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 New Zealand and the United States

(AB-2001-6)

APPELLEE SUBMISSION OF THE UNITED STATES

October 1, 2001

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I. INTRODUCTION

1. On 27 October 1999, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report, and the modified Panel Report in *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*.[1] The DSB found that Canada's Special Milk Class ("SMC") system, which provides milk at reduced prices to processors for the manufacture of dairy products for export, constitutes an export subsidy for purposes of the *Agreement on Agriculture*. The DSB also concluded that Canada exported a greater quantity of subsidized dairy products than is permitted by its reduction commitments on export subsidies and, therefore, breached its obligations under the *Agreement*. Accordingly, the DSB recommended that Canada bring its export subsidy regime into compliance with its export subsidy reduction commitments under Articles 3.3 and 8 of the *Agreement on Agriculture.*

2. As of the close of the agreed reasonable period of time, 31 January 2001, Canada's export subsidies have not been brought into conformity with the DSB's recommendations and rulings, as Canada persists in subsidizing dairy exports at a level that is inconsistent with its reduction commitments. To address Canada's continuing breach of its export subsidy obligations, the United States requested that a panel be convened pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing Settlement of Disputes* ("DSU").

3. The Article 21.5 Panel (hereinafter "the Panel") concluded that Canada's revised export schemes continue to provide export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture,* and that Canada continues to exceed its reduction commitments on export subsidies and, therefore, Canada has breached its obligations under Articles 3.3 and 8 of the *Agreement*. Canada appeals this determination.

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[1] Panel Report on *Canada - Measures Affecting the Exportation of Dairy Products and the Importation of Milk*, WT/DS103; WT/DS113, 17 May 1999 (hereinafter "Panel Report"); Appellate Body Report on *Canada - Measures Affecting the Exportation of Dairy Products and the Importation of Milk*, AB-1999-4, 13 October 1999 (hereinafter "AB Report") .

4. Before turning to the specifics of Canada's arguments, the United States wishes to address the principles at stake in this dispute. The question of whether Canada's revised measures constitute export subsidies has implications that go far beyond trade in dairy products. With discussions already underway on further reform in agriculture, WTO Members do not have the luxury of allowing disciplines already in place to go unheeded. Canada's new measures leave unchanged the most fundamental aspects of the programs found by the DSB to constitute export subsidies. Yet Canada does not consider such exports to be subject to its export subsidy reduction commitments. Canada's disregard of its obligations threatens one of the most critical objectives of the *Agreement on Agriculture*, the limitation and reduction of export subsidies.

5. The United States demonstrates below that the Panel correctly concluded that Canada's revised export schemes continue to provide illegal export subsidies. The Panel properly found that all of the substantive elements of the WTO-inconsistent SMC export subsidies are encompassed in the revised measures. Under both the SMC system and the revised measures, milk at discounted prices is still provided only to exporters. Indeed, prohibitive penalties exist to ensure that any discounted milk or products made from such milk is in fact exported and not diverted into the domestic market. Most importantly, the provision of discounted milk to exporters is accomplished through the indispensable intervention of the federal and provincial governments. Thus, only the form, not the substance, of Canada's export subsidies has changed.

6. Contrary to Canada's contention, the implication of the Panel's conclusion is not that the mere existence of parallel markets for domestic use and for export with different prices constitutes an export subsidy. As explicitly explained by the Panel, "the existence of a 'payment' is not sufficient to conclude that there is an export subsidy." It depends upon "whether that payment was 'financed by virtue of government action.'"[2] Even though the Canadian government no longer micro manages the export milk market by setting the price and volume of specific export contracts, that does not mean that producers' decisions are now market-driven.

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[2] *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products, Recourse by the United States and New Zealand to Article 21.5 of the DSU*, WT/DS103/RW, WT/DS113/ RW, 11 July 2001(hereinafter " Panel Report"), para. 6.30.

This is because the nominally distinct markets in which the producers operate, the domestic and export markets, are contrived by the Canadian government. The lower-priced "export milk" exists and is provided to exporting processors solely by virtue of the Canadian government's legal mandates and careful policing.

7. The United States will demonstrate below that Canada's arguments cannot withstand scrutiny. As such, the Appellate Body should reject those arguments and sustain the Panel's findings.

II. CANADA'S REVISED EXPORT SCHEMES

8. In response to the DSB's recommendations and rulings in this dispute, Canada made certain regulatory changes regarding its dairy exports. Although the new provincial export programs differ in some regards from the Special Milk Class 5(e) that they replace, the objective is the exactly the same: the provision of low priced milk to processors/exporters to make dairy exports commercially viable. The provincial programs vary from each other to some extent but possess several common elements that enable the new programs to accomplish this goal. First, by law, any milk produced above the level of the domestic quota must be sold for export-only processing (or relegated to marginal uses like animal feed that carry a low price mandated by the government). The government mandates that milk that is committed to export may not be introduced into the domestic market; such milk and all components of it (or the resulting dairy products) must be exported by law. Second, exporters of dairy products are provided access to milk at significantly lower prices; they are not required to pay the much higher, regulated price for milk produced within the domestic quota, for which prices are specifically established by provincial authorities, and they are not required to turn to the noncompetitive Import for Re-Export Program ("IREP"). Third, producers are required to aid processors by "pre-committing" to sell in the export market, and export milk must be delivered "first out of the tank." This benefits processors by providing them with a predictable supply of milk. Fourth, the federal and provincial governments monitor and enforce (through financial penalties) the requirement that milk contracted for export may not be redirected into the domestic market.

9. Thus, exporters/processors are furnished with discounted milk solely by virtue of the government controls on milk produced above or outside of domestic quota. By mandating this artificial separation based on the ultimate destination of the milk, the Canadian government ensures that reduced price milk will be offered to processors for export. The producers have no real choice if they produce over-quota or without quota. They can either: 1) sell their milk into the export market for a reduced price; 2) sell their milk into the animal feed market under Class 4(m) at a very low government-set price; or 3) destroy the extra milk at a total loss. The only real commercial option is to sell any over-quota or non-quota milk into the export market. Thus, by restricting the choice of the producer, the government ensures that reduced priced milk will be transferred to processors for export. Absent these restrictions, the processor would have to pay the higher price applicable to milk for dairy products sold into the domestic market.

