

*Canada – Measures Relating to  
Exports of Wheat and Treatment of Imported Grain*

(WT/DS276)

**Executive Summary of the Oral Statement  
of the United States of America  
at the Second Meeting of the Panel**

October 31, 2003

## **CANADA HAS BREACHED ITS OBLIGATIONS UNDER GATT ARTICLE XVII**

1. Article XVII:1 contains three distinct legal obligations. First, Canada undertakes that its State Trading Enterprise – the Canadian Wheat Board (“CWB”) – will “act in a manner consistent with the general principles of non-discriminatory treatment” prescribed in the GATT 1994. Second, Canada undertakes that the CWB will make its purchases and sales “solely in accordance with commercial considerations.” And third, Canada undertakes that the CWB will “afford the enterprises of the other [Members] adequate opportunity . . . to compete for participation in” the CWB’s sales. A breach of any of these obligations is sufficient to establish that Canada has violated Article XVII. This is not a novel interpretation of Article XVII. The *Korea Beef* panel reached the same conclusion.

2. As Canada itself points out, the word "undertakes" – which appears in Article XVII – means "to commit oneself to perform" or to "guarantee." Canada therefore guarantees that the CWB will act consistently with these principles of Article XVII. The CWB is not acting consistently with the principles in Article XVII, and Canada has done nothing to guarantee that the CWB will act according to the principles of Article XVII.

3. The CWB export regime viewed in its entirety – including the CWB’s mandate, its unchecked exercise of its exclusive and special privileges, and the lack of any countervailing supervision or discipline by the Government of Canada – necessarily results in sales that breach Article XVII’s standards. The CWB export regime provides the CWB with greater pricing flexibility and less risk exposure than that experienced by an enterprise acting in accordance with commercial considerations and customary business practice. According to the CWB’s own analysis, the CWB “manages risk to an extent not available in the open market[.]” The CWB uses this greater flexibility to act in a non-commercial manner and in ways that do not provide the enterprises of other Members an adequate opportunity to compete for participation in the sales of the CWB.

4. Indeed, Canada itself states that the CWB's pricing strategy in export markets is "primarily" based on commercial considerations. Why does Canada need this qualifier, that its decisions are "primarily" based on commercial factors? This is because the CWB also makes sales based on non-commercial considerations – a violation of Article XVII.

5. An example of this non-commercial behavior is the protein or quality giveaway. The CWB pays premiums to farmers for high quality wheat, even when these premiums are not justified by demand for high quality wheat in third-country markets. These premium payments result in high quality wheat production that exceeds demand by 32 percent. The CWB then uses this excess production of high quality wheat to act in a non-commercial manner. Having an excess of high quality wheat means that for certain transactions, the CWB provides a price discount for high quality wheat so that it may meet the price competition for lower quality wheat in a given market.

6. This behavior is not in accordance with commercial considerations, because the CWB is

not getting the full replacement value for the high quality wheat it is selling in the market. The CWB gives away quality because its mandate – to maximize sales of Canadian wheat on the world market – combined with the CWB's incentives and special privileges, necessarily result in this behavior that is not in accordance with commercial considerations. Wheat sellers in third-country markets are not afforded an adequate opportunity to compete for participation in the CWB's sales when the CWB gives away quality in this manner. The quality giveaway also demonstrates how, in this case, a violation of the standards set forth in Article XVII:1(b) necessarily leads to a violation of the non-discriminatory treatment standard in Article XVII:1(a).

7. Article XVII:1(b) requires Canada to guarantee that the CWB will afford the enterprises of other Members an "adequate opportunity . . . to compete for participation in" the CWB's sales. Canada must guarantee that the CWB affords buyers and sellers of wheat an adequate opportunity to compete in the marketplace, and the CWB does not do so.

8. Canada also tries to argue that Article XVII:1(b) only requires that the CWB give other enterprises with CWB-like special and exclusive privileges an adequate opportunity to compete in CWB sales. This defies logic and is again unsupported by the text of Article XVII. The obligation under Article XVII:1(b) is not limited to competition among enterprises with special and exclusive privileges. Article XVII:1(b) does not limit which enterprises shall be afforded an adequate opportunity to compete in the CWB's sales, and does not limit the obligation to only those enterprises with privileges similar to those granted to the CWB. Canada must guarantee that the CWB affords all enterprises an adequate opportunity to compete in the marketplace, and the CWB does not do so.

