

BEFORE THE WORLD TRADE ORGANIZATION

European Communities – Export Subsidies on Sugar

WT/DS265

ARBITRATION UNDER ARTICLE 21.3(C) OF THE DSU

**STATEMENT BY AUSTRALIA
AT THE MEETING OF THE ARBITRATOR WITH THE PARTIES**

Geneva, 10 October 2005

Good morning Mr Ganesan.

1. The WTO reasonable period of time does not constitute a period of waiver of WTO obligations. Nor does it entitle a WTO member to opt for an implementation program which would *not* constitute the shortest period of time reasonably possible for implementation within the legal system of the WTO Member concerned.
2. The European Communities has the burden of proof to demonstrate that any time period it has proposed would be the shortest period possible within its legal system. It has not done so. Instead, it has proposed a period which would not constitute prompt compliance nor contribute to the security and predictability of the multilateral trade system.
3. Contrary to the assertions of the European Communities, the interests of the Australian sugar industry would not be well served by a time period which would afford a licence to the European Commission to provide unlimited budgetary outlays on export subsidies until January 2007 and which would allow for the export of unlimited quantities of sugar until that date.
4. The Australian sugar industry has confirmed that its interests would be best met by compliance within the 2005/2006 marketing year.

The European Communities can give effect to its WTO commitments within the 2005/2006 marketing year

5. Australia's submission documents the measures and procedures available to the European Communities which would enable the Commission to give effect to its WTO budgetary outlay and quantity commitments by 25 November 2005.
6. The European Communities has not identified a single legal impediment to implementation of its *budgetary outlay* commitment within the 2005/2006 marketing year.
7. The Commission has the regulatory authority to limit the *level of quota* exports. It also has regulatory powers that would enable it to control – directly or indirectly – *the export availability of C sugar* in any one marketing year. The requirement to export C sugar not carried over is not an in-principle barrier to compliance with the EC's WTO quantity commitment in any one marketing year, or, indeed, in the 2005/2006 marketing year.
8. Producers do not need to incur a penalty for the non-export of C sugar produced in excess of quota in 2005.
9. First, a producer has until February or later (depending on the Member State concerned) to decide whether to carry over sugar. There is no Council regulatory impediment to carry over in full.

10. Second, a producer does not need to export the total quantity of sugar produced in excess of quota in the 2005/2006 marketing year. A producer has until 31 December 2006 to export C sugar produced in 2005, without incurring a penalty.
11. Third, as documented in Australia's submission the Commission has the legal capacity to influence the level of export availability of C sugar.
12. The recent decision by the Commission to increase export availability of C sugar through the declassification mechanism would not justify an extension of the time period for implementation. Australia notes that the Commission justification for such action has nothing to do with compliance with the European Communities' WTO obligations. Australia observes that, under EC law, the declassification mechanism can only be activated for purposes of compliance with the EC's export subsidy commitments under the *Agreement on Agriculture*.
13. In any event, carryover limits do not apply to quota sugar declassified as C sugar. A producer is free to carry over such sugar without limit.
14. If a producer were to carry over C sugar in whole or in part, decisions on beet plantings and sugar production levels in the following year could be adjusted accordingly. Beet growers and sugar processors have ample lead time in which to do so before 2006.
15. The European Communities has not advanced any convincing reasons why the Commission is prevented from applying its export licensing authority to regulate and control the level of C sugar exports, including on a periodic basis.
16. If however it is able to satisfy its burden of proof that the Commission does not have such requisite legal authority, a Council amendment could be given effect and applied within a relatively short time frame. Such amendment could involve authorisation to the Commission to regulate the export of C sugar on a periodic basis, in order to maintain total export quantities within the maximum permitted limits in the 2005/2006 marketing year, which commenced on 1 October.

The European Communities' proposal

17. On 28 April this year, the European Commission stated that, independently of the WTO dispute, it had already committed to a far reaching reform of the sugar regime, in full consultation with all interested parties.¹
18. The European Communities proposal envisages deferral of application of implementing measures beyond the date of entry into force of the proposed reform measures.

¹ Document IP/05/506, 28 April 2005: "European Commission regrets attack on EU sugar regime, but will abide by WTO Appellate Body ruling"

19. A WTO Member cannot justify the *non-application* of implementing measures beyond the time period necessary for the entry into force of implementing measures.
20. The European Communities' proposal involves the introduction of measures in July 2006, with date of application deferred until 1 January 2007. As drafted, the replacement EC sugar regime would accord the Commission unlimited authority to adopt transitional measures. There would be no internal legal barrier to Commission action to "grandfather" sugar produced in 2005 and 2006 from the application of regulatory controls on budgetary outlay and quantity levels. The Commission could continue to authorise unlimited expenditure on export refunds and unlimited export quantities of sugar up to 31 December 2006, without any guarantee of WTO compliance within the 2006/2007 marketing year.

Conclusion

21. In conclusion, Australia requests the Arbitrator to award an implementation period expiring on 25 November 2005. An implementation period of six months and six days would enable the Commission of European Communities to apply the measures at its disposal, to give effect to the EC's WTO budgetary outlay and quantity commitments in the 2005/2006 marketing year.
22. Should it be determined that a Council amendment would be necessary, a period expiring 27 December 2005 would be sufficient to give effect to such amendment and would still enable the European Communities to meet its WTO commitments in the 2005/2006 marketing year.

Thank you, Mr Ganesan.