10. The government further secures the supply of discounted milk for the export market by requiring that producers "pre-commit" their milk destined for the export market and that export milk must be delivered "first out of the tank." This ensures that, by law, producers cannot abandon their obligations to supply milk for export at a discount from the domestic price.

11. These requirements further demonstrate that the export market is not a true commercial market but rather a contrived market created and controlled by the Canadian government. While Canada wishes to create the impression that producers are making a commercial decision to produce for the export market, these two requirements help ensure that export milk is in fact exported and is not redirected into the domestic market. In reality, the system is doing exactly what it did under the Special Milk Class program - arranging for the disposition via export of any milk not permitted to be sold in the domestic market. Under the new scheme, the difference is that the government is forcing the producer to estimate up-front the amount of milk, if any, that cannot be sold into the domestic market (because it is beyond its quota and the class 4(m) market

provides an unattractive return).[3] This benefits the processor by providing it with a more predictable supply of milk for export.

12. The objective of the revised export schemes is exactly the same as the Special Milk Class system. The Canadian government must still ensure the export of any milk that is produced outside of domestic quota in order to maintain the high domestic price. To do so, it must in turn ensure that Canadian dairy exports are commercially viable on the world market – a result that is only possible if export processors have access to milk at a substantial discount from the Canadian domestic price. The government does this by excluding export milk and all components thereof from the domestic market (and ensuring its export through monitoring and enforcement mechanisms). Although the Canadian government no longer directly performs the negotiating activities on behalf of the producers, the result is the same because the prices for export milk are driven by world market prices just as it was under the Special Milk Class 5(e) scheme.

III. ARGUMENT

A. Canada Bears the Burden of Proof

13. Although Canada has not challenged the Panel's conclusion regarding the appropriate allocation of the burden of proof, in order to place the issues on appeal in the proper legal framework, the United States considers it important to expressly recall that the burden of proof rests upon Canada in this proceeding. In most cases, "the burden of proof rests upon the party . . . who asserts the affirmative of a particular claim or defense."[4] This is not the case, however, with respect to a claim under the *Agreement on Agriculture* regarding agricultural export

[3] Canada points to the fact that there are 74 producers that produce only for the export market. Canada misses the point by focusing only on the basis of the producer's decision. Even though these particular producers are not producing within the domestic quota system, the processors buying from these producers are still accessing lower-price milk by virtue of the government's exclusion of export milk from the domestic market.

[4] *United States—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R (23 May 1997) at page 14, quoted in *European Communities—Regime for the Importation, Sale and Distribution of Bananas—Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU (12 April 1999) at n. 255 to para. 6.133).

subsidies. Such claims are governed by the *lex specialis* of Article 10.3 of the *Agreement on Agriculture*. Article 10.3 provides

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

14. As the Panel correctly found (and Canada has not contested), the allocation of the burden of proof pursuant to Article 10.3 is not affected by the fact that the claim is made in the context of an Article 21.5 proceeding.[5]

15. Accordingly, as specified by Article 10.3 of the *Agreement on Agriculture*, Canada continues to bear the burden of establishing that its dairy management measures, including those putatively taken to comply with the DSB's recommendations, have not subsidized dairy exports in excess of its commitment levels under that *Agreement*.[6] As explained below, the Panel correctly concluded that Canada has failed to meet this burden.

B. The Panel Correctly Concluded That Canada's Measures Provide Export Subsidies Within the Meaning of Article 9.1(c) of the Agreement on Agriculture

16. Article 9.1 of the *Agreement on Agriculture* contains six paragraphs, each setting forth a different category of export subsidies, all of which are subject to the *Agreement*'s reduction commitments. Canada's measures constitute export subsidies because they satisfy the criteria

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[5] Panel Report, para. 6.4, citing, *Canada—Measures Affecting the Export of Civilian Aircraft—Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW (9 May 2000) at para. 5.26.

[6] Canada does not dispute that, as of April 2001, its total cheese exports (10,666 metric tons) had exceeded its reduction commitment level (9,076 metric tons) for the marketing year 2000/2001. Panel Report, para. 6.83. Because the complaining parties have satisfied their burden of showing that the commitment levels have been exceeded, pursuant to Article 10.3, the burden shifts to Canada to demonstrate that it is not subsidizing those exports.

contained in Article 9.1(c) of the *Agreement.* Article 9.1(c) identifies the following practice as an export subsidy:

> payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.

17. The foregoing text establishes two conditions for finding an export subsidy to exist under paragraph (c). There must be: (1) payments on the export of an agricultural product and (2) those "payments" must be "financed by virtue of governmental action."[7] The Panel correctly concluded that Canada's revised export schemes fulfill both of these conditions and, thus, constitute an Article 9.1(c) export subsidy.

1. The Panel Correctly Concluded that the Processors/Exporters Receive A "Payment On the Export of an Agriculture Product" Within the Meaning of Article 9.1(c)

18. In accordance with the Appellate Body report in the original proceeding and the Panel report in this proceeding, a "payment" exists within the meaning of Article 9.1(c) if "goods or services are supplied to an enterprise, or a group of enterprises, at reduced rates (that is, at below market-rates) . . . ." Canada does not contest this. Canada also agrees with the Appellate Body and Panel conclusion that the ordinary meaning of the term "payment" encompasses a transfer of economic resources in forms other than money. Finally, Canada does not (and indeed cannot) dispute the Panel's finding of fact that the terms and conditions of milk purchased for the manufacture of export dairy products are substantially better than those available for purchases of any other source of milk.[8]

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[7] Canada does not dispute that these are the appropriate factors for consideration under Article 9.1(c) of the *Agreement on Agriculture*. Canada Appellant Submission, para. 118.

[8] Panel Report, para. 6.10, 6.24-6.25

19. Canada nonetheless contends that there is no "payment" to processors because the prices at which processors are purchasing export milk is a "market" rate, and cannot be properly compared to the prices of any other source of milk, especially the government-regulated price for domestic milk.

