

**CANADA – CONTINUED SUSPENSION OF OBLIGATIONS  
IN THE EC – HORMONES DISPUTE**

Request for the Establishment of a Panel by the European Communities

The following communication, dated 13 January 2005, from the delegation of the European Communities to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The European Communities hereby requests the establishment of a panel pursuant to Articles 4.7 and 6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"). This request concerns Canada's continued suspension of concessions and other obligations under the covered agreements, without recourse to the procedures established by the DSU, after the European Communities has removed the measures found to be inconsistent with WTO law in case DS48, *European Communities – Measures concerning meat and meat products (Hormones)* ("EC – Hormones").<sup>1</sup>

**1. THE HISTORY OF THE DISPUTE**

On 13 February 1998, the Dispute Settlement Body ("DSB") adopted the panel and Appellate Body reports in *EC – Hormones*. In doing so, the DSB recommended that the European Communities bring the measures at issue into conformity with WTO rules. The Arbitrator appointed pursuant to Article 21.3(c) of the DSU determined that the European Communities shall have a "reasonable period of time" until 13 May 1999 to comply with the recommendations. On 26 July 1999, Canada obtained from the DSB the authorization to suspend obligations up to the level of 11.3 million Canadian Dollars per year. The arbitrators acting pursuant to Article 22.6 of the DSU had previously determined this level to be equivalent to the level of nullification or impairment (Article 22.4 of the DSU) suffered by Canada at the time of its recourse to arbitration in May 1999. On 1 August 1999 and pursuant to the DSB's authorization, Canada introduced import duties in excess of bound rates to imports from the European Communities by imposing a 100 % *ad valorem* rate of duty on a list of articles that are the products of certain EC Member States.<sup>2</sup>

The European Communities subsequently removed the measure found to be inconsistent with a covered agreement. It adopted Directive 2003/74/EC of the European Parliament and of the Council

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<sup>1</sup> At its meeting on 13 February 1998, the Dispute Settlement Body adopted the Appellate Body report (WT/DS48/AB/R) and the panel report (WT/DS48/R/CAN), as modified by the Appellate Body report, DSB, *Action by the DSB*, WT/DS48/11, 19 February 1998.

<sup>2</sup> The measures were adopted as the "European Union Surtax Order", P.C. 1999-1323, 28 July 1999, published in *Canada Gazette Part II*, Vol. 133, No. 17, SOR/99-317.

of 22 September 2003 amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists. The Directive was published and entered into force on 14 October 2003.

In conformity with the recommendations and rulings of the DSB and the covered agreements, the new EC legislation is based on comprehensive risk assessments, in particular on the opinions of the independent Scientific Committee on Veterinary Measures relating to Public Health.<sup>3</sup> The risk assessments focussed on potential risks to human health from hormone residues in bovine meat and meat products, in particular such risks arising from residues of six hormonal substances: oestradiol 17 $\beta$ , testosterone, progesterone, trenbolone acetate, zeranol and melengestrol acetate. In carrying out the risk assessments, the European Communities initiated and funded a number of specific scientific studies and research projects. It addressed specific requests to the United States, Canada and third countries to provide any recent scientific data and information in their possession. It took account of the findings of various independent expert bodies.

In light of the risk analyses carried out, the European Communities concluded that the avoidance of intake of oestradiol 17 $\beta$  is of absolute importance to human health and that, consequently, the placing on the market of meat containing this substance should be prohibited. With respect to testosterone, progesterone, trenbolone acetate, zeranol and melengestrol acetate, and on the basis of the available pertinent scientific information reflected in the above-mentioned risk analyses, the European Communities provisionally prohibited the placing on the market of meat containing these substances because the relevant scientific evidence was insufficient.

On 27 October 2003, the European Communities notified to the DSB the adoption, publication and entry into force of this Directive as well as the preceding scientific risk assessments. In the same communication, the European Communities explained that it considers itself to have fully implemented the recommendations and rulings of the DSB in the *EC – Hormones* dispute and that, as a consequence, it considers Canada's suspension of concessions vis-à-vis the European Communities to be no longer justified.<sup>4</sup>

Canada disagreed and denied that the new Directive was based on science and that it implemented the DSB's recommendations and rulings. Canada formally stated in the DSB that it considered the new Directive to be inconsistent with the European Communities obligations under the *SPS Agreement*<sup>5</sup> and that it would continue to impose retaliatory duties on certain products from the European Communities.<sup>6</sup>

## **2. THE OBJECT OF THE DISPUTE**

Despite its judgment that the European Communities' new Directive is inconsistent with the *SPS Agreement* (formally communicated to the Members of the WTO in the DSB), Canada refused to initiate dispute settlement proceedings under Article 21.5 of the DSU in order to obtain a review of the new Directive's consistency with the recommendations and rulings of the DSB. Canada also

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<sup>3</sup> Opinion of the Scientific Committee on Veterinary Measures Relating to Public Health: Assessment of potential risks to human health from hormone residues in bovine meat and meat products (30 April 1999); Opinion on review of previous SCVPH opinions of 30 April 1999 and 3 May 2000 on the potential risks to human health from hormone residues in bovine meat and meat products (adopted on 10 April 2002) and Review of specific documents relating to the SCVPH opinion of 30 April 99 on the potential risks to human health from hormone residues in bovine meat and meat products (adopted on 3 May 2000).

