of adoption by the DSB of the Panel and Appellate Body Reports, that is to say, a period of time expiring on 1 January 2007.[9]

9. As a fundamental general principle, the European Communities emphasizes that "it is the prerogative of the implementing Member to select the means of implementation [of the recommendations and rulings of the DSB] which it deems most appropriate"[10], that "the implementing Member is entitled to choose the method which it deems most appropriate"[11], and that "an Arbitrator cannot prescribe any particular implementation method"[12], as "the selection of the implementing measure ... is the prerogative of the implementing Member".[13]

10. The European Communities' assessment of the "reasonable period of time" required for implementation is based on the following seven sets of "particular circumstances" of the case.

11. First, the European Communities submits that "[t]he measures in the underlying panel proceedings were contained in Council Regulation 1260/2001 and implementing and related instruments"[14], and that, therefore, implementation in the present case requires the adoption of a regulation by the Council of the European Union (the "Council"), followed by the adoption of implementing regulations by the European Commission (the "Commission"). Under the present Council Regulation 1260/2001, the Commission has no legal authority to "limit the exports of C sugar

[9]European Communities' written submission, para. 95.

[10]*Ibid*., paras. 22 and 36.

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

[12]*Ibid*.

[13]*Ibid*.

[14]European Communities' written submission, para. 30.

on the ground that such exports exceed the reduction commitments."[15] As a result, according to the European Communities, "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."[16] The European Communities also argues that if it refuses to grant export licences for exporting C sugar, it would act inconsistently with Article XI of the *General Agreement on Tariffs and Trade 1994*.[17]

12. The European Communities contends that even if the Commission had the authority to limit export of C sugar, this circumstance would not be dispositive for the purpose of establishing the "reasonable period of time" in the present dispute. This is because the European Communities, as the implementing Member, is entitled to choose the means of implementation which it deems most appropriate. Among "many different ways" available to the European Communities to ensure compliance with its reduction commitments, the European Communities may legitimately choose a method that acts "upon the underlying factors which, under the current regime, cause the subsidized exports, such as the level of domestic prices, the volume of production quotas, or the availability of alternative uses for sugar, rather than by placing restrictions on the exports themselves".[18]

13. The second set of particular circumstances, according to the European Communities, is that, as its sugar regime is "complex" and "all its components are ... closely connected and interdependent"[19], it considers that "[a]n implementation method which addresses the structural causes of the subsidized exports of sugar would serve best the objectives of the *Agreement on Agriculture* ..."[20], even if it may require a longer implementation period. Keeping this in view, after a careful assessment of all the options available, the Commission has submitted a proposal to the Council on 22 June 2005 for a new Council regulation, based on an approach that aims at "preserving

[15]European Communities' written submission, para. 33. (footnote omitted) The European Communities' sugar regime provides for quota sugar and non-quota sugar. Quota sugar is composed of A quota sugar and B quota sugar. Quota sugar is the maximum quantity of sugar eligible for domestic price support and direct export subsidies. Quotas are allocated on an annual basis to individual European Communities Member States who, in turn, allocate shares of their national quotas to individual undertakings. Sugar produced over and above the A and B quota is referred to as C sugar; such sugar may not be sold on the domestic market and must be exported. However, an undertaking may decide to "carry forward" C sugar into the next marketing year. In that event, the undertaking need not export C sugar and may sell that C sugar in the next marketing year on the domestic market as quota sugar. However, such carry forward of C sugar is subject to a quantitative limit; this limit is currently set at 20 per cent of the A quota.

[16]European Communities' written submission, para. 35.

[17]*Ibid*., para. 33; European Communities' statement at the oral hearing.

[18]European Communities' written submission, para. 36.

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

[20]*Ibid*., para. 41.

some level of support for the beet farmers and sugar producers while at the same time minimising the production of exportable surpluses."[21] According to the European Communities, a "comprehensive and coherent legal system" will have to be devised by the European Communities' legislator[22], but, regardless of which specific option is ultimately chosen, the implementing measures are "likely to be technically complex".[23]

14. Thirdly, the European Communities submits that a Council regulation repealing, amending or replacing the current Council Regulation 1260/2001 would have to be based on Articles 36 and 37 of the Treaty Establishing the European Community (the "EC Treaty"). Consequently, the following procedural steps are necessary: submission of a Commission proposal to the Council; opinions of the European Parliament and of the Economic and Social Committee of the European Community (the "EESC") to the Council; consultations with the African, Caribbean and Pacific ("ACP") countries; and, finally, the adoption of a regulation by the Council.

15. Following the normal procedure, the Commission proposal of 22 June 2005 will be examined by several committees of the European Parliament[24], and their reports will be debated in one or more plenary sessions of the Parliament. The European Communities estimates that the European Parliament will require at least six months from the reception of the proposal to deliver its opinion, that is, until January 2006. In addition, although Articles 36 and 37 of the EC Treaty do not require the consultation of the EESC, the EESC nevertheless will be consulted pursuant to a 2001 Co-operation Protocol agreed between the Commission and the EESC, as the routine practice in such matters. The European Communities estimates that the EESC will require six months to deliver its opinion, that is, until January 2006.

16. Furthermore, the European Communities is obligated, by Article 12 of the Cotonou Agreement between itself and the ACP countries, to consult ACP countries when it intends to take measures "which may affect the interests of the ACP states".[25] Accordingly, the European Communities has informed the ACP countries of the Commission proposal to the Council and has

[21]European Communities' written submission, para. 43.

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

[23]*Ibid*.

[24]The Committee on Agriculture and Rural Development (COMAGRI); the Committee on Budgets (BUDG); the Committee on International Trade (INTA), and the Committee on Development (DEVE).

[25]European Communities' written submission, para. 61.

engaged in an "extensive consultation process".[26] This process will "add to the complexity of the debate by the different [European Communities'] institutions involved and require additional time."[27]

17. As regards the adoption of the regulation by the Council, the European Communities maintains that, although the Council may start deliberating on a Commission proposal while it is being considered by the European Parliament and the EESC, the Council will require additional time to take into account the opinions issued by those bodies. Referring to the "potential complexity of the implementing measures" and to "recent precedents concerning similar agricultural legislation", the European Communities estimates that the Council will require nine months to adopt formally the relevant regulation, that is, until the end of March 2006.[28]

18. As regards the implementing regulations, the European Communities emphasizes that the Commission will have to enact "a comprehensive set of detailed" implementing regulations.[29] In so doing, the Commission must follow a "comitology procedure[]", under which the Commission is assisted by a "management committee" composed of representatives of the Member States and chaired by a Commission representative.[30] Under that procedure, the Commission presents its proposals to the management committee, which in turn provides its opinion; if a favourable or no opinion is issued by the management committee, the Commission adopts the proposed regulation. If the management committee issues an unfavourable opinion, the Commission nevertheless adopts the regulation, but the Council may take a different decision from the Commission within a specified time period.

19. The European Communities submits that, although Commission staff may start preparing the implementing legislation before adoption of the Council regulation, they cannot finalize the texts and launch the "comitology procedure" until the Council has taken a definitive decision. The Commission will, according to the European Communities, need three months in order to enact the implementing regulations, that is, until the end of June 2006.[31]

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[26]European Communities' written submission, para. 63.

[27]*Ibid*.

[28]*Ibid*., para. 68.

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

[30]*Ibid*., paras. 71–72.

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

20. The fourth set of "particular circumstances" in the present dispute, according to the European Communities, are requirements concerning the publication and entry into force of the regulations at issue. All regulations must be published in the Official Journal of the European Union. Although not explicitly required by the EC Treaty, it is an "established legislative practice" that regulations which must be implemented by the customs authorities are published "at least six weeks before their entry into force and take effect from 1 January or, exceptionally, from 1 July".[32] This practice is based on a Council Resolution of 27 June 1974. The European Communities argues that previous arbitration awards have acknowledged the relevance of this practice for the determination of the reasonable period of time.[33] Moreover, it is also a "well-established legislative practice" that "significant changes to the rules of a common market organization" take effect from the start of the following marketing year, "so as to take account of production in course and avoid disrupting the market".[34] The marketing year 2005/2006 of the European Communities runs from 1 July 2005 to 30 June 2006.

21. As the fifth set of "particular circumstances", the European Communities argues that the European Communities' sugar regime is of a "longstanding nature", because it has been in place since the early 1970s, and is "essentially integrated" in the European Communities' policies.[35] As a result, the implementation of the recommendations and rulings of the DSB will have "a major impact" on the European society and not just on the sugar industry. [36] It is therefore "unavoidable" for the European Communities to consider the "continued viability" of the sugar regime as a whole.[37] In this context, the European Communities refers to the "numerous and very different implementation options"[38] available to it, the significance of sugar as an "essential component of the diet of the European population"[39], energy and environmental policies, as well as the relationship between the European Communities and the ACP countries. These varied factors will show that the implementation of the recommendations and rulings of the DSB necessitates a "serious debate", both within and outside the European Communities' legislature.[40]

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[32]European Communities' written submission, para. 77.

[33]*Ibid*., para. 77, referring to Award of the Arbitrator, *EC – Bananas III*, para. 3 and Award of the Arbitrator, *EC – Tariff Preferences*, paras. 50–51.

[34]European Communities' written submission, para. 78.

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

[36]*Ibid*.

[37]*Ibid*., para. 82.

[38]*Ibid*., para. 83.

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

[40]*Ibid*., para. 87.

