

EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR

Notification of an Other Appeal by Australia
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 25 January 2005, from the Delegation of Australia, is being circulated to Members.

1. Pursuant to Rule 23 of the Working Procedures for Appellate Review, as adopted by the Appellate Body in accordance with the provisions of paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Australia hereby notifies its decision to appeal to the Appellate Body on the basis of errors both in certain issues of law covered in the report of the Panel on *European Communities – Export Subsidies on Sugar* (WT/DS265/R) (the "Panel Report") and in certain legal interpretations developed by the Panel in the Panel Report.
2. Australia seeks appellate review of:
 - (a) the Panel's decision, as set out in paragraphs 7.380-7.387 and in paragraphs 6.14-6.15 of the Panel Report, to exercise judicial economy and to decline to examine Australia's claims under Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"); and
 - (b) the Panel's consequent failure to make a recommendation in accordance with the provisions of Article 4.7 of the *SCM Agreement*.
3. The Panel's decision was based on the following errors of law and legal interpretation:
 - (i) that the Panel's findings under the *Agreement on Agriculture* should be sufficient to fully resolve the matter at issue (paragraph 7.383);
 - (ii) that there was some issue whether the Panel was entitled to make a recommendation to withdraw the measure and to specify a time period in accordance with the provisions of Article 4.7 of the *SCM Agreement* in the circumstances before it (paragraph 7.384);
 - (iii) that the Panel was not required to rule on Australia's claims under the *SCM Agreement* "merely in order to obtain what might – but would not necessarily be – more rapid compliance" (paragraph 7.384);
 - (iv) that the Panel's exercise of judicial economy did not diminish Australia's rights within the meaning of Article 19.2 of the *DSU* (paragraph 7.385); and

- (v) the additional considerations in its decision to exercise judicial economy, being, in its view, that Australia focused on its claims under the *Agreement on Agriculture* and had not set forth its claims under Article 3 of the *SCM Agreement* in quite as clear and unambiguous a manner as under the *Agreement on Agriculture* (paragraphs 6.15 and 7.386).
4. In deciding to exercise judicial economy in respect of Australia's claims under the *SCM Agreement*, the Panel deprived Australia of its rights in regard to:
 - a recommendation, in accordance with Article 4.7 of the *SCM Agreement*, that those export subsidies on sugar found inconsistent with the *SCM Agreement* be withdrawn without delay;
 - a recommendation, in accordance with Article 4.7 of the *SCM Agreement*, specifying a time-period for withdrawal of the export subsidies in question;
 - taking countermeasures in accordance with the provisions of Article 4.10 of the *SCM Agreement* in the event that the subsidies in question were not withdrawn within the specified time-period; and
 - the application of special or additional rules and procedures, in accordance with the provisions of Article 1.2 and Appendix 2 of the *DSU*.
 5. The Panel's decision to exercise judicial economy also serves to diminish Australia's rights under, and is inconsistent with, the provisions of Articles 1.2, 3.2, 3.4, 3.7 and 19.2 of the *DSU*. The Panel's decision is also inconsistent with the Panel's duty under Article 11 of the *DSU* to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.
 6. Australia requests that the Appellate Body reverse the Panel's legal findings and conclusions in respect of the exercise of judicial economy in regard to the provisions of the *SCM Agreement*. Australia further requests the Appellate Body to preserve Australia's rights under Articles 4.7 and 4.10 of the *SCM Agreement*, in accordance with Articles 1.2, 3.2 and 19.2 of the *DSU*, by ruling - on the basis of factual findings by the Panel and the undisputed facts on the Panel record - on Australia's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement* and to make the recommendation provided for under Article 4.7 of the *SCM Agreement*.
 7. Australia cites paragraphs 6.14-6.15 and 7.380-7.387 of the Panel Report as an indicative list of paragraphs containing relevant errors in issues of law and legal interpretation developed by the Panel. Australia also cites paragraphs 3.4, 3.8, 4.2-4.3, 4.102-4.121, 4.177, 4.232-4.266, 7.234, 7.237, 7.375-7.381 and 8.1(e) of the Panel Report as an indicative list of paragraphs relevant to its request in paragraph 6 above of this Notice of Other Appeal.
 8. Australia cites the following legal provisions of the covered agreements as those that the Panel erred in interpreting or applying:
 - *SCM Agreement*: Articles 3.1(a) and 3.2, 4.7 and 4.10;
 - *Agreement on Agriculture*: Article 21.1; and
 - *DSU*: Article 1.2 and Appendix 2; Articles 3.2, 3.4, 3.7, 11 and 19.
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