

**CANADA – MEASURES AFFECTING THE IMPORTATION OF MILK
AND THE EXPORTATION OF DAIRY PRODUCTS**

Second Recourse by the United States to Article 21.5 of the DSU

Request for the Establishment of a Panel

The following communication, dated 6 December 2001, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 27 October 1999, the Dispute Settlement Body (the DSB) adopted its recommendations and rulings in the dispute *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products* (WT/DS103). The DSB found that Canada was exporting subsidized dairy products in breach of its export subsidy reduction commitments under the *Agreement on Agriculture* and recommended that Canada bring its measures into conformity with the *Agreement*.

On 23 December 1999, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU), Canada and the United States concluded an agreement on the reasonable period of time for implementation of the recommendations and rulings of the DSB (WT/DS103/10). By the terms of the agreement, Canada committed to complete implementation by no later than 31 December 2000. The reasonable period of time was later extended to 31 January 2001 by mutual agreement of the parties. (WT/DS103/13)

On 19 January 2001, Canada circulated to the DSB its "final status report", pursuant to Article 21.6 of the DSU (WT/DS103/12/Add.6). In that report, Canada affirmed "that it will be in full compliance with the rulings and recommendations of the DSB by the conclusion of the implementation period" on 31 January 2001.

Considering that Canada had failed to comply with the above mentioned recommendations and rulings of the DSB by 31 January 2001 or since the expiry of that period, the United States requested consultations with Canada on 2 February 2001 (WT/DS103/15). Consultations were held on 9 February 2001, but failed to resolve the dispute. And, as a consequence of this failure, the United States requested, on 16 February 2001, that the matter be referred to a Panel pursuant to Article 21.5 of the DSU (WT/DS103/16).

The Article 21.5 Panel was duly established and submitted its report to the parties on 5 July 2001 (WT/DS103/RW). The Panel concluded that Canada had continued to act inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, by providing export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture* in excess of its quantity commitment levels specified in its Schedule for exports of cheese, for the marketing year 2000/2001.

On 4 September 2001, Canada appealed certain issues of law covered in the Article 21.5 Panel Report, pursuant to Article 16.4 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review*. The Appellate Body released its report on 3 December 2001 (WT/DS103/AB/RW).

The Appellate Body's Article 21.5 Report reversed some of the Panel's legal analysis, but declined to make findings on the inconsistency of the measure in question. Instead, the Appellate Body concluded that, given the factual findings made by the Panel and the lack of uncontested facts in the Panel record, it was unable to complete the analysis of the claims made by the United States under Articles 9.1(c) and 10.1 of the *Agreement on Agriculture*, as well as the claim made by the United States under Article 3 of the *Agreement on Subsidies and Countervailing Measures*. In its Report, the Appellate Body makes it clear that its report "does not amount to a finding that the measure at issue is WTO-consistent, but simply that the Panel's findings are vitiated by error of law" (para 104). In such circumstances, the United States continues to consider that Canada has failed to comply with the original recommendations and rulings of the DSB.

As set forth in the US first request for the establishment of a panel pursuant to DSU Article 21.5, while Canada eliminated the Special Class 5(e) export subsidies that the DSB found to contribute to a violation of Canada's export subsidy commitments under Articles 3, 8, and 9 of the Agreement, Canada substituted new programs in place of the Special Class 5(e) export subsidies. In addition, Canada has retained and continues to use the Special Class 5(d) export subsidy, which Canada acknowledges the DSB found was an export subsidy.

The new programs introduced by Canada as part of its attempted implementation vary from province to province, but possess several common elements. The provincial programs instituted in nine of Canada's provinces during the implementation period allow exporters to purchase milk at prices that are below prevailing market levels in Canada for milk used in dairy products sold into Canada's domestic market. The low priced milk made available to these exporters (dairy processors) can only be used to manufacture dairy products for sale to foreign markets and, thus, the availability of such milk is contingent on export. Sanctions exist to penalize any processor that diverts products made from such low priced milk into Canada's domestic market.

