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- Public Affairs - International Trade -

Disenfranchising the Negotiators:
Consequences of the WTO Appellate Body's Interpretation of Article 9.1(c)

The WTO Dispute Settlement System, including the Panels and the Appellate Body (AB), are important components of the world-trading system. Their decisions are used to clarify the WTO Agreements and to resolve disputes between WTO Members. Although the Dispute Settlement System plays an important role in clarifying the Agreements through its decisions, it cannot add to or diminish the rights and obligations in the Agreement. This is made absolutely clear in Articles 3(2)[1] and 19(2)[2] of the Dispute Settlement Understanding.

In the three Reports that it issued in the *Canada – Dairy Exports* case, the AB has interpreted Article 9.1(c) of the WTO Agreement on Agriculture in a manner that goes beyond simple clarification and assistance. Rather, the AB's interpretation of Article 9.1(c) arguably violates

[1] DSU Article 3(2) reads as follows,
"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. *Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.*" [emphasis added]

[2] DSU Article 19(2) reads as follows,
"In accordance with paragraph 2 of Article 3, in their findings and recommendations, *the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements*." [emphasis added]

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Articles 3(2) and 19(2) by changing the obligations in the Agreement on Agriculture thus adding to or diminishing those rights and obligations.

Article 9.1(c) establishes that "payments" made by third parties on the export of an agricultural product are export subsidies if they are "financed by virtue of governmental action". The AB has interpreted "payment" by considering it exclusively from the perspective of the third party making the payment. The AB did not consider whether the recipient actually received any benefit from the "payment". The result is that an export subsidy could exist even if no one was actually benefited. Under the general definition of "subsidy" in Article I of the *Subsidies and Countervailing Measures Agreement*, there can be no subsidy without a benefit.

The AB recognized that "financed by virtue of governmental action" required that the "payment" made by the third party be financed by a governmental measure. Although the AB said that there had to be a sufficiently close connection between the government measure financing the payment and the payment itself, in practice the AB only required a tenuous connection. So long as a government measure exists that offsets some or all of the third party's costs, it can finance the payment regardless of whether the government directs that a payment be made or compels the third party to participate in the export market. In fact, the government need not be aware that its measure finances an export payment. The result is that an export subsidy can exist without the type of governmental involvement ordinarily associated with a subsidy."[3]

These findings expose WTO Members to considerable uncertainty. WTO Members can only use export subsidies up to the bound volume and value limits set out in the individual Schedules which describe their obligations. By finding that an Article 9.1(c) export subsidy could be given by a private party, unrelated to government, without government having any knowledge, direction or control over the subsidy, the AB has undermined the Members' ability to control their use of export subsidies and has undermined their ability to ensure that they only use export subsidies up to their bound volume and value limits. If WTO Members are not in a position to

[3] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 87

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control all of the export subsidies provided to support exports from agricultural products, how can they be expected faithfully to adhere to the limits in their Schedules?

Through its interpretations of "payment" and of "financed by virtue of governmental action", the AB has gone beyond the limits of the Dispute Settlement Understanding. Its interpretations in *Canada – Dairy Exports*, have added to and diminished the rights and obligations of Article 9.1(c) of the *Agreement on Agriculture.*

Article 9.1(c)

Article 9.1 of the *Agreement on Agriculture* lists a number of practices which are deemed to provide export subsidies.

Ordinarily, an export subsidy is a subsidy that is contingent on export performance. A subsidy is a financial contribution by government, such as a direct payment or the purchase of goods that, by definition, must confer a benefit on the recipient. A subsidy becomes an export subsidy if it is tied to exports in the sense that the subsidy is only granted if there are actual exports or if the government granting the subsidy expects that there will be exports.

Article 9.1(c)[4] describes a unique type of export subsidy program. Here, an export subsidy is deemed to exist if,

(i) there is a "payment";
(ii) if the payment is "made on the export of an agricultural product"; and
(iii) if the payment is "financed by virtue of governmental action".

[4] Article 9.1(c) reads as follows,
"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."

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In *Canada – Dairy Exports,* the AB interpreted "payment" and "financed by virtue of governmental action" in rather novel ways. The AB did not interpret "made on the export" because the Parties agreed that the Canadian program being considered was tied to dairy exports.

