

BEFORE THE  
WORLD TRADE ORGANIZATION  
APPELLATE BODY

*Canada - Measures Affecting the Importation of Milk  
and the Exportation of Dairy Products  
- Recourse to Article 21.5 of the DSU by the United States*

(AB-2001-6)

ORAL STATEMENT OF THE UNITED STATES

October 26, 2001

1. Thank you Mr. Chairman and members of the Division. My delegation and I have the honor of representing the United States in today's hearing. In our appellee submission, we have responded in detail to Canada's arguments. Therefore, I will limit my remarks today to only those issues that are central to this appeal.

2. As you know, this is our second trip to the Appellate Body in this dispute. After the adoption of the Appellate Body report in the original proceeding by the Dispute Settlement Body, Canada undertook several regulatory and statutory changes related to its dairy export schemes, including the elimination of Special Milk Class 5(e). Canada champions these changes as demonstrating that it no longer provides export subsidies in excess of its reduction commitments under the *Agreement on Agriculture*. However, whether Canada has changed its laws is not the issue before the Appellate Body.

3. The question presented at this stage is whether the export schemes that are in place now as a result of the changes made (at both the federal and provincial levels) in response to the DSB's recommendations and rulings are inconsistent with Canada's obligations under the *Agreement on Agriculture*. As this Body recently stated in paragraph 85 of its report in *United States - Shrimp*:

in carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments, and factual circumstances that related to the measure that was subject of the original proceedings. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and difference measure which was not before the original panel.

4. The changes resulting in the revised export schemes now in place in Canada form the factual basis of this case and the Panel's factual findings regarding the new measures are not within the mandate of this appeal. Before considering the legal questions presented, we believe it would be helpful to set out the relevant facts that were found by the Panel. These include:

a. By law, milk committed for export is excluded from the regime for domestic milk, including the high domestic price. As a result, any milk produced above the level of the domestic quota must be sold for export-only processing (or relegated to animal feed which carries a nominal price set by the government).

b. Exporters of dairy products are provided access to milk at terms and conditions that are more favorable than the price for milk produced for domestic consumption or the terms and conditions of milk imported under the Import for Re-Export Program.

c. By law, any milk that is committed for export cannot be introduced into the domestic market; specifically, all products resulting from the processing of such milk and all components of it *must* be exported.

and

d. Federal and provincial governments monitor and enforce, through stringent financial penalties, the requirement that milk contracted for export not be redirected into the domestic market.

5. The Panel also found that the so-called “commercial export market” is not any different from the domestic market in terms of the input, the product, the buyers and the sellers. The only difference is the price charged to the processors. If the milk is going to be consumed domestically, the processor is charged a high government-set price. If the milk is going to the export market, the processors pay a lower price. The only reason this difference exists is intervention by the federal and provincial governments in Canada. The Canadian government ensures through the artificial segregation of the market for milk that lower-priced milk is

available to processors for export.

6. These are the relevant facts of this case and they cannot be disputed by Canada. Let's turn now to the primary legal questions presented in this appeal. Under Article 9.1(c), there are essentially three requirements: 1) that there is a "payment;" 2) upon the export of agricultural products; and 3) that the payment is financed "by virtue of government action."

7. The United States submits that the Panel properly concluded that Canada failed to sustain its burden of demonstrating that its measures do not satisfy these requirements. First, with regard to the "payment" element, as explained in our written submission, the Panel in this proceeding properly concluded that a "payment" within the meaning of Article 9.1(c) is conferred upon the exporter/processor through the provision of discounted milk for export. As the Panel explained, such a discount exists whether the price of export milk is compared to the price of domestic milk or to the terms of imported milk under the Import for Re-export Program ("IREP"), which are the only other sources of milk available to exporters/processors in Canada. The payment under the replacement measures is essentially unchanged from the payment found by the DSB in the original proceeding.

8. Canada does not (and indeed cannot) dispute that the terms and conditions for milk purchased for export are more favorable than those available for any other source of milk. Instead, Canada attempts to avoid the implication of these facts by arguing that it is not

appropriate to compare the export price to the price of milk from any other source. Canada argues those other sources are “regulated” markets characterized by government intervention.

9. As we explained in our written submission, the Panel properly rejected this argument. Canada’s position finds no support in the text of Article 9.1(c) nor in the DSB’s recommendations and rulings in the previous proceeding. And, equally important, as the Panel explained, it ignores the true nature of the so-called “commercial export market.”

10. First, there is nothing in the text of Article 9.1(c) which suggests that the degree of government intervention is relevant in analyzing the “payment” element. Government intervention is relevant to the second element, government action, not the first. As explained in our written submission, this Body’s reports in both *Canada-Aircraft* and *Canada-Dairy* support the Panel’s conclusion on this point. In both reports, the Appellate Body analyzed the element concerning government intervention separately from the element concerning what was conferred on the recipient. Moreover, this Body did not hesitate in the original proceeding to compare the export price to the price available in Canada’s domestic market to find that milk was provided at a “reduced rate.”

11. Second, as the Panel properly found, Canada’s argument conveniently ignores the fact that the buyer and seller are negotiating in a market that is wholly created by the government for export. That is, the only reason that a processor seeking to market products for export is able to

engage in negotiations with a producer for discounted milk in the first place is that the government permits them to do so because the product must be exported. It is not a true commercial market as Canada would like the Appellate Body to believe.