20. Canada's argument should be rejected as it advocates an erroneous approach to analyzing the "payment" element in Article 9.1(c) and ignores the true nature of the commercial export milk market as found by the Panel. 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 in Canada.[9]

21. Canada argues that a benchmark analysis is "unnecessary and inapplicable." This is because, Canada claims, the price for commercial export milk is the product of private arm's length transactions, *i.e.* a "market" rate, and thus cannot be compared to a price set in a government-regulated market, *i.e.*, the domestic milk market. Canada asserts that the Panel erred as a matter of law in failing to consider and accept this argument.[10]

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[9] Because a highly restrictive tariff-rate quota otherwise keeps milk imports out of the country, the only other potential source of milk for export products other milk produced for domestic use is the Import for Re-Export Program. Canada has never contended that the Import for Re-Export program offers a source of milk for export processors on terms that are equal or more favorable than the price available for milk that is purchased for the manufacture of export products.

Even if processors could theoretically purchase milk under the Import for Re-Export Program at an equally favorable price, as the Panel correctly found, the terms and conditions upon which that milk is available are not as favorable. This is because Canada has not changed the requirement that a permit must be obtained from the Minister of the Canadian Department of Foreign Affairs and International Trade before imports under the program are allowed. Moreover, the Minister has substantial discretion in deciding whether to issue a permit. Thus, the Panel correctly concluded that "the fact that the Minister has to issue a permit before IREP imports are allowed, that the Minister disposes of a wide discretion in doing so, and that payment of an administrative fee is required, is proof that these imports are not effectively available under equally favorable terms and conditions as those offered for commercial export milk." Panel Report, para. 6.24-6.25

[10] Canada Appellant Submission, para. 44.

22. Contrary to Canada's assertion, the Panel did consider this argument and properly rejected it. First, the Panel considered whether, for purposes of Article 9.1(c), a government-regulated price might not be an appropriate benchmark. The Panel correctly concluded that it is. The Panel reasoned that selecting or rejecting an appropriate benchmark based on the degree of regulatory intervention by government is not "warranted by either the text and context of Article 9.1(c), or the object and purpose of the Agreement on Agriculture."[11] In reaching this conclusion, the Panel recognized that the "'commercial export market' is not any different from the domestic market in terms of sellers, buyers and products which they trade," and that "[t]he only difference between these 'two' markets is Canada's degree of government intervention depending on whether the buyer purchases milk for export or not."[12] In other words, there is essentially a single market for an identical product, milk, that has been artificially segregated by the Canadian government.

23. As the Panel properly concluded, there is nothing in the text of Article 9.1(c) which suggests that the degree of government intervention should affect the interpretation of the term "payment." The Panel recognized that the degree of government intervention is relevant in the analysis of Article 9.1(c), but not with regard to the "payment" element. Canada argues that the elements should be analyzed together or are somehow interdependent.

24. Quite the opposite is true. Separate consideration of the elements under 9.1(c) is supported by both of the Appellate Body reports in *Canada -Aircraft* and *Canada-Dairy.* In both reports, adopted by the DSB, the Appellate Body analyzed the element concerning government intervention separately from the element concerning what was conferred on the recipient. Indeed, in the same paragraph of the *Canada-Aircraft* decision cited by Canada, paragraph 156, the Appellate Body explicitly states that Article 1.1 of the *SCM Agreement* has "two **discreet** elements: 'a financial contribution by a government or any public body' and ' a benefit is thereby conferred.'"[13] The Appellate Body explains, in rejecting Canada's argument that a "cost to government" standard is appropriate for interpreting the "benefit" element, that it is the first

[11] Panel Report, para. 6.16
[12] Panel Report, para. 6.16
[13] Emphasis added.

element of Article 1.1 that is concerned with the government, not the second.[14] Although the order of the elements is reversed under Article 9.1(c) of the *Agreement on Agriculture* (payment is the first element and government action is the second element), the principle that they should be analyzed separately still applies.

25. The Panel also relied upon the context of other paragraphs of Article 9.1(c), and the object and purpose of the *Agreement on Agriculture* as support for its conclusion. The Panel observed that other paragraphs that specifically stipulate the domestic price as the appropriate benchmark, Articles 9.1(b) and (e), do not condition the use of that benchmark upon the degree of government intervention.[15] In addition, the Panel pointed to the preamble of the Agreement on Agriculture as reflecting the fundamental economic reality that government regulation is the norm in agricultural markets rather than the exception.[16] To suggest that only "markets" free of government regulation can be used as benchmarks in determining whether a "payment" occurs under Article 9.1(c) ignores this economic reality. Practically speaking, under such an approach, there would rarely if ever be acceptable markets against which allegedly subsidized prices could be compared.

26. Second, but equally important, the Panel concluded that, contrary to Canada's assertion, the commercial export milk market is not a market in which transactions occur "privately at arm's length."[17] In paragraph 6.21, the Panel found that "the commercial export milk price itself is, in reality, not a mere product of arm's length transactions in a private commercial context." The Panel explained that "the very existence of - or, as Canada puts it - 'access to' that market is premised on some degree of government intervention."[18] In other words, the "export" market for milk also would not exist absent the government's intervention. As noted by the Panel, the only difference between Canada's claimed "two" markets is the degree of government regulation in each. The buyers, the sellers and the product are all the same. Other than price, there is no

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[14] *Canada-Aircraft*, para. 154, 156.
[15] Panel Report, para. 6.18
[16] Panel Report, para. 6.19
[17] See Canada Appellant Submission, para. 42.
[18] Panel Report, para. 6.21

distinction between milk destined for the export market and milk destined for the domestic market. Canada confirmed during the Panel proceeding that milk destined for the export market is not stored or processed separately from other milk.[19] The export milk market exists solely because of government intervention and solely to provide lower-priced milk to exporters. Thus, under Canada's own theory, the price for commercial export milk is also not a market price appropriate for benchmark analysis because it too is the product of a market subject to government intervention.

27. The very fact that Canada's approach would leave no benchmarks (and therefore no method for determining whether the transfer is below market-rates) demonstrates that its approach is unsound. The correct approach in analyzing the "payment" element under Article 9.1(c) involves a comparison between what is received and what is otherwise available and that comparison is unaffected by the degree of government intervention. There is no basis for excluding the price of milk for domestic production from the "market" for purposes of comparison simply because it is more directly regulated. As explained above, there is no legal basis for such an exclusion and there is no factual basis given that the "two" markets are in reality one market that has been artificially segregated by the government specifically for price discrimination purposes.