9. Finally, Article XVII:1(b) requires the CWB to act commercially, not merely rationally. While Canada attempts to limit the scope of its obligations under Article XVII:1(b), the text of the Article makes clear that Canada has an obligation to ensure that the CWB acts in accordance with commercial considerations.

#### **CANADA'S MEASURES VIOLATE GATT ARTICLE III:4**

10. The measures at issue in this case are specific provisions of the Canada Grain Act ("CGA"), the Canada Grain Regulations ("CGR") and the Canada Transportation Act ("CTA") that provide less favorable treatment for foreign grain.

11. In this dispute, it appears that the parties agree that like products are those classes of grain that have similar intrinsic characteristics and end uses. For example, U.S. corn and Canadian corn are like products, as are U.S. durum wheat and Canadian durum wheat. Nevertheless, even if one were to look at specific varieties rather than classes of grain in order to establish like products in this dispute, in fact, U.S. wheat farmers and Canadian wheat farmers not only grow the same class of wheat (*e.g.*, durum), but they grow several identical varieties of durum wheat (*e.g.*, Kyle). Yet even this identical product – U.S. Kyle durum wheat -- when exported to

Canada, is subject to less favorable treatment than Canadian Kyle durum wheat merely because the U.S. wheat is foreign.

12. There is also no question that the measures at issue here affect the distribution and transportation of like products. Section 57 of the CGA and Section 56 of the CGR are measures that affect the entry of grain into Canada's bulk grain handling system, part of the internal transportation and distribution network for grain in Canada. The rail revenue cap and producer rail car measures also affect the internal transportation of grain in Canada.

13. Section 57 of the CGA states quite simply that no grain elevator in Canada may receive foreign grain. Under Section 56(1) of the CGR, the mixing of foreign grain is prohibited. Both measures are *de jure* prohibitions on the handling of foreign grain by Canadian grain elevators.

14. Canada admits in its second submission that foreign grain is subject to different treatment than Canadian grain. Canada argues that special authorization can be obtained for foreign grain and that this need for special authorization results in no less favorable treatment. However, these authorization procedures – contrary to Canada's assertions – impose real burdens that result in less favorable treatment. The default prohibition applied to foreign grain impedes commercial opportunities for U.S. grain and makes it more burdensome for U.S. grain to enter into and move through Canada's bulk grain handling system.

15. Special authorizations granted to foreign grain by the Canadian Grain Commission ("CGC") do not remedy what is otherwise an Article III:4 violation. As the Appellate Body concluded in *United States – Section 211*, the imposition of an additional regulatory hurdle only for foreign like products violates Canada's national treatment obligation. []

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16. The Canadian measures at issue here provide less favorable treatment to all imported grain. However, I would like to take a moment to focus on shipments of U.S. wheat to Canada. The barriers to U.S. wheat flowing through the Canadian bulk grain handling system are readily apparent, as are the additional costs associated with the extra regulatory burdens placed on U.S. wheat as opposed to like Canadian wheat. My focus here is not on trade effects – which the United States does not need to demonstrate for purposes of this Article III:4 analysis – but only on the additional burdens that result in less favorable treatment and less favorable competitive conditions for U.S. wheat.

17. Let us assume that a U.S. farmer has grown a Canadian variety of wheat, so that the U.S.

product being exported to Canada and received by a Canadian grain elevator is exactly identical to the Canadian product being shipped to the same Canadian grain elevator.

18. Canada's statements that obtaining special authorization from the CGC is a cost-free process is an untenable supposition. Elevators can freely accept Canadian wheat under the CGA and CGR. All wheat, whether domestic or foreign, must be inspected and weighed. However, in addition to these general requirements, accepting U.S. wheat places the following additional burdens on the elevator operator: (1) the CGC must be notified 24 hours in advance of the pending arrival of a U.S. wheat shipment; (2) a CGC employee who is paid by the elevator operator must be on site when the U.S. wheat is unloaded; (3) this CGC employee must monitor the flow of U.S. wheat into the elevator bins and take a sample of the wheat; (4) only the CGC employee can seal the bins once the U.S. wheat is unloaded; (5) when U.S. wheat is discharged from the elevator, the elevator operator must once again give the CGC 24 hours notice; (6) the CGC employee must go through the procedure of unsealing the bin(s), sampling, and monitoring the outward flow of the wheat; and (7) the elevator operator must provide the CGC with the vehicle license numbers or railcar numbers for all U.S. wheat shipments, along with the final destination for that U.S. wheat.