12. As explained in our written submission, the correct approach in analyzing the “payment” element is to ask whether the export price is lower than what is otherwise available to processors. In Canada, there are two conceivable sources of milk - milk produced domestically and milk that is imported. As I mentioned earlier, it is undisputed that under either of these benchmarks, the price for export milk is more favorable. As such, the processors are receiving a "payment" within the meaning of Article 9.1(c).

13. The second requirement under Article 9.1(c) is that the payment be “upon export.” There is no disagreement that the lower-priced milk must be exported. The third requirement under Article 9.1(c) is that the payment is financed "by virtue of government action.” In any appeal, the two basic questions for the Appellate Body are 1) whether the Panel adopted the correct legal standard; and 2) whether the Panel correctly applied that legal standard to the facts of the case. As we explained in our written submission, the Panel’s conclusions regarding the third element of Article 9.1(c) are sound and should be sustained by the Appellate Body.

14. First, there is the question of whether the Panel applied the correct legal standard. This question is answered quite easily in this case. This is because the Panel applied the same

“indispensability” test that this Body applied in the original proceeding. In this regard, the Panel stated that “although it cannot be inferred that the Appellate Body meant to equate ‘by virtue of’ with ‘indispensability’ as a matter of general interpretation, the Panel does consider that, having regard to the text and context of Article 9.1(c), it does constitute an appropriate standard to be applied under Article 9.1(c) in this case, as it did in the original proceeding.”

15. There is no reason for the Appellate Body to depart from this test now that we are in the Article 21.5 phase of the same dispute. Indeed, in its recent report in *United States - Shrimp*, this Body concluded that the Article 21.5 panel in that case could not re-examine a measure that had already been found by the DSB to be WTO-consistent at an earlier stage of the same dispute. The Appellate Body relied upon Article 17.4 of the DSU which provides that adopted Appellate Body reports “shall be ... unconditionally accepted by the parties to the dispute,” and “therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.”

16. Here, the previous Appellate Body report in this dispute was adopted by the DSB and therefore is considered to have been unconditionally accepted by all parties to the dispute, including obviously Canada. Although the facts have changed, there is no reason that the Panel’s adoption of a legal standard already found by the DSB to be acceptable should now constitute reversible error. Indeed, to do so would contradict the expectations of the parties in this particular dispute and create an incoherence in the DSB’s recommendations and rulings.

17. Canada makes much of the fact that the Panel did not expressly consider the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) in interpreting Article 9.1(c) of the *Agreement on Agriculture*. In the United States’ view, Canada’s submission reads as though it is a party to a different appeal - one involving Panel findings under the SCM Agreement and not the Agriculture Agreement. According to Canada, only by reference to the requirements of Article 1.1(a)(1)(iv) of the SCM Agreement can one understand the requirements of Article 9.1(c) of the *Agreement on Agriculture*. This argument completely disregards the distinct nature of the obligations created by Article 9.1(c) of the *Agreement on Agriculture*. By the express terms of Article 9.1(c), the practices listed there constitute export subsidies for purposes of the *Agreement on Agriculture*. Like export subsidies listed in the Illustrative List in Annex I of the SCM Agreement, such practices are export subsidies by the very terms of the respective agreements; there is no need for further consultation of any provision of another agreement.

18. Indeed, in the original Appellate Body report in this case, this Body found no need to refer to the SCM Agreement as context for interpreting Article 9.1(c). The Appellate Body found that other provisions of the *Agreement on Agriculture* were useful context but did not cite the SCM Agreement. The Appellate Body did look to the SCM Agreement for context in interpreting Article 9.1(a). However, this makes sense as Article 9.1(a) includes the term subsidies which is defined in the SCM Agreement but not the Agriculture Agreement.

19. The terms “payment” and “by virtue of government action” are not defined in the SCM



Agreement so, following the Appellate Body's earlier example in this case, there was no reason for the Panel to look to that agreement to help understand the ordinary meaning of the terms in Article 9.1(c).

20. With regard to the application of the indispensability test to the facts of this case, we consider that it is undeniable that without the creation of the artificial "commercial export market" through the enforced exemption of export milk from the higher domestic price, there would be no lower-priced milk available for processors to purchase for export. This separate so-called "market" for export milk exists for no other reason than to provide exporters with lower priced milk.

21. Because government action is indispensable to the transfer of resources from the producers to the processors, the Panel's conclusion that the requirement under Article 9.1(c) that payments on export of agricultural products are financed "by virtue of government action" is satisfied should be affirmed.

22. Finally, as you know, the United States also included an alternative claim under Article 10.1 of the *Agreement on Agriculture* and a separate claim under Article 3 of the SCM Agreement, which the Panel did not decide for reasons of judicial economy. Following Canada's example, we addressed those provisions in our written submission in case the Appellate Body determined that it was appropriate to complete the legal analysis. We consider that our written

submission sets forth the requirements of each of those claims and have demonstrated that those requirements are met in each instance. Consequently, we will not revisit those points today during our oral statement. Of course, the United States stands ready to answer any questions relating to those claims or to anything else.

23. For the reasons we have stated today and those stated in our written submission, the United States respectfully requests that the Appellate Body sustain the Panel's conclusion that Canada continues to provide export subsidies in excess of its reduction commitments under the *Agreement on Agriculture*, and therefore has failed to implement the recommendations and rulings of the DSB.

24. That concludes our oral statement today. Thank you, Mr. Chairman and other Members of the Division.