28. Furthermore, the use of a benchmark and of the domestic market price as a benchmark in particular is supported by the Appellate Body's findings in this dispute and the Appellate Body report in *Canada-Aircraft*. As the Panel here noted, the Appellate Body affirmed the original panel's conclusion that the export milk price was a discounted price and that the provision of discounted milk to processors involved a "payment" under Article 9.1(c). To reach that conclusion, the Appellate Body necessarily used a benchmark analysis and never suggested that the domestic market price (or the IREP for that matter) might be excluded from that comparison because it was subject to a degree of government regulation.

[19] Panel Report, fn 105

29. Similarly, the Appellate Body's interpretation of the term "benefit' in Article 1.1 of the SCM Agreement provides context for the interpretation of "payment" and further support for the use of a benchmark. In *Canada-Aircraft*, the Appellate Body explained that "the word 'benefit,' as used in Article 1.1(b) implies some kind of comparison."[20] The Appellate Body further found that the comparison should be made based upon whether the value of what the recipient received is "on terms more favourable than those available to the recipient in the market."[21]

30. This is the legal standard applied by the Appellate Body in the original proceeding and it remains applicable in this proceeding. Exporters are still receiving milk that is priced lower than what is otherwise available to them, *i.e*, on the domestic market or through the IREP. Indeed, for all practical purposes, the only source of milk otherwise available to Canadian processors - exporters is milk produced in Canada for the domestic market. And that milk is sold at a high price pursuant to regulation (unless, of course, the milk is destined for export). Just as in the case of the Special Milk Class 5(e) scheme, the processor is accessing milk for export at a price that is lower than would be paid by the same processor purchasing the same milk for use in manufacturing dairy products destined for the domestic market. Likewise, producers are providing milk for export at a substantial discount to the market price for milk delivered for domestic consumption. Thus, under the replacement measures, producers are foregoing revenue and processors are receiving a benefit in the same manner that the Appellate Body in the original proceeding found to constitute a "payment" within the meaning of Article 9.1(c).

31. Finally, Canada cannot dispute that the payment (i.e., the provision of lower priced milk) is only available in the case of milk purchased for the manufacture of dairy products destined for the export market. Consequently, the payment constitutes a payment "on the export of an agricultural product" under Article 9.1(c).

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[20] *Canada - Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, para. 157.

[21] *Id*.

2. The Panel Correctly Concluded That the Payments Are "Financed By Virtue of Government Action" Within the Meaning of Article 9.1(c)

a. The Panel Applied The Proper Legal Standard

32. In its previous report in this dispute, the Appellate Body stated that it is necessary to consider the "governmental involvement as a whole" and the action of government bodies "together" to access whether the "payment" from milk producers was "financed by virtue of governmental action."[22] While the Appellate Body did not state that this is the only test, it concluded that if government action is shown to be "indispensable" to the occurrence of the payment, then the requirement contained in Article 9.1(c) that payment be made by "virtue of governmental action" is satisfied.

33. Adopting the Appellate Body's analysis, the Panel in this proceeding applied the "indispensability" test to determine whether the payments under the new export schemes are 'financed by virtue of governmental action." The Panel, which also referred to the "indispensable" test as a "but for" test, asked whether the government action was "necessary or vital to a result [here, the "payment"] which could not take place without it."[23] In reaching its conclusion, the Panel carefully considered the ordinary meaning of the text of Article 9.1(c), its context, and the Appellate Body's previous decision.[24] The Panel's conclusion regarding the proper standard is succinctly summarized in the following two paragraphs of its report:

> 6.39 In conclusion, on the basis of the text and context of Article 9.1(c), the Panel considers that for a payment to be "financed by virtue of governmental action," it must be established that a payment would not be financed, *i.e.* resources would not be transferred from grantor to recipient, *but for* governmental action.

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[22] *Canada-Dairy* AB Report, para. 119

[23] Panel Report, para. 6.40. Canada even agrees that the dictionary definition of "indispensable" is "that cannot be done without; absolutely necessary or vital." Canada Appellant Submission, fn 49.

[24] As explained by the Panel, the dictionary definition of "by virtue of" could encompass a broad range of action from influencing and encouraging to enforcing. In the end, however, the Panel applied the Appellate Body's "indispensability" test.

> 6.40 This textual and contextual meaning coincides with the Appellate Body's interpretation of this term in its report on *Canada-Dairy* as referring to action which is *"indispensable*" to the financing of the payment. An action is indispensable when it is necessary or vital to a result which could not take place without it. Although it cannot be inferred from the Appellate Body report in *Canada-Dairy* 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 case.

34. Like the Appellate Body, the Panel did not equate "indispensability" with "by virtue of" as a general matter, but considered it to be an appropriate standard for assessing the measures in this particular case.[25] Given that the Panel applied the same legal standard adopted by the Appellate Body in its previous report in this dispute, the Panel cannot be found to have erred in its choice of legal standard.

35. Canada's arguments mis-characterize the Panel's analysis and are otherwise confusing. In Canada's view, the test applied by the Panel was legally insufficient because it was "less than a stringent standard."[26] According to Canada, the Panel improperly equated "by virtue of" with "merely influences" or "encourages."

36. A simple review of the panel report confirms that, as explained above, the Panel applied the same "indispensability" test that the Appellate Body applied in the original dispute. It is not surprising that Canada would like to ignore the Panel's actual finding given that it is fatal to the argument being made.

37. Canada points out that the Appellate Body has rejected "but for" tests that are not supported by the ordinary meaning of treaty terms. Canada also observes that in *United States -*

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[25] Panel Report, para. 6.40.
[26] Canada Appellate Submission, para. 55.

FSC, the Appellate Body accepted a "but for" standard because it was grounded in the relevant treaty language. Likewise, as already explained, the Appellate Body in its previous report in this dispute found that, while perhaps not the only test, "indispensable" was an appropriate standard under Article 9.1(c). It is implicit in this finding that the "indispensable" standard is grounded in the language of Article 9.1(c), specifically in the phrase "by virtue of."