Payment - Absence of "Benefit"

The AB has accepted that a subsidy requires that there be a "financial contribution" by government that confers a benefit on the recipient and that both elements must be present.[5] Despite this finding, the AB interpreted Article 9.1(c) so that "benefit" is not required for the export subsidy to exist.

The AB made this decision by focusing exclusively on the role of the third party in making the "payment". Because it found that "payment" in Article 9.1(c), is a "transfer of economic resources" from the third party grantor to the recipient,[6] the AB considered that a "payment" exists if there is a transfer of economic resources regardless of whether the recipient actually received any benefit from the transfer.

This interpretation is clear from a review of the AB's findings in *Canada – Dairy Exports*. For the Canadian dairy system, the AB considered that the sale of commercial export milk at a price below the total industry average cost of production transferred economic resources from the third party to the recipient.

> "In these particular circumstances, we considered that the determination of whether 'payments' are made depends on a comparison between the price of CEM (Commercial Export Milk) and an 'objective standard or benchmark which reflects the proper value of the [milk] to its [provider]. We found that, in the circumstances of this dispute, the standard for determining the proper value of CEM is the average total cost of production of the milk (the COP standard), as this standard represents the economic resources the producer invests in the milk. If CEM is sold at less than its proper value, "payments" are

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5 *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products,* AB-1999-4, WT/DS103/AB/R, WT/DS113/AB/R, 13 October 1999, at para 87

6 *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 85

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> made, because there is a transfer of the portion of economic resources not reflected in the selling price."[7]

The value of the economic resources transferred was determined by considering the total cost of production of the dairy products and the export price of the dairy products. As the total industry average cost of production represented the value of the exported dairy products, the AB concluded that any export price set below total industry average cost of production transferred economic resources from the third party seller to the recipient. As the sale involved a transfer of economic resources, the third party made a "payment" on the sale equivalent to the difference between the total average cost of production of all milk produced and the price of the specific milk that it sold.[8]

The AB's decision to ignore "benefit" in determining whether there is an export subsidy under Article 9.1(c) is flawed. As noted above, "benefit" is a crucial element that cannot be overlooked in determining whether a subsidy has been granted. Unless it can be established that a "payment" or a "financial contribution" has conferred a benefit, no one has been subsidized by the payment. Without "benefit" to the recipient, there is no subsidy.

The definition of subsidy in Article 1.1 of the SCM Agreement makes it clear that WTO Members can make financial contributions to anyone without fear of criticism so long as those financial contributions do not confer a benefit. This is readily seen from SCM Article 1.1(a)(1)(iii), which defines the provision of goods or services, and the purchase of goods, by government to be a financial contribution.

For example, government can provide goods or services at below market rates, or purchase goods at above market rates, and confer a significant benefit on the recipient. In these cases, the government action will constitute a subsidy for purposes of the SCM Agreement.

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[7] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 88

[8] It is interesting to note that the Canadian Commercial Export Milk system allowed price to be freely negotiated between producers and processors. The AB recognized that the export price of milk was freely negotiated between these parties but discounted this fact in deciding that the value of the milk was established by considering the total average cost of production of the milk.

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However, governments also engage in extensive procurement programs under which they acquire everything from ships to office supplies. These purchases are "financial contributions", for purposes of SCM Article 1.1(a)(1)(iii) but would not confer a benefit on the recipient if they are made on commercial terms and at market rates. As the AB noted, this practice does not confer a "benefit" on the recipient as compared with what would have been available to the recipient in the marketplace. On this basis, the financial contribution by government in these cases does not confer a benefit and, therefore, is not a "subsidy".

By focusing on the role of the third party grantor and the value of the transaction to the grantor, it is possible that a "payment" can be made on the export sale of agricultural products at a price at or above the prevailing world market price. For example, if a third party grantor and recipient enter into a contract for the sale of agricultural products at the prevailing market price, the recipient would not receive a "benefit" because it would be purchasing the products at the commercial rate. Likewise, if the recipient offers the third party grantor a premium above the prevailing market price to secure a steady supply of the agricultural product, the recipient cannot be said to receive a benefit from that purchase for purposes of the SCM Agreement. In fact, it may be easier to argue that the premium paid by the recipient increases the cost of the agricultural product relative to other like products available in the market. In both examples, the recipient receives no benefit from its purchase of these agricultural products. But, if the third party grantor sells at a price below its total average cost of production, it will make a "payment" on the sale of these products by transferring economic resources to the recipient. Therefore, an Article 9.1(c) export subsidy would exist even if the export price is above the market price leaving us in a position where an export subsidy exists but neither party has received a benefit.