The access given to low priced milk through these substitute programs does not appear to differ in any meaningful respect from that provided under the Special Class 5(e) system that was found by the Dispute Settlement Body to constitute an export subsidy. Thus, Canada is continuing to provide export subsidies on dairy products through these provincial mechanisms, and the associated federal regulations and orders, as well as Special Class 5(d), including pricing arrangements for milk and its components, without regard to its export subsidy reduction commitments or Canada's obligations with respect to export subsidies. For example, available data show that the quantity of Canada's subsidized exports of cheese and other dairy products (other than butter and skim milk powder) were higher than the applicable reduction commitment levels for marketing year 1999/2000. Moreover, cheese and other dairy product exports during the 2000/2001 marketing year appear to be occurring at monthly levels that, if continued for the remainder of the year, would result in an additional year of subsidized export shipments inconsistent with Canada's obligations. Processors appear to be entitled to access to these export subsidies without any limitation on the quantity used. Accordingly, the export subsidies also threaten to circumvent Canada's export subsidy commitments. These export subsidies distort markets for dairy products and adversely affect the United States.

The United States considers that the following measures establish an export regime that is inconsistent with Canada's obligations under the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures*:

Federal and Inter-Provincial

- (a) Canadian Dairy Commission Act;
- (b) Dairy Products Marketing Regulations, as amended, including those enacted pursuant to the Canadian Dairy Commission Act (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
- (c) Agricultural Products Marketing Act, and amendments to provincial milk orders issued under the Agricultural Products Marketing Act granting authority to regulate marketing in interprovincial and export trade of milk (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
- (d) Comprehensive Agreement on Special Class Pooling, as well as Annexes, Addenda, and Schedules thereto;
- (e) National Milk Marketing Plan, as well as Appendices and Amendments thereto;
- (f) Interprovincial Comprehensive Agreement on Special Class Pooling;
- (g) operations of the Canadian Milk Supply Management Committee;
- (h) directions to the Canadian Dairy Commission by the Minister of Agriculture and Agri-food under Section 11 of the Canadian Dairy Commission Act (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
- (i) official communications from provincial Agriculture Ministers to the Federal Minister of Agriculture and Agri-food outlining the new mechanisms, as per Canada's note of 1 December 2000 "Responses to Questions posed by New Zealand and/or the United States regarding Provincial Dairy Export Mechanisms", heading 4;
- (j) provincial export mechanisms adopted in the provinces of Prince Edward Island, Nova Scotia, New Brunswick; Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia as identified and described in materials provided by Canada to New Zealand in consultations held under the 23 December Implementation Agreement;

Prince Edward Island

- (k) Natural Products Marketing Act, Prince Edward Island Milk Marketing Regulations Amendment (as published in the Royal Gazette on 30 December 2000), and Contractual Commercial Export Activity Order, Board Order MMB00-02;

Nova Scotia

- (l) Dairy Commission Act: Section 5(2) of Schedule 2 "Regulations Respecting Milk Production"; Section 3(15) of Schedule 8 "Regulations for Specified Areas"; Schedule 13 "Regulation Respecting Contracted Exports of Dairy Products";

New Brunswick

- (m) New Brunswick Milk Marketing Board, Exemption Orders Nos. 6, 8 and 11 of 1 August 2000;

Québec

- (n) Government of Québec, Order in Council 1408-2000 (6 December 2000) as published in the Gazette Officielle du Québec on 3 January 2001; Gazette Officielle du Québec, 9 August 2000, no. 32; Décision 7140, Régie des marchés agricoles et alimentaire; Décision 7111, Régie des marchés agricoles et alimentaire;

Ontario

- (o) Regulation 179/00;
- (p) DFO Milk General Regulation 09/00;
- (q) DFO Milk Pricing Regulation 08/00;

Manitoba

- (r) Export Contract Milk Exemption Order;

Saskatchewan

- (s) Milk Control Regulations;

Alberta

- (t) Dairy Board Amendment Regulation, O.C. 260/2000;
- (u) Alberta Contracted Export Milk, Clarification of Operating Procedures;

British Columbia

- (v) British Columbia Milk Marketing Board Consolidated Order.

These measures appear to be inconsistent with the obligations of Canada under the following provisions of the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures*:

- (1) *Agreement on Agriculture*, Articles 3.3, 8, 9, 10.1 and 13; and
- (2) *Agreement on Subsidies and Countervailing Measures*, Articles 1, 3 and Annex I. A statement of available evidence as to the existence and nature of the subsidies is attached.

As indicated above, the Appellate Body's Article 21.5 Report did not make any findings on the consistency of Canada's new measures. Thus, the United States continues to believe that Canada has failed to comply with the original recommendations and rulings of the DSB.

