respect to misrepresentation. Therefore, the prohibition on mixing generally is not necessary to secure compliance with the grading requirements of the CGA, the Competition Act, or any other law or regulation identified by Canada in its submissions.

Question 107: It appears that non-registered wheat varieties need not be visually distinguishable. If so, how can elevator operators avoid improperly grading such wheat on receipt? (*see* Canada's second written submission, para. 119).

36. Canada's statement that "most wheat grown in the United States is of varieties not registered in Canada" is misleading in the context of its answer to Question 107. Furthermore, Canada provides no citations or evidence in support of this assertion. In U.S. states that are adjacent to the Canadian border (and whose farms are often nearer to a Canadian grain elevator than a U.S. grain elevator), registered Canadian varieties are quite commonplace. In the U.S. state of Montana, for example, fifty percent of durum wheat planted in the spring of 2000 was of a Canadian variety.[15] Even so, this wheat is treated as "foreign" and is given less favorable treatment than like Canadian wheat.

Question 109: With reference to Canada's defence under Article XX(d), could Canada please indicate the level of compliance section 56 of the *Canada Grain Act* and section 57 of the *Canada Grain Regulations* seek to secure with the various laws referred to in Question 80? Please provide support for the level indicated.

37. Canada's answer to Question 109 does not satisfy Canada's burden regarding its affirmative defense under Article XX(d). As set forth in our written submissions,[16] Canada must prove that Section 57 of the CGA and Section 56(1) of the CGR are necessary in order to secure compliance with the laws set forth by Canada in its answer to Question 80. Securing a "very high level" of compliance in no way proves that the measures at issue in this dispute are necessary in order to secure compliance with the grading provisions of the CGA, the Canadian Wheat Board Act and accompanying regulations, or the Competition Act. Canada also fails to demonstrate how these discriminatory measures are justifiable under the Article XX chapeau. Making foreign grain alone subject to additional discriminatory requirements when Canada's stated concerns (*e.g.*, misrepresentation, grading) apply equally to Canadian grain and foreign grain constitutes arbitrary and unjustifiable discrimination.

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[15] Montana Agricultural Statistics Service, Montana Wheat Varieties 2003 (July 18, 2003) (Exhibit US-30).

[16] *See, e.g.*, Second Written Submission of the United States, paras. 40-42; *see also* U.S. comments to Question 80, above.