Who is subsidized by the export subsidies in Article 9.1(c)? Based on the AB's interpretation, it is not necessary for anyone to be subsidized, it is only necessary that a "transfer of economic resources" be made from the grantor to the recipient. The AB, in effect, finds that if a border measure, and this could be a tariff, enables a producer to obtain a higher price for its domestic sales than from its exports, any such exports which occur at less than the cost of production

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receive an export subsidy. It is elementary international trade that such practices are "dumping" and if injurious should be addressed under the Anti-dumping Agreement.

What is the value of the export subsidy granted under Article 9.1(c)? Based on the AB's interpretation, the value is measured from the perspective of the grantor and represents their loss on the sale. It is unlikely that the theoretical economic resources transferred by the third party grantor on the sale make any difference to the recipient since it is purchasing agricultural products the true value of which is measured in real market terms.

The question is not whether the third party grantor left any money on the table when it made the sale, or whether it sold the agricultural products at a loss. The question is whether the sale was made at a price that conferred a "benefit" on the recipient (eg., the sale was made at below market price or some other direct or indirect benefit to the recipient was included in the sale). Only by answering this question can we determine whether there was an export subsidy. By failing to address this question, the AB has considered only one side of this coin.

It is possible that the drafters intended to distinguish "payments" in Article 9.1(c) from "financial contributions" in the definition of "subsidy" in the SCM Agreement. If this were the case, we could reasonably expect that the AB would interpret subsidies differently in these two Agreements. However, it would be unreasonable to ignore "benefit" in determining whether there is an export subsidy under Article 9.1.

Article 9.1 deems a number of specific practices to confer export subsidies. Article 1(e) of the *Agreement on Agriculture* defines export subsidies to be *subsidies* contingent on export performance, including the export subsidies listed in Article 9.1. Subsidy is not defined in the *Agreement on Agriculture,* but is defined in the *Subsidies and Countervailing Measures Agreement* as a financial contribution by government that confers a benefit on the recipient. The AB has determined that benefit is a crucial element in establishing the existence of a subsidy that is determined by comparing the financial contribution received by the recipient to what it could have achieved in the market. Because of the interrelation of these Articles, and the AB's

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previous determinations, we cannot take "benefit" out of Article 9.1(c). Unless the "payment" at issue confers a benefit on the recipient, there can be no subsidy and no export subsidy.

The problem of ignoring "benefit" and focusing exclusively on the cost of production was also raised by the United States at the December 18, 2001 meeting of the Dispute Settlement Body. During that meeting, the Members considered whether to adopt the AB Report in *Canada – Dairy Exports, First Recourse to Article 21.5*. In challenging the use of cost of production to determine whether there is payment, the United States representative said,

> "There was nothing in the Agreement on Agriculture to suggest that Members had agreed that the cost of production for a private party, not even a government entity, would be relevant in determining whether another private party was receiving a payment under Article 9.1(c)."[9]

The requirement that there be a "benefit" is crucial to establishing the existence of an Article 9.1(c) export subsidy. By ignoring "benefit", the AB has issued a flawed report. As a consequence of its finding, the scope of what constitutes an export subsidy under Article 9.1(c) has been improperly expanded. Instead of limiting the Article 9.1(c) export subsidies to cases where a "payment" conferred a benefit on the recipient, the AB's finding has expanded this group to cases where any "payment" is made by the third party grantor regardless of whether a benefit is conferred.

Financed by Virtue of Governmental Action

The AB's finding on "financed by virtue of governmental action" is even more troubling than its decision to ignore the requirement that there must be a "benefit" for a subsidy to exist. The AB found that there is no need for government to compel or direct that the payment be made, or to even be aware that the payment is being made. As a result, the AB effectively eliminated any real role for government in providing Article 9.1(c) export subsidies.

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[9] DSB, Minutes of Meeting, WT/DSB/M/116, held 18 December 2001, circulated 31 January 2002, para 34.

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Article 9.1(c) requires that the payment made on the export of the agricultural product be financed by virtue of governmental action. The AB correctly noted that the payment must be financed by virtue of governmental action to constitute an export subsidy, but that not all government programs would meet this financing requirement. There must be a sufficient causal connection between the government financing and the payment for an Article 9.1(c) export subsidy to exist – the mere existence of a government measure would not suffice.

