

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

Second Recourse by New Zealand 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 New Zealand 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/DS113). 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 New Zealand agreed on the reasonable period of time for implementation of the recommendations and rulings of the DSB (WT/DS113/10). According to the terms of the 23 December 1999 agreement, as amended on 11 December 2000 (WT/DS113/13), the staged implementation process was to be completed by 31 January 2001.

On 19 January 2001, Canada circulated to all Members of the DSB its "final status report", pursuant to Article 21.6 of the DSU (WT/DS103/12/Add.6, WT/DS/113/12/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.

Taking the view that Canada failed to comply with the above-mentioned recommendations and rulings of the DSB by 31 January 2001 or since the expiry of that period, New Zealand requested consultations with Canada on 2 February 2001 (WT/DS/113/15). Consultations were held on 9 February 2001, but failed to resolve the dispute. And, as a consequence of this failure, New Zealand requested, on 16 February 2001, that the matter be referred to a Panel pursuant to Article 21.5 of the DSU (WT/DS113/16).

The Panel was duly established and submitted its report to the parties on 5 July 2001 (WT/DS103/RW, WT/DS113/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, WT/DS113/AB/RW).

The Appellate Body's Article 21.5 Report reversed some of the Panel's findings, but the Appellate Body declined to rule on the consistency of the measure in question. Instead the Appellate Body concluded that, in light of the factual findings made by the Panel and the uncontested facts in the Panel record, it was unable to complete the analysis of the claims made by New Zealand under Articles 9.1(c) and 10.1 of the *Agreement on Agriculture*. In its Report, the Appellate Body makes it clear that its decision "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, New Zealand continues to consider that Canada has failed to comply with the original recommendations and rulings of the DSB.

As New Zealand highlighted previously (WT/DS113/16), in substitution for the dairy export measures that have been ruled in contravention of Canada's WTO commitments, Canada has put in place "new measures" for the export of dairy products. In New Zealand's view, these new measures, which are comprised in new provincial schemes that are designed to provide ongoing support to Canadian dairy exports, equally involve the provision of export subsidies within the meaning of Article 9.1(c) or Article 10.1 of the *Agreement on Agriculture*.

The effect of these schemes is that Canada is exporting subsidized dairy products without counting these against its export subsidy reduction commitment levels. As a result, Canada continues to be in violation of its obligations under one or more of Article 3.3, Article 8, Article 9.1(c), Article 10.1 and Article 10.3 of the *Agreement on Agriculture*.

In particular, New Zealand notes the following acts, statutes, orders, regulations, directions, correspondence, and actions:

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; Plan Conjoint; Reglement sur les quotas; Reglement sur le paiement du lait; Marketing Agreements between the Federation du producteurs du lait Quebecois and Agropur, Group Lactel and the Conseil de l'industrie laitiere du Quebec;

Ontario

- (o) Regulation 179/00;
- (p) DFO Milk General Regulation 09/00 and 15/00;
- (q) DFO Milk Pricing Regulation 08/00;

Manitoba

- (r) Export Contract Milk Exemption Order;

Saskatchewan

- (s) Milk Control Regulations;

Alberta

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

British Columbia

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

As indicated above, the Appellate Body's Article 21.5 Report did not rule on the consistency of Canada's new measures. New Zealand 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 New Zealand, within the terms of Article 21.5 of the DSU. New Zealand therefore requests, pursuant to Article 21.5, that this matter be referred to the original Panel.