22. As the sixth set of "particular circumstances", the European Communities refers to sugar beet production already undertaken before the present dispute was decided by the Appellate Body in April 2005. In Europe, beets are sown in February and March and harvested in the autumn. As a result, decisions concerning the volume of beet and sugar to be produced in the marketing year 2005/2006 had been agreed upon between farmers and sugar producers before the DSB made its recommendations and rulings. Reversing their production decisions would be "very costly and often materially impossible".[41] The European Communities points out that the Commission proposal of 22 June 2005 provides for levies to be imposed on the production of "surplus sugar", designed to avoid the accumulation of sugar; however, it would be inappropriate to apply those levies to sugar produced from beet sown before the present dispute was decided.[42] In any event, even if such exports were not allowed after 31 July 2006, its consequence might be that the European producers "would be forced to make all their exports within a shorter period of time", thereby "exacerbat[ing] the effects of those exports", to the detriment of all sugar exporting countries.[43]

23. As the seventh, and final, set of "particular circumstances", the European Communities argues that the reasonable period of time it suggests is "broadly in line" with the time periods granted to the European Communities in previous arbitration awards concerning "similar" legislative measures.[44] The European Communities refers to the awards in *EC – Bananas III* and *EC – Tariff Preferences*, in which the reasonable period of time was 15 months and 6 days, and 14 months and 11 days, respectively. The longer reasonable period of time in the present case is necessary so as "not to penalise production already undertaken" prior to the decision of the Appellate Body in April 2005.[45]

[41]European Communities' written submission, para. 88.

[42]*Ibid*., para. 90.

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

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

[45]*Ibid*., para. 94.

B. *Complaining Parties*

1. Australia

24. Australia disagrees with the reasonable period of time proposed by the European Communities. Australia provides three distinct scenarios to decide how the European Communities could bring itself into compliance with its obligations under World Trade Organization ("WTO") law and the recommendations and rulings of the DSB in the "shortest period possible within the legal system" of the implementing Member. Under the first scenario, the European Communities can implement the DSB's recommendations and rulings by doing three things: by adopting a Commission regulation that limits export licences such that the relevant commitment levels are not exceeded; by adopting a second Commission regulation increasing the permitted carry forward of C sugar; and by adopting a third Commission regulation to reduce the level of export availability of sugar. Under this scenario, the required reasonable period of time is no more than six months and six days from the date of adoption of the Appellate Body Report and the Panel Report by the DSB, that is to say, it would expire on 25 November 2005.[46]

25. Under the second scenario, should the Arbitrator find that, contrary to Australia's assertions, Commission regulations can be used to *regulate*, but not to *limit* the export of C sugar through export licences, then the European Communities can adopt and implement a different set of Commission regulations, spreading C sugar exports over the 2005/2006 and 2006/2007 quantity commitment marketing years; limiting export licences for quota sugar; increasing the permitted carry forward of C sugar; and reducing the level of export availability of sugar.[47] The reasonable period of time under this scenario is no more than six months and six days, that is to say, it would expire on 25 November 2005.[48]

26. The third scenario put forward by Australia is applicable "[i]f the Arbitrator finds ... that a Commission Regulation cannot be used to control the export of C sugar at all"[49]; under this scenario, the European Communities can implement by adopting a Commission regulation limiting export licences for quota sugar and adopting a Council regulation granting the Commission the authority to control the export of C sugar; the Commission could subsequently adopt an implementing

[46]Australia's written submission, para. 201.

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

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

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

Commission regulation to impose such controls.[50] Under this third scenario, the reasonable period of time is no more than 220 days and it would expire on 27 December 2005.[51]

27. Finally, in addition to the three scenarios put forward by it, Australia argues that, even on the basis of the European Communities' submission that a Council regulation on a new common market organization ("CMO") in the sugar sector is required—which basis Australia considers "incorrect"[52]—the reasonable period of time should be shorter than that requested by the European Communities; it should be no more than 11 months and 2 days and should expire on 21 April 2006.

28. Turning to Australia's specific arguments under these various scenarios, Australia argues that the European Communities does not substantiate why a date "significantly in excess" of the Article 21.3(c) guideline of 15 months is justifiable.[53] Australia emphasizes that the reasonable period of time in this dispute must be determined by reference to the action needed to comply with the recommendations and rulings in question, and not by reference to "any wider reform" that the European Communities may choose to undertake in response to a WTO ruling.[54]

29. Australia argues that the European Communities has "full legal authority" under its existing regime to regulate the levels of refunds, to determine the quantity of "export availability of ... C sugar" and to regulate such exports.[55] Contrary to the assertions of the European Communities, the Commission has the authority, under the existing sugar regime, to suspend the granting of export licences for exports of any sugar, *including C sugar*. The requirement in Article 13 of Council Regulation 1260/2001 that C sugar must be exported is not an impediment to this authority, because the relevant provision does not apply to all C sugar, but rather only to C sugar that is not carried forward to the following marketing year. The current limit on such carry forward, amounting to 20 per cent of the A quota[56], has been established by the Commission and could either be increased or "abolished entirely", without requiring a change to Council Regulation 1260/2001.[57]

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[50]Australia's written submission., paras. 165–167.

[51]*Ibid*., para. 205. The reasonable period of time would expire on 25 December; the next working day is 27 December 2005.

[52]Australia's written submission, para. 206.

[53]*Ibid*., para. 11.

[54]*Ibid*., para. 174.

[55]*Ibid*., para. 21.

[56]For a description of A, B, and C sugar, see *supra*, footnote 15.

[57]Australia's written submission, para. 122.

30. Should the Arbitrator find that, contrary to Australia's assertions, the current authority of the Commission cannot be used to prevent or limit the export of C sugar, Australia argues that this "would not serve as a barrier" to compliance by the European Communities by means of Commission regulations.[58] Commission authority under the existing regime can still be used to regulate such exports. Although 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 its production*. Under the existing regime, producers have a period between the end of the marketing year and 31 December to export C sugar not carried forward; in the event that C sugar production in any one year were to exceed the European Communities' quantity commitment level, the European Communities has the legal authority to limit export licences to that quantity commitment level; the balance of C sugar production not carried forward could then be exported in the period 1 October to 31 December in the following marketing year.

31. According to Australia, all of the above-referred measures can be adopted by the Commission under the "management committee procedure". The time period for the Commission to adopt measures in the sugar sector under this procedure in the past has been "very short".[59] Under that procedure, the Commission presents proposals to the management committee, which in turn provides an opinion; if a favourable or no opinion is issued by the management committee, the Commission adopts the proposed regulation. If the management committee issues an unfavourable opinion, the Commission nevertheless adopts the regulation, but the Council may take a different decision from the Commission within a specified time period. Australia argues that, for a range of regulations adopted by the Commission in the sugar sector under the "management committee procedure", the average and median duration of the procedure has been 23 days. Although the European Communities could have, therefore, already implemented the recommendations and rulings of the DSB, Australia proposes that, "exceptionally and as a gesture to the [European Communities]", the reasonable period of time should end four weeks from the date of the circulation of the arbitration award.[60] Thus, the reasonable period of time would expire on 25 November 2005. This reasonable period of time is applicable for both the first and second scenarios for implementation set out in Australia's written submission.

[58]Australia's written submission, para. 125.

[59]*Ibid*., para. 142.

[60]*Ibid*., para. 144.

32. In the event that the Arbitrator were to consider "necessary to calculate ... periods"[61] for the adoption of a new Council regulation amending the CMOs in the sugar sector, as well as for the subsequent adoption of implementing Commission regulations, Australia refers to a "study of Council [r]egulations adopted by the [European Communities] between 1 January 1998 and 31 July 2005 which amended existing common market organizations for agricultural products".[62] On the basis of "median figure[s]" derived from this sample, Australia argues that the adoption of a new Council regulation should occur by 27 November 2005, and the entry into force of this regulation on 2 December 2005.[63] Subsequently, when adopting implementing regulations, the Commission should be granted an additional 23 days to complete the management committee procedure. The reasonable period of time for this scenario should therefore expire on 27 December 2005.[64]

33. As stated above, in Australia's view, contrary to the European Communities' arguments, it is not necessary, for purposes of implementation, to adopt a Council regulation *creating* an entire *new* CMO for sugar; rather, according to Australia, it is sufficient to adopt a Council regulation *amending* the *existing* CMO. Nevertheless, even if the reasonable period of time were calculated on the basis of adopting a Council regulation *creating* a *new* CMO, the reasonable period of time should be shorter than that suggested by the European Communities. Using a median figure from a sample of previous Council regulations that created new CMOs, Australia argues that a new Council regulation could be adopted by 7 March 2006 and it could enter into force by 29 March 2006. Subsequently, for adopting implementing regulations, the Commission should need no more than 23 days to complete the "management committee procedure". The reasonable period of time under this scenario should therefore expire on 21 April 2006.

34. Australia, moreover, disputes that certain factors invoked by the European Communities constitute "particular circumstances" within the meaning of Article 21.3(c) of the DSU, justifying a longer reasonable period of time. Australia points out that arguments related to the likely impact on the domestic industry have been rejected in previous arbitrations. The correction of possible "structural market imbalances" should similarly not be taken into account in the determination of the

[61]Australia's written submission, para. 146.

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

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

[64]*Ibid*., para. 205. The reasonable period of time would expire on 25 December; the next working day is 27 December 2005.

reasonable period of time.[65] Moreover, the present dispute does not present circumstances comparable to those in *Chile – Price Band System*; this is because export subsidies under the European Communities' sugar regime do not have a "unique role and impact" on society, they do not serve as a "cornerstone" of the European Communities' agricultural policy, and they are not "fundamentally integrated" into the "central agricultural policies" of the European Communities.[66] Finally, the implementation period proposed by the European Communities is not, as claimed by the European Communities, "broadly in line"[67] with previous awards under Article 21.3(c) concerning legislative measures of the European Communities; the reasonable periods of time granted in *EC – Bananas III* and *EC – Tariff Preferences* were "only, at the most, around half as long" as the "effective reasonable period of time" sought by the European Communities in this arbitration.[68]

2. Brazil

35. Brazil requests that the Arbitrator determine the reasonable period of time to be six months and six days, that is, until 25 November 2005, if implementation is brought about by administrative action. Alternatively, if implementation requires legislative measures, Brazil requests that the Arbitrator determine the reasonable period of time to be seven months and eight days, that is, until 27 December 2005.

