

CANADA – DAIRY¹

(DS103, 113)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainants	<i>United States, New Zealand</i>	<i>AA Arts. 9.1, 3.3, 10.1 and 8 GATT Art. II:1(b)</i>	Establishment of Panel	25 March 1998
			Circulation of Panel Report	17 May 1999
Respondent	<i>Canada</i>		Circulation of AB Report	13 October 1999
			Adoption	27 October 1999

1. MEASURE AND INDUSTRY AT ISSUE

- **Measure at issue:** Canadian government's support system (Special Milk Classes Scheme) for domestic milk production and export, as well as Canada's tariff rate quota (TRQ) regime for imports of fluid milk.
- **Industry at issue:** Milk and dairy product industry.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **AA Art. 9.1(a) (export subsidies – direct subsidies):** Having reversed the Panel's conclusion that Canada's measure involved export subsidies within the meaning of Art 9.1(a) (based on the Panel's erroneous interpretation of the terms "direct subsidies" and "payments-in-kind" under Art. 9.1(a)), the Appellate Body also reversed the Panel's finding that Canada had acted inconsistently with Arts. 3.3 and 8 by providing export subsidies under Art. 9.1(a) – i.e. by exceeding the support reduction commitment levels scheduled by Canada.
- **AA Art. 9.1(c) (export subsidies – payments financed by virtue of governmental action):** The Appellate Body upheld the Panel's finding that the provision of milk at discounted prices to processors for export constituted "payments" within the meaning of Art. 9.1(c) and that the relevant payments under Canada's scheme were financed by virtue of governmental action. Thus, it upheld the Panel's ultimate conclusion that Canada's scheme constituted an export subsidy within the meaning of Art. 9.1(c), which exceeded the reduction commitment, and thus, Canada had acted inconsistently with Arts. 3.3 and 8.
- **AA Art. 10.1 (export subsidies not listed in Art. 9.1):** The Panel found alternatively that in the event Canada's measures did not involve export subsidies under Art. 9.1(a) or (c), Canada's measures still constituted an "other" export subsidy in the sense of Art. 10.1 and exceed its reduction commitment levels in violation of Art. 10.1.
- **GATT Art. II:1(b) (schedules of concessions):** Recalling its earlier finding² that Members' Schedules should be interpreted under the general rules of interpretation set out in the VCLT, the Appellate Body concluded that Canada's limitation of cross-border purchases of fluid milk to "Canadian consumers" by specifying it as a condition in Canada's tariff schedule justified Canada's effective limitation of access to the TRQ to imports for "personal use". But, it found that Canada's value limitation set at Can\$20 for each importation was inconsistent with Art. II:1(b), as there was no mention of such value limitation in Canada's schedule. (This resulted in a partial reversal of the Panel's interpretations and conclusions.)

3. OTHER ISSUES³

- **Burden of proof (AA Art. 10.3):** The Panel noted that AA Art. 10.3 shifts the burden of proof from the complainant to the respondent in cases dealing with export subsidies once the complainant has shown exports in excess of scheduled quantities. It is then for the respondent to prove that export quantities in excess of reduction commitment levels are not subsidized.

¹ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*

² *EC – Computer Equipment*

³ Other issues addressed: submission of evidence (preliminary panel decision); export subsidies under both the AA and ASCM (AA Art. 9.1(a) – "governments or their agents").

CANADA – DAIRY (ARTICLE 21.5 – NEW ZEALAND AND US)¹ (DS103, 113)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	New Zealand, United States	AA Art. 9.1(c)	Referred to the Original Panel	1 March 2001
			Circulation of Panel Report	11 July 2001
Respondent	Canada		Circulation of AB Report	12 November 2001
			Adoption	18 December 2001

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The revised version of the system of government support for domestic milk production and export, as well as Canada's tariff rate quota regime for imports of fluid milk, which were the measures at issue in the original dispute. Canada revised the supply system for sales of domestic milk and a separate scheme governing milk to be sold for export.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- AA Art. 9.1(c) (export subsidies – payments financed by virtue of governmental action):** On the question of whether the Canadian measures were “payments on the export of an agricultural product that are financed by virtue of governmental action” and thus constituted a subsidy under Art. 9.1(c) (which was made in excess of its export subsidy and quantity commitments in violation of Arts. 3.3 and 8 thereof), the Appellate Body reversed the Panel's legal findings as follows. (The Appellate Body, however, did not complete the analyses based on the correct legal standard.)³

(“payments”) The Appellate Body held first that neither prices for milk destined for the domestic market *nor* world market prices could serve as the appropriate basis for determining whether prices charged for export sales constituted a “payment” within the meaning of Art. 9.1 (c). The Appellate Body, while holding that the “average total cost of production” was the appropriate standard for determining whether export sales involve “payments”, did not suggest a specific method for calculating the average total cost of production.

