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

(WT/DS276)

First Written Submission of the United States of America

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EXHIBITS LIST

I. INTRODUCTION

1. The Canadian Wheat Board ("CWB") sells more wheat on world markets than any other single enterprise. The CWB is also a State Trading Enterprise ("STE") under Article XVII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

2. Canada provides its STE with lavish exclusive and special privileges, including:

- the exclusive right to purchase wheat for human consumption produced in all of Western Canada,
- the exclusive right to sell such wheat in domestic and foreign markets;
- the right to require Canadian farmers to sell their wheat to the CWB at an initial payment price well below full market value;
- complete insulation from all market risk, through a government guarantee of the initial payment;
- government guarantees of CWB borrowing at levels far exceeding the amount required to finance CWB sales operations; providing the CWB with a stream of income from the spread between below-market borrowings and market-based investments; and
- government guarantees of the principal and interest on CWB credit sales.

3. Article XVII does not forbid a WTO Member from providing an STE with such extensive privileges, even if such privileges could distort markets to the detriment of other WTO Members. Article XVII does, however, maintain the balance of GATT rights and obligations by imposing a countervailing obligation: namely, the Member establishing the STE must ensure that the STE in its purchases and sales complies with certain standards. These standards require that the STE:

- act in a manner consistent with the general principles of nondiscriminatory treatment prescribed in the GATT 1994;
- make any purchases or sales solely in accordance with commercial considerations; and
- afford the enterprises of other Members an adequate opportunity, in accordance with customary business practice, to compete for purchases or sales.

4. Canada has utterly failed to meet these obligations. Canada has adopted no processes or procedures to ensure that the CWB complies with the Article XVII standards. Indeed, Canada asserts that it even lacks the information required to evaluate the CWB's compliance with the Article XVII standards. In these circumstances, the United States submits that the Panel must

find that Canada is not in compliance with its obligations under Article XVII of the GATT 1994.

5. This dispute also addresses a series of Canadian measures that serve as a major impediment to the sale of imported grain, including wheat, in the domestic Canadian market.

6. One set of measures serves to exclude imported grain from the entire Canadian grain handling system. A second set of measures favors domestic grain over imported grain in the Canadian rail transportation system.

7. These measures accord to imported grain less favorable treatment than that accorded to like domestic grain. Accordingly, the United States submits that the Panel should find that Canada's treatment of imported grain is inconsistent with Canada's obligations under Article III:4 of the GATT 1994 and Article 2 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement").

II. PROCEDURAL BACKGROUND

8. The United States presented its consultation request (WT/DS276/1) to Canada in this dispute on December 17, 2002. The Parties consulted on January 31, 2003, in Ottawa, Canada. The consultations did not result in a resolution of the dispute.

9. The United States submitted a panel request on March 6, 2003 (WT/DS276/1). A panel was established at the meeting of the Dispute Settlement Body ("DSB") held on March 31, 2003 (hereinafter referred to as the "March Panel").

10. The March Panel was composed on May 12, 2003. On May 13, 2003, Canada filed a submission alleging on a number of grounds that the U.S. panel request of March 6, 2003, did not meet the requirements of Article 6.2 of the *Understanding on Rules and Procedures governing the Settlement of Disputes* ("DSU"). Canada asked that the Panel make a preliminary ruling on this matter.

11. After briefing and argument, on June 25, 2003, the Panel issued a "Preliminary Ruling on the Panel's Jurisdiction under Article 6.2 of the DSU." The Panel rejected most of Canada's arguments, but found that the March 6, 2003, panel request did not adequately specify the Canadian laws and regulations addressed in the United States' claim under Article XVII of the GATT 1994.

12. On June 30, 2003, the United States filed a panel request (WT/DS276/9) that incorporated all of the measures and claims included in the U.S. panel request of March 6, 2003, and that responded to the preliminary ruling by more specifically describing the Canadian laws and regulations addressed in the United States' claim under Article XVII of the GATT 1994.

13. A second panel was established at the DSB meeting held on July 11, 2003 (hereinafter

referred to as the "July Panel"). It was agreed at the July 11, 2003, DSB meeting that the panelists that composed the March Panel would also compose the July Panel, and that the March Panel and July Panel proceedings would be harmonized pursuant to Article 9.3 of the DSU.

14. After seeking and receiving the views of the parties, on July 29, 2003 the Panel notified the parties that the Panel expects that the parties and third parties will provide combined written submissions in the harmonized March Panel and July Panel proceedings, and that the Panel will hold a single set of meetings with respect to each step of these proceedings.

III. STATEMENT OF FACTS

A. The CWB Export Regime

1. Introduction

15. Canada has established the CWB, and has granted to this enterprise exclusive and special privileges. These exclusive and special privileges include the exclusive right to purchase Western Canadian wheat for export and domestic human consumption at a price determined by Canada and the CWB; the exclusive right to sell Western Canadian wheat for export and domestic human consumption; and government guarantees of the CWB's financial operations, including the CWB's borrowing, the CWB's credit sales to foreign buyers, and the CWB's initial payments to farmers. The legal framework of the CWB, Canada's provision to the CWB of exclusive and special privileges, and the actions of Canada and the CWB with respect to the CWB's purchases and sales involving wheat exports will hereinafter be referred to, collectively, as the "CWB Export Regime."

16. Canada has notified the CWB as a State Trading Enterprise within the scope of Article XVII of the GATT 1994.[1] The CWB markets both wheat (tariff item number 1001.00) and barley (tariff item number 1003.00).[2] This proceeding is addressed to purchases and sales involving exports of wheat.

17. As described in the STE Notification, "The statutory objective of the CWB is the marketing in an orderly manner, in inter-provincial and export trade, of grain grown in Canada."[3] The basic goal of the CWB is to sell all wheat (other than lower-priced feed wheat) produced in Western Canada. As Canada itself explains, "The volume of grain exported is primarily a

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[1] *See* Working Party on State Trading Enterprises, New and Full Notification [by Canada] Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII, G/STR/N/4/CAN, 5 November 2002 (hereinafter referred to as the "STE Notification"), at 8 (Exhibit US-1).

[2] *Id.*

[3] *Id.* (emphasis added); *see also* Canadian Wheat Board Act, sec. 5 (Exhibit US-2).

function of the available supply less domestic use and inventory adjustments."[4] Under its governing statute, the CWB must sell Western Canadian wheat "for such prices as it considers reasonable with the object of promoting the sale of grain produced in Canada in world markets."[5] Nothing in the statute requires the Canadian Wheat Board to make its sales in accordance with commercial considerations.

18. Until 1998, the CWB was a Canadian Crown Corporation, which meant, among other things, that the CWB was an agent of the Crown. Starting in 1998, the CWB was converted to a "mixed corporation" due to a change in its corporate governance. In particular, since 1998, the CWB has been governed by a 15-person Board of Directors. The Board president and four directors are selected by Canada, and the remaining ten directors are elected by grain producers.[6] Thus, the CWB is currently governed by a Board of Directors the majority of whom are elected by producers. In addition, Canada has asserted in this proceeding that Canada does not control the day-to-day operations of the CWB.[7]

19. The CWB does not make publicly available any information indicating that its sales are made in accordance with commercial considerations.[8] In particular, the CWB maintains the secrecy of specific information concerning its export sales, such as price, quality, length of contract, and credit terms. Indeed, Canada itself asserts that it is not in possession of such information regarding CWB wheat sales.[9] On December 23, 2002, the United States submitted a request to Canada under Article XVII:4(c) of the GATT 1994 for more detailed information concerning CWB sales.[10] Canada has not responded to that request.

20. In sum, the CWB statute does not require the CWB to sell its wheat for export in accordance with commercial considerations, and the CWB maintains the secrecy of its transaction-specific sales practices. Moreover, as described in the following subsections, the exclusive and special privileges enjoyed by the CWB detach the CWB from the economic considerations that would govern the conduct of commercial actors engaged in the purchase and

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[4] *See* STE Notification, at 9 (emphasis added) (Exhibit US-1).

[5] Canadian Wheat Board Act, sec. 7(1) (emphasis added) (Exhibit US-2).

[6] *Id.*, sec. 3.

[7] Preliminary Submission of Canada Regarding Procedures for the Protection of Strictly Confidential Information, 13 May 2003, para. 4 ("Canada notes that although the CWB has been notified as a State Trading Enterprise, it is not under the control or influence of the Government of Canada.")

[8] The STE Notification and CWB annual reports only include aggregate data on the volume and value of CWB sales.