38. Citing the *Canada - Periodicals* Appellate Body report,[27] Canada also argues that the Panel erred in its consideration of the levy example set forth in Article 9.1(c), and that the Panel should have concluded from that example that all government action under Article 9.1(c) must include a direct government imposition of financial obligations and a direct government allocation of the proceeds.

39. As noted by both the Panel in this proceeding and the Appellate Body in *Canada-Periodicals*, an example is illustrative, not exhaustive.[28] Canada's argument in reality attempts to restrict the scope of Article 9.1(c) to the types of government action connected with direct producer levies. The ordinary meaning of the text is broader than Canada's proposed limitation. The text does not dictate that "by virtue of government action" only includes circumstances in which there is a government imposition of a levy and direct government allocation of the proceeds.

40. In any event, Canada's dairy export schemes do involve a government imposition of financial obligations on the producers and allocation of the proceeds to the processors. It is through the government-mandated exclusion of export milk from the higher domestic price that the federal and provincial governments impose a lower priced milk on producers and it is this legal exclusion (and government enforcement of this exclusion) that ensures that the proceeds (cheaper milk) are allocated to the dairy processors seeking to export. So, even under Canada's preferred new approach, its export schemes fall within Article 9.1(c).

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[27] *Canada - Certain Measures Concerning Periodicals*, Report of the Appellate Body, AB-1997-2, 30 June 1997.

[28] *Id.* at p.33.

41. Finally, Canada criticizes the Panel for failing to consider the context of the *SCM Agreement* in interpreting the second element of Article 9.1(c). Canada cites the Panel's analysis of Article 1.1(a)(1)(iv) report in *United States - Export Restraints*[29] as support for its argument.

42. First, the fact that the Panel did not expressly consider the context of the *SCM Agreement* in determining the appropriate legal test does not invalidate the Panel's otherwise valid conclusion regarding the proper standard.

43. Second, consideration of the *SCM Agreement* actually supports the Panel's conclusion. As explained more fully below, the original panel in this dispute in considering the *SCM Agreement* as context for the alternative claim under Article 10.1 found that paragraph (d) of the Illustrative List of Export Subsidies was the most relevant paragraph. This conclusion applies equally with regard to Article 9.1(c). Paragraph (d) specifically addresses the provision of export subsidies directly or indirectly through the government-mandated schemes. That situation most closely matches the facts of this case. As explained below in paragraphs 64 to 69, Canada's export measures qualify as export subsidies under paragraph (d).

44. Finally, Canada repeatedly cites *United States - Export Restraints* in support of its Article 1.1(a)(1)(iv) argument. That report is irrelevant in the first instance, and the portions cited by Canada are of decidedly questionable validity given their hypothetical and advisory nature. First, the panel's analysis in that dispute is substantively inapposite to this dispute as it pertained specifically to Article 1.1(a)(1)'s subparagraph (iv) and not to paragraph (d) of the Illustrative List. In fact, that panel explicitly declined to address the relationship between Article 1 and the Illustrative List.[30]

45. Second, the *Export Restraints* panel's legal analysis of Article 1.1(a)(1)(iv) is *obiter dictum* at best and therefore of no legal effect. The panel's application of the

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[29] *United States - Measures Treating Export Restraints As Subsidies*, Report of the Panel, WT/DS194/R, adopted 23 August 2001.

[30] *Id.* at fn 144.

mandatory/discretionary doctrine to the U.S. measures was dispositive of Canada's claims. Nevertheless, the panel proceeded to analyze a purely hypothetical and abstract category of measures not within the panel's terms of reference. The panel's statements regarding export restraints do not relate to its finding on the actual measure at issue in that dispute. As such, the Appellate Body should recognize that they lack legal effect and therefore any persuasive force whatsoever before this tribunal.

46. Notwithstanding the Appellate Body's previous report in this dispute, Canada argues that the test is properly articulated in terms of "a strong affirmative and positive linkage between the government action and the financing of the payments." The United States is somewhat puzzled by this argument as the standard proposed seems less stringent than the one actually applied by the Panel and the Appellate Body in this dispute. It is hard to imagine a stronger, more affirmative or positive linkage than the requirement that government action be absolutely necessary or vital to the transfer of economic resources.

47. This Body need not decide whether some case in the future where the government action is not indispensable to the payment but there is a "strong affirmative and positive linkage" would satisfy the requirements of Article 9.1(c). Here, the Panel applied the same test that was found by the Appellate Body in its previous report in this dispute to satisfy the requirements of the second element of Article 9.1(c). This was correct as a matter of law and should be sustained once again by the Appellate Body.

b. The Panel Did Not Err in Its Application of the Legal Standard to the Facts of This Dispute

48. Once the Panel concluded that the "indispensability" test was the appropriate legal standard in this dispute, it then applied that standard to the facts. The Panel identified two facts which it considered would satisfy the indispensability test if established. These include: 1) that governmental action "prevents Canadian milk producers from selling more milk on the regulated domestic market at the higher price than to the extent of the quota allocated to them;"and 2) that governmental action "obliges Canadian milk processors to export all milk contracted as lower-

priced commercial export milk, and accordingly penalizes the diversion by processors of milk contracted as commercial export milk to the domestic market."[31] The Panel reasoned that if these two facts are established it follows that these government actions have obliged producers to forego revenue and sell to the export market (because they will do so only if they cannot sell to the domestic market, whether because their quota is filled, or they anticipate it will be filled, or because they do not hold quota). The Panel understood that producers can be expected to behave in an economically rational manner by seeking to maximize profits.

49. The Panel then reviewed the evidence and concluded that federal and provincial laws do prevent Canadian producers from selling milk produced outside of their quota on the domestic market.[32] The Panel also found that, by law, processors must export all milk contracted for the manufacture of export products and that the government enforces this requirement through its federal and provincial auditing authority and substantial financial penalties.[33]

50. Having properly found these two facts, the Panel concluded that the governmental action was indispensable to the transfer of resources from the producers to the processors. The Panel explained that, in the absence of either of these governmental measures, lower-priced milk would not be provided to the processor/exporters. Without the limitation (*i.e.* quota) on the amount of milk that a producer can sell in the higher-priced domestic market, an economically rational producer would not chose to sell in a lower-priced export market. Without the government requirement that milk contracted for export products must be exported and the government enforcement of that requirement, export milk would be diverted into the domestic market thereby undermining the low export price as well as the high domestic price. Both governmental measures are necessary to transfer resources from producers to processors/exporters in the form of lower-priced milk.