Accordingly, there continues to be "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB" between Canada and the United States, within the terms of Article 21.5 of the DSU. The United States therefore requests, pursuant to Article 21.5 of the DSU, that this matter be referred to the original Panel.

Statement of Available Evidence

1. Canadian Dairy Commission Act;
2. Dairy Products Marketing Regulations, as amended, including those enacted pursuant to the Canadian Dairy Commission Act (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
3. Agricultural Products Marketing Act, and amendments to provincial milk orders issued under the Agricultural Products Marketing Act granting authority to regulate marketing in interprovincial and export trade of milk (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
4. Comprehensive Agreement on Special Class Pooling, as well as Annexes, Addenda, and Schedules thereto;
5. National Milk Marketing Plan, as well as Appendices and Amendments thereto;
6. Interprovincial Comprehensive Agreement on Special Class Pooling;
7. operations of the Canadian Milk Supply Management Committee;
8. directions to the Canadian Dairy Commission by the Minister of Agriculture and Agri-food under Section 11 of the Canadian Dairy Commission Act (in effect on 13 December 2000 and published in Part II of the Canada Gazette on 3 January 2001);
9. official communications from provincial Agriculture Ministers to the Federal Minister of Agriculture and Agri-food outlining the new mechanisms, as per Canada's note of 1 December 2000 "Responses to Questions posed by New Zealand and/or the United States regarding Provincial Dairy Export Mechanisms", heading 4;
10. provincial export mechanisms adopted in the provinces of Prince Edward Island, Nova Scotia, New Brunswick; Quebec, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia as identified and described in materials provided by Canada to New Zealand in consultations held under the 23 December Implementation Agreement;

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11. Natural Products Marketing Act, Prince Edward Island Milk Marketing Regulations Amendment (as published in the Royal Gazette on 30 December 2000), and Contractual Commercial Export Activity Order, Board Order MMB00-02;

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12. Dairy Commission Act: Section 5(2) of Schedule 2 "Regulations Respecting Milk Production"; Section 3(15) of Schedule 8 "Regulations for Specified Areas"; Schedule 13 "Regulation Respecting Contracted Exports of Dairy Products";

New Brunswick

13. New Brunswick Milk Marketing Board, Exemption Orders Nos. 6, 8 and 11 of 1 August 2000;

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14. Government of Québec, Order in Council 1408-2000 (6 December 2000) as published in the Gazette Officielle du Québec on 3 January 2001; Gazette Officielle du Québec, 9 August 2000, no. 32; Décision 7140, Régie des marchés agricoles et alimentaire; Décision 7111, Régie des marchés agricoles et alimentaire;

Ontario

15. Regulation 179/00;
16. DFO Milk General Regulation 09/00;
17. DFO Milk Pricing Regulation 08/00;

Manitoba

18. Export Contract Milk Exemption Order;

Saskatchewan

19. Milk Control Regulations;

Alberta

20. Dairy Board Amendment Regulation, O.C. 260/2000;
21. Alberta Contracted Export Milk, Clarification of Operating Procedures;

British Columbia

22. British Columbia Milk Marketing Board Consolidated Order.

Other

23. Export contract volumes and prices for November-December 2000-2001 reported on the Quebec Individual Export Mechanism (Bulletin Board), at <http://www.telmatik.com/laitexport>.
24. Export contract volumes and prices contained on the Ontario Bulletin Board found at <http://exportcontracts.org>
25. Prices for milk and milk components sold into the domestic market in Canada as reported at <http://dairyinfo.agr.ca/cadairy.htm>.
26. Memorandum from Catherine Tokarz to Members of National Dairy Council regarding status of Optional Export Program, dated March 2000.
27. Excerpt from Barry Wilson's Dairy Industry Newsletter, dated 1 August 2000, entitled "Farmers Leap at New Export Regime"
28. Letter from Parmalat Canada, dated October 2000, describing changes in Canada's export subsidy regime resulting from the WTO dispute ruling and recommendations.
29. National Post article, 20 March 2000, "Why milk marketing boards must go."

30. National Dairy Council of Canada, April 2000, volume 9-2, "Dairy Export Business in Crisis"
 31. Cost of milk production data as reported by the Canadian Dairy Commission, the provincial governments, and other public sources such as the Ontario Dairy Farmer Accounting Project.
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