[9] Preliminary Submission of Canada Regarding Procedures for the Protection of Strictly Confidential Information, 13 May 2003, para. 4 ("Nor is Canada in possession of information regarding the CWB's commercial negotiations and contracts with suppliers, service providers or customers on the prices, terms and other conditions of wheat sales.")

[10] Working Party on State Trading Enterprises, Questions Posed by the United States Concerning the Article XVII Notification of Canada, G/STR/Q1/CAN/6, 13 January 2003 (Exhibit US-3).

sale of wheat.

2. Exclusive Rights Regarding the Purchase and Sale of Wheat

21. Canada has provided to the CWB three related exclusive and special privileges that make the CWB unlike any private grain trader: (a) monopoly rights of purchase and sale; (b) the right to set the initial purchase price paid to producers, with any remaining income distributed in "pool" payments; and (c) a government guarantee of the initial payment.

i. *Monopoly Rights of Purchase and Sale*

22. The CWB "is solely responsible for the sale of Western Canadian wheat in export markets and for human consumption in the domestic market."[11] In other words, producers of Western Canadian wheat are allowed to market their own wheat only if it is destined for domestic feed use. Since feed wheat is a much lower-priced commodity than wheat destined for export or for domestic human consumption, as a practical matter Western Canadian farmers have no choice but to sell their wheat to the Canadian Wheat Board.[12]

23. Canada enforces the CWB's monopoly purchase and sale rights with both civil and criminal penalties.[13] Nonetheless, some Canadian producers are so dissatisfied with the CWB's monopoly rights that they have subjected themselves to such penalties. On October 31, 2002, Jim Chatenay, one of 10 elected directors on the Canadian Wheat Board, along with 12 other Alberta farmers, chose to serve jail sentences to protest the Canadian Wheat Board's monopoly over Western grain growers.[14] Mr. Chatenay was sentenced to 62 days in jail for exporting a single bushel of wheat without obtaining the permission of the CWB.[15]

ii. *The Right to Set the Initial Price*

24. Not only does the CWB have a monopoly purchase and sale rights with respect to Western Canadian wheat, but the producer also has no say over the price at which he must sell

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[11] STE Notification, at 9 (Exhibit US-1). Under Canadian law, the formal name for "Western Canadian wheat" is "wheat grown in the designated area", which means wheat grown in Manitoba, Saskatchewan, Alberta, or the Peace River area of British Columbia. *Id.*; *see also* Canadian Wheat Board Act, sec. 2 (defining "designated area") (Exhibit US-2).

[12] The CWB has also established a producer "buy-back" program, under which a producer can, in theory, sell its wheat to the CWB and, upon buying it back at a higher price, can then have the right to sell the wheat for export or domestic human consumption. The CWB, however, sets the buy-back price sufficiently high as to make the buy-back program commercially insignificant.

[13] Canada Wheat Board Act, sec. 68(3) (Exhibit US-2).

[14] "Alberta Farmer Finishes Jail Time for Illegally Moving Grain Across Border," Canadian Press, November 23, 2002 (Exhibit US-4).

[15] *Id.*

his wheat to the CWB. Under Canadian law, the CWB has the right to purchase wheat from producers at a price established jointly by the CWB and Canada for each grade of wheat.[16] Any additional revenue received by the CWB on the resale of the wheat is retained in a "pool." The pool amounts are eventually returned to producers, after mandatory deductions, through interim and final payments during and after the marketing year.[17]

25. Over the past 15 years, the CWB's initial payment has been, on average, between just 65% to 75% of the final value of the wheat sold. The CWB's right to procure wheat at prices well below full market value provides the CWB with greater pricing flexibility than that available to any commercial grain trader.

iii. *Government Guarantee of Initial Payment*

26. Even if the CWB and Canada miscalculate by setting the initial payment price too high (that is, greater than total revenue received less expenses), Canada removes all market risk from the CWB by providing a government guarantee for the initial payment.[18] This condition, which requires Canada to pay funds into the pool account, is known as a "pool deficit." Over the past 15 years, the CWB has run two pool deficits with respect to wheat sales.[19] In the 1985/86 marketing year, the wheat pool had a deficit of C$23 million. In the 1990/91 marketing year, the wheat pool had a deficit of C$673 million on total sales revenue of C$2.5 billion.

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[16] Canadian Wheat Board Act, sec. 32 (Exhibit US-2).

[17] The STE Notification describes the initial pricing and pool system as follows:

> All funds received by the CWB from the sale of grains are pooled. Separate pools are maintained each year for each type of grain, i.e., wheat, durum wheat, barley and designated barley. All producers will, at any time during the crop year, receive the same initial payment for the same grade of grain delivered to the CWB. In the first phase of the pooling system, producers receive an initial payment when they deliver grain to a primary elevator. The level of this initial payment is set by the Government and varies from year to year according to market conditions. At the end of a crop year, the net value of grain in each pool account is determined after all grain has been sold and all costs involved in marketing have been deducted. These costs include interest, insurance, storage, terminal elevators' handling charges and the CWB's own operating costs. All funds remaining in the pool after deduction of costs are returned to producers in the form of a final payment. This payment is made in accordance with the number of tonnes and grade of grain each producer delivered during the crop year.

STE Notification, at 12 (Exhibit US-1).

[18] Canadian Wheat Board Act, sec. 7.3 ("Losses sustained by the Corporation (a) from its operations under Part III in relation to any pool period fixed thereunder, or (b) from its other operations under this Act during any crop year, for which no provision is made in any other Part, shall be paid out of moneys provided by Parliament.") (Exhibit US-2).

[19] Over the past 20 years, there have also been several pool deficits for barley and oats. Oats were removed from CWB control in 1989.

27. Even when the CWB does not have a pool deficit, the government guarantee of the initial payment increases the CWB's pricing flexibility. A comparable commercial actor either could not afford to take similar risks, or would need to purchase appropriate hedges or options to insure against market risk.

3. Government-Guaranteed Borrowing

28. Another exclusive or special privilege that Canada provides to the CWB is a government guarantee on CWB borrowings. The government guarantee allows the CWB to borrow funds at a favorable noncommercial rate. The CWB can use the borrowed funds to make credit sales on terms not practicable for commercial sellers, or to generate investment income. As detailed below, the CWB takes advantage of this privilege by borrowing at *extraordinary* levels. Balances outstanding at the end of a marketing year typically *exceed* the CWB's total annual sales value, and the cumulative borrowings and repayments during a marketing year will commonly exceed annual sales value by a factor of *ten.*

29. On an annual basis, the CWB submits for approval to the Canadian Minister of Finance a plan indicating the amount of money the CWB plans to borrow in the upcoming crop year.[20] So long as the borrowings under the plan are in accordance with the terms approved by the Minister of Finance, the repayment, with interest of CWB borrowings "is guaranteed by the Minister of Finance on behalf of Her Majesty."[21]

30. The largest annual cost the CWB incurs is the initial payments to producers, as well as for any interim payments, which the CWB must borrow to cover throughout a marketing year.

31. The CWB also borrows money over and above its daily cash requirements and uses it for short-term investments.[22] The borrowing is explained in the CWB annual reports as "short-term investments for the purpose of cash management."[23] CWB annual reports also include an apparently corresponding source of income, labeled "temporary investments."[24] This value has varied between C$62 million and C$911 million in recent years.[25]

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[20] Canadian Wheat Board Act, sec. 19(3) (Exhibit US-2).

[21] *Id.*, sec. 19(5).

[22] Office of the Auditor General, Canada. "Canadian Wheat Board Special Audit Report." Presented to the Board of Directors on February 27, 2002 (Exhibit US-5).

[23] Canadian Wheat Board, Annual Report: 2001-02 (Financial Results), p. 52 (Exhibit US-6)

[24] *Id.*

[25] Canadian Wheat Board, Annual Report: 2001-02 (Financial Results), p. 52; Canadian Wheat Board, Annual Report: 2000-01 (Financial Results), p. 50; Canadian Wheat Board, Annual Report: 1999-2000 (Financial Results), p. 66; Canadian Wheat Board, Annual Report: 1998-99 (Financial Results), p. 49; Canadian Wheat Board, Annual Report: 1997-98 (Financial Results), p. 46; Canadian Wheat Board, Annual Report: 1996-97 (Financial Results); Canadian Wheat Board, Annual Report: 1995-96 (Financial Results), p. 49; Canadian Wheat Board, Annual Report: 1994-95 (Financial Results), p. 48 (Exhibit US-6).

