**WORLD TRADE ORGANIZATION**

**WT/DS276/R**
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# CANADA – MEASURES RELATING TO EXPORTS OF WHEAT AND TREATMENT OF IMPORTED GRAIN

## *Reports of the Panel*

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# I. INTRODUCTION

## A. COMPLAINT OF THE UNITED STATES

1.1 On 17 December 2002, the United States requested consultations with the Government of Canada pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("*DSU*"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("*GATT 1994*") and Article 8 of the *Agreement on Trade-Related Investment Measures ("TRIMs Agreement")*, with regard to matters concerning the export of wheat by the Canadian Wheat Board and the treatment accorded by Canada to grain imported into Canada.[1]

1.2 On 31 January 2003, the United States and Canada held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 6 March 2003, the United States requested the establishment of a panel to examine the matter.[2]

## B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 31 March 2003, the Dispute Settlement Body established a panel in accordance with Article 6 of the *DSU* and pursuant to the request made by the United States in document WT/DS276/6 (hereinafter referred to as the "March Panel").

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS276/6, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 12 May 2003, the Director-General composed the Panel as follows:

Chairperson: Ms Claudia Orozco

Members: Mr Alan Matthews
Mr Hanspeter Tschäni

1.7 On 13 May 2003 the Panel received two preliminary submissions from Canada requesting an early ruling on issues relating to the Panel's jurisdiction under Article 6.2 of the DSU and the adoption of special procedures for the protection of strictly confidential information.

1.8 At the request of Canada, the Panel held a hearing on preliminary issues on 6 June 2003. This hearing included a special session with the third parties. On 25 June 2003, the Panel issued a "Preliminary Ruling on the Panel's Jurisdiction under Article 6.2 of the DSU" finding that the United States' request for the establishment of a panel of 6 March 2003 (WT/DS276/6) did not meet the requirements of Article 6.2 of the DSU because it did not adequately specify the Canadian laws and regulations addressed in the United States' claim under Article XVII of the GATT 1994.

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[1] WT/DS276/1.
[2] WT/DS276/6.

1.9 On 30 June 2003, the United States filed a second panel request (WT/DS276/9) that incorporated all of the measures and claims included in the United States' panel request of 6 March 2003.

1.10 At its meeting of 11 July 2003, the Dispute Settlement Body established a second panel in accordance with Article 6 of the *DSU* and pursuant to the 30 June 2003 request by the United States (hereinafter referred to as the "July Panel"). The terms of reference for the Panel, as contained in document WT/DS276/13, are:

> "To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS276/9, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

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

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

1.13 Australia, Chile, China, the European Communities, Japan, Mexico and Chinese Taipei reserved their third-party rights in this dispute for both the March Panel and the July Panel.

### C. PANEL PROCEEDINGS

1.14 The Panel met with the parties on 6 June 2003 for a hearing on preliminary issues which included a special session with the third parties; on 8-9 September 2003 for the first substantive meeting; and on 21 October 2003 for the second substantive meeting. The Panel met with third parties on 9 September 2003.

1.15 On 22 December 2003, the Panel issued its interim reports to the parties. On 16 January 2004, the Panel received comments from the parties. On 10 February 2004, the Panel issued its final reports to the parties.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the Canadian Wheat Board ("CWB") Export Regime, which the United States has defined as including 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.[3]

2.2 This dispute also concerns certain requirements related to Canada's bulk grain handling system established under Section 57 of the *Canada Grain Act* ("CGA") and Section 56 of the *Canada Grain Regulations* ("the *Regulations*"); Canada's rail revenue cap established under Section 150 of the *Canada Transportation Act* ("CTA"); and, Canada's producer railway car allocation programme established under Section 87 of the CGA.

[3] WT/DS276/9.

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

### A. UNITED STATES

3.1 The United States requests the Panel to find that:

(a) the CWB Export Regime is inconsistent with the obligations of Canada under Article XVII:1 of the GATT 1994;

(b) the Canadian grain segregation requirements (Section 57 of the CGA and Section 56 of the *Regulations* as it existed at the time that the March and July Panels were established) are inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*; and

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

### B. CANADA

3.2 Canada asks that the Panel make the following findings:

(a) that the CWB, in its purchases or sales involving wheat exports has acted in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994; and therefore that the Government of Canada is not in violation of paragraph 1(a) of Article XVII of GATT 1994;

(b) that if the Panel finds that the CWB, in its purchases or sales involving wheat exports has not acted in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994, that any such discriminatory conduct is in accordance with commercial considerations; and therefore that the Government of Canada is not in violation of Article XVII:1 of GATT 1994;

(c) that the CGA and *Regulations* are not in violation of Article III:4 of GATT 1994 and Article 2 of the *TRIMs Agreement*;

(d) that the maximum revenue entitlement of the *Canada Transportation Act* is not in violation of Article III:4 of GATT 1994 and Article 2 of the *TRIMs Agreement*; and

(e) that Section 87 of the CGA dealing with producer car allocations is not in violation of Article III:4 of GATT 1994 and Article 2 of the *TRIMs Agreement*.

## IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments as presented in their submissions are summarized in this section. The summaries are based on the executive summaries submitted by the parties. The parties' written answers to questions are set forth in the Annexes to this report (see list of annexes, page viii, *supra*).

### A. PRELIMINARY WRITTEN SUBMISSION OF CANADA ON THE PANEL'S JURISDICTION UNDER ARTICLE 6.2 OF THE DSU

4.2 Detailed below are Canada's arguments in its first preliminary written submission on the Panel's jurisdiction under Article 6.2 of the DSU.

4.3 In its Request for the Establishment of a Panel in this dispute ("Request")[4], the United States has failed to comply with the requirements of Article 6.2 of the DSU.

4.4 The Request does not identify the precise nature and scope of the measures at issue in relation to the regulation and practices of the CWB and the treatment of imported grain. It also lacks the requisite brief summary of the legal basis of the United States' complaints sufficient to present the problem clearly.

4.5 A WTO panel has both the right and the obligation to determine whether the claims raised by a party fall within its jurisdiction. Where, as in this case, a complaining party has not set out its claims in accordance with Article 6.2, those claims fall outside the jurisdiction of the Panel. The Panel may not assume jurisdiction over claims that do not comply with the requirements of Article 6.2.

#### 1. The Panel has the right and the obligation to refuse to assume jurisdiction in respect of claims that do not comply with the requirements of the DSU

4.6 A panel has both the right and the duty to determine whether the request for the establishment of a panel by a complaining party complies with the requirements of the DSU. As found by the Appellate Body in *EC - Bananas III*:

> "As a panel request is normally not subject to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[5]

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[4] WT/DS276/6.

[5] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142. This was re-affirmed by the Appellate Body in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy*"), WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, para. 122.; Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, para. 86; Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by the Appellate Body Report, WT/DS213/AB/R, para 8.5; and Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast*

4.7 The Appellate Body has "stressed, on more than one occasion, the fundamental importance of a panel's terms of reference."[6] It found in *India – Patent Protection for Pharmaceutical and Agricultural Products*, that "[a] panel cannot assume jurisdiction that it does not have".[7]

4.8 The Request does not satisfy the requirements of Article 6.2. The claims advanced by the United States fail to meet the letter and the spirit of that Article. Because this deficient Request also establishes the terms of reference for this Panel, the Panel should refuse to assume jurisdiction in respect of claims not properly set out in the Request.

**2. The requirements of Article 6.2 of the DSU**

(a) The text and context of Article 6.2

4.9 Requests for the establishment of a panel must comply with the requirements of Article 6.2, which provides:

> "The request for the establishment of a panel ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

4.10 The Appellate Body has stressed the need to adhere to all of the requirements of Article 6.2:

> "It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint."[8]

4.11 In *Korea – Dairy*, the Appellate Body found:

> "When parsed into its constituent parts, Article 6.2 may be seen to impose the following requirements. The request must: (i) be in writing; (ii) indicate whether consultations were held; (iii) identify the specific measures at issue; and (iv) provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In its fourth requirement, Article 6.2 demands only a summary - and it may be a brief one - of the legal basis of the complaint; but the summary must, in any event, be one that is "sufficient to present the problem clearly". It is not enough, in other words, that "the legal basis of the complaint" is summarily identified; the identification must "present the problem clearly"."[9]

4.12 Whether a request for the establishment of a panel meets the requirements of Article 6.2 must be decided on a case-by-case basis.[10] As the Appellate Body further found in *Korea – Dairy*:

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*Iron Tube or Pipe Fittings from Brazil* ("*EC – Tube or Pipe Fittings*"), WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R.), para. 7.18.

[6] Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* ("*India – Patents (US)*"), WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 87).

[7] *Id*., para. 92.

[8] Appellate Body Report, *EC - Bananas III*, para. 142; Appellate Body Report, *Korea – Dairy*, para. 122; Appellate Body Report, *Thailand – H-Beams*, para. 84.

[9] Appellate Body Report, *Korea – Dairy*, para. 120.

[10] Appellate Body Report, *Korea – Dairy*, para. 127; Appellate Body Report, *Thailand – H-Beams*, para. 87.

> "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough … there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."[11]

(b) Object and purpose of Article 6.2

4.13 According to the Appellate Body, "a defending party is always entitled to its full measure of due process in the course of WTO dispute settlement."[12] The express requirements of Article 6.2 crystallize the due process rights of a party in respect of the jurisdiction of a panel.

4.14 The fundamental fairness of the proceedings are undermined where the complaining party fails to comply with the requirements of Article 6.2, more specifically, the obligation to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." In *Thailand – H-Beams*, the Appellate Body stated:

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[11] Appellate Body Report, *Korea – Dairy*, para. 124; Appellate Body Report, *Thailand – H-Beams*, para. 87. See also Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* ("*Mexico – Corn Syrup*"), WT/DS132/R and Corr.1, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.13.

The Panel in the *EC - Bed Linen* case rejected certain claims made by India under Article 6 of the Anti-Dumping Agreement because India had failed to set forth such claims in its request for the establishment of the panel. The panel recalled that in the *Korea – Dairy* dispute, the Appellate Body had found that there might be situations where a "mere listing" of treaty Articles would not satisfy the standards of Article 6.2. It then went on to state that:

> the treaty Articles alleged to be violated *are not even listed* in the request for establishment - Article 6 of the AD Agreement does [not] appear on the face of the document at all. In this circumstance, we consider that the legal basis of a complaint with respect to that Article has not been presented at all. ... In our view, a failure to state a claim in even the most minimal sense, by listing the treaty Articles alleged to be violated, cannot be cured by reference to subsequent submissions. ... Thus, the fact that India may have fully elucidated its position with respect to alleged violations of Article 6 of the AD Agreement in its first written submission to the Panel avails it nothing as a legal matter. Failure to even mention in the request for establishment the treaty Article alleged to have been violated in our view constitutes failure to state a claim at all.

Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC – Bed Linen*"), WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2319, paras. 6.13 and 6.15.

[12] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.24. See also the Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, DSR 1999:VI, 2363, para. 9.3, and more recently the Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, para. 36.

> "Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party. *A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.* Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. *This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings*."[13] [emphasis added]

(c) Deficiency in a panel request may not be "cured"

4.15 The requirements of Article 6.2 must be met in the request for establishment of a panel. Any deficiencies in the panel request may not be "cured" by the submissions of the complainant. The Appellate Body in *EC - Bananas III* held that:

> "We do not agree with the Panel that even if there was some uncertainty whether the panel request had met the requirements of Article 6.2, the first written submissions of the Complainants 'cured' that uncertainty because their submissions were sufficiently detailed to present all the factual and legal issues clearly. Article 6.2 of the DSU requires that the claims, but not the *arguments*, must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint. If a *claim* is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."[14]

4.16 The Appellate Body has reinforced this point, stating that "a claim *must* be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case."[15]

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[13] *Thailand – H-Beams*, Appellate Body Report, para. 88. Similarly, in *Brazil - Measures Affecting Desiccated Coconut*, the Appellate Body noted that:

> A panel's terms of reference are important for two reasons. First, *terms of reference fulfil an important due process objective* - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute. [emphasis added]

Panel Report, *Brazil – Measures Affecting Desiccated Coconut* ("*Brazil – Desiccated Coconut*"), WT/DS22/R, adopted 20 March 1997, as upheld by the Appellate Body Report, WT/DS22/AB/R, DSR 1997:I, 189, p. 22.

[14] Appellate Body Report, *EC - Bananas III*, para. 143. See also Report of the Appellate Body, *European Communities - Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, para. 72, footnote 49; and Panel Report, *EC - Bed Linen*, para. 6.15. In addition, the Panel in the *Argentina - Footwear* dispute noted that: "Clearly, due process and adequate notice would not be served if a complaining party were free to add new measures or new claims to its original complaint as reflected in its panel request at a later stage of a panel proceeding." (Panel Report, *Argentina – Safeguard Measures on Imports of Footwear* ("*Argentina – Footwear*"), WT/DS121/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS121/AB/R, DSR 2000:II, 575, para. 8.45.)

[15] Appellate Body Report, *India - Patents (US)*, para. 89 [emphasis in original]. See also Appellate Body Report, *Brazil - Coconut*, p. 22.

4.17 It is for the complaining party in a given dispute to establish clearly the grounds upon which it founds its case. This obligation flows directly from Article 6.2. Failure to satisfy the obligation creates a prejudice to the interests of the defending party. The sole remedy for breach of the fundamental safeguards set out in Article 6.2 is for a panel to refuse to assume jurisdiction with respect to the deficient claims. This remedy is key to ensuring the due process rights of disputing parties under the DSU.

### 3. Certain claims in the United States' request for the establishment of a Panel fail to meet the requirements of Article 6.2

4.18 The United States makes two broad allegations against the Government of Canada and the CWB. The first is in respect of paragraphs 1(a) and (b) of Article XVII of GATT 1994. The second concerns Article III:4 of GATT 1994 and Article 2 of the *TRIMs Agreement*. Neither allegation satisfies the express requirements of Article 6.2 of the DSU. Both fail to identify the specific measures in issue and to identify clearly (or at all) the legal basis for the complaint.

4.19 The specific inconsistencies of each claim with the requirements of Article 6.2 are set out below.

(a) Claim under Article XVII of GATT 1994

4.20 The United States alleges that:

> "The Government of Canada has established the [CWB] and has granted to this enterprise exclusive and special privileges ... The laws, regulations and actions of the Government of Canada and the CWB appear to be inconsistent with the obligations of the Government of Canada under Article XVII of the GATT 1994. In particular, the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat appear to be:
>
> - inconsistent with paragraph 1(a) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB, in its purchases or sales involving wheat exports, shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994; and
>
> - inconsistent with paragraph 1(b) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB shall make such purchases or sales solely in accordance with commercial considerations and shall afford the enterprises of other WTO Members adequate opportunity, in accordance with customary business practice, to compete for such purchases."

4.21 As part of its claim, the United States also alleges that "the apparent inconsistency with Canada's obligations under Article XVII of the GATT 1994 includes the failure of the Government of Canada to ensure that the CWB makes such purchases or sales in accordance with the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII."

4.22 The foundation for the United States' claim is in various "laws, regulations and actions" that are nowhere described. Any number of laws, regulations and actions may be related to the export of

wheat but have no relevance to the instant claim.[16] Even assuming a finite universe of potentially relevant "laws and regulations," the United States must identify the laws, regulations and actions that it alleges violate the WTO Agreement. As was the case in *Japan – Film*, the complaining party must identify both the law *and* how it applies. Without greater detail, the case to meet is simply too vast. There are at least three ways in which this claim violates the requirements of Article 6.2.

4.23 First, the United States has alleged that various "actions" by Canada and the CWB violate Canada's Article XVII obligations. The term "action" implies some specific conduct or instance, but the United States identifies neither conduct nor a specific instance to support claims of inconsistency with Article XVII obligations.

4.24 Second, the United States refers to violation by Canada of Article XVII:1(b) as a result of these undefined "laws, regulations and actions". However, Article XVII:1(b) contains two obligations. The first obligation relates to the operations of STEs generally; the other imposes an obligation on a Member to afford to the enterprises of other WTO Members the opportunity to compete for the business of STEs. The Request does not make it clear which laws, regulations or actions result in the violation of which obligation.

4.25 Third, the United States fails to identify the nature of its claim in respect of Article XVII:1(b). Article XVII does not contain an express definition for either of the terms "commercial considerations" or "customary business practice", in paragraph 1(b) of Article XVII. As the Appellate Body set out in *Korea – Dairy*, a complaining party is required, at a minimum, to set out a brief summary of the legal case sufficient to describe the problem clearly.[17] Nothing in the United States' claim establishes the legal basis of allegations by the United States that the CWB does not follow customary business practice or does not take into account commercial considerations in its conduct, or that Canada is in violation of its Article XVII obligations because it has failed to "ensure" such conduct. Such practice and considerations are to be viewed through the prism of the offending "laws, regulations and actions", which are not cited in the United States' request. That is, there is no context within which to evaluate the United States' claim under Article XVII:1(b).

4.26 For these reasons, the United States' claim under Article XVII fails to satisfy the requirements of Article 6.2 and so the Panel should refuse to assume jurisdiction over this claim.

(b) Claim under Article III:4 of GATT 1994

4.27 The United States' claim under Article III:4 begins: "[w]ith regard to the treatment of grain that is imported into Canada, Canadian measures discriminate against imported grain, including grain that is the product of the United States." The claim proceeds to allege a violation of Article III:4 in respect of rail car allocation.

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[16] On this issue, it is useful to consider the thoughts of the panel in *Japan - Film*:

> In considering whether these ... measures were adequately identified in the panel request, we note that in contrast to the Premiums Law, which has a relatively narrow focus (i.e., premiums), the Antimonopoly Law has a very broad scope and deals with a broad range of issues. As such, we would have some hesitation in saying that a reference to the Antimonopoly Law alone would be sufficient to bring all measures taken by Japan under that Law within the scope of the panel request.

Ultimately, it was not necessary for the *Japan - Film* panel to decide this issue. (Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.16.)

[17] Appellate Body Report, *Korea – Dairy*, para. 120.

4.28 As the Appellate Body found in *Korea – Dairy*, a complainant's identification of the legal basis for the complaint is necessary but not sufficient: that identification must present the problem clearly. The United States alleges that, in allocating railcars used for transport of grain, Canada provides a preference for domestic grain over imported grain. However, this element of the United States' claim fails to give any indication of the specific measures with which it takes issue. It is not possible for Canada to prepare a defence against this claim without being alerted in *some* detail to the provisions that are alleged to violate Article III:4.

4.29 It is insufficient under Article 6.2 of the DSU to raise generally the issue of rail car allocation without providing details as to the measure at issue. The obligation of the United States is to identify the measures that allegedly accord United States' grain less-favourable treatment through such allocation. It has failed to do so. Because the United States' claim in respect of car allocation fails to satisfy the requirements of Article 6.2, the Panel should refuse to assume jurisdiction over this claim.

(c) Claim under Article 2 of the *TRIMs Agreement*

4.30 The claims of the United States against Canada in respect of Article 2 of the *TRIMs Agreement* are based upon the allegations it makes concerning its claims under Article III:4. The United States alleges violations of Article 2 in respect of rail transportation, rail car allocation and grain segregation under the *Canada Grain Act* and associated regulations.

4.31 In alleging a violation of the *TRIMs Agreement*, the United States appears to rely solely on the relationship between Article 2 and Article III:4. The United States fails, however, to provide any indication as to the nature of the investment measure that it alleges is inconsistent with Canada's obligations under the *TRIMs Agreement*. The United States' allegation does not refer, for example, to any measures of the type identified in the illustrative list under Article 2(2). As noted above, Article 6.2 requires complainants to identify the measure at issue. The prejudice to Canada is abundantly clear; Canada can but speculate as to the unstated measures and legal basis for the allegation of breach of Article 2 of the *TRIMs Agreement*. Because the United States' claim against Canada for breach of obligations under the *TRIMs Agreement* fails to satisfy the requirements of Article 6.2, the Panel should refuse to assume jurisdiction over this claim.

(d) Efforts at clarification

4.32 A deficient request may not be cured through subsequent submissions. Canada nonetheless made a good-faith effort to clarify the grounds for the Request. On 7 April 2003, Canada wrote to the United States seeking the following clarifications:[18]

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[18] Previous cases suggest that the defending party may seek clarifications from the complaining party about the claims that have been made. As the Appellate Body stated in *Thailand – H-Beams*:

> In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU that enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". As we have previously stated, the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."

This point was also emphasized in the Panel Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ("*US – Lamb*"), WT/DS177/R,

> "The United States' request, dated 6 March 2003, does not meet the requirements of Article 6(2). Specifically, it does not 'identify the specific measures at issue', as it refers generally to 'the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat' and 'measures concerning rail transportation'. As well, the United States' request makes certain allegations but does not set out the legal basis of its complaints.
>
> We ask the United States' to promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint."

4.33 Canada received no reply from the United States. Canada thus has no information that would clarify the grounds upon which the United States founds its claims.

**4. Request for preliminary rulings**

4.34 The United States has denied Canada the due process protections afforded by Article 6.2. Certain claims in the Request fail to satisfy the express requirements of Article 6.2. The legal prejudice to Canada is obvious; Canada is invited to engage in conjecture and speculation as to the case it must meet. Article 6.2 ensures against this fundamental departure from due process; it requires more of complaining parties than mere allegations founded in generalities. And it establishes the basis for this Panel's authority to reject those elements of the Request that do not meet the requirements of Article 6.2.

4.35 Canada respectfully requests that the Panel find that the Request does not meet the requirements of Article 6.2 and that, as a result, the Panel should not assume jurisdiction in respect of the following:

- the claim under Article XVII of the GATT 1994;
- the claim under Article III:4 of the GATT 1994 concerning rail car allocation; and
- the claim under Article 2 of the *TRIMs Agreement* concerning rail car allocation and grain segregation.

4.36 Canada makes this submission at the earliest juncture in the Panel process to permit the Panel to make a decision on this fundamental procedural question before the Parties' first substantive submissions are due. If the Panel deems it necessary, Canada would be willing to meet with the Panel and the United States to discuss Canada's procedural objections.

B. PRELIMINARY WRITTEN SUBMISSION OF CANADA ON PROCEDURES FOR THE PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

4.37 Set out hereunder are Canada's arguments in its first preliminary written submission on procedures for the protection of strictly confidential information.

4.38 Canada seeks a preliminary ruling by the Panel establishing a procedure for the protection of proprietary or commercially sensitive information (referred to in this submission as "strictly confidential information" or "SCI") that may be submitted to the Panel in the course of these proceedings.

4.39 In a separate submission, Canada requests that the Panel issue a preliminary ruling that certain allegations contained in the Request for the Establishment of a Panel (the "Request"),

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WT/DS178/R, adopted 16 May 2001, as modified by the Appellate Body Report, WT/DS177/AB/R, WT/DS178/AB/R, at paras. 5.44-5.45.

submitted by the United States on 6 March 2003, do not meet the requirements of Article 6.2 of the DSU. In that submission Canada asks the Panel to find that these allegations are not within the scope of the Panel's jurisdiction.

4.40 Because of the deficiencies of the Request, it is difficult for Canada to specifically identify the types of SCI it will need to submit. However, if the Panel finds that any of the allegations in the Request fall within the Panel's jurisdiction, and if the United States meets its prima facie burden with respect to these allegations, Canada may well be required, in its defence, to submit evidence to the Panel that contains SCI. For example, the United States makes certain allegations with respect to whether the CWB makes purchases and sales solely in accordance with commercial considerations. To the extent that these allegations are clarified and substantiated, Canada may well have to adduce evidence on the commercial practices of the CWB, including its sales and pricing policies as well as on specific commercial transactions. Such evidence will necessarily contain SCI.

4.41 In this respect, 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. 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. Canada will be able to obtain, assess and provide such SCI to the Panel, only where it can give the CWB and its customers adequate assurance of confidentiality of their commercially sensitive information. For this reason, we ask the Panel to put in place procedures, to govern handling of that information and the access thereto in the course of these proceedings.

**1. Analysis**

4.42 Effective dispute settlement pursuant to the DSU is premised on an objective assessment by a dispute settlement panel of the matters in dispute, including an objective assessment of the facts of the case. The receipt and provision of factual information is a central feature of the process. Members must be able to disclose and receive the evidence necessary to defend or challenge the measure at issue. In order to do so, assurances that the confidentiality of the information will be maintained are critical.

4.43 The current DSU rules acknowledge the need to provide protection for confidential information in the context of dispute settlement. Article 18.2 of the DSU provides, *inter alia*, that "Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential." Similar provisions are found in the panel Working Procedures (Appendix 3, paragraph 3) and the *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes* (Article VII:1). However, these provisions offer insufficient procedural protection for SCI.

4.44 This is not a theoretical problem. In *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*[19], the Appellate Body noted its "strong agreement with the Panel that a 'serious systemic issue' is raised by the question of the procedures which should govern the protection of information requested by a panel under Article 13.1 of the DSU and which is alleged by a Member to be confidential."[20] The absence of clear and effective rules to protect SCI can be detrimental to a Member's ability to advance or defend a challenge and thereby to the effectiveness of the dispute settlement system.

[19] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717.

[20] *United States' – Wheat Gluten* at para. 170.

4.45 In addressing the issue of SCI, the Panel must balance two competing interests, both deeply rooted in fairness and due process, neither in itself having a claim to better protection than the other: First, additional procedural safeguards are necessary to provide private business interests with adequate protection for their proprietary business information when a disputing party deems it necessary to present such evidence in support of its case; second reasonable access to such information, when introduced into evidence, must be provided to the Panel and the other disputing parties. Previous panels have recognized the need to balance these interests and have adopted special procedures for handling SCI.[21]

4.46 In this light, Canada proposes a procedure governing SCI, set out as an Annex to this submission. Canada submits that this procedure achieves a reasonable balance between the competing interests identified above.

**2. Request for a preliminary ruling**

4.47 Canada requests that the Panel adopt the procedures proposed as part of its working procedures, pursuant to Article 12.1 of the DSU. Canada further requests that the Panel make this decision prior to the deadline for the first written submission of the United States.

4.48 Canada makes this submission at the earliest juncture possible in the Panel process to provide the United States with sufficient notice of this request and to permit the Panel to make a decision on this procedural issue before the Parties' first substantive submissions are due. If the Panel deems it necessary, Canada would be willing to meet with the Panel and the United States to discuss this proposal at greater length.

C. PRELIMINARY WRITTEN SUBMISSION OF THE UNITED STATES ON THE PANEL'S JURISDICTION UNDER ARTICLE 6.2 OF THE DSU

4.49 The United States' arguments in its first preliminary written submission on the Panel's jurisdiction under Article 6.2 of the DSU are described below.

4.50 Canada provides no legitimate basis for its request for a preliminary ruling that certain claims set forth in the United States' panel request fail to meet the requirements of Article 6.2 of the DSU. To the contrary, as required by Article 6.2, each of the United States' claims properly "identif[ies] the specific measures at issue and provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

4.51 Rather than relying on the text of Article 6.2 of the DSU and Appellate Body analyses of that provision, Canada instead asks this Panel to find that the United States' panel request must go beyond the requirements of Article 6.2 to summarize the legal arguments to be presented in the first United States' submission. The Appellate Body in *EC – Bananas III*[22] has already rejected the suggestion that a complaining party must summarize its legal arguments in the panel request, and this Panel should do so as well.

[21] For example, see Panel Report, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221; Article 22.6 Arbitration Decision, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27/ABR); Panel Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R, DSR 2001:III, 779.

[22] Appellate Body Report, *EC - Bananas III*.

**1. Statement of facts**

4.52 The United States presented its consultation request to Canada in this dispute on 17 December 2002.[23] Canada agreed to hold consultations, and indicated no concerns with the specificity of the matters raised in the United States request.

4.53 The United States and Canada agreed to hold consultations on 31 January 2003, in Ottawa, Canada. In advance of the consultations, the United States sent to Canada a list of 49 detailed questions concerning the Canadian measures at issue in this dispute.

4.54 With regard to the United States claim under Article XVII of the GATT 1994, the United States' questions first asked for copies of Canadian laws and regulations that establish and govern the conduct of the CWB. The questions then presented inquires regarding the special privileges provided by the Government of Canada to the CWB that divorce the CWB from market considerations. For example, the questions addressed the Government of Canada's guarantees of the financial operations of the CWB; the Canadian law requiring that all Western Canadian farmers producing wheat for human consumption must sell their wheat to the CWB; and the payment system adopted by the Government of Canada and the CWB, which requires Canadian farmers to accept initial payments from the CWB at prices well below market value. The questions also probed the procedures and policies of the CWB with regard to setting the terms of sale for wheat exports, and inquired into whether the Government of Canada exercised any oversight of CWB sales practices.

4.55 With regard to the United States claims under GATT Article III and Article 2 of the *TRIMs Agreement* regarding the treatment of imported grain, the United States' questions requested copies of laws or regulations of the Government of Canada that relate: (i) to the segregation of Canadian-grown grain and imported grain; and (ii) to the rail transportation of western Canadian grain, including rail rates and the allocation of rail cars. The questions then presented 24 separate inquiries into the apparent differences between the treatment that Canada accords to domestic grain and that Canada accords to imported grain.

4.56 As scheduled, the consultations were held in Ottawa on 31 January 2003. During the consultations, the Canadian delegation never expressed any concern that the consultation request was insufficiently clear, and never asked the United States delegation to clarify any aspect of the United States' consultation request.

4.57 [ ][24]

4.58 [ ]

4.59 [ ]

4.60 With respect to the rail car allocation claim – which Canada now claims it finds insufficiently precise – the United States' delegation read a statement from a Canadian government website, indicating differential treatment for Western Canadian and imported wheat, and asked the Canadian delegation for elaboration. The Canadian delegation stated that it had no knowledge of Canadian rules on this issue, and provided no information.

[23] WT/DS276/1.

[24] For reasons explained in Section V.B, the content of this and the two subsequent paragraphs was redacted from the March Panel's final report.

4.61 At the conclusion of the consultations, the Canadian delegation agreed to provide in writing and at a subsequent time answers to a small fraction of the questions that it declined to answer during the consultations.

4.62 Since the consultations failed to resolve the matter in dispute, the United States submitted its first panel request on 6 March 2003.

4.63 On 12 March 2003, nearly six weeks after the consultations, and *after* the United States' 6 March panel request, the Government of Canada finally provided responses to the few questions it had agreed to answer in writing. These answers, however, were limited. On the issue of railcar allocation, for example, the response notes that the Canadian Grain Commission issues an annual order that sets out the allocation of railcars, but the response does not provide an explanation or copy of the order, nor does the response indicate where the order might be found.

4.64 The Dispute Settlement Body considered the first United States' panel request at its meeting held on 18 March 2003. The Canadian delegation, although not agreeing to the establishment of a panel, expressed no difficulties in understanding the issues covered in the United States' panel request, and did not ask for any clarifications.

4.65 The United States proceeded to make its second panel request at the DSB meeting held on 31 March 2003. Canada expressed regret that the United States was seeking to establish a panel, but again indicated no problems in understanding any of the issues raised in the United States' request.

**2. The Requirements of Article 6.2 of the DSU**

4.66 Article 6.2 of the DSU requires, in relevant part, that a request for the establishment of a panel:

> "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

4.67 The Canadian request for a preliminary ruling quotes at length from two Appellate Body reports that examine this provision: *Korea – Dairy*[25] and *EC – Bananas III*. Canada's discussion of these reports, however, is fundamentally misleading: Canada has omitted the two principles in those reports that are *most* pertinent to Canada's arguments regarding the sufficiency of the United States' panel request. Canada also fails to consider the emphasis of the *US - FSC* Appellate Body report on the need to raise procedural objections at the earliest opportunity.[26]

4.68 First, Canada has omitted mention of the key distinction between the *claims* – which must be included in the panel request – and the *arguments* in support of those claims – which need not be included. As the Appellate Body explained in *EC – Bananas III*:

> "In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."[27]

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[25] Appellate Body Report, *Korea – Dairy*.

[26] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, para. 165.

[27] Appellate Body Report, *EC - Bananas III*, para. 141.

4.69 Furthermore, the Appellate Body in *EC – Bananas III* made clear that a panel request may adequately state a claim if the request simply cites the pertinent provision of the WTO agreement:

> "We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements."[28]

4.70 In *Korea – Dairy* – the second report relied upon by Canada – the Appellate Body confirmed this construction. In *Korea – Dairy*, the problem with the panel request was that it cited too broadly to the *Agreement on Safeguards* and Article XIX of the GATT 1994, so that it was difficult to determine which obligations in those provisions were at issue.[29] The United States' panel request, in contrast, cites to specific provisions of the WTO agreement at issue, and cannot be said to suffer a similar defect.

4.71 The second principle in the Appellate Body reports that Canada fails to note is that *even if* a panel request is insufficiently detailed "to present the problem clearly," the panel is not automatically deprived of jurisdiction over the matter. Rather, the panel must examine, based on the "particular circumstances of the case," whether the defect has prejudiced the ability of the responding party to defend itself. The Appellate Body explained in *Korea – Dairy*:

> "In assessing whether the European Communities' request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU."[30]

4.72 Accordingly, the continual emphasis on the "jurisdictional" nature of its Article 6.2 argument in Canada's request for preliminary ruling is misleading. To be sure, if the United States were to present a claim in its first submission based on the *Agreement on Textiles and Clothing*, for example, that claim would not be within the jurisdiction of the Panel. However, in evaluating claims regarding whether a panel request "presents the problem clearly," the Panel must consider the particular circumstances of the case, including whether the defending party has been prejudiced.

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[28] *Id*.

[29] The Appellate Body explained:

> In the present case, we note that the European Communities' request for a panel, after identifying the Korean safeguard measure at issue, listed Articles 2, 4, 5 and 12 of the Agreement on Safeguards and Article XIX of the GATT 1994. Article XIX of the GATT 1994 has three sections and a total of five paragraphs, each of which has at least one distinct obligation. Articles 2, 4, 5 and 12 of the Agreement on Safeguards also have multiple paragraphs, most of which have at least one distinct obligation. The Agreement on Safeguards in fact addresses a complex multi-phased process from the initiation of an investigation, through evaluation of a number of factors, determination of serious injury and causation thereof, to the adoption of a definitive safeguard measure. Every phase must meet with certain legal requirements and comply with the legal standards set out in that Agreement.

Appellate Body Report, *Korea – Dairy*, para. 129.

[30] *Id.*, para. 131.

4.73 Finally, Canada fails to recognize that procedural objections must be raised at the earliest possible opportunity, and not for the first time in a letter sent after the establishment of the panel. In the *US – FSC* dispute, the United States requested a preliminary ruling that a claim be dismissed because of an inadequacy in the consultation request. The panel rejected that request, and the Appellate Body upheld that rejection, stating:

> "It seems to us that, by engaging in consultations on three separate occasions, and not even raising objections in the DSB meetings at which the request for establishment of a panel was on the agenda, the United States acted as if it had accepted the establishment of the panel in this dispute, as well as the consultations preceding such establishment. In the circumstances, the United States cannot now, in our view, assert that the European Communities' claims … should have been dismissed."[31]

4.74 Likewise, at no time prior to the establishment of this Panel did Canada so much as intimate that it considered the panel request in any way deficient, waiting until after the Panel was established to offer its objection. In upholding the Panel's rejection of the United States' request for a preliminary ruling in *US – FSC* under very similar circumstances, the Appellate Body stated: "The procedural rules of the WTO dispute settlement system are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[32] This Panel should reject Canada's effort to avoid the fair, prompt and effective resolution of this dispute through its groundless – and untimely – objections to the United States' panel request. Canada's resort to litigation techniques must not stand in the way of consideration of the substantive issues in this dispute.

### 3. The Canadian arguments

4.75 Canada's arguments regarding the sufficiency of the United States' panel request are entirely without merit. Each claim in the United States' request both: (1) identifies the specific measures at issue; and (2) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. The Canadian arguments fail to distinguish between these two elements of Article 6.2. The responses below will address the Canadian arguments within the context of the apparently relevant Article 6.2 requirement.

(a) GATT Article XVII claim

4.76 The first Canadian argument regarding the GATT Article XVII claim seems to be based on the Article 6.2 requirement to identify the specific measures at issue. In particular, Canada argues that:

> "The foundation for the United States' claim is in various "laws, regulations and actions" that are nowhere described."

4.77 This argument is plainly false. Any person reading this phrase would take note of the immediately preceding paragraph in the United States' panel request which identifies the specific measures at issue:

> "The Government of Canada has established the Canadian Wheat Board ("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 the

[31] Appellate Body Report, *US - FSC*, para. 165.
[32] *Id.*, para. 166.

> Government of 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."

4.78 Moreover, the panel request goes on to clarify that the measures at issue include "the failure of the Government of Canada to ensure that the CWB makes such purchases or sales in accordance with the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII."[33]

4.79 The Canadian request for a preliminary ruling supports its argument with a statement that is meritless. In particular, Canada argues that, "Any number of laws, regulations and actions may be related to the export of wheat but have no relevance to the instant claim." In the context of the panel request, however, any reader would fairly realize that the laws, regulations, and actions referenced here are those concerning wheat sales practices of the State-trading enterprise, CWB. Moreover, Canada knows *precisely* what is at issue in this dispute: from the consultation request, from the detailed questions that the United States presented in advance of the consultations, from the discussions at the consultations, and from the United States' panel request.[34]

4.80 Canada next expresses concern that the panel request does not specify which of the two obligations in Article XVII(1)(b) are covered in the panel request.[35] But the panel request is completely clear on this point: the request cites both obligations because the United States submits that the Canadian measures are inconsistent with both of these obligations.

4.81 Finally, Canada argues that the United States "must set out a brief summary of its legal case" under Article XVII(1)(b). Although Canada cites to *Korea – Dairy*, the requirement suggested by Canada differs substantially from the findings of the Appellate Body in *Korea – Dairy* and from the language of Article 6.2 of the DSU. What the DSU requires is instead "a brief summary of the legal *basis* of the complaint sufficient to present the problem clearly" (emphasis added). As illustrated in both *Korea – Dairy* and *EC – Bananas III*, a panel request may even satisfy this requirement simply by listing the provisions of the WTO agreements with respect to which the measures at issue are allegedly inconsistent. And in fact, the United States' Article XVII claim in the panel request goes well beyond a simple listing of the pertinent provisions of the WTO agreement.

4.82 Furthermore, Canada cites no case in which a panel request was required to go beyond a specific listing of the provisions at issue and was required instead to present a summary of the legal argument. To the contrary, as noted above, the Appellate Body in *EC – Bananas III* explicitly noted that Article 6.2 does *not* require a panel request to include a summary of the complaining party's legal arguments:

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[33] The Canadian request for preliminary ruling also complains that the panel request does not define the word "action." The request uses "actions," in addition to "laws and regulations," because the provisions of GATT Article XVII(1) quoted in the request impose obligations with regard to purchases and sales involving wheat exports. The terms "laws and regulations" were not sufficient to cover this aspect of conduct addressed in the panel request and covered by Article XVII.

[34] Canada also argues that "As was the case in *Japan-Film*, the complaining party must identify both the law *and* how it applies." What Canada means by this statement is unclear, and the proposition is not supported by the *Japan Film* panel report. In any event, Canada's contention is inconsistent with the plain text of Article 6.2 of the DSU, which provides that the panel request must simply "identify the specific measure at issue."

[35] The first obligation in Article XVII(1)(b) requires State-trading enterprises to make purchases and sales in accordance with commercial considerations. The second obligation requires State-trading enterprises to afford enterprises of other WTO Members an adequate opportunity to compete.

> "We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."[36]

4.83 In short, Canada is asking that the panel reject the United States' Article XVII claim solely because, in Canada's view, the United States' panel request fails to meet a non-existent requirement to summarize the legal arguments. This requirement is not contained in the text of Article 6.2, as the Appellate Body correctly concluded. Accordingly, Canada's request must be denied.

(b) Claim regarding rail car allocation

4.84 Canada argues that the rail car allocation claim in the United States' panel request is inadequate to meet the requirements of DSU Article 6.2, apparently because of an alleged failure to "identify the specific measures at issue." This argument is without merit. Moreover, in light of Canada's conduct with regard to the consultations addressed to this issue[37], Canada's argument is disingenuous.

4.85 As explained above, during the consultations, the United States' delegation read a statement from the website of the Canadian Grain Commission ("CGC"), indicating that Canada had adopted a measure providing differential treatment for Western Canadian and imported wheat, and asked the Canadian delegation for elaboration. The Canadian delegation stated that it had no knowledge of any Canadian rules on this issue, and provided no information. Without confirmation of the proper appellation or legal status of this rule, the United States' panel request reasonably addressed this issue by noting that "in allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain."

4.86 Six weeks after the consultations, and after the United States had filed its panel request, Canada finally confirmed that it indeed does establish rules governing the allocation of rail cars used in the transport of grain. Canada wrote:

> "The only allocation powers the CGC is exercising pertain to Section 87 of the CGA and Section 68 of the regulations to CGA which give it the power to administer the allocation of producer cars.
>
> On a crop year basis, the CGC issues to the industry at large an order that sets out how the CGC will allocate producer cars for the various grains and destinations for the coming crop year."[38]

4.87 Whether or not the CGC rules do indeed discriminate against imported grain is an issue to be decided on the merits in the normal course of this dispute. But, in light of these circumstances, there can be no legitimate confusion over the rail car allocation measures at issue. In fact, Canada must

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[36] Appellate Body Report, *EC - Bananas III*, para. 141.

[37] Indeed, as noted above, the United States finds it difficult to reconcile Canada's conduct of these negotiations with its obligations under Article 4.3 of the DSU.

[38] As noted above, Canada still declined to provide an actual copy of these allocation rules, and declined even to explain whether the rules in whole or in part are publicly available.

certainly be aware of the content of CGC grain car allocation orders, and its contention – that "it is not possible for Canada to prepare a defence against this claim without being alerted in *some* detail to the provisions that are alleged to violate Article III:4" – is simply not credible.

(c) Claims under Article 2 of the *TRIMs Agreement*

4.88 Canada argues that the United States' panel request fails to identify the "specific measures at issue" with regard to the alleged violation of Article 2 of the *TRIMs Agreement*. This argument is baseless. The GATT Article III:4 claims and the TRIMs claims in the panel request identify exactly the same specific measures at issue, and – with the exception of the rail car allocation rules discussed above - Canada has not made, and cannot make, an argument that the measures were not specifically identified.

4.89 The Canadian argument is thus not actually about the "specific measures at issue." Rather, Canada is essentially arguing that the panel request must lay out the legal arguments why the specifically identified measures are within the scope of the *TRIMs Agreement*. But, as noted above, there is no such requirement in Article 6.2 of the DSU, nor has the Appellate Body concluded otherwise. Canada is not entitled to have the United States' *TRIMs Agreement* claims rejected simply because Canada would prefer to review the United States' legal arguments in advance of receiving the first United States' submission.

**4. Conclusion**

4.90 For the reasons stated above, Canada's arguments in support of its request for a preliminary ruling under Article 6.2 are without merit. Accordingly, the Panel should reject that request.

D. UNITED STATES' RESPONSE ON THE ISSUE OF PROCEDURES FOR THE PROTECTION OF STRICTLY CONFIDENTIAL INFORMATION

4.91 Set out below is the United States' response to Canada's preliminary submission on the issue of procedures for the protection of strictly confidential information.

4.92 The United States remains surprised that this is the subject of a request for a preliminary ruling. There is no disagreement between the parties as to the adoption of special procedures, and this is in any event a matter of the Panel's organization. Accordingly, there is nothing on which to "rule." Rather, the Panel simply needs to exercise its authority under Article 12 of the DSU to adopt additional procedures in consultation with the parties. The United States continues to stand ready for such consultations and to assist the Panel in this matter.

4.93 Canada has stated in paragraph 3 of its request that such procedures should be established because Canada may need to submit Business Confidential Information ("BCI") during the course of these panel proceedings. As noted above, to the extent that Canada will be submitting such information, the United States does not object to the Panel establishing procedures for the protection of BCI, as nothing in the DSU precludes panels from adopting additional procedures for protecting BCI. The United States also recalls that, at the panel organizational meeting of 21 May 2003, the United States represented that it does not plan to rely on BCI in its presentations before the Panel.

4.94 It is important to note that this same situation arose in a very recent dispute between Canada and the United States. In that dispute, *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264), Canada and the United States were able to agree on procedures for the treatment of BCI. There was no need for a preliminary ruling in that dispute.

4.95 The United States believes that these procedures, which both Canada and the United States are already familiar with and are currently utilizing, should simply be adopted by this Panel to protect BCI in this dispute. Indeed, nothing in Canada's request for a preliminary ruling suggests the need for procedures different than those attached here. And by adopting these previously agreed-to procedures, the Panel and the parties can avoid wasting time and effort in considering and debating the uncertain implications of Canada's newly developed proposals.

E. ORAL STATEMENT OF CANADA AT THE PRELIMINARY HEARING

4.96 The following summarizes Canada's arguments in its oral statement delivered at the preliminary hearing:

**1. Why are we here?**

4.97 First, why are we – Canada – here? Why have we raised a procedural challenge?

4.98 Simply put, we have a genuine concern about prejudice to our interests and to our ability to defend ourselves in this dispute because we do not know what case we have to answer. And we do not know the case, because the United States' request for the establishment of this panel is deficient – it does not meet the requirements of Article 6.2 of the DSU.

4.99 Article 6.2 requires a complaining party to be clear about the legal basis of its complaint and to set out the claims it is asserting. This means that the complaining party must identify, in its panel request, the measure that is alleged to be in violation; the WTO provision that is alleged to be violated; and, generally, the legal basis for alleging that the measure violates the provision.

4.100 To give you a concrete example, it is not enough for a complaining party to say in its panel request that import restrictions by a Member violate Article 5 of the *SPS Agreement*. Rather, the complaining party must identify which specific measures violate which specific provision of the *SPS Agreement*.

4.101 This is not a trivial or merely procedural requirement. Here is what the Appellate Body said in *Thailand – H-Beams*:

> "[A] defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence… *This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.*" [emphasis added]

4.102 Where a Member fails to meet the requirements of Article 6.2, at a minimum it causes a legal prejudice to the interests of the responding Member in the fair and orderly conduct of dispute settlement proceedings.

4.103 In this case, the deficiencies in the United States' panel request cause additional prejudice, because they also significantly impede Canada's ability to identify, and respond to, the complaint being made in these proceedings.

4.104 For example, the United States' panel request refers to "laws, regulations and actions … related to exports of wheat". From a preliminary search, we have identified dozens of "laws and regulations" that could be the subject of the United States' panel request as worded. These laws and regulations encompass hundreds of measures that may be the subject of United States' allegations.

4.105 The United States' request also refers to "actions" of the Government of Canada and the Wheat Board related to the export of wheat. In its submission, the European Communities reads this as "administrative actions". But, it is not clear whether the United States also means administrative actions by the Government of Canada, or other actions by the CWB. In this respect, we note that the CWB is a multi-billion dollar corporation that competes in a complex and competitive global wheat market. It sources wheat from over 85,000 Western Canadian farmers and markets it on their behalf to hundreds of customers located in scores of markets around the globe. Selling, financing, sourcing and supplying wheat involves thousands of individual transactions and multiple parties from the farmers all the way through to the customer. And yet, the United States' panel request gives no clue whatsoever as to which of these actions is the focus of the United States' complaint, let alone how those actions supposedly violate Article XVII.

4.106 In the light of this uncertainty Canada made a good-faith effort to clarify the grounds for the United States' request. In a letter dated 7 April 2003, Canada asked the United States to identify the measures at issue and set out the legal basis for its challenge. Canada received no response. We do not consider that Article 6.2 deficiencies are legally curable; but this request for a preliminary ruling would not have been necessary if the United States had responded appropriately to Canada's 7 April letter.

4.107 We are here because the United States' request sent us on a search of all laws and regulations that affect the wheat trade, and all of the transactions of the Wheat Board, to figure out what it is that the United States is complaining about. And we are here, in this preliminary challenge, because in its comments, the United States still does not expressly limit its complaint to the measures listed in the first paragraph of claim 1 – to the exclusion of all other laws, regulations and actions related to exports of wheat that have not been specified.

4.108 In the initial stages of the dispute settlement process, the complaining party dictates the timetable. The complaining party files its panel request based in large measure on how ready it is to present its case. The responding party has an inherent disadvantage: it can only prepare its defence once the complainant files its panel request. Only then does the complainant reveal the specific measures at issue and the legal basis for its complaint. Where, as in this case, the panel request is deficient, the inherent disadvantage to the responding party becomes actual prejudice to its ability to prepare its defence.

4.109 The prejudice to Canada is real and ongoing. And we are here to rectify that prejudice

**2. What are the legal issues involved?**

4.110 The second question is, what are the legal issues involved? And, specifically, in what way does the United States' panel request fail to meet the requirements set out in Article 6.2?

4.111 The United States' panel request fails to identify the specific measures at issue because there is only a general reference to "laws, regulations and actions that relate to the export of wheat".