The AB determined that "governmental action" in "financed by virtue of governmental action" was qualified "by virtue of" and held that this limited the scope of possible governmental action that could finance a payment.[10] By making this finding, the AB should have been able to establish that there had to be a rational connection between the payment and the government measure financing the payment. It would have been reasonable for the AB to determine that not all government measures "finance" payments by third parties. For example, the AB could have determined that only government measures directing that "payments" be made or compelling the third party to make export sales "finance" payments by the third party. However, the AB chose to interpret the financing element much more broadly.

The loose connection between the "financing" and the "payment" that it required to establish an Article 9.1(c) export subsidy is evident in the AB's consideration of Canada's commercial dairy export system.

First, the AB considered that Article 9.1(c) covers the full range of governmental action by which governments regulate, control or supervise individuals, including action to regulate the supply and price of milk on the domestic market.[11] Consequently, Article 9.1(c) is all encompassing; it potentially includes any governmental measure that falls within the broad definition of measures that regulate, control or supervise individuals.

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[10] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 130

[11] *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, WT/DS103/AB/RW, WT/DS113/AB/RW2, 3 December 2001, at para 112

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Second, the AB considered that Article 9.1(c) does not require any form of government compulsion or direction to export.

> "We observe that Article 9.1(c) does not require that payments be financed by virtue of government "*mandate*", or other "*direction*". Although the word "action" certainly covers situations where government mandates or directs that payments be made, it also covers other situations where no such compulsion is involved."[12]

Thus, there is no need for direct or indirect government control or direction over the export subsidy. Government simply has to adopt a measure.

Finally, because the payment has to be "financed" *by virtue of* governmental action, rather than be financed by the government, the AB considered that although significant aspects of the financing might not involve government, it must play a sufficiently important part in the process by which the private party funds payments.[13]

In *Canada – Dairy Exports*, *Second Recourse to Article 21.5*, the AB was faced with a Canadian dairy system that included extensive regulation of the domestic market and de-regulation of the export market for milk. Although Canada continued to control the production and sale of milk for consumption on the domestic market, the AB accepted that Canada had de-regulated production and sale of milk for use in dairy products destined for export. Canadian producers and processors were able freely to negotiate contracts for the purchase and sale of milk outside the domestic system. In making this determination, the AB accepted that government did not control or direct the Commercial Export Milk market and did not compel producers or processors to participate, to any degree, in this market. In light of the requirement that there be a sufficient connection between the governmental action and the payment made on export to demonstrate that the payment was financed by virtue of governmental action, it seemed reasonable that by de-

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[12] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 128

[13] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 132 - 133

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regulating production and sale for export, Canada had withdrawn the governmental action needed to "finance" the payments.

However, the AB looked past Canada's de-regulation of the export market to its continued regulation of the domestic system to find the governmental measure that "financed" payments on the export of dairy products from Canada. The AB found that Canadian producers holding quota allowing them to produce and sell on the domestic market could use the more lucrative sales on the domestic market to cross-subsidize their sales on the export market. The AB did not openly criticize Canada for maintaining a regulated domestic system, it simply found that this purely domestic measure financed payments for purposes of Article 9.1(c).

The AB rejected Canadian arguments that it no longer regulated the export market and allowed producers to freely decide to produce milk for export sale. The AB stated that,

> "Certainly, producers decide for themselves whether and when to sell [Commercial Export Milk]. However, governmental action in the domestic market goes further than simply creating a regulatory environment in which producers choose to make export payments using their own resources. Rather, as we have said, Canadian governmental action is instrumental in providing a significant percentage of producers with the *resources* that enable them to sell [Commercial Export Milk] at below the costs of production."[14]

The AB went on to state that even government measures that unintentionally enabled third parties to make "payments" or enabled those "payments" through "cross-subsidization" (a concept not included in or disciplined under the WTO) "financed" those payments.

> "We have explained that the text of Article 9.1(c) applies to any "governmental action" which "finances" export "payments". The text does not exclude from the scope of the provision any particular governmental action, such as regulation of domestic markets, to the extent that this action may become an instrument for granting export subsidies. Nor does the text exclude any particular form of financing, such as "cross-subsidization". Moreover, the text focuses on the consequences of governmental action ("by virtue of

[14] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 147

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> which") and not the intent of government. Thus, the provision applies to governmental action that finances export payments, even if this result is not intended."[15]

Thus, the AB considered that the ability to sell milk on the domestic market "financed" payments by Canadian producers on their sales for export. The fact that Canada did not direct, mandate or compel producers to produce or sell for export, that Canada did not direct that payments be made on the export of dairy products and that Canada's domestic dairy system was not considered WTO-inconsistent were not relevant considerations. The mere existence of a domestic dairy policy was sufficient to find that the payments made by producers on the export of these agricultural products were "financed by virtue of governmental action."