32. Over the past eight years, CWB net borrowing has ranged from C$6.4 billion to C$7.6 billion. This level exceeds annual sales revenue, which has ranged between C$3.5 and C$6.0 billion over the past decade. At the same time, the Public Accounts of Canada reports that the CWB has had additional borrowings and repayments on an annual basis of between C$31 billion and C$185 billion over this same period (Table 1).[26] The balance from this borrowing and repayment activity roughly corresponds with net CWB borrowing reported in the annual reports. This borrowing, as noted, exceeds annual sales by roughly a factor of ten.

Table 1 – CWB Borrowings and Repayments

Fiscal Year	Net CWB Borrowing	CWB Borrowings	CWB Repayments	Balance on March 31
	Million C$			
1994/95	6,492	45,478	45,440	7,320
1995/96	6,459	51,904	52,848	6,377
1996/97	6,241	61,968	61,872	6,474
1997/98	6,716	184,969	184,745	6,698
1998/99	6,769	48,858	48,770	6,786
1999/00	7,264	85,663	79,119	6,544
2000/01	7,645	85,266	84,627	7,182
2001/02	7,336	31,185	30,618	7,749

1/ The first column is from the CWB Annual Reports and the last three columns are from the Public Accounts of Canada.[27]

The CWB also borrows funds to administer cash advance programs (the Agricultural Marketing Program Act and the Spring Credit Advance Program) that provide interest-free loans to producers to assist with spring planting costs. The CWB issues the cash advances under these programs and is reimbursed by the Canadian Government for its administrative costs.

[26] In a response to questions posed by the U.S. Government during the consultations held on January 31, 2003, the Canadian Government stated in a written reply on March 10, 2003, that the CWB had informed them that the figure of C$185 billion was incorrect and should be C$47 billion. The response also noted that additional, significant information on CWB financial activity could be found in the CWB annual reports, but this borrowing activity has never been reported in the annual reports, only in the Public Accounts.

[27] Canadian Wheat Board, Annual Report: 2001-02 (Financial Results), p. 40; Canadian Wheat Board, Annual Report: 2000-01 (Financial Results), p. 37; Canadian Wheat Board, Annual Report: 1999-2000 (Financial Results), p. 54; Canadian Wheat Board, Annual Report: 1998-99 (Financial Results), p. 34; Canadian Wheat Board, Annual Report: 1997-98 (Financial Results), p. 31; Canadian Wheat Board, Annual Report: 1996-97 (Financial

4. Government Guarantees of CWB Credit Sales

33. In addition to borrowing to cover the initial payments and the cash advance programs, the CWB also borrows to make export sales under credit programs.[28] The CWB makes credit sales mainly under two government-guaranteed programs – the Credit Grain Sales Program (CGSP) and Agri-food Credit Facility (ACF).[29]

34. The CGSP covers sales to customers who can offer a sovereign guarantee of repayment. Canada, in consultation with the CWB, approves country eligibility and individual country credit ceilings on an annual basis. Repayment terms cannot exceed 36 months and commercial interest rates are charged. Canada guarantees the repayment of principal and interest of all receivables made from sales under the CGSP.[30]

35. The ACF covers sales to private importers. Canada guarantees a declining percentage of all receivables from the ACF.[31]

36. When the CWB makes a sale on credit, the credit is extended at a commercial rate. Then the CWB borrows at a preferential rate (because of the government guarantee) the same amount extended as credit. The spread in the two rates results in additional CWB revenue.[32]

B. Canadian Treatment of Imported Grain

1. Introduction

Results), p. 29; Canadian Wheat Board, Annual Report: 1995-96 (Financial Results), p. 35; Canadian Wheat Board, Annual Report: 1994-95 (Financial Results), p. 34; Receiver General for Canada, Public Accounts of Canada 2002 (Tables 9.6 and 9.7); Receiver General for Canada, Public Accounts of Canada 2001 (Tables 9.6 and 9.7); Receiver General for Canada, Public Accounts of Canada 2000 (Tables 9.6 and 9.7); Receiver General for Canada, Public Accounts of Canada 1999 (Tables 9.6 and 9.7); Receiver General for Canada, Public Accounts of Canada 1998 (Table 9.6); Receiver General for Canada, Public Accounts of Canada 1997 (Table 9.6); Receiver General for Canada, Public Accounts of Canada 1996 (Table 9.6); Receiver General for Canada, Public Accounts of Canada 1995 (Table 9.6) (Exhibit US-6).

[28] The Canadian Wheat Board Act authorizes the Minister of Finance to guarantee CWB credit sales: "(6) The Minister of Finance, on behalf of Her Majesty, may, on any terms and conditions that the Governor in Council may approve, . . . (b) guarantee payment with interest of amounts owing to the Corporation in respect of the sale of grain on credit." Canadian Wheat Board Act, sec. 19(6) (Exhibit US-2).

[29] Canadian Wheat Board, Annual Report: 2001-02 (Management Report and Analysis and Financial Results), pp. 36, 37 and 50 (Exhibit US-6).

[30] *Id.*

[31] *Id.*

[32] *Id.*

37. Canadian measures discriminate against imported grain, including grain that is the product of the United States: Under the Canada Grain Act and Canadian Grain Regulations, imported grain must be segregated from Canadian domestic grain throughout the Canadian grain handling system; imported grain may not be received into grain elevators; and imported grain may not be mixed with Canadian domestic grain being received into, or being discharged out of, grain elevators.

38. In addition, Canadian law favors domestic grain over imported grain in the rail transportation system. Canadian law caps the maximum revenues that railroads may receive on the shipment of Canadian domestic grain, but not revenues that railroads may receive on the shipment of imported grain. In addition, in allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain.

2. Canadian Grain Segregation Requirements

39. Part IV of the Canada Grain Act governs grain elevators and grain handling throughout Canada. Under the Canada Grain Act, the term "elevator" is broadly defined, and basically means any facility used for handling or storing grain.[33]

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[33] The Canada Grain Act, section 2, provides:

"elevator" means

(a) any premises in the Western Division

(i) into which grain may be received or out of which grain may be discharged directly from or to railway cars or ships,

(ii) constructed for the purpose of handling and storing grain received directly from producers, otherwise than as a part of the farming operation of a particular producer, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged, or

(iii) constructed for the purpose of handling and storing grain as part of the operation of a flour mill, feed mill, seed cleaning plant, malt house, distillery, grain oil extraction plant or other grain processing plant, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged for processing or otherwise,

(b) any premises in the Eastern Division, situated along Lake Superior, Lake Huron, Lake St. Clair, Lake Erie, Lake Ontario or the canals or other navigable waters connecting those Lakes or the St. Lawrence River or any tidal waters, and into which grain may be received directly from railway cars or ships and out of which grain may be discharged directly to ships,

(c) the portion of any premises in the Eastern Division designated by regulation pursuant to subsection 116(3) that is used for the purpose of storing grain,

(d) any premises in the Eastern Division constructed for the purpose of handling and storing grain

40. The grains covered by the Canada Grain Act are the following types of seeds: barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, solin, soybeans, sunflower seed, triticale and wheat.[34]

41. Section 57 of the Canada Grain Act mandates severe discrimination against "foreign grain," which is basically defined as "any grain grown outside Canada."[35] In short, absent special authorizations, imported grain, just like grain that is "infested or contaminated," may not be received into any elevator (which, as noted, is broadly defined) anywhere in Canada. Section 57 of the Act provides in full:

> Except as may be authorized by regulation or by order of the [Canadian Grain] Commission, no licensee operating an elevator shall receive into the elevator
>
> (a) any grain, grain product or screenings unless the grain, grain product or screenings is weighed at the elevator immediately before or during receipt;
>
> (b) any material or substance for storage other than grain, grain products or screenings;

> received directly from producers, otherwise than as a part of the farming operation of a particular producer, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged, and
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> (e) any premises in the Eastern Division constructed for the purpose of handling and storing grain as a part of the operation of a flour mill, feed mill, seed cleaning plant, malt house, distillery, grain oil extraction plant or other grain processing plant, and into which grain may be received, at which grain may be weighed, elevated and stored and out of which grain may be discharged for processing or otherwise,
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> including any such premises owned or operated by Her Majesty in right of Canada or a province or any agent thereof.

As indicated, the Canada Grain Act divides Canada into Eastern and Western divisions. The dividing line is the "the meridian passing through the eastern boundary of the City of Thunder Bay". Canada Grain Act, sec. 2 (Exhibit US-7).