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[31] Panel Report, para. 6.42
[32] Panel Report, para. 6.50-6.54
[33] Panel Report, para. 6.56- 6.75

51. This application of the indispensability standard to the facts of this dispute is correct and should be sustained by the Appellate Body. In its response to the Panel's discussion of these two facts and the application of the indispensability test to them, Canada argues that the Panel improperly adopted a "two-part effects test." Canada explains that the two categories of government measures are not "indispensable" to the provision of lower-priced milk to exporters.

52. So, at first blush, it appears that Canada is challenging the Panel's legal conclusion regarding the application of the indispensability test to the facts. However, upon closer review, it becomes clear that Canada is actually challenging the facts as found by the Panel. In paragraph 82 of its appellant submission, Canada begins by arguing that "the fact that quota prevents producers 'from selling more on the regulated market, at a higher price, than to the extent of the quota allocated to them' is not governmental action that finances the payment..." However, Canada then explains that this is because "[t]his measure, [quotas], have nothing to do with the producer's decision to produce or sell milk for the commercial export market or the price and timing of the transaction."

53. This is a direct challenge to the fact as properly found by the Panel that producers in Canada, being economically rational, will sell on the export market (the less profitable market) only after they have filled their domestic quota or in anticipation of filling their domestic quota. In addition to being an impermissible factual challenge, Canada's argument is nonsensical. Only an economically irrational producer would seek to sell in a lower-priced market when it could sell in the higher-priced market. Given that Canada carries the burden of proof in this dispute, it could have presented evidence to the Panel that Canadian producers are economically irrational. But it did not.[34] Even if it had, DSU Article 17.6 of the DSU provides that a factual review is outside the mandate of the Appellate Body.

54. Likewise, in paragraph 83, Canada argues that the penalty provisions do not finance payments because a penalty for diverting export milk into the domestic market "only comes into

[34] The reality is that such evidence does not exist because Canadian producers are economically rational.

play once the transaction between the producer and processor is complete." The Panel rejected the same argument in finding, as a matter of fact, that penalty provisions do deter processors from diverting export milk into the domestic market. The Panel aptly observed that "one would not forgo the making of an income tax declaration because the tax inspector only audits one's books later on."[35]

55. Canada also criticizes the Panel's so-called "two-part test" as improperly focusing on the effects of domestic regulation instead of on the measures taken in response to the rulings and recommendations of the DSB.

56. First, the Panel did not consider the "effects" of the government action in the manner suggested by Canada. Canada claims that the Panel in this dispute 'based its entire decision ... on the presumed reaction of private entities to governmental intervention in the domestic market." To the contrary, the decision was not based upon a "presumed" reaction because the governmental action at issue in this dispute guarantees a specific result, no less than if the government were to mandate that producers write a check to processors. The government action at issue in this dispute guarantees that milk produced outside of quota will become an exported dairy product and that it will be available for export products at a lower price. The difference is that the provision of the subsidy in this case is indirect while a government mandate that producers write a check is more direct. There is no question that the ordinary meaning the "by virtue of" encompasses an indirect provision of the payment.[36]

57. Second, the Panel's consideration of what Canada's calls "domestic regulation" was really the artificial segregation of the milk market into a "domestic" market and an "export" market. Such consideration was not inappropriate and, in any event, was not the only governmental action reviewed. By considering the segregation of the markets, the Panel

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[35] Panel Report, fn 156.

[36] The Panel noted that the New Shorter Oxford English Dictionary definition of 'by virtue of" included "by the power or efficacy of; now, on the strength of; in consequence of; because of," and the Black's Law Dictionary defined the phrase as "by force of, by authority of, by reason of." Panel Report, 6.35. Indeed, the ordinary meaning of "by virtue of" suggests that an effects test is appropriate under Article 9.1(c).

analyzed government intervention in the export market, not just the domestic market. Furthermore, the Panel considered government action as a whole in this dispute, as required by the Appellate Body in its previous reports. The whole of the Canadian governmental action included the fact that any milk produced above the level of the domestic quota must be sold for export-only processing (or relegated to marginal uses like animal feed that carry a low price mandated by the government). The milk that is committed to export may not be introduced into the domestic market; such milk and all components of it (or the resulting dairy products) must be exported by law. It also included the fact that exporters of dairy products are provided access to milk at significantly lower prices in comparison to all other sources of milk available to them. Further, it included the fact that the federal and provincial governments monitor and enforce the requirement that milk contracted for export may not be redirected into the domestic market. And, finally, it included the fact that the government imposes severe financial penalties for diverting milk contracted for export into the domestic market. All of these facts led the Panel to conclude that government action was "indispensable" to the producers providing lower price milk to processors. It was not "the mere existence of parallel markets with lower export prices," as alleged by Canada, but, rather, the pervasive government intervention to make Canadian dairy exports commercially viable on the world market. The export market would not exist absent governmental action. It is a "market" wholly contrived by the Canadian government.

58. Finally, Canada condemns the Panel for allegedly failing to take into account the "deregulation" of the export market in terms of the changes made in response to the DSB recommendations and rulings. The United States does not dispute that Canada made some regulatory changes, but the question in this dispute is whether the measures now in place in Canada constitute export subsidies within the meaning of Article 9.1(c). To reach its conclusion in this proceeding, the Panel applied the legal test articulated as an appropriate test by the Appellate Body to the facts of the case before it. This was an appropriate use of applicable legal precedent. Canada's implicit suggestion that the use of Appellate Body report should be limited to the facts of that case is fallacious.

59. In sum, the Panel's choice of legal standard and its application of that legal standard to the facts as it found them is legally correct and should be sustained by the Appellate Body. The Panel correctly concluded that Canada did not satisfy its burden of establishing that the measures in question do not constitute export subsidies under Article 9.1(c). A review of the factual record establishes that it is only through governmental action that processors are provided with milk at discounted prices, contingent on export. Thus, the Panel's conclusion that processors are receiving payments "financed by virtue of government action" should be upheld.

