*Canada's SCI removed from para. 29*

***Canada – Measures Relating to***
***Exports of Wheat and Treatment of Imported Grain***
**(WT/DS276)**

**Opening Statement of the United States of America**
**at the Second Meeting of the Panel**

October 21, 2003

1. Thank you, Madame Chairperson, and members of the Panel. The United States appreciates this opportunity to further discuss the key issues in this dispute. We have described our case in detail in our second written submission and in our responses to the Panel's first set of questions. We believe these written submissions have adequately and clearly expressed our case; however, we would like to take this opportunity today to further discuss our claims and address certain aspects of Canada's second written submission.

2. This dispute is not, in the words of Canada, "a recipe for chaos and disaster in the WTO." This dispute is simply about Canada's legal obligations under Article XVII of the GATT 1994, Article III:4 of the GATT 1994 and Article II of the TRIMs Agreement, and Canada's failure to meet its obligations under those Articles.

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

3. I will begin with Article XVII. Article XVII:1 contains three distinct legal obligations. First, Canada undertakes that its State Trading Enterprise – the Canadian Wheat Board ("CWB") – will "act in a manner consistent with the general principles of non-discriminatory treatment" prescribed in the GATT 1994. Second, Canada undertakes that the CWB will make its purchases and sales "solely in accordance with commercial considerations." And third, Canada undertakes

that the CWB will "afford the enterprises of the other [Members] adequate opportunity . . . to compete for participation in" the CWB's sales. A breach of any of these obligations is sufficient to establish that Canada has violated Article XVII.

4. This is not a novel interpretation of the legal standards set forth in Article XVII. The *Korea Beef* panel reached the same conclusion, observing that "[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." Thus, if the Panel concludes that Canada has allowed the CWB to act inconsistently with any of the standards set forth in either Article XVII:1(a) or Article XVII:1(b), Canada has violated its obligations under Article XVII.

5. In its second submission, Canada remains focused on the word "ensure," which we used in our first submission to describe Canada's obligations under Article XVII. But this argument over semantics is merely a smoke screen intended to distract from the legal obligations at issue in this dispute. As Canada itself points out, the word "undertakes" – which appears in Article XVII – means "to commit oneself to perform" or to "guarantee." Canada therefore guarantees that the CWB will act consistently with these principles of Article XVII. As I will elaborate on in a moment, the CWB is <u>not</u> acting consistently with the principles in Article XVII, and Canada has done <u>nothing</u> to guarantee that the CWB will act according to the principles of Article XVII. Canada has therefore breached its obligations.

6. As explained in detail in our written submissions, the CWB export regime, left undisciplined and unsupervised, violates all three standards set forth in Article XVII. The CWB

export regime viewed in its entirety – including the CWB's mandate, its unchecked exercise of its exclusive and special privileges, and the lack of any countervailing supervision or discipline by the Government of Canada – necessarily results in sales that breach Article XVII's standards.

7. Our written submissions have described at length how the CWB export regime violates the standards set forth in Article XVII. The CWB export regime provides the CWB with greater pricing flexibility and less risk exposure than that experienced by an enterprise acting in accordance with commercial considerations and customary business practice. According to the CWB's own analysis, the CWB "manages risk to an extent not available in the open market[.]" The CWB uses this greater flexibility to act in a non-commercial manner and in ways that do not provide the enterprises of other Members an adequate opportunity to compete for participation in the sales of the CWB.

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

9. An example of this non-commercial behavior is the protein or quality giveaway, which we describe in detail in our second submission. The CWB pays premiums to farmers for high quality wheat, even when these premiums are not justified by demand for high quality wheat in third-country markets. As cited in our written submissions, these premium payments result in high quality wheat production that exceeds demand by 32 percent.

10. The CWB then uses this excess production of high quality wheat to act in a non-

commercial manner. Having an excess of high quality wheat means that for certain transactions, the CWB provides a price discount for high quality wheat so that it may meet the price competition for lower quality wheat in a given market.

11. This behavior is not in accordance with commercial considerations, because the CWB is not getting the full replacement value for the high quality wheat it is selling in the market. Giving away quality in this manner is inconsistent with Article XVII standards. The CWB gives away quality because its mandate – to maximize sales of Canadian wheat on the world market – combined with the CWB's incentives and special privileges, necessarily result in this behavior that is not in accordance with commercial considerations. Wheat sellers in third-country markets are not afforded an adequate opportunity to compete for participation in the CWB's sales when the CWB gives away quality in this manner. The CWB uses pricing flexibility that a commercial actor does not have to capture sales.