[34] The Canada Grain Act, section 2, defines "grain" as "any seed designated by regulation as a grain for the purposes of this Act." *Id.* The Canada Grain Regulations, section 5(1), provide that "The following seeds are designated as grain for the purposes of the Act: barley, beans, buckwheat, canola, chick peas, corn, fababeans, flaxseed, lentils, mixed grain, mustard seed, oats, peas, rapeseed, rye, safflower seed, solin, soybeans, sunflower seed, triticale and wheat." Canada Grain Regulations, sec. 5(1) (Exhibit US-8).

[35] The full definition of "foreign grain" is "any grain grown outside Canada and includes screenings from such a grain and every grain product manufactured or processed from such a grain." Canada Grain Act, sec. 2 (Exhibit US-7).

(c) any foreign grain; or

(d) any grain that the operator has reason to believe is infested or contaminated.

42. Accordingly, absent a specific regulation, a special order of the Canadian Grain Commission would be required prior to the receipt of foreign grain into a Canadian elevator.

43. Even if such special permission were granted, a separate regulation prohibits the mixing of foreign grain with grain grown in Canada:

> 56. (1) The operator of a licensed transfer elevator may mix any grade of grain being received into, or being discharged out of, the elevator, with grain of any other grade if neither of the grains is western grain or foreign grain.[36]

3. Differential Treatment in Canadian Transportation System

44. The Canada Transportation Act includes a special division (Division VI) designed to cap the rail transportation charges on the transport of Western Canadian grain.[37] The definition of "grain" is similar, but not identical, to the definition used in the Canada Grain Act. First, in Division VI, the term "grain" is defined to include only grain grown in the Western Division of Canada. Second, the types of grain included in the definition are not identical to the types specified in the Canada Grain Act.[38]

45. The Canadian measure operates by capping the annual revenue that Canadian railroads may collect for transporting Canadian grain. Under these rules, a railroad must refund, with penalties, any revenues received in excess of the cap. Thus, Canadian railroads have a great incentive to hold their rates on Western Canadian grain at a level that will ensure that the railroads do not exceed the revenue cap. No comparable incentive, however, exists for setting the rates charged for the transport of imported grain. The operative provisions of the Canadian Transportation Act are as follows:

> Maximum Grain Revenue Entitlement
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> 150. (1) A prescribed railway company's revenues, as determined by the [Canadian Transportation] Agency, for the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that year as

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[36] Canada Grain Regulations, sec. 56(1) (Exhibit US-8).

[37] Canada Transportation Act, Part III, Division VI, consisting of section 147-152 (Exhibit US-9).

[38] Section 147 of the Canada Transportation Act defines "grain" as any grain or crop included in Schedule II that is grown in the Western Division, or any product of it included in Schedule II that is processed in the Western Division. Schedule II, which is included in Exhibit US-9, covers, among other products, barley, corn, oats, and wheat. *Id.*

> determined under subsection 151(1).
>
> (2) If a prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year exceed the company's maximum revenue entitlement for that year as determined under subsection 151(1), the company shall pay out the excess amount, and any penalty that may be specified in the regulations, in accordance with the regulations.[39]

46. Canadian law also favors Canadian grain over imported grain in the allocation of government railcars. Section 87 of the Canada Grain Act establishes a program known as "producer railway cars." On its face, the program appears only to apply to grain grown by a producer, meaning that no imported grain is eligible for the producer car program. Section 87 of the Canada Grain Act provides as follows:

> 87. (1) One or more producers of grain, not exceeding the number designated by order of the Commission, having grain, in sufficient quantity to fill a railway car, that may be lawfully delivered to a railway company for carriage to a terminal elevator, transfer elevator or process elevator or to a consignee at a destination other than an elevator may apply in writing to the Commission, in prescribed form, for a railway car to receive and carry the grain to the elevator or other consignee.
>
> The Commission shall, in each week, allocate to applications made by producers of grain pursuant to subsection (1), in the order in which the applications are received, available railway cars that enter each shipping control area in that week up to such number or percentage of the available cars entering the area in that week and under such terms and conditions as the Commission may order.

The Canadian Grain Commission summarizes this program as follows: "Producers can order rail cars from the CGC to ship their grain to market."[40] Canada has no comparable program that provides rail cars for the transport of imported grain.

IV. LEGAL ARGUMENTS

A. Canada is Not in Compliance with its Obligations under GATT Article XVII

1. GATT Article XVII Imposes an Obligation on Canada to Ensure that the CWB Makes Purchases or Sales in Accordance with the Article XVII

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[39] *Id.*, sec. 150.

[40] *See* "The CGC and Producer Cars," www.grainscanada.gc.ca/pubs/FactsFarm/factsfarmers15-e.htm (emphasis added) (Exhibit US-10).

Standards

47. Based on the plain text and the context of the GATT 1994, Article XVII imposes an obligation on Canada to ensure that the CWB makes purchases or sales in accordance with the Article XVII standards. The pertinent provisions of Article XVII provide that:

> 1.* (a) Each [Member] undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges,* such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.
>
> (b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations,* including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other [Members] adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
>
> ***Ad Article XVII***
>
> The charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.[41]

48. Applying this language to the facts of this case,[42] the obligations of Canada are as follows:

(a) Canada undertakes that . . . the CWB shall, in its purchases or sales involving exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.

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[41] GATT 1994, Article XVII:1 and Note (replacing "Contracting Party" with "Member," per Explanatory Note 2(a) of the GATT 1994).

[42] In particular, the Article XVII obligations are restated to reflect that the CWB is the STE in question, and that the conduct at issue involves the CWB's exports.

(b) The provisions of sub-paragraph (a) . . . shall be understood to require that the CWB shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other [Members] adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

49. The plain language of Article XVII imposes a clear obligation on Canada to "undertake" that the CWB shall makes its purchases or sales in accordance with the Article XVII standards. The legal term "undertake" means to: "Take on (an obligation, duty, task, etc)"; "commit oneself to perform"; "Give a formal promise or pledge"; "guarantee, affirm."[43]

50. This obligation on Members establishes the GATT's basic balance with regard to STEs. Members may establish STEs that enjoy special benefits and privileges not available to free-market enterprises. These benefits and privileges may enable the STE to engage in trade-distorting practices, to the detriment of other Members. But Article XVII restores the balance, by imposing an obligation on the Member establishing the STE to ensure that the STE acts in a manner consistent with the general principles of non-discriminatory treatment, to make purchases or sales solely in accordance with commercial considerations, and to allow the enterprises of other Members an adequate opportunity to compete.

51. The context of Article XVII confirms that the obligation on Canada is to ensure that the STE it has established meets the Article XVII requirements. Article XVII:1(c) provides a lesser obligation for enterprises which are not STEs, but which are nonetheless affected by government regulations. In particular, Article XVII:1(c) provides:

> (c) No [Member] shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph.[44]

Thus, Article XVII establishes two levels of Member obligations for enterprises affected by the Member's potentially trade-distorting regulations. With respect to STEs, a Member has an obligation to ensure that the STE does not engage in trade-distorting conduct. With respect to other enterprises, the Member has a lesser and different obligation: the Member must not prevent the enterprise from engaging in free-market conduct, but the Member otherwise has no duty to oversee the enterprise's conduct.

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[43] New Shorter Oxford English Dictionary (1993), at 3476.

[44] GATT 1994, Article XVII:1 and Note (replacing "Contracting Party" with "Member," per Explanatory Note 2(a) of the GATT 1994) (emphasis added).

52. Professor Jackson, based on an examination of the plain language and drafting history of Article XVII, reaches the same conclusion:

> Insofar as a contracting party maintains complete state control over an enterprise, there is little doubt that the state has an obligation to see that the enterprise's trading activities comply with the standards of paragraph 1. (See wording in paragraph 1(a) *supra.*) Its complete control makes the enterprise action tantamount to state action. In the event that a contracting party grants "special privileges" to an enterprise but the enterprise continues to be largely privately controlled, paragraph 1(c) at least requires the state to not "prevent" the enterprise from complying. Going one step further, paragraph 1(a) may reasonably be construed to require that the contracting party *attempt to ensure* compliance by the enterprise with the standards set forth. This would not seem beyond the State's power, since it could simply condition the granting of the "special privilege" on the enterprise conforming with Article XVII requirements.[45]

In short, whether or not the Member has control over the STE, Article XVII imposes an obligation on the Member to ensure that the STE complies with the standards set out in Article XVII:1(a) and (b).