C. In the Alternative, Canada's Measures Are Inconsistent with Article 10.1 of the Agreement on Agriculture

60. Although the Panel exercised judicial economy and did not review the alternative Article 10.1 claim, Canada has addressed this claim in its appellant submission. Accordingly, in the event that the Appellate Body undertakes to complete the analysis of the alternative claim under Article 10.1 of the *Agreement on Agriculture*, the United States provides the following response to the argument of Canada.

61. If the Appellate Body concludes that the revised export schemes are not export subsidies within the meaning of Article 9.1(c) of the *Agreement on Agriculture*, those measures should nevertheless be found to be export subsidies for purposes of Article 10.1 of the *Agreement*.

> Article 10.1 provides:
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> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

62. In *United States - Tax Treatment of Foreign Sales Corporations*,[37] the Appellate Body stated that the obligations under Article 10.1 come into play when three factors are present: (1) there is a subsidy not identified in Article 9.1 of the *Agreement*, (2) that subsidy is contingent on

[37] WT/DS108/AB/R, adopted 20 March 2000 (hereinafter "*United States - FSC*")

export, and (3) the subsidy results in, or threatens to lead to, circumvention of a Member's export subsidy commitments.[38]

63. Therefore, the initial task here, should the Appellate Body fail to find export subsidies within the meaning of Article 9.1, is to determine whether the revised export schemes in Canada are export subsidies for purposes of Article 10.1. In *United States - FSC*, the Appellate Body drew upon the *SCM Agreement* as context for interpreting Article 10.1 of the *Agreement on Agriculture*.[39]

64. In the original panel report, the Panel found, because the question is one of export subsidies in this case, it is more appropriate "to examine what practices are considered under the *SCM Agreement* to be 'export subsidies', rather than to examine how that Agreement defines the more general concept of a "subsidy" in its Article 1."[40] In doing so, the original panel considered paragraph (d) of the Illustrative List of Export Subsidies contained in Annex I to the *SCM Agreement* to be the most relevant paragraph. Paragraph (d) specifically addresses the situation where a government provides inputs, indirectly through a government-mandated scheme, to exporters "on terms or conditions more favorable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption."

65. The original panel concluded that there are several conditions that must be fulfilled to satisfy paragraph (d): (1) the goods must be provided on terms or conditions more favorable than for provision of like or competitive products in the production of goods for domestic consumption; (2) the goods must be used in production for export; (3) the provision of goods must be by governments or mandated by them, either directly or indirectly; and (4) the goods provided to export processors must be available on terms or conditions more favorable than those commercially available on world markets to those exporters.[41]

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[38] *United States - FSC,* AB Report, para. 135-154.
[39] *Id.* at para. 136.
[40] *Canada-Dairy* Original Panel Report, para. 7.126.
[41] *Canada-Dairy* Original Panel Report, para. 7.128

66. Like the Special Milk Classes, Canada's revised export schemes satisfy each of these elements. First, as explained above, dairy processors continue to have access to milk for dairy products for export that is priced on more favorable terms than would otherwise be available to such processors for milk in the domestic market. The price differential continues to be substantial.

67. Second, the lower prices are only available for milk used in the production of export products. As explained above, all milk purchased through the commercial export milk market must be used in products that are exported. There are severe penalties if such products are ultimately sold into the domestic market.

68. Third, the lower-priced milk is provided by Canada's "governments or agencies directly or indirectly through government-mandated schemes." Again, as explained above, the provision of lower-priced milk for use in the production of dairy products for export is only possible through government intervention, including the government-mandated and enforced exclusion of such milk from the domestic market.

69. Finally, the terms and conditions on which milk is made available to processors for export are more favorable than those available to them on world markets. In fact, the facts underlying the original panel's finding on this point have not changed. For all practical purposes, commercial imports of fluid milk for processing cannot enter Canada due to import restrictions.[42] Thus, if processors want to export dairy products, their only choice is to use domestically

[42] See *Canada-Dairy* Original Panel Report para. 7.53-7.55, 7.131.

produced milk.[43] Obviously, this is not a choice which is "unrestricted and depends only on commercial considerations" in the sense of the footnote to Paragraph (d).

70. The next factor in the analytical framework suggested by the Appellate Body is to consider whether the availability of discounted milk pursuant to the revised export schemes is "contingent on export performance."[44] As explained above, under the revised export schemes, the availability of discounted milk is dependent on use of the milk in the manufacture of dairy exports.

71. The only question that remains in determining whether Article 10.1 applies to the revised export schemes is whether the export subsidy thereby conferred "results in, or threatens to lead, to circumvention of export subsidy commitments." The Appellate Body's construction of this requirement in *United States - FSC* is also pertinent in this dispute.

72. In *United States - FSC*, the Appellate Body began its interpretation of the relevant text with the words "export subsidy commitments," "because the meaning of those words defines the obligations that are to be protected under Article 10.1."[45] The Appellate Body found that the words "export subsidy commitments" refers to the obligations assumed by WTO Members under Articles 3, 8 and 9 of the *Agreement on Agriculture.*

73. The Appellate Body found that Article 10.1's prohibition on the circumvention of export subsidy commitments is designed to prevent Members from "evading" their "export subsidy

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[43] As noted earlier in footnote 9, Canada argues that world market terms are available to exporters through the Import for Re-Export Program. Canada argues that the Minister's discretion to issue permits is not a barrier to it being a competitive source of milk for exporters and that the Panel failed to apply the principle that discretionary measures are not WTO-inconsistent. As noted earlier, that principle is irrelevant here because the WTO-consistency of the IREP is not at issue. Second, the question of whether the terms and conditions of the IREP are as favorable as the commercial export milk market is a question of fact that Canada is precluded from challenging before the Appellate Body pursuant to DSU Article 17.6. In any event, it is clear that the Panel was correct that the requirements of the IREP demonstrate that its terms and conditions are less favorable. These include: 1) the fact that the Minister has broad discretion as to whether to issue a permit for import under this program; 2) the fact that an importer has to obtain a permit in the first place; and 3) the fact that there is an administrative fee.

[44] *United States - FSC*, AB Report, para. 141.