The consequences of this decision goes well beyond Canada's dairy industry. As a result of this decision, there is virtually no role for government under Article 9.1(c) beyond adopting a measure. Government is not required actively to participate in the export subsidization. Government does not have to provide funds or direct that payments be made or compel its producers or processors to participate in the export market. Article 9.1(c) can encompass situations in which government actively participates in the export subsidy, but based on the AB's interpretation, government may adopt measures that "finance" payments and confer Article 9.1(c) export subsidies without having the slightest idea that any of this has happened.

For example, assume that a WTO Member negotiates a Tariff Rate Quota (TRQ) and relies on this TRQ to protect its domestic producers from imported products. The TRQs successfully increases the price of the products in the domestic market and gives domestic producers higher returns on their product.

The domestic producers decide to sell their agricultural products on the export market at prices covering their incremental or cash costs of production (ie., at prices below their total average cost of production). The third party producer can make sales at prices below total average cost

[15] *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,* AB-2002-6, WT/DS103/AB/RW2, WT/DS113/AB/RW2, 20 December 2002, at para 148

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of production because the revenue generated through their domestic sales allow them to cover all of their cost of production.

As the export sales are made at below total industry average cost of production, the AB decision dictates that there is a transfer of economic resources from the third party producer to the recipient purchaser in the export market. Because the TRQ had the intended effect of increasing the domestic market price, there will be a sufficient connection between the TRQ and the third party payment to demonstrate that the TRQ "finances" the payment made by the third party producer.

Therefore, through adoption of a TRQ intended to protect the domestic market, the WTO Member may unwittingly have financed the payment for purposes of Article 9.1(c) even though it took no steps to compel export sales to be made or to set the sale price of those goods exported or used in the production of exports.

This outcome is patently unfair. Why should a WTO Member acting in good faith and adopting measures that respect its WTO obligations be found to have provided export subsidies to support the sale of agricultural products in these circumstances.

This finding is particularly unfair in light of the clear requirement that WTO Members limit their use of export subsidies to the bound volume and value limits set out in their Schedules. It is reasonable to assume that WTO Members only agreed to be bound by these limits if they believed that they had the ability to restrict their use of export subsidies to these limits. It is unreasonable to assume that WTO Members would have accepted this obligation while agreeing to allow third parties, outside their knowledge or control, to grant export subsidies. No doubt, WTO Members would have ensured that they had the ability to control their export subsidies before taking on this obligation. Prior to the AB's interpretation in *Canada – Dairy Exports* this was the case because a subsidy required a financial contribution by government that conferred a benefit; government had the ability to control its use of export subsidies. Under the new rules, third parties may be found to be granting export subsidies without government knowledge or control. In light of the AB's decision, government no longer has an effective ability to control

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export subsidies. In these circumstances, government can no longer say that it knows whether or not it is providing export subsidies within the bound volume and value limits of its Schedule to the *Agreement on Agriculture*.

Consequences of the AB's Interpretation

The AB's interpretation of Article 9.1(c) in *Canada – Dairy Exports* will have an impact well beyond the Canadian dairy industry. The finding that "payment" does not include the concept of "benefit" is flawed, but it has become the new standard. As a result of this finding, a range of commercial practices by third parties in all WTO Member States will now be Article 9.1(c) export subsidies.

Because the AB does not require any explicit action by government to participate in and direct the provision of export subsidies under Article 9.1(c), many WTO Members may be financing payments through what they believed to be innocuous domestic programs and be providing export subsidies in excess of their bound commitments while honestly having no idea that, according to the rules as interpreted by the AB, they were granting export subsidies.

Articles 3(2) and 19(2) *Dispute Settlement Understanding* prohibit the WTO Dispute Settlement Body and the AB from issuing recommendations and rulings that add to or diminish the rights and obligations in the WTO Agreements. The AB plays an important role in clarifying the Agreements, but its role is strictly limited; it cannot change the negotiated balance of rights and obligations in the Agreements. Despite this clear limit, the AB has issued an interpretation of Article 9.1(c) that has radically changed the rights and obligations agreed to by the WTO Members when the *Agreement on Agriculture* was negotiated.