2. The Standards in Article XVII Apply to the Wheat Exports of the CWB

53. The standards in both paragraphs 1(a) and (b) of Article XVII:1(a) apply to the wheat exports of the CWB.

54. Article XVII:1(a) requires that Canada ensure that the CWB "act[s] in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders." The conduct prohibited by this provision includes the CWB's use of its special benefits and privileges to target particular export markets. This provision also prohibits the CWB from harming other Members' wheat sellers by, in effect, shutting them out of markets, or portions of markets, that are subject to the CWB's targeting. Such conduct by an STE would amount to discrimination in the terms of sale between export markets, and thus would run afoul of "a general principle of non-discriminatory treatment prescribed in this Agreement," as reflected in the most-favored-nation obligation.[46]

55. Article XVII:1(a) also prohibits the CWB from making use of its exclusive privileges to discriminate in its terms of sale between export markets and the Canadian domestic market. In this category of conduct, "the general principles of non-discriminatory treatment" are those

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[45] Jackson, World Trade and the Law of GATT (1969), at 344 (emphasis in original, footnotes omitted).

[46] See GATT 1994, Article I(1).

reflected in the national treatment obligation. It must be noted, however, that prior panels have reached different conclusions on whether the "general principles" in Article XVII:1(a) include discrimination between external markets/foreign products and the internal markets/domestic products of the Member that established the STE. Those panels were in the GATT 1947 *Canada FIRA* dispute and the more recent *Korea Beef* dispute.[47]

56. The *Korea Beef* report, issued in 2000, found that the "general principles of non-discriminatory treatment" in Article XVII:1(a) do include discrimination between foreign and domestic products. Korea Beef examined the issue of whether the general principles of non-discriminatory treatment under GATT Article XVII:1(a) include discrimination between beef imported into Korea and Korean domestic beef. The panel in an earlier case – the 1982 *Canada FIRA* case – had written that it "saw great force in Canada's argument that only the most-favoured-nation and not the national treatment obligations fall within the scope of the general principles referred to in Article XVII:1(a)."[48] But based on a full examination of the purpose and context of Article XVII:1, the *Korea Beef* panel concluded differently. The United States submits that the panel report in *Korea Beef* is far better reasoned and represents the correct view on this issue.

57. The *Korea Beef* panel relied in large part on the GATT Ad Note to Articles XI, XII, XIII, XIV and XVIII. This note provides that:

> Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

Article XI, referred to in the Ad note, generally prohibits import restrictions. The *Korea Beef* panel wrote that:

> The basic purpose of this note is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that the contracting parties cannot escape their obligations with respect to private trade by establishing state-trading

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[47] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (WT/DS161/R WT/DS169/R) (31 July 2000) (hereinafter *Korea Beef)*; *Canada – Administration of the Foreign Investment Review Act*, adopted on 7 February 1984 (L/5504 - 30S/140) (hereinafter *Canada FIRA).*

[48] *Canada FIRA,* para. 5.16. Because the panel found a separate violation of Canada's GATT Article III obligations, the panel did not make a finding on this issue. *Id.* The panel's views were based in part on Article XVII drafting history, which showed that early versions of Article XVII did not include discrimination between domestic and foreign products. *Id.,* para. 3.14 and 3.15. This type of drafting history, however, is a two-edged sword. The change from an early version to the final version of Article XVII may just as well indicate that the drafters intentionally used the broad phrase "general principles of non-discriminatory treatment" because they did not want to limit the scope of the provision to MFN treatment.

operations.[49]

In light of the context provided by the Ad note, the *Korea Beef* panel concluded that in a case involving an STE import monopoly, the "general principles of non-discriminatory treatment" in GATT Article XVII:1(a) must include national treatment (that is, discrimination between imported and domestic products). Otherwise, the STE could refuse to import any foreign beef, and thus would be free to impose the type of import restriction prohibited by Article XI. Accordingly, the panel found that the failure of the Korean STE to sell stocks of imported beef, when the STE was selling stocks of domestic beef, amounted to a violation of the general principles of non-discriminatory treatment (in this case, national treatment) provided for in GATT Article XVII:1(a).[50]

58. The Ad Note provides similar context for the examination of an export monopoly such as the CWB. As applied to export monopolies, the Ad Note provides that the term "export restrictions" includes restrictions made effective through an STE that enjoys an export monopoly. And, Article XI of the GATT 1994 generally prohibits export restrictions. Accordingly, as indicated by the Ad Note and its application of the Article XI prohibition to export restrictions made effective through STEs, the "general principles of non-discriminatory treatment" in Article XVII:1(a) that are applicable to an export monopoly like the CWB include non-discrimination between the domestic market and export markets.[51]

59. Subparagraph (b) of Article XVII:1 establishes two different, but related, obligations. First, Canada must ensure that the CWB makes any purchases or sales involving wheat exports solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale.

60. Second, and relatedly, Canada must ensure that the CWB affords the enterprises of other Members adequate opportunity, in accordance with customary business practice, to compete for

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[49] *Korea Beef,* para. 749 (quoting Report of the Panel, *Japan – Restrictions on Imports of Certain Agricultural Products,* L/6253-35S/163, adopted 2 February 1988, para. 5.2.2.2).

[50] *Korea Beef*, para. 769 ("[T]he Panel considers that, when it delayed its sales of imported beef into the Korean market while having important stocks, the [Korean STE] was not acting "in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.").

[51] The *Canada FIRA* report reached the opposite conclusion. The panel's reasoning, however, is cursory and unconvincing. It wrote that: "[T]here is no provision in the General Agreement which forbids requirements to sell goods in foreign markets in preference to the domestic market." *Canada FIRA*, para. 5.18. This argument ignores that GATT Article XI forbids export prohibitions; that is, under Article XI, a Member may not require goods to be sold in domestic markets and to be withheld from export markets. Moreover, the Ad note explicitly applies Article XI disciplines to STEs. This is more than sufficient to establish that the "general principles of non-discriminatory treatment" in Article XVII include discrimination between export markets and the home market. The *Canada FIRA* panel may have overlooked the Ad note on STEs – the case did not actually involve STEs, but instead involved other enterprises covered by the lesser, negative obligation in Article XVII:1(c).

participation in purchases or sales involving wheat exports.

61. The separate obligations in subparagraphs XVII:1(a) and (b) are related, and each must be read in the context of the other. In particular, the note to Article XVII:1 provides that an STE does not violate general principles of non-discrimination if it charges different prices for its sales of a product in different markets if "such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets." This ad note provision ties into subparagraph (b)'s requirement for STEs to make sales solely in accordance with commercial considerations. In addition, subparagraph (b) has an introductory clause tying back to subparagraph (a): namely, "the provisions of sub-paragraph (a) of this paragraph shall be understood to require" that STEs make their sales in accordance with commercial considerations and allow enterprises of other members an adequate opportunity to compete.

62. The *Korea Beef* panel explained how these separate but related obligations should be applied:

> The list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability etc…) are to be used to facilitate the assessment whether the state-trading enterprise has acted in respect of the general principles of non-discrimination. A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on "commercial considerations", would also suffice to show a violation of Article XVII.[52]

As addressed below, the United States submits that whether looked at as a question of non-discrimination, or as a question of sales in accordance with commercial considerations and allowing the enterprises of other Members to compete, Canada has failed to comply with its obligations under GATT Article XVII to ensure that the CWB does not abuse its exclusive benefits and privileges.

3. Canada Has Not Met its Obligation to Ensure that the CWB Makes Purchases or Sales in Accordance with the Article XVII Standards

63. As addressed in Subsection 1 above, Article XVII imposes an obligation on Members establishing STEs to ensure that those STEs comply with the Article XVII standards. As addressed in Subsection 2 above, the Article XVII standards require that the CWB make its purchases and sales involving wheat exports in accordance with general principles of non-discrimination, in accordance with commercial considerations, and in a manner allowing the enterprises of other

[52] *Korea Beef*, para. 757. Similarly, the *Canada FIRA* panel found that the obligations in subparagraph (b) must be construed in light of the general principles established in subparagraph (a). *Canada FIRA*, para. 5.16.

Members to compete. Canada, however, has completely failed to meet its obligation of ensuring that the CWB meets these standards.