4.112 What is the United States' response?

4.113 The United States makes four arguments in defence of its request for the establishment of a panel. None is valid.

4.114 First, it argues that the opening paragraph of claim 1, which refers to certain privileges granted to the Wheat Board, sets out the "specific measures" as required by Article 6.2. This argument, however, is an after-the-fact rationalization of a defective panel request.

4.115 For one thing, as the European Communities noted in its submission, the second paragraph of claim 1 introduces "a certain imprecision". It refers generally to "*the* laws, regulations, and actions … related to the export of wheat". If the United States had considered the privileges listed in the first paragraph to constitute the "specific measures" required by Article 6.2, then the second paragraph of claim 1 should have referred to "*these* measures", or "*the* measures listed in the foregoing paragraph". But it does not. On its face, the scope of the second paragraph of claim 1 is far wider than the measures allegedly specified in the first paragraph. Accordingly, because of this imprecision, claim 1 does not meet the requirements of Article 6.2.

4.116 As well, the opening paragraph of claim 1 refers to privileges granted to CWB by the Government of Canada. The next paragraph refers, however, to "laws, regulations and actions" of both the Government of Canada *and* the Canadian Wheat Board. The European Communities reads this as "administrative actions". But this is the European Communities' interpretation. The general reference to "actions" and the mention of the Wheat Board in the second paragraph undermine the United States' argument that the "specific measures" required by Article 6.2 are listed in the first paragraph of claim 1.

4.117 The submissions of Chile and the European Communities are premised on the assumption that the United States has identified the specific measures in the first paragraph of claim 1. However, as the European Communities also notes, the second paragraph is far wider and less precise than the first paragraph. The claim as a whole does not meet the requirements of Article 6.2.

4.118 If the Panel agrees with the United States that the specific measures listed in the first paragraph meet the requirements set out in Article 6.2, then the Panel should make a finding to that effect. That is, the Panel should rule that only the first paragraph of claim 1 meets the requirements of Article 6.2 and limit the United States' claim to:

- the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of Canada and the Wheat Board;

- the exclusive right to sell western Canadian wheat for export and domestic human consumption; and

- government guarantees of the Wheat Board's financial obligations, including the Wheat Board's borrowing, the Wheat Board's credits sales to foreign buyers, and the Wheat Board's initial payments to farmers.

4.119 With respect to rail car allocation, if the Panel agrees that Canada's responses to the United States' questions can clarify the scope of the panel request, then it should limit the United States' claim to:

- the allocation powers of the Canadian Grain Commission under Section 87 of the Canada Grain Act and under Section 68 of the Regulations to the Canada Grain Act.

4.120 With respect to the claim under Article 2 of the *TRIMs Agreement*, the panel request fails to identify the investment measure that it alleges is inconsistent with Canada's obligations under the *TRIMs Agreement*.

4.121 The second argument relied on by the United States relates to the consultations. Indeed, the factual section of the United States' comments is taken up largely with an incomplete and inaccurate recitation of certain bilateral discussions in the course of the consultations. The United States goes so far as to suggest that, in respect of the car allocation issue, *Canada's* response to United States'

questions in the course of the consultations should determine whether the *United States* is meeting its Article 6.2 obligations in respect of the panel request.

4.122 United States' arguments on this point are legally untenable for at least two reasons.

4.123 For one thing, Article 6.2 is not about the consultations, but about the request for the establishment of a panel. Indeed, we recall the arguments of the United States in *US – Lamb*. As the panel noted:

> "The United States does … seriously question the admissibility and the relevance to panel proceedings of information from bilateral, confidential consultations – for which usually no neutral witnesses or written records exist – when ascertaining whether the specificity requirements stipulated by DSU Article 6.2 *for panel requests* are met."

4.124 We agree with that earlier United States' position.

4.125 For another, even if consultations were somehow relevant, their relevance would be highly limited in respect of whether a request for a panel meets the requirements of Article 6.2. This is because, as the *Brazil – Aircraft* panel found, the DSU does not require "a precise identity between the matter with respect to which consultations were held and that with respect to which establishment of a panel was requested." That is, the specific measures that form the subject matter of a dispute and that are set out in the request for the establishment of a panel *could be* different from those discussed in the consultations.

4.126 And so, even if Canada knew what the United States' complaint was about *in the course of the consultations* – and we do not agree with the United States' characterization of the consultations – the measures before the Panel are those set out in the panel request and *not* those that Canada might have thought the United States was complaining about *in the consultations*. The panel request is the document that forms the terms of reference of the Panel. Whatever was discussed at the consultations, or indeed in the preceding ten years, the United States had an obligation to specify its claims in accordance with the DSU. It has not done so. And so its claims cannot form part of the Panel's jurisdiction.

4.127 Third, the United States objects to the timing of Canada's procedural challenge.

4.128 Both at the outset of the consultations, and at their conclusion, Canada raised serious concerns about the vagueness of the United States' allegations and their lack of substance and merit. But of course the issue before you is not the request for consultations and the United States' reliance on the *US – FSC* case is misplaced. The issue before you is the request for the establishment of this Panel and, more important, whether the matters objected to fall within the jurisdiction of the Panel. The real legal issue concerning the adequacy of the request solidifies only when a panel has been established and not before; and a proper procedural challenge may be raised only when a panel has been composed, and not before.

4.129 Canada asked the United States for clarification a week after the establishment of the Panel. The United States did not reply to this request. Canada waited more than a month, and still no reply was forthcoming. And so, Canada sought redress from the Panel at the earliest opportunity – the day after the panel was composed.

4.130 It is true that Canada did not raise any objections at the DSB to the adequacy of the United States' request. But the DSB has no mandate and no procedure to rule on the adequacy, under

Article 6.2, of panel requests. In this respect, we recall the words of the Appellate Body in *EC – Bananas III*:

> "[W]e recognize that a panel request will usually be approved *automatically* at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.[72] *As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the sprit of Article 6.2 of the DSU.* It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and second, it *informs* the defending party and the third parties of the legal basis of the complaint." [emphasis added]

4.131 We also recall the United States' argument in *US – FSC* that nothing in the DSU requires a defending party to "perfect" the pleadings of the complaining party.

4.132 Canada fails to see how it could have acted any earlier, or any basis for the United States now to contend that it was entitled to additional notice of Canada's concerns.

4.133 Finally, the United States argues that Canada is asking for the inclusion of arguments rather than claims in the panel request. In *EC – Bananas III*, the Appellate Body noted that a panel request need not include detailed arguments, but rather the request must be sufficiently precise so as to inform the responding party of the basis for the complaint. To do so, a complaining party must identify in its panel request the specific measures at issue and provide a brief summary of the legal basis of its complaint.

4.134 The United States does not set out what it means by "claims" and "arguments"; and it does not relate its assertions in this respect to its obligation under Article 6.2. "The laws, regulations and actions related to export of wheat" are not "specific measures". To ask, as Canada does and as Article 6.2 requires, that the United States identify *which* laws, regulations and actions violate the WTO Agreement is not to ask the United States to set out its legal arguments.

4.135 For these reasons, the United States' assertions have no merit.

**3. What is the appropriate remedy in these circumstances?**

4.136 The final issue to be addressed is this: what is the only appropriate remedy in these circumstances?

4.137 The law is clear the requirements of Article 6.2 must be met in the request for the establishment of a panel. Deficiencies in the document that creates the Panel's jurisdiction cannot be "cured".

4.138 Canada asks, therefore, that the Panel find that the panel request does not meet the requirements of Article 6.2 and that, as a result, the Panel not assume jurisdiction with respect to:

- the claim under Article XVII of the GATT;
- the claim under Article III:4 of the GATT concerning rail car allocation; and
- the claim under Article 2 of the *TRIMs Agreement* concerning rail car allocation and grain segregation.

4.139 In the alternative, if the Panel agrees with the United States that the measures listed in the first paragraph of claim 1 and Canada's response to the questions of the United States in respect of rail car allocation constitute "specific measures" for the purposes of Article 6.2, then Canada requests that the Panel rule that these measures and *no other* come within the jurisdiction of the Panel.

**4. Procedures for dealing with SCI**

4.140 Turning to Canada's request for the adoption, by the Panel, of additional procedures safeguarding SCI. Canada has had a chance to review the United States' comments and we welcome the spirit of openness and cooperation reflected in those comments. However, in the light of the issues and interests at play in this case, we must ask you to consider and adopt the procedures proposed by Canada, rather than those adopted by the panel in *US – Softwood Lumber IV*.

4.141 For ease of reference, we are providing you with a list of additional procedures and safeguards that exist in the current Canadian proposal, and that were not included in the *US – Softwood Lumber IV* procedures. These additional safeguards are necessary for two reasons.

4.142 First, in the *US – Softwood Lumber IV* case, the panel is examining sensitive commercial information that already exists and is in the possession of the United States. In this case, however, it is entirely possible that much of the information needed for the defence will have to be generated, or obtained from private parties not party to this dispute. For Canada to be able to secure that information and, more important, get permission to produce it for a panel, we need a higher level of protection than the *United States' – Softwood Lumber IV* procedures provide for.

4.143 Second, unlike in the *US – Softwood Lumber IV* case, Canada – the party that will be providing the confidential information in question – is the defending party. And, again unlike the *US – Softwood Lumber IV* case, the commercial information that might be at issue could relate to private parties that have no control over these proceedings: whether we are talking about the customers of the Wheat Board or railway companies or grain elevators, they have not asked for this dispute and to the extent that their sensitive commercial information might come into play, they need to be satisfied that that information will not be disseminated beyond those who need the information to argue and decide the case.

4.144 Some of the important differences between the *US – Softwood Lumber IV* procedures and those proposed for this case are that, in this case, access to strictly confidential information would be limited to the disputing parties. Additionally, the proposed procedures, unlike the *US – Softwood* procedures, include specific requirements for access, storage, use and disclosure, and return or destruction of SCI. These, and the additional safeguards included in the procedures proposed for this case, are necessary to satisfy private parties, who are not party to this dispute, that commercially sensitive information that they provide for Canada's defence will be safeguarded. Other differences are identified in the document that Canada has given you.

4.145 We are, of course, mindful of the need to exercise sound judgement and discretion in designating information strictly confidential. And so, the additional protections in the Canadian proposal are balanced by a due restraint requirement.

4.146 In the light of these considerations, we ask you to adopt the procedures proposed by Canada.

F. ORAL STATEMENT OF THE UNITED STATES AT THE PRELIMINARY HEARING

4.147 In its oral statement at the preliminary hearing, the United States made the following arguments:

**1. Canada's request for a ruling under Article 6.2 of the DSU**

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

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

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

4.151 As noted in the United States' submission, Canada's summarization of Appellate Body reports leaves out many of the most pertinent findings.

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

4.153 The Appellate Body confirmed this construction in *Korea – Dairy*. The Appellate Body did find a problem with the panel request: namely, the request cited too broadly to the *Agreement on Safeguards* and Article XIX of the GATT 1994, so that it was difficult to determine which obligations in those provisions were at issue. But, the Appellate Body repeated the distinction, set forth in *Bananas III*, between claims and arguments. And, even though the panel request in *Korea – Dairy* was insufficiently precise, the Appellate Body nonetheless did *not* dismiss the claims, as Canada asks this Panel to do.

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

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

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

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

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

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

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

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

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

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

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

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

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

**2. Canada's request for a preliminary ruling on Business Confidential Information.**

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

4.167 As for the procedures themselves, the United States stands ready to consult with the Panel and with Canada in this regard. As noted in the United States' 28 May submission, Canada and the United States consulted with the panel in the recent *US – Softwood Lumber IV* case to reach agreement on procedures for the treatment of BCI.

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

G. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.169 Described hereunder are the United States' arguments in its first written submission:

4.170 The 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 GATT 1994. 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, and the right to require Canadian farmers to sell their wheat to the CWB at an initial payment price well below full market value. Canada has adopted no processes or procedures to ensure that the CWB complies with 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.

4.171 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. One set of measures serves to exclude imported grain from the entire Canadian grain handling system. A second set of measures favours domestic grain over imported grain in the Canadian rail transportation system. These measures accord to imported grain less favourable 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 *TRIMs Agreement*.

## 1. Statement of Facts

(a) The CWB export regime

4.172 Canada has notified the CWB as a STE within the scope of Article XVII of the GATT 1994. 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." The basic goal of the CWB is to sell all wheat produced in Western Canada. As Canada itself explains, "The volume of grain exported is primarily a function of the available supply less domestic use and inventory adjustments." 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." Nothing in the statute requires the CWB to make its sales in accordance with commercial considerations.

4.173 The CWB does not make publicly available any information indicating that its sales are made in accordance with commercial considerations. In particular, the CWB maintains the secrecy of specific information concerning its export sales, such as price, quality, length of contract, and credit terms. On 23 December 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. Canada has not responded to that request.

4.174 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.

4.175 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 favourable non-commercial rate. The CWB can use the borrowed funds to make credit sales on terms not practicable for commercial sellers. The CWB also borrows to make export sales under government-guaranteed credit programmes.

(b) Canadian treatment of imported grain

4.176 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.

4.177 In addition, Canadian law favours 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. 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.

4.178 Canadian law also favours Canadian grain over imported grain in the allocation of government railcars. The Canada Grain Act establishes a programme known as "producer railway cars." On its face, the programme appears only to apply to grain grown by a producer, meaning that no imported grain is eligible for the producer car programme. The CGC summarizes this programme

as follows: "Producers can order rail cars from the CGC to ship their grain to market." Canada has no comparable programme that provides rail cars for the transport of imported grain.

**2. Legal arguments**

(a) Canada is not in compliance with its obligations under GATT Article XVII

*(i) GATT Article XVII imposes an obligation on Canada to ensure that the CWB makes purchases or sales in accordance with the Article XVII standards*

4.179 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."

4.180 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.

4.181 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. With respect to STEs, a Member has an obligation to ensure that the STE does not engage in trade-distorting conduct. 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).

*(ii) The standards in Article XVII apply to the wheat exports of the CWB*

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

4.183 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-favoured-nation obligation.[39]

4.184 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 reflected in the national treatment obligation.

4.185 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. 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 participation in purchases or sales involving wheat exports.

4.186 The separate obligations in subparagraphs (a) and (b) of Article XVII:1 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.

4.187 The *Korea – Various Measures on 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."

[39] See GATT 1994, Article I:1.

4.188 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.

*(iii) Canada has not met its obligation to ensure that the CWB makes purchases or sales in accordance with the Article XVII standards*

4.189 Article XVII imposes an obligation on Members establishing STEs to ensure that those STEs comply with the Article XVII standards. 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 Members to compete. Canada, however, has completely failed to meet its obligation of ensuring that the CWB meets these standards.

4.190 Canada has already acknowledged in this proceeding that it takes no measures to enforce the Article XVII standards on the CWB. If, as Canada asserts, Canada has no control or influence over the CWB, then 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."

4.191 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."

4.192 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.

*(iv) Canada's policy of non-supervision cannot meet Canada's obligation to ensure that the CWB complies with the Article XVII standards*

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

4.194 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, 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.

4.195 First, the monopoly power over Western Canadian wheat gives the CWB greater pricing flexibility than any private actor. 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.

4.196 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.

4.197 Third, government guarantees of the CWB's borrowings allow the CWB to provide more favourable 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.

4.198 These special benefits enable the CWB, if it so chooses, to make its sales not in accordance with commercial considerations, and on such non-commercial 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).

4.199 The special benefits also enable the CWB, if it so chooses, to provide such non-commercial 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).

4.200 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.

4.201 That the CWB is a revenue maximizer, rather than a profit maximizer, is established by the CWB's governing statute. 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." 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." Again, the prime objective is to sell the wheat produced in Western Canada, not to maximize profit.

4.202 A revenue-maximizing firm will act differently in the market than will a profit-maximizing firm. In particular, revenue-maximizing firms will tend to produce greater volumes, and sell at lower prices, than would profit-maximizing firms. This distinction illustrates 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.

(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*

*(i) Canadian grain segregation requirements*

4.203 Canada's grain segregation requirements provide more favourable 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*. As the Appellate Body explained in *Korea - Various Measures on 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."

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

4.205 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.

4.206 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". The Canadian Grain Act broadly defines "elevators" to cover all Canadian facilities used for handling and storing grain. 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.

4.207 Third, the treatment accorded to imported grain is less favourable than that accorded to like domestic grain. As the Appellate Body explained in *Korea – Various Measures on Beef*, this factor may be analysed as follows:

> "Article III obliges Members of the WTO to provide <u>equality of competitive conditions</u> 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 customs. Otherwise indirect protection could be given."

4.208 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. In these circumstances, the conditions of competition established by the Canadian measure strongly favour 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.

4.209 Section 56(1) of the Canadian Grain Regulations prohibits the mixing of imported grain and domestic grain in transfer elevators. In *Korea – Various Measures on 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 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." 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.

*(ii) Differential treatment in Canadian transportation system*

4.210 The rail revenue cap and the producer car programme both favour domestic grain over imported grain, and are thus inconsistent with Canada's obligations under Article III:4 of the GATT 1994. Both programmes satisfy the three elements required to establish a violation of Article III:4.

4.211 First, the imported and domestic products at issue are identical, and are thus "like products" for the purpose of GATT Article III. 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. Third, both of these measures accord treatment to imported grain that is less favourable than that accorded to like products of national origin. The rail revenue cap applies to Western Canadian grain, and no imported grain is eligible to receive the benefits of the programme. This discriminatory treatment provides more favourable conditions of competition for Canadian domestic grain than for imported grain.

4.212 Similarly, the producer car programme 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 programme, receives no such benefits. Again, the result is a system which mandates a competitive advantage for domestic grain over imported grain.

*(iii) The Canadian grain segregation requirements and discriminatory rail transportation measures are also inconsistent with Article 2 of the TRIMs Agreement*

4.213 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:
>
> (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."

4.214 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*.

4.215 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*. 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*.

## H. FIRST WRITTEN SUBMISSION OF CANADA

4.216 Canada's arguments as described in its first written submission are outlined below:

### 1. Article XVII claims of the United States

4.217 While the bulk of wheat production is consumed domestically, an average of 103 MT was traded internationally from 1997-1998 to 2001-2002. The market for wheat is global; and yet, trade is highly concentrated in a handful of large entities that include private sector multi-national grain companies and state trading enterprises. Most major exporters have in place government-sponsored export credit guarantee programmes. In each market, a number of factors influence the demand for wheat. One of the most prominent factors is the highly diverse demand in quality. As well, competition between the few major wheat-sellers in the global market is fierce and unless they can differentiate themselves on some basis, such as service or product quality, most sellers tend to be price-takers.

4.218 Born out of the Canadian cooperative movement of the 1920s, the CWB has been for more than sixty-five years the vehicle through which Western Canadian farmers have marketed their product. The CWB is a single-desk seller and has the exclusive authority to sell Western Canadian wheat for export and for domestic human consumption. It is modelled after agricultural marketing cooperatives, in that producers are associated with the CWB through a pooling mechanism, receive an initial payment when they deliver their product, and once the wheat is sold, receive a balance of sales proceeds, less operating expenses. The CWB does not have the legal authority to retain any of its after-cost earnings, save for amounts credited to a contingency fund. The logic behind the CWB is simple: farmers, acting together as one single entity, have a better bargaining position when marketing their agricultural products than each individually. This aids in their ability to compete with the economic strength of multi-national grain companies.

4.219 Established by legislation, the CWB is controlled by Western Canadian farmers. The mission of the farmer-controlled Board is to market quality products and services in order to "maximize returns to Western Canadian grain producers." In its marketing strategy, the CWB produces detailed estimates of all factors relevant to achieving its objectives. This includes assessing the Canadian supply situation and determining the set of customers that provides the best return or the supplies available for sale. The CWB's sales strategy evolves throughout the year as supply and demand situations develop, and often is adjusted daily. Prices for wheat are ultimately established through negotiation between buyers and sellers, but are linked to United States' futures exchange prices. Price differences are primarily based on the grade and protein of the wheat, as well as location and shipping arrangements. Like any commercial entity, the CWB requires financing to carry on its operations, having an ongoing funding requirement of approximately Can$7 billion, of which approximately Can$6 billion is for credit receivables.

4.220 Under Article XVII, WTO Members have the right to establish and to maintain state enterprises, and to grant these and other enterprises exclusive or special privileges. Article XVII:1 provides that state trading enterprises must act in accordance with the general principles of non-discriminatory treatment set out in GATT 1994. The general principles of non-discriminatory treatment are not violated where a state trading enterprise is acting in accordance with commercial considerations.

4.221 Neither of the terms "state trading enterprise" or "exclusive or special privileges" are defined in GATT 1994. For the purposes of this submission, the former term will mean a governmental or non-governmental enterprise that has been granted exclusive or special privileges. A "special privilege" is an exceptional or out of the ordinary right or advantage. An "exclusive privilege" is a right or advantage granted to a restricted or limited group. Nothing in Article XVII disciplines the *nature* of such rights or privileges, or the *scope* of the grant by a Member of such rights or privileges. Rather, Article XVII disciplines the conduct of state trading enterprises and their use of such rights or privileges with respect to purchases and sales in the market.

4.222 Article XVII:1(a) sets out the substantive obligation under Article XVII:1. In respect of purchases and sales, state trading enterprises must act in a manner consistent with the general principles of non-discriminatory treatment. Because any business, in making purchasing and sales decisions, makes distinctions as between products, sellers and buyers, the non-discrimination requirement in Article XVII:1(a) is further interpreted, and tempered, by Article XVII:1(b). The introductory language of Article XVII:1(b) provides: "[t]he provisions of subparagraph (*a*) of this paragraph *shall be understood to require* …." [emphasis added]. In this way, Article XVII:1(b) recognizes that where it does so in accordance with commercial considerations, a state trading enterprise may discriminate in its purchases or sales. Article XVII:1(b), thus, excludes such purchases or sales from the scope of application of Article XVII:1(a).

4.223 Jurisprudence, the negotiating history and the writings of prominent experts support the proposition that the term "general principles of non-discriminatory treatment" refers only to a modified most-favoured nation obligation. If Article XVII:1(a) refers to "national treatment", this could only be in respect of *import* monopolies – as *export* monopolies have little to do with conditions of competition between imports and like domestic products.

4.224 The term "commercial considerations" refers to the normal business practices of private sector enterprises. An appropriate interpretation for "commercial considerations" in the context of Article XVII would be "considerations consistent with normal business practices of privately-held enterprises in similar circumstances." This is supported by Article XVII:1(b), the *Ad* Note, and the object and purpose of Article XVII, which is to prevent WTO Members from doing indirectly through STEs that which they have contracted not to do directly in GATT 1994. To determine whether a firm has acted in accordance with commercial considerations, the action must be examined in its proper context and in comparison to what a privately-held enterprise would do in similar circumstances.

4.225 Canada is not in violation of Article XVII:1 because of an alleged failure to implement "processes and procedures" to "ensure" that the CWB acts in accordance with the requirements of that Article.

4.226 First, Article XVII does not require "processes and procedures". Article XVII does not prescribe *how* Members must "ensure" – a term that does not appear in Article XVII – that state trading enterprises act in the manner required by that Article. Article XVII:1 places an *obligation of results* on Members that grant special or exclusive privileges. If the drafters had in mind specific mechanisms or actions for a Member to "ensure" that its state trade enterprises meet the standard set out in that Article, these would have been set out precisely.

4.227 As well, the object and purpose of Article XVII would militate against an obligation of "mechanisms" and "actions". An obligation of means would result in more government interference and involvement in the affairs of state trading enterprises rather than less. Moreover, it would lead to the counterintuitive situation that a Member could be found in violation of Article XVII:1(b) in respect of the operations of a fully commercial state trading enterprise, because it does not impose its own judgement upon the operations of the enterprise. It is not consonant with common sense to suggest that the operations of a state trading enterprise are not "commercial" simply because the

government that established it does not pry into or direct its transactions. Rather the opposite is true: an entity's operations are carried out on the basis of "commercial considerations" where its actions are not directed by political considerations and under government supervision and control.

4.228 The proper interpretation is that Article XVII:1 contains an obligation "of results". Where a complaining party fails to demonstrate that the conduct of a state trading enterprise does not meet the standard in Article XVII:1(a) and (b), then the defending party must be assumed to have honoured its undertaking. Canada is not in violation of Article XVII:1 because of an alleged failure to implement "processes and procedures" to "ensure" that the CWB acts in accordance with the requirements of that Article.

4.229 Even if "processes and procedures" were the standard, Canada is not in violation of Article XVII:1. It has, in fact, put in place such processes and procedures. The Act of Parliament that established the CWB also established a Board of Directors, the majority of whom are farmers elected by farmers. This is the best guarantee that the Board acts in the best interests of those private interests and, therefore, acts in accordance with commercial considerations. Finally, were facts to come to the attention of the Government of Canada that the CWB was acting in a manner inconsistent with its obligations under Article XVII, Section 18 of the *CWB Act* enables the Government to undertake corrective action.

4.230 Second, the United States seeks impermissibly to challenge the "privileges" granted to the CWB. The United States appears to interpret "commercial considerations" through the lens of actions of private enterprises that do *not* have the privileges that may be granted to state trading enterprises. Such a comparison transforms the granting of privileges into an *irrebuttable presumption* that state trading enterprises cannot, by their very nature, act commercially. Under the reasoning of the United States, granting special or exclusive privileges to a state trading enterprise would necessarily lead to a conclusion that the state trading enterprise was not acting commercially, and that the Member granting such privileges is necessarily violating Article XVII. Such an argument is an unreasonable and absurd interpretation of the provisions of Article XVII.

4.231 An alternative reading of the United States' argument is that any such "presumption" is rebuttable. But this is not sustainable either, as the United States would be proposing that the exercise by a Member of a right under a provision of the WTO Agreement reverses the burden of establishing a violation under the same provision. Such presumption of violation is nowhere to be found in Article XVII.

4.232 The United States expressly agrees that Canada has the right to grant special privileges and that Article XVII does not place any limitations on the type or scope of privilege that may be granted to an enterprise.

4.233 Third, the complaining party has the burden of establishing the case it wishes to advance. The United States has failed to meet this burden of proof.

4.234 The United States offers no evidence and indeed makes no allegations that the CWB engages in conduct that is discriminatory.

4.235 Even if the Panel found that the CWB engaged in actions that were discriminatory, the United States still must demonstrate such discrimination is not in accordance with what a privately-held enterprise operating in similar circumstances would do.

4.236 The United States has not established that the CWB does not act in accordance with commercial considerations. The mere possibility that a state enterprise *may* act inconsistently with

commercial considerations – and this is the *only* allegation of the United States – does not establish that Canada is in violation of its treaty obligations in international law.

4.237 The CWB does act commercially, similar to agricultural marketing cooperatives. The United States' allegations reflect a fundamental misapprehension of the CWB. The CWB is modelled on a cooperative, and not a share-capital corporation. The United States' reliance on the absence of CWB "shareholders" and "profits" demonstrates a deep misunderstanding of the case.

4.238 The United States' government itself agrees that cooperatives operate differently from share-capital corporations. Instead of striving to generate profits for itself, a cooperative exists as a way to share risk, expenses and revenues with other producers. The artificial distinction in the United States' submission between "revenue maximizing" and "profit maximizing" entities is a red-herring. The CWB operates no differently from the entities that the United States itself considers perfectly commercial in operation. Canada is not in violation of Article XVII:1.

**2. Article III:4 claims of the United States**

4.239 Unlike Canada, in the United States Government involvement in terms of grain quality assurance is not a major factor. The United States' government and the industry do, however, recognize the growing importance of quality assurances and end-use characteristics in purchasing decisions, as well as the threat that the absence of such assurances in the United States poses to the United States' share of the world market. This is particularly significant in the case of wheat, where Canada has a reputation as a producer of high quality, potentially offering a commercial advantage over wheat produced in the United States.

4.240 Canada's grain quality assurance system seeks to ensure that: (a) grain meets customer' end-use requirements; (b) only the best varieties of grain are registered for production in Canada; (c) grain delivered into the handling system is assembled into lots of like quality where the standards of quality are explicitly defined; (d) this distinction is maintained as the grain moves through the handling system and is progressively assembled into larger lot sizes; and (e) the cleanliness and safety of the grain is maintained throughout.

4.241 There are four cornerstones to ensuring the quality of Canada's grain. The first is through variety registration. The Seeds Act requires that varieties of seed of most agricultural crops sold in Canada be registered, but only after undergoing evaluations and field trials to ensure the agronomic performance of the seed in Canadian growing conditions. Because of this rigorous screening, new grain varieties approved for commercial production are assured of meeting strict quality guidelines and provide grain buyers with the assurance of a consistent product over time.

4.242 The second is Canada's grain grading system, which is administered by the Canadian Grain Commission. Established under the authority of the Canada Grain Act, statutory grade specifications are set out for most grain. Imported grain may enter under the grading designation of the originating country. The objectives of the grain grading system are to: (a) establish a method of ensuring that quality of the product can be translated into commercial advantage; (b) facilitate grain handling by encouraging the collective storage of bulk lots of consistent quality; (c) enable a buyer to rely on the grain being of the specified quality; and, (d) separate grain into sufficient number of quality divisions so that buyers have a choice of grades, but, at the same time, limit the number of grades to facilitate handling and storage in an efficient bulk-handling system.

4.243 The third aspect of ensuring the quality of Canada's grain is uniformity and consistency. Canadian grain has a reputation for being uniform and consistent within, and among, shipments and from year to year. This allows processors to select a grade that best meets their requirements and that of their customers with confidence that it will perform according to expectation. A number of factors

contribute to the uniformity and consistency of Canadian grain. In particular, the grading system assures consistency in physical condition and intrinsic quality attributes among shipments of like grade despite the challenges posed by shipping large quantities of grain over large distances. Uniformity is also assured through the registration system, which establishes strict criteria for registration, and the fact that only relatively small numbers of new varieties are introduced in the market.

4.244 The final aspect is cleanliness and safety. End-users greatly appreciate, in particular, the cleanliness of Canadian grain. Through CGC monitoring, customers are assured that grain shipments meet the most stringent Canadian and international tolerances for toxic chemical contaminants. Similarly, the strict cleaning procedures, both at primary and export levels, ensure that buyers do not have excessive dockage to clean out, reducing the likelihood that the grain will spoil during storage as well as contributing to higher milling yields.

4.245 Grain handling and transportation in Canada is a bulk system. Designed for the efficient movement of vast quantities of Western Canadian grain to export markets, the grain handling system comprises privately owned handling and storage facilities, including primary, terminal and transfer elevators. There is no legal requirement for grain to enter the bulk handling system, and, in fact, it is seldom used when grain is destined for nearby purchasers.

4.246 There are no restrictions on where, how or to whom United States-origin grain imported into Canada can be sold. United States' farmers and grain companies may sell United States' wheat or other grain directly to Canadian customers, including millers, feedlots or elevators.

4.247 However, when United States-origin grain imported into Canada is destined for an elevator – that is, when it enters the Canadian bulk grain handling system – certain precautions are taken to ensure that bulk United States-origin grain is not misrepresented as Canadian grain and that it does not threaten the Canadian grain quality assurance system. Section 57 of the *CGA* requires the authorization of the CGC for foreign grain, including grain imported from the United States, to enter into licensed Canadian grain elevators, however, except for when grain has been infested or contaminated, there has never been an occasion when the CGC has refused entry. In addition, the "Wheat Access Facilitation Programme" has enabled the CGC to provide advance consent to primary elevator operators wishing to import United States-origin wheat. For transfer elevators, the CGC also provides advance consent for annual imports of United States-origin grain into the elevators.

4.248 Once United States-origin grain enters the Canadian bulk grain handling system, it is subject to the same mixing restrictions as apply to Canadian and other grain in the system. Exceptions do exist, such as under Section 56 of the *Regulations*, which allows mixing of different grades of Eastern Canadian grain, most of which is not exported, and under Section 57 which permits CGC authorized mixing of United States-origin grain and Canadian grain provided that the grain was identified as such.

4.249 Canada's treatment of imported grain does not contravene Article III:4. Section 57 of the CGA and Section 56 of the *Regulations* do not accord United States-origin grain treatment less favourable than accorded to Canadian-origin grain. Finally, even if inconsistent with Article III:4, the provisions are permitted under Article XX.

4.250 To determine whether a measure is consistent with Article III:4, it is necessary to examine whether: (a) imported products and domestic products are like products; (b) the measures constitute a "law, regulation or requirement"; (c) the law, regulation or requirement affects the internal sale, offering for sale, purchase, transportation, distribution or use; and (d) imported products are accorded less favourable treatment than the treatment accorded to like domestic products.

4.251 A like product determination is done on a case-by-case basis. All grains are not "like". For example, soybean and wheat, while both grains, are clearly different products. Wheat itself has different qualities and end-uses. The United States has failed to specify *which* imported grains are like which domestic grains and why.

4.252 The scope of Article III is limited to measures affecting the *internal* sale, offering for sale, purchase, transportation, distribution or use of imported products. Where a measure primarily affects exports, and incidentally the internal sale of the product, only the impact of the measure on the internal sales may be examined in the context of Article III. Different obligations set out in Article V of GATT 1994 apply to foreign products in-transit through a Member country, which the United States does not allege.

4.253 A portion of United States-origin grain that enters the Canadian bulk grain handling system is destined for re-export to third countries. To the extent the authorization requirement of Section 57 of the *CGA* and the mixing conditions of Section 56 of the *Regulations* affect United States-origin grain in transit through Canada, they are outside the scope of Article III:4 and of the Panel's terms of reference. The compliance of these provisions with Article III:4 only requires an examination of the effect of the measure on United States-origin grain imported for sale in Canada.

4.254 Mixing restrictions on grain in the bulk grain handling system do not amount to less favourable treatment of imported grain. In any event, the CGC has discretion to authorize mixing of foreign grain.

4.255 WTO Members are required to provide *effective equality of competitive opportunities* between "like" domestic goods and imported goods. This means that mere formal differences in treatment between imported and like domestic products do not establish a violation. In *Korea – Various Measures on Beef*, the Appellate Body found that a "formal difference of treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4."

4.256 Similarly, the Appellate Body in *US – Section 211* stated that "the mere fact that imported products are subject… to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing the inconsistency with Article III:4." The different treatment also has to be less favourable treatment.

4.257 As set out in *EC – Asbestos*, the Appellate Body recognized that a Member does not violate Article III:4 simply because a product (which is both imported and produced domestically) is treated differently from another product in the group of "like" products. Article III:4 is also not violated by virtue of drawing distinctions between "like" products within domestic regulations.

4.258 The United States claims that two measures are inconsistent with Canada's obligations under Article III:4. Section 57 of the CGA and Section 56 of the *Regulations* relate to the delivery of certain grain to elevators and to the mixing of grain within the Canadian bulk grain handling system.

4.259 United States-origin grain has unfettered access to Canadian end-users. As well, the CGC routinely allows imported grain to enter Canadian elevators. Authorization is typically granted within a day or two. In addition, various programmes have been put in place to allow routine or even annual orders permitting receipt of foreign grain. The Wheat Access Facilitation Programme between Canada and the United States is one of these programmes.

4.260 A measure may be challenged as such before a WTO panel only where it is mandatory in nature and *requires* the violation of the Agreement. Section 57 of the CGA is not a mandatory provision. The CGC has the discretion to always authorize foreign grain to enter elevators, and does

so routinely and regularly. The advance annual authorization to transfer elevators and to primary elevators under the WAFP further confirms the practice of the CGC to authorize entry of foreign grain into Canadian elevators. And the CGC has never refused entry of foreign grain into Canadian elevators.

4.261 The United States adduces no evidence to the contrary. In fact, other than vague allegations concerning the practices of the CGC, the United States has not presented any credible evidence in support of its contention that Section 57 in any way affects the conditions of competition of United States-origin grain. Its challenge must fail.

4.262 Finally, Section 56 of the *Regulations* does not result in treatment less favourable for United States-origin grain. The principal object and effect of the various regulations at issue is to ensure that United States-origin grain is not misrepresented as "Canadian" grain when it enters Canadian elevators. The precautions that have been put in place reflect the fact that the Canadian grain handling system is geared toward bulk movement of goods for export. Contrary to United States' assertions, nothing in Article III:4 requires a Member to allow mixing of bulk grain from different origins and of different quality, or to permit foreign grain to be misrepresented as domestic grain.

4.263 And the United States fundamentally misunderstands the purpose and effect of Section 56 of the *Regulations*. A significant portion of United States-origin grain exported to Canada is shipped directly to end-users, by-passing elevators to which Section 56 would apply. End-users may mix grain they purchase from different sources, as Canada does not impose any mixing restrictions outside the bulk grain handling system. As well, mixing restrictions in the bulk handling system apply to both domestic and imported grain. Mixing restrictions in the bulk handling system do not amount to less favourable treatment as there are no greater costs imposed on United States' -origin grain as a result. Finally, mixing of Canadian and foreign grain may be allowed. Section 56 of the *Regulations* does not violate Article III:4.

4.264 Even if Section 57 of the CGA and Section 56 of the *Regulations* are found to be inconsistent with Article III:4, they are justified under Article XX(d) of GATT 1994.

4.265 These measures are necessary in order to secure compliance with the grading provisions of the CGA, the *CWB Act* and the misrepresentations and consumer protection provisions of Canada's competition laws, laws that are not inconsistent with the provisions of the General Agreement. These measures are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

### 3. Maximum Grain Revenue Entitlement is Consistent with Article III:4

4.266 The provision at issue caps the revenue of two railways, the Canadian National Railway (CN) and the Canadian Pacific Railway (CP), on certain movements of grain within Canada in a given crop year. The revenue cap only applies to movements originating in Western Canada and destined to: (a) a port in British Columbia (*that is*, Vancouver or Prince Rupert) for export, *except for* exports to the United States for consumption in the United States; (b) Churchill, Manitoba for export; or (c) Thunder Bay or Armstrong, Ontario for domestic consumption or export.

4.267 Since the introduction of the revenue cap, railway revenues have been below, and during the most recent crop year (2001-02) were significantly below, those permitted under the revenue cap.

4.268 Article III:4 does not apply to laws affecting the transportation of goods in-transit; Article V of GATT 1994 does. Article V:1 deems to be "in-transit" goods passing across the territory of a

contracting state when such passage is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Therefore, because of the geographic and other limitations of the revenue cap, the only portion that affects transportation of United States-origin grain for domestic use in Canada are those movements destined for either Thunder Bay or Armstrong. However, there are virtually no such movements of United States-origin grain to Thunder Bay or Armstrong for domestic sale in Canada because there is no natural market for eastbound movements of United States-origin grain through Canada: it is far easier for United States-origin grain to move eastbound through the United States, south of the Great Lakes, and then north into Canada.

4.269 Furthermore, United States-origin grain is not accorded less favourable treatment. Railway rates are set on a commercial basis. In addition, the revenue cap has not been met and is unlikely to be met in the future.

4.270 Railway rates are set on a commercial basis as the revenue cap does not actually regulate rates for shipping in any way. The revenue cap only regulates the revenues earned by the prescribed railways, on the prescribed parts of certain movements. The revenue cap does not specify or limit individual freight rates and the discretionary setting of rates is left entirely to them.

4.271 For movements that include a "non-revenue cap" portion, only the rates for the full movement are relevant and the railways have the discretion to charge what the market will bear, regardless of what the rate may be for the revenue cap portion of the movement. It is generally accepted that railways in North America practice differential pricing. This practice consists of charging prices that the market will bear by examining a shipper's transportation alternatives, including alternative costs, for the full movement, that is from the origin to destination. Because of the railways' differential pricing practices, the revenue cap clearly does not confer treatment that is less favourable for movements of United States-origin grain. Accordingly, the revenue cap does not accord treatment that is less favourable for movements of United States-origin grain.

4.272 The revenue cap has never been met and is unlikely to be met in the future. Since the introduction of the revenue cap, railway revenues have been below, and during the most recent crop year were significantly below, those permitted under the revenue cap. This is, in part, because the revenue cap baseline already provides an adequate level of returns to the railways. Further, revenue caps are not adjusted downward for productivity gains.

4.273 Actual revenues earned by the railways are significantly below the maximum entitlement. The railways had the option to charge higher rates and still meet the requirements of the CTA, but chose not to. This supports the presumption that as profit-maximizing enterprises, the railways were simply charging the rates the market would bear. In addition, the formula used to calculate the revenue cap allows for upward adjustments for inflation but no corresponding reduction for gains in productivity. As a result, it is expected that over time there will be an increase in the gap between grain revenues and the revenue caps.

**4. Producer Car Allocation is consistent with Article III:4**

4.274 Since 1 August 2000, there has been no government intervention or formal mechanism for the allocation of rail cars, with the exception of a minor role played by the CGC. The railways alone determine how rail car supply will be allocated, based on commercial considerations. The CWB and grain companies obtain rail cars from the railways. Farmers can also access rail cars themselves in order to load their own grain directly for shipment to a terminal elevator or other destination. These rail cars are known as "producer cars" and provide farmers with the opportunity to by-pass the primary elevator and save on elevation charges.

4.275 Farmers apply to the CGC for producer cars. The CGC only allocates those rail cars that the railways make available; and it is the railways that determine the number of rail cars that will be provided to its various customers, based on commercial considerations. The CGC allocates the rail cars on a first come-first served basis, under conditions set out in the CGC's annual "Producer Car Order".

4.276 Producer cars are allocated on a non-discriminatory basis. The term "producer" is not defined in the CGA and, contrary to the United States' assertion, there is no indication in the CGA (or, for that matter, in the description of the producer car programme prepared by the CGC and upon which the United States relies), the *Regulations* or the practice of the CGC that Section 87 of the CGA only applies to producers of Canadian grain.

4.277 A United States' producer requesting a producer car for United States-origin grain in Canada would be treated as a Canadian producer requesting a producer car for his Canadian grain. An application received by the CGC from a United States' producer would have to comply with the same conditions as an application from a Canadian producer. Therefore, the CGC does not accord less favourable treatment to United States' -origin grain.

4.278 Canada's conclusion with respect to Article III:4 is that United States' assertions are founded neither in law nor fact.

### 5. Claims under Article 2 of the *TRIMS Agreement*

4.279 First, the United States' request does not identify any trade-related investment measure. The CGA and the CTA are not trade-related investment measures. Therefore, the *TRIMs Agreement* does not apply. Second, the measures being challenged by the United States are not covered by Item 1(a) of the Illustrative List and are not local content requirements. Third, the United States allegation that the "grain segregation measures" require elevator operators to "use" domestic Canadian grain has no foundation in fact or law.

4.280 As a threshold matter, it is not at all clear that the term "use" in the context of the *TRIMs Agreement* refers to handling, transportation or storage of products. Moreover, Section 56 of the *Regulations* does not require elevators to "use" domestic grains over imports, nor does it condition any advantage on the purchase or use of Canadian grain. This provision simply allows mixing of Eastern Canadian grain. As well, mixing restrictions have nothing to do with local content requirements. Section 56 provides that elevators that handle grain, be it Canadian or foreign grain, may have to respect certain mixing restrictions. Finally, the United States' allegation that shippers are required to "use" domestic grain "in order to obtain the advantages of the rail revenue cap or government rail cars" is also unsupported by fact and law. With respect to the revenue cap, the United States has not established that the rail revenue cap confers any advantage, or that it is the type of advantage contemplated by Item 1(a) of the Illustrative List. With respect to "government rail cars" it is unclear what this refers to. Canada assumes that the United States refers to Section 87 of the CGA, which is the rail car allocation provision it refers to under its Article III challenge. This provision does not require use of Canadian grain in order to obtain a producer car.

4.281 The United States' assertions that Canada has violated its obligations under Article 2 of the *TRIMs Agreement* are founded neither in law nor fact and should be dismissed

## I. FIRST ORAL STATEMENT OF THE UNITED STATES

4.282 In its first oral statement, the United States made the following arguments:

## 1. GATT Article XVII Claims

4.283 The GATT 1994 does not prohibit Members from establishing and maintaining a STE and granting to that STE special benefits and privileges not available to private sector enterprises. However, in recognition of the fact that these benefits and privileges may enable the STE to engage in trade-distorting practices to the detriment of other Members, Article XVII imposes obligations on Members that choose to establish an STE.

4.284 In particular, in order to ensure that such trade-distorting practices do not occur, Article XVII imposes an obligation on the Member establishing the STE to ensure that the STE acts in a manner consistent with 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. As made clear by the *Korea - Various Measures on Beef* panel, a violation of any of these obligations constitutes a violation of Article XVII. These obligations are inter-related and should be read together as a consistent regime designed to discipline STEs that might otherwise engage in trade-distorting practices.

4.285 Canada seems to argue differently in its written submission with regard to the relationship between Article XVII:1(a) and 1(b). But it certainly agreed with this interpretation earlier in these proceedings. In particular, in its Article 6.2 submission last spring, one of Canada's arguments for dismissing the United States' panel request was premised on the notion that Article XVII:1(a) and (b) had distinct obligations.

4.286 Canada, like all Members who establish STEs and grant them special benefits and privileges, must fulfil its obligations under Article XVII and ensure that the CWB does not engage in trade-distorting conduct. Canada has not met this obligation.

4.287 Canada has provided the CWB with exclusive and special privileges, including: (1) monopoly rights of purchase and sale of all Western Canadian wheat for export and domestic human consumption; (2) the right to set the price paid to Canadian producers for wheat; (3) government guarantee of initial payments made to producers; and (4) government guarantee of CWB financial operations, including CWB borrowings at levels far exceeding the amount required to finance CWB sales operations and CWB credit sales to foreign buyers.

4.288 The CWB does not sell grain as a private-sector actor according to commercial considerations and therefore violates Article XVII. The CWB is an undisciplined state enterprise with special privileges neither enjoyed by a cooperative or a large private-sector corporation. Unlike the CWB, producers' cooperatives are voluntary, private associations. The CWB, on the other hand, requires all Western Canadian farmers who wish to sell their wheat for human consumption or export to do so through the CWB. Farmers in a true cooperative have the option, not the obligation, to join in a joint enterprise. Also, unlike a cooperative, the CWB is not required to sell the wheat grown by Western Canadian farmers. It has strong incentives to do so, but it is not required to do so. In short, the CWB is a sales organization, but a very unusual one.

4.289 Canada's analogy to corporations such as Cargill is similarly off the mark. The CWB does not act as a private sector grain exporter according to commercial considerations. First, a private exporter who wishes to export wheat must first purchase that wheat on the domestic market, with the market establishing the price, not the exporter. In contrast, the CWB has a guaranteed supply of wheat at a cost of acquisition well below market value. Canada acknowledges that it sets the initial payment price, and that this price is below estimated market value. Canada tries to argue that it has no guaranteed supply because farmers are not forced to grow wheat under Canadian law. However, many farmers do in fact grow wheat, and these farmers are obligated to have the CWB export that

wheat. Many Canadian farmers do not want to sell their wheat for domestic human consumption and export to the CWB, but they are forced to do so by operation of Canadian law.

4.290 Second, if a private exporter misjudges the price of wheat, it has to absorb the loss. The CWB, however, is shielded from these market forces. The CWB is not required to recoup the total amount of its initial payments to farmers. Instead, under the Government of Canada's initial payment guarantee, the Canadian Parliament bails out the CWB if the amount the CWB receives for sales in a given marketing year falls below the CWB's total initial payments to producers.

4.291 Third, the CWB's guaranteed access to supply at a known price enhances the CWB's ability to forward contract wheat for future delivery at a fixed price, in a manner that a private exporter could not accomplish without assuming considerable financial risk and added handling costs.

4.292 Fourth, the CWB is given more favourable credit terms than a commercial exporter would receive. The Government of Canada also guarantees the CWB's borrowings, thereby giving the CWB an opportunity to offer favourable credit terms to high-risk buyers.

4.293 The CWB's legislative mandate to maximize revenues, not profits, also leads to a violation of Article XVII. By statute the CWB is required to sell Western Canadian wheat "for prices as it considers reasonable with the object of promoting the sale of grain produced in Canada in world markets." Thus, the CWB has a fundamentally different objective than profit-maximizing, private export companies. That objective – to maximize revenues – means that the CWB has strong incentives to act inconsistently with commercial considerations.

4.294 In light of these extensive, market-distorting business practices and Canada's acknowledgment that it has not taken any steps to ensure that these non-commercial practices do not lead to serious obstacles to trade, one can only conclude that Canada has failed to comply with Article XVII.

4.295 Canada spends much of its submission knocking down the straw man concerning "obligations of process" and "obligations of result." Canada seems to justify this straw man argument based on the fact that the United States' submission uses phrases such as "Canada must ensure that the CWB meets the Article XVII disciplines." However, our use of this phrase is simply a shorthand for the obligations of Canada as set out in Article XVII. We do not see Canada as disagreeing that it has such obligations. Use of the word "ensure" to summarize the obligations under Article XVII is entirely appropriate. We would recall Article XVI:4 of the *Marrakech Agreement Establishing the World Trade Organization*. That article, which applies to the GATT 1994, provides: "Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements."