36. Brazil recalls that the European Communities is required to comply "in the shortest time legally possible"[69] and rejects the European Communities' argument that the implementation period should be the period that it will take for the European Communities to reform its overall sugar regime. Rather, implementation requires only the adoption of measures that will ensure that the European Communities respects its export subsidy reduction commitment levels.

37. Brazil submits that the existing legal framework of the European Communities' sugar regime permits the European Communities to comply within four weeks. Three principles of European Communities' law are relevant in this respect: first, international agreements are binding on the institutions of the European Communities and on its Member States; secondly, secondary legislation

[65]Australia's written submission, para. 185, referring to the European Communities' written submission, para. 41.

[66]Australia's written submission, para. 192, referring to Award of the Arbitrator, *Chile – Price Band System*, paras. 46 and 48.

[67]Australia's written submission, para. 197, referring to the European Communities' written submission, para. 92.

[68]Australia's written submission, para. 197.

[69]Brazil's written submission, heading IV.A.

of the European Communities must, as far as possible, be interpreted in a manner consistent with these agreements; and thirdly, the management of agricultural policy is left "very largely" to the Commission, acting under the implementing authority delegated to it by the Council.[70] In this respect, Brazil argues that the Commission enjoys the authority to suspend the grant of export licences for sugar, "for the express reason of ensuring compliance with the [European Communities'] obligations under the *Agreement on Agriculture*"[71]; the Commission also enjoys the authority to amend the existing rules to enable producers to carry forward, to the following marketing year, any C sugar that cannot be exported in a given year.

38. With respect to export licences, Brazil argues that Article 22 of current Council Regulation 1260/2001 "subjects all exports of sugar ... to an export licence and draws no distinctions between A, B and C sugar".[72] Furthermore, the Commission is authorized to lay down detailed implementing rules governing the conditions for granting export licences for all exports of sugar, including C sugar. In 1995, the Commission adopted rules to govern import and export licences "among other reasons, to enable the [European Communities] to control the level of its exports of subsidized sugar".[73] These rules are still in force and contain rules regulating the grant of export licences for A, B and C sugar. The Commission does not require express authorization to control exports of C sugar, provided that such controls are not prohibited by Council Regulation 1260/2001 or implementing regulations, which is not the case. In this respect, Brazil also rejects the European Communities' argument that Council Regulation 1260/2001 *requires* that C sugar be exported; rather, C sugar can also be carried forward into the following marketing year.

39. With respect to the rules governing the carry forward of C sugar into the next marketing year, Brazil argues that under Council Regulation 1260/2001 *all* C sugar could be carried forward. The implementing rules concerning this provision are contained in a Commission regulation that limits the carry forward to 20 per cent of the A quota; however, if it wishes, the Commission can "increase the quantity of C sugar that can be carried forward from the current 20 [per cent] limit [or] eliminate *entirely* the current ... restriction on carry-forward."[74] Indeed, previously, the relevant implementing rules permitted producers to carry forward 100 per cent of their sugar production. If the Commission

[70]Brazil's written submission, para. 28.

[71]*Ibid*., para. 33. (original italics)

[72]Brazil's written submission, para. 34. (For a description of A, B, and C sugar, see *supra*, footnote 15.)

[73]Brazil's written submission, para. 38.

[74]*Ibid*., para. 62. (original italics)

permitted full carry forward of C sugar, it could, in conjunction with a suspension of export licences, ensure that subsidized sugar in excess of its quantity commitment levels is not passed onto the world market; rather, this sugar would remain within the Community and would "be[] absorbed internally in the next marketing year".[75]

40. Neither of these two measures—suspending the grant of export licences for A, B and C sugar, as well as raising or eliminating the 20 per cent restriction on the carry forward of C sugar—is, in Brazil's view, particularly complex, and both are similar to measures that have been adopted previously by the Commission. Both measures could be adopted under the "management committee procedure" and could be adopted in "just four weeks".[76] Brazil notes that, for a range of 27 regulations adopted by the Commission in the sugar sector under this procedure, the length of the procedure has varied between 14 and 43 days, with an average and median length of 23 days.

41. Brazil concludes that, on the basis of the Commission's existing authority, the European Communities could secure compliance within a period of 28 days, to be counted from the date of the adoption by the DSB of the Appellate Body Report and the Panel Report. Brazil notes that, in fact, the European Communities "did not take the necessary steps to implement within the shortest possible period".[77] Brazil therefore proposes, "exceptionally and as a gesture" to the European Communities, that the reasonable period of time should end 28 days from the date of circulation of the arbitration award, that is, on 25 November 2005.[78]

42. In the event that the Arbitrator decides that the Commission's existing authority under Council Regulation 1260/2001 does not permit the European Communities to secure implementation, Brazil argues, alternatively, that a limited amendment to Council Regulation 1260/2001 would permit the European Communities to comply in seven months. Under this scenario, the European Communities would have to "extend the existing [control] system to apply expressly to C sugar", and this involves "no more than a straightforward amendment of ... Regulation [1260/2001]".[79]

43. Although Brazil "generally agrees" with the procedural steps for the adoption of a Council regulation, as explained by the European Communities, it disagrees with the asserted duration of this

[75]Brazil's written submission, para. 64.

[76]*Ibid*., para. 68.

[77]*Ibid*., para. 78.

[78]*Ibid*., para. 78.

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

procedure.[80] In providing its estimate on the basis of previous legislative procedures, the European Communities refers only to the duration of procedures for the adoption of *new* CMOs, rather than *amendments* to *existing* CMOs. The median period for the adoption of a new CMO is 9.2 months, while it is 5.4 months for the adoption of an amendment to an existing CMO. Thus, the adoption of an amending regulation is "considerably quicker" than the adoption of a new CMO.[81] Although the reasonable period of time should be the shortest possible period within which a Member can implement in its domestic law, Brazil states that it does not object if the Arbitrator uses this median figure for purposes of determining the reasonable period of time. This median period runs from the date of the Commission proposal to the entry into force of the Council regulation and, consequently, it should expire on 2 December 2005.

44. Furthermore, Brazil rejects the European Communities' arguments on publication and entry into force of the regulation. The alleged European Communities' practice of publishing regulations to be implemented by customs authorities six weeks before their entry into force, and implementing them only from 1 January or 1 July, is "not as widespread" as the European Communities claims[82]; Brazil lists 33 European Communities' regulations whose implementation did not follow that practice. Moreover, Brazil contends that the Council document setting out this alleged practice does not indicate that it applies to measures regulating import and export licences. Brazil also rejects the argument that "significant changes to the rules of a common market organization should take effect, at the earliest, from the start of the following marketing year, so as to take account of production in course and avoid disrupting the market."[83] Brazil refers to ten Council amendments to existing CMOs that did not take effect at the commencement of the marketing year. In any event, the changes that implementation would entail are not "significant", as the European Communities suggests, because the Commission already has significant authority to control sugar exports.[84]

45. Brazil acknowledges that, when the Council amends Council Regulation 1260/2001, the Commission "will likely have to adopt" an implementing regulation.[85] The Commission could, as the European Communities admits, "start preparing the implementing regulations before the adoption of

[80]Brazil's written submission, para. 83.

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

[82]*Ibid*., para. 94.

[83]*Ibid*., para. 98, referring to the European Communities' written submission, para. 78.

[84]Brazil's written submission, para. 102, referring to the European Communities' written submission, para. 78.

[85]Brazil's written submission, para. 104.

the Council regulation", such that this regulation enters into force eight days after the Council amending the regulation.[86] However, "exceptionally and as a gesture to the [European Communities]", Brazil requests that the Arbitrator grant the European Communities the "full average or median period" of 23 days for the completion of the management committee procedure, such that the reasonable period of time expires on 27 December 2005.[87]

46. Brazil rejects that four additional factors invoked by the European Communities constitute "particular circumstances" relevant to the determination of the reasonable period of time in this case. First, concerning the need for consultations with the ACP countries, Brazil argues that the European Communities fails to substantiate how the ACP countries will be affected by implementation. This is because the European Communities' obligations to the ACP countries are to *import* certain quantities of ACP sugar, whereas the European Communities' obligations in the present dispute relate to *exports* of the European Communities' own subsidized sugar. Secondly, with respect to the alleged need for debate within European society, Brazil argues that previous arbitrators have declined to accept that domestic "contentiousness" and "political sensitivity" are a particular circumstance relevant under Article 21.3(c).[88] Thirdly, there is "no justification" for additional time for structural adjustment for the [European Communities'] domestic industry.[89] Brazil submits that no arbitrator to date has granted a Member additional time to enable its domestic industry to make structural adjustments facilitating the transition to a WTO-consistent regime; a right to such a transition period does not exist even under European Communities law. Fourthly, the duration of reasonable periods of time in previous cases in which the European Communities was the implementing Member is "irrelevant".[90]

47. Finally, Brazil requests that, Brazil being a developing country Member, the Arbitrator pay particular attention to the significance of prompt compliance for Brazil's development objectives, pursuant to Article 21.2 of the DSU. Brazil's sugar industry is an important part of its economy; the

[86]Brazil's written submission, para. 106, referring to the European Communities' written submission, para. 74.

[87]Brazil's written submission, para. 110. The reasonable period of time would expire on 25 December; the next working day is 27 December 2005.

[88]Brazil's written submission, para. 118, referring to Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 60; Award of the Arbitrator, *Canada – Patent Term*, para. 58; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 61.

[89]Brazil's written submission, heading IV.D(3).

[90]*Ibid*., heading IV.D(4).

European Communities' WTO-inconsistent subsidized sugar exports "cost Brazil USD $ 494 million annually".[91]

3. Thailand

48. Thailand requests that the reasonable period of time for implementation of the recommendations and rulings of the DSB in this case be set at six months and six days, that is, until 25 November 2005, if implementation is effected by administrative action. Alternatively, should legislative action be required, Thailand argues that the reasonable period of time be set at seven months and eight days, that is, until 27 December 2005.