64. In fact, Canada has already acknowledged in this proceeding that it takes no measures to enforce the Article XVII standards on the CWB. Canada's preliminary submission on confidential information explains as follows:

> Canada notes that although the CWB has been notified as a State Trading Enterprise, it is not under the control or influence of Canada. Nor is Canada in possession of information regarding the CWB's commercial negotiations and contracts with suppliers, services or customers on terms and other conditions of wheat sales.[53]

If, as Canada asserts, Canada has no control or influence over the CWB, than Canada has not complied – and, under its current regulatory structure, cannot comply – with its obligation to ensure that the CWB meets the standards in Article XVII regarding wheat exports. Similarly, if, as Canada asserts, it does not even collect information on the CWB's "contracts with . . . customers on terms and other conditions of wheat sales," Canada cannot *even begin* to meet its obligation to ensure that the CWB's purchases and sales involving wheat exports are made "solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale."[54]

65. The statute governing the CWB further confirms that Canada has failed to meet its obligation to ensure that the CWB's purchases or sales involving wheat exports comply with the Article XVII standards. The provision in the CWB Act governing CWB pricing provides only that:

> Subject to the regulations, the [CWB] shall sell and dispose of grain acquired by it pursuant to its operations under this Act for such prices as it considers reasonable with the object of promoting the sales of grain produced in Canada in world markets.[55]

Thus, under its organic statute, the CWB need only sell wheat at any price it considers "reasonable." In addition, the term "reasonable" is to be construed in the context of "the object of promoting the sales of" Canadian grain in foreign markets. The object of "sales promotion" is not the same as, or even consistent with, the requirements that CWB's wheat exports are in accordance with general principles of non-discrimination, in accordance with commercial considerations, and are made in a manner allowing the enterprises of other Members to compete. In short, there are no

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[53] Preliminary Submission of Canada Regarding Procedures for the Protection of Strictly Confidential Information (WT/DS276), 13 May 2003, at para. 4.

[54] GATT 1994, Article XVII:1(b).

[55] Canadian Wheat Board Act, Sec. 7(1) (emphasis added) (Exhibit US-2).

statutory requirements under Canadian law for the CWB to make sales in accordance with Canada's international obligations under Article XVII of the GATT 1994.

66. Moreover, the legislative history of the Canadian Wheat Board Act shows that where Canada does intend for the CWB to make sales in accordance with Canada's international obligations, the Act will include a specific provision to this effect. In addition to obligations under GATT Article XVII, Canada has international obligations with respect to CWB exports under the North American Free Trade Agreement (NAFTA).[56] In a 1998 amendment to the Canadian Wheat Board Act, the status of the CWB under Canadian law changed from a Crown Corporation to a "mixed enterprise." As part of this change, the drafters of the amendment believed that specific language had to be included to ensure that the CWB, under its new status as a "mixed enterprise," acted in accordance with Canada's NAFTA obligations. The legislative history explains as follows:

> Clause 27 would add proposed section 61.1 regarding the implementation of the North American Free Trade Agreement (NAFTA). At present, the Canadian Wheat Board, as a Crown corporation, is subject to the Financial Administration Act (FAA) and must act in accordance with the NAFTA. If the corporation were to cease to be a Crown corporation, and thus no longer subject to the FAA, proposed section 61.1 would become operative and would require the new Corporation [*i.e., the CWB]* to ensure that it complied with the NAFTA.[57]

In accordance with this legislative history, the current Canadian Wheat Board Act now includes a section 61.1 requiring the CWB to comply with Canada's obligations under the NAFTA.[58] In stark contrast, nothing in the Canadian Wheat Board Act requires the CWB to act in accordance with Canada's obligations under the WTO agreements.[59]

4. Canada's Policy of Non-Supervision Cannot Meet Canada's Obligation to Ensure that the CWB Complies with the Article XVII Standards

67. In light of the extensive, market-distorting privileges that Canada provides to the CWB,

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[56] See North American Free Trade Agreement, Annex 702.1 (incorporating agricultural provisions of the United States-Canada Free Trade Agreement (USCFTA)). Article 701(4) of the USCFTA, for example, provides that "neither party, including any public entity that it establishes or maintains [such as the CWB], shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods."

[57] Library of Parliament, Legislative Summaries, Bill C-4: An Act to Amend the Canadian Wheat Board Act and to Make Consequential Amendments to Other Acts, 29 Sept. 1997, revised 20 November 1997 (Exhibit US-11).

[58] Canadian Wheat Board Act, section 61.1, provides that "in exercising its powers and performing its duties, the [CWB] shall give effect to the provisions of the [NAFTA] that pertain to the [CWB]." (Exhibit US-2).

[59] This discussion is not meant to imply that a comparable WTO provision in the Canadian Wheat Board Act would be sufficient to meet Canada's obligation under Article XVII of the GATT 1994; or that Canada and the CWB are currently in compliance with Canada's NAFTA obligations.

Canada's acknowledgment that it takes no affirmative steps to ensure that the CWB's wheat exports meet the Article XVII standards is sufficient to establish that Canada has failed to comply with its international obligations under Article XVII. This subsection will nonetheless address the probable Canadian response that, somehow, Canadian non-supervision of CWB operations amounts to compliance with Canada's Article XVII obligations. As discussed below, such an argument is untenable for three reasons: (i) it ignores the distinction in Article XVII between the level of obligation applicable to STEs and other enterprises; (ii) it fails to take into account the extensive special privileges accorded by Canada to the CWB which divorce the CWB from the market constraints that govern free-market enterprises; and (iii) it does not recognize that the CWB has different incentives and motivations than a commercial grain trading company.

i. *Article XVII Establishes a Higher Level of Obligations for STEs*

68. As explained in Subsection (1) above, Article XVII establishes two levels of obligations for enterprises affected by a Member's potentially trade-distorting regulations. With respect to STEs, the language of Article XVII:1(a) – "Each Member undertakes" – establishes an obligation to ensure that the Member's STEs do not engage in trade-distorting conduct. With respect to other enterprises, the language of Article XVII:1(c) – "no Member shall prevent any enterprise" – establishes a lesser, negative obligation not to require enterprises to engage in trade-distorting conduct. In this case, it is undisputed that the CWB is an STE, and accordingly that the obligation in Article XVII:1(a) applies.

69. Any Canadian argument that non-supervision of the CWB somehow amounts to compliance with Canada's Article XVII obligations would be inconsistent with the two-tiered structure of Article XVII obligations. Non-supervision might be sufficient if the CWB were an enterprise subject only to XVII:1(c). The CWB, however, is an STE covered by Article XVII:1(a), and this provision requires Canada to take measures to ensure that the CWB meets the Article XVII standards.

ii. *The Exclusive Privileges that Canada Provides to the CWB Divorce the CWB from the Market Constraints that Govern the Conduct of Commercial Enterprises*

70. There is no basis to presume that the CWB, without the adoption of any measures to ensure compliance with Article XVII standards, will nonetheless make its wheat exports in accordance with those standards. Enterprises make sales in accordance with commercial considerations because they are governed by commercial considerations. The CWB, however, is not. To the contrary, as explained in Part III above, the extensive special privileges that Canada provides to the CWB detach the CWB from the commercial considerations that govern the conduct of free-market enterprises.

71. First, the monopoly power over Western Canadian wheat gives the CWB greater pricing flexibility than any private actor. In particular:

– Western Canadian farmers who intend to sell Western Canadian wheat for export or domestic human consumption must, by law, sell their wheat to the CWB.

– The CWB, by law, does not need to pay the farmer the market value of the wheat. Instead, the CWB pays the farmer only an initial price, generally equal to only 65 to 75 percent of the final value of the wheat.

– The extra income enjoyed by the CWB as a result of the Canadian Government financial guarantees further provides the CWB with pricing flexibility. Unlike a private actor, the CWB finances its purchases by borrowing at below-market, government-insured interest rates. In addition, the CWB appears to have substantial investment income arising from the fact that it can borrow at below market, government-insured interest rates and invest in instruments with market-based returns.[60]

72. Thus, the CWB, unlike any commercial actor, has a guaranteed supply of wheat at a cost of acquisition well below the market value, as well as a reduced interest costs and an extra income stream from investment earnings. As a result, the CWB has greater flexibility in setting the price of its wheat. Moreover, the CWB is not even required to recoup the amount of the initial payment. Under the initial payment guarantee, the Canadian Parliament will make up the difference if the actual amount received in a marketing year falls below the CWB's initial payments to producers.

73. Second, the exclusive and special privileges enjoyed by the CWB allow the CWB – as compared to a commercial grain trader – much greater freedom to engage in forward contracts or long-term contracts. In entering into a long-term or forward contract, a commercial actor has to account for the risks associated with the possible changes in the market price of wheat. The CWB, in contrast, has guaranteed access to supplies at a known price. This privilege enhances the CWB's ability to forward contract wheat for future delivery at a fixed price in a manner that a private company could not without incurring additional costs. Moreover, the CWB's risk is further reduced by the government guarantee of the initial payment.