4.296 The United States' submission does not, as Canada claims, argue that Article XVII contains "obligations of process." The reason that the United States' submission emphasizes the lack of any Canadian controls over the CWB is that without such controls, the CWB will not act, and has not acted, in accordance with commercial considerations. It is not for the United States to say how Canada should meet its obligations. However, where Canada establishes an STE such as the CWB, with a guaranteed supply of wheat at below market prices and all of its other advantages, and without any statutory or other mechanism to require compliance with the Article XVII disciplines, Canada has not met its obligations.

4.297 The United States has not, as Canada has claimed, asked the Panel to reverse the burden of proof. To the contrary, the entire first United States' submission is dedicated to meeting the United States' burden of proof. It does this by setting forth the privileges enjoyed by the CWB, its

statutory structure and mandate, all of which combine to show that the CWB acts in a non-commercial manner.

4.298 Canada seems to argue that the United States must submit actual sales data to meet its burden of proof. It is this Canadian argument, not the United States' submission, that departs from jurisprudence under the DSU. Certainly nothing in GATT Article XVII, or under the DSU, specifies the types of information that a complainant must use to meet its initial burden. Why did the United States decide to present its case in this way? First, the structure and advantages of the CWB are publicly available, and we believe that they are more than sufficient to meet the United States' burden of establishing an Article XVII violation. Second, and in contrast, specific data on CWB sales practices are not publicly available. The United States has asked Canada for such information under the procedures set forth in Article XVII [ ][40]. Canada has chosen not to provide it. We therefore chose to present our case based on the information available to us, and not on the basis of information held primarily by the Government of Canada under a veil of secrecy.

**2. GATT Article III:4 and TRIMs Article 2 Claims**

4.299 The United States is also challenging Canada's discriminatory treatment of imported grain. Canada's grain segregation requirements, its rail revenue cap, and its producer car programme all discriminate against grain imports in violation of Canada's national treatment obligation under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

4.300 The United States is challenging Canada's grain segregation requirements under the Canada Grain Act and Canada Grain Regulations, as well as the regulation of the bulk grain handling system and grain transport system. Under these regulations imported grain is being treated less favourably than like Canadian grain – a violation of Canada's obligations under Article III:4 of the GATT 1994.

4.301 Canada's violation of Article III:4 could not be clearer. First, there is no question that imported and domestic grains are "like products" for purposes of Article III:4. Canada's argument that the imported grain at issue may not be a "like product" with respect to domestic grain is disingenuous, especially since some imported United States' grain is the same variety as Canadian grown grain, the only difference being that the United States' grain is grown south of the Canadian border.

4.302 There is also no question that the grain segregation regulations at issue affect the internal sale, offering for sale, purchase, transportation and distribution of grains, since the overwhelming majority of grain in Canada travels though the bulk grain system.

4.303 Finally, the treatment accorded to imported grain is less favourable than that accorded to like domestic grain. As explained by the Appellate Body in *Korea - Various Measures on Beef*, "Article III obliges Members of the WTO to provide equality of competitive conditions for imported goods in relation to domestic products."

4.304 Canada responds that in certain cases the CGC has allowed imported grain to enter into Canadian elevators. However, what is critical for purposes of the Article III:4 analysis is the fact that under Canadian law and regulations, Canadian grain is automatically allowed entry into Canadian elevators. Imported grain, however, requires special permission, under conditions specified nowhere in Canadian law. Furthermore, as Canada references in its own submission, approvals are often subject to certain burdensome and costly sealing and labelling requirements that are not imposed on like domestic grain.

[40] For reasons explained in Section V.B, the content of this sentence was redacted from the July Panel's final report.

4.305 The Canadian Grain Regulations promulgated under the Canadian Grain Act provide further restrictions on the free flow of imported grain. 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 opportunities of imported grain to reach Canadian end-users. As in the case of *Korea - Various Measures on Beef*, this segregation "can only be reasonably construed, in our view, as the imposition of a drastic reduction of commercial opportunity to reach, and hence to general sales to, the same consumers served by the traditional . . . channels."

4.306 Canada's argument that United States' exporters can sell grain directly to Canadian end users does not address the discrimination inherent in the bulk grain handling system. Article III:4 protects conditions of competition, not trade flows per se. The United States is not required to demonstrate any trade effects of Canada's measures in order to establish a violation of Article III:4.

4.307 Canada's reference to the Wheat Access Facilitation Programme ("WAFP") does not counter the argument that imported grain is subject to discriminatory treatment. Under the WAFP, grain elevators that receive United States' wheat must satisfy numerous onerous regulatory requirements and seek CGC approval. In fact, no United States' wheat has ever been shipped under the WAFP because of these onerous requirements.

4.308 Canada also makes a half-hearted attempt to invoke an Article XX(d) defence in an attempt to justify its discrimination against imported grain. However, Canada has the burden of establishing the existence of an exception under Article XX, and the single paragraph in Canada's submission does not meet this burden. Canada has not shown how the discriminatory measures at issue here are designed to secure compliance with a legitimate regulatory scheme and are necessary to secure such compliance. Furthermore, Canada has failed to demonstrate that its discriminatory measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised barrier to international trade.

4.309 The United States submits that the rail revenue cap and the producer car programme also violate Article III:4 by according treatment to imported grain that is less favourable than the treatment granted to like products of national origin. Only Western Canadian grain, not imported grain, benefits from the rail revenue cap programme. This favours Western Canadian grain, since railroads shipping Western Canadian grain must choose a tariff for transport so that total revenue does not exceed the government-mandated rail revenue cap. In contrast, the railroads are free to charge higher tariffs for non-Western Canadian grain in order to boost revenues not subject to the revenue cap. This dual scheme gives domestic grain a competitive advantage.

4.310 Similarly, the producer car programme only provides cars to domestic producers for the transport of domestic grain. The provision of government rail cars only for domestic grain gives domestic grain a special privilege and a competitive advantage by lowering the transportation costs for domestic grain. Canada's submission mentions that United States' farmers can use producer cars. However, the issue here is the treatment of grain. Since farmers must be able to use the producer cars, and United States' farmers are not in Canada, we fail to see how United States' grain can take advantage of the producer car programme.

4.311 Canada's grain segregation requirements and discriminatory rail transport measures also violate Article 2 of the *TRIMs Agreement*. Under Article 2, TRIMs that are inconsistent with Article III of the GATT 1994 are also inconsistent with the *TRIMs Agreement*. The grain segregation requirements and the rail transportation measures both require elevator operators and shippers, respectively, to favour domestic over imported grain. Both of these measures also fall squarely within Illustrative List 1(a) of TRIMs and thus violate Article 2 of that Agreement.

## J. FIRST ORAL STATEMENT OF CANADA

4.312 The following summarizes Canada's arguments in its first oral statement:

### 1. Article XVII

4.313 At the heart of Article XVII is both a right and an obligation. The right is to establish and maintain state trading enterprises and to grant them exclusive and special privileges. The obligation is that these enterprises not discriminate in their purchases and sales in the sense of GATT 1994. Article XVII does not prescribe *how* this obligation is to be fulfilled. It leaves that up to each Member to decide. It certainly does not *require* Members to set up "processes and procedures", "supervisory controls" and "statutory or other mechanisms".

4.314 Article XVII:1(a) sets out the principal substantive obligation under Article XVII:1: in respect of their purchases and sales, state trading enterprises must act in a manner consistent with the general principles of non-discriminatory treatment in GATT 1994. This refers, at a minimum, to the most-favoured-nation ("MFN") treatment principle set out in Article I of GATT 1994. Article I in turn provides the advantages, favours, privileges and immunities granted in respect of products destined to one Member, must be extended immediately and unconditionally to products destined to other members. In respect of *export* sales, therefore, the applicable principle of non-discriminatory treatment would prohibit the selling of products *at a higher price* or under *more stringent terms and conditions* into one market than when selling into another. The MFN principle would require the seller to extend the *more favourable of the terms and conditions* to all other Members to which a product is destined.

4.315 However, markets and market conditions differ from one country to another. For this reason, private traders make distinctions as to pricing and terms of sales based on these market conditions, as do state trading enterprises. Article XVII:1(b) interprets Article XVII:1(a) to the effect that a state trading enterprise may "discriminate" in its purchases or sales in the sense of Article I of GATT 1994, so long as it does so in accordance with "commercial considerations".

(a) "Commercial considerations"

4.316 The term "commercial considerations" is nowhere defined, but Article XVII contains ample clues as to the most reasonable interpretation. Again, it should be recalled what is at issue here: where an enterprise gives an advantage in respect of products destined to one Member, but not in respect of products destined to another. So the question is, therefore not whether the *advantage* is consistent with commercial considerations, but rather whether the *refusal to grant* that advantage in other markets is consistent with commercial considerations.

4.317 Article XVII:1(a) refers to "private traders"; Article XVII:1(b) talks about "customary business practice" and sets out certain market-related factors. In this light, "commercial considerations" are those considerations that a private trader in similar circumstances would take into account in making purchases or sales. In determining whether a state enterprise and a private trader are in similar circumstances, account must be taken of the special or exclusive privileges that have been granted. A state trading enterprise acts in accordance with commercial considerations where in its refusal to extend an advantage granted to products destined to a Member, to products destined to other Members, it acts consistently with the normal business practices of private traders in similar circumstances.

(b) "Processes or procedures" are not required

4.318 Article XVII is not an obligation of means, but of results. It requires a specific outcome, but does not prescribe a particular means by which this outcome is to be achieved. The term "undertake" manifestly does not obligate a Member to implement any "processes or procedures" or, as the EC suggests, "supervisory control". But even if the United States is correct and Article XVII imposes an obligation of means, Canada has established the means to ensure that the CWB acts in a manner consistent with Article XVII.

(c) Burden of proof

4.319 There is no evidence to demonstrate that Canada is in violation of its obligations under Article XVII. The United States seeks to reverse the onus of proof by arguing that, because Canada has exercised its rights under Article XVII by granting the CWB certain privileges, Canada is no longer entitled to the normal presumption that it has acted in accordance with its obligations under GATT 1994.

4.320 The claim is not that the CWB actually does discriminate, but rather, that it can. This is hypothetical speculation. Whatever the CWB *could* do *if it so chooses*, does not constitute the concrete evidence that would be necessary to begin evaluating a claim under Article XVII.

**2. Article III :4**

(a) Measures related to entry of grain into elevators and mixing requirements

4.321 The two measures at issue, Section 57 of the CGA and Section 56 of the *Regulations*, form an integral part of the Canadian grain quality assurance system. To achieve the objectives of the system, Canada has put in place a strict variety registration process and has established grading standards. Grain is assembled into lots of like quality in order to maintain the quality of grain while it moves through the system and to markets. Grain is also subject to inspections to ensure cleanliness.

4.322 There are over a hundred thousand farmers in Canada who produce on average about 60 million tonnes of grain each year, about half of which is exported. Most grain is grown far from export points and requires approximately 20,000 rail cars and about 300,000 rail movements to transport it over a distance of approximately 1,600 kilometres. In addition to distance, the large volume of grain that transits through elevators poses further logistical challenges. Different types and grades have to be taken into consideration as end-users expect to get not only the *type* of grain they contract for, but also the quality they order. Adequate guarantees to preserve integrity in the bulk handling system are necessary, and this is why the *Canada Grain Act* and *Regulations* set out certain rules, among which are the measures that the United States is challenging.

(b) Entry authorization

4.323 United States-origin grain has never been refused entry into Canadian elevators under Section 57 as this provision is not a prohibition. Rather, it gives the CGC discretion to accommodate the delivery of foreign grain into licensed Canadian elevators, which has been faithfully and routinely exercised to authorize such deliveries. This is fully consistent with the original object of that provision: *not* to hamper trade, but simply to track the nature, amount, and movements of imported grain delivered to elevators in order to maintain the quality differences of grain in the handling system.

4.324 No authorization is required for end-users or for Eastern primary elevators. Authorization is, however, required for foreign grain to enter Western primary elevators, transfer elevators or terminal elevators.

4.325 The CGC has the discretion to grant authorization; and there is no allegation that this discretion has ever been exercised inconsistently with Article III:4. Where a measure can be and is applied consistently with WTO obligations, there is no violation.

4.326 In addition, the authorization requirement does not in and of itself amount to "less favourable treatment". Authorization is granted routinely and consistently, within a day or two of the elevator's request. No request for authorization has been denied and there is no cost associated with making a request. Furthermore, the CGC has given, and gives, advance consent to entry of large volumes of United States-origin grain into certain elevators.

(c) Grain mixing restrictions

4.327 There are no mixing restrictions or segregation requirements applied when grain is sold directly to end-users, which is in fact how most United States' farmers and grain companies sell grain in Canada. Various mixing restrictions apply in the transfer and terminal elevator system to ensure that only grain of like quality is mixed, subject to some exceptions set out in the *Regulations* or as otherwise authorized. Both foreign and Canadian grain is subject to the principle that only grain of like quality should be mixed in the bulk handling system. However, even if the products were to be considered "like" in the sense of Article III:4, because imported grain is not subject to the same quality assurances as is Canadian grain, and the quality of foreign grain is often unknown, a different treatment in the bulk handling system may be necessary. In any event, as noted by the *Section 337* panel, even if different, this treatment is not less favourable.

4.328 The treatment of grain in this situation is completely different than that which arose in *Korea - Various Measures on Beef*, where imported beef had to be sold in different stores from domestic beef. United States-origin grain can and does enter Canadian elevators, at a volume of almost 3 million tonnes each year. United States-origin grain also has unimpeded access to end-users.

(d) Article XX(d)

4.329 Even if the grain handling provisions at issue are found to be in violation of GATT Article III:4, they are justified under Article XX(d). The grain handling provisions are necessary in order to secure compliance with the grading provisions of the *Canada Grain Act*, and to ensure that there is no misrepresentation of grain in the system, consistent with the *Competition Act* and other applicable laws dealing with deceptive or misleading practices. These laws are not inconsistent with the provisions of the *General Agreement*. In addition, these measures are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

(e) Measures related to the transportation of grain

4.330 Producer cars are available to all producers, regardless of origin. There is no differential treatment and therefore no less favourable treatment of imported grain in Canada.

4.331 The railway revenue cap has never been reached, and the railways set rates commercially and practice differential pricing. The United States Department of Commerce recently found that the revenue cap does not confer a benefit to domestic producers. This effective admission against interest should be considered conclusive: if, as Commerce has found, Canadian farmers do not benefit from the cap, there can be no treatment less favourable of non-Canadian products.

(f) *TRIMs Agreement* allegations

4.332 As recognized by the European Communities in its third party submission, the United States has not established the existence of any trade-related investment measure, nor has it demonstrated the existence of any local content requirement, let alone a violation of the *TRIMs Agreement*

K. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.333 In its second written submission, the United States made the following arguments:

**1. Canada has breached its obligations under GATT Article XVII**

4.334 Article XVII sets forth clear obligations for any Member, including Canada, that chooses to establish a STE and provide that STE with special and exclusive privileges. Under Article XVII, Canada undertakes that if it chooses to establish or maintain an STE, that STE shall "act in a manner consistent with the general principles of non-discriminatory treatment" prescribed in the GATT 1994. As Article XVII goes on to state, it is understood that this obligation requires that the STE make purchases and sales "solely in accordance with commercial considerations." Furthermore, this obligation requires that the STE "afford the enterprises of the other [Members] adequate opportunity . . . to compete."

4.335 The CWB's unique legal structure, its unchecked exercise of its exclusive and special privileges, its incentives to act in a non-commercial and discriminatory manner, and the lack of any countervailing government supervision necessarily results in sales that are not in accordance with Article XVII standards. Yet Canada takes no action to ensure that the CWB adheres to the behaviour required by Canada's Article XVII obligations. Under these circumstances, the only possible conclusion is that Canada has breached its obligations under Article XVII.

4.336 Article XVII contains several distinct obligations, and a violation of any of these would sufficiently result in a violation of Article XVII. As stated unequivocally by the *Korea - Various Measures on Beef* panel, "[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."

4.337 In this case, the CWB acts inconsistently with all of the standards set forth in Article XVII:1. The CWB takes actions that violate principles of non-discriminatory treatment found in the GATT 1994, fails to act in accordance with commercial considerations, and denies the enterprises of other Members an adequate opportunity to compete for participation in the CWB's purchases and sales.

4.338 Article XVII:1(a)'s obligation to act "according to the general principles of non-discriminatory treatment," goes beyond most-favoured-nation principles to include behaviour that would run afoul of the general principles of non-discriminatory treatment in the GATT 1994. This includes discrimination between third country markets, as well as discrimination between domestic and third country markets. The CWB engages in both types of prohibited, discriminatory conduct.

4.339 Moreover, the very structure of the CWB export regime leads the CWB to make sales not in accordance with commercial considerations under Article XVII:1(b), which also violates the principles of non-discriminatory treatment set forth in Article XVII:1(a).

4.340 As the CWB itself observes, "The link between farmers and the federal government offers three distinct economic advantages. Firstly, the federal government guarantees initial payments to farmers when they deliver their grain. Secondly, the CWB is able to compete in higher risk markets

and make sales on credit because of federal government backing. Finally, the government guarantees our borrowing enabling us to finance our operations at much lower rates of interest than any comparably-sized, private-sector company. These financial savings more than cover the CWB's administrative costs." These special and exclusive privileges, combined with the CWB's structure and lack of government oversight, necessarily lead to non-competitive and discriminatory practices.

4.341 In addition, the special and exclusive privileges of the CWB give it more pricing flexibility and less exposure to market risk than a commercial actor. For example, while a commercial grain trader has to pay the market price – a price that fluctuates and cannot be taken as fixed or guaranteed for a given marketing year – for grain, the CWB, through its special and exclusive privileges, has a fixed, guaranteed and known acquisition cost of wheat along with guaranteed supply. Similarly, according to the CWB's own analysis, the CWB "manages risk to an extent not available in the open market[.]" Indeed, "[t]he average risk management costs for [non-Board grains] flax and canola were found to be at least $5.53 per tonne higher than the cost of managing a wheat transaction through the CWB." Such a risk structure, by artificially lowering CWB costs, clearly gives the CWB greater pricing flexibility than a commercial actor, because a commercial actor would have to pay to manage risk in a way that the CWB does not.

4.342 Canada appears to admit that some discipline over the CWB is required if the CWB is to act in accordance with commercial considerations, noting that "the discipline over the CWB is not from the top but from the bottom. The farmers will ensure that the CWB acts in accordance with commercial considerations." However, as we emphasized in our responses to the Panel's questions, wheat farmers in Canada cannot discipline the CWB because the farmers are required, by law, to sell all of their grain for human consumption and export to the CWB. Canadian wheat farmers have no real choice. They sell to the CWB at a fixed initial payment price that is set by the Government of Canada and the CWB, and that is guaranteed by the Government of Canada. Due to the disadvantageous terms of the buy back programme, a farmer who wants to sell wheat for domestic human consumption or export has no real alternative but to sell his wheat to the CWB.

4.343 The Canadian Government's guarantee of all initial payments for wheat, which translates into a fixed, guaranteed, and known acquisition cost, combined with other aspects of the CWB export regime, clearly enable the CWB to act non-commercially. As the CWB itself has observed and we noted in our first submission, Canada's guarantee of initial payments "is like a revenue insurance policy for farmers with no premiums." There is no risk to the CWB for running pool deficits because "the federal government makes up the difference." The CWB uses its pricing flexibility and its reduced risk exposure to make sales on non-commercial terms in order to target particular export markets. This results in a violation of the general principles of non-discriminatory treatment and deprives the enterprises of other Members an adequate opportunity to compete according to customary business practice.

4.344 One example of this behaviour is the CWB's decision to pay premiums to Canadian farmers for high quality wheat even when this acquisition behaviour is not justified by demand for high quality wheat in third-country markets. This behaviour gets to the heart of the CWB's non-commercial practices. The CWB gives Western Canadian farmers an incentive to over-produce high quality wheat and the CWB uses this over-production to act non-commercially and make sales that a commercial actor would not be able to consummate.

4.345 Specifically, and as mentioned in our first submission, Canadian high-quality wheat production exceeded demand by 32 per cent over 1992-1997. This occurred because the CWB was willing to pay a premium for high quality wheat to give it flexibility when it consummates export sales. Western Canadian wheat farmers respond to the realities of the CWB-dominated wheat market and, with only the lower-valued feed market as an alternative marketing option, continue to produce

and sell wheat to the CWB of a quality and in a quantity that is responsive to the CWB rather than to market demand.

4.346 This excess of high quality wheat means that for certain transactions, the CWB provides a price discount for high quality wheat to meet the price competition for lower quality wheat in a given market. This behaviour results in a protein or quality giveaway, because the CWB provides wheat at a greater protein level or at a higher grade or quality level than the commercial terms of the contract require. At the same time, in a second market, the CWB charges a premium price for its high quality wheat. When combined with the CWB's other incentives and privileges, the ability to price discriminate in this fashion over the long run is behaviour that runs contrary to commercial considerations, does not afford commercial enterprises from other Members an adequate opportunity to compete according to customary business practices, and results in a violation of the non-discriminatory treatment principles of the GATT 1994.

4.347 Canada keeps its pricing data secret, making specific examples difficult to come by. However, the CWB itself states that "[t]he CWB monopoly captures premiums because it allows price differentiation[.]" The CWB observes that in the 1994-95 crop year, the CWB set a price for No. 2 Canada Western Red Spring (13.5% protein) wheat – a wheat of a higher quality than No. 3 Canada Western Red Spring wheat – at prices *below* the price for No. 3 Canada Western Red Spring. Again, such pricing flexibility, the result of the CWB's structure and incentives and its exclusive privileges, could not be exercised by a commercial enterprise acting according to customary business practice.

4.348 One of several elements of the CWB export regime that allows the CWB to engage in price discrimination is its ability to benefit from borrowing at below-market rates. Government-guaranteed borrowing at below-market rates enables the CWB to derive extra interest income from its credit sales by extending credit at rates that are higher than the government-guaranteed rate extended to the CWB. The spread in the two rates results in additional revenue for the CWB. In the words of the CWB, "With the CWB's borrowing power, it is able to borrow money at a lower rate of interest than the rate extended to the credit customer. As a result, the CWB benefits from the 'spread' in interest rates in the form of excess interest revenues over interest expenses."

4.349 These "net interest earnings" go directly into the pool accounts, even though these earnings are a benefit of the preferential borrowing rates extended to the CWB, not revenues from wheat and barley sales. This extra income is significant and "virtually covers the total annual administrative costs of operating the CWB." The CWB's exercise of its government-guaranteed borrowing privileges, combined with the incentives of the CWB export regime more generally, give the CWB pricing flexibility that a commercial actor would not possess, thus enabling the CWB to act in a discriminatory manner by not providing other enterprises a adequate opportunity to compete in the sales of the CWB.

4.350 Canada tries to argue that the CWB should only be held to the standard of affording an adequate opportunity to compete only to enterprises with similar exclusive and special privileges like those enjoyed by the CWB. This defies logic and is unsupported by the text of Article XVII. The obligation under Article XVII is not to protect the non-commercial behaviour of an STE with special and exclusive privileges in one country from the non-commercial behaviour of an STE with special and exclusive privileges in another. The obligation under Article XVII, stated in Article XVII:1(b), focuses on the protection of commercial actors, and affording those commercial actors an adequate opportunity to compete in the marketplace.

4.351 As stated in our response to the Panel's questions, Article XVII:1(b) requires that the CWB act commercially, not merely as a rational economic actor. Unless the CWB acts in accordance with commercial considerations, it cannot give the enterprises of other Members an adequate opportunity to compete. Canada's argument that mere "rational" behaviour is required under Article XVII:1(b)

directly contradicts the plain language of the provision, which requires the CWB to act both according to commercial considerations *and* afford enterprises from other Members an adequate opportunity to compete, according to customary business practice.

**2. Canada provides less favourable treatment to imported like grain, in violation of GATT Article III:4**

(a) United States' grain and Canadian grain are like products.

4.352 Each category of grain is a like product for purposes of the Panel's analysis under GATT Article III:4 (*i.e.*, wheat, whether domestic or foreign, or soybeans, whether domestic or foreign). As explained in detail in our responses to the Panel's questions, origin cannot serve as a basis for distinguishing like products. The Canada grain segregation and rail transportation measures at issue here differentiate among grains based not on physical characteristics or end-uses, but based on factors not relevant to the definition of likeness, such as whether or not the grain is "foreign." Given the nature of Canada's grain segregation and transportation measures, the United States has met its burden of establishing that like products are at issue.

4.353 Even if Canada contends that the like product analysis should focus on specific varieties of grain – an argument that is not supported by the measures at issue and that the United States does not concede – the fact remains that United States' growers in the northern United States plant wheat varieties that are identical to wheat varieties planted in Canada. Canada, in its answers to the Panel's questions, notes that "[t]here are many different classes of wheat produced in Canada that have different inherent characteristics and are grown for different uses, such as hard red spring wheat (for bread) as opposed to soft white winter wheat (for cookies)." United States' wheat farmers also grow hard red spring wheat, and it is this same product that is subject to less favourable treatment under the Canadian grain segregation and transportation measures.

(b) Canada's Regulations are measures affecting the internal sale, offering for sale, purchase, transportation, distribution or use of like products.

4.354 Although Canada suggests otherwise in its first submission, there is no question that the measures at issue here affect the distribution and transportation of like products. As explained in our responses to the Panel's questions, 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 directly affect the transportation of grain.

4.355 There is therefore no question that Article III applies to the measures at issue in this case. Canada's references to Article V of the GATT 1994 and to in transit shipments are irrelevant. The measures at issue in this case are measures affecting the internal transportation and distribution of grain. Any imported grain or domestic grain entering Canada's bulk grain handling system is subject to Canada's internal grain regulation when that grain arrives at an elevator in Canada, regardless of the final destination of the product.

4.356 As explained in our responses to the Panel's questions, some United States' grain is truly "in transit" through Canada and is not subject to Canada's internal regulatory process. United States' grain shipped from the United States' State of Montana by rail on sealed rail cars that travel through Canada and do not stop until they reach their final destination in the United States' State of Washington are not subject to Canada's internal measures because that grain never enters the Canadian grain handling system. Any Canadian regulations in connection with such traffic in transit are not at issue in this case.

(c) Canada's grain segregation measures accord imported grain less favourable treatment than domestic grain.

4.357 As discussed in our first submission, "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."[41] Canada thus has an obligation under Article III:4 "to provide *equality of competitive conditions* for imported products in relation to domestic products."[42]

4.358 To argue that Section 57 of the Canada Grain Act treats imported grain as favourably as like domestic grain is disingenuous. On its face, Canada's grain segregation measures discriminate against imported grain. Section 57 of the Canada Grain Act states that foreign grain may not enter grain elevators in Canada, unless special authorization is granted. The default is a prohibition on foreign grain. Canadian grain does not require any special authorization to enter grain elevators. Similarly, Canada's measures related to mixing treat imported grain less favourably than like domestic grain by permitting mixing only "if neither of the grains is . . . foreign grain." These regulatory prohibitions have a real, negative impact on the ability of imported United States' grain to move through the Canadian bulk grain distribution and transport system, thereby affording protection to Canadian grain. The default prohibition impedes commercial opportunities for United States' grain by making it more costly and burdensome for United States' grain to move through the bulk grain handling system.

4.359 Canada argues that even though these measures prohibit the entry of imported grain into grain elevators in Canada, the CGC is authorized to grant exceptions to these general prohibitions and, thus, treatment is not necessarily "less favourable" for imported grain. Canada provides isolated examples of these CGC authorizations in an attempt to demonstrate that the CGC does provide approvals for the entry of foreign grain into Canadian elevators. However, these authorizations do not remedy what is otherwise an Article III:4 violation. The fact that imported grain needs to obtain these authorizations, while domestic grain does not, means that the imported grain is treated less favourably.

4.360 Even when a CGC authorization is obtained under the exception to Section 57 prohibiting entry of imported grain into grain elevators, imported grain is subject to additional regulatory requirements that are not placed on like domestic grain. And under the Wheat Access Facilitation Programme, storage bins containing United States' wheat must be sealed by a CGC employee (not simply the elevator manager, who is permitted to take such action for Canadian grain).

4.361 Despite Canada's statements to the contrary, these additional regulatory requirements result in real costs to grain elevators and discourage grain elevators from handling United States' grain. This limits the access that United States' grain has to the Canadian market.

4.362 In the same way that restrictions on access to points of sale can be violations of Article III:4, restriction on access to key entry points in the distribution network can deny imported grain competitive opportunities afforded to like domestic grain. For example, the Wheat Access Facilitation Programme is a series of cumbersome regulatory requirements that imported wheat must satisfy – but Canadian wheat need not satisfy – in order to enter Canadian grain elevators. These cumbersome and costly additional requirements provide Canadian grain with more favourable treatment and results in United States' grain being forced to compete on unequal footing.

4.363 As the CGC's Memorandum to the Trade explains, "[p]rimary elevator facilities are required to notify the CGC . . . of the upcoming arrival of United States' wheat at least 24 hours in advance to

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[41] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5, para. 135.

[42] *Id.* (italics in original).

ensure that a CGC employee/designate is on site when the wheat is unloaded." This CGC employee must "take a sample for information purposes," "monitor the flow of United States' wheat into the bin(s)," and "seal the bin(s)." The primary elevator must pay for these CGC services, thereby making the costs of receiving United States' wheat higher than the cost of receiving like Canadian wheat. There are also indirect costs such as the time and equipment it takes to comply with the foreign grain requirements, and the additional regulatory uncertainty resulting from the need to contact the CGC in advance and rely upon its inspectors. For Canadian grain, however, the elevator manager does any necessary weighing and sampling without the need for advance notice.

4.364 Again, when United States' wheat is discharged, the primary elevator must pay for a CGC employee to return to the elevator. The CGC's office must be notified 24 hours in advance of the discharge. The CGC employee then must go through the procedure of unsealing the bin(s), sampling, and monitoring the outward flow of the grain. As Canada itself concedes, "[a]dditional requirements apply to United States' wheat shipped to a processing facility or a terminal elevator."

4.365 Finally, despite the fact that the Wheat Access Facilitation Programme provides that "[d]uring the initial stages of [the Programme], the CGC costs of monitoring United States' wheat will be covered by Agriculture and Agri-Food Canada (AAFC) and the Canadian Department of Foreign Affairs and International Trade (DFAIT)," this alone does not remedy the inequalities of the system, which to this day discourage Canadian elevator operators from accepting United States' wheat that is like Canadian wheat. The system puts into effect precisely the type of discrimination that Article III:4 forbids.

(d) Canada's transportation system affords less favourable treatment to imported grain.

*(i) Producer Cars.*

4.366 Canada has argued that producer cars are theoretically available to all producers, regardless of whether those producers produce Canadian or foreign grain. But as discussed in our responses to the Panel's questions, only Canadian producers can take advantage of producer rail cars under Section 87 of the Canada Grain Act, because all producer car loading stations are in Alberta, British Columbia, Manitoba, or Saskatchewan.

4.367 Furthermore, Agriculture and Agri-Food Canada itself states that only "Canadian grain producers with an adequate quantity of lawfully deliverable grain may apply to the Commission," and the only eligible provinces are "Alberta, British Columbia, Manitoba and Saskatchewan."

4.368 Access to these producer cars is a competitive opportunity insomuch as they provide domestic grain producers with increased transportation flexibility and lower costs. Thus, denying imported grain access to these cars results in less favourable treatment for imports.

*(ii) Rail Revenue Cap.*

4.369 The rail revenue cap also violates Article III:4 by treating imported grain less favourably than like domestic grain. The revenue cap, which is only available for shipments of domestic grain, reduces transportation costs and thus provides a tangible benefit to domestic grain. As 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 on Canadian shipments than on like foreign shipments. This denies imported grain the same competitive conditions as accorded like domestic grain.

4.370 The United States' Commerce Department analysis mentioned by Canada is not relevant to the legal question before the Panel. The Panel must examine whether the revenue cap results affords

domestic grain more favourable treatment than like foreign grain in violation of Article III:4, and to do so does not require that actual trade effects be shown. The Commerce Department analysis focused on the fact that the rail revenue cap has not been reached in the 2001-01 and 2001-02 crop years. The Commerce Department did not address the discriminatory aspect of the revenue cap, that is, that railroads have an incentive to charge higher rail rates for foreign grain than domestic grain on the routes governed by the rail revenue cap.

### 3. Canada has failed to make the requisite showing under Article XX(d) with respect to its grain segregation measures

4.371 Recognizing that its arguments under Article III:4 will fail, Canada attempts to justify its grain segregation measures under Article XX(d) of the GATT 1994. This Article XX(d) defence must also fail because Canada has continuously failed to carry its burden of proof with respect to such an affirmative defence.[43]

4.372 As stated by the Appellate Body in *United States - Gasoline* and affirmed by the Appellate Body in *Korea - Various Measures on Beef*, in examining Canada's grain segregation measures under Article XX, a two-tiered analysis is appropriate.

> First, the measure must be one designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be 'necessary' to secure such compliance. A Member who invokes Article XX(d) as a justification has the burden of demonstrating that these two requirements are met.[44]

(a) Canada has not demonstrated that its grain segregation measures at issue are necessary to secure compliance with any provision of Canadian Law.

4.373 In a single paragraph in its first submission, Canada asserts that its grain segregation requirements are necessary in order to secure compliance with the grading provisions of the Canada Grain Act and to ensure that there is no misrepresentation of grain in the system consistent with the Competition Act. This mere assertion does not satisfy Canada's burden under Article XX(d).

4.374 Canada has also failed to show how the grain segregation measures are necessary to secure compliance with either the grading requirements of the Canada Grain Act or the Competition Act. Indeed, grain can be and is identified in the marketplace based not on whether the grain is of foreign or domestic origin, but based on the intrinsic characteristics of the grain itself, such as grade and protein.

(b) Canada's grain segregation measures constitute unjustifiable discrimination.

4.375 Not only are Canada's grain segregation measures unnecessary to secure compliance with the Canada Grain Act, they also constitute unjustifiable discrimination within the chapeau of Article XX of the GATT 1994. Concerns about misrepresentation and grading apply to all grain, and therefore all grain – not just imported grain – should be subject to additional regulation and special CGC oversight. To limit these regulatory requirements to foreign grain only thus results in arbitrary and unjustifiable discrimination.

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[43] Furthermore, it is important to note that Canada fails to explicitly invoke this affirmative defence with respect to its discriminatory rail transportation measures.

[44] Appellate Body Report, *Korea – Various Measures on Beef*, para. 157.

### 4. Canada's grain segregation and rail transportation measures are inconsistent with Article 2 of The *TRIMs Agreement*

4.376 As stated in our response to the Panel's questions, Canada's prohibition on the receipt of foreign grain in elevators and prohibition on the mixing of foreign grain are "mandatory" and "enforceable" requirements within the meaning of the *TRIMs Agreement* Illustrative List. Moreover, they provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain because the need for special authorization to accept and/or mix foreign grain and the onerous conditions that are often placed on such authorizations creates a regulatory regime that financially rewards those elevators that accept domestic grain over foreign grain.

4.377 Similarly, the rail revenue cap and producer car programmes are "mandatory" and "enforceable" within the meaning of the *TRIMs Agreement* Illustrative List. These measures provide cost advantages in the form of lower rail transport rates to those shippers that choose to ship Canadian grain rather than foreign grain.

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

## L. SECOND WRITTEN SUBMISSION OF CANADA

4.379 In its second written submission, Canada made the following arguments:

### 1. Part One: Article XVII

#### (a) The United States mischaracterizes the law

4.380 The law does not vary according to the structure of the state trading enterprise in question. The United States' assertion that Article XVII contains different obligations in different contexts is not legally tenable. A central element of the WTO dispute settlement system is that it provides "security and predictability" to the multilateral trading system. The dispute settlement system cannot be predictable if *obligations* under the WTO Agreements are interpreted on a case-by-case basis.

4.381 Article XVII may not be interpreted to require *Canada* to establish "processes and procedures" to oversee the operations of the *CWB*, while not requiring another Member to take such measures with respect to its state trading enterprises. Either Article XVII entails an "obligation of means" or it entails an "obligation of results". The way that the law is applied may vary depending on the facts of the case, but obligations under the law are constant.

4.382 The law should be interpreted in accordance with the principles of treaty interpretation in customary international law. The Panel must decide whether, as a matter of law, Article XVII requires that Members must establish "processes and procedures" or "statutory or other mechanisms" to "ensure" that their state trading enterprises comply with Article XVII. Or, whether Article XVII requires that a Member is responsible for the conduct of a state trading enterprise that it establishes, and that Article XVII does not prescribe *how* a Member must discharge that obligation. Once the nature of the obligation has been clarified, the Panel may examine the facts of this case and determine whether the law, as interpreted, is applicable to the circumstances at issue.

4.383 Article XVII contains an obligation of results, not an obligation of means. On its face, Article XVII requires a specific outcome: that enterprises act in a particular manner. It does not prescribe a particular means or mechanism by which a Member is to achieve that outcome. The word "ensure", referred to repeatedly by the United States, is not used in Article XVII, Note *Ad* Article XVII or the *Understanding on the Interpretation of Article XVII of GATT 1994*, with the

exception of a reference to ensuring transparency of the activities of state trading enterprises. Members did not use "ensure" to describe the obligation under Article XVII:1; this militates strongly against reading in that word in Article XVII. The operative verb in Article XVII that describes the obligation of Members is "undertakes". The United States defines this word in its First Written Submission, and the word "ensure" is not found in the definition. WTO Members have given an undertaking, promise or pledge to be responsible if their state trading enterprises contravene the requirements of Article XVII.

4.384 The United States has erred in its analysis of the law in three additional ways.

4.385 First, Article XVII places disciplines only on impermissible discrimination. The object of Article XVII is to prevent Members from doing indirectly through state trading enterprises that which they have contracted not to do directly with respect to impermissible discrimination.

4.386 Article XVII:1(a) sets out the principal substantive obligation under Article XVII:1. At a minimum, the term "general principles of non-discriminatory treatment" refers to the most-favoured-nation principle set out in Article I of GATT 1994. Article I provides that an advantage, favour or privilege granted in respect of products destined to a WTO Member must be immediately and unconditionally accorded to the products destined to other Members. In respect of export sales by a state trading enterprise, Article I would prohibit the selling of products at a *higher* price or under more stringent terms and conditions in one market than when selling in another. Under Article XVII, the most-favoured-nation principle would require the state trading enterprise to extend the more favourable of the terms and conditions to all other Members where it sells its products.

4.387 Article XVII:1(b) does not create an obligation independent of Article XVII:1(a). Rather, it interprets and tempers the obligation under Article XVII:1(a). The interpretation was needed because markets and market conditions vary from one country to another. Accordingly, to remain in business internationally, all enterprises – whether "state trading" or "private" – make distinctions as to pricing and terms of sale that may be tied to the destination or the origin of a product, but that are nevertheless based on commercial considerations. This category of "discriminatory" conduct, which may be otherwise incompatible with Article XVII:1(a), is protected by Article XVII:1(b). A non-exhaustive list of commercial considerations is contained in Article XVII:1(b). Depending on the nature of the enterprise or product, other considerations may also be relevant.

4.388 Accordingly, Article XVII:1(b) is not an independent obligation. It interprets Article XVII:1(a) to the effect that a state trading enterprise may discriminate in its purchases or sales as long as it does so based on "commercial considerations." Only where a state trading enterprise discriminates between markets based on *non-commercial considerations* would it then violate Article XVII.

4.389 If Article XVII:1(a) and (b) were interpreted as independent obligations, a violation of Article XVII:1(a) would be found on the demonstration of "discrimination", even if such discrimination were based on commercial considerations. State trading enterprises would not be able to make distinctions between sellers or purchasers based on the commercial considerations that private enterprises make, such as "price, quality, availability, marketability, transportation and other conditions of purchase or sale." In this way, they would be seriously disadvantaged *vis-à-vis* private traders. Nothing in Article XVII indicates that state trading enterprises should be more constrained in their commercial conduct than private traders.

4.390 Article XVII does not limit the nature or scope of privileges that may be granted by Members to state trading enterprises. Article XVII only disciplines a particular use of their special and exclusive privileges: it prohibits state trading enterprises that benefit from "special and exclusive privileges" from discriminatory conduct that is not based on commercial considerations. Accordingly,

Article XVII:1 may not be used to discipline measures or actions by Members with respect to state trading enterprises that are appropriately remedied by other applicable disciplines in GATT 1994 or other WTO Agreements.

4.391 Second, for an export state trading enterprise, the second clause of Article XVII:1(b) refers to purchasers. The reference in the second clause of Article XVII:1(b) is to enterprises of other Members that are interested in purchasing the products offered for sale by a state trading enterprise; in the case of the CWB this would be wheat and barley. This interpretation is confirmed by the use of the word "participation". In the context of exports, enterprises that compete for business in export markets do not "participate" in each other's sales. Rather, they compete *against* one another to get those sales. In each transaction, it is the seller and the purchaser who "participate" in that transaction; competitors do not "participate", unless they, too, were already involved in the transaction. The reasoning behind this interpretation is simple: the whole object of a commercial enterprise engaged in sales is to get the business of purchasers, to the exclusion of its competitors. Accordingly, the object of a transaction is to benefit the "participants" in the transaction, to the exclusion of other potential sellers and purchasers – the competitors. And so, the *competitors* of an exporter in export markets do not *participate* in the sales of that exporter by virtue of the competition alone.

4.392 Commercial actors do not *allow* their competitors to participate in their sales. The objective of a commercial actor is to win sales at the expense of its competitors, not to assist them. This is customary business practice. Article XVII:1 does not obligate the CWB to allow multinational wheat traders such as Cargill or ADM (enterprises that are many times larger than the CWB) to "participate" in its sales. Rather, the CWB is obligated to afford wheat purchasers of all Members "adequate opportunity, in accordance with customary business practice, to compete for participation in [the CWB's]… sales."

4.393 Third, Article XVII does not require non-discrimination between sales in the domestic market and sales in export markets. It is not clear on what basis "withhold[ing] goods from export markets" can be equated with the obligation to not discriminate between sales in the domestic and export market. The proposition is inconsistent with the provisions of GATT 1994. To begin with, Note *Ad* Article XI does not refer to Article I or Article III, and is not concerned with discrimination by a state trading enterprise between sales in the domestic market and sales in the export market. Furthermore, Note *Ad* Article XVII, which does refer to the general principles of non-discriminatory treatment, expressly permits a state enterprise to charge different prices in different markets, provided that such different prices are charged for commercial reasons. In any event, there is no evidence or analysis on the record to demonstrate that the term "general principles of non-discriminatory treatment" includes a national treatment obligation. Canada has demonstrated that the negotiating history, the jurisprudence and the writings of prominent experts support the proposition that the term refers only to a modified most-favoured-nation obligation. And, even if Article XVII:1(a) could be found to include national treatment, it could only be in respect of *import* monopolies.

4.394 Finally, the "legal structure" and "incentives" of the CWB are fully consistent with Article XVII. The United States has not established that the CWB *does not* act in accordance with Article XVII:1, nor has it been demonstrated that the CWB *cannot* act in accordance with Article XVII.

4.395 Canada would be in violation of its obligation under Article XVII if the United States were to demonstrate that the CWB does not *act* in accordance with the general principles of non-discriminatory treatment *and* that such discrimination was not based on the commercial considerations. There is no evidence to demonstrate that the CWB does not *act* in a manner consistent with the general principles of non-discriminatory treatment. Furthermore, the United States has expressed its intention not to adduce any such evidence.

4.396 These are allegations as to conduct, but these consist merely of conclusory statements unsupported by evidence of *actual* conduct. These do not show that the CWB *in fact* acts or does not act in one way or another. Because this case has now been cast in the structure of an "as such" challenge, it must be demonstrated not that the CWB does or does not act in a particular way, but that the CWB *cannot* act in a way that would be consistent with Article XVII: in brief, that its structure and statutory mandate *require* the CWB to not respect the provisions of Article XVII.

4.397 Furthermore, it has not been demonstrated that the CWB *cannot act* in accordance with Article XVII. Canada argues that not only is the mandate of the CWB consistent with Article XVII, but also that the exclusive and special privileges granted to it do not result in a violation of Article XVII.

4.398 With respect to the CWB's mandate, the CWB was established by an Act of Parliament, the *CWB Act*, which sets out its corporate structure and its object and powers. Under the *CWB Act*, the CWB is incorporated with "…the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada." Further, Section 7(1) of the *CWB Act* provides that 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 sale of grain produced in Canada in world markets." This mandate does not preclude the CWB from acting in accordance with commercial considerations.

4.399 Nothing in the *CWB Act* mandates the CWB to act in a way inconsistent with the requirements of Article XVII. In addition, there has been no analysis or evidence to demonstrate that the CWB's mandate could not be fulfilled in a manner that is consistent with Article XVII. The United States expressly acknowledges the discretionary nature of the CWB's mandate in its First Written Submission when it notes that the CWB *could* act in violation of Article XVII "*if it so chooses*", not that the CWB *must* act in violation of Article XVII. Similarly, in its responses to the Panel's Questions, the United States acknowledges that the CWB's mandate does not necessarily require it to act in violation of Article XVII.

4.400 The exclusive and special privileges granted to the CWB also do not result in a violation of Article XVII. Under Article XVII, Members have the right to establish state trading enterprises and to grant to these enterprises "exclusive or special privileges". The nature and scope of such privileges is neither prescribed nor proscribed in Article XVII. Commensurate with the right of Members to grant privileges is the right of state trading enterprises to receive such privileges and, as a corollary, the right to use the privileges granted to them.

4.401 While it was originally asserted that Canada must be presumed to be in violation of Article XVII:1 because the CWB could, "*if it so chooses*", utilize its privileges in a manner inconsistent with Article XVII:1, it is now asserted that the privileges granted to the CWB *necessarily* result in a violation of Article XVII:1.

4.402 An interpretation that would require state trading enterprises that enjoy exclusive and special privileges to act exactly like private enterprises that do not enjoy the same privileges makes the granting of exclusive or special privileges meaningless as the state trading enterprise would not be able to use the privileges without violating Article XVII. This would transform the granting of privileges into an irrebuttable presumption that state trading enterprises, by their very nature, cannot act in accordance with Article XVII. If Article XVII does not place limits on the nature or scope of privileges that may be granted, the *use* of these privileges *per se* cannot result in a violation of Article XVII.

4.403 Similarly, assertions that a state trading enterprise, in using its exclusive or special privileges, must act in the same manner as do private enterprises that do not enjoy the same privileges, that is,

that are not in *similar circumstances*, is a re-statement of the *per se* theory. The use, and therefore the grant, of special and exclusive privileges does not result in a violation of Article XVII.

(b) The United States mischaracterizes the facts

4.404 There are four fundamental ways in which the United States mischaracterizes the facts.

4.405 First, the CWB does not have a "guaranteed" supply of wheat. Wheat supply is subject to the vagaries of the agricultural market. These include such things as farmers' planting decisions, other production decisions and climatic conditions. Taken together, these factors determine the quantity and quality of production. The quantity and quality of wheat produced at different times in a single crop year and from one year to the next can vary significantly. The CWB, therefore, does not have a "guaranteed" supply of wheat that allows it to "forward contract wheat for future delivery at a fixed price". Like any commercial actor, the CWB's ability to forward contract is limited by factors beyond its control.

4.406 Second, the exclusive and special privileges granted to the CWB are not unique. Other WTO Members provide similar privileges to their own enterprises. For example, the United States offers similar credit guarantees to its multinational grain traders, such as Cargill and ADM. The USDA administers export credit guarantee programmes for commercial financing of United States' agricultural exports. The use of credit sales guarantees by the CWB is not only not unique, but does not result in non-commercial behaviour. Rather, it is fully consistent with actions of private grain traders, including United States' multinationals. Where a state trading enterprise acts no differently from commercial enterprises *in similar circumstances*, the state trading enterprise cannot be found to have acted not in accordance with commercial considerations.

4.407 Third, the CWB does not impermissibly "target" markets. "Targeting" has not been adequately defined, nor has any support been provided that "targeting" constitutes impermissible discrimination under Article XVII. There is also no evidence to demonstrate that the CWB actually targets markets. Therefore, this allegation should be rejected as not having met the threshold of *prima facie* evidence.

4.408 Furthermore, the United States misinterprets the law. It alludes to "targeting" as driving competitors out through *lower* prices. However, as established in Canada's First Oral Statement, the "non-discrimination" obligation in Article XVII refers to the most-favoured-nation principle. Under Article I, "targeting" amounts to "discrimination", not where the targeted market enjoys *lower* prices, but where lower prices in certain markets are not offered in *targeted* premium markets.

4.409 Finally, even if it were established that the CWB "targets" markets, such behaviour cannot violate the obligation under Article XVII because the identification of particular markets as being especially worthy of marketing focus is commonplace commercial behaviour.

4.410 Fourth, the Government of Canada has the authority to direct the action of the CWB if circumstances warrant. The United States' assertion that "while [Canada] could supervise the CWB under Article 18, it chooses not to do so" is incorrect. The CWB acts fully in accordance with Article XVII, so it has not been necessary for the Government of Canada to direct the actions of the CWB. If circumstances warrant, that is, if it were to come to the attention of the Government of Canada that the CWB was acting in a manner inconsistent with Canada's obligations under Article XVII, then Canada would take appropriate action.