Other commentators have also noted that the AB has issued decisions that have changed the nature of the WTO agreements. John Magnus, in a recent presentation to the Canadian Bar Association, said that decisions by the Dispute Settlement Body have "minted and imposed new

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obligations" on WTO Members.[16] Mr. Magnus referred to the changes wrought by these decisions as "mission creep".[17]

Alan Wolff, former Deputy US Trade Representative and USTR General Counsel has also raised concerns noting that,

> "… dispute settlement panels are acting outside their authority and are in effect re-writing the WTO agreements contrary to international law as well as the intent of the parties to the WTO."[18]

U.S. Government officials have pointed out that the WTO Dispute Settlement Body, including the Appellate Body, has not properly interpreted or applied the Agreement on Antidumping. Article 2105 of the U.S. Trade Act of 2002 directed the Secretary of Commerce, the Secretary of State, the Secretary of the Treasury, the Attorney General and the U.S. Trade Representative to submit a report to Congress regarding whether WTO Dispute Settlement Panels and the Appellate Body have issued reports that have added to or diminished the rights and obligations of the U.S. under the Agreement. The Report issued in response noted that,

> "… panels and the Appellate Body must ground their analyses firmly in the agreement text and reasonable, permissible interpretations of the WTO agreements by the Members. Although these fundamental tenets of the dispute settlement system are clear, aspects of several recent reports by WTO panels and the Appellate Body have departed from them."[19]

In response to a more recent General Accounting Office Report, *Standard of Review and Impact of Trade Remedy Rulings* (GAO-03-824, July 2003), officials in the U.S. Department of Commerce and U.S. International Trade Commission complained that WTO decisions have

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[16] John Magnus, *Recent WTO Cases Involving Trade Remedy Measures: Flawed Decisions Emerging from a Flawed System*, Presentation at the Canadian Bar Association's Fourth Annual International Law CLE Conference, Ottawa, Ontario, June 6, 2003, at page 1.

[17] John Magnus, *Recent WTO Cases Involving Trade Remedy Measures: Flawed Decisions Emerging from a Flawed System*, Presentation at the Canadian Bar Association's Fourth Annual International Law CLE Conference, Ottawa, Ontario, June 6, 2003, at page 2.

[18] Alan Wm. Wolff, *Major Problems with WTO Dispute Settlement*, Remarks made at the Global Business Dialogue, Inc., Washington, D.C., September 26, 2002, at page 2.

[19] *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and the Appellate Body, Report to the Congress Transmitted by the Secretary of Commerce,* December 30, 2002, at page 8.

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improperly interpreted the standard of review that must be applied by domestic authorities considering antidumping cases.

Although the foregoing comments deal with interpretation of the Antidumping Agreement, they point to a developing problem; decisions by the Appellate Body are rewriting the WTO and upsetting the balance of rights and obligations negotiated by the Parties. Unless effective disciplines to guide application of DSU Articles 3(2) and 19(2) are introduced, we can expect more of these intrusive decisions from the AB.

The *Canada –Dairy Exports* case points to the need for WTO Members to take back their Agreement. The WTO is an agreement intended to achieve economic benefits for the Member States. The rights and obligations in the WTO are a balance that was negotiated to achieve these results. Through the give and take of negotiations, Members assumed some obligations in the expectation of receiving other rights. For better or worse, the WTO represents the balance negotiated by the WTO Members and only those Members have any right to change that balance. The AB's finding has thrown this negotiated balance of rights and obligations out of balance.

The Doha Round negotiations offer WTO Members an opportunity to take back their Agreement and right the negotiated balance of rights and obligations. This objective cannot be achieved through quantitative formulae and modalities. This objective requires a qualitative approach. Negotiators must carefully examine the impact of AB decisions and interpretations on the WTO Agreement in light of light of the balance of rights and obligations negotiated by the WTO Members and correct any imbalances introduced by AB decisions. Only by fully understanding the impact of AB activities can negotiators hope to reverse and correct their impact on the Agreement. This will not be an easy task – certainly it will not be as easy as entering tariff rates into a computer program and waiting for the computing device to dictate the results – but it is a necessary step.

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