19. These are not insignificant burdens, and these burdens are not imposed on Canadian wheat. When U.S. wheat is received, the grain elevator must pay for special CGC inspection and monitoring services, thereby making the cost of receiving U.S. wheat higher than the cost of receiving like Canadian wheat. There are also indirect costs such as the time it takes an elevator operator to comply with the special requirements for U.S. wheat, and the additional regulatory uncertainty resulting from the need to contact the CGC in advance and rely upon the CGC's inspectors. These additional requirements and costs for U.S. wheat shipments apply even if a Canadian variety of wheat is shipped from the United States to the Canadian grain elevator. The additional costs and regulatory requirements for U.S. wheat make U.S. wheat a less attractive option for elevator operators.

20. Canada's transportation measures also afford less favorable treatment to imported grain. As set forth in our second submission, only Canadian grain can take advantage of producer rail cars under Section 87 of the CGA. The Canadian Government itself states on the Agriculture and Agri-Food Canada website that only Canadian grain producers may apply to the CGC for a producer rail car. Foreign grain receives less favorable treatment, as it is denied access to producer cars. Access to these producer cars provide Canadian grain producers with increased transportation flexibility and lower costs that are unavailable to like foreign grain.

21. Canada's rail revenue cap also violates Article III:4. The revenue cap, which only applies to shipments of domestic Canadian grain, reduces transportation costs and uncertainty regarding those costs, thus providing a tangible benefit to domestic grain. Shipments of U.S. grain are not subject to the cap. Since there is a significant penalty for shippers who exceed the rail revenue cap, shippers have an incentive to charge lower fees for shipments of Canadian grain than for

shipments of like foreign grain.

### **CANADA'S ARTICLE XX(d) DEFENSE FAILS**

22. Canada attempts to invoke Article XX(d) of the GATT 1994 to justify the discriminatory measures under Section 57 of the CGA and Section 56(1) of the CGR. However, Canada fails to meet its burden of proof with regard to this affirmative defense.

23. In attempting to establish its Article XX(d) defense, Canada goes on at length about its varietal development system. However, Canada's grain segregation measures treat imported grain less favorably than like domestic grain even when Canadian varieties – approved through Canada's varietal development system – are grown in the United States and exported to Canada.

24. Canada has not demonstrated that its grain segregation measures based on origin – excluding foreign grain from the bulk handling system and prohibiting mixing of foreign grain – are necessary to secure compliance with the varietal development and registration system under the CGA or with provisions of Canada's unfair competition and consumer protection laws.

25. Grain can be identified based not on whether the grain is of foreign or domestic origin, but based on the intrinsic characteristics of the grain itself, such as protein content. Such an alternative measure, which does not impermissibly treat foreign grain less favorably than like domestic grain, is available if Canada wishes to pursue its objectives.

26. Not only are Canada's grain segregation measures unnecessary to secure compliance with the CGA and Canada's unfair competition laws, but the measures also constitute unjustifiable discrimination. Canada's concerns about misrepresentation of grain apply to all grain, and therefore all grain – not just foreign grain – should be subject to additional regulation and special CGC oversight.

### **CANADA'S MEASURES VIOLATE ARTICLE II OF THE TRIMs AGREEMENT**

27. Finally, Canada's grain segregation requirements and discriminatory rail transportation measures violate Article 2 of the TRIMs Agreement. These measures fall squarely within the Illustrative List 1(a) of the TRIMs Agreement as mandatory and enforceable measures that provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain. Similarly, the rail revenue cap and producer car programs are mandatory and enforceable measures within the meaning of the Illustrative List. These measures provide cost advantages in the form of lower rail transportation rates to those shippers that choose to ship Canadian grain rather than foreign grain.

28. These TRIMs, which are inconsistent with Article III:4, are necessarily inconsistent with Article 2 of the TRIMs Agreement.