[45] *United States - FSC*, AB Report, para. 144.

commitments."[46] Significantly, the Appellate Body concluded that: " . . . under Article 10.1 it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'. It suffices that 'export subsidies' are applied in a manner . . . which *threatens to lead to circumvention* of export subsidy commitments."[47] In determining whether circumvention of export subsidy commitments is likely to result, the Appellate Body concluded that the structure and other characteristics of the measure are pertinent.[48]

74. Under the revised export schemes, the Canadian government requires that over-quota or non-quota milk be excluded from ultimate consumption in the domestic market. The direct consequence of that exclusion is that such milk must be used to produce either products for export or animal feed. Processors who export are free from any limitation on the amount of over-quota or non-quota milk for which they contract. Similarly, milk producers may provide as much such milk to processors for export as those producers are willing to pre-commit. In other words, the availability of discounted milk for export is confined only by the export opportunities available to Canada's dairy product processors. The revised export schemes lack any internal limit or control on the volume of discounted milk going to processors for export. Indeed, Canadian federal authorities repeatedly emphasized in implementation consultations with the United States and New Zealand that those authorities had no intention of monitoring the volume of milk exported pursuant to the new export regime. Consequently, the export schemes, and the resulting subsidized exports, are not subject to any limitation.

75. The absence of any constraints on the use of an export subsidy was an important consideration for the Appellate Body in determining whether an export subsidy was likely to threaten to lead to circumvention of export subsidy commitments in *United States - FSC*.

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[46] *Id*. at para.148. The original panel found it unnecessary to construe the second part of Article 10.1 in the original dairy report as the parties all agreed that in circumstances where the volume of exports exceeded the level indicated in a Member's export subsidy commitments and an export subsidy other than one identified in Article 9.1 was applicable, circumvention of those commitments within the meaning of Article 10.1 had occurred. See *United States - FSC*, Original Panel Report, para. 7.122-7.123.

[47] *United States - FSC,* AB Report, para. 148.

[48] *Id*. at para. 149.

76. It is for this same reason that Canada's revised export schemes threaten to lead to circumvention of Canada's export reduction commitments on dairy products. For the reasons stated, Canada's revised export schemes constitute an export subsidy under Article 10.1 if this Body does not conclude that such subsidies are encompassed by Article 9.1(c) of the *Agreement on Agriculture*. Additionally, because there is no constraint on the availability of the export subsidy created by the revised export schemes, those export subsidies are unlimited in scope as are the exports which they foster. As a result, those revised export schemes threaten to lead to the circumvention of Canada's reduction commitments in precisely the same manner that caused the Appellate Body to conclude in *United States - FSC* that the United States had breached Articles 3.3 and 8 of the *Agreement*.

77. Moreover, the United States would note that in this case there is not only threatened, but actual circumvention of Canada's export commitments under Canada's revised export measures. As the Panel observed and Canada does not contest, Canada's exports of cheese have in fact already exceeded (or for purposes of Article 10.1, circumvented) the limitations to which it committed itself in the *Agreement on Agriculture*.[49] Thus the threat of additional, unchecked circumvention of Canada's dairy export subsidy commitments is no mere possibility—it is underway.

78. Canada posits that its new export programs do not fall within Article 10.1 because they are not subsidies within the meaning of Article 1.1(a)(1)(iv) or paragraph (d) of the Illustrative List. Canada's arguments regarding the proper interpretation of these provisions are convoluted, unsupported and seem just an attempt to distract from the proper straightforward analysis.

79. The original panel correctly concluded that paragraph (d) is the most relevant paragraph for purposes of considering the context of the *SCM Agreement*. To interpret paragraph (d) in a manner consistent with the ordinary meaning of its text, as the original panel did in this case, does not "impermissibly graft a new type of 'financial contribution' onto the definition of

[49] See *supra* footnote [3] and Panel Report para. 6.83.

'subsidy'" as alleged by Canada. Measures which qualify as export subsidies under the Illustrative List by definition satisfy the requirements of Article 1 of the *SCM Agreement*. As a matter of definition, Article 3 of the *SCM Agreement* mandates that all subsidies described in the Illustrative List are subsidies for purposes of Article 1 of the *SCM Agreement*.

80. Canada again cites the panel report in *United States - Export Restraints*[50] for support of its arguments. As explained above, that report is irrelevant in the first instance to this dispute, and the portions cited by Canada constitute an advisory opinion which should be given no legal effect by the Appellate Body.

81. Because the revised export schemes satisfy each of the criteria identified in paragraph (d) of the Illustrative List, the revised schemes are export subsidies for purposes of the *SCM Agreement*. As the *SCM Agreement* is part of the context of the *Agreement on Agriculture*, the fact that the schemes constitute a subsidy under the Illustrative List supports a finding that the revised export schemes are export subsidies under Article 10.1 of the *Agreement on Agriculture*.

D. Canada's Revised Export Schemes Constitute Prohibited Export Subsidies Under Article 3 of the SCM Agreement

82. In the event that the Appellate Body decides to complete the analysis regarding the claim brought under Article 3 of the *SCM Agreement*, the United States incorporates by reference the arguments set forth in its first and second submissions before the Panel. In short, because, as explained above, Canada's revised export schemes fall within paragraph (d) of the Illustrative List of Export Subsidies, they constitute a *per se* violation of *SCM Agreement* Article 3. The government of Canada, at both the federal and provincial level, provides milk to dairy processors for export "on terms and conditions more favorable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption." Canada's revised measures are *ipso facto* an export subsidy and therefore prohibited.

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[50] *United States - Measures Treating Export Restraints as Subsidies*, WT/DS194/R, Report of the Panel, adopted 23 August 2001.

IV. CONCLUSION

83. For the foregoing reasons, the United States requests that the Appellate Body affirm the Panel's conclusion that Canada's revised export schemes provide export subsidies within the meaning of Article 9.1(c) of the Agreement on Agriculture.

84. In the alternative, should the Appellate Body deem it necessary to complete the Panel's analysis, the United States requests that the Appellate Body find that Canada's revised export schemes are inconsistent with Article 10.1 of the Agreement on Agriculture.

85. Finally, should the Appellate Body deem it necessary to complete the Panel's analysis with regard to Article 3.1 of the Subsidies and Countervailing Measures Agreement, the United States requests that the Appellate Body find that Canada's revised export schemes provide prohibited export subsidies within the meaning of the Article 3.1 of the SCM Agreement.