## 2. Part Two: Article III:4

(a) The United States has erred in its analysis of the scope and substance of Article III:4

4.411 Article III:4 does not apply to United States-origin grain in the United States. With respect to the allegation that Canada is in violation of its Article III:4 obligations because producer cars are available *only in Canada*, Canada points out that the national treatment obligation of Article III:4 only applies to "[t]he products of the territory of any contracting party *imported* into the territory of any other contracting party" in respect of laws and regulations of the Government of Canada affecting their "*internal* sale, offering for sale, purchase, transportation, distribution or use". There is no support for the argument that the national treatment obligation applies extra-territorially to products not yet imported.

4.412 Article III:4 also does not apply to goods in transit. The United States asks the Panel to extend the coverage of Article III:4 to any and all goods that enter into Canada from the United States, whether or not those goods are properly *imported* into Canada or are being offered *in Canada* for sale. This is inconsistent with the provisions of Article V of GATT 1994. Twenty one per cent of United States-origin grain that enters Canada, usually by boat and sometimes by rail, goes into transfer or terminal elevators for loading to vessels and re-export to third countries. This grain is not *imported* into Canada. As a basic matter, therefore, this grain is not covered by Article III:4, which governs measures applied to *imported* goods. Rather, for the purposes of customs documentation and for all other purposes, this grain is transported through Canada *in transit*. In these circumstances, both with respect to the CGA and the revenue cap, this grain is subject to Article V and not Article III:4 of GATT 1994.

(b) The United States mischaracterizes the facts

4.413 First, the United States does not properly represent the movement of United States-origin grain into Canada or movements of grain through the elevator system. The United States' claim that United States-origin grain is shut out of the Canadian market and cut-off from the normal distribution channels has no factual basis. Exhibit US-17 does not present a correct picture of movements of United States-origin grain into Canada as it only takes into account five of the twenty-one categories of grain covered by the CGA. As a consequence, the United States significantly understates the quantity of United States-origin grain actually imported into Canada.

4.414 In addition, the United States' assertion that United States-origin grain is cut off from the "normal" distribution channels because elevator operators have to request authorization to receive United States' grain is based on the incorrect premise that grain destined for the domestic Canadian market usually moves through the elevator system or that there is an inherent advantage in doing so. The majority of Canadian grain destined for domestic consumption does not move through the elevator system: *less than a third* of the grain produced and consumed in Canada in 2001-02 and 2002-03 moved through the elevator system. Accordingly, the "normal" distribution channel for Canadian grain is direct sale to end-users. There are no Section 57 entry authorization requirements or mixing restrictions in respect of United States-origin grain that is sold directly to end-users. And while United States-origin grain can enter the Canadian bulk grain handling system much in the same way as Canadian-origin grain, the economics and logistics of the grain-handling system usually discourage such movements. Exactly for the reasons put forward by the United States, in the case of United States-origin grain, because of proximity, it will usually make more sense for the United States' farmer to deliver grain not to a Canadian elevator but to a nearby United States' elevator or grain dealer; the grain will then be shipped by rail directly to processors or other end-users in Canada.

4.415 Second, not all Canadian grain of a certain type is like United States-origin grain of the same type. Not only is it insufficient to define "like products" by category, but the grades and varieties of the grain must be taken into account in certain circumstances because of their different end-uses and end-use characteristics. In any event, the like product issue is irrelevant here as it has not been shown that any difference in treatment between such imported and Canadian grain amounts to less favourable treatment within the meaning of Article III:4.

4.416 Third, there are no onerous regulatory requirements related to the entry authorization under Section 57 of the CGA. The United States refers to the entry authorization request as a requirement for a "license" that is "conditionally granted." The Canadian Grain Commission does not issue licenses regarding the entry or handling of foreign grain. There is no requirement for an importer to obtain a license, or for imported grain to have a license. The authorization request simply requires a letter or email to the CGC advising them of the elevator's intention to receive foreign grain, and describing the type of grain, quality of the grain, origin and destination, and volume of the grain, as well as the anticipated date of receipt. The authorization is issued almost immediately and can cover several shipments or an entire crop year. The authorization process is routine, quick, responsive to the needs of elevators and does not result in additional costs. Elevator operators are aware of this process and make use of it regularly and routinely, free of costs and administrative hassles.

4.417 Section 57 of the CGA allows for entry of foreign grain into Canadian elevators and does not mandate any additional requirements. While conditions regarding the *handling* of the grain in the bulk system *may* be included in the order, these do not require elevators to "satisfy additional onerous regulatory requirements." These conditions are either in the nature of a notification requirement or relate to keeping grain separate for identification purposes and do not themselves result in additional costs, except where certain precautions are necessary for phytosanitary reasons.

4.418 Fourth, Section 56 of the *Regulations* does not impose onerous regulatory requirements on United States-origin grain. The mixing restrictions in Section 56 apply to both Canadian and United States-origin grain, and can be lifted upon request. The process to obtain an authorization to mix different Canadian grains is the same process as the process to obtain an authorization to mix Canadian and foreign grain. Much like the Section 57 entry authorization process, the process to obtain authorization to mix Canadian and foreign grain is simple and cost free.

### 3. A proper application of the law to the facts leads to the conclusion that there is no Article III:4 violation

4.419 First, Section 57 of the CGA and Section 56 of the *Regulations* do not result in less favourable treatment. The facts do not support the conclusion that United States-origin grain is receiving less favourable treatment. United States-origin grain can, and does, enter the Canadian bulk grain handling system. Different treatment of United States-origin grain is necessary because United States-origin grain is not subject to the same quality assurance system as Canadian grain. This different treatment does not amount to less favourable treatment.

4.420 The CGC has discretion to authorize mixing of Canadian grain and foreign grain and does so, just as it has the discretion to authorize the mixing of different classes or qualities of Canadian grain. The fact that elevators have to make a request to mix Canadian grain and foreign grain so that it is not misrepresented as "Canadian grain" does not amount to less favourable treatment of foreign grain.

4.421 Second, in any event, Section 57 of the CGA and Section 56 of the *Regulations* are justified under Article XX(d). Article XX(d) is meant to "secure compliance with laws or regulations which are not inconsistent with the provisions of [this] Agreement, including those relating to… the enforcement of monopolies." It therefore covers measures related to the enforcement of obligations

under laws or regulations consistent with GATT 1994. It also permits measures necessary to the enforcement of monopolies.

4.422 Reviewing the relevant elements of Article XX(d), the first point pertains to the "necessary" character of the measure. A panel is not required to examine the necessity of the policy goal of the measure at issue; only the necessity of the measure to implementing the policy. The term "necessary" has been interpreted as referring to a range of degrees of necessity. The second point is that the chapeau to Article XX sets out three requirements that the measure must meet. It must not be applied in such a manner as to constitute: (1) a means of arbitrary discrimination between countries where the same conditions prevail; (2) a means of unjustifiable discrimination between countries where the same conditions prevail; or, (3) a disguised restriction on international trade. Discrimination in the context of Article XX(d) is not the same as discrimination under Article III:4. A finding that a measure is inconsistent with Article III:4 does not necessarily mean that it amounts to arbitrary and/or unjustifiable discrimination within the meaning of the Chapeau to Article XX.

4.423 Previous panels have interpreted the application of a measure to other Members (not just limited to the complaining party), to secure compliance with the not otherwise inconsistent law or regulation, as indicative of the measure not being applied in a manner which would constitute a means or arbitrary or unjustifiable discrimination against countries where the same conditions prevail. In this case, it is necessary to track and keep foreign/United States' grain segregated from domestic grain, unless otherwise authorized, in order "to secure compliance with laws or regulations which are not consistent with the provisions of this Agreement, including those relating to…the enforcement of monopolies". Section 57 of the CGA and Section 56 of the *Regulations* are not applied in a manner which constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

4.424 With respect to justification of the entry authorization requirement and mixing restrictions of the CGA, Section 57 of the CGA and Section 56 of the *Regulations* are necessary to: (1) secure compliance with grading requirements in the CGA; (2) secure compliance with the *CWB Act* and with the enforcement of the CWB monopoly; and (3) secure compliance with the *Competition Act* by ensuring that grain is not misrepresented in Canada and in third countries as Canadian grain. These Acts (or the relevant provisions of the Act in the case of the CGA) are consistent with GATT 1994.

4.425 The Panel does not have to consider the choice made by Canada to protect consumers of its grain against misrepresentation, to ensure the quality of Canadian grain, and to enforce the CWB monopoly, nor the level of protection Canada wishes to achieve. The Panel need only determine if Section 57 of the CGA and Section 56 of the *Regulations* fall within the range of policies designed to achieve these goals.

4.426 Canada's choice of these measures is consistent with the Appellate Body's approach in *Korea - Various Measures on Beef*. The Appellate Body held that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." A more trade restrictive measure was available to Canada. Pursuant to Article XI:2 of GATT 1994, Canada could have prohibited imports of United States-origin grain destined for the elevator system to maintain the quality of Canadian grain, the Canadian grading system and quality assurances. Canada chose a less trade restrictive measure: it allows entry into elevators and, where necessary, it attaches conditions necessary to maintain Canada's grading system and quality assurances and to avoid misrepresentation.

4.427 With respect to the necessity of the grading provisions of the CGA, the quality of grain grown in Canada is assured through the varietal development and registration system, which encourages the development of cultivars with quality factors demanded by the end-user as well as good agronomic

performance. The ability to deliver grain of consistent quality is maintained through the Canadian grain grading system, which segregates grain into classes of similar end-use characteristics.

4.428 Canada uses a numerical grading system that separates grain into divisions of quality defined by grading factors. A grade name or number identifies each division and grain is bought and sold on the basis of these grades. Buyers obtain the specific quality desired by selecting the grain by grade name and number. The Canadian grading system has been designed to reflect end-use quality through the simple measurement of grading factors. The system design is such that it can be applied at all points along the grain handling system by those who have been trained in its application.

4.429 There are a number of differences between the Canadian and United States' grain quality control systems. Of particular importance is the CGC's grain quality assurance programme. This programme results in consistent and reliable shipments of grain that meet contract specifications for quality, safety and quantity. In addition, Canadian grain, from the very beginning, is subject to strict rules and guidelines before it is grown and delivered into the grain handling system. Conversely, United States-origin grain is not subject to the same level of quality assurance. Thus, the uncontrolled mixing of grain from these two very different systems would result in an inability on the part of the CGC to grade the grain, to attest to the specific end-use characteristics of the grain, or to attest to the origin of the grain. Segregation requirements for all foreign grain that is not subject to the Canadian quality assurance system are necessary to maintain the integrity of the Canadian grading system and to comply with Section 32 of the CGA.

4.430 In addition, because it is necessary to keep grain of different origin separate from one another until they are delivered to the end-user or, if mixed, to identify it so it is not misrepresented as to its origin, Section 57 of the CGA and Section 56 of the *Regulations* are necessary to secure compliance with Canada's unfair competition and consumer protection laws. If Canada were not able to determine and guarantee the origin of the grain in its grain handling system, it would not be able to provide assurances as to its quality and end-use characteristics.

4.431 Canadian grain is graded by its visual characteristics. Grades are carefully established to describe the processing qualities of the grain. When the CGC certifies the grade of Canadian grain (and thus its intrinsic qualities and end-use characteristics), it is able to do so because it knows that it is Canadian grain. CGC certificates are recognized internationally and accepted as Canada's assurance that what our customers receive what they are expecting to receive. When buyers purchase grain from other countries, they may wish to see the actual grain they are buying before they close the deal. Purchasers of Canadian grain are satisfied that Canadian grain will perform consistently and have the end-use characteristics attached to the product's grade/quality.

4.432 No other measure is reasonably available that would ensure strict compliance with the prohibition against misrepresentation of products.

4.433 Finally, Section 57 of the CGA and Section 56 of the *Regulations* are necessary to secure compliance with the provisions establishing the CWB as a single desk exporting state trading enterprise, as contained in the *CWB Act*, because the relevant CWB privileges apply to the sale of Canadian wheat for export or for domestic human consumption. If foreign wheat were not distinguished from Canadian wheat, the single-desk authority of the CWB could not be enforced and the CWB could not attest that it is properly using the privileges it has been granted.

4.434 Section 57 of the CGA and Section 56 of the *Regulations* do not frustrate or defeat the trade facilitation purpose of GATT 1994 and the WTO Agreements. Rather, by not applying a more restrictive measure, such as denying imports access to the bulk handling system, Canada is facilitating the potential flow of United States-origin wheat into Canada, with only that level of regulation required to maintain its own quality and grading system. Section 57 of the CGA and Section 56 of the

*Regulations* are applied in the same manner to all foreign grain and not just United States-origin grain, and so, even in the event that it is found to be discriminatory, it should not be found to be arbitrary or unjustifiable in its application.

4.435 Section 57 of the CGA and Section 56 of the *Regulations* do not limit, or restrict in any way, the import of United States' grain. In fact, they allow for importation while ensuring that the Canadian grading system, competition laws, and the CWB's monopoly are not jeopardized.

4.436 Third, Section 87 of the CGA does not distinguish between Canadian and United States-origin grain. The United States argues that "[d]espite Canada's statement to the contrary, foreign producers cannot take advantage of the producer rail car programme…". The United States' "as such" challenge seems to be based on the fact that the relevant regulations do not state that foreign grain is eligible for the producer rail car programme. The idea that a law should specify that it also applies to foreign products or otherwise be found to be inconsistent with GATT Article III:4 has no basis in the WTO Agreements. Given that the provision is neutral as to origin, it is, on its face, consistent with Article III:4. To succeed in a challenge, it must be demonstrated, as a matter of fact, that the words of Section 87 of the CGA mean something other than what they expressly state, and that as a result there is a violation of Article III:4.

4.437 In addition, Article III:4 applies to measures that affect the *internal sale* of products *imported* into Canada. There cannot be a breach of Article III:4 because producer cars are not made available by Canada to United States-origin grain *in the United States* or because producer car loading sites are only located in Canada. Nothing prevents a United States' farmer from trucking his grain across the border to a Canadian producer car loading facility and requesting a producer car.

4.438 Fourth, the revenue cap does not provide less favourable treatment to United States-origin grain. The only movements that are relevant for an Article III:4 analysis are movements, in Canada, of United States' grain destined for the Canadian domestic market. In this case, these would be movements through Thunder Bay or Armstrong, originating in Western Canada, to domestic customers further east. Railways would charge market prices both for Canadian and United States' grain on these movements. In addition, railways know the volume of traffic they will get. Moreover, the railways are in contact with major shippers, including the CWB, before and during each crop year and are sophisticated at predicting volumes of movement in order to plan for and optimize the use of railway resources. In addition, the revenue cap applies to all grains referred to in Schedule II of the CGA, not only CWB grain.

4.439 Finally, the United States claims that shipments of Western Canadian grain that are subject to the rail revenue cap pay lower transportation costs than those shipments would pay without the revenue cap, but provides no support for this assertion. In fact, the analysis in the context of the United States' CVD investigation demonstrates the contrary. Because the railways have been significantly under their revenue cap since its inception – and it is expected this will be the case in the future – and that in any event railways practice differential pricing, the revenue cap does not amount to less favourable treatment of United States-origin grain going through Thunder Bay and Armstrong and destined for the Canadian market.

## 4. Part Three: The *TRIMs Agreement*

4.440 As the panel in *Indonesia - Autos* stated in its analysis of the *TRIMs Agreement*, the existence of an investment measure is a prerequisite for the application for the agreement. The United States has still not identified an investment measure; neither the CGA and its *Regulations* nor the CGA are investment measures. As a result, the *TRIMs Agreement* does not apply.

4.441 With respect to the allegations that there is a requirement to "use" Canadian grain imposed on Canadian elevators and shippers by virtue of the CGA and *Regulations* and the CGA, the measures at issue contain no such local content requirements. The United States' equation of "use" with handling, storage and transport of grain is inconsistent with basic principles of treaty interpretation. The elevator operators who handle, store and transport grain do not "use" grain; they provide services to farmers in relation to grain or they purchase it for re-sale. Shippers, whether the CWB or the grain companies, do not "use" grain when they ship it by rail. They are using the railways to provide them with transport services. In addition, neither in the CGA nor the *Regulations* is there a "requirement" to "use" domestic products, nor is there an advantage to elevators that is conditioned on the use of domestic products. Elevator operators are interested in receiving as much grain as possible, Canadian or foreign, so that they can earn their handling fee, plus any other charges they might levy for other services that may be requested.

## M. SECOND ORAL STATEMENT OF THE UNITED STATES

4.442 In its second oral statement, the United States made the following arguments:

### 1. Canada has breached its obligations under GATT Article XVII

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

4.444 As Canada itself points out, the word "undertakes" – which appears in Article XVII – means "to commit oneself to perform" or to "guarantee." Canada therefore guarantees that the CWB will act consistently with these principles of Article XVII. The CWB is <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.

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

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

4.447 An example of this non-commercial behaviour is the protein or quality giveaway. The CWB pays premiums to farmers for high quality wheat, even when these premiums are not justified by demand for high quality wheat in third-country markets. These premium payments result in high quality wheat production that exceeds demand by 32 per cent. 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.

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

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

4.450 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.

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

**2. Canada's measures violate GATT Article III:4**

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

4.453 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, United States' corn and Canadian corn are like products, as are United States' durum wheat and Canadian durum wheat. Nevertheless, even if one were to look at specific varieties rather than classes of grain in order to establish like products in this dispute, in fact, United States' 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 – United States' Kyle durum wheat - when exported to Canada, is subject to less favorable treatment than Canadian Kyle durum wheat merely because the United States' wheat is foreign.

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

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

4.456 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 United States' grain and makes it more burdensome for United States' grain to enter into and move through Canada's bulk grain handling system.

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

4.458 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 United States' wheat to Canada. The barriers to United States' 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 United States' 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 United States' wheat.

4.459 Let us assume that a United States' farmer has grown a Canadian variety of wheat, so that the United States' 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.

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

4.461 These are not insignificant burdens, and these burdens are not imposed on Canadian wheat. When United States' wheat is received, the grain elevator must pay for special CGC inspection and monitoring services, thereby making the cost of receiving United States' 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 United States' wheat, and the additional regulatory uncertainty resulting from the need to contact the CGC in advance and rely upon the CGC's inspectors. These additional requirements and costs for United States' wheat shipments apply even if a Canadian variety of wheat is shipped from the United States to the Canadian grain elevator. The

additional costs and regulatory requirements for United States' wheat make United States' wheat a less attractive option for elevator operators.

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

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

### 3. Canada's Article XX(d) defence fails

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

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

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

4.467 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.

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

### 4. Canada's measures violate Article II of the *TRIMs Agreement*

4.469 Finally, Canada's grain segregation requirements and discriminatory rail transportation measures violate Article 2 of the *TRIMs Agreement*. These measures fall squarely within the Illustrative List 1(a) of the *TRIMs Agreement* as mandatory and enforceable measures that provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain. Similarly, the rail revenue cap and producer car programmes 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.

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

## N. SECOND ORAL STATEMENT OF CANADA

4.471 The following summarizes Canada's arguments in its second oral statement:

### 1. Introduction

4.472 The United States has still not identified what "*actions of the CWB*" are inconsistent with the requirements set out in Article XVII:1. There has been no evidence of actual discrimination, and no evidence of actual conduct not based on commercial considerations: indeed, no evidence of conduct of any sort; just assertion. Neither has the United States provided an interpretation of the provisions at issue that is consistent with the principles enunciated by the Appellate Body in *Reformulated Gasoline* and in practically every report since. The United States has simply not established its case, and its claims should be dismissed.

4.473 Although the United States has not supported any of its principal allegations and assertions concerning the "actions" of the CWB, it does have one *new* factual allegation in respect of protein over-delivery that purports to be supported by new evidence. In direct contravention of the *Working Procedures of the Panel*, the United States makes a specific allegation and adduces new evidence. There is also one new legal allegation, with respect to the phrase "adequate opportunity to compete." This allegation is based on a misleading presentation of the law. The Panel should dismiss both the new factual assertion and the new legal allegation.

4.474 The United States' case under Article III is just as problematic. It has adduced no evidence and no analysis supporting its assertions that the Canadian entry authorization provisions are "onerous". Its only response to Canada's evidence is that its represents "isolated examples". Mere denial is not sufficient in rebutting the only evidence on the record as to how the Canadian entry authorization provisions work. The evidence demonstrates that there is no "treatment less favourable" as a result of the entry authorization requirement and this evidence has not be controverted.

### 2. Article XVII

(a) The United States' interpretation of the law is wrong

4.475 The United States' case has at least four egregious legal errors.

4.476 First, the United States persists in asserting an obligation of means in Article XVII without justifying the assertion through legal analysis. The latest is "countervailing government supervision", which has no basis in treaty language. The very notion of "countervailing government supervision" is contradictory to Article XVII. To "countervail" means to "counterbalance" or to "neutralize the effect of" an action or an event. This "countervailing supervision" proposed by the United States would neutralize the effect of an action or an event related to the operations of the CWB. There is no evidence of a discriminatory and non-commercial activity; the only events or actions mentioned by the United States are the exclusive and special privileges that Canada grants to the CWB. This, then, is the United States' submission: to act in conformity with its Article XVII obligations, Canada must *neutralize* the effects of exclusive and special privileges it has the right to grant to the CWB under Article XVII. This is an absurd and unreasonable interpretation of Article XVII.

4.477 Further, the United States interprets Article XVII:1(a) and (b) as creating two independent obligations. Such an interpretation would place state trading enterprises at a commercial disadvantage as compared to private traders. A violation of Article XVII would be found on the demonstration of discrimination alone, even if such discrimination was based on commercial considerations. State trading enterprises would, therefore, not be permitted to make distinctions between sellers or purchasers based on commercial considerations that private traders make.

4.478 Second, Article XVII:1(a) does not prohibit "discrimination between domestic and third country markets." Contrary to the United States' contention, Article XI is not appropriate context for the interpretation of Article XVII as it is not concerned with discrimination. If, however, the Panel considers Article XI to be appropriate, Article XI would have an effect opposite to the one proposed by the United States. Article XI prohibits restrictions on exports, and not measures that may increase exports. Accordingly, from this perspective, Article XI would be relevant only where a state trading enterprise will only sell to export markets at a higher price than in the domestic market, and thus potentially acts in a way that would limit exports. This goes against United States' assertions.

4.479 Third, Article XVII:1(b) requires state trading enterprises to act like private enterprises in *similar circumstances*. The obligation is for the state trading enterprise to base its behaviour in the market – including its use of those privileges – on the same considerations as private traders in similar circumstances. Naturally, the proper benchmark of behaviour, in this context, would be private traders that have the same or similar privileges.

4.480 Fourth, Article XVII:1(b) requires export state trading enterprises to afford adequate opportunity to *purchasers* to compete for participation in purchases and sales. The CWB does not have to allow its competitors to participate in its sales, but rather it must allow wheat purchasers of all Members "adequate opportunity, in accordance with customary business practice, to compete for participation in [its] sales." Customary business practice does not require an enterprise to allow its competitors to participate in its sales. Rather, it is for enterprises to win sales at the expense of their competitors, not to assist them. The United States purports to read competition disciplines into Article XVII that do not exist in that article or in the WTO Agreement in general, and have come up with a new object for Article XVII: the protection of private traders against anticompetitive conduct.

(b) The United States mischaracterizes the facts

4.481 The United States also mischaracterizes the facts in at least four ways.

4.482 First, the United States undermines its own argument that, because of its mandate, the CWB must, "necessarily", act in violation of Article XVII. Nothing in the CWB's mandate requires it to act in violation of Article XVII. The United States even doubts its own arguments. For example, it alleges that the CWB could "if it so chooses" act in violation of Article XVII - not that the CWB *must* act in violation of Article XVII, but rather that it *could*. Similarly, it has asserted that the CWB has the "ability to engage in conduct proscribed by Article XVII:1". In addition, it has alleged that the CWB's privileges and incentives "enable[] the CWB to act in a discriminatory manner". Each of these allegations imparts an element of voluntariness on the conduct of the CWB. The United States *acknowledges* that the CWB has discretion and does not have to "necessarily so act".

4.483 Second, the United States fails to adduce any evidence to demonstrate that the CWB actually does what the United States accuses it of doing. The United States alleges that the CWB "uses its pricing flexibility and its reduced risk exposure to make sales on non-commercial terms […] to target particular export markets." The United States has not adduced any evidence to demonstrate: (1) that the CWB actually has "price flexibility" and "reduced risk exposure"; (2) that if it does, that the CWB uses such "price flexibility" and "reduced risk exposure" to make sales on "non-commercial terms"; (3) what the "non-commercial terms" actually are (which would, of course, require the United States

to establish what "commercial terms" are); and (4) that the CWB actually discriminates between particular markets by offering "non-commercial terms" to some "targeted" markets, but not to others. Without demonstrating all of these factors, the United States cannot make out this allegation.

4.484 The United States also alleges that the CWB's special and exclusive privileges give it less exposure to market risk than a commercial actor. And that "[s]uch a risk structure, by artificially lowering CWB costs, clearly gives the CWB greater pricing flexibility than a commercial actor…" The United States has not adduced any evidence to demonstrate that: (1) the CWB's privileges actually give it less exposure to market risk than a commercial actor (which would require establishing what the market risk of a commercial actor would be); (2) the risk structure artificially lowers the CWB costs; (3) these lower costs give the CWB greater pricing flexibility; and (4) the CWB actually uses this greater pricing flexibility to discriminate between markets in a way that a commercial actor would not (which would require the United States to demonstrate what the pricing flexibility of a commercial actor actually is and how such flexibility is normally used). The United States must establish all of these factors to make out this allegation.

4.485 The United States also makes allegations about the conduct of private traders, without adducing any evidence in support of such allegations. The United States must establish not only a certain conduct or pattern of conduct by the state trading enterprise in question, but also that that conduct is not in accordance with a benchmark – the conduct of private traders. The United States must establish a benchmark as against which the conduct of the CWB must be gauged. It has not done so.

4.486 Third, the United States' allegations with respect to protein over-delivery are wrong. The presentation of this factual allegation and the evidence allegedly presented in support at this stage of the proceedings contravenes the *Working Procedures* of the Panel and should, therefore, be declared inadmissible. In any event, the allegations, even if true and relevant, are misguided. The point is not only the *actions* of the CWB. Rather, it must be established that such actions are discriminatory and are not based on commercial considerations. That is, they should be compared as against a commercial benchmark. In respect of protein over-delivery, the United States does not provide such a comparator, and the reason is because protein over-delivery is routine commercial practice in the wheat industry; it is done to avoid contract penalties for protein under-delivery. The United States International Trade Commission, in a December 2001 Report, found that "over-delivery of protein occurs in exports of both United States' and Canadian wheat." Wheat exporters, both United States' private traders and the CWB, all of them commercial actors, over-deliver protein to avoid contract penalties for under-delivery. Therefore, even if United States' allegations as to protein over-delivery were correct, the CWB would not be acting non-commercially were it to over-deliver protein.

4.487 Finally, the United States undermines its own argument that the CWB has greater pricing flexibility than other wheat traders. United States' arguments that the CWB's alleged "price flexibility" gives it greater power in the market mischaracterize the facts and are contradictory. The United States asserts that the CWB can sell wheat at prices lower than a commercial grain trader could because it makes allegedly *low* initial payments to farmers in exchange for their wheat. However, in its Second Written Submission the United States claims that "the CWB charges a premium price for its high quality wheat." That is, the CWB actually charges *high* prices for its wheat. These are contradictory. And they are further undermined by the study on "Domestic Costs of Statutory Marketing Authorities", a United States' exhibit, which notes that "[t]here is a high degree of substitutability among wheats [sic] from various exporters and this means the CWB is essentially a *price taker* in the wheat market."

(c) Conclusion for Article XVII

4.488 In paragraph 16 of its oral statement, the United States mischaracterizes Canada's submission. In respect of the first element of Article XVII:1(b), Canada has argued that the proper benchmark for the operations of the CWB is a *private trader* in similar circumstances. That is the only way to determine if the CWB is acting in accordance with commercial considerations. In respect of the second element, Canada has observed that the CWB is not required to allow its *competitors* to participate in its sales.

**3. GATT Article III:4**

(a) Entry and blending authorizations

4.489 In the context of the *Canada Grain Act* and *Regulations*, the question before the Panel with respect to Article III:4 is this: does a formal distinction between imported and domestic goods give rise to an irrebuttable presumption of violation? Does formally different treatment between domestic and imported goods automatically result in a breach of Article III:4? The United States has not put forward any evidence of less favourable treatment of foreign goods, but has simply relied on the existence of different formal treatment. The express language of Article III:4 as well as the findings of panels and the Appellate Body support the position that the requirement under Article III:4 is that imported products be granted "treatment no less favourable", and not "identical treatment". The mere existence of a formal distinction is therefore not enough to demonstrate a violation: what the United States must establish is that United States' products have been denied equal conditions of competition because of their origin.

4.490 Canada asks the Panel to view the measures in question and the treatment of imported grain in the light of the uncontroverted evidence on the record. First, Section 57 of the CGA requires that elevator operators request an authorization before accepting foreign grain that is not subject to the same quality assurance system as Canadian grain. What are the costs of this requirement? Both the request and the authorization are cost-free. How burdensome is the process? An email, fax or letter to the Canadian Grain Commission listing the amount, the type and the origin of the grain suffices. An authorization is then issued within a few days of the request. The evidence on the record establishes the informal and flexible nature of the process. Has the authorization process resulted in refusals? No requests have been refused since the entry into force of the WTO Agreement. There have been issues of concern such as the presence of unapproved genetically-modified maize in United States' maize shipments, but even these were dealt with by imposing certain conditions with respect to the handling of the grain and not by refusing its entry. How routine then is the procedure? Elevator operators often contract for grain before making their request for authorization and that elevator operators can request authorization for multiple shipments over the course of a crop year. The evidence on the record, put before you by Canada, establishes this point as well. It is the only evidence on the record with respect to the entry authorization process and it does not disclose treatment less favourable of imported grain. This has not been controverted by United States' evidence.

4.491 The same is true for Section 56 of the *Regulations*, which requires an elevator operator to obtain an authorization in order to mix any Canadian Western grain of different grades, Eastern grain with Western grain or any foreign grain with Canadian grain in transfer elevators. The United States says that United States-origin grain suffers from an additional burden because it has to be kept in separate bins in elevators. Keeping grain in separate bins is not specific to United States-origin grain as there are often as many as thirty different segregations of Canadian grain in elevators. And if elevator operators want to mix grain, the same informal, cost-free authorization process applies. The authorization process does not therefore amount to treatment less favourable of foreign grain. Provided that the mixed grain is not identified as Canadian grain, mixing will be authorized. Why is

it important to properly identify the grain? Quite apart from avoiding misrepresentation, because United States-origin grain is not subject to the same grading and quality assurance systems, the end-use characteristics of mixed Canada-United States' grain could not be guaranteed. Canada fails to see how requiring that United States-origin grain be sold as United States-origin grain, or as mixed grain when it is mixed, amounts to treatment less favourable of such grain. The United States has repeatedly mischaracterized the measures at issue and it has made allegations of "onerous regulatory burdens" without adducing any evidence or providing a single concrete example in support.

4.492 Neither of these measures subjects United States-origin grain to additional regulatory requirements. The fact that mixed Canada-United States' grain should not be represented as Canadian grain is not an onerous regulatory requirement. It simply stems from the general regulation against deceptive practices and false representation of products. The examples of entry and mixing authorizations are not isolated examples but rather representative of the Canadian practice. This practice is evidenced by the significant amount of United States' grain that enters Canadian elevators. In the absence of any evidence to the contrary, this must be accepted. The fact that the treatment of Canadian grain and foreign grain is not exactly the same is not conclusive of a violation of Article III:4. Different treatment is required because foreign grain, unlike Canadian grain, is not subject to the Canadian quality assurance system. The authorization requirement is not of consequence in practice given that the authorizations are routinely granted. The different treatment, therefore, does not amount to less favourable treatment.

4.493 Second, the United States criticizes the WAFP. This programme was created at the request of the United States' government and negotiated with United States' officials to resolve alleged concerns about access of United States' wheat into Canada. The United States did not identify the WAFP as a measure that it was challenging and has said again today that Section 57 of the CGA and Section 56 of the *Regulations* are the only measures before the Panel in respect of grain handling..

4.494 Third, even if the Panel were to find that the measures at issue amount to a violation of Article III:4, These measures are justified under GATT Article XX(d). Foreign grain that is not subject to the same quality assurance system must not enter elevators in an uncontrolled manner and possibly be misrepresented as being Canadian grain. There may be a same variety grown in Canada and in the United States, but this misses the point: there are United States' varieties of wheat that are indistinguishable from Canadian varieties but have different end-use characteristics. The Canadian variety registration system ensures this is not the case in Canada. Misrepresentation could affect the whole basis of the Canadian marketing system, as the Canadian system is not based only on differentiation on the basis of protein content of wheat, but also on the end-use characteristics of the wheat. The measures are necessary to ensure compliance with Canadian competition law, grading provisions of the CGA and the *CWB Act*.

(b) Producer cars

4.495 The United States' challenge with respect to producer cars has relied on unsubstantiated allegations that are false and on novel interpretations of Article III:4 that would extend the national treatment obligation extra-territorially to products not yet imported into Canada. With respect to the internet page submitted in evidence by the United States (Exhibit US-23), this contains minimal information on the producer car programme and refers the reader to the responsible authority, the CGC. It is Section 87 of the CGA that is the subject of the United States' challenge; a web page does not have an independent legal status. Section 87 does not make any distinctions between domestic and imported products.

(c) Revenue cap

4.496 The United States' challenge with respect to the revenue cap also fails to establish any more favourable treatment of Canadian grain. This is supported by a finding of the United States Department of Commerce. Rail rates are driven by market factors whether the revenue cap applies or not. In any event, the railways have never even come close to reaching their respective revenue cap. The gap between actual revenues and the cap has been increasing and this trend is expected to continue over time. The impact or eventual impact of the cap on rates has simply not been established.

**4. TRIMs**

4.497 Finally, the allegations of violation of the *TRIMs Agreement* fail not only for lack of evidence, but in three fundamental respects: (1) the measures at issue are not investment measures; (2) there is no local content requirement or requirement to "use" domestic products over foreign products; and (3) there is no advantage being granted for any use of domestic product.

O. THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

4.498 In its third party written submission, Australia made the following arguments:

4.499 In its submission Australia addresses only those issues that are relevant to the content and scope of Article XVII of the GATT 1994 concerning STEs[45], in particular:

- the permissibility of STEs, including those exercising monopoly rights, under GATT 1994; defining the standards of STE behaviour envisaged by Article XVII:1 of GATT 1994;
- the need for the interpretation and application of these standards on a case by case basis;
- the need for consistency between standards applied to STEs and those applied to governmental measures affecting imports or exports of private traders.

4.500 Australia notes, as accepted by both Parties and recognised by previous Panels, that the creation of STEs (both state enterprises and enterprises granted exclusive or special privileges by Members) including those exercising monopoly rights, is entirely consistent with GATT 1994. With regard to STEs, the issue before the Panel in this dispute is therefore when the activities of a particular STE may become inconsistent with the general principles of non-discriminatory treatment prescribed by GATT 1994, such that the WTO Member creating that STE is in breach of its obligations under Article XVII.

4.501 Also uncontested is that the purpose of Article XVII is to ensure that WTO Members do not through an STE circumvent their obligations with respect to non-discriminatory treatment. Australia submits that this objective - that STE creation does not confer any advantage on a Member - must necessarily be balanced by recognition that a Member choosing to create an STE to undertake certain activities should not be placed in a worse position than a Member whose private traders carry out the same activities, just as STEs themselves should not be placed in a worse trading position than such private traders.

[45] Such enterprises are understood to mean, pursuant to Article XVII:1(a) both State enterprises established or maintained by a Member, wherever located, or any enterprise to which that Member has granted, formally or in effect, exclusive or special privileges and a reference in this submission to STEs encompasses both forms of enterprise.

4.502 In this context, Australia submits that the standard to be applied to the acts of STEs must complement, and be consistent with, standards applied under GATT disciplines reviewing governmental measures affecting imports and exports of private traders. A different standard is neither required by, nor consistent with, the text or the objective of Article XVII.

4.503 Australia also submits that Article XVII obligations should not be considered to provide an avenue for contesting governmental measures that are otherwise permitted by, or not inconsistent with, particular disciplines of GATT 1994. Article XVII should also not be used to attempt to address situations more appropriately remedied by particular applicable GATT 1994 or other WTO disciplines.

4.504 Finally, Australia also notes that this is the first dispute in which the application of Article XVII to an exporting STE, and in particular one exercising export monopoly rights, is at issue. Previous Panels addressing Article XVII and STEs have addressed importing STEs and the non-discriminatory principles applicable to purchases and sales involving imports, and their opinions must be considered in that context.

**1. Article XVII of GATT 1994**

(a) STEs are not inconsistent with GATT 1994

4.505 As acknowledged by both Parties to this dispute, the creation of STEs to undertake purchases or sales involving imports or exports, is entirely consistent with GATT 1994.

4.506 Moreover, it is also clear from the text of GATT 1994 and the conclusions of prior Panels dealing with (import) monopolies that the creation of STEs exercising monopoly rights and their behaviour as monopolies *per se*, is also not inconsistent with Members' obligations under GATT 1994 in general or Article XVII of GATT 1994 in particular.

4.507 As the 1989 Panel Report in Republic of *Korea – Restrictions on Imports of Beef – Complaint by the United States*[46] concluded:

> "the rules of the General Agreement did not concern the organization or management of import monopolies but only their operations and effect on trade,...*the existence of a producer-controlled monopoly could not in itself be in violation of the General Agreement*."[47]

4.508 That such STEs are not in themselves inconsistent with the GATT 1994 has been and should continue to be a fundamental consideration for any Panel in interpretation and application of Article XVII. For example, in considering which "principles of non-discriminatory treatment" are appropriate, the Panel should ensure that the application and/or interpretation of such principles does not negate or undermine the permitted right of Members to create exporting STEs, including those exercising export monopoly rights.

(b) The nature and scope of Article XVII:1(a)

4.509 Article XVII:1(a) of GATT 1994 essentially serves to ensure that WTO Members do not, through an STE, circumvent their GATT obligations with respect to non-discriminatory treatment. In practice, it essentially requires of Members, as regards their STEs, the same general standard

[46] Panel Report, *Republic of Korea – Restrictions on Imports of Beef – Complaint by the United States* ("*Korea – Beef (US)*"), adopted 7 November 1989, BISD 36S/268.

[47] Ibid , para 115 emphasis added

regarding consistency with the general principles of non-discriminatory treatment of GATT 1994 as such Members have undertaken regarding their measures affecting private import and export trade.

4.510 This is clear from the text of Article XVII:1(a) itself (emphasis added):

> "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.*"

4.511 However it is equally clear that the obligation set out in Article XVII:1(a) is relevant to only a particular set of activities by STEs – that is '*purchases or sales* involving either imports or exports'. Article XVII:1(a) does not extend this undertaking of consistency to all trade-related activities or to the general behaviour of importing or exporting STEs.

4.512 Australia also notes that Article XVII:1(a) contains only a general obligation in the form of an undertaking that STEs shall act consistently with the principles of non-discriminatory treatment of GATT 1994. It does not contain additional obligations which specify, proscribe or direct how a Member must give effect to its undertaking. Any Member is free to choose the approach it takes to fulfil this obligation. It may choose direct oversight or supervision of its STE or create legislative, regulatory reporting and monitoring structures, or it may not. It is under no obligation under Article XVII to choose any particular course of action[48]. Similarly, there is no inference that any means of implementation is better than another, or that its presence or absence is more or less indicative of GATT consistency, just as there is no inference that any particular type of exclusive or special privilege granted to an STE is inconsistent with GATT 1994 *per se.*

(c) Defining the standards applicable to STE behaviour

4.513 The fundamental primacy of the non-discriminatory treatment principles of the GATT 1994 in defining the standard against which STE behaviour (in purchases or sales involving imports or exports) is to be measured is clearly evident from the text of Article XVII:1(a). This has been confirmed in the approach that previous Panels have taken to the relationship of Article XVII with the rest of GATT 1994. The panels in, *Canada – Administration of the Foreign Investment Review Act*[49], *Canada, Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*[50] and *Korea – Various Measures on Beef* all essentially found, as the *Korea – Various Measures on Beef* panel put it:

> "(a) conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII'."[51]

4.514 Subparagraph XVII:1(b) states that:

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[48] Even Article XVII:4 which prescribes STE notification procedures and requirements on Members only identifies the information to be provided, and does not determine how a Member should go about gathering information domestically to fulfil this obligation.

[49] Panel Report, *Canada – Administration of the Foreign Investment Review Act* ("*Canada – FIRA*"), adopted 7 February 1984, BISD 30S/140.

[50] Panel Report, *Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies* ("*Canada – Provincial Liquor Boards (EEC)*"), adopted 22 March 1988, BISD 35S/37.

[51] *Korea – Various Measures on Beef*, para 757

> "The provisions of subparagraph (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 other [Members] adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.'

4.515 From the text of Article XVII:1, it is clear that the role of subparagraph 1(b) is to provide better identification, interpretation and application of the obligation and standard set out in subparagraph 1(a). This is unambiguously articulated in the wording of the first phrase of subparagraph 1(b) itself – *"(t)he provisions of sub-paragraph (a) of this paragraph shall be understood to require… having due regard to the other provisions of the GATT…*".

4.516 The Panels in the *Canada - FIRA*[52] case and the *Korea - Various Measures on Beef* case both concluded (as stated by the *Korea - Various Measures on Beef* Panel), that "(t)he GATT jurisprudence has also made clear that the scope of paragraph XVII:1(b), which refers to commercial considerations, *defines* the obligations set out in paragraph 1(a)"[53].

4.517 In this regard, the *Korea - Various Measures on Beef* Panel's additional statement that:

> "similarly, a conclusion that a decision to purchase or buy was not based upon commercial considerations would also suffice to *show* a violation of Article XVII."[54]

is not suggesting that Article XVII:1(b) creates an entirely separate obligation on Members concerning the standard of behaviour of their STEs. It would be inconsistent with the rest of that Panel's analysis and conclusions on this matter for it to be suggested that the *Korea - Various Measures on Beef* Panel is asserting that the elements of subparagraph (b) are to be considered and interpreted in isolation from subparagraph 1(a). Rather, in that dispute, the reasoning of the Panel suggested that a decision to purchase or buy not based on commercial consideration shows - or demonstrates - that a violation of Article XVII:1(a) has occurred.

4.518 Australia therefore submits it is clear that "the general principles of non-discriminatory treatment prescribed in the GATT" of subparagraph 1(a) is the standard against which the behaviour of STEs is to be assessed. The definitional elements and illustrative variables of subparagraph 1(b) assist in this process.

4.519 The primary objective of Article XVII:1(c) is to require a certain standard of behaviour of the Member government – that is, of not preventing its enterprises (STE and private alike) from acting consistently with the general principles of non-discriminatory treatment of GATT 1994. This obligation runs parallel to, and complements, a Member's other undertakings under Article XVII and under GATT 1994 itself.

4.520 As with the obligation enunciated in XVII:1(a), similarly XVII:1(c) is silent as to how and to what degree a Member is to act so as to 'not prevent' consistency. This remains the choice of the Member concerned. Similarly, Australia submits that this obligation to refrain cannot be read to imply a more direct obligation on a Member to actively ensure any form of behaviour by its enterprises.

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[52] Panel Report, *Canada – FIRA* , para 5.16.
[53] Panel Report, *Korea – Various Measures on Beef* ,para 755
[54] Panel Report, *Korea – Various Measures on Beef* , para 757, emphasis added.

4.521 Subparagraph 1(c) also envisages that subparagraphs (a) and (b) are to be read together in enunciating the obligation contained in subparagraph 1(c). Following this reasoning, when examining the scope of subparagraph 1(c), the Panel in *Canada FIRA* concluded that "subparagraph 1(b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations"[55] .

(d) The need for a case by case approach to the interpretation and application of the standard

4.522 Any application of the elements of Article XVII must necessarily be undertaken on a case-by-case basis. What is an appropriate application to the particular enterprise in question of the general principles of non-discriminatory treatment prescribed in GATT 1994, including which principles are of relevance to the particular acts complained of in the instant case, must be considered.

4.523 It should also be noted that, when elements of subparagraph (b) are applied, the language of the subparagraph itself requires a case by case approach. For example, in considering the meaning of 'solely in accordance with commercial considerations' it is clear that the additional variables listed ('*including* price, quality, availability, marketability, transportation and other conditions of purchase or sale') are not intended to be exclusive or exhaustive.

4.524 Additionally, what is a relevant commercial consideration and what would be indicative evidence that an STE is or is not acting solely in accordance with such considerations will vary from enterprise to enterprise and from industry sector to industry sector. Relevant factual considerations may include the particular privileges granted to the STE and the regulatory environment under which it operates.

4.525 Also relevant is what is usual or customary commercial business practice in the market, including that of private traders, and the nature and conditions of the international market. For example, market segregation for the purposes of marketing and pricing is a common private sector business practice, considered to be in accordance with commercial considerations. Like private traders, export STEs can and do differentiate between markets as a result of supply and demand conditions. That this is considered permissible behaviour for an STE is expressly recognised in the interpretive Ad Note to this Article.[56] Similarly pooling arrangements are a normal commercial risk management and marketing tool used in agricultural production and trade by agricultural and other co-operatives and also are used in other industry sectors, such as insurance.

4.526 Article XVII must not be interpreted in such a way as to be held to require a different standard for regulation of STE behaviour by Members as distinct from their regulation of private traders involved in the same activities. This would in effect undermine the legitimacy of the existence of such enterprises under GATT 1994. Any standard/s applied to purchases and sales involving either imports or exports by STEs must complement and be consistent with those applied to governmental measures affecting private traders.

## 2. Conclusions

4.527 State Trading Enterprises, including those exercising monopoly rights for purchases or sales involving imports or exports, are permissible under, and are not inconsistent with, GATT 1994.

4.528 The obligation undertaken by a Member under Article XVII:1(a) concerning the conduct of its STEs is a general obligation to achieve a result, and does not encompass any specific obligations concerning how that result is to be achieved. The obligation under Article XVII:1(a) also only

[55] Panel Report, *Canada – FIRA*, paras. 5 and 16.
[56] Interpretive Note Ad Article XVII paragraph 1.

extends to the behaviour of its STEs in making purchases or sales involving imports and exports and not to other behaviour of that STE.

4.529 In regard to assessing whether a member has met its obligation under Article XVII:1, the behaviour or action of the STE at issue will need to be considered against the standard provided for in Article XVII:1(a), as assisted by the additional definitions provided in subparagraph 1(b). The unambiguous wording of Article XVII:1(a), and the weight of opinion in previous Panels indicates that the applicable standard is that of consistency of the behaviour or action with the general principles of non-discriminatory treatment prescribed in GATT 1994. What the applicable general principles are will depend on the facts of each case and the behaviour complained of regarding a STE's purchases or sales, and possibly also whether the purchase or sale involves imports or exports.

4.530 Similarly, in reviewing the further elements of interpretation in subparagraph 1(b) including 'commercial considerations', such requirements must be considered on a case by case basis, having regard to the particular factual situation of each dispute.

4.531 Article XVII must not be interpreted in such a way as to require a different level of obligation to be applied to Members with regard to their non-discriminatory treatment undertakings concerning their STEs as compared to their measures affecting imports or exports by private traders. Similarly, it must not be interpreted so as to prohibit activities that are permitted, or not prohibited, elsewhere in the WTO Agreement.

## P. THIRD PARTY ORAL STATEMENT OF AUSTRALIA

4.532 Australia, in its oral statement, made the following arguments:

4.533 It appears we all agree that the intent of Article XVII is to ensure that Members cannot circumvent their GATT 1994 obligations regarding non-discrimination through the creation of State Trading Enterprises to undertake certain trading activities.

4.534 Article XVII does this by having Members undertake that their STEs will act, in their purchases and sales for import or export, in a manner consistent with the same general principles of non-discriminatory treatment to which those Members are otherwise bound under the Agreement as regards their governmental measures affecting imports and exports.

4.535 If the same principles are applied, and if STEs are clearly recognised as not in themselves inconsistent with GATT 1994, it follows that the interpretation or application of Article XVII should not place Members who choose to create and use State Trading Enterprises in a different, and certainly not a worse, position, than Members who do not utilise STEs. This fundamental approach must guide the Panel.

4.536 In this regard, Australia believes that it is crucial to fulfilling the intention of Article XVII that the elements of subparagraph 1(b) are considered and interpreted within the context of, and therefore consistently with, how the general principles of non-discriminatory treatment noted in subparagraph 1(a) are interpreted and applied in GATT 1994. Any de-linking of subparagraph 1(b) elements, for example the 'commercial considerations' requirement, from this context risks the development under Article XVII of a different standard of non-discriminatory behaviour for STEs from that applied in the rest of the Agreement to governmental measures affecting import and export trade. This could lead in turn to the undermining of the legitimate right of Members to create and grant privileges to their STEs.