12. The quality giveaway also demonstrates how, in this case, a violation of the standards set forth in Article XVII:1(b) necessarily leads to a violation of the non-discriminatory treatment standard in Article XVII:1(a).

13. The CWB's discriminatory sales behavior is a result of the unique CWB export regime. This unique regime includes the CWB's mandate to maximize sales by accepting merely "reasonable" prices – as opposed to the profit-maximizing price – for its wheat, the CWB's guaranteed initial payment for wheat backed by the Government of Canada, the CWB's net interest earnings that flow directly into CWB pool accounts, and the government guarantees that permit the CWB to engage in high risk credit sales. This CWB regime fails to afford the

enterprises of other Members an adequate opportunity to compete in accordance with customary business practice and results in sales that are not in accordance with commercial considerations. These sales also violate the non-discriminatory treatment principles of the GATT 1994.

14. Before I move on to our Article III:4 and TRIMs claims, I would like to take a moment to clarify the standards under Article XVII:1(b). Article XVII:1(b) requires Canada to guarantee that the CWB will afford the enterprises of other Members an "adequate opportunity . . . to compete for participation in" the CWB's sales. This opportunity for participation includes both wheat buyers and wheat sellers in third country markets.

15. Canada tries to argue that Article XVII:1(b) only requires that the CWB allow competition among wheat buyers. This is unsupported by the text of Article XVII. Canada must guarantee that the CWB affords buyers and sellers of wheat an adequate opportunity to compete in the marketplace, and the CWB does not do so.

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

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

18. For all of these reasons, the United States asks the Panel to find that Canada has breached its obligations under Article XVII.

## CANADA'S GRAIN HANDLING MEASURES AND TRANSPORTATION MEASURES VIOLATE GATT ARTICLE III:4

19. I next turn to Article III:4. With regard to our Article III:4 claims, Canada ignores the real issue. This case is not about Canada's labeling and grading of grain. The measures at issue in this case are specific provisions of the Canada Grain Act, the Canada Grain Regulations and the Canada Transportation Act that provide less favorable treatment for foreign grain. This less favorable treatment occurs specifically under Canada Grain Act Section 57, which prohibits entry of foreign grain into grain elevators, Canada Grain Regulations Section 56(1), which prohibits the mixing of foreign grain by grain elevators, Canada Grain Act Section 87, which provides producer cars only for Canadian grain, and the rail revenue cap program under Canada Transportation Act Sections 150(1) and 150(2). These are the only measures that are before the Panel.

20. Before I discuss less favorable treatment, I would like to emphasize that there is no question that like products are at issue in this dispute and that the measures that are the focal point of this dispute are measures that affect the internal sale, offering for sale, purchase,

transportation, distribution or use of these like products.

21. It is well-established that origin cannot serve as a basis for distinguishing like products. The Canadian grain segregation and rail transportation measures at issue here differentiate among grains based not on intrinsic qualities or end-uses, but based on factors not relevant to the definition of likeness, such as whether or not the grain is "foreign."

22. In this dispute, it appears that the parties agree that like products are those classes of grain that have similar intrinsic characteristics and end uses. For example, U.S. corn and Canadian corn are like products, as are U.S. durum wheat and Canadian durum wheat. Canada adopts the same approach in its answers to the Panel's questions. Nevertheless, even if one were to look at specific varieties rather than classes of grain in order to establish like products in this dispute, in fact, U.S. wheat farmers and Canadian wheat farmers not only grow the same class of wheat (*e.g.*, durum), but they grow several identical varieties of durum wheat (*e.g.*, Kyle). Yet even this identical product – U.S. Kyle durum wheat -- when exported to Canada, is subject to less favorable treatment than Canadian Kyle durum wheat merely because the U.S. wheat is foreign.

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

24. I would now like to focus my remarks on the less favorable treatment imported grain

receives in Canada as compared to domestic grain. First, I will discuss Canada's grain segregation measures and mixing prohibitions for all foreign grain entering Canadian grain elevators. Then I will briefly discuss Canada's transportation measures.