(“financed by virtue of governmental action”) Second, (i) having found, based on a textual approach, that Canada's regulation of supply and price of milk in the domestic market was a “governmental action” and that the term “by virtue of” in Art. 9.1(c) implies that the payments must be financed “as a result of, or as a consequence of” the governmental action, and (ii) having noted that “payments” within the meaning of Art. 9.1(c) cover both the financing of monetary payments and payments-in-kind, the Appellate Body reversed the Panel's finding that the Canadian governmental action in this case “obliged” producers to sell commercial export milk and that there was a demonstrable link between the governmental action and the financing of the payments. The Appellate Body found that although the governmental action established a regulatory regime whereby some milk producers could make additional profits only if they chose to sell commercial export milk, there was *no demonstrable link* between the governmental action and the financing of the payments.

¹ Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States

² Other issues addressed: AA Arts. 3.1 and 10.1.

³ As a result of the Appellate Body's findings, New Zealand and the United States once again referred this matter to the original panel on the date of the adoption of the first compliance Panel/Appellate Body reports. (See *Canada – Dairy (Article 21.5 – New Zealand and US II)*).

CANADA – DAIRY (ARTICLE 21.5 – NEW ZEALAND AND US II)¹ (DS103, 113)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainants	<i>New Zealand, United States</i>	<i>AA Arts. 3 and 9</i>	Referred to the Original Panel	<i>18 December 2001</i>
			Circulation of Panel Report	<i>11 July 2002</i>
Respondent	<i>Canada</i>		Circulation of AB Report	<i>5 December 2002</i>
			Adoption	<i>17 January 2003</i>

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- The system of government support for domestic milk production and export, as well as Canada's tariff rate quota regime for imports of fluid milk, which were the measures at issue in the original dispute. Canada revised the supply system for sales of domestic milk and a separate scheme governing milk to be sold for export.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- **AA Art. 9.1 (c) (export subsidies – payments financed by virtue of governmental action):** The Appellate Body upheld the Panel's finding that the supply of commercial export milk by Canadian milk producers, at a price below the "average total cost of production", to Canadian dairy processors involved export subsidies under Art. 9.1(c) and were accordingly "payments" within the meaning of Art. 9.1(c). The Appellate Body then considered the "role" of the Canadian government and noted that "governmental action" controls "virtually every aspect of domestic milk supply and management," and the effect of these different governmental actions is to secure a highly remunerative price for sales of domestic milk by producers. The Appellate Body concluded that these factors were sufficient to demonstrate the "nexus" between the governmental actions and the financing and hence were covered by Art. 9.1(c). Regarding the method by which to establish the production costs, which are necessary to ultimately determine the existence of "payments", the Appellate Body found that the standard is "an industry-wide average figure that aggregates the costs of production of all producers of milk" and that the industry-wide cost of production could be based on a statistically valid sample of all producers.
- **AA Art. 3.3 (export subsidy commitments):** On the basis of its findings on the export subsidies within the meaning of Art. 9.1(c), which were provided in excess of the quantity reduction commitment set forth in Canada's Schedule, the Appellate Body confirmed that Canada had acted inconsistently with its obligations under Art. 3.3.

3. OTHER ISSUES²

- **Burden of proof (AA Art. 10.3):** Reversing the Panel's finding that it is for the complaining Member to make a prima facie case that the exports in excess of the schedule commitments are subsidized, the Appellate Body said that Art. 10.3 "is clearly intended to alter the generally accepted rules on burden on proof" in respect of whether an export subsidy has been granted to the excess quantities. In this connection, the traditional burden of proof principle (i.e. the burden is on the complainant Member) apply only to the question of whether exports have been made in quantities above export quantity commitment levels. Despite the Panel's misapplication of the burden of proof on the issue, the Appellate Body found that the Panel ultimately arrived properly at the burden of proof situation envisaged by Art.10.3 and that its error did not vitiate any of the Panel's substantive findings under Arts. 3.3, 8, 9.1(c) and 10.1.

¹ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States*

² Other issues addressed: AA Arts. 10.1 and 8.