4.537 Also fundamental is that Article XVII covers only the purchases and sales involving imports or exports of STEs. The nature of that STE, including its particular structure and privileges, and its non-purchasing and non-selling activities should not be at issue.

4.538 Consideration of Article XVII and its relationship to the rest of the Agreement also suggests to Australia that care must be taken to distinguish between situations in which a Member may be found not to have met one of its GATT 1994 obligations (Article XVII) because its STE has not acted in the way that Member has undertaken it will, and situations in which a Member's own governmental measures are more directly at issue. Article XVII should not be used to pursue issues regarding the GATT consistency of a Members' measures which are more appropriately dealt with elsewhere under the agreement.

4.539 Finally, Australia wishes to underline the need for taking a case-by-case approach, having regard to the particular factual situation of each enterprise and each dispute, when considering whether an STE has acted, pursuant to Article XVII, in a manner consistent with the relevant general principles of non-discriminatory treatment applied in GATT 1994 to governmental trade measures. Our submission to the Panel, and we note those of others, have outlined several factors that will need to be considered, including, but not limited to, what is effective and accepted commercial practice by private traders operating in the same sector.

Q. THIRD PARTY WRITTEN SUBMISSION OF CHINA

4.540 China, in its written submission, made the following arguments:

**1. State Trading Enterprise Issues**

(a) Substantive obligations are imposed regarding the state trading enterprises in Article XVII Of GATT 1994

4.541 The key issue of Article XVII is to regulate the activities of state trading enterprises. Under Article XVII: 1 (a), WTO Members undertake that if they maintain a state trading enterprise, or grant exclusive or special privileges to any enterprise, such enterprise shall act in a manner consistent with the general principles of non-discriminatory treatment, which is further required by explanation in Article XVII: 1(b) to mean that such enterprises shall make purchases and sales solely on the basis of commercial considerations and shall afford the enterprises of the other Members adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

4.542 Thus, if the requirements of commercial considerations and adequate opportunity for competition are met, the non-discriminatory principle is met by WTO Members maintaining or establishing state trading enterprises or granting exclusive or special privileges to any enterprise.

(b) GATT Article XVII does not impose an obligation on governments to involve in state trading enterprises' everyday management

4.543 State trading enterprise issue and the interpretation of Article XVII of GATT 1994 are among the entangled questions under GATT and in WTO, and not many panel decisions have touched this issue. We concern the issue that what role should a Member's government play in regulating state trading enterprises. According to the position of the United States, a government should "ensure" that a state trading enterprise does not engage in trade-distorting conduct. What the United States intends to establish is that government should pry into or monitor the state trading enterprise's day-to-day business to ensure that the activities of the enterprise comply with GATT Article XVII. We cannot share this view with the United States on this point for the following reasons.

*(i) If a government were imposed such an obligation, it would be too burdensome and not practical.*

4.544 By its terms, Article XVII: 1 covers (i) state enterprises and (ii) enterprises granted exclusive or special privileges. The most recent authoritative definition on state trading enterprises lies in the 1994 Understanding on the Interpretation of Article XVII, which includes the following working definition:

> "Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special right or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

4.545 Neither Article XVII nor the Understanding specifies what percentage of ownership constitutes a state trading enterprise, nor do they include an illustrative list of special privileges. Therefore, if an enterprise is conferred some kind of privileges by a government, the exercise of which will influence the level or direction of imports or exports, then it will be considered as a state trading enterprise. If a government has to monitor or interfere with the day-to-day operation of all such enterprises, it seems to be unreasonable and prohibitively impossible. Neither can the government afford the personnel nor the time to do this in a market economy. In addition, government officials are not in a better position to make business decisions than the management of state trading enterprises can do.

*(ii) Such an obligation runs afoul of the objective of GATT Article XVII.*

4.546 Article XVII 1(b) provides:

> "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 contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."

4.547 "With commercial considerations" means that a state trading enterprise should conduct business in a manner consistent with normal business practices of privately held enterprises in similar circumstances. The purpose of this provision is to prohibit a government from interfering with state trading enterprises' day-to-day management and evading its obligations under GATT through the business of state trading enterprises. The United States argues that a government shall "ensure" the state trading enterprises it established acting WTO-legally, and that the non-supervision policy of Canadian government is inconsistent with its WTO obligations. However, we think that the activities of state trading enterprises could not be ensured to be conducted on the basis of "commercial considerations" if the government interferes with the daily operation of state trading enterprises or pries or directs their transactions, and thus the objective of Article XVII would be hard to be achieved. On the other hand, the operations of state trading enterprises are carried out on the basis of "commercial considerations" where their actions are not directed by political considerations, and under government supervision and control neither.

*(iii) The Article XVII 1(a) imposes on WTO Members an "obligation of result", not an "obligation of conduct".*

4.548 On this point, we think Canada's argument will stand.

(c) Revenue is a commercial consideration

4.549 The United States alleged that the Canadian Wheat Board is an revenue-maximizor, and this kind of enterprises tend to make sales in greater volumes, and at lower prices, than a normal, profit-maximizing firm. This is only a hypothesis. Moreover, profit is one kind of commercial considerations; revenue is a kind of commercial consideration, too. According to the United States' logic, "commercial considerations" in Article XVII would be interpreted as "not including revenue". This is not right.

4.550 As to the meaning of the phrase "commercial considerations", the interpretative notes and the drafting history indicate that Article XVII:1 (b) would not preclude the charging by a state trading enterprise of different prices in different export markets[57]; nor consideration of the advantages of receiving a "tied loan" in connection with a purchase.[58] Moreover, it was understood that the phrase "customary business practice" as used in Article XVII:1 (b) was intended to cover business practices customary in the respective line of trade.[59]

4.551 Panels have held that producer-controlled import monopolies, although they may in practice infringe rules such as Article XI:1 and XVII, are not intrinsically contrary to GATT.[60] If the monopoly enterprise handles business with commercial considerations, that will be WTO-legal. The Canadian Wheat Board is a producer-controlled export monopoly; similarly, it does not inherently infringe GATT provisions. Only when it concludes transactions with non-commercial considerations or fails to give adequate competing opportunities, then it could be accused of violating Article XVII. In this case, substantial evidences must be put forward before accusing that any GATT or WTO provisions have been violated.

4.552 To conclude, if a state trading enterprise tries to make sales as much as possible, and it is doing business with commercial considerations, one cannot say that it violates GATT Article XVII.

(d) Canada's policy of non-supervision does not violate its obligations under Article XVII

4.553 From the submissions of the United States and Canada, it is obvious that the Canadian government does not have complete control over the Canadian Wheat Board. The majority of the board of directors are wheat producers. The Canadian government grants some privileges to the Canadian Wheat Board, but this does not change the commercial nature of it. It is unreasonable to oblige Canadian government to look into everyday operation of the Canadian Wheat Board.

4.554 Moreover, as above-mentioned, Article XVII:1 imposes on Contracting Parties of GATT an "obligation of result", not an "obligation of conduct". Canada has the discretion to decide the ways and means to achieve this goal. Canadian government's obligation is that if the state trading enterprises it established is proved of violating Article XVII, it will assume the responsibility. Therefore, Canada's non-supervision does not constitute a violation of Article XVII.

(e) National treatment or most-favoured-nation treatment

4.555 Paragraph 1(a) of Article XVII states that Members shall undertake that their state trading enterprises shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in GATT.

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[57] Interpretative Note Ad Article XVII:1.
[58] Interpretative Note Ad Article XVII:1(b).
[59] *GATT Analytical Index: Guide to Law and Practice*, Updated 6th Edition (1995), p. 477.
[60] Panel Report, *Korea – Beef (US)*, para. 115.

4.556 The United States alleges that the "non-discriminatory treatment" refers to national treatment rather than most-favoured-nation treatment. Their only support is from the panel report on the *Korea - Various Measures on Beef* case. However, various authorities show that the Article XVII 1(a) refers to most-favoured-nation treatment. The drafting history can be read to suggest that only MFN treatment is required. For example, in the original United States' proposal only MFN treatment was required, and there is an explicit statement in the relevant sub-committee that this was the intention.[61] This interpretation also finds support in two panel reports.[62] Moreover, a United States' proposal in the Uruguay Round to explicitly subject state trading to the national treatment obligation was not accepted.[63]

4.557 The United States submits that the panel report in *Korea - Various Measures on Beef* is "far better reasoned and represents the correct view". We do not agree. The *Korea - Various Measures on Beef* panel relied on the GATT Note to Article XI, XII, XIII, XIV and XVIII and concluded that in a case involving a state trading enterprises import monopoly, the "general principles of non-discriminatory treatment" in GATT Article XVII:1(a) must include national treatment; otherwise, the state trading enterprises could refuse to import any foreign beef, and thus would be free to impose the type of import restriction prohibited by Article XI.[64]

4.558 We think that the *Korea – Various Measures on Beef* panel might be too worried over this issue. An Interpretative Note explains that a state enterprise may charge different prices for its sales of a product in different markets as long as this is done for commercial reasons, to meet conditions of supply and demand in export markets. This provision can be reasonably construed as that, if a transaction is concluded on commercial considerations, there will no discrimination existing. Similarly, if a state trade enterprise, with commercial considerations, does not import foreign goods while buying domestic products, it will be WTO-legal.

4.559 On the contrary, if a state trading enterprise, with non-commercial considerations, favours domestic products over imported ones in its purchases, it might violate Article XVII. In the other cases, if the state trading enterprises' manner constitutes any kind of import restriction prohibited by Article XI, the Article XI will apply. In any case, there is no need to stretch the "general principles of non-discriminatory treatment" to cover national treatment.

4.560 Professor Jackson also has concluded that a modified or relaxed form of the most-favoured-nation obligation seems to be the general thrust of Article XVII.[65]

> The preparatory work reflects that the words "general principles of non-discriminatory treatment" were inserted in Article XVII, paragraph 1(a), at Geneva (1947) in order to allay the doubt that " 'commercial principles' [in Article XVII, paragraph 1(b)] meant that exactly the same price would have to exist in different markets." Thus it appears that what is meant by "non-discriminatory treatment" is a Most-Favoured-Nation principle tempered by "commercial considerations," such as those listed in Article XVII, paragraph 1(b).

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[61] See, *GATT Analytical Index*, op, cit., 475.

[62] Panel Report, *Belgian Family Allowances (allocations familiales)* ("*Belgium – Family Allowances*"), adopted 7 November 1952, BISD 1S/59, para. 4; Panel Report, *Canada – FIRA*, para. 6.16.

[63] Terence P. Stewart as editor: *The GATT Uruguay Round—A negotiation History* (1986-1992), at 1833.

[64] The Note provides that:" Throughout Article 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 restriction.

[65] John H. Jackson, *World Trade and the Law of GATT* (1969), at 346.

(f) The United States did not meet its obligations to prove that Canada violated Article XVII

4.561 The United States claims that Canada does not "intend" for the Canadian Wheat Board to make sales in accordance with its obligations under Article XVII, and that the privileges provided to the Canadian Wheat Board "enable" or "allow" the Canadian Wheat Board to act in a fundamentally non-commercial manner. But the United States cannot bring out any particular transaction concluded by the Canadian Wheat Board in a non-commercial manner. Mere allegation is not enough to support the United States' claim.

4.562 The United States alleged that relevant Canadian laws and regulations with respect to the Canadian Wheat Board such as the Canadian Wheat Board Act "enable" or "allow" the Canadian Wheat Board to do business with non-commercial consideration. However, these Canadian laws and regulations do not necessarily lead to the result that the Canadian Wheat Board has handled business with non-commercial considerations. According to United States' logic, any monopoly or privilege will entail non-commercial behaviour, and all state trading enterprises are presumed to do business with non-commercial considerations. If this is the case, the existence of state trading enterprises itself will be WTO-illegal, and Members will be deprived of the right to establish state trading enterprises and Article XVII will be turned void.

**2. Canada's Treatment Of Imported Grain**

(a) Segregation is not inconsistent with Article III in itself

4.563 According to the panel report of *Korea – Various Measures on Beef*, the "dual retail" system that keeps imported beef and domestic beef apart does not amount to a competitive advantage for domestic beef.[66] If United States is to establish that Canadian grain segregation system violates Article III, it must adduce adequate evidence and/or prove that the relevant Canadian laws and regulations regarding the segregation system are in violation of Article III (4) in itself. Without meeting such burden of proof, it is inappropriate to reach a conclusion that the Canadian segregation of imported goods from domestic products violates Article III (4). We do not think the United States provided adequate evidence in this regard.

**3. Conclusion**

4.564 The Canadian Wheat Board is a state trading enterprise. Nonetheless, the existence of the Canadian Wheat Board itself is not a violation of GATT Article XVII. Only if there is sufficient proof that the Canadian Wheat Board has done business not in a manner in accordance with commercial considerations, Canada might be held to have violated Article XVII. A government has no positive obligations to involve in state trading enterprises' everyday business. Therefore, the Canadian non-supervision policy to the Canadian Wheat Board does not violate its obligation under Article XVII.

4.565 The United Stated fails to prove that Canadian grain segregation requirements between domestic and imported grain violate GATT Article III: 4The Basic Principle of Good Faith

R. THIRD PARTY ORAL STATEMENT OF CHINA

4.566 China, in its oral statement, made the following arguments:

[66] Panel Report, *Korea – Beef (US)*, paras. 135 and 137.

**1. State Trading Enterprise Issues**

(a) Substantive obligations are imposed regarding the state trading enterprises in Article XVII Of GATT 1994

4.567 The key issue of Article XVII is to regulate the activities of state trading enterprises. Under Article XVII: 1 (a). WTO Members undertake that if they maintain a state trading enterprise, or grant exclusive or special privileges to any enterprise, such enterprises shall act in a manner consistent with the general principles of non-discriminatory treatment. Article XVII: 1 (a) is explained in Article XVII: 1(b) to mean that such enterprises shall make purchases and sales solely on the basis of commercial considerations and shall afford the enterprises of the other Members adequate competing opportunity.

4.568 Thus, if the requirements of commercial considerations and adequate opportunity for competition are met, the non-discriminatory principle is met by WTO Members maintaining or establishing state trading enterprises

(b) GATT Article XVII does not impose an obligation on governments to involve in state trading enterprises' everyday management

4.569 We concern the issue that what role should a Member's government play in regulating state trading enterprises. According to the position of the United States, a government should "ensure" that a state trading enterprise does not engage in trade-distorting conduct. What the United States intends to establish is that government should pry into or monitor the state trading enterprise's day-to-day business to ensure that the activities of the enterprise comply with GATT Article XVII. We cannot share this view with the United States' for the following reasons.

*(i) If a government were imposed such an obligation, it would be too burdensome and not practical.*

4.570 By its terms, Article XVII: 1 covers (i) state enterprises and (ii) enterprises granted exclusive or special privileges. The most recent authoritative definition on state trading enterprises lies in the 1994 Understanding on the Interpretation of Article XVII, which includes a working definition.

4.571 Neither Article XVII nor the Understanding specifies what percentage of ownership constitutes a state trading enterprise, nor do they include an illustrative list of special privileges. Therefore, if an enterprise is conferred some kind of privileges by a government, and the exercise of these privileges will influence the level or direction of imports or exports, then it will be considered as a state trading enterprise. If a government has to monitor or interfere with the day-to-day operation of all such enterprises, it seems to be unreasonable and prohibitively impossible. Neither can the government afford the personnel nor the time to do this in a market economy. In addition, government officials are not in a better position to make business decisions than the management of state trading enterprises can do.

*(ii) Such an obligation runs afoul of the objective of GATT Article XVII*

4.572 Article XVII 1(b) provides that state trading enterprises shall make purchases or sales solely in accordance with commercial considerations.

4.573 "With commercial considerations" means that a STE should conduct business in a manner consistent with normal business practices of privately-held enterprises in similar circumstances. The purpose of this provision is to prohibit a government from interfering with state trading enterprises' day-to-day management and evading its obligation under GATT through the business of such

enterprises. The United States' argues that a government shall "ensure" the state trading enterprises it established acting WTO-legally, and that the non-supervision policy of Canadian government is inconsistent with its WTO obligations. However, we think that the activities of state trading enterprises could not be ensured to be conducted on the basis of "commercial considerations" if the government interferes with the daily operation of state trading enterprises, and thus the objective of Article XVII would be hard to be achieved. On the other hand, the operation of state trading enterprises will be carried out on the basis of "commercial considerations" where their actions are not directed by political considerations, and not under government supervision or control.

*(iii) The Article XVII 1(a) imposes on WTO Members an "obligation of result", not an "obligation of conduct"*

4.574 On this point, we think Canada's argument in their first written submission will stand.

*(iv) There are no "two levels of " obligations in Article XVII*

4.575 The United States argues that Article XVII places two levels of Member obligations, a strict supervising obligation on state trading enterprises and a less rigid one on other enterprises provided by Article XVII 1(c).

4.576 The plain text of Article XVII 1(c) is that this provision applies to state trading enterprises and other enterprises equally. This means that no matter a state trading enterprise or not, a government should not interfere with its operation with non-commercial considerations. We could not see any intention in this provision that different standards shall be applied to a state trading enterprise and a non-state trading enterprise.

(c) Revenue is a commercial consideration

4.577 The United States alleged that the Canadian Wheat Board is an revenue-maximizor, and this kind of enterprises tend to make sales in greater volumes, and at lower prices, than a normal, profit-maximizing firm. This is only a hypothesis. Moreover, profit is one kind of commercial considerations; revenue is a kind of commercial consideration, too. According to the United States' logic, "commercial considerations" in Article XVII would be interpreted as "not including revenue". This is not right.

4.578 Panels have held that producer-controlled import monopolies, although they may in practice infringe rules such as Article XI:1 and XVII, are not intrinsically contrary to GATT.[67] If the monopoly enterprise handles business with commercial considerations, that will be WTO-legal. The Canadian Wheat Board is a producer-controlled export monopoly; similarly, it does not inherently infringe GATT provisions. Only when it concludes transactions with non-commercial considerations or fails to give adequate competing opportunities, then it could be accused of violating Article XVII. In this case, substantial evidences must be put forward before accusing that any GATT or WTO provisions have been violated.

4.579 To conclude, if a state trading enterprise tries to make sales as much as possible, and it is doing business with commercial considerations, one cannot say that it violates GATT Article XVII.

(d) Canada's policy of non-supervision does not violate its obligation under Article XVII

4.580 From the submissions of the United States' and Canada, it is obvious that the Canadian government does not have complete control over the Canadian Wheat Board. The majority of the

[67] Panel Report, *Korea – Beef (US)*, para. 115.

board of directors are wheat producers. The Canadian government grants some privileges to the Canadian Wheat Board, but this does not change the commercial nature of it. It is unreasonable to oblige Canadian government to look into everyday operation of the Canadian Wheat Board.

4.581 Moreover, as above-mentioned, Article XVII:1 imposes on Contracting Parties of GATT an "obligation of result", not an "obligation of conduct". Canada has the discretion to decide the ways and means to achieve this goal. Canadian government's obligation is that if the state trading enterprises it established is proved of violating Article XVII, it will assume the responsibility. Therefore, Canada's non-supervision does not constitute a violation of Article XVII.

(e) National treatment or most-favoured-nation treatment

4.582 Paragraph 1(a) of Article XVII states that Members shall undertake that their state trading enterprises shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in GATT.

4.583 The United States alleges that the "non-discriminatory treatment" refers to national treatment rather than most-favoured-nation treatment. Their only support is from the panel report on the *Korea – Various Measures on Beef* case. However, various authorities show that the Article XVII 1(a) refers to most-favoured-nation treatment. The drafting history can be read to suggest that only MFN treatment is required. For example, in the original United States' proposal only MFN treatment was required, and there is an explicit statement in the relevant sub-committee that this was the intention.[68] This interpretation also finds support in two panel reports.[69] Moreover, a United States' proposal in the Uruguay Round to explicitly subject state trading to the national treatment obligation was not accepted.[70]

4.584 The United States submits that the panel report in *Korea – Various Measures on Beef* is "far better reasoned and represents the correct view". We do not agree. The *Korea – Various Measures on Beef* panel relied on the GATT Note to Article XI, XII, XIII, XIV and XVIII and concluded that in a case involving a state trading enterprise import monopoly, the "general principles of non-discriminatory treatment" in GATT Article XVII:1(a) must include national treatment; otherwise, the state trading enterprises could refuse to import any foreign beef, and thus would be free to impose the type of import restriction prohibited by Article XI.[71]

4.585 We think that the *Korea – Various Measures on Beef* panel might be too worried over this issue. An Interpretative Note explains that a state enterprise may charge different prices for its sales of a product in different markets as long as this is done for commercial reasons, to meet conditions of supply and demand in export markets. This provision can be reasonably construed as that, if a transaction is concluded on commercial considerations, there will no discrimination existing. Similarly, if a state trade enterprise, with commercial considerations, does not import foreign goods while buying domestic products, it will be WTO-legal.

4.586 On the contrary, if a state trading enterprise, with non-commercial considerations, favours domestic products over imported ones in its purchases, it might violate Article XVII. In the other cases, if the state trading enterprises' manner constitutes any kind of import restriction prohibited by

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[68] See, *GATT Analytical Index*, op, cit., 475.

[69] Panel Report, *Belgian Family Allowance*s, para. 4; Panel Report, *Canada – FIRA*, para. 6.16.

[70] Terence P. Stewart as editor: *The GATT Uruguay Round — A negotiation History* (1986-1992), at 1833.

[71] The Note provides that:" Throughout Article 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 restriction.

Article XI, the Article XI will apply. In any case, there is no need to stretch the "general principles of non-discriminatory treatment" in Article XVII to cover national treatment.

4.587 Professor Jackson also has concluded that a modified or relaxed form of the most-favoured-nation obligation seems to be the general thrust of Article XVII in his famous book World Trade and the Law of GATT.[72]

(f) The United States did not meet its obligations to prove that Canada violated Article XVII

4.588 The United States claims that Canada does not "intend" for the Canadian Wheat Board to make sales in accordance with its obligations under Article XVII, and that the privileges provided to the Canadian Wheat Board "enable" or "allow" the Canadian Wheat Board to act in a fundamentally non-commercial manner. But the U. S. cannot bring out any particular transaction concluded by the Canadian Wheat Board in a non-commercial manner. Mere allegation is not enough to support the United States' claim.

4.589 The United States alleged that relevant Canadian laws and regulations with respect to the Canadian Wheat Board such as the Canadian Wheat Board Act "enable" or "allow" the Canadian Wheat Board to do business with non-commercial consideration. However, these laws and regulations do not necessarily lead to the result that the Canadian Wheat Board has handled business with non-commercial considerations. According to United State's logic, any monopoly or privilege will entail non-commercial behaviour, and all state trading enterprises are presumed to do business with non-commercial considerations. If this is the case, the existence of state trading enterprises itself will be WTO-illegal, and Members will be deprived of the right to establish state trading enterprises and Article XVII will be turned void.

### 2. Canada's Segregation of Imported Grain Is Not Inconsistent with Article III In Itself

4.590 According to the panel report of *Korea - Various Measures on Beef*, the "dual retail" system that keeps imported beef and domestic beef apart does not amount to a competitive advantage for domestic beef.[73] If United States is to establish that Canadian grain segregation system violates Article III, it must adduce adequate evidence and/or prove that the relevant Canadian laws and regulations regarding the segregation system are in violation of Article III (4) in itself. Without meeting such burden of proof, it is inappropriate to reach a conclusion that the Canadian segregation of imported goods from domestic products violates Article III (4). We do not think the United States provided adequate evidence in this regard.

## S. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

4.591 In its third party written submission, the European Communities made the following arguments:

### 1. The United States' Claims under Article XVII:1 GATT 1994

(a) The non-discrimination obligation under Article XVII:1(a) and (b) GATT 1994

4.592 In the European Communities' view, Article XVII:1(a) and (b) GATT do not have an identical scope, even though they are interrelated. Subparagraph (b) does not give an exhaustive interpretation or qualification of subparagraph (a). The language of subparagraph (b) does not say that subparagraph (a) shall be understood to require *only* that STEs should act in accordance with "commercial

[72] John H. Jackson, *World Trade and the Law of GATT* (1969), at 346.
[73] Panel Report, *Korea – Beef (US)*, paras. 135 and 137.

considerations" and respect the "adequate opportunities" obligations. Moreover, it would seem implausible that one sole qualification such as that under subparagraph (b) could define comprehensively the general principles of non-discriminatory treatment under subparagraph (a). For these reasons, the European Communities considers that the scope of the obligation of non-discrimination under subparagraph (a) is broader than the related qualification under subparagraph (b).

4.593 The European Communities notes a certain ambiguity in the Panel jurisprudence on the relationship between subparagraphs (a) and (b). Yet, the European Communities agrees with a conceptual approach according to which subparagraph (b) does not give an exhaustive definition, but rather qualifies one specific aspect of the obligation contained in subparagraph (a).

4.594 With regard to the scope of the "non-discriminatory treatment" obligation under subparagraph (a), the European Communities concurs with the *Korea – Various Measures on Beef* Panel that this provision encompasses the most favoured nation ("MFN") and the national treatment principle. Yet, the European Communities notes that the GATT Ad Note Article XVII modifies the application of the MFN principle because if a STE varies its prices for "commercial reasons" it would not violate the non-discriminatory obligation under Article XVII:1(a) GATT in conjunction with the MFN principle.

4.595 With regard to subparagraph (b), the European Communities considers that if a STE operates in its trade related activities on the basis of its special and exclusive commercial advantages it is not *per se* prevented from acting "in accordance with commercial considerations". This notion has to be interpreted in the light of a normal (private) commercial behaviour. The European Communities would also emphasise that the second criterion under Article XVII:1(b) GATT which is to provide other enterprises "adequate opportunities,…, to compete for participation in such purchases or sales" counterbalances to a certain extent the commercial use of the STEs special and exclusive economic rights.

4.596 The European Communities has doubts whether the CWB in its export sales activities respects the non-discrimination standard under Article XVII:1(a) and (b) GATT. Sections 5 and 7(1) of the *CWB Act*, which describe the purpose of the CWB, do not contain any requirement that operations should be made "in accordance with commercial considerations" or that they require to afford for "adequate opportunities" for competitors. Similarly, neither provision requires the CWB to act in accordance with general principles of non-discriminatory treatment, as required by Article XVII:1 (a).

4.597 One appropriate way of determining whether the CWB is acting in accordance with "commercial considerations" would be to assess the relevant data on prices charged by the CWB on export sales and the European Communities would encourage the Panel to ask Canada whether it could provide respective data.

4.598 The European Communities would, in principle, agree with the United States' economic analysis on the impact of CWB exclusive and special rights corroborating the European Communities' doubts whether the CWB's trade activities are "in accordance with commercial considerations", and whether they afford "adequate opportunities" to other competitors. The European Communities finally considers that the general principles of non-discriminatory treatment in respect of MFN may not be respected if the CWB targets specific third country markets. Whether this is the case is primarily a factual question. However, the European Communities recalls that under Sections 5 and 7(1) of the *CWB Act* export sales must not necessarily be made in accordance with "commercial considerations".

(b) The Member's obligation to secure compliance with the non-discriminatory principles under Article XVII:1(a) and (b) GATT 1994

4.599 The language of Article XVII:1(a) unequivocally provides that Members "undertake" that their STEs comply with the basic non-discriminatory GATT rules. Thus, Members must "ensure" that STEs do not engage in trade-distorting conduct. Therefore, Members do not escape their basic GATT obligations by establishing or maintaining a STE.

4.600 The nature of this Member's obligation is an "obligation of result" and not an "obligations of means". Article XVII:1(a) GATT does not prescribe precise ways and means on how to achieve the objective of compliance with the general principles of non-discriminatory treatment. The European Communities does not understand the United States' position to suggest certain specific "processes and procedures" to meet the obligations under Article XVII:1(a) GATT and which could therefore be regarded as an "obligation of means". Yet, the European Communities consider that under Article XVII:1(a) and (b) GATT, a Member has to provide for some kind of mechanism in order to effectively ensure whether its STEs comply with the objective of non-discriminatory treatment as set out under this provision. In this sense, a failure to employ the necessary means may result in a violation of the "obligation of result".

4.601 A violation of the Member's obligation under Article XVII:1(a) GATT could, in principle, occur in two cases:

- Either because of structural shortcomings due to which a STE will systematically violate in its trade-related operations Article XVII:1(a) and (b) GATT.

- Or if a STE disregards in specific cases Article XVII:1(a) and (b) GATT.

4.602 The European Communities concerns regarding CWB's respect of the requirements under Article XVII:1(a) and (b) GATT are of structural nature. Logically it would follow that, in turn, Canada by establishing and maintaining the CWB, did not comply with its obligations under Article XVII:1(a) and (b) GATT. More specifically, the European Communities notes Canada's argument during the preliminary proceedings that the CWB "is not under the control or influence of Canada". While the European Communities agrees that the purpose of the obligation under Article XVII:1(a) GATT is not to oblige Members to interfere in the day-to-day business, the European Communities considers it nevertheless indispensable that a Member should take whatever measures are necessary, including possibly some kind of supervisory control on STE's operations.

4.603 The European Communities also considers that Canada's explanation of the CWB's institutional structure does not provide for sufficient assurances that the CWB actually acts in accordance with the obligations under Article XVII:1(a) and (b) GATT. Canada's defence is solely focused on the commercial behaviour of the CWB. However, under Article XVII:1(b) GATT it is equally necessary that enterprises from other Members should be given "adequate opportunities (…) to compete for participation in such purchases or sales". Canada's explanation does not address how its control mechanisms take into account this aspect of Article XVII:1(b) GATT.

**2. The United States' Claims under Article III:4 of the GATT 1994**

(a) The Canadian Grain Segregation Requirements

4.604 The requirements to be fulfilled to establish a violation of Article III:4 are defined as follows:

- the imported and domestic products must be like products;

- the measure at issue must be a law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use;

- the imported products must be accorded "less favourable treatment" than that accorded to like domestic products.

4.605 The European Communities does not see a legal difficulty in regard to the definition by the United States of the like products concerned which are under stood to be, but for the difference in origin, otherwise identical.

4.606 Furthermore, the European Communities understands the United States' claims under Article III:4 GATT to be concerned exclusively with the internal sale of wheat in Canada, but not with the transit of grain through Canada.

4.607 The European Communities considers that the general prohibition for foreign grain to enter Canadian grain elevators results in conditions of competition less favourable to foreign grain than to domestic grain. By generally prohibiting the entry of foreign grain into Canadian grain elevators, Canada effectively shuts the Canadian bulk grain handling system to foreign grain. Such a closure of a central part of the handling and distribution network to foreign products must be considered as constituting less favourable treatment within the meaning of Article III:4 GATT. Support for this interpretation can be found in the Appellate Body Report in *Korea – Various Measures on Beef* and in the Panel Report in *Canada – Provincial Liquor Boards (EEC)*.

4.608 The European Communities considers that the facts evoked by Canada in its defence such as direct end user deliveries, the good knowledge of the processes, or possibility of authorisations granted by the Canada Grain Commission, do not remove the less favourable treatment of foreign grain. As the Panel held in *Korea - Various Measures on Beef*, it is not necessary to demonstrate actual and specific negative effects of a trade measure in order to establish a violation of Article III:4 GATT:

4.609 The European Communities considers the prohibition on mixing of Canadian and foreign wheat equally as a less favourable treatment of foreign grain. The possibility of a special authorisation for mixing of imported grain, which is not required for domestic grain, does not remove this violation of Article III:4 GATT.

4.610 With regard to a possible justification under Article XX(d) GATT, the European Communities recalls that in *United States – Gasoline*, the Appellate Body clarified the two-step analysis in the application of Article XX GATT, i.e. first, whether the measure is "provisionally justified" under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; and second, it must be appraised whether the measure satisfies also the requirements imposed by the opening clauses of Article XX GATT.

4.611 The party who invokes Article XX GATT bears the burden of proof. Canada, thus far, has failed to prove that the measure is provisionally justified under Article XX (d) GATT. The simple reference to the enforcement of the "CGA, the *CWB Act*, and the misrepresentations and consumer protection provisions of Canada's competitions laws" is not sufficient to establish that these laws and regulations are "consistent with the Agreements", and that the measures in question would be "necessary" to ensure compliance with such laws. Canada appears to assume that foreign grain is inferior to Canadian grain. The European Communities does not share this assumption. In this context, the European Communities notes in particular the statement by Canada that there are no mixing restrictions that apply to end-users. If this is so, the question arises why such restrictions are maintained at the level of the bulk-trading system.

4.612 Even if the objective of the CGA to ensure segregation of Canadian and foreign wheat were considered legitimate, the European Communities still doubts that they could be considered as "necessary", as defined in *United States - Section 337,* since less restrictive alternatives are available. For instance, in order to avoid contact or mixing of foreign and domestic grain, regulations on elevator management and cleaning coupled with on-the-spot checks could easily have achieved the same goal. Similarly, in respect of the mixing requirement, appropriate labelling or grading provisions could make the mixed origin of wheat transparent to the purchaser or consumer.

(b) Differential Treatment in the Canadian Transportation System

4.613 As regards the revenue cap, the European Communities considers that to the extent that this measure results in lower charges for the transport of domestic grain compared to imported grain, it constitutes less favourable treatment of imported compared to domestic products, and therefore violates Article III:4 GATT. In this context, the European Communities recalls the findings of the Panel in *Canada - Periodicals*, which held that the provision of special lower postal rates for the posting of domestic periodicals constituted a violation of Article III:4 GATT. As to Canada's defence that the revenue cap has never been reached, and therefore has not had an effect on rates and charges, the European Communities considers that the onus to show that the revenue cap has had no effect on rates should be on Canada. The European Communities also notes that the revenues indicated by Canada were not very significantly short of the revenue cap.

4.614 In respect of the producer railway car allocation, the European Communities considers the availability of such railway cars to foreign producers as a factual question. The European Communities, therefore, cannot take a position on this. However, the European Communities would like to stress that if such railway cars are indeed available only for the transportation of domestic grain, but not for imported products, this would constitute a violation of Article III:4 GATT.

### 3. The United States' Claims under the *TRIMs Agreement*

4.615 Regarding the relationship between Article III:4 GATT and the TRIMS the European Communities recalls the finding of the Panel in *Indonesia - Cars*, according to which the *TRIMs Agreement* and Article III GATT are two legally independent and distinct sets of provisions. On the other hand, Panels have also exercised judicial economy and based themselves exclusively on Article III:4 GATT in cases where they came to the conclusion that a measure was already incompatible with Article III:4 GATT, or if they felt that their conclusions as to Article III:4 GATT also invalidated the claims made under Article 2 of the TRIMs.

4.616 Should the Panel consider it necessary to examine the United States' claims under Article 2 of the TRIMS, the European Communities would remark that the coverage of the *TRIMs Agreement* is defined in Article 1 thereof. It should be stressed that only TRIMs, and not any violation of Article III of the GATT, fall under the *TRIMs Agreement*.

4.617 The *TRIMs Agreement* does not contain a definition of the term "investment measure". However, in *Indonesia - Cars* the Panel attached significance to the fact that the measures in question had "investment objectives and investment features" and "were aimed at encouraging the development of a local manufacturing capability". In the present case, the European Communities does not see in which way the Canadian measures would be related to investments.

4.618 As to the United States' reference to point 1 (a) of the Illustrative List, the European Communities doubts that the Canadian measures fall under this definition. In particular, it should be noted that Point 1 (a) refers to "the purchase or use by an enterprise of products of domestic origin". However, neither grain elevator nor rail car operators normally "purchase or use" the grain; rather,

they provide a service with respect to the grain, namely the handling, storage, or transportation thereof.

### 4. Conclusion

4.619 For these reasons the European Communities submits that

- Canada appears not to comply with the obligations under Article XVII:1(a) and (b) GATT.
- Canada is in violation of Article III:4 GATT with regard to the Canadian grain segregation requirements, and, depending on the clarification of certain factual issues, also with regard to the differential treatment of domestic and imported grain under the Canadian transportation system.
- The Canadian measures do not fall under the *TRIMs Agreement*.

## T. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

4.620 The European Communities, in its oral statement, made the following arguments:

### 1. The United States' Claims under Article XVII:1 GATT 1994

4.621 The European Communities would note that the language of Article XVII:1(a) is unequivocal: Members "undertake" that their STEs comply with the basic non-discriminatory GATT rules, as refined by Article XVII:1(b) GATT. To this extent, Members must "ensure" that STEs do not engage in trade-distorting conduct. Thus, a Member may not escape its basic GATT obligations by establishing or maintaining a state trading enterprise.

4.622 In the European Communities' view, the nature of the Member's obligation is an "obligation of result" and not an "obligations of means". Indeed, Article XVII:1(a) GATT does not prescribe precise ways and means on how to achieve the objective of compliance with the general principles of non-discriminatory treatment. Yet, the European Communities considers it as evident that under Article XVII:1(a) and (b) GATT, a Member would have to provide for some kind of mechanism in order to effectively ensure that its STEs comply with the objective of non-discriminatory treatment as set out under this provision.

4.623 In the European Communities' view, a violation of the Member's obligation under Article XVII:1(a) GATT could be established in two ways:

- Either because of structural shortcomings due to which a STE will systematically violate in its trade related operations Article XVII:1(a) and (b) GATT.
- Or if a STE acts in specific cases in a matter incompatible with Article XVII:1(a) and (b) GATT.

4.624 Turning to the substantive content of the obligations of Article XVII:1 (a) and (b), the European Communities considers it necessary to first examine the relationship between these subparagraphs of Article XVII:1. In this respect, the European Communities would submit that, even though they are interrelated, Article XVII:1(a) and (b) GATT do not have an identical scope. In the view of the European Communities, subparagraph (b) does not give an exhaustive interpretation of subparagraph (a). Indeed, subparagraph (b) does not say that subparagraph (a) shall be understood to require *only* that STEs should act in accordance with "commercial considerations" and respect the obligation to provide "adequate opportunities".

4.625 In the view of the European Communities, an interpretation which would equate the standards of subparagraph (b) with those of subparagraph (a) would render one of the two provisions superfluous. For these reasons, the European Communities considers that Articles XVII :1 (a) and (b) establish related, but complementary obligations. In other words, the scope of the obligation of non-discrimination under subparagraph (a) is broader than the obligation to act in accordance with commercial considerations under subparagraph (b).

4.626 With regard to the content of Article XVII:1 (a), the European Communities would agree with the *Korea - Various Measures on Beef* Panel that this provision encompasses the most-favoured-nation ("MFN") and the national treatment principle. Yet, the European Communities would also note that the GATT Ad Note to Article XVII modifies the application of the MFN principle because if a STE varies its prices for "commercial reasons" it would not violate the non-discriminatory obligation under Article XVII:1(a) GATT in conjunction with the MFN principle.

4.627 With regard to the obligations under subparagraph (b), the European Communities considers that the fact that a STE operates in its trade related activities on the basis of its special and exclusive commercial advantages does not *per se* prevent it from acting "in accordance with commercial considerations". However, should an STE use its special privileges in order to act in a way that is not motivated by commercial considerations, this would be incompatible with Article XVII:1 GATT.

4.628 Against this background, the European Communities has doubts whether the CWB's structure and activities are compatible with Article XVII:1(a) and (b) GATT.

4.629 First, the European Communities would refer to the statutory provisions of the Canadian Wheat Board Act, and notably Sections 5 and 7(1) thereof, which describe the overall purpose of the CWB's activities. The first provision merely refers to the "marketing in an orderly manner". This general purpose is further specified by the provision that CWB must charge "reasonable" prices in view of promoting the sale of grain in world markets. In contrast, neither provision contains any requirement that operations should be made "in accordance with commercial considerations" or that they provide "adequate opportunities" for competitors. Similarly, neither provision requires the CWB to act in accordance with general principles of non-discriminatory treatment. On the basis of these provisions, it appears that the mandate of the CWB is not limited to commercial activities, but that it is also mandated to take into account considerations which are not of a commercial nature.

4.630 Second, the European Communities would, in principle, agree with the United States' economic analysis of the impact of CWB's exclusive and special rights. In the European Communities' view, these privileges corroborate its doubts as to whether the CWB's trade-related activities are "in accordance with commercial considerations", and whether they afford "adequate opportunities" to other competitors. Similarly, the European Communities shares the United States' concern that general principles of non-discriminatory treatment in respect of MFN may not be respected if the CWB targets particular export markets and harms other Member's wheat sellers by shutting them out of markets.

4.631 In this context, the European Communities would emphasize that an appropriate way of determining whether the CWB is acting in accordance with "commercial considerations" would be to assess the relevant data on prices charged by the CWB on export sales. For the purpose of these proceedings, the European Communities would therefore encourage the Panel to ask Canada, in accordance with Article 13 DSU, whether it could provide respective data on these export sales.

4.632 The European Communities, therefore, is concerned that the structure and activities of the CWB are not in compatibility with Article XVII:1(a) and (b) GATT.

## 2. The United States' Claims under Article III:4 of the GATT 1994

4.633 The main issue arising under Article III:4 is whether the Canadian grain segregation measures can be regarded as granting less favourable treatment to imported wheat. As the United States has aptly pointed out, the purpose of Article III:4 GATT must be seen in the light of Article III:1 GATT, from which it results that "internal measures should not be applied to imported or domestic products so as to afford protection to domestic production".

4.634 When applied to the Canadian prohibition for foreign grain to enter Canadian grain elevators, the European Communities considers that this prohibition clearly results in conditions of competition less favourable to foreign grain than to domestic grain. As Canada has itself stated, the Canadian grain handling and transportation system is primarily a bulk system. Thus, by generally prohibiting the entry of foreign grain into Canadian grain elevators, Canada effectively shuts the Canadian bulk grain handling system to foreign grain. Such a closure of a central part of the handling and distribution network to foreign products must be considered as constituting less favourable treatment within the meaning of Article III:4 GATT. Support for this interpretation can be found in the Appellate Body Report in *Korea – Various Measures on Beef* and in the Panel Report in *Canada – Provincial Liquor Boards (EEC)*.

4.635 The fact evoked by Canada that foreign producers are not obliged to use Canadian grain elevators, and may for instance deliver directly to Canadian end users, does not remove the unfavourable effects of the prohibition. It must be presumed that an efficient bulk grain handling system offers cost advantages compared to *ad hoc* distribution possibilities.

4.636 Finally, Canada argues in defence of its measure that derogations from this general prohibition may be granted by the Canada Grain Commission, and that the latter has never refused the entry into Canadian grain elevators of foreign grain. However, in the European Communities' view, this possibility of derogation does not remove the less favourable treatment of foreign grain. Already the requirement to obtain an authorization, which does not apply to domestic products, constitutes a competitive disadvantage, which constitutes less favourable treatment.

4.637 The fact that the CGC has never refused entry of foreign grain, which was referred to by Canada, similarly does not affect this conclusion. As the Panel held in *Korea - Various Measures on Beef*, it is not necessary to demonstrate actual and specific negative effects of a trade measure in order to establish a violation of Article III:4 GATT. Accordingly, the fact that an authorization was granted in all cases an application was made does not preclude that the authorization requirement may have deterred exporters from third countries, who may therefore not even have applied.

4.638 As regards the prohibition on mixing of Canadian and foreign wheat, the European Communities considers that this equally constitutes less favourable treatment of foreign grain. In a bulk trading system, the quantity of grain supplied by one provider and the quantity demanded may not always coincide. In this situation, it will be natural for grain handlers to mix grain of different origins, as long as it is otherwise identical, in order to meet the quantity demanded. To be excluded from this possibility of mixing is a significant competitive disadvantage for foreign grain, which constitutes only a minor proportion of the Canadian market.

4.639 In this context, Canada argues that under certain circumstances defined in its law, the mixing of Canadian and foreign wheat may nevertheless be allowed. However, as already outlined above, the requirement of a special authorization for mixing of imported grain constitutes a violation of Article III:4 GATT. Moreover, these derogations seem to have been granted only in few narrowly defined cases.

4.640 Regarding Canada's reference to Article XX(d), the European Communities would recall that the party who invokes Article XX GATT bears the burden of proof. Yet, in the European Communities' view, Canada fails to prove that the measure is provisionally justified under Article XX(d) GATT. The simple reference to the enforcement of the "CGA, the *CWB Act*, and the misrepresentations and consumer protection provisions of Canada's competitions laws" is not sufficient to establish that these laws and regulations are "consistent with the Agreements", and that the measures would be "necessary" to ensure compliance with such laws.

4.641 In its submission, Canada describes at some length its "Grain Quality Assurance Scheme", and stresses the importance it attaches to this for ensuring the quality of "Canadian grain". However, the segregation requirements and mixing prohibitions seem to be based on the assumption that Canadian grain is necessarily superior in quality to imported grain. As the United States has aptly noted, this is particularly striking in the drafting of Section 57 of the Canada Grain Act, which seems to put foreign grain on a par with infested or contaminated grain.

4.642 The European Communities sees no basis for such an assumption of an inferiority of foreign to Canadian grain. Whereas the European Communities appreciates the need to ensure appropriate protection of traders and consumers with respect the variety, grade, and other relevant characteristics of grain, the European Communities does not believe this justifies the segregation measures taken by Canada.

4.643 For this reason, the European Communities does not consider the CGA and the CWB "to constitute laws or regulations consistent with the provisions of the GATT". For the same reason, the European Communities does not consider that the measures in question are necessary for the prevention of deceptive practices.

4.644 Even if the objective of the CGA to ensure segregation of Canadian and foreign wheat were considered legitimate, the European Communities still doubts that they could be considered as "necessary".

4.645 In the current context, it appears that the Canadian restrictions on access to elevators were not necessary, since less restrictive alternatives were available. In order to avoid contact or mixing of foreign and domestic grain, regulations on elevator management and cleaning coupled with on-the-spot checks could easily have achieved the same goal. Indeed, it is not clear why an elevator which has previously received imported grain could not subsequently receive Canadian, and vice versa. This is in line with the findings of the Panel in *Korea - Various Measures on Beef*, which held that a separate retail system for domestic and imported beef was an excessive measure to prevent deception of consumers as to the origin of beef.

4.646 Similarly, less restrictive alternatives are also available in respect of the mixing requirement. In particular, appropriate labelling or grading provisions could make the mixed origin of wheat transparent to the purchaser or consumer. This is in fact exactly what was done in the exceptional case in which Canada authorized the mixing of Canadian and US wheat.

### 3. The United States' Claims under the *TRIMs Agreement*

4.647 The European Communities considers that in order to establish a claim under the TRIMs, the United States must demonstrate that the Canadian measures are indeed trade-related investment measures within the meaning of Article 1 of the *TRIMs Agreement*.

4.648 The *TRIMs Agreement* does not contain a definition of the term "investment measure". However, reference can be made to the Panel's findings in *Indonesia - Cars*, in which the Panel attached significance to the fact that the measures in question had "investment objectives and

investment features" and "were aimed at encouraging the development of a local manufacturing capability".

4.649 In the present case, the European Communities does not see in which way the Canadian measures would have a specific "investment objective" or "encourage investment". As to the United States' reference to point 1 (a) of the Illustrative List, the European Communities doubts that the Canadian measures fall under this definition. In particular, it should be noted that Point 1 (a) refers to "the purchase or use by an enterprise of products of domestic origin". However, neither grain elevator nor rail car operators normally "purchase or use" the grain; rather, they provide a service with respect to the grain, namely the handling, storage, or transportation thereof.

## U. THIRD PARTY ORAL STATEMENT OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

4.650 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, in its oral statement, made the following arguments:

4.651 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu considers that this case concerns the right of every Member to maintain state trading enterprises and to grant such enterprises and other ones exclusive or special privileges in accordance with Article XVII of the GATT 1994, and thus we have a systemic interest in the proper interpretation of this article. Accordingly, we would like to limit our comments on the interpretation of the word "undertakes" in the first sentence of Article XVII:1(a) of the GATT 1994 and on the establishment of a violation of this article.

4.652 We do not believe that Article XVII:1(a) imposes on the Member concerned a positive obligation to adopt explicit means to ensure that its state trading enterprises conform to the requirement of the provision. We agree with Canada that international obligations needs to differentiate between obligation "of means" and obligation "of result". Since there is no prescription about the means of a Member in ensuring state trading enterprises from acting discriminatorily, we believe that Article XVII only contains an obligation of result. Had the negotiators intended for Members to take positive processes and procedures to ensure compliance of Members' undertaking under Article XVII, one would expect to find explicit requirements to that effect in the Article itself, or in the Understanding on the Interpretation of Article XVII of GATT 1994. We find no such requirement

4.653 The United States in essence argues that the word "undertakes" contains in Article XVII:1(a) imposes on a Member the obligation to adopt processes or procedures to ensure that their state-trading enterprises comply with Article XVII. It is hard for us to see how one word can be interpreted to contain such an elaborate positive obligation. We therefore do not share the view of the United States that the word "undertakes" poses such a positive obligation on Members in adopting processes or procedures in relation to the supervision of their state-trading enterprises.