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

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

27. As explained at length in our second submission, special authorizations granted to foreign grain by the Canadian Grain Commission ("CGC") do not remedy what is otherwise an Article III:4 violation. The fact that an elevator operator must obtain special authorization before he can receive foreign grain, but like Canadian grain can be accepted without special authorization, results in less favorable treatment for foreign grain. As the Appellate Body concluded in *United States – Section 211*, the imposition of an additional regulatory hurdle only for foreign like products violates Canada's national treatment obligation.

28. In its second submission, Canada speaks at length of U.S. shipments that bypass Canadian grain elevators and go directly to Canadian end users. These shipments directly to end users are not at issue here. The United States is challenging the Canada Grain Act and Canada Grain Regulations provisions that prohibit entry of foreign grain into Canadian grain elevators and prohibit the mixing of foreign grain by grain elevators. Direct shipments to end users are beside the point.

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

31. Let us assume for purposes of this example that a U.S. farmer has grown a Canadian variety of wheat, so that the U.S. product being exported to Canada and received by a Canadian grain elevator is exactly identical to the Canadian product being shipped to the same Canadian grain elevator.

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

33. These are not insignificant burdens, and these burdens are not imposed on Canadian wheat shipments to grain elevators. When U.S. wheat is received, the grain elevator must pay for special CGC inspection and monitoring services, thereby making the cost of receiving U.S. wheat

higher than the cost of receiving like Canadian wheat. There are also indirect costs such as the time it takes an elevator operator to comply with the special requirements for U.S. wheat, and the additional regulatory uncertainty resulting from the need to contact the CGC in advance and rely upon the CGC's inspectors. For Canadian wheat, the elevator operator himself can complete any inspection and weighing that is necessary. It is important to recall that these additional requirements and costs for U.S. wheat shipments apply even if a Canadian variety of wheat is shipped from the United States to the Canadian grain elevator.

34. The additional costs and regulatory requirements for U.S. wheat make U.S. wheat a less attractive option for elevator operators. The result is less favorable treatment and less favorable competitive conditions for U.S. wheat entering the Canadian bulk handling system.

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

36. Finally, Canada's rail revenue cap also violates Article III:4 by affording imported grain less favorable treatment than like domestic grain. The revenue cap, which only applies to shipments of domestic Canadian grain, reduces transportation costs and uncertainty regarding

those costs, thus providing a tangible benefit to domestic grain. U.S. grain travels along the same routes that are subject to the revenue cap. However, shipments of U.S. grain are not subject to the cap. As we discussed in detail in our first submission and in our response to the Panel's questions, because there is a significant penalty for shippers who exceed the rail revenue cap, shippers have an incentive to charge lower fees for shipments of Canadian grain than for shipments of like foreign grain.

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

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

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

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

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

41. Not only are Canada's grain segregation measures unnecessary to secure compliance with the Canada Grain Act and Canada's unfair competition laws, but the measures also constitute unjustifiable discrimination. Canada's concerns about misrepresentation of grain apply to all grain, and therefore all grain – not just foreign grain – should be subject to additional regulation and special CGC oversight. To limit these regulatory requirements to foreign grain thus results in arbitrary and unjustifiable discrimination.

## CANADA'S GRAIN HANDLING MEASURES AND TRANSPORTATION MEASURES VIOLATE ARTICLE II OF THE TRIMs AGREEMENT

42. Finally, Canada's grain segregation requirements and discriminatory rail transportation measures violate Article 2 of the TRIMs Agreement. These measures fall squarely within the Illustrative List 1(a) of the TRIMs Agreement as mandatory and enforceable measures that provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain. As stated earlier, the need for elevator operators to seek special authorization before accepting and/or mixing foreign grain and the conditions often placed on such authorizations creates a regulatory regime that financially rewards those elevator operators that accept domestic grain rather than foreign grain.

43. Similarly, the rail revenue cap and producer car programs are mandatory and enforceable

measures within the meaning of the Illustrative List. These measures provide cost advantages in the form of lower rail transportation rates to those shippers that choose to ship Canadian grain rather than foreign grain.

44. Therefore, these TRIMs, which are inconsistent with Article III:4, are necessarily inconsistent with Article 2 of the TRIMs Agreement.

**CONCLUSION**

45. Madame Chairperson, members of the Panel, this concludes our oral statement for today. We welcome any oral or written questions the Panel may wish to present at any time. Thank you.