49. Thailand argues that the European Communities bears the burden of proof of demonstrating that the duration of its proposed implementation period constitutes a reasonable period of time and that it has not discharged this burden. The European Communities is required to implement within the "shortest period possible within [its] legal system" by making changes to those aspects of its sugar regime that were subject to the recommendations and rulings of the DSB.[92] The European Communities "must not delay its immediate obligation to implement ... to facilitate any broader review of its agricultural policy".[93] According to Thailand, the relevant circumstances in this case "all [militate] in favour of speedy implementation by the [European Communities]."[94]

50. Thailand argues further that the European Communities needs no additional time to consider its implementation options. Thailand also takes issue with the European Communities' argument that, due to the complexity of the sugar regime, there are many different options available to it to implement the recommendations and rulings of the DSB. The fact that the European Communities has already decided upon a proposed means of implementation "suggests" that it has already engaged in consultations with its domestic industry, the ACP countries and other interested parties, so that there is no reason to permit further consideration of alternative options.[95] Similarly, the fact that implementation may engender political debate is not a factor that can affect the determination of the reasonable period of time. In addition, unlike in *Chile – Price Band System*, the European Communities' measure is not one of "horizontal application affecting a number of agricultural

[91]Brazil's written submission, para. 140, referring to a study by Oxfam International.

[92]Thailand's written submission, heading IV.A.2.

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

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

[95]*Ibid*., para. 34.

products and their pricing", but rather it relates only to the European Communities' sugar policy and does not require any changes to policy regarding other agricultural products.[96]

51. Thailand emphasizes that the European Communities' implementation obligations relate only to the measure that was found inconsistent with WTO law and can be fulfilled promptly by administrative means. Thailand argues that the only point of disagreement between the parties is "whether the [European Communities] can control exports of C sugar by administrative means".[97] By "suspending export licences and enabling producers to carry-over [C sugar] that cannot be exported in a given year to the next", the European Communities could secure "rapid and prompt compliance".[98]

52. Thailand argues that, contrary to the European Communities' assertions, the Commission does have the authority under existing regulations to control the export of C sugar in a manner that would enable it to comply with its reduction commitments. Council Regulation 1260/2001 permits all C sugar to be carried forward; decisions on limits on the carry forward of C sugar—like the current limit of 20 per cent of the A quota—lie with the Commission, are "purely discretionary"[99], and are currently found in a separate Commission regulation.[100] This shows that the Commission enjoys "full authority" under Council Regulation 1260/2001 either not to restrict the carry forward of C sugar or to increase the quantity of C sugar that can be carried forward above the current limit of 20 per cent of the A quota.[101] According to Thailand, the Commission can accomplish this by following the management committee procedure under Council Regulation 1260/2001. Similarly, according to Thailand, the Commission could control exports by suspending the issuance of export licences for A, B, and C sugar. There is no legal basis to the European Communities' assertion that the Commissions' authority to suspend licences with respect to A and B sugar does not extend to C sugar. Requiring C sugar to be carried forward and suspending export licences "together constitute the most flexible and efficient means by which the [European Communities] can reduce the level of its subsidised exports".[102]

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[96]Thailand's written submission., para. 36.

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

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

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

[100]Commission Regulation (EEC) No. 65/82 of 13 January 1982.

[101]Thailand's written submission, para. 44.

[102]*Ibid*., para. 49.

53. In Thailand's view, the shortest period possible for the aforementioned administrative action is the period required for the "management committee procedure" under Council Regulation 1260/2001, namely, one month. Under this procedure, the Commission submits a proposal for a Commission regulation to the management committee that must render an opinion within a time-limit fixed by the Chairman of that committee. If the committee renders a favourable opinion, the Commission regulation is adopted immediately; if the opinion is unfavourable, the Commission nevertheless adopts the regulation, but the regulation is also referred to the Council, which may take a different decision within one month. There have been no unfavourable opinions delivered in the management committee procedure, and the average as well as median period for completion of the procedure has been 23 days. Thailand considers that the management committee procedure could "certainly" be completed within 28 days.[103] As a result, Thailand takes the view that the European Communities could have implemented the recommendations and rulings of the DSB even before commencement of the present arbitration. However, "[a]s a practical matter", given that the European Communities has not taken these steps, Thailand proposes that the reasonable period of time end 28 days from the date of circulation of the arbitration award, that is, on 25 November 2005.[104]

54. In Thailand's view, the European Communities has failed to prove that a legislative measure to implement would take 12 months to enact. However, in the event that the Arbitrator considers that the European Communities needs to take legislative action to allow a greater proportion of C sugar to be carried forward, Thailand submits that this can be achieved by a simple amendment to the existing Council Regulation 1260/2001. An implementing Member's decision to "undertake broad systemic reforms" does not justify a longer implementation period.[105] Moreover, Thailand argues that the European Communities has overstated "significantly" the time required to implement by legislative means.[106] Thailand refers to a table submitted as an exhibit to the submissions of Australia, Brazil and Thailand and argues that regulations amending existing CMOs can be adopted in periods considerably shorter than the median figure of 5.4 months. Nevertheless, Thailand states that it would not object if the Arbitrator were to use this median figure as the basis for assessing the duration of the reasonable period of time.

[103]Thailand's written submission, para. 58.

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

[105]*Ibid*., para. 63.

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

55. In Thailand's view, applying the period of 5.4 months to the date of the Commission proposal, that is, 22 June 2005, the Council amendment could enter into force on 2 December 2005. Allowing another 23 days for the Commission to adopt implementing regulations, the reasonable period of time should expire on 27 December.[107] Thailand also points out that a number of regulations to be implemented by customs authorities have in the past entered into force on dates other than 1 January or 1 July, and that therefore this plea of the European Communities has no validity.

56. Finally, Thailand argues that the particular circumstances in this case favour prompt implementation. Referring to the special provisions of Articles 21.2 and 21.8 of the DSU for developing country Members, Thailand submits that the implementation of the rulings in this dispute is "crucial" to Thailand's development objectives.[108] Thailand argues that the WTO-inconsistent sugar export subsidies maintained by the European Communities impose an annual loss of USD 151 million on Thailand, affect approximately 1.5 million farmers' and sugar-related workers' households and have "very serious consequences for the Thai sugar industry".[109] Concerning the ACP countries' interests, Thailand submits that the European Communities should fully respect its commitments with respect to these countries, but argues that these countries' interests "cannot take priority over the obligation of the [European Communities] to ensure prompt implementation."[110] Thailand also notes that it has not "in any way" contested the preferential access enjoyed by the ACP countries and India to the European Communities' market.[111] Furthermore, the European Communities should not be permitted to use the alleged effects of its sugar regime reform on the ACP countries for "doing nothing"[112]; the European Communities must be deemed to have taken into account the interests of the ACP countries in announcing its proposal on 22 June 2005; as a result, no additional time need be considered to permit further consultations with the ACP countries.

57. Thailand also argues that the reasonable period of time should not include a phase-in period, during which European Communities sugar producers would be permitted to export out of quota until 1 January 2007. Previous arbitral awards under Article 21.3(c) have established that the fact that implementation may require some structural adjustments on the part of a domestic industry does not

[107]Thailand's written submission., para. 68. The reasonable period of time would expire on 25 December; the next working day is 27 December 2005.

[108]Thailand's written submission, heading IV.E.1.

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

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

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

[112]*Ibid*., para. 82.

constitute a "particular circumstance[]" within the meaning of that provision. Moreover, the European Court of Justice has held that recipients of a subsidy are not entitled to a transition period on the elimination of that subsidy; thus, even under the European Communities' own law, there is no requirement to build in a transition period before changes to a subsidy programme take effect. Thailand submits that, by requesting a phase-in period, the European Communities is effectively requesting a waiver for its obligations, pursuant to Article IX of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*").

III. Reasonable Period of Time

58. Pursuant to Article 21.3(c) of the DSU, my task as arbitrator in this case is to determine the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the Dispute Settlement Body (the "DSB") in *EC – Export Subsidies on Sugar*.[113] The "reasonable period of time" will be calculated as from 19 May 2005, the date on which the Panel and Appellate Body Reports relating to this dispute were adopted.

59. Article 21.3(c) of the DSU provides that, when the "reasonable period of time" is determined through arbitration:

> … a guideline for the arbitrator should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. (footnote omitted)

In this regard, I would observe, as have other arbitrators before me, that, in arbitrations conducted pursuant to Article 21.3(c), the implementing Member bears the burden of proof to demonstrate that the period of time it seeks is a reasonable period of time within the meaning of Article 21.3 of the DSU.

60. Before I proceed to determine the reasonable period of time for the European Communities to implement the recommendations and rulings of the DSB in this dispute, I set out the views of the parties on certain general principles applicable to the determination of the reasonable period of time under Article 21.3(c) of the DSU, as articulated in previous arbitration awards.

[113]See WT/DS265/29, WT/DS266/29, WT/DS283/10.

61. These governing principles at issue are:

- the reasonable period of time should be the shortest period of time possible within the legal system of the implementing Member[114];
- the implementing Member must utilize all the flexibility and discretion available within its legal and administrative system in order to implement within the shortest period of time possible; and
- the "particular circumstances" of the case must be taken into account in determining the reasonable period of time.

