

1 ARTICLE 3	1
1.1 Text of Article 3.....	1
1.2 Article 3.1	1
1.3 Article 3.2	2
1.4 Article 3.3	2

1 ARTICLE 3

1.1 Text of Article 3

Article 3

Incorporation of Concessions and Commitments

1. The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.
2. Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.
3. Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.

1.2 Article 3.1

1. In *EC – Export Subsidies on Sugar*, the Appellate Body referred to Article 3.1 in the context of finding that the normal rules of treaty interpretation apply in interpreting export subsidy commitments specified in a Member's Schedule under the Agreement on Agriculture:

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

The applicable rules for interpreting the provisions of the GATT 1994 are the 'customary rules of interpretation of public international law'.¹ The Appellate Body has held that these rules are codified in the *Vienna Convention on the Law of Treaties*² (the '*Vienna Convention*'). As provisions of a Member's Schedule are 'part of the terms of the treaty', they are subject to these same rules of treaty interpretation.³

¹ (footnote original) Article 3.2 of the DSU.

In *US – Gasoline*, the Appellate Body stated:

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

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

Accordingly, these rules apply in interpreting Footnote 1. We note that no participant or third participant in this appeal contests the applicability of these rules in interpreting Footnote 1."⁴

2. In *EC – Export Subsidies on Sugar*, the Appellate Body stated that:

"We do not see Article 3.1 as permitting a Member to limit subsidization to whatever commitment it chooses to specify in its Schedule without regard to Members' obligations under the *Agreement on Agriculture*. Rather, with respect to export subsidy commitments, we see Article 3.1 as requiring a Member to limit its subsidization to the budgetary outlay and quantity reduction commitments specified in its Schedule in accordance with the provisions of the *Agreement on Agriculture*. This is also clear from the provisions of Article 9.2(a) of the Agreement, which requires adherence by a Member in each year of the implementation period to the budgetary outlay and quantity 'reduction commitments', as specified in the Member's Schedule."⁵

3. In *EC – Export Subsidies on Sugar*, the Appellate Body also referred to Article 3.1 in the context of clarifying the hierarchy between the Agreement on Agriculture and the export subsidy commitments in a Member's schedule:

"As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1. We, therefore, do not agree with the European Communities that 'there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*'.⁶

1.3 Article 3.2

4. In *Korea – Various Measures on Beef*, while examining whether Korea's domestic support to its cattle industry was consistent with Articles 3, 6 and 7 of the Agreement on Agriculture, the Panel stated that:

"It is ... clear that Article 3 provides that support in favour of domestic producers (and here explicit reference is made to 'subject to Article 6') cannot exceed the level of support provided for in a Member's schedule. So, when assessing the WTO compatibility of domestic support, two parameters are indicated: first the provisions of Article 6 which refer to the object of those same 'commitments' on domestic support; and second, Section I of Part IV of a Member's schedule."⁷

1.4 Article 3.3

5. In *US – FSC*, the Appellate Body explained the obligations set forth in Article 3.3 by distinguishing two distinct types of "commitments":

"Under Article 3, Members have undertaken two different types of 'export subsidy commitments'. Under the first clause of Article 3.3, Members have made a commitment that they will not 'provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitments levels specified therein'. This is the commitment for *scheduled* agricultural products. ...

Under the second clause of Article 3.3, Members have committed *not* to provide *any* export subsidies, *listed in Article 9.1*, with respect to *unscheduled* agricultural products. This clause clearly also involves 'export subsidy commitments' within the

⁴ Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 166-167.

⁵ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 209.

⁶ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 222.

⁷ Panel Report, *Korea – Various Measures on Beef*, para. 803.

meaning of Article 10.1. Our interpretation of this term is confirmed by the title of Article 9, which is '*Export Subsidy Commitments*'. Consistently with our reading of that term, Article 9.1 relates *both* to (1) the commitments made for *scheduled* agricultural products, under the first clause of Article 3.3, and to (2) the general prohibition, in the second clause of Article 3.3, against providing export subsidies listed in Article 9.1 to *unscheduled* agricultural products."⁸

6. The Appellate Body in *US – FSC* further stated that with regard to unscheduled products, Members are prohibited from providing any export subsidies, while in respect of scheduled agricultural products the "nature of the commitment made under the first clause of Article 3.3 is different":

"With respect to *unscheduled* agricultural products, Members are *prohibited* under Article 3.3 from providing *any* export subsidies as listed in Article 9.1. Article 10.1 prevents the application of export subsidies which '*results in, or which threatens to lead to, circumvention*' of that prohibition. Members would certainly have 'found a way round', a way to 'evade', this prohibition if they could transfer, through tax exemptions, the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1. Thus, with respect to the *prohibition* against providing subsidies listed in Article 9.1 on *unscheduled* agricultural products, we believe that the FSC measure involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, '*threatens to lead to circumvention*' of that 'export subsidy commitment' in Article 3.3.

