

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

Recourse by the United States to Article 21.5 of the DSU

*Request for the Establishment of a Panel*

The following communication, dated 16 February 2001, from the Permanent Mission of the United States to the Permanent Mission of Canada and to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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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, Canada and the United States concluded an agreement pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU) (WT/DS/103/10) on the reasonable period of time available to Canada to implement the DSB's recommendations. By the terms of that agreement, Canada committed to complete the implementation process by no later than 31 December 2000. The reasonable period of time later was extended to 31 January 2001 by the mutual agreement of the parties to the dispute (WT/DS103/13).

The United States considers that Canada has failed to comply with the DSB recommendations and rulings by not bringing its export regime for dairy products into compliance with its export subsidy commitments under the Agreement on Agriculture. While Canada has 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 export subsidy programmes 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 programmes introduced by Canada as part of its attempted implementation vary from province to province, but possess several common elements. The provincial programmes 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. Procedures 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 programmes 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 subsidy regime that is inconsistent with Canada's obligations under the Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement):

- (1) the Canadian Dairy Commission Act;
- (2) the Dairy Products Marketing Regulations, as amended, including those amendments published in the Canada Gazette on 3 January 2001, and SOR/94-466;
- (3) the Agricultural Products Marketing Act, as well as amendments to the provincial milk delegation orders issued under the Act relating to the authority to regulate marketing in interprovincial and export trade of milk, including those amendments published in the Canada Gazette on January 3, 2001 and Order JUS602260; Nova Scotia Milk Order, SOR/94-626; Ontario Milk Order C.R.C., c. 215; Quebec Milk Order SOR/94-720; New Brunswick Milk Order SOR/94-627; Manitoba Milk Order C.R.C., c.155; Prince Edward Island Milk Order, Registration 6 October 1994; Saskatchewan Milk Order SOR/94-721; Alberta Milk Order SOR/94-719;
- (4) the Comprehensive Agreement on Special Class Pooling, as well as Annexes, Addenda, and Schedules thereto, including the Optional Export Programme, both as described therein and as operated in the provinces exporting dairy products;
- (5) the National Milk Marketing Plan, as well as Appendices and Amendments thereto;
- (6) the Interprovincial Comprehensive Agreement on Special Class Pooling;
- (7) the operations of the Canadian Milk Supply Management Committee;
- (8) official communications from provincial Agricultural 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" (hereinafter Canadian Responses);

- (9) directions to the Canadian Dairy Commission by the Minister of Agriculture and Agri-Food under Section 11 of the Canadian Dairy Commission Act as published in the Canada Gazette on 3 January 2001(JUS-602420);
- (10) the 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 the United States in consultations held under the 23 December 1999 Implementation Agreement and referenced in Canadian Responses (Answer to Question 1);
- (11) all acts, statutes, regulations, orders, and rulings regarding the provincial export mechanisms referenced above or relating to the provincial authority to regulate milk for intraprovincial, interprovincial, or export trade, including the following:
  - (a) Prince Edward Island: Contractual Commercial Export Activity Order, Board Order MMBOO-02;
  - (b) Nova Scotia: Dairy Commission Act, Section 5(2) of Schedule "Regulations Respecting Milk Production"; Section 3(15) of Schedule 8 "Regulations for Specified Areas"; Schedule 13 "Regulation Respecting Contracted Exports for Dairy Products";
  - (c) Quebec: Government of Quebec, Order in Council 1408-2000 (6 December 2000), as published in Gazette Officielle du Quebec on 3 January 2001; Gazette Officielle du Quebec, 9 August 2000, no. 32; Decision 7140, Regie des marches agricoles et alimentaire; Decision 7111, Regie des marches agricoles et alimentaire;
  - (d) Ontario: Regulation 179/00; DFO Milk General Regulation 09/00; DFO Milk Pricing Regulation 08/00;
  - (e) Manitoba: Export Contract Milk Exemption Order;
  - (f) Saskatchewan: Milk Control Regulations;
  - (g) Alberta: Dairy Board Amendment Regulation, O.C. 260/2000; Alberta Contracted Export Milk, Clarification of Operating Procedures; and
  - (h) British Columbia: British Columbia Milk Marketing Board Consolidated Order;

These measures appear to be inconsistent with the obligations of Canada under the Agreement on Agriculture and the SCM Agreement. The provisions of these agreements with which these measures appear to be inconsistent include:

- (1) Agreement on Agriculture, Articles 3.3, 8, 9.1(a), 9.1(c), 10.1, 10.3 and
- (2) Agreement on Subsidies and Countervailing Measures, Articles 3.1(a) and 3.2 and item (d) of Annex I.

Accordingly, because "there is 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 the United States and Canada, within the terms of Article 21.5 of the DSU, the United States seeks recourse to Article 21.5 of the DSU in this matter. The United States requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

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