62. While the parties agree with the first principle, they differ sharply on the implementing measure with respect to which the "shortest period of time" is to be determined. The European Communities places considerable emphasis on the proposition that "it is the *prerogative* of the implementing Member to select the means of implementation which it deems most appropriate"[115], and that, therefore, the "shortest period of time possible" must be determined with respect to the implementation method chosen by the implementing Member. The European Communities submits that it is not for the arbitrator, or the complaining parties, to impose any particular method on the implementing Member on the ground that it would result in the fastest implementation of the recommendations and rulings of the DSB. According to the European Communities, "[w]hen previous Arbitrators have said that the 'reasonable period of time' is the 'shortest period of time' within the legal system of the implementing Member, they referred to the procedure for the adoption of the implementing measure, and not to the selection of the implementing measure, which is the prerogative of the implementing Member."[116] Thus, in the view of the European Communities, it is not for the arbitrator to select a particular method of implementation and determine the reasonable period of time on the basis of that selection. Rather, the task of the arbitrator under Article 21.3(c) is to determine

[114]Award of the Arbitrator, *Chile – Price Band System*, para. 34 (quoting Award of the Arbitrator, *US – 1916 Act*, para. 32). See also Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25.

[115]European Communities' written submission, para. 22, referring to Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 43; Award of the Arbitrator, *Chile – Price Band System*, para. 32; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, paras. 48 and 53; Award of the Arbitrator, *EC – Tariff Preferences*, para. 30; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 26. (emphasis added)

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

the "shortest period [of time] possible"[117] within which the Member can implement through the method it has chosen, taking into account the time required to adopt the necessary legislative, regulatory, and administrative measures.

63. In contrast, Australia, Brazil, and Thailand (the "Complaining Parties") argue that "prompt compliance" with the recommendations and rulings of the DSB, as required by Article 21.1 of the DSU, is fundamental to the functioning of the dispute settlement system[118]; therefore, it is only when "prompt compliance" is "impracticable" that the implementing Member is entitled to a "reasonable period of time" for implementation under Article 21.3 of the DSU. The shortest possible period of time for implementation—the standard articulated by previous arbitrators, which flows from the fundamental requirement in Article 21.1 of "prompt compliance"—must, therefore, be determined on the basis of a method available to the implementing Member that is consistent with its legal system and that would result in implementation within the shortest period of time possible. Furthermore, the scope of the implementation method must be confined to that required to implement the recommendations and rulings of the DSB, and it must not extend to extraneous objectives that the implementing Member may seek to include in it. In the view of the Complaining Parties, the right of a Member to choose the means of implementation is not unlimited, and should not be allowed to be used by the implementing Member as a means to obtain a longer period of time for implementation.

64. As regards the second principle governing the determination of the reasonable period of time pursuant to Article 21.3(c), the European Communities contends that the requirement that a Member use all flexibility available to it within its legal system should not be interpreted to mean that an implementing Member is required "to utilize an *extraordinary* procedure rather than the *normal* procedure"[119]. The European Communities points out, furthermore, that, as previous arbitrators have held, the reasonable period of time must include the time required, not only for procedural steps that are explicitly mandated by legal instruments, but also for procedural steps that constitute the normal and "routine[]" legislative or administrative practices of the implementing Member.[120]

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[117]Award of the Arbitrator, *Chile – Price Band System*, para. 34 (quoting Award of the Arbitrator, *US – 1916 Act*, para. 32). See also Award of the Arbitrator, *EC – Hormones*, para. 26; Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 47; Award of the Arbitrator, *EC – Tariff Preferences*, para. 26; and Award of the Arbitrator, *US – Oil Country Tubular Goods Sunset Reviews*, para. 25.

[118]Australia's written submission, para. 4; Brazil's written submission, para. 13; Thailand's written submission, para. 20.

[119]European Communities' written submission, para. 23. (original emphasis)

[120]*Ibid*., paras. 58–59. The European Communities relies on the statement of the Arbitrator in *EC – Tariff Preferences*, para. 42.

65. In contrast, the Complaining Parties argue that, even where legislative and regulatory steps are required for implementation, it is incumbent upon the implementing Member to utilize all the discretion and flexibility available within its system to ensure fast implementation of its international obligations.

66. As regards the third principle relating to the "particular circumstances" of the case within the meaning of Article 21.3(c) of the DSU, the European Communities and the Complaining Parties agree that "particular circumstances" are a relevant factor to be taken into account by the arbitrator in determining the reasonable period of time. However, the parties differ on what constitutes such "particular circumstances" for the purposes of the present dispute. The European Communities requests that I take into account seven "particular circumstances"[121]; the Complaining Parties disagree. Furthermore, Brazil and Thailand argue that the arbitrator should pay "particular attention" to their respective development interests, pursuant to Article 21.2 of the DSU. The divergence in views is particularly acute with respect to three issues: first, the scope of the means of implementation proposed by the European Commission (the "Commission"), as contained in its proposal to the Council of the European Union (the "Council") dated 22 June 2005; secondly, the need for "serious debate" within European Communities society concerning the implementing measures as well as the need to consult the African, Caribbean, and Pacific ("ACP") countries[122]; and, thirdly, the need for a transition period with respect to domestic production already undertaken.

67. The parties disagree sharply with respect to the scope of the implementing measure needed in this dispute. The essence of this disagreement is that, according to the Complaining Parties, the sole obligation to be implemented by the European Communities in this dispute is to limit the budgetary outlay on export subsidies on sugar to € 499.1 million, and the quantity of subsidized exports of sugar to 1,273,500 tonnes in any marketing year. This being so, the European Communities can simply use an export licensing system to limit the quantity of exports in any marketing year to 1,273,500 tonnes. The Complaining Parties argue that the Commission has the necessary legal and delegated authority to do this under existing Council Regulation 1260/2001. Moreover, even if the Commission does not

[121]The European Communities' seven "particular circumstances" are: (i) implementation requires the adoption of a Council regulation and of implementing Commission regulations; (ii) the implementing measures are complex; (iii) the implementation process involves a number of procedural steps that are mandated by legal documents or by constitutional practice; (iv) there are requirements concerning the publication and entry into force of the regulations at issue; (v) the impact of the measures on European society requires serious debate; (vi) account must be taken of production undertaken or planned prior to the decision in the underlying dispute; and, finally, (vii) reasonable periods of time awarded in previous awards concerning legislative measures of the European Communities.

[122]European Communities' written submission, paras. 28 and 80.

already have the legal authority to control the export of C sugar, the Commission can simply acquire such authority by means of an amendment to Council Regulation 1260/2001.[123]

68. The European Communities observes that there are two "extreme[]" options available to it as means of implementation, namely, "plac[ing] direct restrictions on the exports of sugar"[124], while "leav[ing] the level of [domestic] support unmodified"[125], as propounded by the Complaining Parties on the one extreme, and "dismantling the system of support for sugar or ... liberalising completely the imports of sugar into the [European Communities'] market" on the other extreme.[126] Between these two extremes, after a "careful assessment of all the options available"[127], the European Communities, in its proposal of 22 June 2005, has chosen an intermediate option which "aim[s] at preserving some level of support for the beet farmers and sugar producers while at the same time minimising the production of exportable surpluses".[128] According to the European Communities, unless the "structural causes of the subsidized exports of sugar"[129] are addressed by modifying the level of support given for beet farmers and sugar producers, surplus production of sugar in the European Communities cannot be avoided or controlled. Therefore, the European Communities considers that the means of implementation set out in its proposal of 22 June 2005 is the most appropriate means for implementation from the long-term point of view. In this connection, the European Communities contends that, as recognized by both the Panel and the Appellate Body in the underlying dispute, the European Communities' sugar regime is "very complex"[130] and its various components are "closely connected and interdependent".[131] More importantly, the Panel and the Appellate Body had found that it is the operation of the European Communities' sugar regime as a whole that has led to the subsidization of C sugar exports within the meaning of Article 9.1(c) of the *Agreement on Agriculture*. The European Communities is, therefore, of the view that the means of implementation it has chosen flows logically from the Panel and Appellate Body Reports.[132]

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[123]The parties to this proceeding agree that the Commission has the authority to control exports of A and B sugar.

[124]European Communities' written submission, para. 41.

[125]*Ibid*., para. 41.

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

[127]*Ibid*., para. 44.

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

[129]*Ibid*., para. 41.

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

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

[132]European Communities' response to questioning at the oral hearing.

69. Having considered the arguments of the parties on the general principle of "shortest period of time possible" for implementation, I set out my views in this regard. I am in agreement with previous arbitrators that it is not "the role of the arbitrator under Article 21.3(c) to identify [or select] a particular method of implementation and to determine the 'reasonable period of time on the basis of that method'".[133] Rather, the choice of the method of implementation rests with the implementing Member. However, the implementing Member does not have an unfettered right to choose any method of implementation. Besides being consistent with the Member's WTO obligations, the chosen method must be such that it could be implemented within a reasonable period of time in accordance with the guidelines contained in Article 21.3(c). Objectives that are extraneous to the recommendations and rulings of the DSB in the dispute concerned may not be included in the method if such inclusion were to prolong the implementation period. Above all, it is assumed that the implementing Member will act in "good faith" in the selection of the method that it deems most appropriate for implementation of the recommendations and rulings of the DSB.

70. Turning to the dispute underlying this arbitration, I note that the Appellate Body upheld "as a result of its findings ... the Panel's finding ... that the European Communities, through its sugar regime, acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*".[134] Under Articles 3.3 of the *Agreement on Agriculture*, the European Communities has the obligation, *inter alia*, "not [to] provide export subsidies ... in excess of the budgetary outlay and quantity commitment levels specified [in its Schedule]."[135] With respect to C sugar, as noted earlier, the export subsidy that was found to exist was a subsidy falling within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, the source of which was the domestic support given, under the complex and integrated sugar regime of the European Communities, for beet farmers and sugar producers.

[133]Award of the Arbitrator, *US – Gambling*, para. 33. See also Award of the Arbitrator, *Korea – Alcoholic Beverages*, para. 45. In this regard, I also note, as the parties agree, that the question whether a measure taken to comply by the implementing Member is in conformity with the obligations of the implementing Member is a matter that falls under Article 21.5 of the DSU. I also note that under Article 21.3(a), it is the implementing Member that proposes the reasonable period of time required by it to implement through the measure it chooses to take.

[134]Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 346(f).

[135]Article 8 of the *Agreement on Agriculture* provides that "[e]ach Member undertakes not to provide export subsidies other than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."

