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

(WT/DS276)

Oral Statement of the United States at the First Panel Meeting

June 6, 2003

1. Thank you, Madam Chairperson, and members of the Panel. The United States appreciates this opportunity to present its views on the issues raised in Canada's requests for preliminary rulings. In the U.S. submissions of May 27 and May 28, the United States explained its views in detail. Therefore, in this statement, I will not repeat everything in those submissions, but will instead summarize the main points.

2. With respect to Canada's request for a ruling under Article 6.2 of the DSU, the United States submits that Canada has no basis to ask for the dismissal of any of the U.S. claims. To the contrary, each of the U.S. claims meets the standard set out in Article 6.2, which is to "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

3. What Canada is really asking is for this Panel to impose a new requirement on complaining parties: namely, for the panel request to summarize the arguments to be presented in the first submission. However, such a requirement is not included in Article 6.2 of the DSU. Moreover, the Appellate Body in *EC Bananas* clearly rejected this notion.

4. Also, the Canadian idea, if adopted, would result in procedural disputes in each and every case brought under the DSU. If the panel request has to summarize the complaining party's arguments, every subsequent submission of the complaining party would be subject to challenge that one or more arguments, or sub-arguments, should be disregarded as being inadequately summarized in the panel request. This process would not result in any additional fairness or better reports. Instead, it would just encourage preliminary motions and procedural disputes.

5. As noted in the U.S. submission, Canada's summarization of Appellate Body reports leaves out many of the most pertinent findings.

6. First, Canada omitted mention of the key distinction between the *claims* – which must be included in the panel request – and the *arguments* in support of those claims – which need not be included. In fact, the Appellate Body in *EC-Bananas* made clear that a panel request may adequately state a claim if the request simply cites the pertinent provision of the WTO agreement.

7. The Appellate Body confirmed this construction in *Korea Dairy*. The Appellate Body did find a problem with the panel request: namely, the request cited too broadly to the *Agreement on*

Safeguards and Article XIX of the GATT 1994, so that it was difficult to determine which obligations in those provisions were at issue. But, the Appellate Body repeated the distinction, set forth in *Bananas,* between claims and arguments. And, even though the panel request in *Korea Dairy* was insufficiently precise, the Appellate Body nonetheless did *not* dismiss the claims, as Canada asks this Panel to do.

8. This brings me to the second principle in the Appellate Body reports that Canada fails to note. That is, *even if* a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself. In *Korea Dairy,* the Appellate Body found that even although the panel request was inadequate, the responding party had failed to show prejudice, and dismissal was not warranted.

9. The third principle that Canada fails to recognize is that procedural objections must be raised at the earliest possible opportunity, and not for the first time in a letter sent after the establishment of the panel. In the *FSC* dispute, the Appellate Body upheld the rejection of an Article 6.2 claim, because the responding party had failed to raise the matter during the consultations or during the DSB meetings that established the panel.

10. Likewise, in this case, at no time prior to the establishment of this Panel did Canada so much as intimate that it considered the panel request in any way deficient. Instead, Canada waited until after the Panel was established to offer its objection.

11. I will now turn to Canada's specific arguments regarding the purported insufficiency of the U.S. panel request.

12. The first Canadian argument regarding the GATT Article XVII claim seems to be based on the Article 6.2 requirement to identify the specific measures at issue. Canada argues that: "The foundation for the U.S. claim is in various '*laws, regulations and actions*' that are *nowhere described.*" This argument is hard to credit. Quite clearly, the phrase "laws, regulations, and actions" in the U.S. panel request refers to the Canadian measures laid out in the request. These measures include:

- the establishment of the Canadian Wheat Board ("CWB");
- granting the CWB exclusive and special privileges; including
- the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of Canada and the CWB;
- the exclusive right to sell western Canadian wheat for export and domestic human consumption;
- government guarantees of the CWB's financial operations, and
- the failure of the Government of Canada to ensure that the CWB makes its purchases or sales of wheat in accordance with the requirements of Article XVII.

In short, only by ignoring the plain language of the U.S. panel request can Canada assert a misunderstanding of the measures that are at issue in this dispute.

13. Canada also expresses concern that the panel request does not specify which of the two obligations in Article XVII(1)(b) of GATT 1994 are covered in the panel request. But the panel request is clear on this point: the request cites *both* obligations because the United States submits that the Canadian measures are inconsistent with *both* of these obligations.

14. Finally, Canada argues that the U.S. Article XVII claim must be dismissed because it does not "set out a brief summary of the [U.S.] legal case." The premise of Canada's argument, however, is simply incorrect. As I explained previously, the requirement under Article 6.2, as confirmed by the Appellate Body, is to set out the claims – not a summary of the arguments.

15. Turning to the GATT Article III and TRIMs Agreement claims, Canada first argues that the rail car allocation claim fails to "identify the specific measures at issue." In light of the circumstances of this case, Canada's argument is disingenuous.

16. During the consultations, the U.S. delegation read a statement from an official Canadian website indicating that Canada had adopted a measure providing differential railcar allocations for Western Canadian and imported wheat. Obviously, Canada is aware of this measure referred to in our panel request – even if they denied such knowledge at the consultations.

17. Moreover, six weeks after the consultations, and after the United States had filed its panel request, Canada finally confirmed that it indeed established rules governing the allocation of rail cars used in the transport of grain. The Canadian response, attached to the U.S. May 27 submission, specifies the section numbers of the Canadian laws and regulations that apparently govern this issue.

18. In light of these circumstances, Canada's contention – that "it is not possible for Canada to prepare a defence against this claim without being alerted in *some* detail to the provisions that are alleged to violate Article III:4" – is simply not credible. At the very same time that Canada was arguing that it did not know what rail car allocation measures are at issue, Canada had already provided the United States with the specific legal cites to these very same measures.

19. Finally, Canada complains that the panel request does not lay out the legal arguments why the discriminatory measures affecting grain imports are within the scope of the TRIMs Agreement. Again, there is no requirement in DSU Article 6.2 to summarize the complaining party's legal arguments. Nor has the Appellate Body concluded otherwise. Canada is not entitled to have the U.S. TRIMs Agreement claims rejected simply because Canada would prefer to review the U.S. legal arguments in advance of receiving the first U.S. submission.

20. I will now briefly address Canada's request for a preliminary ruling on Business Confidential Information.

21. The United States remains surprised that this is the subject of a request for a preliminary ruling. There is no disagreement between the parties as to the adoption of special procedures, and this is in any event a matter of the Panel's organization. The Panel may simply exercise its authority under Article 12 of the DSU to adopt additional procedures in consultation with the parties. To the extent the Panel considers that a ruling is necessary, the United States believes that the ruling should be that panels can, as they have in the past, at their discretion exercise such authority to adopt procedures for handling BCI.

22. As for the procedures themselves, the United States stands ready to consult with the Panel and with Canada in this regard. As noted in the U.S. May 28 submission, Canada and the United States consulted with the panel in the recent *Softwood Lumber* case to reached agreement on procedures for the treatment of BCI.

23. In fact, we propose that this Panel also adopt those same procedures. Both Canada and the United States are already familiar with and are currently utilizing these procedures. Moreover, nothing in Canada's request for a preliminary ruling suggests the need for procedures different than the *Softwood Lumber* procedures. And, as mentioned before, by adopting these previously agreed-to procedures, the Panel and the parties can avoid wasting time and effort in considering and debating the uncertain implications of Canada's newly developed proposals.

24. This concludes our oral presentation. We welcome any questions the Panel may have regarding these matters.