With respect to *scheduled* agricultural products, the nature of the commitment made under the first clause of Article 3.3 is different. Members are not subject to a general prohibition against providing export subsidies as listed in Article 9.1; rather, there is a *limited authorization* for Members to provide such subsidies up to the level of the reduction commitments specified in their Schedule. ...

As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those subsidies. ... In our view, Members would have found 'a way round', a way to 'evade', their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1."⁹

7. In *EC – Export Subsidies on Sugar*, the Appellate Body found that Article 3.3 required Members to schedule their export subsidy commitments in terms of both budgetary outlay and quantity commitments levels:

"Article 3.3 does not ... explicitly state that export subsidy commitments must be specified in a Member's Schedule in terms of both budgetary outlay *and* quantity commitment levels. At the same time, Article 3.3 does not explicitly state that a Member may specify its commitment level in terms of either of the two forms of commitments. In our view, the use of the conjunctive 'and', and the corresponding use of the word 'levels' in the plural, suggest that the drafters of the Agreement intended that both types of commitments must be specified in a Member's Schedule in respect of any export subsidy listed in Article 9.1."¹⁰

8. Panel in *India – Sugar and Sugarcane* underlined that, with regard to export subsidies, the Agreement on Agriculture distinguishes between the commitments for scheduled and unscheduled products:

"Under the first part of Article 3.3, Members have committed not to provide export subsidies listed in Article 9.1 in respect of *scheduled* agricultural products in excess of

⁸ Appellate Body Report, *US – FSC*, paras. 145-146.

⁹ Appellate Body Report, *US – FSC*, paras. 150-152.

¹⁰ Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 193.

budgetary outlays and quantity commitment levels specified in the relevant Member's Schedule. Article 9.1 of the Agreement on Agriculture refers to scheduled agricultural product commitments as 'reduction commitments'. Under the second part of Article 3.3, Members have committed not to provide any export subsidies listed in Article 9.1 with respect to *unscheduled* agricultural products, i.e. those that are not specified in the Member's Schedule. Article 3.3 thus prohibits providing export subsidies within the meaning of Article 9.1 on unscheduled agricultural products.

As noted above, the Agreement on Agriculture distinguishes between the commitments for scheduled and unscheduled products. Therefore, to determine a Member's commitment with respect to export subsidies on an agricultural product, it has to be established whether the agricultural product in question is included in Section II of Part IV of the Member's Schedule and, if so, what commitment has been undertaken therein for that product."¹¹

9. In *India – Sugar and Sugarcane*, the Panel referred to the linkages between Articles 3.3, 9.1 and 10.1 of the Agreement on Agriculture, as follows:

"As noted, the inconsistency of export subsidies with Article 3.3 relates only to the export subsidies listed in Article 9.1. All other subsidies contingent upon export performance, as defined in Article 1(e) of the Agreement, are subject to the provisions of Article 10. Article 10.1, which is designed to prevent circumvention of export subsidy commitments, does not permit granting of export subsidies not listed in Article 9.1 in a way that would lead, or threaten to lead, to the circumvention of export subsidy commitments. It also stipulates that non-commercial transactions should not be used to circumvent export subsidy commitments."¹²

10. The Panel then proceeded to analyse India's schedule in order to determine which provision of the Agreement on Agriculture would apply:

"As observed above, pursuant to Article 3.3 of the Agreement on Agriculture, the level at which India can provide export subsidies listed in Article 9.1 depends on whether India's Schedule contains an export subsidy reduction commitment.

The parties agree that sugar is an unscheduled agricultural product for India. Our own review of India's Schedule and Supporting Tables also demonstrates that India did not make export subsidy reduction commitments with respect to sugar. As a result, if we find that India provides export subsidies within the meaning of Article 9.1 of the Agreement on Agriculture, these subsidies would be inconsistent with Articles 3.3 and 8 of that Agreement."¹³

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¹¹ Panel Report, *India – Sugar and Sugarcane*, paras. 7.168-7.169.

¹² Panel Report, *India – Sugar and Sugarcane*, para. 7.173.

¹³ Panel Report, *India – Sugar and Sugarcane*, paras. 7.174-7.175.