4.654 We also note from the exhibits to the United States' First Written Submission that Canada has in fact exercised its supervision on the Canadian Wheat Board. In US-5 the report from the Auditor General of the Canadian Government, the scope of the audit is rather broad as to include examination and recommendation on various commercial practices of the CWB. If there exists any obligation of positive supervision on Members under Article XVII in the form of adopting processes and procedures, which we doubt, we consider that any comprehensive audit similar to that by the Canadian Auditor General and its recommendations would arguably satisfy that obligation.

4.655 Turning to the issue of the establishment of a violation of Article XVII:1 of GATT 1994, we consider that a demonstration of special and exclusive privileges granted to an enterprise for the

purpose of Article XVII, even though the nature and substance of the privileges are such as to lead to possible abuse, does not discharge a complaining Member's obligation in proving that non-discriminatory treatment under Article XVII:1(a) and (b) has been violated. The mere allegation that a Member has no control or influence over the state trading enterprises can only suggest a remote possibility that the state enterprises are acting in violation of Article XVII. It is still very likely that there is no discrimination maintained by such state enterprises.

4.656 The United States, in this case, seems to be arguing that by virtue of the "exclusive or special privilege" granted to CWB and the lack of substantive involvement by the Canadian government in the commercial affairs of the CWB, the CWB would be *presumed* to have harmed "other Members' wheat sellers by, in effect, shutting them out of markets, or portions of markets, that are subject to the CWB's targeting." Even disregarding our reservation on whether the provision of Article XVII:1 covers such a broad interpretation of "non-discriminatory treatment", the United States' presumption is inappropriate. Nowhere in Article XVII:1 does it suggest that the presumption as prescribed by the United States exists. The basic fact remains that the United States, as the complaining party in this case, bears the burden of proof, and with that burden, the United States must prove that the Canadian Wheat Board, by its own action, has violated Article XVII:1.

4.657 By way of conclusion, my delegation would like to point out that under our reasoning, if a Member has a comprehensive control process to ensure conformity with Article XVII, and yet its STEs are acting in a discriminatory manner, the Member should still be considered in violation of Article XVII. On the other hand, if a Member has not adopted any control process, and no discrimination is being carried out by the STE in question, then there is no reason to find the Member in violation of Article XVII. We consider this to be the appropriate interpretation of Article XVII:1.

# V. INTERIM REVIEW[74]

## A. BACKGROUND

5.1 For reasons indicated at paragraph 6.11 below, the DSB has successively established two panels to resolve this dispute. One panel was established on 31 March 2003 (hereafter the "March Panel"), the other on 11 July 2003 (hereafter the "July Panel"). In letters dated 16 January 2004, Canada and the United States requested an interim review by the Panel of certain aspects of the interim reports issued to the parties on 22 December 2003. Neither party requested an interim review meeting. As agreed by the Panel, both parties were permitted to submit further comments on the other party's interim review requests. Both parties submitted further comments on 23 January 2004.

5.2 We have outlined our treatment of the parties' requests below in the following manner:

(a) Section V.B concerns the descriptive part of both Panels and the preliminary ruling on Canada's request under Article 6.2 of the DSU issued by the March Panel.

(b) Section V.C concerns the review of the findings of the July Panel on the "measure relating to exports of wheat" which the United States claims is inconsistent with Article XVII:1 of the GATT 1994.

(c) Section V.D concerns the review of the findings of both the March and the July Panel on "measures affecting the treatment of imported grain" which the United States claims are inconsistent with Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

5.3 We have also made certain necessary technical revisions to our reports.

## B. CONFIDENTIALITY OF THE CONSULTATIONS

5.4 **Canada** recalled that Article 4.6 of the DSU requires Members to maintain the confidentiality of consultations. To this end, Canada requested that the Panel redact a number of specific references to the discussions and events that occurred during the consultations from the final report, replacing them with square brackets.

5.5 The **United States** responds that according to Article 18.2 of the DSU, and subject to the second sentence of that paragraph, written submissions to the Panel "shall be treated as confidential." Nevertheless, it is accepted practice that in the interest of transparency and for the benefit of all Members, summaries of the parties' submissions (factual presentations and arguments) are disclosed in the descriptive part of the Panel's report, as contemplated in Article 15.1 of the DSU. The United States considered that, all of the statements in the Panel's report related to consultations are appropriate, and Canada's requests for deletion should not be accepted. The United States notes that the majority of Canada's comments seek to modify descriptions of United States arguments.[75] In the view of the United States the statements in the descriptive part of the Panel's report accurately reflect United States arguments, and Canada does not argue to the contrary. Moreover, these descriptions are

[74] Pursuant to Article 15.3 of the DSU, the findings of the final panel reports shall include a discussion of the arguments made at the interim review stage. This Section of the Panel reports is therefore part of the Panel's findings.

[75] The United States does not comment on Canada's requests with respect to Canada's own argumentation in paragraphs 4.119, 4.121, and 4.128 of the interim report.

necessary in order to fully present the United States' positions. The statements Canada refers to do not contain any "strictly confidential information," which the United States considers to be the only appropriate grounds for requesting brackets in the text of the Panel's report. The United States argues that if Canada's request is granted, a one-sided view of the arguments will be presented in the Panel's final report. The United States specifically argued with respect to some of the redactions requested by Canada that redacting parts of the description of the arguments of one party at the request of the other party would be contrary to current practice and may present an unbalanced view of the United States' position. Finally, the United States also notes that the Panel circulated its preliminary ruling in this dispute to Members on 21 July 2003. That preliminary ruling summarized United States arguments, including references to consultations, and Canada did not object at that time to the inclusion of such references.

5.6 At the outset the **Panel** notes that we do not disagree with Canada that Article 4.6 of the DSU establishes an obligation to maintain the confidentiality of consultations. In our view, such obligation is imposed on the Members that participated in the consultations, and refers to information that is not otherwise in the public domain and is disclosed by the other party.

5.7 In addressing Canada's request, we first recall the sequence of events concerning disclosure of information about the consultations in the current case. Information on the consultations was first disclosed to the Panel by the United States in its preliminary written submission, and then in its oral statement at the preliminary hearing. On its part, Canada also referred to the consultations in its statement at the preliminary hearing. Subsequently, the parties requested that, given the brevity of the preliminary submissions and statements, they be treated as their own executive summaries to be reproduced in the descriptive part of the March Panel's report. Submissions by both parties contained references to the consultations. The Panel then included a brief description of these references in the relevant part of the preliminary ruling. At the request of the United States, and after seeking the views of Canada and the relevant third parties, the preliminary ruling was circulated as a WTO document.[76] At no stage throughout this procedure did Canada object to the disclosure of information presented by the parties about the consultations.

5.8 We note that Canada's redaction request relates to the summary of the arguments of the parties in the preliminary ruling of the Panel and the parties' descriptions of their arguments in the descriptive part of the report. With respect to the information that refers to the summary of the arguments of the parties in the preliminary ruling of the Panel, we note the United States' argument that the ruling has already been released as a WTO document.[77] The Panel has explained in document WT/DS276/11 the reasons and circumstances why it was considered appropriate to accede to the United States' request for circulation of the preliminary ruling. Therefore, in light of the fact that the information in the preliminary ruling that Canada has requested to be redacted from the report is already in the public domain we decline Canada's request to redact certain information from paragraph 25 (page 116), paragraph 35 (page 119), paragraph 41 (page 120), paragraph 42 (page 121), and paragraph 55 (page 124) of the interim report.

5.9 With respect to the parties' descriptions of their arguments, the Panel finds itself in a very particular situation in that some of the information that Canada now seeks to be redacted from the description of the parties' arguments has also been disclosed to the public. Indeed, the arguments that were presented by the parties during the preliminary stage of the Panel proceedings have been summarized in the preliminary ruling of the Panel, including information which Canada now seeks to be redacted. Therefore, we see no object in now deleting parts of the description of the arguments presented by the parties when the underlying information has already been summarized and published as part of the preliminary ruling of the Panel. We also note that some of the information that Canada

[76] WT/DS276/12.
[77] WT/DS276/12.

requests to be redacted concerns descriptions by the United States of its own conduct during the consultations (e.g., that questions were posed, etc.), but does not disclose the content of the positions or views adopted by Canada during those consultations. We do not see a justification for redacting such information. In light of the above considerations, the Panel declines Canada's request to redact certain information from paragraphs 4.52 to 4.54, 4.56, 4.60. 4.61, 4.63, 4.79, 4.84 to 4.86, 4.119, 4.121, 4.128, and 4.162 to 4.164 of the interim report.

5.10 Regarding Canada's request that we redact the information in paragraphs 4.57, 4.58, 4.59 and certain information in 4.298, we note that this information has not been disclosed in the preliminary ruling and pertains to Canada's positions during the consultations. In light of the above considerations, we accept Canada's request to redact the information in paragraphs 4.57, 4.58, 4.59 and certain information in paragraph 4.298 from the report. However, we wish to highlight that when a party wishes that information disclosed to the Panel, by itself or by the other party, be treated as confidential information and not included in the public version of the panel report, it should so indicate at a time that is early enough to avoid an interpretation that the party has waived its right to confidentiality.

## C. MEASURE RELATING TO EXPORTS OF WHEAT

5.11 The **United States** requests that the Panel delete the second sentence of paragraph 6.27, arguing that it is misleading because information on particular export sales transactions is not necessary for the United States' challenge or the Panel's analysis.

5.12 **Canada** considers that the second sentence of paragraph 6.27 should be retained.

5.13 The **Panel** does not agree with the United States that the sentence in question is misleading. To the contrary, the sentence is important because it makes clear that, in the present case, the United States is not complaining about individual CWB export sale transactions. The United States itself has stated that "perhaps in some other case, a complainant might choose to meet its burden of proof through the submission of sales data".[78] For these reasons, the Panel declines to delete the second sentence.

5.14 The **United States** requests that the Panel modify the third sentence of paragraph 6.40, arguing that the requested change is necessary to accurately reflect the United States' position that Canada's failure to exercise its authority to oversee the CWB is one of the elements of the CWB Export Regime which leads to non-conforming CWB sales.

5.15 **Canada** considers that the Panel's wording accurately reflects the United States' position and that the proposed modification confuses its position.

5.16 The **Panel** notes that the third sentence of paragraph 6.40 states the Panel's understanding of what the United States is *not* arguing in this case. The modification requested by the United States would transform this sentence into a statement on what the United States *is* arguing in this case. However, the Panel indicates its understanding of what the United States *is* arguing in this case in the fourth sentence of paragraph 6.40. The United States has made no comments on the fourth sentence. In any event, the fourth sentence reflects the United States' argument that "Canada's failure to exercise its authority to oversee the CWB is one of the elements of the CWB Export Regime which leads to non-conforming CWB sales". In the light of these considerations, we do not find it appropriate to make the requested change to the third sentence of paragraph 6.40.

[78] United States' first oral statement, para. 21.

5.17 The **United States** requests that the Panel delete references to subparagraph (b) of Article XVII:1 in paragraphs 6.40 and 6.41 and references to subparagraph (a) of Article XVII:1in paragraph 6.42. The United States considers these changes to be necessary to accurately reflect its argument that Articles XVII:1(a) and (b) contain distinct obligations and to reflect the fact that the relevant section of the Panel's report discusses only Article XVII:1(a).

5.18 **Canada** has not expressed a view on these comments.

5.19 The **Panel** does not consider it appropriate to delete the specified references to subparagraph (b) of Article XVII:1 in paragraphs 6.40 and 6.41. Nevertheless, the Panel has made appropriate changes in paragraphs 6.40-6.42, including by adding two footnotes, in order to reflect more clearly the United States' argument that Articles XVII:1(a) and (b) contain distinct obligations. Regarding the requested change to paragraph 6.42, the Panel does not find it necessary to delete references to subparagraph (a) of Article XVII:1 because the undertaking by Members is set forth in Article XVII:1(a). The Panel has made an editorial change to make this point clearer.

5.20 The **United States** requests that the Panel make the statement made in the footnote accompanying paragraph 6.43 in the text of paragraph 6.43 in view of the importance of the statement.

5.21 **Canada** has not expressed a view on this comment.

5.22 The **Panel** notes that the footnote in question "recalls" a statement that is made earlier in the text. The Panel does not find it necessary to repeat this point in the text, given that it is already made at paragraph 6.41. Nevertheless, the Panel has included a cross-reference to paragraph 6.41 in the footnote in question and has also clarified the relevant statement at paragraph 6.41.

5.23 The **United States** requests the Panel to remove from paragraph 6.88 the example of "the national (economic or political) interest of the Member maintaining the STE". The United States finds the example confusing and ambiguous. The United States also considers that an STE that acts in the national economic interest of the Member that maintains the STE could be acting consistently with "commercial considerations", depending on the circumstances.

5.24 **Canada** disagrees with the United States and requests that the Panel retain its original wording.

5.25 The **Panel** has added a footnote to clarify the example in question. The Panel notes that it is of course true that an STE which acts solely in accordance with commercial considerations may be acting in the national economic or political interest. But this is not the point the Panel is making in paragraph 6.88. The Panel's point is that where an STE is directed to make, or does make, purchases or sales in accordance with considerations relating to the national economic or political interest, it would not be making purchases or sales "solely" in accordance with commercial considerations.

5.26 The **Panel** has also corrected a typographical error in paragraph 6.149.

## D. MEASURES AFFECTING THE TREATMENT OF IMPORTED GRAIN

### 1. Panel's analysis of the "necessity" of Section 57(c) of the *Canada Grain Act* and Section 56(1) of the *Canada Grain Regulations* under Article XX(d) of the GATT 1994

5.27 The **United States** urges the Panel to adopt the "weighing and balancing" test that was referred to by the Appellate Body in *Korea – Various Measures on Beef* noting, however, that such an approach would lead to the same result as that reached by the Panel in its interim reports.

5.28 **Canada** submits that with respect to the United States' additional submissions in response to Canada's defence under Article XX(d) of the GATT 1994, it is not appropriate for the United States to be re-litigating points at this late stage in the Panel's proceedings.

5.29 The **Panel** does not consider that its analysis in the interim reports is inconsistent with the Appellate Body's findings in *Korea - Various Measures on Beef*. Indeed, the Panel specifically relied on the Appellate Body's findings in that case.

5.30 We had indicated in footnote 282 of our interim reports that, in light of the statements by the Appellate Body in *Korea – Various Measures on Beef* that "the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'"[79] and given that Canada had argued before the Panel that the challenged measures are "necessary" because less trade-restrictive alternatives were not available to Canada, we would determine whether there were alternative measures that achieved the same objective and which were reasonably available to Canada.[80] We consider that, in light of the way in which the Appellate Body in *Korea - Various Measures on Beef* and subsequently in *EC - Asbestos* applied the "weighing and balancing" test, the examination of the existence of a reasonably available alternative measure is clearly relevant.[81] The United States agrees.[82] We agree that, in addition, other elements of consideration, such as the importance of the value pursued by the laws or regulations to be enforced, are also relevant.[83] Indeed, in our examination of Canada's Article XX defence, we took into account all relevant considerations, even if we did not find it necessary, in this case, to specifically discuss our other considerations in our findings. In view of the United States' request that we modify our initial analysis, we have, however, supplemented our initial analysis in paragraph 6.222 to include some specific discussion of our other considerations.

5.31 The **United States** argues that the factors pointed to by the Panel in paragraph 6.223 of its interim reports, where the Panel describes the relevant factors for determining whether an alternative measure is reasonably available, misstates the Appellate Body's guidance. More particularly, the United States submits that these factors should be used in evaluating the WTO measure at issue in the dispute -- in this case, Sections 57(c) of the *Canada Grain Act* and Section 56(1) of the *Canada Grain Regulations* -- not the reasonableness of alternative measures.

5.32 The **Panel** notes firstly that, contrary to what has been suggested by the United States, we did not examine the "reasonableness of alternative measures". Rather, the Panel considered whether an alternative measure which achieved the same objective was reasonably available. Secondly, the Panel does not agree that the factors referred to in paragraph 6.223 do not relate to the question of whether the alternative measure is reasonably available. With respect to the first factor -- the extent to which the alternative measure contributes to the realization of the end pursued -- we note that the Appellate Body in *EC – Asbestos* stated that a WTO-consistent alternative measure is reasonably available to the extent to which it contributes to the realization of the end pursued.[84] In relation to the second factor -- the difficulty of implementation -- the Appellate Body in *EC – Asbestos* stated that an alternative

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[79] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 166.

[80] *See* Canada's second written submission, paras. 112 – 113.

[81] *See* Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 178; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC – Asbestos*"), WT/DS135/AB/R, adopted 5 April 2001, para. 172.

[82] United States' comments on the interim reports, page 6.

[83] Appellate Body Report, *EC – Asbestos*, *supra*, para. 172.

[84] Ibid.

measure which is impossible to implement is not reasonably available.[85] The Appellate Body further stated in that case that, in determining whether a suggested alternative measure is reasonably available, several factors must be taken into account, besides the difficulty of implementation.[86] In respect of the third factor -- the extent to which the alternative measure restricts trade -- the Appellate Body in *EC – Asbestos* stated that the remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.[87]

5.33 The **United States** also argues that there is no need to reach the question of a hypothetical, "less WTO-inconsistent measure" where there are WTO-consistent alternatives available. The United States suggests that there are a number of WTO-consistent alternative measures that are available.

5.34 The **Panel** notes that the Appellate Body in *Korea – Various Measures on Beef* stated the following:

> In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a *WTO-consistent alternative measure* which the Member concerned could "reasonably be expected to employ" is available, or whether a *less WTO-inconsistent measure* is "reasonably available".[88] (emphasis added)

It is clear from this statement, as well as from the findings of the panel in *US – Section 337*[89] that, in determining whether alternative measures are reasonably available to a responding Member, a panel needs to satisfy itself that an alternative measure which would be available is, at a minimum, less WTO-inconsistent than the measures maintained by the responding Member. However, the fact that an alternative measure exists which is less WTO-inconsistent than the challenged measure in no way prejudges the issue of whether or not there might also be WTO-consistent alternative measures. Nor does it necessarily mean that a Member may use a less WTO-inconsistent measure.[90]

5.35 We also note that in this case, the Panel has not stated that the alternative measures to Section 57(c) of the Canada *Grain Act* and Section 56(1) of the *Canada Grain Regulations* to which the Panel refers, purely by way of example, are WTO-consistent. Nor has the Panel stated that they are necessarily WTO-inconsistent. The Panel merely states that, *at a minimum*, they are less WTO-inconsistent than the challenged measures.

### 2. United States' proposal that the Panel make alternative findings under the chapeau of Article XX(d)

5.36 The **United States** encourages the Panel to make findings in the alternative under the chapeau to Article XX of the GATT 1994.

5.37 **Canada** argues that it does not believe that it is necessary to make alternative findings under the chapeau to Article XX in light of the Panel's findings with respect to the test in sub-paragraph (d) of Article XX.

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[85] Ibid., para. 169.
[86] Ibid, para. 170.
[87] Ibid. para. 172.
[88] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 166.
[89] Panel Report, *United States - Section 337 of the Tariff Act of 1930* ("*US – Section 337*"), adopted 7 November 1989, BISD 36S/345, para. 5.26.
[90] Indeed, it is clear to us from the statement of the panel in *US - Section 337* reproduced at para. 6.222 of our findings, which statement was also referred to by the Appellate Body in *Korea – Various Measures on Beef* at paras. 165-166, that a Member may only use a less WTO-inconsistent measure if a WTO-consistent alternative measure is not reasonably available.

5.38 The **Panel** does not consider that additional findings under the chapeau of Article XX are necessary given the Panel's conclusion that the relevant measures are not provisionally justified under subparagraph (d) of Article XX. We note in this regard that the Appellate Body in *US – Shrimp* said, in respect of a measure for which justification was claimed under Article XX(g), that "[i]f the measure is not held provisionally justified under Article XX(g), it cannot be ultimately justified under the chapeau of Article XX".[91] We believe the same is true in this case where the measures at issue are not provisionally justified under Article XX(d). Moreover, in our view, there is no need in this case to make additional findings in the alternative.

### 3. Editorial changes proposed by the United States

5.39 The **United States** has requested that the heading on page 170 of the Panel's interim reports be changed to read "Canada fails to demonstrate that Section 57 does not affect the conditions of competition between domestic grain and imported grain". The United States makes this request on the basis that, in the section of the interim reports following the relevant heading, the Panel rejects a number of arguments put forth by Canada.

5.40 The **Panel** does not agree that the proposed change is necessary. The paragraph preceding the heading in question clearly indicates that the Panel intends to deal with Canada's defences, one of which is the argument that "Section 57 does not affect the conditions of competition between domestic grain and imported grain". Therefore, there could be no doubt in a reader's mind that the heading is *not* a finding by the Panel but, rather, identifies a defence raised by Canada, which the Panel intends to examine. Further, the Panel's conclusion that Canada has "failed to demonstrate" this defence is illustrated *after* the heading and not before.

5.41 We note that we have corrected the typographical error in paragraph 6.221 referred to by the United States. We have also made some consequential changes that became necessary after making the changes referred to above.

## VI. FINDINGS

### A. STRUCTURE OF THE FINDINGS

6.1 This dispute concerns two very different categories of measures. One relates to Canadian exports of wheat[92], the other to the treatment of grain imported into Canada.[93] Moreover, for reasons indicated at paragraph 6.11 below, the DSB has successively established two panels to resolve this dispute. One panel was established on 31 March 2003 (hereafter the "March Panel"), the other on 11 July 2003 (hereafter the "July Panel").

6.2 In response to a question posed by the Panel, the parties indicated that they did not wish the two Panels to issue separate reports in separate documents.[94] The two Panels saw no compelling reason to proceed differently[95] and therefore decided to issue their separate Reports in the form of a single document.[96]

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[91] Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ("*US – Shrimp*") WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 149.

[92] United States' first written submission, para. 16.

[93] Ibid., para. 5.

[94] Parties' letters to the Panel of 23 July 2003.

[95] It should be noted in this regard that the March Panel and the July Panel were both established under the case name *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* and under the case number 276 (WT/DS276). Both Panels are composed of the same panellists. Moreover, after the

6.3 The remainder of the Findings section of this document is structured as follows:

(a) Section VI.B reproduces certain preliminary decisions and rulings issued by the March Panel in response to requests by Canada.[97]

(b) Section VI.C examines the "measure relating to exports of wheat" which the United States claims is inconsistent with Article XVII:1 of the GATT 1994. The findings in this subsection are those of the July Panel.[98]

(c) Section VI.D examines the "measures affecting the treatment of imported grain" that the United States claims are inconsistent with Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement (Agreement on Trade-Related Investment Measures)*. Subsection D contains findings which are common to the March Panel and the July Panel. In other words, the March Panel and the July Panel have made identical findings with respect to the "measures affecting the treatment of imported grain", but these findings are reproduced in this document only once.

(d) Section VII, which is the Conclusion section of this document, contains two sets of conclusions, one for the March Panel and one for the July Panel.

6.4 For simplicity, in the remainder of this document, the term "Panel" will be used to refer to either the March Panel, the July Panel, or to both. The term "Panel" will be used in the singular even in those instances where the findings are those of both the March Panel and the July Panel.

## B. PROCEDURAL DECISIONS AND RULINGS BY THE MARCH PANEL

6.5 On 13 May 2003, Canada requested the March Panel to decide certain issues before the due date of the parties' first written submissions. These issues concerned the consistency with Article 6.2 of the DSU of the United States' request for the establishment of a panel of 6 March 2003 and certain additional procedures proposed by Canada for the protection of proprietary or commercially sensitive information.

### (a) Third-party participation in the preliminary stage of the proceedings

6.6 Canada's requests for preliminary decisions on the two above-noted issues gave rise to the question of how the third parties were to be involved in this preliminary phase of the proceedings. In this connection, the Panel sent a letter to the parties and third parties. The letter, dated 27 May 2003, is reproduced, in relevant part, below:[99]

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establishment of the July Panel, the two Panels harmonized their timetables. They received combined written submissions from the parties and third parties and held combined substantive meetings with the parties and third parties. Thus, as a practical matter, once the July Panel had been established, the two proceedings were conducted as if there was only one panel.

[96] We note that the panel in *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* followed a similar approach. Panel Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products* ("*US – Steel Safeguards*"), WT/DS248/R, WT/DS249/R, WT/DS251/R, WT/DS252/R, WT/DS253/R, WT/DS254/R, WT/DS258/R, WT/DS259/R and Corr.1, adopted 10 December 2003, as modified by the Appellate Body Report, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, para. 10.725.

[97] The July Panel was not requested to make preliminary decisions or rulings.

[98] The March Panel made no findings with respect to the "measure relating to exports of wheat".

[99] Footnotes included in the letter are gathered as endnotes to the quotation.

**"I. Procedural Background**

2. On 13 May 2003, Canada provided the Panel and the United States with two preliminary written submissions in which it requested the Panel to decide certain issues before the due date of the parties' first written submissions.[i] On 21 May 2003, the Panel held the organizational meeting with the parties. At that meeting, the Panel consulted the parties on the procedures it proposed in response to Canada's requests for early preliminary rulings. The Panel notably proposed to give the United States an opportunity to provide preliminary written submissions in response to Canada's earlier preliminary submissions and also indicated a willingness to schedule a preliminary hearing if requested by either party. The Panel further requested the parties to provide comments on the issue of third party participation in any preliminary hearing. The Panel received written comments on this issue on 23 May 2003. Also on 23 May 2003, the Panel provided the parties with the final version of the timetable and the Working Procedures. The timetable provided for the United States to make preliminary written submissions in response to Canada's earlier submissions on 27 and 28 May 2003, respectively. At the request of Canada, the Panel also scheduled a preliminary hearing for 6 June 2003. Finally, the Panel indicated that it would issue the requested preliminary rulings on 13 June 2003.

**II. The Panel's decision**

3. The Panel, after consulting the parties to the dispute in accordance with Article 12.1 of the DSU[ii], has decided that the third parties to this dispute shall be invited to participate in the preliminary stage of these panel proceedings[iii] as follows:

> (a) third parties shall receive the preliminary written submissions of the parties to the dispute[iv];
>
> (b) third parties shall have an opportunity to make preliminary written submissions to the Panel for purposes of commenting on the parties' preliminary written submissions; and
>
> (c) third parties shall have an opportunity to be heard by the Panel on the issues raised in the parties' preliminary written submissions.

4. Consistent with this decision, the Panel hereby amends paragraph 6 of its Working Procedures of 23 May 2003 such that it reads as follows:

> 6. The third parties shall be invited in writing to present their views during a session of the preliminary hearing of the Panel set aside for that purpose as well as during a session of the first substantive meeting of the Panel set aside for that purpose. The third parties may be present during the entirety of these sessions.

5. The Panel's decision to allow the third parties to participate in the preliminary stage of these proceedings is consistent with the flexibility the DSU allows to panels to establish their own procedures. More specifically, in establishing additional procedures governing third party participation in the preliminary stage of the proceedings, the Panel was guided by the following considerations.

6. Turning first to our decision that "[t]hird parties shall receive the preliminary written submissions of the parties to the dispute", we note that this was recommended by both parties. We also attach significance to the circumstance that, had Canada made its requests for preliminary rulings in its first written submission, there would have been no question that the third parties would have received all written submissions made pursuant to Canada's requests for preliminary rulings.[v] We do not consider that the mere fact that Canada in this case provided the Panel with prompt notice of its requests in order to permit the Panel to make an early ruling justifies denying the third parties access to the information contained in the parties' preliminary written submissions.

7. Regarding our decision that the "third parties shall have an opportunity to make written submissions to the Panel for purposes of commenting on the parties' preliminary written submissions [and] […] to be heard by the Panel on the issues raised in the parties' preliminary written submissions", we think it would be incongruous to give the third parties access to the parties' preliminary written submissions without also giving them an opportunity to address the Panel on the issues discussed therein. Since this Panel intends to issue a preliminary ruling before the due date of the parties' first written submissions, and since there would be no point in having the third parties address the preliminary issues after the Panel has ruled on those issues, the Panel necessarily needs to receive the third parties' arguments with respect to those issues before it issues its preliminary ruling.

8. In respect of Canada's request concerning the alleged failure by the United States to comply with Article 6.2 of the DSU, we note, moreover, that inviting the third parties to present their views to the Panel is warranted also in view of the serious consequences that would result if we were to accept Canada's request that we "not assume jurisdiction" in respect of the United States' claims under Article XVII of the GATT 1994, Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*. Regarding Canada's other request, *viz*., that we adopt certain procedures for the protection of proprietary or commercially sensitive information, we note that, in *Canada - Aircraft*, the Appellate Body had to deal with a similar request for a preliminary ruling relating to procedures governing business confidential information. The Appellate Body in that case ruled on the request at a preliminary stage of the relevant proceedings, after having given the third participants an opportunity to present their views.[vi]

9. Finally, in the specific circumstances of this case, we consider it appropriate to invite the third parties to address the Panel both in writing and orally, during a session of the preliminary hearing of the Panel set aside for that purpose. In this regard, we note that, in the interest of an expeditious disposition of the preliminary issues raised by Canada, it was necessary to set a tight deadline for the third parties to provide written submissions on the preliminary issues. As a consequence, the Panel found it appropriate, given this tight deadline, to give an additional opportunity to the third parties to develop or refine their arguments during a session of the preliminary hearing of the Panel set aside for that purpose."

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[i] On 23 May 2003, Canada also provided its preliminary written submissions to the third parties to this dispute.

[ii] On 23 May 2003, the United States and Canada provided written comments on the issue of third party participation in the preliminary stage of the Panel's proceedings.

[iii] For the purposes of these proceedings, the expression the "preliminary stage of these panel proceedings" refers to the proceedings up to the time the Panel issues its preliminary ruling on the requests made in Canada's preliminary written submission of 13 May 2003.
[iv] For the purposes of these proceedings, the expression "preliminary written submissions of the parties to the dispute" refers to the preliminary written submissions by Canada of 13 May 2003 and the preliminary written submissions to be filed by the United States on 27 and 28 May 2003.
[v] See Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* ("*US – FSC* (*Article 21.5 – EC*) "), WT/DS108/AB/RW, adopted 29 January 2002, para. 245
[vi] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft* ("*Canada – Aircraft* "), WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 126.

6.7 In accordance with the Panel's decision, the third parties were provided with copies of the parties' preliminary written submissions on 23, 27 and 28 May 2003, and were given the opportunity to address the Panel in writing by 4 June 2003 and orally on 6 June 2003 at a special session of the preliminary hearing.

(b) Establishment of procedures for the protection of proprietary or commercially sensitive information

6.8 On 13 June 2003, the Panel issued the following decision in response to Canada's request for the adoption of specific procedures for the protection of proprietary or commercially sensitive information:[100]

> "1**.** **Canada** asserts that, if the Panel finds that any of the allegations raised in the United States' panel request fall within the Panel's jurisdiction, and if the United States meets its prima facie burden with respect to these allegations, Canada may well be required, in its defence, to submit evidence to the Panel that contains proprietary or commercially sensitive information ("strictly confidential information").
>
> 2. Canada recalls, for example, that the United States makes certain allegations with respect to whether the Canadian Wheat Board ("CWB") makes purchases and sales solely in accordance with commercial considerations. In Canada's view, to the extent that these allegations are clarified and substantiated, Canada may well have to adduce evidence on the commercial practices of the CWB, including its sales and pricing policies as well as on specific commercial transactions. Such evidence will necessarily contain strictly confidential information. In this respect, 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. 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. Canada will be able to obtain, assess and provide such strictly confidential information to the Panel only where it can give the CWB and its customers adequate assurance of confidentiality of their commercially sensitive information.
>
> 3. Canada further argues that effective dispute settlement pursuant to the DSU is premised on an objective assessment by a dispute settlement panel of the matters in

[100] Footnotes included in the decision are gathered as endnotes to the quotation.

dispute, including an objective assessment of the facts of the case. According to Canada, the receipt and provision of factual information is a central feature of the process. Members must be able to disclose and receive the evidence necessary to defend or challenge the measure at issue. In order to do so, assurances that the confidentiality of the information will be maintained are critical.

4. In Canada's view, the provisions of the DSU governing the protection for confidential information offer insufficient procedural protection for strictly confidential information. Canada submits in this regard that the absence of clear and effective rules to protect such information can be detrimental to a Member's ability to advance or defend a challenge and thereby to the effectiveness of the dispute settlement system.

5. For these reasons, Canada proposes a particular procedure governing strictly confidential information, which is set out in the annex to its preliminary written submission on the matter at issue. Canada submits that this procedure achieves a reasonable balance between the competing interests involved. Canada therefore requests that the Panel adopt the procedures proposed by Canada as part of its working procedures, pursuant to Article 12.1 of the DSU.

6. The **United States** responds that it is surprised that this issue is the subject of a request for a preliminary ruling. There is no disagreement between the parties as to the adoption of special procedures, and this is in any event a matter of the panel's organization. Accordingly, there is nothing on which to "rule". To the extent the Panel considers that a ruling is necessary, the United States believes that the ruling should be that panels can, as they have in the past, at their discretion exercise their authority under Article 12 of the DSU to adopt additional procedures in consultation with the parties. The United States stands ready for such consultations and to assist the Panel in this matter.

7. The United States recalls that, according to Canada, procedures for the protection of strictly confidential information should be established because Canada may need to submit such information during the course of these proceedings. The United States notes that, to the extent that Canada will be submitting such information, the United States does not object to the Panel establishing procedures for its protection, as nothing in the DSU precludes panels from adopting additional procedures for protecting such information. The United States also recalls that, at the panel organizational meeting of 21 May 2003, the United States represented that it does not plan to rely on strictly confidential information in its presentations before the Panel.

8. The United States notes that this same situation arose in a very recent dispute between Canada and the United States. In that dispute, *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264), Canada and the United States were able to agree on procedures for the treatment of strictly confidential information. There was no need for a preliminary ruling in that dispute. The United States believes that these procedures, which both Canada and the United States are already familiar with and are currently utilizing, should simply be adopted by this Panel to protect strictly confidential information in this dispute. According to the United States, nothing in Canada's request for a preliminary ruling suggests the need for procedures different from those used by the above-referenced panel. By adopting these previously agreed-to procedures, the Panel and the parties

could also avoid wasting time and effort in considering and debating the uncertain implications of Canada's newly developed proposals.

9. For these reasons, the United States asks the Panel to adopt the procedures referenced above for the treatment of strictly confidential information in these panel proceedings.

10. The **Panel** notes that the request it is asked to rule on is very specific. Canada requests that the Panel "adopt the procedures [governing strictly confidential information] set out in Annex I [to Canada's preliminary written submission on this matter] as part of its working procedures".[vii]

11. We have carefully considered Canada's proposal, as well as the comments on that proposal by the United States and two third parties, Chile and the European Communities. On balance, we are not persuaded that it is appropriate to adopt the procedures proposed by Canada without modification. In particular, we are concerned about the fact that the proposed procedures do not take into account third party interests.[viii] Moreover, we are unable to agree with some of the proposed wording.

12. At the same time, we do not find it appropriate to accept the proposal by the United States that we simply adopt the procedures adopted by the Panel in *United States – Final Dumping Determination on Softwood Lumber from Canada*. We note, in this regard, the concern expressed by Canada that, in the circumstances of this case, the procedures adopted by the aforementioned Panel would not provide a sufficient level of protection of strictly confidential information.[ix] We also note that the procedures used in *United States – Final Dumping Determination on Softwood Lumber from Canada* are not very detailed in respect of issues like the designation and approval of persons with access to strictly confidential information, or the treatment and use of the information submitted as strictly confidential.

13. This said, we note that neither the United States nor any of the third parties that chose to comment on Canada's proposal objected to the Panel adopting additional procedures regarding the protection of strictly confidential information, as requested by Canada. We further note that previous panels have decided to adopt special procedures for the protection of strictly confidential information.[x] Since Canada has sufficiently explained and substantiated the need for such procedures in this case, and given the absence of any objections on the part of other participants to these proceedings, we see no reason not to put in place such procedures before the parties' first written submissions are due.[xi] However, as always when establishing additional procedures, we must comply with the requirement in Article 12.1 of the DSU to consult the parties.

14. In the light of the above, the Panel has prepared a proposal of its own (see attachment), which is based on Canada's proposal and which takes into account the views expressed on this issue by the United States and two third parties, Chile and the European Communities. Consistent with Article 12.1 of the DSU, we invite the parties to offer their comments on the Panel's proposal in writing. Since the parties have already had opportunities to address this matter, the Panel requests that the parties provide their views to the Panel no later than 5:30 p.m. on Tuesday, 17 June 2003. After considering the views of the parties, the Panel will decide on the additional procedures to be adopted and will transmit those to the parties and third parties."

[vii] Canada's preliminary written submission, para. 10; Canada's preliminary oral statement, para. 51.
[viii] We note that, under Canada's proposal, access to strictly confidential information is limited to the disputing parties. Canada's preliminary oral statement, para. 48.
[ix] Canada argues, *inter alia*, that in *United States – Final Dumping Determination on Softwood Lumber from Canada*, the Panel is examining sensitive commercial information that already exists and is in the possession of the United States. According to Canada, in this case, much of the strictly confidential information which Canada thinks it may need may have to be obtained from private parties not party to this dispute. Canada's preliminary oral statement, paras. 47.
[x] See, *e.g.*, Panel Reports, *Brazil – Export Financing Programme for Aircraft* ("*Brazil – Aircraft*"), WT/DS46/R, adopted 20 August 1999, as modified by the Appellate Body Report, WT/DS46/AB/R, DSR 1999:III, 1221; *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* ("*US – Wheat Gluten*"), WT/DS166/R, adopted 19 January 2001, as modified by the Appellate Body Report, WT/DS166/AB/R; Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU* ("*EC – Bananas III (US) (Article 22.6 – EC)*"), WT/DS27/ARB, 9 April 1999, DSR 1999:II, 725; exhibit US-3 (re: procedures concerning business confidential information adopted by the Panel on *United States – Final Dumping Determination on Softwood Lumber from Canada* (WT/DS264)).
[xi] Canada specifically requested that we "make a decision on this procedural issue before the Parties' first substantive submissions are due". Canada's preliminary written submission, para. 11.

6.9 On 25 June 2003, the Panel adopted Additional Working Procedures for the Protection of Strictly Confidential Information ("SCI"), after considering comments submitted by Canada and the United States.[101]

(c) Consistency of the United States' panel request with Article 6.2 of the DSU and timeliness of Canada's objection to the United States' panel request

6.10 On 25 June 2003, the Panel issued the following preliminary ruling in response to Canada's allegation that the United States' panel request of 6 March 2003 did not satisfy the requirements of Article 6.2 of the DSU:[102]

> "**1. Consistency of the United States' panel request with Article 6.2 of the DSU**
>
> (a) Introduction
>
> 1. Article 6.2 of the DSU provides in relevant part:
>
> > The request for the establishment of a panel shall … identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

[101] The parties later gave their consent to a waiver on some specific aspects of the Additional Working Procedures related to the treatment of third parties. It is worth noting that, at the request of Canada and with the agreement by the United States, the same SCI procedures were later adopted by the July Panel as well.
[102] Footnotes included in the preliminary ruling are gathered as endnotes to the quotation.

2. **Canada** asserts that certain claims set out in the United States' panel request[xii] fail to satisfy the requirements of Article 6.2 of the DSU. Canada considers that Article 6.2 establishes the basis for the Panel's authority to reject those elements of the United States' panel request that do not meet the requirements of Article 6.2. Specifically, Canada requests that the Panel not assume jurisdiction in respect of (i) the claim under Article XVII of the GATT 1994, (ii) the claim under Article III:4 of the GATT 1994 concerning rail car allocation and (iii) the claims under Article 2 of the *TRIMs Agreement* concerning rail car allocation and grain segregation.

3. The **United States** considers that Canada's arguments in support of its request for a preliminary ruling in respect of the consistency of the United States' panel request with Article 6.2 of the DSU are without merit. The United States submits, therefore, that the Panel should reject Canada's request for a favourable preliminary ruling. The United States also argues that, even if its panel request were defective, this would not automatically deprive the Panel of jurisdiction over the matter. Rather, the Panel must consider the particular circumstances of the case, including whether Canada has been prejudiced by the relevant defect. Also, the United States argues, Canada's procedural objections to the United States' panel request are in any event untimely. The United States notes in this regard that procedural objections must be raised at the earliest possible opportunity and not, as in this case, for the first time in a letter sent after the establishment of the panel.[xiii]

4. The **Panel** notes that Canada's request for a preliminary ruling regarding the consistency of the United States' panel request with Article 6.2 of the DSU concerns three distinct elements of the panel request. The Panel will examine these elements separately and in the order in which they were addressed in Canada's request for a preliminary ruling.

5. However, before addressing the three elements identified by Canada, it is well to recall the recent Appellate Body report on *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, wherein a summary is given of the Appellate Body jurisprudence on Article 6.2 of the DSU. The summary states in relevant part:[xiv]

> There are […] two distinct requirements [in Article 6.2], namely identification of *the specific measures at issue*, and the provision of a *brief summary of the legal basis of the complaint* (or the *claims*). Together, they comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU.[xv]
>
> The requirements of precision in the request for the establishment of a panel flow from the two essential purposes of the terms of reference. First, the terms of reference define the scope of the dispute. Secondly, the terms of reference, and the request for the establishment of a panel on which they are based, serve the *due process* objective of notifying the parties and third parties of the nature of a complainant's case.[xvi] When faced with an issue relating to the scope of its terms of reference, a panel must scrutinize carefully the request for establishment of a panel "to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU."[xvii]

> As we have said previously, compliance with the requirements of Article 6.2 must be demonstrated on the face of the request for the establishment of a panel. Defects in the request for the establishment of a panel cannot be "cured" in the subsequent submissions of the parties during the panel proceedings.[xviii] […] Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.[xix]

6. With this statement of Appellate Body jurisprudence in mind, we now turn to the first element of the panel request in respect of which Canada seeks a ruling.

(b) Claims under Article XVII of the GATT 1994

7. The United States' panel request sets out a claim under Article XVII of the GATT 1994 as follows:[xx]

> (1) The Government of Canada has established the Canadian Wheat Board ("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 the Government of 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 laws, regulations and actions of the Government of Canada and the CWB appear to be inconsistent with the obligations of the Government of Canada under Article XVII of the GATT 1994. In particular, the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat appear to be:
>
> - inconsistent with paragraph 1(a) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB, in its purchases or sales involving wheat exports, shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994; and
>
> - inconsistent with paragraph 1(b) of Article XVII of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB shall make such purchases or sales solely in accordance with commercial considerations and shall afford the enterprises of other WTO Members adequate opportunity, in accordance with customary business practice, to compete for such purchases or sales.

> The apparent inconsistency with Canada's obligations under Article XVII of the GATT 1994 includes the failure of the Government of Canada to ensure that the CWB makes such purchases or sales in accordance with the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII.

8. **Canada** considers that the United States' claim under Article XVII as set out in the panel request fails to satisfy the requirements of Article 6.2 of the DSU in at least three ways. *First*, Canada considers that the Article XVII claim does not "identify the specific measures at issue". According to Canada, the foundation for the United States' claim is in various "laws, regulations and actions", but these laws, regulations and actions are nowhere described. Canada submits that any number of laws, regulations and actions may be related to the export of wheat but have no relevance to the instant claim. Canada argues that there are dozens of "laws and regulations" that could be the subject of the United States panel request as worded. With respect to the term "actions", Canada notes that this term implies some specific conduct or instance, but the United States panel request identifies neither conduct nor a specific instance.

9. *Second*, Canada recalls that the United States alleges a violation of Article XVII:1(b) and that that article contains two distinct obligations. Canada asserts that the United States panel request is defective in that it does not make clear which laws, regulations or actions result in the violation of which obligation.

10. *Third*, Canada considers that the United States' panel request does not set out a brief summary of the legal case sufficient to present the problem clearly. According to Canada, there is nothing in the United States' Article XVII claim which establishes the legal basis of allegations by the United States that the CWB does not follow customary business practice or does not take into account commercial considerations in its conduct, or that Canada is in violation of its Article XVII obligations because it has failed to ensure such conduct.

11. The **United States** considers that Canada's *first* argument regarding identification of specific measures is without merit. The United States submits that Canada is incorrect to argue that the foundation for the United States' claim is in various "laws, regulations and actions" which are nowhere described. The United States argues that any person reading the phrase "laws, regulations and actions" would take note of the immediately preceding paragraph of the United States panel request, which identifies the specific measures at issue. These measures include the establishment of the CWB granting the CWB exclusive and special privileges, including the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of Canada and the CWB, the exclusive right to sell western Canadian wheat for export and domestic human consumption and government guarantees of the CWB's financial operations. The United States further argues that the subsequent paragraph also clarifies that the measures at issue include the failure by the Government of Canada to ensure that the CWB acts in conformity with the provisions of Article XVII. With regard to the term "actions", the United States notes that its panel request uses the term "actions" because the provisions of Article XVII:1 quoted in the request impose obligations with regard to purchases and sales involving wheat exports. The terms "laws and regulations" were not sufficient to cover this aspect of conduct addressed in the panel request.

12. In response to the *second* deficiency alleged by Canada, the United States argues that its panel request cites both obligations contained in Article XVII:1(b) because the Canadian measures are inconsistent with both of these obligations.

13. Regarding the *third* alleged deficiency, the United States recalls that Article 6.2 of the DSU requires "a brief summary of the legal *basis* of the complaint sufficient to present the problem clearly". The Unites States notes that a panel request may satisfy this requirement simply by listing the provisions of the WTO agreements with respect to which the measures at issue are allegedly inconsistent. The United States argues that there is no requirement in Article 6.2 that panel requests contain a summary of the legal arguments in support of a claim.

*(i) Identification of the Specific Measures at Issue*

14. The **Panel** begins its analysis with Canada's assertion that the United States' panel request fails to "identify the specific measures at issue". In determining whether the United States' identification of the measures at issue in this dispute is sufficient for the purposes of Article 6.2, we consider, as an initial matter, the provisions of Article 6.2 itself. At issue is the phrase "identify the specific measures at issue". The dictionary defines the term "identify" as "establish the identity of".[xxi] The term "specific" is defined as "clearly or explicitly defined; precise; exact"[xxii]. Thus, the ordinary meaning of the phrase "identify the specific measures at issue" is "to establish the identity of the precise measures at issue". Accordingly, based on the text of Article 6.2, it is clear to us that in the present case the United States' panel request must establish the identity of the precise measures at issue.

15. Having regard to the relevant context of Article 6.2 of the DSU, we note Article 4.4 of the DSU, which deals with the contents of requests for consultations. It states in relevant part that "any request for consultations shall give the reasons for the request, including identification of the measures at issue". Notably, Article 4.4 omits the term "specific" in referring to the "measures at issue". We believe that this difference in language is not inadvertent and must be given meaning. Indeed, in our view, this difference in language supports the view that requests for consultations need not be as specific and as detailed as requests for establishment of a panel under Article 6.2 of the DSU. As a corollary, in our view, this relevant context bears out the importance of the term "specific" as it appears in Article 6.2.

16. We note, in addition, that it is clear from the Appellate Body report on *US – Carbon Steel* that the purposes underlying the requirements of Article 6.2 are (i) to define the scope of a dispute and thus a panel's jurisdiction, and (ii) to notify and inform the responding party and the third parties of the nature of the complaining party's case.[xxiii] We believe that the emphasis deriving from the presence of the term "specific" in the phrase "identify the specific measures at issue" is consistent with these purposes. Indeed, without identification of the precise measures at issue, the jurisdiction of a panel could not be clearly established. Likewise, the due process objective of notifying and informing the responding party and the third parties could not be attained.

17. In considering whether a panel request can be said to have identified the specific, or precise, measures at issue, we find relevant the statement by the Appellate Body that whether the actual terms used in a panel request to identify the measures at issue are sufficiently precise to meet the requirements of Article 6.2 "depends […] upon whether they satisfy the purposes of [those] requirements".[xxiv] We also find

relevant the statement by the Appellate Body that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".

18. With these considerations in mind, we now turn to examine whether the United States' Article XVII claim set out in the panel request "identifies the specific measures at issue". We agree with Canada that the measures covered by the panel request are set out in the second paragraph of the Article XVII claim contained in the panel request. In that paragraph, the United States refers to "the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat". Canada objects to this description of the measures at issue on the grounds that it is overly broad.

19. We note that the United States' panel request refers to "laws" and "regulations", yet does not specify the relevant laws and regulations by name, date of adoption, etc. We consider that it is desirable for Members to be as specific as possible in identifying measures of general application, including by indicating their name and date of adoption. However, by its terms, Article 6.2 does not require that panel requests explicitly specify measures of general application – *i.e.*, laws and regulations – by name, date of adoption, etc.[xxv] Therefore, we consider that the fact that the United States has not specified the relevant laws or regulations by name, date of adoption, etc. does not necessarily render the panel request inconsistent with Article 6.2.