74. These reductions in risk, as compared to the risk faced by commercial grain traders, enable the CWB to act in a fundamentally non-commercial manner with respect to long-term or forward sales.

75. Third, government guarantees of the CWB's borrowings allow the CWB to provide more favorable credit terms than those provided by commercial grain traders, and government guarantees of credit sales allow the CWB to offer credit to high-risk buyers.

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[60] *See* Subsection III.A.2 and III.A.3, *supra.*

76. This description of the consequences of the special benefits provided by Canada is fully consistent with the CWB's own analysis.

> The CWB's status as a federal government agency is of significant financial benefit to western Canadian grain farmers. The CWB marketing system really represents a partnership between western Canadian grain farmers and the federal government in the marketing of western Canadian wheat and barley that is implemented by the CWB. This partnership benefits farmers financially in three ways.
>
> First, the federal government guarantees the CWB's initial payments....This is like a revenue insurance policy for farmers with no premiums. (Emphasis in original.)
>
> Second, the federal government guarantees the borrowings the CWB makes to finance its business ... Money has a cost, and in a grain business that cost will ultimately be borne by grain farmers. The federal government guarantee to lenders on CWB borrowings allows the CWB to borrow money to finance operations at significantly lower interest rates that it could achieve without this guarantee, or that other grain companies can achieve. To put this into perspective, it is estimated that western Canadian grain farmers save at least $40 million annually in interest costs because the CWB can borrow at lower rates due to the federal government guarantee....
>
> Third, the federal government guarantees repayment to the CWB on credit grain sales by the CWB through a program reserved for the use of the CWB called the "Credit Grain Sales Program." This guarantee of repayment means that western Canadian grain farmers are not exposed to the risk of any of these credit buyers defaulting on their debt for purchases made on credit from the CWB. That risk is transferred to the Government of Canada – to the taxpayers of Canada...[61]

77. These special benefits enable the CWB, if it so chooses, to make its sales not in accordance with commercial considerations (in terms of price, length of contract, and credit terms), and on such noncommercial terms that do not allow the enterprises of other WTO Members an adequate opportunity to compete. In other words, the special benefits provided by Canada pricing enable the CWB to engage in conduct proscribed in GATT Article XVII:1(b).

78. The special benefits also enable the CWB, if it so chooses, to provide such noncommercial terms of sale in some markets and not others. Such conduct amounts to discrimination between markets, and thus is likewise inconsistent with the discipline set forth in GATT Article XVII:1(a).

79. In sum, the special privileges enjoyed by the CWB free it from commercial considerations

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[61] Canadian Wheat Board. "The Role of the Canadian Wheat Board in the Western Canadian Grain Marketing System," February 23, 1996 (submitted by the CWB to the Western Grain Marketing Panel) (Exhibit US-12).

that constrain the conduct of a private grain trader. In these circumstances, there is no basis for presuming that the CWB sales are made in accordance with the standards set forth in Article XVII.

iii. *The CWB has Different Incentives and Motivations than a Private Grain Trading Company*

80. Finally, the CWB has fundamentally different incentives and motivations than those of a private grain trading company. The goal of commercial entities is to maximize profit, which is revenue minus expenses (including the cost of purchasing wheat). The CWB, on the other hand, was created for the purpose of maximizing only revenue. In other words, the CWB must try to sell all of the wheat produced in Western Canada, and in doing so will presumably try to obtain the best prices. A private grain trader, however, would not necessarily maximize revenue by selling all wheat available; rather, it would limit its purchases and sales if in doing so it would maximize the profit of the enterprise.

81. That the CWB is a revenue maximizer, rather than a profit maximizer, is established by the CWB's governing statute, the CWB's public statements, and the CWB's structure of governance.

82. The prime objective of the CWB, as set forth in its statute, is the "marketing in an orderly manner, in inter-provincial and export trade, of grain grown in Canada."[62] The objective of the CWB is to market Western Canadian wheat, it does not have an objective, like a private trader, of maximizing profit. Similarly, the governing statute provides that the CWB must sell Western Canadian wheat "for such prices as it considers reasonable with the object of promoting the sale of grain produced in Canada in world markets."[63] Again, the prime objective is to sell the wheat produced in Western Canada, not to maximize profit.

83. The public statements of the CWB and Canada confirm that the goal of the CWB is to maximize to revenue. For example, the CEO of the CWB has stated, "We intend to market all wheat and barley offered by producers and we will strive to obtain the best possible value for their grain."[64] Similarly, Canada's STE notification states: "The volume of grain exported is primarily a function of the available supply less domestic use and inventory adjustments."[65]

84. The corporate structure of the CWB further confirms that its prime goal is to maximize revenue, not profit. A private enterprise is governed by a board of shareholders, and the goal of a shareholder is to maximize enterprise profit. The CWB is governed by a board with members either elected directly by producers, or selected by Canada, which must ultimately answer to voters

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[62] Canadian Wheat Board Act, sec. 5 (emphasis added) (Exhibit US-2).

[63] *Id.*, sec. 7(1) (emphasis added).

[64] Greg Arason, CWB President and CEO, "Grain Prices and Future Trends in the Agriculture Industry," www.cwb.ca/publicat/speeches/nov2399/index.htm at 3 (Exhibit US-13).

[65] STE Notification, at 9 (Exhibit US-1).

(including producers). Thus, unlike a private enterprise, the CWB has a strong incentive to satisfy the greatest number of producers. These producers would likely express strong dissatisfaction if the CWB began to maximize profits by refusing to purchase wheat from significant numbers of producers.

85. The attached Note on Revenue Maximizing Firms[66] draws on basic microeconomics to show that a revenue-maximizing firm will act differently in the market than will a profit-maximizing firm. In particular, the Note shows that revenue-maximizing firms will tend to produce greater volumes, and sell at lower prices, than would profit-maximizing firms.

86. The point of this Note is not to attempt to quantify the point of intersection between the CWB's marginal costs and marginal revenues. Instead, its purpose is to illustrate, using basic economic theory, the fundamental fallacy of any claim that the "CWB tries to get the best prices" is equivalent to an assertion that the CWB will conduct itself like a private grain trader. Instead, where a firm is a revenue maximizer like the CWB, the firm will tend to make sales in greater volumes, and at lower prices, than a normal, profit-maximizing firm.[67]

B. Canada's Treatment of Imported Grain is Inconsistent with its Obligations under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement

1. Canadian Grain Segregation Requirements

87. Canada's grain segregation requirements in the Canada Grain Act and Regulations provide more favorable treatment to domestic grain than to like imported grain, and are thus inconsistent with Canada's obligations under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement.

88. Article III:4 of the GATT 1994 reads in relevant part:

> The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or

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[66] *See* Exhibit US-14.

[67] In fact, one study, co-authored by the CWB itself, indicates that the CWB may market greater volumes of certain types of wheat than called for by market conditions. A joint study by the Manitoba Rural Adaptation Council and the Canadian Wheat Board examined the wheat market, forecast world wheat demand, and provided insight into the market demand for various classes of wheat and wheat production in Canada. The study illustrated that for the five-year period 1992-97, Canadian high-quality wheat production exceeded what the market could bear. In particular, the analysis suggests that Canadian high-quality wheat production exceeded demand by 32 percent over 1992-1997. "The Market Competitiveness of Western Canadian Wheat: Summary," a joint study by the Manitoba Rural Adaptation Council, Inc. and the Canadian Wheat Board, January 1999 (Exhibit US-15).

use.

89. As the Appellate Body explained in *Korea Beef*, three elements must be satisfied to establish a violation of Article III:4:

> [1] that the imported and domestic products at issue are "like products"; [2] that the measure at issue is a "law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use"; and [3] that the imported products are accorded "less favourable" treatment than that accorded to like domestic products.[68]

Each of these three elements apply to the Canadian grain segregation requirements.

90. First, the imported and domestic products at issue – the types of grain covered by the Canada Grain Act and Regulations – are identical, and are thus "like products" for the purpose of GATT Article III.

91. Second, the measures at issue are laws and regulations affecting the transportation and distribution of grain. Section 57 of the Canada Grain Act and Section 56 of the Canadian Grain Regulations apply to the receipt of grain into, or discharge of grain from, "elevators". As noted above, the Canadian grain act broadly defines "elevators" to cover all Canadian facilities used for handling and storing grain.[69] Thus, by placing strict limitations on foreign grain received into or removed from "elevators," the Canadian measures concern the treatment of foreign grain throughout the entire Canadian system for transportation and distribution of grain.