71. I turn first to the argument of the Complaining Parties that limiting or prohibiting exports of sugar, or of C sugar more specifically[136], by means of suspending the grant of export licences, is the only option available to the European Communities to comply with the recommendations and rulings of the DSB in this dispute. The Complaining Parties have not succeeded in rebutting the arguments of the European Communities that the latter could, besides limiting its exports of sugar, choose to comply with the recommendations and rulings of the DSB by "withdrawing or reducing the subsidies"; "by repealing the requirements that make the subsidies export contingent"; or "by taking measures to offset the subsidies (e.g. in the form of export duties)".[137] I do not therefore agree that limiting or prohibiting the exports of sugar, or of C sugar more specifically, is the only option available, or the most effective, for implementation in this dispute.

72. Given this conclusion, I need not decide here whether it is within the legal authority of the Commission, as a matter of European Communities law under existing Council Regulation 1260/2001, to suspend the granting of export licences with respect to C sugar. Similarly, I need not address the European Communities' argument that, by suspending export licences with respect to C sugar, the European Communities would be acting inconsistently with Article XI of the *General Agreement on Tariffs and Trade 1994*.

73. As I held earlier with respect to the governing principle, the choice of the method of implementation rests with the implementing Member. Given the facts of the dispute underlining this arbitration, I am satisfied that the European Communities is not pursuing extraneous objectives in addressing "the structural causes of the subsidized exports of sugar".[138] I therefore proceed to determine the reasonable period of time required by the European Communities with respect to its proposal of 22 June 2005.

74. I address first the arguments of the parties concerning the steps involved in the European legislative process. The Complaining Parties agree, in principle, with the European Communities on the basic steps involved in the legislative process under Articles 36 and 37 of the Treaty Establishing the European Community (the "EC Treaty"), namely: preparation of a proposal by the Commission and its presentation to the Council; obtaining the opinions of the European Parliament and the Economic and Social Committee of the European Community (EESC); adoption of a regulation by

[136]Under the European Communities' existing sugar regime, C sugar is exported without the benefit of export refunds.

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

[138]European Communities' written submission, para. 41.

the Council; and, finally, adoption of implementing regulations by the Commission.[139] The adoption of the implementing regulations by the Commission is governed by the so-called "management committee procedure".[140]

75. However, a disagreement exists as to whether, under the so-called "management committee procedure", the Commission may start preparing the implementing regulations before the adoption of the Council regulation. The European Communities acknowledges that the Commission can start preparing such regulations before the Council has formally adopted the Council regulation; however, the Commission "cannot finalise the texts and launch the formal inter-service procedure and the comitology procedure until the Council has taken a definitive decision".[141] In contrast, Brazil argues that a Commission proposal can be finalized by the Commission, and approved by the management committee, before adoption of the Council regulation.[142]

76. The European Communities' legislative system is characterized by "considerable flexibility", in the sense that no mandatory minimum time periods are imposed for any particular step in the legislative process as outlined by the European Communities.[143] Furthermore, as acknowledged by the European Communities, it is possible that certain steps of the legislative process may proceed in parallel. Thus, for instance, the European Communities agrees that the Council may start deliberating a Commission proposal, which is still being considered by the European Parliament and the EESC. However, the European Communities argues, in this regard, that the Council will "in any event require additional time in order to take due account of the opinions issued by those bodies".[144]

77. I take note of the "flexibility" available that the Council could begin its examination of the Commission proposal of 22 June 2005 before it receives the opinions of the European Parliament and

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[139]Australia's written submission, paras. 145–156; Brazil's written submission, para. 82; Thailand's written submission, paras. 61–70. The Complaining Parties do not agree with the European Communities' arguments that additional time is required for purposes of consulting ACP countries. I address this point in paragraphs 80–81, *infra*.

[140]Under the "management committee procedure" or "comitology procedure", the Commission is assisted by a "management committee" composed of representatives of the Member States and chaired by a Commission representative. Under that procedure, the Commission presents its proposals to the management committee, which in turn provides its opinion on the proposal. In the event that a favourable or no opinion is issued by the management committee, the Commission adopts the proposed regulation. In the event that the management committee issues an unfavourable opinion, the Commission nevertheless adopts the regulation, but the Council may take a different decision from the Commission within a specified time period.

[141]European Communities' written submission, para. 74.

[142]Brazil's written submission, para. 108.

[143]The same observation was made by the Arbitrator in *EC – Tariff Preferences*, para. 36.

[144]European Communities' written submission, para. 67.

the EESC.[145] This could save some time as compared with the Council examining the Commission proposal only after receiving the opinion of the European Parliament and the EESC.[146] I agree, however, with the European Communities that, even if the Council has begun examination of the Commission proposal prior to receiving the opinions of the European Parliament and the EESC, it will still require time to consider these opinions after it has received them. As the Arbitrator in *EC – Tariff Preferences* noted, "[i]f no such time were provided for this, it would defeat the purpose of seeking the opinions."[147]

78. I also note that the European Communities agrees that, under the "management committee procedure", the Commission could begin preparing its implementing regulations prior to the adoption of a Council regulation.[148] The European Communities points out that the staff of the Commission "may start preparing the implementing regulations before the adoption of the Council regulation"[149]; however, the Commission cannot finalize the text and present it to the management committee, for purposes of obtaining the opinion of that committee, "until the Council has taken a definitive decision".[150] In this respect, the Complaining Parties submitted an exhibit indicating three instances where the management committee delivered its opinion *before* the Council adopted the relevant regulation. The European Communities responds that, although the management committee may be invited by the Commission to deliver its opinion before the Council regulation has been adopted, this, nevertheless, remains an extraordinary procedure in the practice of the European Communities' institutions.[151]

79. I agree with previous arbitrators that an implementing Member is not required to adopt "extraordinary legislative procedures" in every case.[152] In this respect, I am not persuaded by the argument of the Complaining Parties that, although the instances cited by them are few, the flexibility suggested by them should not be regarded as "extraordinary". In this respect, I take note of the

[145]This flexibility was also noted by the Arbitrator in *EC – Tariff Preferences*, para. 43.

[146]I note that, according to the time limit proposed by the European Communities, both these opinions will be available to the Council at about the same time, namely, January 2006.

[147]Award of the Arbitrator, *EC – Tariff Preferences*, para. 43.

[148]European Communities' written submission, para. 74.

[149]*Ibid*.

[150]*Ibid*.

[151]European Communities' response to questioning at the oral hearing.

[152]Award of the Arbitrator, *US – Section 110(5) Copyright Act*, para. 32; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 74. Award of the Arbitrator, *EC – Tariff Preferences*, para. 42.

requirement that the opinion of the management committee would have to be sought again in the event that the Council, in adopting the regulation, modified the original Commission proposal.[153]

80. Another aspect of the European Communities' legislative procedure on which the parties disagree concerns the need to consult ACP countries. The European Communities argues that it is obliged, under the Cotonou Agreement between itself and the ACP countries, to consult ACP countries on measures that may "affect the interests" of those countries.[154] This requirement to consult the ACP countries "throughout the legislative process", as well as the need "to consider and respond to their submissions", will, according to the European Communities, "add to the complexity of the debate ... and require additional time".[155]

81. I do not question the need for the European Communities to consult the ACP countries under the Cotonou Agreement on "measures which may affect the interests of the ACP states".[156] However, the European Communities has not demonstrated why this should have an impact so as to require additional time for the European Communities to implement the recommendations and rulings of the DSB. I observe, first, that implementation by the European Communities in this dispute relates to its *export subsidy commitments* under the *Agreement on Agriculture*, whereas the ACP countries enjoy preferential *market access* to the European Communities' market. Secondly, the European Communities did not provide sufficient information on what consultations have taken place with the ACP countries, nor on past experience on how consultations with ACP countries had an impact on the European Communities' legislative process. The European Communities has not provided me with information sufficient to substantiate its assertion that consultations with the ACP Countries will necessitate additional time for implementation of the recommendations and rulings of the DSB.[157]

82. I now turn to the disagreement between the parties concerning the time needed for the legislative procedure in this case. In this respect, I note that the European Communities estimates that the Council will adopt a Council regulation at the end of March 2006 and that, thereafter, the

[153]At the oral hearing, the European Communities stated that the opinion rendered by the management committee before the adoption of a Council regulation would be "conditional" on the Council adopting the Commission proposal without modifications.

[154]European Communities' written submission, para. 61. The Cotonou Agreement is a partnership agreement between, on the one hand, the European Communities and, on the other hand, the ACP countries; it relates to political, trade, and development issues.

[155]European Communities' written submission, para. 63.

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

[157]I discuss the relevance, under Article 21.2 of the DSU, of the interests of ACP countries in para. 102, *infra*.

Commission will need three months to enact the necessary implementing regulations, that is, until the end of June 2006.[158] In contrast, the Complaining Parties argue that the Council could adopt a regulation by 2 December 2005 and that the Commission could adopt implementing regulations by 27 December 2005. The Complaining Parties base their estimate on the adoption of a "narrow"[159] and "straightforward ... amend[ment]"[160] to the existing European Communities' sugar regime[161], rather than on a broader reform of that regime, as propounded by the European Communities. Australia[162] and Brazil[163] have also argued that, even on the basis of a broader reform of the European Communities, the Council should adopt a regulation by 29 March 2006 and the Commission should adopt implementing regulations by 21 April 2006.

83. The Complaining Parties have presented several tables containing information about the duration of prior legislative procedures of the European Communities based on Articles 36 and 37 of the EC Treaty. On the basis of a sample of previous regulations *amending* an *existing* common market organization ("CMO") for agricultural products, and on the basis of another sample of previous regulations *adopting* a *new* CMO for agricultural products, the Complaining Parties argue that the relevant median periods are 5.4 months for the adoption of an *amendment* to an *existing* CMO, and 9.2 months for the *adoption* of a *new* CMO.