20. We consider that in the absence of an explicit identification of a measure of general application by name, as in the present case, sufficient information must be provided in the request for establishment of a panel itself that effectively identifies the precise measures at issue. Whether sufficient information is provided on the face of the panel request will depend, as noted above, on whether the information provided serves the purposes of Article 6.2, and in particular its due process objective, as well as the specific circumstances of each case, including the type of measure that is at issue.

21. In light of the foregoing and in the absence of an explicit reference to the laws and regulations at issue, we proceed now to examine whether, in the absence of an explicit reference to the laws and regulations at issue, the information provided by the United States in its panel request is sufficient to inform Canada, as the responding party in this case, of the specific measures at issue.

22. In this regard, we note firstly that the panel request uses the terms "laws" and "regulations" in the plural. This strongly suggests that more than one law and regulation are implicated by the United States' panel request. Precisely how many laws and regulations are covered by the panel request is not stated in explicit terms. This absence of clarity as to the number of laws and regulations at issue is the source of significant uncertainty.

23. Secondly, the precise content of the laws and regulations which are being challenged is unclear. In particular, in identifying the measures at issue, the United States, in the second paragraph of its Article XVII claim, refers to the "laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat". This phrase suggests that the laws and regulations implicated by the panel request are those "related to exports of wheat" by the Government of Canada and the CWB. On the other hand, the first paragraph of the United States' Article XVII claim

provides a description of certain aspects of the Canadian legal regime governing the activities of the CWB. In particular, it specifies certain exclusive and special privileges which have allegedly been granted by the Government of Canada to the CWB. We agree with the United States that reference should be made to that paragraph given that, as always when interpreting portions of a text, it is important to take account of the relevant context. However, when the first and second paragraph of the Article XVII claim are read together, confusion and uncertainty arise. *First*, it is unclear whether the measures at issue include only those laws and regulations, or those parts of laws and regulations, which govern the activities of the CWB mentioned in the first paragraph, or whether other laws and regulations, or other parts of laws and regulations, would also be included. *Second*, another source of uncertainty is that the second paragraph is concerned with measures "related to exports of wheat", while the first paragraph appears to refer also to activities which are not necessarily export-related, such as the purchase and sale of wheat by the CWB for domestic consumption, or "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". Accordingly, we do not agree with the United States that the first paragraph removes all uncertainty as to the precise content of the laws and regulations which are being challenged.

24. In our view, the United States' panel request, by creating considerable uncertainty as to the identity, number and content of the laws and regulations which it is challenging, does not provide adequate information on its face to identify the specific measures at issue. In particular, we consider that it does not fulfil the due process objective inherent in Article 6.2. Due process requires that the complaining party fully assume the burden of identifying the specific measures under challenge. In the present case, the panel request effectively shifts part of that burden onto Canada as the responding party, inasmuch as it leaves Canada little choice, if it wants to begin preparing its defence[xxvi], but to undertake legal research and exercise judgement in order to establish the precise identity of the laws and regulations implicated by the panel request.

25. The United States has offered no persuasive explanation for the lack of precision about the identity of the laws and regulations at issue. The United States argues that Canada knows what is at issue in this dispute from the discussions at the consultations preceding the panel request and, indeed, from 15 years of previous discussions between the two countries on this issue.[xxvii] Even assuming that this was correct, Article 6.2 requires that a panel request provide the necessary information, regardless of whether the same information, or additional information, is already available to the responding party through different channels, *e.g.*, previous discussions between the parties. Moreover, the fact that Canada would know or should know which laws and regulations the United States meant to be covered by the panel request would not relieve the United States of its obligation to establish, in its panel request, the identity of the laws and regulations at issue. In our view, it is a corollary of the due process objective inherent in Article 6.2 that a complaining party, as the party in control of the drafting of a panel request, should bear the risk of any lack of precision in the panel request.

26. With respect to the term "actions" as it appears in the phrase "the laws, regulations and actions of the Government of Canada and the CWB related to exports of wheat", Canada argues that these actions are nowhere identified and that it is unclear what the actions at issue are. The United States asserts that it used the term "actions" because Article XVII prescribes certain conduct with respect to purchases

and sales by state-trading enterprises.[xxviii] In our view, the two indents of the second paragraph of the Article XVII claim as well as the first and third paragraphs bear out this assertion, inasmuch as the only actions referred to in these paragraphs are actions relating to purchases and sales involving wheat exports. While we consider that the United States could certainly have included additional information regarding the actions to which it wished to refer in its panel request, we agree with the United States that the Article XVII claim sufficiently establishes the nature of the actions at issue.[xxix]

27. Canada notes that the CWB is involved in thousands of transactions with multiple parties.[xxx] We agree that the panel request as drafted potentially applies to a multitude of actions which are not specified in the request. However, we consider that, for this type of measure, the United States need not necessarily specify the relevant actions individually.[xxxi] Failure to identify the relevant actions individually inevitably creates some uncertainty for Canada as the responding party. Nevertheless, unlike in the case of the reference to "laws" and "regulations" in the United States' panel request, it is clear that the relevant part of the panel request that refers to actions of the CWB relates to purchases and sales of wheat for export. Therefore, we do not think that the uncertainty created by the lack of enumeration of each action significantly impairs Canada's ability to prepare its defence.

28. In conclusion, we note that, taken as a whole, the United States' panel request does not sufficiently establish the identity of the "laws" and "regulations" at issue in the Article XVII claim. In particular, the identification of the measures at issue in this claim is inadequate because it creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to "begin preparing its defence"[xxxii] in a meaningful way.[xxxiii] Accordingly, we conclude that the United States' panel request is inconsistent with Article 6.2 because the Article XVII claim set out therein does not "identify the specific measures at issue".[xxxiv]

*(ii) Legal Basis of the Complaint Sufficient to Present the Problem Clearly*

29. Canada makes the further assertion that the United States' panel request is inconsistent with Article 6.2 because it does not make clear which laws, regulations or actions result in the violation of which of the two obligations set forth in Article XVIII:1(b). The first observation to be made here is that the panel request identifies both obligations contained in Article XVIII:1(b). Thus, the panel request thus does more than merely list Article XVII. By referring to the Government of Canada and the CWB when identifying the two obligations, the panel request also links those obligations to the facts of the case. Thus, we believe that the request on its face provides adequate notice to Canada and the third parties that the United States may have wished to raise claims of violation under the two obligations set out in Article XVII:1(b). We do not agree with Canada's assertion that the panel request does not make it clear which laws, regulations or actions are inconsistent with which obligation. The panel request states that "the laws, regulations *and* actions of the Government of Canada and the CWB related to exports of wheat appear to be […] inconsistent with paragraph 1(b) of Article XVII of the GATT 1994 […]" (emphasis added). This wording suggests to us – and we consider that it should suggest to Canada and the third parties as well – that the United States may have wished to claim before us that each of the three categories of measures identified – laws, regulations and actions – is inconsistent with both obligations of Article XVII:1(b). This way of presenting the Article XVII claim does not, in our view, have as a

consequence that Canada does not know what case it has to answer and so cannot begin to prepare its defence, or that the third parties are uninformed as to the legal basis of the complaint and thus lack an opportunity effectively to respond to the United States' complaint. We do not consider, therefore, that this aspect of the presentation of the Article XVII claim compels the conclusion that the United States' panel request falls short of the requirements of Article 6.2.

30. Canada's third and final allegation is essentially that the United States' claim under Article XVII:1(b) does not establish why and how the CWB does not follow customary business practice or does not act in accordance with commercial considerations, or why or how Canada fails to ensure that the CWB acts consistently with Article XVII:1(b). The requirement imposed by Article 6.2 is that the panel request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". The panel request in this case explicitly identifies the relevant legal provisions by citing the relevant subparagraph of the article at issue and states the two distinct obligations contained in the relevant subparagraph. As previously noted, the panel request also links those obligations to the Government of Canada and the CWB. We find this summary of the legal basis of the United States' Article XVII:1(b) claim to be adequate, in the circumstances of this case, to present the problem clearly. It is apparent to us – and we consider that it should be apparent to Canada and the third parties as well – that the United States may have wished to claim before us that, as a result of the laws and regulations at issue or through its conduct in specific instances, the CWB fails to make purchases or sales involving wheat exports solely in accordance with commercial considerations and to afford the enterprises of other Members adequate opportunity to compete for such purchases or sales. Moreover, if the measures at issue had been sufficiently identified, the link established in the panel request between, on the one hand, the mentioned laws and regulations and, on the other hand, the alleged violation of Article XVII:1(b) would no doubt have had more meaning. Thus, while the summary provided of the legal basis for the United States' claim under Article XVII:1(b) is brief, we do not think that this results in Canada not knowing what case it has to answer and hence being unable to begin preparing its defence, or in the third parties being uninformed as to the legal basis of the complaint and thus lacking an opportunity effectively to respond to the United States' complaint. We therefore do not agree with Canada that the summary of the legal basis for the Article XVII:1(b) claim fails to comply with the requirements of Article 6.2.

31. It should also be recalled that, under Article 6.2 as interpreted by the Appellate Body, the United States' panel request must set out the United States' claims, but not the arguments supporting those claims.[xxxv] Accordingly, we do not consider that the United States' panel request is defective because it does not set out arguments supporting the conclusion that the measures at issue are inconsistent with the obligations contained in Article XVII:1(b).

32. Overall, we thus conclude that those portions of the United States' panel request which deal with the Article XVII claim fail to satisfy the requirements of Article 6.2 insofar as they do not "identify the specific measures at issue". As a result, we will refrain from addressing the merits of this claim.

(c) Claim in respect of rail car allocation

33. The United States' panel request sets out a claim in respect of rail car allocation as follows:[xxxvi]

> (2) With regard to the treatment of grain that is imported into Canada, Canadian measures discriminate against imported grain, including grain that is the product of the United States:
>
> […]
>
> - 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*. These measures concerning rail transportation accord to imported grain less favorable treatment than that accorded to like domestic grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

34. **Canada** considers that the United States claim in respect of rail car allocation as set out in the panel request fails to meet the requirements of Article 6.2 of the DSU. Specifically, Canada asserts that the panel request does not give any indication of the specific measures with which the United States takes issue. In Canada's view, it is insufficient to raise generally the issue of rail car allocation without providing details as to the measure at issue. Canada submits that it is not possible for Canada to prepare a defence against this claim without being alerted in some detail to the provisions that are alleged to violate WTO obligations.

35. The **United States** does not agree with Canada that the United States' claim regarding rail car allocation fails to identify the specific measures at issue. Moreover, in the United States' view, in view of Canada's conduct with regard to the consultations addressed to this issue, Canada's argument is disingenuous.[xxxvii] The United States asserts that, during consultations, it sought elaboration from Canada on a statement from the website of the Canadian Grain Commission ("CGC") indicating that Canada had adopted a measure providing differential treatment for Western Canadian and imported wheat. According to the United States, Canada stated that it had no knowledge of any Canadian rules on this issue. The United States notes that, in the absence of confirmation of the proper appellation or legal status of this rule, its panel request reasonably addressed this issue. The United States further points out that, six weeks after the consultations, and after it had filed its panel request, Canada confirmed that it does establish rules governing the allocation of rail cars used in the transport of grain. The United States notes that Canada referred to the allocation powers of the CGC under Section 87 of the Canada Grain Act and under Section 68 of the Regulations to the Canada Grain Act and also stated that, on a crop year basis, the CGC issues to the industry at large an order that sets out how the CGC will allocate producer cars for the various grains and destinations for the coming crop year.[xxxviii] The United States also notes that Canada's response does not explain whether these rules and orders are publicly available. The United States submits that, in the light of the aforementioned circumstances, there can be no legitimate confusion over the rail car allocation measures at issue. Canada must certainly be aware of the content of CGC grain car allocation orders.

36. The **Panel** understands Canada to allege that the claim set out in the United States' panel request concerning the issue of rail car allocation fails to "identify the specific measures at issue" in the sense of Article 6.2. The claim in question is set out in the panel request in the following terms: "[I]n allocating railcars used for the transport of grain, Canada provides a preference for domestic grain over imported grain". We note that this description of the measures at issue does not specify any particular laws, regulations or other legal instrument. However, as noted by us previously in relation to the Article XVII claim, the fact that a panel request does not specify by name, date of adoption, etc. the relevant law, regulation or other legal instrument to which a claim relates does not necessarily render the panel request inconsistent with Article 6.2, provided that the panel request contains sufficient information that effectively identifies the precise measures at issue. In this regard, as we have also noted above, whether a panel request provides sufficient information will depend on whether the information provided serves the purposes of Article 6.2 and, in particular, its due process objective. It will also depend upon the specific circumstances of each case, which include, *inter alia*, the type of measure that is at issue.

37. In examining whether, in the absence of an explicit reference to the particular laws, regulations or other instruments, the description provided in the United States' panel request of the measures at issue in the claim regarding rail car allocation is sufficient for the purposes of Article 6.2, we begin by considering whether that description adequately notifies and informs Canada of the measures under challenge so that Canada can begin preparing its defence in a meaningful way.

38. The first thing to be noted is that unlike in the case of the United States' claim under Article XVII, where it is in many ways unclear what measures "related to exports of wheat" are being challenged, the United States' claim here at issue identifies clearly what specific Canadian measures concerning rail transportation are at issue. The panel request makes it clear that the specific measures at issue are Canada's measures concerning the allocation of rail cars used for the transport of grain.

39. We observe, furthermore, that the claim in respect of rail car allocation does not explicitly indicate whether the measures at issue are laws, regulations and/or actions.[xxxix] However, we consider that the description in the panel request is broad enough to cover both measures of general application – *i.e.*, laws and regulations related to the allocation of rail cars – and individual (administrative) acts of rail car allocation.

40. Moreover, we note that, in its defence, the United States suggests that it has been unable to obtain confirmation from Canada of the proper name or legal status of the relevant measures and that, in the absence of such confirmation, its panel request reasonably identifies the measures at issue. In considering this argument, we recall that "compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances".[xl]

41. The facts and circumstances which we have been made aware of and which we consider relevant are as follows. At the conclusion of the consultations of 31 January 2003 in Ottawa, Canada agreed to provide in writing and at a subsequent time answers to a number of questions. In one of these questions, the United States sought "[i]nformation on any rules, regulations or administrative actions concerning

the [Canadian Grain Commission's] allocation of railcars".[xli] It appears that a written version of this and other questions was sent to Canada on 11 February 2003.[xlii] On 12 March 2003, *i.e.*, almost five and a half weeks after completion of the consultations and six days after the United States' panel request of 6 March 2003[xliii], Canada provided the United States with the requested answers, including to the question on rail car allocation.[xliv] At the preliminary hearing, the United States stated that, at the time it submitted its panel request to Canada and the WTO, it was not confident that Canada would still provide written answers.[xlv] Canada, on the other hand, stated that, during the consultations in Ottawa, Canada's head of delegation had given her word that the relevant questions would be answered and that, at the time the United States filed its panel request, Canada was in the midst of answering the United States' questions.[xlvi] The parties have made conflicting statements regarding whether the United States renewed its request for answers before filing its panel request.[xlvii]

42. In addition, it should be noted that in the answer Canada provided to the United States' question on rail car allocation, Canada refers, in a general way, to certain allocation orders issued by the Canadian Grain Commission ("CGC") on a crop year basis.[xlviii] At the preliminary hearing, Canada provided the further explanation that there are two types of CGC allocation orders, regulatory and shipment-specific ones, and that only the former are publicly available.[xlix]

43. To reiterate, it is our view that the panel request makes it clear that the specific measures at issue are Canada's measures concerning the allocation of rail cars used for the transport of grain. This said, we accept the United States' contention that the aforementioned facts and circumstances affected the degree of precision with which the United States did set out and could be expected to have set out the measures at issue in its claim in respect of rail car allocation. More specifically, we consider the fact that the panel request does not explicitly indicate whether the measures at issue are laws, regulations and/or actions to be justified in the light of the attendant circumstances[l] and the fact that the description in the panel request is broad enough to cover both measures of general application and individual acts of rail car allocation.

44. Therefore, having regard to the text of the panel request and the particular facts and circumstances of this case, we consider that the United States' claim regarding rail car allocation adequately notifies and informs Canada of the specific measures under challenge. We do not agree with Canada that it is impossible for it to prepare its defence because the panel request in this case is inadequate. The United States' panel request in our view provides sufficient information on the measures at issue to allow Canada to "begin preparing its defence"[li] in a meaningful way. The information on relevant rules governing rail car allocation transmitted by Canada to the United States days after the filing of the panel request confirms our view.

45. With respect to whether the claim regarding rail car allocation adequately notifies and informs the third parties of the specific measure under challenge, we note that one of the third parties to these panel proceedings, Japan, has suggested that, by failing to specify the relevant laws, regulations and actions, the United States did not fully take into account the object and purpose of Article 6.2, *i.e.*, to inform the third parties, in addition to Canada, of the substance of the complaint.[lii] Another third party, the European Communities, has stated that it is unclear from the description in the panel request whether the United States seeks to challenge legislation, or

administrative or commercial practices.[liii] As we have already stated, we think that the United States' panel request clearly identifies the Canadian rail transportation measures at issue. Also, it is clear from the panel request as worded that it covers both measures of general application and individual (administrative) acts of rail car allocation. Finally, we recall our finding that, due to the particular circumstances of this case, it was justifiable for the United States to set out the measures concerning rail car allocation by using the description provided in the United States' panel request. We consider, therefore, that it would be inconsistent for us to conclude that, notwithstanding these particular circumstances, the United States' panel request is inadequate because it does not sufficiently inform the third parties of the measures at issue. Were we to conclude otherwise, we would, in effect, require the United States to do more than it could be expected to do in the circumstances of this case.

46. In conclusion, we find that Canada has failed to establish that the United States' panel request, when examined on its face and in light of the attendant circumstances, is inconsistent with Article 6.2 because the rail car allocation claim set out therein does not "identify the specific measures at issue". Accordingly, we see no reason not to address the merits of this claim.[liv]

(d) Claims under Article 2 of the *TRIMs Agreement*

47. The United States' panel request sets out claims under Article 2 of the *TRIMs Agreement* as follows:[lv]

> (2) With regard to the treatment of grain that is imported into Canada, 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. These measures accord to imported grain less favorable treatment than that accorded to like Canadian grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.
>
> - 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. These measures concerning rail transportation accord to imported grain less favorable treatment than that accorded to like domestic grain, and thus appear to be inconsistent with the obligations of Canada under Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

48. **Canada** considers that the United States' claims under Article 2 of the *TRIMs Agreement* as set out in the panel request fail to meet the requirements of Article 6.2 of the DSU. Canada asserts that the United States appears to rely solely on the relationship between Article 2 of the *TRIMs Agreement* and Article III:4 of the GATT 1994. Canada notes that the United States does not provide any indication as to the nature of the investment measure that it alleges is WTO-inconsistent. For example, there is no reference to any measures of the type identified in the illustrative list under Article 2 of the *TRIMs Agreement*. Therefore, Canada submits that it can only speculate as to the specific investment measures at issue and the legal basis for the allegation of breach of Article 2 of the *TRIMs Agreement*.

49. The **United States** rejects Canada's arguments. According to the United States, Canada's arguments are not about the "specific measures at issue". Rather, Canada is essentially arguing that the panel request must lay out the legal arguments why the specifically identified measures are within the scope of the *TRIMs Agreement*. However, there is no such requirement in Article 6.2 of the DSU.

50. The **Panel** begins its analysis with Canada's assertion that the United States' claims under the *TRIMs Agreement* do not give any indication as to the nature of the specific "investment measures" at issue.[lvi] The requirement imposed by Article 6.2 of the DSU is that a panel request "identify the specific measures at issue". We do not consider that Article 6.2 requires the United States to establish, in its panel request, that the measures identified by it are trade-related investment measures within the meaning of the *TRIMs Agreement*, or that they fit within one of the investment measures enumerated in the illustrative list in the Annex to the *TRIMs Agreement*. That the measures identified by the United States in its panel request are properly to be considered trade-related investment measures within the meaning of the *TRIMs Agreement* is something to be established by the United States in its written submissions and oral statements, through evidence and argument. We therefore disagree with Canada that the United States' panel request is inconsistent with Article 6.2 because it fails to set out the "investment measures" which are alleged to be contrary to the *TRIMs Agreement*.

51. According to Article 6.2, the United States' panel request must "provide a summary of the legal basis sufficient to present the problem clearly". The claims under Article 2 of the *TRIMs Agreement* set out in the panel request cite the relevant article, which has two paragraphs, but in fact contains only one obligation. The claims also state that the measures at issue "accord to imported grain less favourable treatment than that accorded to like domestic grain", which makes it clear that the United States' claims are based on Article 2 of the *TRIMs Agreement* insofar as that article incorporates the obligations contained in Article III:4 of the GATT 1994. This is confirmed by the fact that the measures which are being challenged under Article 2 of the *TRIMs Agreement* are also challenged under Article III:4 of the GATT 1994. The claims also contain allegations regarding how the relevant measures concerning rail transportation, rail car allocation and grain segregation give rise to less favourable treatment for imported grain. In view of the foregoing, we think that the summary of the legal basis for the United States' claims under Article 2 of the *TRIMs Agreement* presents the problem raised with sufficient clarity, such that Canada is able to know the case it has to answer and begin preparing its defence. We also think that the summary provided is sufficient to inform the third parties about the legal basis of the complaint and to give them an opportunity effectively to respond to the United States' complaint. We therefore do not consider that the summary of the legal basis for the

claims under Article 2 of the *TRIMs Agreement* fails to comply with the requirements of Article 6.2.

52. Based on the above considerations, we reject Canada's assertion that the United States' panel request is inconsistent with Article 6.2 because the claims under Article 2 of the *TRIMs Agreement* do not identify the specific measures at issue and do not indicate the legal basis for the complaint. Accordingly, we see no reason not to address the merits of these claims.

### 2. Timeliness of Canada's objection to the United States' panel request

53. Having concluded above that the United States' panel request fails to satisfy the requirements of Article 6.2, we need to consider, as an additional matter, the United States' argument that Canada's request for a preliminary ruling on Article 6.2 should be denied on the basis that Canada failed to raise its procedural objection at the earliest opportunity.

54. The United States notes that at no time prior to the establishment of this Panel did Canada indicate that it considered the panel request deficient, and that it waited until after the panel was established to offer its objection. The United States considers that Canada's procedural objection to the panel request is untimely and should not stand in the way of consideration of the substantive issues in this dispute. The United States points out that the Appellate Body in *United States - Tax Treatment for "Foreign Sales Corporations"*[lvii] upheld the panel's rejection of a United States request for a preliminary ruling under very similar circumstances.

55. In addressing the United States' argument, we first recall the relevant facts as we understand them. Canada filed its requests for a preliminary ruling on 13 May 2003, the day after the Director-General of the WTO announced the Panel's composition to the parties. Prior to that, on 7 April 2003, Canada wrote to the United States, indicating, *inter alia*, that "[t]he U.S. request, dated 6 March 2003, does not meet the requirements of Article 6(2). […] We ask the U.S. to promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint".[lviii] Canada did not receive a reply from the United States.[lix] The DSB established this Panel on 31 March 2003. The parties disagree over whether Canada raised objections prior to the establishment of the Panel.[lx] Canada asserts that it raised similar objections in respect of the United States' request for consultations during consultations, which is denied by the United States.[lxi]

56. The United States considers that Canada should not have raised its objections for the first time in a letter sent after the establishment of the Panel. In considering this issue, we note that Canada informed the United States of its concerns about the consistency of the United States' panel request with Article 6.2 by letter. Before us, Canada described the letter it sent to the United States as "a good-faith effort to clarify the grounds" for the United States panel request. Canada noted in this regard that the Appellate Body in *Thailand - H-Beams* made the following statement:[lxii]

> In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party,

> even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". As we have previously stated, the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".[lxiii]

57. We find this statement relevant to the issue before us. The Appellate Body made this statement as part of its review of a finding by the panel that the request for the establishment of a panel submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU. The panel, in turn, made this finding in response to a request for a preliminary ruling by Thailand, the defending party in that case. Thailand submitted its request to the panel as part of its first written submission.[lxiv] There is no indication in the Panel report that Thailand made its concerns known to Poland before filing its first written submission.

58. The above-quoted statement by the Appellate Body notes that there is no legal bar to any Member requesting clarification of a panel request even before the filing of the first written submission. The statement does not suggest that, in *Thailand - H-Beams*, Thailand should have raised its concerns at the DSB meetings at which Poland's panel request was on the agenda. In the case at hand, Canada did avail itself of the possibility of seeking clarification of the claims raised in the United States' panel request. As suggested by the Appellate Body, Canada did so "before the filing of the first written submission", namely, soon after this Panel was established. Canada did not receive a reply from the United States.[lxv] Canada then filed its request for a preliminary ruling immediately upon receiving notice that this Panel had been duly constituted. Unlike Thailand in the *Thailand - H-Beams* case, Canada did not wait until the due date of its first submission before filing its request. In fact, Canada informed the Panel at the earliest possible opportunity. In addition, Canada requested the Panel to rule on its request at the earliest possible opportunity, namely, before the due date of the parties' first written submissions. In the light of this, we do not think that the conduct of Canada in this case justifies the conclusion that Canada has engaged in "litigation techniques" in an effort to prevent this Panel from considering the substantive issues of this dispute.

59. We note that Canada could arguably have sought clarification of the United States' panel request earlier than it did. We recall in this regard that Canada waited a month, from 6 March 2003 to 7 April 2003, before it informed the United States of its concerns.[lxvi] Had Canada informed the United States earlier, it might have convinced the United States to amend its panel request, which, in turn, might have obviated the need for Canada to request a preliminary ruling. We might then have been able to proceed to examine the substance of the United States' Article XVII claim. Obviously, this would have been a preferable outcome. At the same time, Canada might have failed to convince the United States to amend its panel request. If the United States had declined to amend its panel request, and if it had done so notwithstanding the merits of some of Canada's arguments, Canada could not have prevented the panel from being established.

60. While we thus consider it unfortunate that Canada did not act more promptly in raising its concerns with the United States, it would, in our view, be inappropriate, in the specific circumstances of this case, to focus solely on the conduct of Canada.

As we have said, Canada's letter of 7 April 2003 was not answered by the United States. If the United States had provided sufficient clarification of its panel request to Canada, Canada might, for instance, have refrained from requesting a preliminary ruling. Indeed, Canada stated so at the preliminary hearing.[lxvii] We do not see why it should be assumed by us that the United States would have amended its panel request if Canada had raised concerns at a relevant DSB meeting, but that Canada would necessarily have proceeded with its request for a preliminary ruling if the United States had provided clarification of its panel request.[lxviii] We find it incongruous, therefore, for the United States to suggest that Canada should have raised its concerns before the Panel was established (and thus assisted the United States in making use of its right to have a dispute resolved effectively and promptly) when the United States itself made no attempt at addressing Canada's concerns (and thus at assisting Canada in exercising its rights of defence effectively) once Canada did raise those concerns with the United States. In our view, both disputing parties are under an obligation to engage in dispute settlement procedures in good faith in an effort to resolve their dispute.

61. We do not think that the Appellate Body report on *US - FSC* assists the United States in this case. Contrary to what the United States suggests[lxix], the Appellate Body in that case did not address a preliminary objection by the United States based on Article 6.2 of the DSU, *i.e.*, an objection in respect of a panel request. Rather, the objection in question was based on Article 4.4 of the DSU and thus concerned the request for consultations in that case.[lxx] It was in this context that the Appellate Body stated that:[lxxi]

> […] a year passed between submission of the request for consultations by the European Communities and the first mention of this objection by the United States – despite the fact that the United States had numerous opportunities during that time to raise its objection. It seems to us that, by engaging in consultations on three separate occasions, and not even raising its objections in the two DSB meetings at which the request for establishment of a panel was on the agenda, the United States acted as if it had accepted the establishment of the Panel in this dispute, as well as the consultations preceding such establishment. In these circumstances, the United States cannot now, in our view, assert that the European Communities' claims under Article 3 of the *SCM Agreement* should have been dismissed and that the Panel's findings on these issues should be reversed.

62. As an initial matter, we note that, in the present case, it was not a year that passed between submission of the panel request and the first mention of Canada's objection to the request, but a month. Regarding the issue of whether Canada should have raised its objections in the DSB meetings in this case, it should be noted that later in the *US - FSC* report, the Appellate Body stated that "the […] principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB *or* the Panel, so that corrections, if needed, can be made to resolve disputes"[lxxii]. We think that if the Appellate Body was of the view that raising objections at relevant DSB meetings is always necessary in cases where such objections could be made at such meetings, the Appellate Body would have used different wording. We note that, in a subsequent case, *Mexico – Anti-Dumping Investigation of High Fructose Corn*

*Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, the Appellate Body stated that:[lxxiii]

> In examining Mexico's conduct, we note that Mexico did not bring up the issues it now relies upon at the DSB meeting on 23 October 2000. Rather, Mexico in effect consented to refer the matter to the Article 21.5 Panel at the first DSB meeting where the matter was raised. We further note that Mexico did not refer to these issues, *at all*, in either of its written submissions to the Panel. Nor did Mexico ask the Panel to make any preliminary ruling on these issues. The alleged deficiencies in the authority of the Panel were mentioned by Mexico *only* at the meeting with the Panel on 20-21 February 2000.

63. The Appellate Body then went on to find that the panel in that case "could reasonably have concluded that Mexico's 'objections' were not raised in a timely manner".[lxxiv] However, there is no indication that the Appellate Body based this finding primarily, or even solely, on Mexico's failure to raise its "objections" at the DSB meeting where the matter was raised. We believe that, in the circumstances of the present case, we cannot reasonably conclude that solely because Canada did not raise its objections at the relevant DSB meetings, Canada's request for a preliminary ruling should be denied.

64. For these reasons, we are unable to accept the United States' argument that we decline Canada's request for a preliminary ruling on the grounds that it was not raised in a timely manner. Accordingly, we grant Canada's request for a preliminary ruling and, consistent with our ruling, will refrain from considering the substance of the United States' claim under Article XVII.

65. In reaching this conclusion, we wish to emphasise once again that disputing parties are required, under the provisions of Article 3.10 of the DSU, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute." Accordingly, should the United States wish to see a panel address the substance of its Article XVII claim promptly, we believe that the procedures of the DSU are sufficiently flexible, if adhered to in good faith by both disputing parties, to allow the United States to do so. Thus, we consider that, in working with each other towards a resolution of this dispute, it may be possible for the parties to explore, and avail themselves of, the flexibility offered by the DSU. In our view, the options open to the parties include the possibility of the United States filing a new panel request and the parties agreeing to have a panel established at the first DSB meeting at which the panel request is on the agenda.[lxxv] The Panel, for its part, stands ready to assist the parties in their efforts to reach a fair, prompt and effective resolution of this dispute."

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[xii] See document WT/DS276/6.

[xiii] On 7 April 2003, Canada sent a letter to the United States in which it stated its view that the United States' panel request did not meet the requirements of Article 6.2 of the DSU and requested that the United States promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint. Canada's preliminary written submission, para. 30.

[xiv] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paras. 125-127.
[xv] (original footnote) Appellate Body Report, *Guatemala – Cement I*, paras. 69-76.
[xvi] (original footnote) Appellate Body Report, *Brazil – Desiccated Coconut*, at 186. See also, Appellate Body Report, *EC – Bananas III*, para. 142.
[xvii] (original footnote) Appellate Body Report, *EC – Bananas III*, para. 142.
[xviii] (original footnote) Ibid., para. 143.
[xix] (original footnote) Appellate Body Report, *Korea – Dairy*, paras. 124-127.
[xx] See document WT/DS276/6.
[xxi] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1304.
[xxii] Ibid., Vol. 2, p. 2972.
[xxiii] Appellate Body Report, *US – Carbon Steel*, *supra*, para. 126.
[xxiv] Appellate Body Report, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment* ("*EC – Computer Equipment*"), WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851, para. 69
[xxv] At the preliminary hearing, the parties expressed the same view. Canada's reply to preliminary Panel question no. 6; United States' reply to preliminary Panel question no. 3.
[xxvi] Appellate Body Report, Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/AB/R, adopted 5 April 2001, para. 88.
[xxvii] United States preliminary written submission, para. 28; United States reply to preliminary Panel question no. 6.
[xxviii] United States' preliminary written submission, note 15.
[xxix] It should be noted that the term "actions" could, in principle, be read to refer to actions by the Government of Canada as well as by the CWB. It is thus somewhat unclear whether the term "actions" was meant to refer only to CWB actions, just like, presumably, the term "laws" was intended to refer only to the Government of Canada, or whether the United States meant to indicate that the actions of the CWB were attributable also to the Government of Canada. Whereas this lack of clarity is regrettable, we note that, in either case, the nature of the actions at issue is the same.
[xxx] Canada's preliminary oral statement, para. 11.
[xxxi] We note that, in *EC – Computer Equipment*, the Appellate Body found that a general reference to the "application of tariffs on LAN equipment and PCs with multimedia capability by customs authorities in the European Communities" constituted a "proper" identification of the "specific measures at issue" within the meaning of Article 6.2, even though these measures were not normative rules. Appellate Body Report, *EC – Computer Equipment*, *supra*, para. 65.
[xxxii] Appellate Body Report, *Thailand – H-Beams*, *supra*, para. 88.
[xxxiii] In view of our finding that that the United States' panel request fails to give adequate notice to Canada of the measures at issue, we do not need to examine, in addition, whether the panel request gives adequate notice to the third parties.
[xxxiv] We believe that our finding is sufficient to resolve the issue before us and we do not, therefore, find it necessary to "limit" the United States' Article XVII claim to certain measures identified by Canada. Canada's preliminary oral statement, para. 24.
[xxxv] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*EC – Bananas III*"), WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 141.
[xxxvi] See document WT/DS276/6 (emphasis added).
[xxxvii] The United States notes in this regard that it finds it difficult to reconcile Canada's conduct of the consultations with its obligations under Article 4.3 of the DSU.
[xxxviii] The United States refers to exhibit US-2, para. 15.
[xxxix] See also EC preliminary written third party submission, para. 18
[xl] Appellate Body Report, *US – Carbon Steel*, *supra*, para. 127.

[xli] The United States sent similar questions to Canada in advance of the consultations in Ottawa. Exhibit US-1, question nos. 35 and 48. It is not clear whether the final version of these questions was agreed during the Ottawa consultations.
[xlii] United States' reply to preliminary Panel question no. 4.
[xliii] The panel request was circulated to WTO Members on 7 March 2003. See document WT/DS276/6. We further note that the United States' request for consultations is dated 19 December 2002 and that, pursuant to Article 4.7 of the DSU, if the consultations fail to settle a dispute, the complaining party may request a panel within 60 days after the date of receipt of the request for consultations.
[xliv] Exhibit US-2. Canada provided relatively short answers to all fifteen questions. We also note that the United States did not consider Canada's answer to the question on rail car allocation fully satisfactory. United States' preliminary written submission, note 20.
[xlv] United States' reply to preliminary Panel question no. 10.
[xlvi] Canada's reply to preliminary Panel question nos. 10 and 4. Canada indicated that the "delay" was due, *inter alia*, to the need for interdepartmental consultations and vetting of replies by lawyers. Canada's reply to preliminary Panel question no. 4.
[xlvii] United States' reply to preliminary Panel question no. 4; Canada's reply to preliminary Panel question no. 10.
[xlviii] Exhibit US-2, para. 15.
[xlix] Canada's reply to preliminary Panel question no. 5.
[l] See also Appellate Body Report, *Thailand – H-Beams*, *supra*, paras. 91-92.
[li] Appellate Body Report, *Thailand – H-Beams*, *supra*, para. 88.
[lii] Japan's preliminary oral third party statement, para. 9.
[liii] European Communities' written third party submission, para. 18. We note that, in its third party submission, Chile did not suggest that the United States' panel request insufficiently informs the third parties of the measure at issue in the United States' claim concerning rail car allocation.
[liv] We believe that our finding is sufficient to resolve the issue before us and we do not, therefore, find it necessary to "limit" the United States' claim regarding the rail car allocation to certain measures identified by Canada. Canada's preliminary oral statement, para. 24.
[lv] See document WT/DS276/6.
[lvi] Canada's preliminary oral statement, para. 25.
[lvii] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("*US – FSC*"), WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619.
[lviii] Canada's preliminary written submission, para. 30.
[lix] Ibid.
[lx] Canada's comments at the preliminary hearing on para. 9 of the United States' preliminary oral statement; United States' preliminary written submission, para. 24.
[lxi] Since there appears to be no formal record of the consultations, we are unable to determine whether or not Canada raised an objection during the consultations in respect of the request for consultations, and whether the alleged objection should have assisted the United States in drafting its panel request in a way which meets the requirements of Article 6.2.
[lxii] Appellate Body Report, *Thailand - H-Beams*, para. 97.
[lxiii] (original footnote) Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.
[lxiv] Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ("*Thailand – H-Beams*"), WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, para. 7.1.
[lxv] The United States indicated in this regard that any clarification of its panel request could not have cured possible defects of its panel request, and that the United States' panel request was sufficient on its face. United States' reply to preliminary Panel question no. 3.
[lxvi] Canada indicated to us that it used the time from 7 to 31March 2003 to hold interdepartmental consultations on the panel request which it considered unclear. Canada indicated that these consultations involved several ministries, including those of agriculture, finance, transport, foreign affairs and trade, as well as the Canada Wheat Board and the

Canadian Grain Council. Canada's comments on para. 9 of the United States' preliminary oral statement.

[lxvii] Canada's comments on para. 9 of the United States preliminary oral statement.

[lxviii] It is true that the United States could not have "cured" any inconsistencies with Article 6.2 of its panel request subsequent to the establishment of this Panel and hence could not have prevented Canada from successfully challenging the panel request. However, this does not provide a justification in itself for the United States not working with Canada to clarify its request. Indeed, if that were the case, there would have been little point in the Appellate Body pointing out, in *Thailand - H-Beams*, that responding parties may seek clarification of panel requests even before the filing of their first written submissions to panels.

[lxix] United States' preliminary oral statement, para. 9.

[lxx] Article 4.4 of the DSU reads as follows:

> All such requests for consultations shall be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations. Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

[lxxi] Appellate Body Report, *US – FSC*, *supra*, para. 165.

[lxxii] Appellate Body Report, *US - FSC*, *supra*, para. 166 (emphasis added).

[lxxiii] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States* ("*Mexico – Corn Syrup (Article 21.5 – US)*"), WT/DS132/AB/RW, adopted 21 November 2001, para. 45.

[lxxiv] Appellate Body Report, *Mexico - Corn Syrup (Article 21.5 - US)*, para. 50.

[lxxv] Without taking a position on this issue, we note that the provisions of Article 9.3 of the DSU may also be of interest to the parties.

6.11 In response to the Panel's preliminary ruling, the United States requested and was granted a suspension of the work of the Panel until 21 July 2003.[103] During the period of suspension of the Panel's work, on 30 June 2003, the United States filed a new request for the establishment of a panel.[104] As previously noted, on 11 July 2003, the DSB established a second panel, the July Panel, pursuant to the United States' request of 30 June 2003.

## C. MEASURE RELATING TO EXPORTS OF WHEAT

### 1. Measure at issue

6.12 The United States' complaint in respect of Canadian wheat exports is directed against what the United States refers to as the "CWB Export Regime". The abbreviation "CWB" stands for "Canadian Wheat Board". The CWB Export Regime as defined by the United States comprises three elements. They are:

(i) the legal framework of the CWB;

(ii) Canada's provision to the CWB of exclusive and special privileges; and

(iii) the actions of Canada and the CWB with respect to the CWB's purchases and sales involving wheat exports.[105]

6.13 These three elements taken collectively constitute the measure under challenge.[106]

[103] WT/DS276/10.
[104] WT/DS276/9.
[105] Ibid., para. 15.

6.14 The *first element* - the "legal framework of the CWB"[107] - comprises the governing statute of the CWB, the *Canadian Wheat Board Act*[108] (hereafter the "*CWB Act*").[109]

6.15 The *second element* -- Canada's provision to the CWB of exclusive and special privileges - encompasses a number of privileges provided to the CWB by the Government of Canada.[110] The privileges at issue are:[111]

(i) the exclusive right to purchase and sell Western Canadian wheat for export and domestic human consumption;

(ii) the right to set, subject to government approval, the initial price[112] payable for Western Canadian wheat destined for export or domestic human consumption;

(iii) the government guarantee of the initial payment to producers of Western Canadian wheat;

(iv) the government guarantee of the CWB's borrowing; and

(v) government guarantees of certain CWB credit sales to foreign buyers.

6.16 The *third element* may be divided into two sub-elements. The first of these - "the actions of Canada" with respect to wheat exports by the CWB – comprises: (1) Canada's alleged failure to exercise its authority to oversee the CWB, (2) Canada's approval of the CWB's borrowing plan and Canada's guarantee of the CWB's borrowing and credit sales, and (3) Canada's approval and guarantee of the initial payment to producers of Western Canadian wheat.[113] The other sub-element - "the actions of the CWB" with respect to wheat exports - concerns CWB purchases and sales of wheat destined for export on allegedly discriminatory or non-commercial terms.[114]

6.17 Since Canada did not express any concerns about the United States' use of the term "CWB Export Regime", the Panel will hereafter use the term in the sense ascribed to it by the United States.

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[106] Ibid.

[107] The United States appears to treat the term "legal structure of the CWB" as interchangeable with the term "legal framework of the CWB". United States' replies to Panel question Nos. 2(b) and (e) and United States' second written submission, para. 3.

[108] Exhibit US-2.

[109] United States' first written submission, paras. 2, 17 and 65-66.

[110] Canada does not deny the existence of these privileges. Canada's first oral statement, paras. 10 and 81; Canada's first written submission, paras. 4 and 126.

[111] United States' first written submission, paras. 21-36.

[112] For an explanation of the concept of "initial price", *see, e.g.*, Canada's notification pursuant to Article XVII:4(a) of the GATT 1994 concerning state trading enterprises, where it is stated that "[a]ll funds received by the CWB from the sale of grains are pooled. Separate pools are maintained each year fore 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 the 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. [...] 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." G/STR/N/4/CAN, p. 12 (Exhibit US-1).

[113] United States' reply to Panel question No. 1(c).

[114] United States' reply to Panel question No. 1(d).

## 2. Findings requested by the parties and main supporting arguments

6.18 The **United States** requests the Panel to find that the CWB Export Regime is inconsistent with Canada's obligations under Article XVII:1 of the GATT 1994.

6.19 Pursuant to Article XVII:1(a), each Member undertakes that if it establishes or maintains a state trading enterprise (hereafter "STE"), that STE must, 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 the GATT 1994. Article XVII:1(b) goes on to state that this obligation requires the STE concerned: (1) to make purchases or sales involving either imports or exports "solely in accordance with commercial considerations" and (2) to "afford the enterprises of other [Members] adequate opportunity to compete for participation in such purchases or sales".[115]

6.20 In the United States' view, the very structure of the CWB Export Regime leads the CWB to act inconsistently with all of the standards set forth in Article XVII:1(a) and (b).[116] In other words, it leads the CWB to make export sales that: (i) violate the principles of non-discriminatory treatment found in the GATT 1994, (ii) are not in accordance with commercial considerations, and (iii) deny the enterprises of other Members an adequate opportunity to compete.

6.21 More specifically, the United States argues that the CWB's unique legal structure and mandate, its exercise of its exclusive or special privileges, its incentives to act in a non-commercial and discriminatory manner, and the absence of any government supervision or other countervailing incentives necessarily result in the CWB making export sales that are not in accordance with the Article XVII:1 standards and, hence, in Canada not meeting its obligations under Article XVII:1.

6.22 **Canada** requests the Panel to find that the CWB Export Regime is not inconsistent with Article XVII:1 of the GATT 1994. More particularly, Canada requests the Panel to find that the CWB, in its sales involving wheat exports has acted in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994 and, therefore, that Canada is not in breach of Article XVII:1(a) of the GATT 1994.

6.23 Canada considers that the United States' assertions in respect of the CWB's alleged non-compliance with the Article XVII:1 standards and Canada's alleged violation of Article XVII:1 are founded neither in law nor in fact. Canada submits that the United States' assertions are based on an incorrect interpretation of the obligations contained in Article XVII:1. Moreover, Canada asserts that the United States has in any event failed to establish that the CWB does not act in accordance with Article XVII:1, or that it cannot so act because of its "legal structure" or "incentives". In Canada's view, the United States' claim under Article XVII:1 should, therefore, be dismissed.

## 3. Substance of the United States' claim

6.24 Before assessing the merits of the parties' requests for findings, it is necessary briefly to address the substance and nature of the United States' claim in respect of the CWB Export Regime. In an effort to obtain further clarification in this regard, the Panel has put a series of questions to the United States.[117] Based on the replies offered by the United States and the United States' submissions as a whole, the Panel understands the United States' claim and main argument to be essentially the following:

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[115] For the full text of Article XVII:1, *see* para. 6.30 below.
[116] United States' second oral statement, para. 6; United States' second written submission, paras. 5-7.
[117] Panel question Nos. 1(a)-(d) and 2(a)-(e).

> Canada has breached its obligations under Article XVII:1 because the CWB Export Regime, including:
>
> (i) the CWB's legal structure and mandate,
>
> (ii) the privileges enjoyed by the CWB, and the incentives created by these privileges as well as the CWB's legal structure and mandate, and
>
> (iii) the lack of any supervision or controls by the Government of Canada, or other countervailing incentives,
>
> necessarily results in CWB export sales which are not in accordance with the standards set forth in Article XVII:1(a) and (b) (hereafter "non-conforming" CWB export sales).[118]

6.25 The Panel understands the United States to argue that it is the combination of the various elements of the CWB Export Regime, not any one element taken in isolation, that necessarily results in the CWB making non-conforming export sales.[119] Indeed, the United States has observed that if one of the elements making up the CWB Export Regime were to be modified, the GATT-consistency of the CWB Export Regime would need to be "re-evaluated".[120]

6.26 The view that the United States in this case only challenges the CWB Export Regime "as a whole"[121] is borne out by the fact that the United States does not appear to challenge the constituent elements of the CWB Export Regime separately. By way of example, in the Panel's understanding, the United States does not claim that the CWB's governing statute as such is inconsistent with Article XVII:1.[122] Similarly, the United States does not challenge the fact that the CWB has been granted the privileges identified above.[123] Moreover, it is clear to the Panel that the United States

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[118] It should be recalled here that the United States has identified "the actions […] of the CWB with respect to the CWB's purchases and sales involving wheat exports" as an element of the CWB Export Regime. United States' first written submission, para. 15. This language, which also appears in the United States' request for the establishment of the July Panel (WT/DS276/9), might suggest that the United States' claim in respect of the CWB Export Regime concerns not only CWB sales of wheat, but also CWB purchases of wheat. However, whereas the United States' submissions to the Panel consistently indicate a concern with whether the CWB makes sales of wheat on non-discriminatory and commercial terms and also put forward specific arguments regarding why and how certain aspects of the CWB Export Regime result in the CWB making non-conforming export sales of wheat, the United States' submissions do not do the same with respect to CWB purchases of wheat. In fact, the United States did not present and develop specific arguments which could support the conclusion that certain aspects of the CWB Export Regime result in CWB wheat purchases which do not meet the Article XVII:1 standards. In these circumstances, it would be neither possible nor appropriate for the Panel to make specific findings on whether CWB actions with respect to wheat purchases are in accordance with the Article XVII:1 standards.

As a separate matter, we note that there is evidence on the record which suggests that the CWB does not actually "purchase" wheat, but is simply transferred ownership of a Western Canadian producer's wheat so that it, the CWB, can sell the wheat on the producer's behalf. Therefore, we will hereafter put the word "purchases" in quotation marks whenever we use that word in connection with the CWB. Exhibit US-24, p. 14.

[119] United States' second oral statement, para. 6; United States' first oral statement, para. 20; United States' reply to Panel question No. 2(e).

[120] United States' reply to Panel question No. 2(e).

[121] United States' replies to Panel question Nos. 1(b) and 2(c).

[122] United States' replies to Panel question Nos. 1(a) and 26.

[123] The United States has stated in this regard that "Article XVII does not forbid a WTO Member from providing an STE with such extensive privileges [as those enjoyed by the CWB], even if such privileges could distort markets to the detriment of other WTO Members" (United States' first written submission, para. 3). *See also* United States' first written submission, para. 50; United States' first oral statement, para. 3; United States' reply to Panel question No. 1(b).

does not allege that a lack of government supervision of the CWB and its operations would in itself give rise to an inconsistency with Article XVII:1.[124]

6.27 The United States identified "the actions of the CWB" with respect to export sales as an element of the CWB Export Regime. The term "the actions of the CWB" is apparently not intended to refer to particular CWB export sale transactions.[125] Rather, it seems that this term is intended to refer to certain types of CWB actions - non-commercial and discriminatory CWB export sales[126] - that are alleged to result from other elements of the CWB Export Regime.[127] Thus, the United States in this case is not complaining about specific CWB export sale transactions, but the (alleged) fact that the CWB Export Regime necessarily results in non-conforming "actions of the CWB" with respect to export sales.