92. Third, the treatment accorded to imported grain is less favorable than that accorded to like domestic grain. As the Appellate Body explained in *Korea Beef*, this factor may be analyzed as follows:

> The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. [T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through

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[68] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, AB-2000-8, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000), para. 133 (hereinafter cited as "*Korea Beef* AB Report").

[69] Canada Grain Act, sec. 2 (definition of "elevator") (Exhibit US-7).

customs. Otherwise indirect protection could be given.[70]

93. The two Canadian measures that make up the segregation requirements call for separate analysis under this factor. Under Section 57 of the Canada Grain Act, imported grain, just like "infested or contaminated grain," may not be received into any grain-handling facility without special approval of the Canadian Grain Commission. In addition, Section 57 provides no indications of the criteria that the Commission might use in deciding whether to grant such approval. In stark contrast, Canadian domestic grain is automatically approved for receipt into any grain-handling facility in Canada.

94. In these circumstances, the conditions of competition established by the Canadian measure strongly favor domestic grain over imported grain. Canadian grain is provided with a special status that assures its eligibility to be received into grain-handling facilities throughout Canada. Imported grain, however, enjoys no such assurances. Any person wishing to make use of imported grain must seek special approval, based on unstated, nontransparent criteria.

95. Section 56(1) of the Canadian Grain Regulations prohibits the mixing of imported grain and domestic grain in transfer elevators. In *Korea Beef*, the Appellate Body examined under Article III:4 a comparable Korean measure that required the segregation in all retail stores of imported and domestic beef. The Appellate Body's analysis of the effects of a segregation requirement on competitive conditions is pertinent:

> [T]he putting into legal effect of the dual retail system for beef meant, in direct practical effect, so far as imported beef was concerned, the sudden cutting off of access to the normal, that is, the previously existing, distribution outlets through which the domestic product continued to flow to consumers in the urban centers and countryside that make up the Korean national territory. The central consequence of the dual retail system can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to generate sales to, the same consumers served by the traditional retail channels for domestic beef.
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> . . . .
>
> [T]he reduction of access to normal retail channels is, in legal contemplation, the effect of that measure. In these circumstances, the intervention of some element of private choice [of the retail store operators] does not relieve Korea of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product.

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[70] *Korea Beef* AB Report, para. 135 (citing earlier AB cases; internal quotation marks omitted; emphasis in original).

96. Although the measures in *Korea Beef* and the present case involve different levels of the distribution system (retail stores in *Korea Beef* versus the Canadian grain handling system), the analysis is the same. The effect of the Canadian anti-mixing requirement is to cut off imported grain from existing Canadian distribution channels, with the effect of reducing the commercial opportunity of imported grain to reach Canadian end-users. The fact that Canadian elevator operators have some element of private choice (although only upon receiving special permission of the Canadian Grain Commission) to handle imported grain does not relieve Canada of its responsibility under Article III:4 for the resulting establishment of less favorable conditions of competition for imported grain.

2. Differential Treatment in Canadian Transportation System

97. The rail revenue cap[71] and the producer car program[72] both favor domestic grain over imported grain, and are thus inconsistent with Canada's obligations under Article III:4 of the GATT 1994. Both programs satisfy the three elements required to establish a violation of Article III:4.

98. First, the imported and domestic products at issue – the types of grain covered (or not covered, as is the case with imported grain) by the rail revenue cap and producer car program – are identical, and are thus "like products" for the purpose of GATT Article III.

99. Second, both of these measures directly relate to the transportation of grain, and are thus "laws, regulations and requirements affecting . . . transportation" under Article III:4.

100. Third, both of these measures accord treatment to imported grain that is less favorable than that accorded to like products of national origin. The rail revenue cap applies to Western Canadian grain, and no imported grain is eligible for receiving the benefits of the program. This discriminatory treatment provides more favorable conditions of competition for Canadian domestic grain than for imported grain. In particular, a purchaser of Western Canadian grain is assured that total revenue received by a railroad on the transport of such grain is capped, and thus the tariff to be charged by a Canadian railroad is limited under the Canadian measure. In contrast, Canadian law lacks any such limits for the transport of imported grain. The result is a system which mandates a competitive advantage for domestic grain over imported grain.

101. Similarly, the producer car program only applies to grain grown by Canadian producers, and thus excludes all imported grain. Making government rail cars available for the transport of domestic grain reduces transportation costs for any grain that receives this benefit. In contrast, imported grain, which is not eligible for the program, receives no such benefits. Again, the result is a system which mandates a competitive advantage for domestic grain over imported grain.

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[71] Canada Transportation Act, sec. 151 (Exhibit US-9).

[72] Canada Grain Act, sec. 87 (Exhibit US-7).

3. The Canadian Grain Segregation Requirements and Discriminatory Rail Transportation Measures are also Inconsistent with Article 2 of the TRIMs Agreement

102. The Canadian grain segregation requirements and discriminatory rail transportation measures are also inconsistent with Article 2 of the TRIMs Agreement. First, these measures fall within the types of measures covered in the Illustrative List in the Annex to the TRIMs Agreement. Illustrative List 1(a) provides:

> 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
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> > (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

103. The grain segregation measures require elevator operators to use domestic Canadian grain. The discriminatory rail transportation requirements require shippers to use domestic Canadian grain in order to obtain the advantages of the rail revenue cap or government rail cars. Thus, both types of measures fall squarely within the Illustrative List of measures covered by the TRIMs Agreement.

104. Second, under Article 2 of the TRIMs Agreement, a TRIM that is inconsistent with Article III of the GATT 1994 is also inconsistent with the TRIMs Agreement.[73] Thus, for the same reasons that the grain segregation requirements and discriminatory rail transportation measures are inconsistent with Canada's obligations under Article III:4 of the GATT 1994, these measures are also inconsistent with Article 2 of the TRIMs Agreement.

V. CONCLUSION

105. For all of the reasons set forth above, the United States respectfully requests that the Panel find that:

> (1) the CWB export regime is inconsistent with the obligations of Canada under Article XVII:1 of the GATT 1994;

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[73] TRIMs Agreement, art. 2 ("Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.").

(2) the Canadian grain segregation requirements are inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement; and

(3) the rail revenue cap and the producer car program are inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement**.**

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

WT/DS276

First Written Submission of the
United States of America

LIST OF EXHIBITS

US - 1. Working Party on State Trading Enterprises, New and Full Notification [by Canada] Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII, G/STR/N/4/CAN, 5 November 2002.

US - 2. Canadian Wheat Board Act.

US - 3. Working Party on State Trading Enterprises, Questions Posed by the United States Concerning the Article XVII Notification of Canada, G/STR/Q1/CAN/6, 13 January 2003.

US - 4. "Alberta Farmer Finishes Jail Time for Illegally Moving Grain Across Border," Canadian Press, November 23, 2002.

US - 5. Office of the Auditor General, Canada. "Canadian Wheat Board Special Audit Report." Presented to the Board of Directors on February 27, 2002.

US - 6. Canadian Wheat Board. Annual Report 2001-02 (excerpts from Management Report and Analysis and Financial Results). Prior Annual Reports *available at* http://www.cwb.ca/en/publications/index.jsp. Receiver General for Canada. Public Accounts of Canada 2002 (Tables 9.6 and 9.7). Prior Public Accounts of Canada *available at* http://collection.nlc-bnc.ca/100/201/301/public_accounts_can/ .

US - 7. Canada Grain Act.

US - 8. Canada Grain Regulations.

US - 9. Canada Transportation Act, Part III, Division VI, sections 147-152 and Schedule II.

US - 10. The CGC and Producer Cars, *available at* www.grainscanada.gc.ca/pubs/FactsFarm/factsfarmers15-e.htm .

US - 11. Library of Parliament, Legislative Summaries, Bill C-4: An Act to Amend the Canadian Wheat Board Act and to Make Consequential Amendments to Other Acts, 29 Sept. 1997, revised 20 November 1997.

US - 12. Canadian Wheat Board. "The Role of the Canadian Wheat Board in the Western Canadian Grain Marketing System," February 23, 1996 (submitted by the CWB to the Western

Grain Marketing Panel).

US - 13. Greg Arason, CWB President and CEO, "Grain Prices and Future Trends in the Agriculture Industry," www.cwb.ca/publicat/speeches/nov2399/index.htm.

US - 14. Note on Revenue-Maximizing Firms.

US - 15. "The Market Competitiveness of Western Canadian Wheat: Summary," a joint study by the Manitoba Rural Adaptation Council, Inc. and the Canadian Wheat Board, January 1999.