84. As I have stated earlier, limiting or prohibiting exports of C sugar by means of suspending the grant of export licences is not the only option available to the European Communities to comply with the recommendations and rulings of the DSB in this dispute. Accordingly, I do not base my determination of the reasonable period of time exclusively on the procedure for adopting such an *amending* regulation as suggested by the Complaining Parties, or on the basis of the evidence concerning the duration of the adoption process for such amending regulations.

85. At the same time, I note that the information submitted by the Complaining Parties shows that the average time for the adoption of a Council regulation and of implementing Commission

[158]The period of time between the date of the adoption of the Panel and Appellate Body Reports—that is, 19 May 2005—and 30 June 2006 is 13 months and 11 days.

[159]Brazil's written submission, para. 81.

[160]Thailand's written submission, para. 65.

[161]This amendment, according to the Complaining Parties, should be limited to granting the Commission the legal authority to limit exports of C sugar by means of suspending the granting of export licences.

[162]Australia's written submission, para. 206.

[163]At the oral hearing, Brazil stated that it agreed with Australia in this respect.

regulations establishing a new CMO for agricultural products is 11.4 months, and the median figure is 9.2 months. The European Communities has not contested the validity of this data, but emphasizes the complexity and sensitivity of the present dispute. I note that these time periods are shorter than those suggested by the European Communities in this arbitration proceeding for the completion of its legislative process.[164] I also agree with Thailand that an average or median figure "inherently represent[s] more than the shortest possible period of time necessary within [an implementing Member's] legal system".[165] Even granting that the circumstances of adoption of previous Council regulations may have been different and that the proposal at issue here may involve a different degree of complexity, it would appear that the European Communities can use the flexibility and discretion in its legal system to ensure that the relevant Council regulation, as well as the Commission implementing regulations, are enacted more speedily than the proposed timeline it has suggested. Indeed, the fact that the legislative process at hand is intended to bring the European Communities into compliance with its international obligations reinforces the need for the European Communities to use all flexibility and discretion that may be available to it within its legal system.

86. I now turn to the *other* "particular circumstances"[166] alleged by the European Communities: first, the alleged complexity of the implementing measures; secondly, the need for a serious debate in European society; thirdly, that it would be "appropriate" to permit European Communities sugar producers to export C sugar until 1 January 2007; fourthly, the requirements concerning the publication and entry into force of regulations; and, fifthly, the reasonable periods of time determined in previous arbitration awards concerning legislative measures of the European Communities.

87. The European Communities contends that the reasonable period of time must be determined taking into account that the implementing measures are "complex".[167] The European Communities submits that its sugar regime is "a very complex regulatory regime, consisting of many different support mechanisms"[168] that are "closely connected and interdependent"[169]; as a result, the European

[164]The period between 22 June 2005, the date on which the Commission presented its proposal to the Council, and 30 June 2006, the date suggested by the European Communities as the end point of its legislative process, is 12 months and 8 days. Moreover, a legislative process ending on 30 June 2006 represents a period of 13 months and 11 days from the date of adoption of the Panel and Appellate Body Reports in this dispute, that is, 19 May 2005.

[165]Thailand's written submission, para. 70.

[166]See *supra*, footnote 121.

[167]European Communities' written submission, para. 45.

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

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

Communities has "many different options in order to implement the recommendations and rulings of the DSB".[170] Regardless of which specific option is ultimately chosen, "the content of the implementing measures is likely to be technically complex".[171]

88. As previous arbitrators have noted, the complex nature of implementing measures can be a relevant factor for the determination of the reasonable period of time under Article 21.3(c) of the DSU.[172] But the degree of complexity of an implementing measure depends on the facts of the case. I am not persuaded that the standard of "complexity" is, as the European Communities appears to suggest, reached every time that implementation of the recommendations and rulings of the DSB requires more than "simply ... rewrit[ing] an isolated legal provision or ... repeal[ing] without more the whole measure at issue".[173] As an example of "complexity" of an implementing measure, I refer to the one given by the arbitrator in *Canada – Pharmaceutical Patents*, namely where "implementation is accomplished through extensive new regulations affecting many sectors of activity".[174] Although I acknowledge that the sugar regime of the European Communities has many components that are interrelated, I am not convinced that the Commission proposal of 22 June 2005 possesses such a level of "complexity" as to warrant the granting of any additional time for implementation.

89. The next argument of the European Communities is that the impact of the implementation measures on European society requires a "serious debate" because the European Communities' sugar regime is of a "long-standing nature", is "essentially integrated" in the European Communities' policies and, in some cases, "go[es] back ... to the Napoleonic wars of the early XIX century".[175] The European Communities relies on a finding of the arbitrator in *Chile – Price Band System* in contending that this "particular circumstance[]" should have a bearing on the determination of the reasonable period of time. The Complaining Parties respond that the need for "serious debate" or the "political sensitivity" of the subject matter cannot be regarded as a "particular circumstance[]" for

[170]European Communities' written submission, para. 40.

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

[172]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 50; Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 60.

[173]European Communities' written submission, para. 45.

[174]Award of the Arbitrator, *Canada – Pharmaceutical Patents*, para. 50; see also Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, footnote 67 to para. 60.

[175]European Communities' written submission, para. 81.

extending the reasonable period of time required for implementation[176]; this is all the more so, according to the Complaining Parties, as implementation required in this dispute consists only in the prevention of subsidized exports taking place beyond the European Communities' reduction commitments.

90. Previous arbitrators have consistently held that the "contentiousness" or "political sensitivity" of the measure to be implemented is not a "particular circumstance[]" that is relevant under Article 21.3(c).[177] In any event, I am not persuaded that the European Communities' export subsidies on sugar are characterized by a degree of political contentiousness that would fundamentally distinguish these measures from any other measure that is likely to be the subject of a WTO dispute. I do not consider that the measures at issue in this dispute raise concerns comparable to those recognized by the arbitrator in *Chile – Price Band System*. Thus, in my view, the European Communities' reliance on the award of the arbitrator in *Chile – Price Band System* is misplaced; the measure in that dispute had a "unique role and impact on Chilean society", was "fundamental[ly] integrat[ed] into the central agricultural policies of Chile", and had a "price-determinative regulatory position in Chile's agricultural policy".[178]

91. I turn now to the European Communities' contention that production already undertaken before the dispute in *EC – Export Subsidies on Sugar* was decided should be given consideration as a "particular circumstance[]". More specifically, the European Communities argues that "it would be appropriate to allow the European Communities' exporters to continue to export out of quota sugar until 1 January 2007 without being subject to the payment of the 'surplus' levies provided [for] in the Commission proposal."[179] The Complaining Parties consider it unwarranted to grant an additional six months as a transition period to enable the domestic industry to export the sugar it has already produced. The Complaining Parties submit that previous arbitrators have rejected arguments that additional time should be granted for "structural adjustment" of the domestic industry.[180] Brazil and

[176]Australia's written submission, para. 196; Brazil's written submission, paras. 118 and 122; Thailand's written submission, para. 33.

[177]See Award of the Arbitrator, *Canada – Patent Term*, para. 58; and Award of the Arbitrator, *US – Offset Act (Byrd Amendment)*, para. 61.

[178]Award of the Arbitrator, *Chile – Price Band System*, para. 48.

[179]European Communities' written submission, para. 90.

[180]Australia's written submission, paras. 181–191; Brazil's written submission, para. 124; Thailand's written submission, paras. 87–88.

Thailand also argue that, even under the European Communities' own law, subsidies may be discontinued without advance notice to the affected industry.[181]

92. I agree with the views put forth by the Complaining Parties. In my view, the European Communities effectively requests a transitional period *following* the withdrawal or modification of a WTO-inconsistent measure, so that the domestic industry may adjust to such withdrawal or modification. As previous arbitrators have held, the perceived need for such "structural adjustment" or phase-in periods for the domestic producers does not constitute a "particular circumstance[]" within the meaning of Article 21.3(c) and, as such, cannot have an impact on the determination of the reasonable period of time under that provision.[182] In my view, allowing such a transitional period would have the effect of including in the reasonable period of time action that is extraneous to implementation of the recommendations and rulings of the DSB.

93. I turn next to the European Communities' argument concerning the entry into force of its implementing measures. The European Communities argues that the Council regulation under discussion must enter into force on 1 July 2006 because "it is an established legislative practice that regulations which must be implemented by the customs authorities should be published at least six weeks before their entry into force and take effect from 1 January, or exceptionally, from 1 July".[183] This practice is based on a Council resolution from 1974. In addition, the European Communities also argues that it is a "well-established legislative practice" that significant changes to the rules of a CMO should take effect from the start of the following marketing year.[184]

94. In response, the Complaining Parties have submitted two tables showing 33 Council and Commission regulations that, according to the Complaining Parties, "appear to fall within the [European Communities'] description of the Council's long-standing practice"[185]; however, in the case of these regulations, the alleged European Communities' practice was not followed, in that the relevant regulations did not enter into force on 1 January or 1 July, and were not published six weeks prior to their entry into force. The European Communities does not dispute the data submitted by the

[181]For this proposition, Brazil and Thailand rely on the judgment of the European Court of Justice in Case C-14/01, *Molkerei Wagenfeld Karl Niemann*. (See Brazil's written submission, para. 99; Thailand's written submission, para. 89.)

[182]Award of the Arbitrator, *Indonesia – Autos*, para. 23; Award of the Arbitrator, *Argentina – Hides and Leather*, para. 41.

[183]European Communities' written submission, para. 77.

[184]*Ibid*., para. 78.

[185]Brazil's written submission, para. 96.