<sup>4</sup> *European Communities – Measures concerning meat and meat products (Hormones)*, Communication from the European Communities, WT/DS26/22, WT/DS48/20, 28 October 2003.

<sup>5</sup> DSB, *Minutes of Meeting held on 7 November 2003*, WT/DSB/M/157, 18 December 2003, para. 30.

<sup>6</sup> See *id.*, para. 33.

rejected several proposals extended to it by the European Communities to establish an agreed procedure for resolving this dispute. At the same time (and as announced in the DSB), Canada maintained the suspension of its obligations in relation to imports from the European Communities and continued to impose import duties in excess of bound rates on imports from the European Communities.

This conduct by Canada is inconsistent with Canada's obligations under Articles I and II of GATT 1994 and Articles 23.1; 23.2(a) and (c); 3.7; 22.8 and 21.5 of the DSU.

Canada has acted inconsistently with Article 22.8 of the DSU by failing to apply the suspension of concessions or other obligations only until such time as the measure found to be inconsistent with a covered agreement has been removed, or the implementing Member has provided a solution to the nullification or impairment of benefits previously caused to Canada.

Canada has acted inconsistently with Articles I and II of GATT 1994 by imposing import duties in excess of bound rates on imports from the European Communities. In violation of Article I of GATT 1994, Canada has failed to accord an advantage granted, with respect to customs duties, to products originating in other countries immediately and unconditionally to the like products originating in the territory of the European Communities. Inconsistent with Article II:1(a) of GATT 1994, Canada has failed to accord to the commerce of another Member treatment no less favourable than that provided for in the appropriate part of the Schedule annexed to the GATT 1994 and, inconsistent with Article II:1(b) of GATT 1994, Canada has also failed to exempt products, which are the products of territories of another Member, on their importation into Canada's territory, from ordinary customs duties in excess of those set forth and provided in Canada's Schedule.

Canada has acted inconsistently with Article 23.1 of the DSU by failing to have recourse to, and abide by, the rules and procedures of the DSU, in a situation where it seeks redress of an alleged violation of obligations under a covered agreement. In the particular instance, Canada failed to have recourse to dispute settlement pursuant to Article 21.5 of the DSU, in a situation where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with DSB recommendations and rulings.

Canada has acted inconsistently with Article 23.2(a) of the DSU. In a situation where it sought redress of an alleged violation of obligations under a covered agreement, Canada unilaterally made a determination to the effect that the new EC legislation is in violation of the European Communities' obligations under the covered agreements, despite the removal of the measures found to be inconsistent. Canada made such a determination without recourse to dispute settlement in accordance with the rules and procedures of the DSU and, as a consequence, in the absence of findings contained in an adopted panel or Appellate Body report or arbitration award rendered under the DSU.

By applying the suspension of concessions or other obligations against the new EC legislation, Canada has acted inconsistently with Articles 23.2(c) and 3.7 of the DSU. Canada has failed to follow the procedures set forth in Article 22 of the DSU and to obtain DSB authorization in accordance with those procedures before suspending concessions or other obligations under a covered agreement in response to the alleged failure of another Member to implement DSB recommendations and rulings. Simultaneously, Canada has suspended the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the European Communities, without ongoing authorization by the DSB of such measures.

### **3. REQUEST FOR THE ESTABLISHMENT OF A PANEL**

On 8 November 2004, the European Communities requested consultations with Canada with a view to reaching a mutually satisfactory solution of the matter. The request was circulated in document WT/DS/321/1 dated 10 November 2004. The consultations were held on 16 December 2004 in Geneva. They have allowed a better understanding of the respective positions but have not led to a satisfactory resolution of the matter.

Therefore, the European Communities respectfully requests that a panel be established, with the standard terms of reference, to consider the above complaint with a view to finding that the conduct by Canada is inconsistent with Canada's obligations under the DSU and the GATT, in particular, but not necessarily exclusively, under Articles I and II of GATT 1994 and Articles 23.1; 23.2(a) and (c); 3.7; 22.8 and 21.5 of the DSU.

The European Communities asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 25 January 2005.

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