Complaining Parties; however, it argues that this practice has been in place since 1974 and that, as a result, a long list of exceptions can be expected to exist.[186]

95. In my view, the statistical information submitted by the Complaining Parties suggests that a degree of flexibility exists with respect to the practice alleged by the European Communities. I am aware that the arbitrator in *EC – Tariff Preferences* regarded this administrative practice of the European Communities as a relevant factor in determining the reasonable period of time for implementation.[187] However, unlike in that case, the Complaining Parties have presented clear evidence that the practice has not been followed in a number of instances. The European Communities has not explained why, in this particular case, the European Communities cannot make use of the flexibility it appears to have with respect to this particular administrative practice.

96. With respect to the European Communities' argument that there is a "well established legislative practice"[188] that significant changes to the rules of a CMO should take effect from the start of the following marketing year, I note that the European Communities has not directed my attention to any factual evidence in support of this claim. In contrast, the Complaining Parties have submitted evidence that casts doubt on the existence of the "legislative practice" in the form of a table with ten Council amendments to existing CMOs that, according to the Complaining Parties, did not take effect at the start of the marketing year. I am therefore of the view that the European Communities has not discharged its burden of proof with respect to this issue. Therefore, the alleged "legislative practice" that "significant changes to the rules of a common market organization should take effect ... from the start of the following marketing year"[189] is not a "particular circumstance[]" that I propose to take into account in determining the reasonable period of time.

97. I now turn to the fifth "particular circumstance[]" suggested by the European Communities as affecting the determination of the reasonable period of time to comply, namely, the periods of time awarded in previous arbitration awards concerning legislative measures of the European Communities. In my view, Article 21.3(c) requires an arbitrator to take into account the "particular circumstances" of the case before the arbitrator. Although an arbitrator could derive some useful guidance from previous arbitration awards in this regard, the facts and circumstances of implementation in one dispute may, and in most instances will, differ from the facts and

[186]European Communities' response to questioning at the oral hearing.

[187]Award of the Arbitrator, *EC – Tariff Preferences*, para. 50.

[188]European Communities' written submission, para. 96.

[189]*Ibid*., para. 78.

circumstances of implementation in another dispute. As a result, I decline to consider as a "particular circumstance[]" here the reasonable periods of time awarded in previous arbitration awards concerning legislative measures of the European Communities, exclusively on the ground that the present arbitration also involves implementation by the European Communities by means of a legislative measure.

98. Finally, I turn to the parties' arguments concerning Article 21.2 of the DSU. Brazil and Thailand argue that I should pay "[p]articular attention", within the meaning of that provision, to their respective interests as developing WTO Members, and have submitted extensive evidence with a view to demonstrating those interests. The European Communities agrees that the scope of Article 21.2 of the DSU is not limited to developing country Members as *implementing*, rather than as *complaining*, parties to a dispute. Rather, the European Communities argues that Article 21.2 is also applicable to developing country Members who are *not* parties to a dispute.[190] The European Communities does not appear to dispute the development interests of Brazil and Thailand, nor the evidence submitted by Brazil and Thailand. Instead, the European Communities argues that a consequence of a shorter implementation period, combined with the suspension of export C sugar as advocated by the Complaining Parties, "could be" an increase in the world market price of sugar[191], and that would adversely affect the interests of sugar importing developing countries. The European Communities also argues that these interests, as well as the interests of ACP countries, are also interests within the meaning of Article 21.2 to which I should pay "[p]articular attention".

99. I find that previous arbitrators have not explicitly resolved the question whether the phrase "developing country Members" in Article 21.2 refers exclusively to the *implementing* Member, or whether it also applies to developing country Members *other* than the implementing Member such as, for instance, the complaining Member, third parties to the dispute, or any developing country Member

[190]European Communities' statement at the oral hearing and response to questioning at the oral hearing.

[191]The European Communities has submitted a study according to which the Complaining Parties do not have the necessary production capacity to replace the European Communities as a supplier of sugar to the world market by December 2005, in the event that the European Communities were to suspend its exports of C sugar. According to the European Communities, this circumstance would lead to a higher world market price for sugar, which in turn would adversely affect the developing countries that are importers of sugar. (European Communities' statement at the oral hearing and response to questioning at the oral hearing.)

of the WTO.[192] I consider that Article 21.2 is to be interpreted as directing an arbitrator to pay "[p]articular attention" to "matters affecting the interests" of both an *implementing* and *complaining* developing country Member or Members.[193] I note that Brazil, the European Communities and Thailand explicitly agree on this point.[194] In arriving at this conclusion, I agree with the arbitrator in *US – Gambling* that the text of Article 21.2 does not limit its scope of application to an implementing developing country Member.[195] I also note that Articles 21.7 and 21.8 refer to circumstances in which a "matter ... has been raised by a developing country Member" or "the case is one brought by a developing country Member"; this suggests that, where the drafters of the DSU wished to limit the scope of a provision to a particular category or group of developing country Members, they did so expressly.[196]

100. Having concluded that I am enjoined by Article 21.2 to pay "[p]articular attention" to matters affecting the interests of Brazil and Thailand as complaining parties in this dispute, I turn to consider the specific arguments of Brazil and Thailand in this respect. Brazil argues that its sugar industry constitutes more than a fifth of its total agribusiness gross domestic product; that a study in 1997 concluded that the sugar industry was "responsible for creating more than 654,000 direct and 937,000 indirect jobs in Brazil" and directly employed 764,593 persons in Brazil[197]; that the sugar industry has added importance because it is often located in rural areas and has a tradition of socially responsible employment; and that the European Communities' exports of subsidized sugar have a "detrimental effect on prices in the export market".[198] Thailand argues that the European

[192]Previous arbitrators have considered that the interests of an *implementing* developing country Member of the WTO fall within the scope of Article 21.2. (Award of the Arbitrator, *Indonesia – Autos*, para. 24; Award of the Arbitrator, *Chile – Alcoholic Beverages*, para. 45; and Award of the Arbitrator, *Argentina – Hides and Leather*, para. 51.) The Arbitrator in *EC – Tariff Preferences* stated explicitly that he was not required to resolve the question whether Article 21.2 also applied to interests of developing Member countries not parties to the arbitration. (Award of the Arbitrator, *EC – Tariff Preferences*, para. 59.) The Arbitrator in *US – Gambling* stated explicitly that he was not required to resolve the question whether Article 21.2 applied to a *complaining* developing country Member. (Award of the Arbitrator, *US – Gambling*, para. 62.)

[193]As noted in paragraph 104, *infra*, it is not necessary for me to decide whether Article 21.2 is applicable to developing countries that are *not* parties to the arbitration proceedings.

[194]Brazil's written submission, para. 137; European Communities statement at the oral hearing and response to questioning at the oral hearing; Thailand's written submission, para. 74.

[195]Award of the Arbitrator, *US – Gambling*, para. 59.

[196]For instance, Article 3.12 also explicitly refers to a situation in which "a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member". Article 12.10 refers to "consultations involving a measure taken by a developing country Member" and a "complaint against a developing country Member".

[197]Brazil's written submission, para. 138.

[198]*Ibid*., para. 140.

Communities' sugar exports have a "depressive effect ... on the world market price for sugar".[199] Thailand also refers to adverse consequences flowing from continued subsidized exports from the European Communities on "1.5 million farmers' and sugar-related workers' households".[200] Thailand also argues that a large portion of its sugar-producing areas are located in parts of Thailand with annual incomes below the average annual income of Thailand. Both Brazil and Thailand submit evidence in support of their respective arguments.

101. Upon perusal of the evidence, I am satisfied, overall, that Brazil and Thailand have demonstrated their interests as developing country Members for purposes of Article 21.2 and that these interests are relevant for my determination of the reasonable period of time in this arbitration.

102. With respect to the development interests of the ACP countries[201], I am aware of the preferential market access to the European Communities' market that the ACP countries enjoy under the Cotonou Agreement. However, the rather limited evidence before me does not enable me to glean in which specific manner the ACP countries will be affected by implementation of the recommendations and rulings of the DSB in this dispute. Therefore, I have no precise basis on which to rely in order to pay "[p]articular attention" to the interests of the ACP countries in determining the reasonable period of time in this arbitration.

103. Likewise, there is insufficient evidence before me that would demonstrate whether or how the interests of other developing country Members who are exporters or importers of sugar would be affected by the implementation of the recommendations and rulings of the DSB. The European Communities has not specifically identified such other developing country Members in its submission or at the oral hearing.

[199]Thailand's written submission, para. 75.

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

[201]With respect to ACP countries that were involved in the dispute as third parties with enhanced rights and that are least-developed countries, the European Communities refers to Article 24.1 of the DSU. Article 24.1 provides that, "[a]t all stages of ... dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members." Specifically, Members are to exercise "due restraint" in raising matters under dispute settlement procedures involving a least-developed country Member; where nullification or impairment is found to result from a measure taken by a least-developed country Member, complaining parties "shall exercise due restraint in asking for compensation or seeking authorization to suspend the application of concessions or other obligations pursuant to [dispute settlement] procedures".

104. Accordingly, it is not necessary for me, in the specific circumstances of this arbitration, to decide whether Article 21.2 is also applicable to developing country Members that are *not* parties to the arbitration proceedings under Article 21.3(c).

105. Finally, I note that the parties expressed various views on a question raised by me during the oral hearing: if the reasonable period of time expires in the course of a marketing year, how would this circumstance affect budgetary and quantity limitation commitments of the implementing Member for that marketing year, assuming that these commitments under the *Agreement on Agriculture* apply to a marketing year as a whole? Brazil and the European Communities stated expressly that the resolution of this issue does not fall within the mandate of an arbitrator under Article 21.3(c) of the DSU and that it is not of relevance for determining the reasonable period of time under that Article. I do not consider it necessary to address this issue.

106. On the basis of the above considerations, I determine that the "reasonable period of time" for the European Communities to implement the recommendations and rulings of the DSB in this dispute is 12 months and 3 days from 19 May 2005, which was the date on which the DSB adopted the Panel and Appellate Body Reports. The reasonable period of time will therefore expire on 22 May 2006.

Signed in the original at Geneva this 18th day of October 2005 by:

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A.V. Ganesan

Arbitrator