6.28 It is clear from the foregoing that the United States is making a *per se* challenge to the CWB Export Regime viewed in its entirety. Canada did not argue that the Panel should not assess the WTO-consistency of the CWB Export Regime as defined by the United States. Also, none of the third parties raised concerns in this regard. For the purposes of its analysis, the Panel will assume that it may entertain the United States' *per se* challenge to the CWB Export Regime.

### 4. Article XVII:1 of the GATT 1994

6.29 Having set out its understanding of the United States' claim in respect of the CWB Export Regime, the Panel now turns to assess the merits of that claim. As an initial matter, the Panel needs to address the parties' disagreement over the meaning to be given to the provisions of Article XVII:1. In a subsequent step, the Panel will examine whether the CWB Export Regime necessarily results in non-conforming CWB export sales.

6.30 Article XVII:1 of the GATT 1994 and its *ad* Note provide in relevant part:

> **"Article XVII**
>
> State Trading Enterprises
>
> 1.* (a) Each contracting party 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 subparagraph (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 contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

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[124] United States' replies to Panel question Nos. 2(a), 2(b), 2(c) and 2(e); United States' first oral statement, para. 19.

[125] United States' first oral statement, para. 22. The United States did not supply information on particular CWB export sale transactions.

[126] United States' reply to Panel question No. 1(d).

[127] United States' reply to Panel question No. 1(b).

> (c) No contracting party shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.
>
> ***Ad* Article XVII**
>
> Paragraph 1
>
> […]
>
> 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."

6.31 The United States bases its claim in respect of the CWB Export Regime on the provisions of subparagraphs (a) and (b) of Article XVII:1. While there is some disagreement between the parties regarding the interpretation of subparagraph (a), the main and fundamental disagreement is over the meaning to be given to subparagraph (b).

6.32 The Panel begins its analysis with subparagraph (a).

(a) Article XVII:1(a) of the GATT 1994

6.33 The parties' arguments regarding the interpretation of subparagraph (a) have centred on two issues: (i) the obligation imposed on Members establishing or maintaining an STE[128] and (ii) the meaning of the phrase "the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders".

*(i) Obligation imposed on Members in respect of their state trading enterprises*

6.34 Beginning with the first issue, the **United States** argues in its first written submission that it is clear from the verb "undertake" that Article XVII:1 imposes an obligation on Members establishing or maintaining an STE. The obligation imposed on Members is the obligation to ensure that the STE in its purchases or sales complies with certain specified standards. According to the United States, this view is confirmed by the provisions of Article XVII:1(c), which provides a lesser obligation for enterprises which are not STEs, but which are nonetheless affected by government regulations. With respect to such enterprises, a Member merely has a negative obligation not to require such enterprises to engage in trade-distorting conduct. In contrast, Article XVII:1(a) imposes a higher level of obligation for STEs in that with respect to an STE, a Member has an obligation to ensure that that STE does not engage in trade-distorting conduct.

6.35 In its first oral statement, the United States clarifies that its use of phrases like "Canada must *ensure* that the CWB meets the Article XVII standards" is simply a shorthand for the obligations of Members under Article XVII:1(a). Moreover, use of the word "ensure" is entirely appropriate in view of the provisions of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade*

[128] Like the parties, the Panel uses the term "STE" or "state trading enterprise" to refer to both types of enterprises covered by Article XVII:1, *i.e.*, State enterprises or enterprises that have formally or in effect been granted exclusive or special privileges.

*Organization* (hereafter the "*WTO Agreement*").[129] Finally, the United States notes that its first written submission does not argue that Article XVII:1(a) contains "obligations of process"[130].

6.36 Relying on the term "undertake", **Canada** argues that, as a matter of international law, Article XVII:1(a) commits a Member with respect of the conduct of its STEs. In other words, under Article XVII:1(a), a Member is responsible under international law for the conduct of an STE. Where a complaining party does not demonstrate that the conduct of another Member's STE does not meet the standard in Article XVII:1(a) and (b), that Member must be assumed to have honoured its undertaking.

6.37 Canada notes that Article XVII:1 does not prescribe a particular route or mechanism by which a Member must carry out its undertaking. On its face, Article XVII:1 requires a specific outcome, or result: that STEs act in a particular manner. Nothing in the wording of Article XVII:1 indicates that the drafters had in mind specific mechanisms or actions for a Member to "ensure" that its STEs meet the standard set out in Article XVII:1(a) and (b). The word "ensure" is not used in Article XVII:1, nor does the word "ensure" correspond to one of the dictionary meanings of the word "undertake", a word which is used in Article XVII:1. Rather, the choice of the means by which a Member maintaining or establishing an STE achieves the desired outcome, or result, is left to that Member. Therefore, on a proper interpretation, Article XVII:1(a) sets out an obligation of "results" and not of "means".

6.38 In Canada's view, Article XVII:1(c) does not indicate that Article XVII encapsulates a two-tiered structure of obligations. More particularly, it does not follow from the provisions of Article XVII:1(c) that, with respect to STEs, Members must put in place specific mechanisms, or take specific actions, to ensure that STEs act in accordance with Article XVII:1(a) and (b).

6.39 The **Panel** agrees with the parties that subparagraph (a) of Article XVII:1 imposes an obligation on Members establishing or maintaining STEs. Article XVII:1(a) uses the verb "undertake", which, as noted by the United States[131], is defined as "[t]ake on (an obligation, duty, task, etc.)", "commit oneself to perform", "[g]ive a formal promise or pledge", "guarantee, affirm".[132] In Article XVII:1(a), Members therefore formally guarantee, pledge, or promise that their STEs shall act in the prescribed manner. That subparagraph (a) should be understood as imposing a legal obligation on Members using STEs is also supported by another consideration. If subparagraph (a) did not impose a legal obligation on Members, Members could create and use STEs to evade disciplines imposed by the GATT 1994 on governmental measures affecting imports or exports by private traders, since Members could not be brought to task in the event that their STEs did not abide by the disciplines imposed by Article XVII:1. The Panel considers it highly unlikely that the drafters of subparagraph (a) intended to leave the door open for Members to circumvent their obligations under the GATT 1994 in this way. Indeed, such an interpretation of Article XVII:1 would also be inconsistent with the purpose of other GATT 1994 disciplines bearing on state trading.[133]

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[129] Article XVI:4 provides:

> Each Member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the annexed Agreements.

[130] The Panel understands the United States to use the expression "obligations of process" as a synonym for the more commonly used expression "obligations of means".

[131] United States' first written submission, para. 49.

[132] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. II, p. 3476.

[133] The panel in *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* stated that "Articles II:4, XVII and the Note *Ad* Articles XI, XII, XIV and XVIII [of the GATT 1994] clearly [indicate] the drafters' intention not to allow [Members] to frustrate the principles of the General Agreement governing measures affecting private trade by regulating trade through monopolies". Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*

6.40 The United States considers that the obligation imposed by subparagraph (a) on Members using STEs is an obligation to "ensure" that the relevant STEs act in accordance with the principles of Article XVII:1(a) and (b). Considering the United States' submissions in their entirety, we do not understand the United States to argue that Members must always and necessarily take positive measures to ensure that their STEs comply with the principles of Article XVII:1(a) and (b).[134] As we understand it, the United States does not argue that Canada is in breach of its obligation under Article XVII:1(a) because Article XVII:1(a) requires Canada to put in place appropriate statutory or supervisory mechanisms to ensure that the CWB observes the principles of Article XVII:1(a) and (b) and because Canada has not done so. Rather, the United States' basic argument appears to be as follows: Canada is in breach of its obligation under Article XVII:1(a) whenever the CWB acts inconsistently with the principles of Article XVII:1(a) or (b); in the absence of affirmative steps taken by Canada, the CWB's legal structure, the privileges enjoyed by the CWB and the incentives created thereby will necessarily result in the CWB acting inconsistently with those principles; therefore, Canada has failed to meet its obligation under Article XVII:1(a).

6.41 It follows from the preceding paragraph that in order to resolve the present dispute, we need not and do not determine whether Article XVII:1(a) requires Members to take positive measures to ensure that their STEs observe the principles of Article XVII:1(a) and (b). The issue we need to and do resolve is whether a Member that maintains a measure which "necessarily results" in an STE acting inconsistently with the principles of Article XVII:1(a) or (b)[135] can be said to be honouring the undertaking contained in Article XVII:1(a).

6.42 In our view, it is apparent from the text of Article XVII:1(a) that if a Member's STE does not act in accordance with the principles of Article XVII:1(a) or (b)[136], or if it is clear from relevant facts and circumstances that the STE will not so act, this *ipso facto* places the Member concerned in breach of the undertaking contained in Article XVII:1(a).[137]

6.43 The immediate context of Article XVII:1(a) supports this view. Article XVII:1(c) requires Members not to prevent any enterprise under its jurisdiction, including its STEs, from acting consistently with the principles of Article XVII:1(a) and (b).[138] Thus, under the provisions of Article XVII:1(c), a Member is not responsible for the conduct of its STEs or other enterprises, as long as it does not prevent its STEs or other enterprises from observing the principles of Article XVII:1(a) and (b). In contrast, by virtue of the undertaking given in Article XVII:1(a), a Member is responsible for the conduct of its STEs even if it does not prevent them from acting consistently with the principles of Article XVII:1(a) and (b). In other words, Article XVII:1(a) goes

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("*Canada – Provincial Liquor Boards* (*US*) "), adopted 18 February 1992, BISD 39S/27, para. 5.15. Similarly, the panel in *Japan – Restrictions on Imports of Certain Agricultural Products* stated that the "[t]he basic purpose of [the Note ad Articles XI, XII, XIII, XIV and XVIII of the GATT 1994] is to extend to state-trading the rules of the General Agreement governing private trade and to ensure that [Members] cannot escape their obligations with respect to private trade by establishing state-trading operations". Panel Report, *Japan – Restrictions on Imports of Certain Agricultural Products* ("*Japan – Agricultural Products I* "), adopted 2 March 1988, BISD 35S/163, para. 5.2.2.2.

[134] United States' replies to Panel question Nos. 2(a) and 2(e).

[135] We note that, for reasons indicated at para. 6.59 below, we are assuming, for the sake of argument, that an inconsistency with Article XVII:1 can be established merely by demonstrating that an STE is acting contrary to the principles of subparagraph (b).

[136] Here again, we are assuming, for the sake of argument, that an inconsistency with Article XVII:1 can be established by demonstrating that an STE is acting contrary to the principles of subparagraph (b).

[137] The parties appear to agree with this basic proposition. United States' comments on Canada's second oral statement, para. 7; United States' second oral statement, para. 4; United States' reply to Panel question No. 2(a); Canada's second written submission, para. 34; Canada's first written submission, paras. 95-96.

[138] For the text of Article XVII:1(c), *see* para. 6.30 above.

further than Article XVII:1(c), in that, under Article XVII:1(a), non-conforming conduct by a Member's STE engages that Member's responsibility under international law, even in the absence of intervention of the Member itself, as would be necessary under Article XVII:1(c).[139]

*(ii) "The general principles of non-discriminatory treatment prescribed in the GATT 1994"*

6.44 The Panel now turns to consider the phrase "the general principles of non-discriminatory treatment prescribed [in the GATT 1994] for governmental measures affecting imports or exports by private traders". It should be noted at the outset that since the present dispute concerns an STE which is involved in exports, the Panel's analysis here and elsewhere focuses on the principles to be followed by STEs of this type. For simplicity, the Panel will hereafter refer to STEs which are involved in exports as "export STEs".

6.45 In the **United States'** view, the phrase quoted in the preceding paragraph is about more than just the most-favoured-nation principle reflected in Article I:1 of the GATT 1994, as it has a broad scope and does not refer to a specific article of the GATT 1994 or a specific obligation. According to the United States, two types of conduct by an export STE would run counter to the general principles of non-discriminatory treatment prescribed in the GATT 1994: (i) discrimination in the terms of sale between different export markets; and (ii) discrimination in the terms of sale between export markets, on the one hand, and the domestic market of the Member establishing or maintaining the STE, on the other hand.

6.46 In support of the second type of prohibited conduct, the United States points to Article XI of the GATT 1994 and its *ad* Note. The United States recalls that Article XI generally prohibits restrictions on exports. The *ad* Note, for its part, makes clear that a Member cannot circumvent its obligations under Article XVII:1(a) by acting through an STE. In the United States' view, these two provisions establish that the non-discriminatory treatment prescribed in the GATT 1994 includes non-discriminatory treatment between export markets and the domestic market.

6.47 **Canada** considers that the reference in subparagraph (a) to the general principles of non-discriminatory treatment prescribed by the GATT 1994 is a reference to the most-favoured-nation treatment principle set out in Article I:1 of the GATT 1994. Canada disagrees with the United States' argument that the general principles of non-discriminatory treatment prescribed by the GATT 1994 would require export STEs not to discriminate in their sales between domestic and third-country markets. Canada considers that Article XI is not appropriate context for the interpretation of Article XVII, which deals with STEs. The Note to Article XI does deal expressly with STEs, but does not refer to Article I or Article III of the GATT 1994. It is, therefore, not concerned with discrimination. Canada notes that, in any event, Article XI could be relevant only where an export STE sells to export markets at a higher price than in the domestic market. Canada recalls that, in this case, the United States is alleging the opposite, namely that the CWB sells at a lower price in export markets than in Canada.

6.48 The **Panel** has no difficulty accepting the parties' view that the phrase "the general principles of non-discriminatory treatment prescribed [in the GATT 1994] for governmental measures affecting imports or exports by private traders" includes the general principles of most-favoured-nation treatment as enshrined in Article I:1 of the GATT 1994. Article I:1 of the GATT 1994 clearly prescribes "non-discriminatory treatment […] for governmental measures affecting imports or exports

[139] To recall, the Panel does not take a position on whether Article XVII:1(a) requires Members to take positive measures to ensure that their STEs do not engage in non-conforming conduct.

by private traders".[140] Also, interpreting the phrase in question in this way is consistent with the views expressed by previous panels.[141]

6.49 In our view, it is clear from the Note *ad* Article XVII:1[142] that an export STE would not act in a manner inconsistent with the general principles of most-favoured-nation treatment as prescribed in the GATT 1994 if it were to charge different prices for its sales of a product in different export markets, provided that such different prices are charged for commercial reasons.[143]

6.50 The United States is of the view that the phrase "the general principles of non-discriminatory treatment prescribed in [the GATT 1994] for governmental measures affecting imports or exports by private traders" should be interpreted to require also that, in their sales, export STEs should not discriminate between export markets, on the one hand, and their home market, on the other hand.[144] Since resolving this particular issue would not affect our disposition of the United States' claim, we need not and do not take a position.[145] This said, for the sake of argument, we will continue on the assumption that the United States' view is correct.[146]

(b) Article XVII:1(b) of the GATT 1994

6.51 In the circumstances of this case, the provisions of subparagraph (b) of Article XVII:1 present essentially three interpretative issues: (i) the legal relationship between subparagraph (a) of Article XVII:1 and subparagraph (b), (ii) the meaning of the term "commercial considerations" in the first clause of subparagraph (b), and (iii) the meaning of the term "enterprises of other Members" as it appears in the second clause of subparagraph (b).

*(i) Relationship with Article XVII:1(a) of the GATT 1994*

6.52 With regard to the relationship between subparagraphs (a) and (b) of Article XVII:1, the **United States** notes that while subparagraphs (a) and (b) are related and, hence, must be read together, they nevertheless contain distinct legal obligations. Referring to the introductory clause in

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[140] Article I:1 reads:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, […] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

[141] Panel Reports, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59, para. 753; *Canada – Administration of the Foreign Investment Review Act* ("*Canada – FIRA*"), adopted 7 February 1984, BISD 30S/140, para. 5.16.

[142] For the text of the Note, *see* para. 6.30 above.

[143] We understand the parties to agree with this point. *See* United States' first written submission, para. 61; Canada's first written submission, paras. 75 and 78.

[144] The United States bases this view on the provisions of Article XI of the GATT 1994 and its *ad* Note.

[145] We note that Canada appears to agree that it is not necessary in this case for the Panel to take a position on this issue. Canada's first written submission, para. 138.

[146] We also assume that the rationale of the Note *ad* Article XVII:1 would be equally valid in a situation where the comparison is between sales in an export STE's home market and its sales abroad. In other words, we assume that export STEs may discriminate between export markets and their home market for commercial reasons.

subparagraph (b) - "the provisions of subparagraph (a) of this paragraph shall be understood to require" - the United States argues that subparagraph (b) sets forth examples of conduct that subparagraph (a) requires. In the United States' view, to fail to engage in the required conduct under subparagraph (b) constitutes a violation of Article XVII:1.

6.53 Based on the argument set out in the previous paragraph, the United States submits that Article XVII:1 contains three distinct legal obligations. *First*, Canada in this case undertakes that the 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. According to the United States, a breach of any of these obligations is sufficient to establish that Canada has violated Article XVII:1. The United States considers that the panel in *Korea - Various Measures on Beef* reached the same conclusion. That panel stated unequivocally 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."[147]

6.54 **Canada** submits that, by its express terms, subparagraph (b) of Article XVII:1 does not create an obligation independent of subparagraph (a). The operative obligation is set out in subparagraph (a), not (b). Without subparagraph (a), subparagraph (b) would not impose an obligation on Members. In Canada's view, what subparagraph (b) does is to interpret and temper the obligation under subparagraph (a). According to Canada, the interpretation was needed because market conditions vary from one country to another. Accordingly, to remain in business internationally, all enterprises - whether STEs or not - make distinctions as to pricing and terms of sale that may be tied to the destination or the origin of a product, but that are nevertheless based on commercial considerations. Canada argues that this category of "discriminatory" conduct, which may be otherwise incompatible with subparagraph (a), is protected by subparagraph (b). As a result, only where an STE discriminates between markets on non-commercial considerations would it violate Article XVII:1.

6.55 Canada argues that the United States' interpretation should also be rejected because it would place STEs at a commercial disadvantage *vis-à-vis* private traders. *First*, a violation of the subparagraph (a) could then be found on the demonstration of "discrimination", even if such discrimination were based on commercial considerations. *Second*, STEs would not be able to make distinctions between sellers or purchasers based on the commercial considerations that private enterprises make. Nothing in Article XVII indicates that STEs should be more constrained in their commercial conduct than private traders.

6.56 Regarding the statement by the panel in *Korea Various Measures on Beef*, Canada considers that, in that case, there was ample evidence of discriminatory treatment by the STE in question and ample evidence that it was not acting in accordance with commercial considerations. As a result, the statement by the panel in that case with respect to there being two obligations was not necessary to the panel's decision. Moreover, the panel in *Korea Various Measures on Beef* expressly endorsed the views of the panel in *Canada – FIRA*, which read subparagraphs (a) and (b) as one obligation.[148]

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[147] Panel Report, *Korea – Various Measures on Beef*, *supra*, para. 757.

[148] Canada refers to the following statement by the panel in *Canada - FIRA*:

6.57 In Canada's view, to prove a violation of Article XVII:1, the United States must establish, *first*, that there has been discrimination and, *second*, that the discrimination has not been in accordance with commercial considerations. A demonstration that an STE did not act in conformity with the standards set out in subparagraph (b) alone is not enough to prove a violation of Article XVII:1. This is because the first step in determining the existence of a violation under Article XVII:1 is a finding that the STE did not act in a manner consistent with the general principles of non-discriminatory treatment.[149]

6.58 The **Panel** notes that, in the present case, the United States' allegation of discriminatory sales behaviour by the CWB is in the nature of a consequential allegation. That is to say, the United States argues that, on the facts of this case, the alleged discriminatory sales behaviour by the CWB is a necessary result of the CWB not making sales solely in accordance with commercial considerations.[150] Thus, if the United States succeeded in demonstrating that the CWB Export Regime necessarily leads to the CWB not making sales solely in accordance with commercial considerations, this case would present the interpretative issue whether an inconsistency with Article XVII:1 could be established merely by showing that an STE is acting contrary to the principles of subparagraph (b) of Article XVII:1. As is clear from the preceding paragraphs, the parties have opposite views on this interpretative issue.

6.59 The Panel does not consider it necessary to take a position on this issue. For reasons which are set out in subsection C.5 below, the Panel is not persuaded that the CWB Export Regime necessarily leads to the CWB making sales in a manner inconsistent with the principles of subparagraph (b) of Article XVII:1. In this case, the Panel therefore does not reach the above-mentioned interpretative issue. Nevertheless, for the sake of argument, the Panel will proceed on the assumption that an inconsistency with Article XVII:1 can be established merely by demonstrating that an STE is acting contrary to the principles of subparagraph (b).[151]

*(ii) Second clause of Article XVII:1(b) of the GATT 1994*

6.60 Both parties agree that the two clauses of subparagraph (b) impose separate requirements.[152] The order in which the Panel analyses the two clauses is, therefore, of no particular importance. The Panel begins its analysis with the second clause because the United States relies on the second clause to support its interpretation of the first clause.

6.61 In regard to the second clause of subparagraph (b), the **United States** argues that, as a result of that clause, an export STE has an obligation to afford all enterprises an adequate opportunity to

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> "The fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding subparagraph, is made clear through the introductory words 'The provisions of subparagraph (a) of the paragraph shall be understood to require ...'." (Panel Report, *Canada - FIRA*, *supra*, para. 5.16)

[149] In support of its view, Canada points to the following statement by the panel in *Canada - FIRA*:

> "[T]he commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of non-discriminatory treatment by the General Agreement." (Panel Report, *Canada - FIRA*, *supra*, para. 5.16)

[150] United States' second oral statement, para. 12; United States' second written submission, paras. 7 and 11; United States' reply to Panel question No. 20; United States' first written submission, para. 78.

[151] We note in this regard that Canada has stated that even under the United States' own interpretation of the relationship between subparagraph (a) and subparagraph (b) of Article XVII:1, the United States failed to support its allegation that the CWB Export Regime necessarily results in the CWB not acting in accordance with the principles of subparagraphs (a) and (b) of Article XVII:1. Canada's second oral statement, para. 10.

[152] United States' first written submission, para. 59; Canada's reply to Panel question No. 96.

compete for participation in its export sales. In the instant case, the enterprises at issue would include any enterprise that is competing for participation in CWB wheat sales, including enterprises competing to purchase wheat from the CWB (*i.e.*, wheat buyers) and those enterprises selling wheat in the same market as the CWB (*i.e.*, wheat sellers).

6.62 Concerning the latter category of enterprises, that is enterprises selling the same product as an export STE in the same markets, the United States argues that export STEs must afford such enterprises of other Members an adequate opportunity to compete in the marketplace, according to customary business practices. According to the United States, the obligation under the second clause of subparagraph (b) focuses on the protection of commercial actors and is, therefore, not limited to competition among enterprises with special or exclusive privileges. Therefore, to give all enterprises of other Members, including enterprises which do not enjoy government-conferred special or exclusive privileges, an adequate opportunity to compete, export STEs must make their sales on commercial terms.

6.63 **Canada** argues that for an export STE the relevant "enterprises" referred to in the second clause of subparagraph (b) are the enterprises of other Members that are interested in purchasing the products offered by the STE. According to Canada, this interpretation is confirmed by the use of the word "participation". In the context of exports, competing enterprises do not "participate" in each other's sales. Rather, they compete against one another to get those sales. In each transaction, it is the seller and the purchaser who "participate" in that transaction. Competitors do not "participate". The competitors of an exporter in export markets do not participate in the sales of that exporter by virtue of the competition alone.

6.64 Canada notes that under the second clause of subparagraph (b), export STEs must allow the enterprises of other Members "adequate opportunity, in accordance with customary business practice, to compete for participation in [their] sales". Canada submits that customary business practice does not require an enterprise to allow its competitors to "participate" in its sales. Customary business practice is for enterprises to win sales at the expense of their competitors, not to assist their competitors. For these reasons, Canada considers that export STEs do not have to allow their competitors to participate in their sales.

6.65 Regarding the object of the second clause of subparagraph (b), Canada notes that, in the case of export STEs, the second clause focuses, not on the terms and conditions of a sales agreement (an issue which is addressed in the first clause of subparagraph (b)), but on the very chance, the opportunity to compete for such transactions. In Canada's view, the second clause thus addresses a situation where no export sale has taken place because the export STE refuses to consider even allowing a purchaser the opportunity to compete for participation in its sales. In such a situation, the first clause of subparagraph (b) and the factors set out therein, such as price, quality, etc. are not immediately relevant.

6.66 The **Panel** commences its analysis by recalling the text of the second clause of subparagraph (b): "[An STE] shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales". It is clear to the Panel, and the parties appear to agree[153], that the expression "such purchases or sales" is a reference to the expression "its purchases or sales involving either imports or exports" as it appears in subparagraph (a) of Article XVII:1. Since the present case concerns only the "sales" of an export STE, the requirement set out in the second clause of subparagraph (b) can be restated as

[153] Parties' replies to Panel question No. 21(a).

follows: "[An export STE] shall afford the enterprises of the other [Members] adequate opportunity, in accordance with customary business practice, to compete for participation in [its] sales".[154]

6.67 The parties' disagree on the meaning to be given to the term "enterprises of the other [Members]" in a case concerning the "sales" of an export STE. The United States considers that, in such a case, the term "enterprises of the other [Members]" encompasses the enterprises interested in buying the products offered for sale by an export STE (*i.e.*, the customers of an export STE) as well as the enterprises interested in selling the same product in the same markets as the export STE (*i.e.*, the competitors of the export STE). Canada, on the other hand, considers that the term in question should be interpreted to refer only to the enterprises interested in buying from the export STE.

6.68 As a textual matter, it would appear that the term "enterprises of the other [Members]" is, in principle, open to the interpretation advanced by the United States. There may be "enterprises of the other [Members]" which are interested in buying a product from an export STE, just like there may be "enterprises of the other [Members]" which sell the same product as the export STE in the same markets.

6.69 As always when interpreting treaty terms, however, we must also have regard to the context in which those terms occur. The phrase "compete for participation in [the relevant export STE's] sales" is part of the immediate context of the term "enterprises of the other [Members]". Considering the term "enterprises of the other [Members]" in this context, we have no difficulty accepting the notion that enterprises interested in buying the product offered for sale by an export STE may compete to "participate", or to "have a part or share"[155], in an export STE's sales.[156] On the other hand, we think it cannot equally be said that enterprises selling the same product as an export STE compete to "participate", or to "have a part or share", in an export STE's sales.[157] To be sure, enterprises selling the same product as an export STE may "compete" with an export STE for sales in general. But we are not persuaded that, in their capacity as sellers, such enterprises "compete for participation in [the relevant export STE's] sales". Indeed, as also noted by Canada, rather than wanting to participate, themselves, in the sales of an export STE, such enterprises would ordinarily want to prevent such sales, in the sense that they would want to win for themselves the sales which might otherwise be captured by the export STE in question.

6.70 We also believe that if the second clause of subparagraph (b) was intended to refer to the competitors of an export STE, as the United States suggests, different wording would have been used. The second clause might then have required, for instance, that an export STE afford the enterprises of

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[154] United States' second oral statement, paras. 14 and 16; United States' replies to Panel question Nos. 21(a) and (b); Canada's second written submission, para. 48; Canada's second oral statement, para. 39; Canada's replies to Panel question Nos. 21(a) and (b).

[155] The *Merriam-Webster OnLine Thesaurus*, http://www.m-w.com (December 2003), defines the verb "participate" as "to have a part or share in something".

[156] It is instructive to note here that the term "participate" appears to be used in very similar context in the *WTO Agreement on Government Procurement*. Article VIII(c) of the *Agreement*, which deals with the "Qualification of Suppliers", provides:

> "Suppliers requesting to *participate in a particular intended procurement* who may not yet be qualified shall also be considered, provided there is sufficient time to complete the qualification procedure." (emphasis added)

Of course, the closest analogy in the state trading context to the situation envisaged in Article VIII(c) would not be an export STE, but an import STE. Under the second clause of Article XVII:1(b), an import STE is to afford the enterprises of other Members adequate opportunity to "compete for participation in [its] purchases". We wish to stress, however, that we refer to Article VIII(c) purely for illustrative purposes; we do not rely on that provision as relevant context.

[157] Unless, of course, those enterprises, in addition to selling the same product as a given export STE, were also engaged in buying that product from the export STE in question.

the other Members "adequate opportunity to compete", or that it afford them "adequate opportunity to compete in the marketplace". We note that, in its submissions to the Panel, the United States uses both of these alternative phrases to refer to the requirement set out in the second clause.[158] It is sufficient to observe in this regard that the meaning of the phrases "adequate opportunity to compete" or "adequate opportunity to compete in the marketplace" is not the same as the phrase actually used in the second clause of subparagraph (b), which is "adequate opportunity [...] to compete for participation in […] sales".

6.71 Finally, we note the United States' argument that the purpose of subparagraph (b) is to protect "commercial actors", including those selling the same product as an export STE (*i.e.*, the competitors of an export STE).[159] We will return to this argument below.[160] Suffice it to say at this point that even if this argument was correct, this would not alter the fact that enterprises selling the same product as an export STE cannot reasonably be regarded as competing for participation in that export STE's sales.[161] In other words, the United States' argument would not justify giving the second clause an interpretation that we are not convinced it can reasonably bear.

6.72 In light of the above considerations, we are unable to accept the United States' view that, in the case of an export STE, the "enterprises of the other [Members]" may include enterprises selling the same product as that offered for sale by the export STE in question (*i.e.*, the competitors of the export STE).

6.73 Since both parties agree with our view that enterprises interested in buying the products offered for sale by an export STE fall within the meaning of the term "enterprises of the other [Members]"[162], and since the United States in this case is not focusing on the opportunities afforded such enterprises by the CWB[163], it is unnecessary, in the specific circumstances of this case, to offer additional analysis of the second clause of subparagraph (b).[164]

*(iii) First clause of Article XVII:1(b) of the GATT 1994*

6.74 Regarding the first clause of subparagraph (b), which refers to the need for STEs to make their sales solely in accordance with "commercial considerations", the **United States** notes that the first clause specifically references consideration of price, quality, availability, etc., as "commercial considerations". According to the United States, commercial behaviour driven by these considerations would result in actions that reflect market realities and are consistent across all actors in a given industry or market sector. Where an export STE has been granted special and exclusive privileges which permit it to operate without the normal market constraints faced by a commercial actor, that STE could make use of its privileges to gain market share in particular markets, but such

[158] United States' second oral statement, paras. 15-16; United States' second written submission, paras. 2, 18-19; United States' reply to Panel question No. 3; United States' first oral statement, para. 4; United States' first written submission, paras. 65 and 77.

[159] United States' second written submission, para. 18; United States' reply to Panel question No. 23.

[160] *See* para. 6.93 below.

[161] Again, we note the theoretical possibility that those enterprises, in addition to selling the same product as a given export STE, might also be engaged in buying that product from the export STE in question.

[162] United States' comment on Canada's reply to Panel question No. 96; United States' reply to Panel question No. 21(b); United States' second oral statement, paras. 14-15; Canada's reply to Panel question No. 21(b).

[163] United States' second oral statement, paras. 11 and 16; United States' second written submission, para. 1, 14, 17-19; United States' first written submission, para. 77.

[164] We also note that since this case does not concern the "purchases" of an export STE, we need not and do not take a position regarding whether the term "enterprises of the other [Members]" could include the suppliers to the relevant export STE, as China and the European Communities appear to suggest. China's reply to Panel question No. 2(b); European Communities' reply to Panel question No. 2(b).

behaviour would not be commercial. The United States considers that one example of such non-commercial behaviour would be sustained, long-run price discrimination which involves selling a product in one market at a price that is less than its replacement value.

6.75 The United States notes that it may be rational for an export STE to use its privileges to make sales on terms which could not or would not be offered by commercial operators. But, the United States maintains, subparagraph (b) nowhere states or implies that an export STE must merely make its sales as a rational actor with special privileges. Acting rationally and acting commercially are not the same thing. A synonym for "rational" is "reasonable".[165] "Commercial", on the other hand, is defined as "[i]nterested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business".[166] In the United States' view, an export STE like the CWB which sells its products for a price it deems "reasonable" and hence maximizes sales rather than profits may be acting rationally, but it is not acting commercially.

6.76 That mere rational behaviour is not sufficient to meet the requirement set out in the first clause of subparagraph (b) is also clear from the second clause of that subparagraph. Subparagraph (b) must be read in its entirety. It requires export STEs to act according to commercial considerations *and* to afford enterprises of other Members an adequate opportunity to compete, according to customary business practice. The first clause of subparagraph (b) cannot render moot the second clause. Therefore, the United States submits, the "commercial considerations" requirement in the second clause must be intended to ensure that STEs do not use their special and exclusive privileges to the disadvantage of commercial actors.

6.77 In **Canada's** view, an appropriate interpretation of the term "commercial considerations" would be "considerations consistent with normal business practices of privately-held enterprises in similar circumstances". Canada considers that this interpretation is consistent with the context of subparagraph (b), including the factors mentioned in the first clause (price, quality, availability, etc.). These factors are the types of considerations that a private sector enterprise would normally take into account in its purchasing and sales activities. Also, the Note *ad* Article XVII:1[167] makes clear that actions "to meet conditions of supply and demand" are considered as commercial considerations. Canada further points out that the object and purpose of Article XVII is to prevent Members from doing indirectly through STEs that which they have contracted not to do directly. Canada submits that where an STE acts based on commercial considerations of business and trade, the purpose of Article XVII is not implicated because the STE would not be used to circumvent GATT 1994 obligations.

6.78 Canada submits that in determining whether an STE and a private trader are in similar circumstances, one would need to compare the STE with enterprises in similar circumstances. Canada notes in this regard that the behaviour of a commercial company depends on the circumstances in which it operates. It may vary depending on the size of the enterprise, the market in which it operates, the type of organisation that it is, etc. Regarding the size of an enterprise, Canada notes that a large enterprise with significant assets may be willing to extend supplier credits that a smaller enterprise would not be able to extend because of the economic risk involved. Each enterprise would be acting consistently with commercial considerations, even though the resulting conduct is opposite. Regarding the type of organization, Canada notes that an STE, such as the one at issue in this case, which functions as a cooperative marketing agency should be compared with a privately-held enterprise functioning in that same capacity, rather than with a share-capital corporation.

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[165] *Merriam-Webster's Collegiate Dictionary*: *Tenth Edition* (2001), p. 967
[166] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 451.
[167] The relevant part of the Note is reproduced at para. 6.30 above.

6.79 Canada considers that in determining whether an STE and a private trader are in similar circumstances, account must also be taken of the special or exclusive privileges that have been granted to the STE in question. Such an inquiry would need to concentrate on whether the STE acts as would a private enterprise that has the same rights and privileges as the relevant STE. Canada does not agree with the United States that the first clause of subparagraph (b) requires STEs which enjoy exclusive and special privileges to act exactly like private enterprises which do not enjoy the same privileges. If the special and exclusive privileges granted to an STE allow it to charge a lower price than a private trader, doing so would be consistent with commercial considerations, as it is exactly what any private enterprise with the same privileges would do. In fact, Canada notes, an STE would be acting non-commercially if it were to ignore its competitive advantage.

6.80 Canada also argues that the United States' interpretation would make the granting of exclusive or special privileges meaningless because STEs would not be able to use them without violating Article XVII. But Article XVII neither prescribes nor proscribes the nature or scope of privileges that may be granted by Members to STEs. Canada submits that if Article XVII does not place limits on the nature or scope of privileges that may be granted, an STE's use of these privileges *per se*, including in the business activities of the STE, cannot result in a violation of Article XVII. Article XVII only disciplines a particular use of an STE's special or exclusive privileges: it prohibits the STE that benefits from such privileges from engaging in discriminatory conduct that is not based on commercial considerations.

6.81 Finally, Canada observes that there is a distinction between non-commercial behaviour and anti-competitive behaviour. In some circumstances, selling into one market at a price that is intended to deter other exporters from contesting that market may be commercial behaviour, even if it may also be anti-competitive. It is precisely because commercial considerations may lead enterprises to engage in anti-competitive behaviour that some Members have adopted laws prohibiting such behaviour. Article XVII, or indeed the *WTO Agreement*, does not prohibit anti-competitive behaviour. Canada also notes in this context that a Member which believes it has been disadvantaged by a particular commercial pricing strategy of an STE might be able to challenge such behaviour, or the privileges from which such behaviour may result, under the *Agreement on Subsidies and Countervailing Measures* (hereafter the "*SCM Agreement*") or the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (hereafter the "*Anti-Dumping Agreement*").

6.82 The **United States** rejects Canada's argument that the expression "commercial considerations" in this case means the considerations of a private grain trader in circumstances similar to those of an export STE. The United States submits that this would mean that an export STE would need to afford an adequate opportunity to compete only to enterprises with exclusive and special privileges similar to those enjoyed by the STE in question. In the United States' view, this defies logic. The obligation under subparagraph (b) is not to protect the non-commercial behaviour of an STE with special and exclusive privileges in one country from the non-commercial behaviour of an STE with special and exclusive privileges in another. Subparagraph (b) focuses on the protection of commercial actors. Also, the first clause of subparagraph (b) does not qualify the word "commercial". Canada impermissibly reads into the first clause words which are simply not there. Finally, under the second clause of subparagraph (b), all enterprises, not just those with privileges similar to those granted to an export STE, must be afforded the opportunity to compete in the marketplace.

6.83 The United States also disagrees with Canada's assertion that, under the United States' interpretation of the first clause of subparagraph (b), Members could grant special or exclusive privileges, but not use them. The United States notes that the use of special and exclusive privileges is permitted within certain parameters. For example, subparagraph (b) allows the CWB to exercise its monopoly privilege related to the sale of Western Canadian wheat for export. In other words, the CWB is not required, under subparagraph (b), to let other entities sell Western Canadian wheat. The

United States also considers that the Note *ad* Article XVII:1 provides an example of an STE's use of its privileges that is consistent with subparagraph (b).[168]

6.84 The **Panel** commences its analysis by noting that relevant dictionary meanings of the word "commercial" are: "engaged in commerce; of, pertaining to, or bearing on commerce" or "[i]nterested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business".[169]

6.85 In the particular context of the first clause of subparagraph (b), which provides that STEs are to "make […] purchases or sales solely in accordance with commercial considerations", we think the term "commercial considerations" should be understood as meaning considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales "as mere matters of business".

6.86 This interpretation draws support from another element of the context of the term "commercial considerations". The term "commercial considerations" is immediately followed by the phrase "including price, quality, availability, marketability, transportation and other conditions of purchase or sale". The word "including" makes clear that price, quality, etc. are to be regarded as "commercial considerations". This supports our interpretation of the term "commercial considerations", for if an STE makes purchases or sales based solely on such elements of consideration as price, quality, availability, etc., it makes purchases or sales based on considerations which relate to, and are characteristic of, commerce and trade, and which involve regarding purchases or sales as mere matters of business.

6.87 In our view, the requirement that STEs make purchases or sales solely in accordance with commercial considerations must imply that they should seek to purchase or sell on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc. Were it otherwise, an export STE could sell a good to the buyer offering the lowest price and justify that sale as being driven by the sole consideration of "price", which is listed in the first clause of subparagraph (b) as a "commercial consideration". Manifestly, such an interpretation would be unreasonable.

6.88 The preceding paragraphs lead us to the view that if an STE is directed to make, or does make, purchases or sales on the basis of such considerations as the nationality of potential buyers or sellers, the policies pursued by their governments, or the national (economic or political) interest of the Member maintaining the STE[170], it would not be acting solely in accordance with commercial considerations.

6.89 The considerations mentioned in the previous paragraph do not relate to, and are not characteristic of, commerce and trade, and they are not consistent with regarding purchases or sales as mere matters of business. Such considerations are also unlike any of the commercial considerations specifically mentioned in the first clause (price, quality, etc.). Moreover, allowing STEs to take into account such considerations would be inconsistent with the purpose of Article XVII:1, which, as previously noted, is to ensure that Members do not use STEs to escape GATT 1994 obligations with respect to private trade. For instance, if STEs, in their purchases or sales, could make distinctions between buyers or sellers based on their nationalities, Members could use STEs to circumvent their

[168] The relevant part of the Note is reproduced at para. 6.30 above.

[169] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 451.

[170] To give an example, suppose that a Member has a substantial trade deficit with another Member. If in such a situation the Member concerned directs its STEs to sell their goods to the Member with which it has a trade deficit, because this is deemed to be in the national interest, even though, for the STEs concerned, it implies foregoing sales at higher prices offered by other Members, the STEs concerned would not be making their sales solely in accordance with commercial considerations.

obligations under Article I:1 of the GATT 1994, which prohibits the imposition of discriminatory import or export duties on like products originating in or destined for the territory of another Member.

6.90 According to the United States, the first clause of subparagraph (b) must be interpreted to require, in the instant case, that export STEs not use their special or exclusive privileges to the disadvantage of "commercial actors", including those selling the same product as an export STE in the same markets. The United States bases this interpretation essentially on three elements: (i) the term "commercial" in the first clause of subparagraph (b), (ii) the second clause of subparagraph (b), and (iii) the implications of not adopting the proposed interpretation.

6.91 In relation to the term "commercial", the United States argues that this term makes clear that export STEs must act like "commercial actors", not merely like "rational economic actors" with special or exclusive privileges. For the United States, "commercial actors" are actors that maximize profit, do not enjoy government-conferred privileges and are disciplined by market forces. Therefore, to the extent the privileges enjoyed by an export STE divorce it from normal market constraints, it may not use its privileges to gain special advantages in the marketplace *vis-à-vis* "commercial actors".

6.92 In considering this argument, the first observation to be made is that, by its terms, the first clause of subparagraph (b) does not require export STEs to act like "commercial actors". In fact, subparagraph (b) nowhere uses the term "commercial actors". What the first clause actually requires is that export STEs make sales solely in accordance with "commercial considerations". But the "commercial considerations" requirement does not imply that in deciding whom to sell to and on what terms, export STEs must act as if they were "commercial actors" as the United States has defined this term.

6.93 The logic underlying the United States' argument basically appears to be as follows: Because STEs are not inherently "commercial actors", and because subparagraph (b) focuses on the protection of "commercial actors"[171], the "commercial considerations" requirement must be intended to require STEs to behave like "commercial actors".[172] While we have no particular difficulty with the first premise[173], we do not agree that subparagraph (b) focuses on the protection of "commercial actors" competing with STEs. As we have already noted, the first clause of subparagraph (b) talks about "commercial considerations", not "commercial actors". Moreover, the second clause of subparagraph (b) as we interpret it does not support the view that subparagraph (b) focuses on the protection of "commercial actors" competing with STEs.[174]

6.94 In our view, the circumstance that STEs are not inherently "commercial actors" does not necessarily lead to the conclusion that the "commercial considerations" requirement is intended to make STEs behave like "commercial" actors. Indeed, we think it should lead to a different conclusion, namely, that the requirement in question is simply intended to prevent STEs from behaving like "political" actors.[175] To elaborate, "commercial actors" must make purchases or sales solely in accordance with commercial (*i.e.*, not political, etc.) considerations in order to stay in business.[176] STEs, on the other hand, because they are not inherently "commercial actors", may be able to make purchases or sales in accordance with *non*-commercial (*i.e.*, political, etc.) considerations and still stay in business. As we see it, this is precisely why it is necessary to require

[171] United States' second written submission, para. 18; United States' reply to Panel question No. 23.

[172] United States' reply to Panel question No. 21(b).

[173] We recall that STEs include enterprises which have been granted, formally or in effect, exclusive or special privileges.

[174] *See* para. 6.72 above.

[175] We use the word "political actors" here merely to contrast our understanding of the first clause with that of the United States. Non-commercial considerations include, but are not limited to, political considerations. *See* para. 6.88 above.

[176] *See also* United States' reply to Panel question No. 87(b).

them to make purchases or sales solely in accordance with commercial (*i.e.*, not political, etc.) considerations. Otherwise, Members could seek to use STEs to escape relevant GATT 1994 obligations.[177]

6.95 Another concern we have with the United States' interpretation of the first clause of subparagraph (b) is that for STEs to be able to *act* like "commercial actors", in many cases, they effectively would need to *be* "commercial actors", at least with respect to their purchase or sale operations. In order to subject themselves to the same sort of market constraints as those faced by "commercial actors", they might, for instance, need to refrain from using certain of their privileges when making purchases or sales, or isolate their purchase or sale operations from other operations in respect of which privileges may have been granted (*e.g.*, financial operations). We believe that if the intent behind the "commercial considerations" requirement had been to produce such far-reaching consequences, this intent would have been expressed both with greater clarity and in more detail.

6.96 Finally, the United States' argument that STEs must act like "commercial actors" tends to overlook the fact that STEs are not necessarily used only for commercial purposes. STEs may also be established or maintained to carry out governmental policies or programmes (*e.g.*, policies related to food security, policies aimed at reducing alcohol consumption, policies to achieve price stabilization, etc.).[178] Such STEs must and, hence, do purchase or sell on the basis of commercial considerations, but they do not normally purchase or sell for the purpose of maximizing profit.

6.97 Since, in our view, the term "commercial" in the first clause of subparagraph (b) does not imply that export STEs may not use their special or exclusive privileges to the disadvantage of "commercial actors", we proceed to examine the second element relied on by the United States, *i.e.*, the second clause of subparagraph (b). The United States argument concerning the second clause is that the first clause of subparagraph (b) must not be interpreted so as to render ineffective the second clause.[179] To recall, the United States considers that the second clause requires an export STE to afford all enterprises of other Members, including those selling the same product as the export STE in the same markets, an adequate opportunity to compete. The United States submits that an export STE could not meet this requirement if the first clause were interpreted to permit an export STE to use its special or exclusive privileges to the disadvantage of "commercial actors" selling the same product as the export STE.

6.98 We agree that we should not give an interpretation to the first clause which would deprive the second clause of its intended meaning and effect. However, as we have stated above[180], we do not consider that the second clause can be interpreted as meaning that export STEs are to afford their competitors, which may include "commercial actors", an adequate opportunity to compete in the marketplace. Logically, no interpretation of the first clause can deprive the second clause of a meaning or an effect it does not have. For this reason, we do not agree that the second clause supports the United States' view that the first clause requires export STEs not to use their special or exclusive privileges to the disadvantage of "commercial actors".

6.99 The third element adduced by the United States in favour of its interpretation of the first clause relates to the implications of not adopting the United States' interpretation. According to the United States, if export STEs could use their exclusive or special privileges to gain a competitive

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[177] Indeed, as Jacob Viner aptly put it: "Private enterprise, as such, is normally non-patriotic, while government is automatically patriotic". Jacob Viner, "International Relations between State-Controlled National Economies", *American Economic Review*, no. 34, supplement (March 1944), p. 439.

[178] *See, e.g.*, G/STR/2, paras. 4-8; G/STR/4, para. 8.

[179] United States' second written submission, para. 19; United States' replies to Panel question Nos. 3 and 23.

[180] *See* para. 6.72 above.

advantage *vis-à-vis* "commercial actors", effectively, only other enterprises with similar exclusive or special privileges would have an adequate opportunity to compete with them. The United States argues that such an outcome would "defy logic".[181]

6.100 We agree that, in principle, it is possible that export STEs might be granted exclusive or special privileges which, when exercised in a particular manner, might place "commercial actors", including those selling the same product as the export STE in the same markets, at a competitive disadvantage. However, as we explain below, this fact alone neither requires nor authorizes us to interpret the first clause so as to prevent export STEs from using their exclusive or special privileges to gain a competitive advantage in the marketplace.

6.101 To begin with, and this has also been noted by the United States itself, the word "commercial" in the first clause is unqualified.[182] Notably, the first clause does not require export STEs to make sales solely in accordance with "fair" commercial considerations. Also, as previously indicated, we do not consider that subparagraph (b) focuses on the protection of "commercial actors" competing with STEs, or that the second clause of subparagraph (b) requires export STEs to afford their competitors an adequate opportunity to compete. Accordingly, we do not think that particular sales by an export STE could be regarded as not in accordance with "commercial" considerations merely because the specific terms of these sales could not have been offered in the absence of the exclusive or special privileges granted to the export STE.

6.102 However, if, for example, an export STE were to use its exclusive or special privileges to sell into one export market at the economically best price possible and into other export markets at a price that is lower than would be necessary to meet local conditions of supply and demand, this would tend to indicate that the STE in question is not charging the lower price for commercial reasons.[183] We find support for this view in the Note *ad* Article XVII:1, which provides that "[t]he 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*" (emphasis added).

6.103 Thus, as we see it, the only constraint the first clause of subparagraph (b) imposes on the use by export STEs of their exclusive or special privileges is that these privileges must not be used to make sales which are not driven exclusively by "commercial considerations" as we understand that term. Whether particular sales by an export STE are driven exclusively by commercial considerations must be assessed in light of the specific circumstances surrounding these sales, including the nature and extent of competition in the relevant market.

6.104 It is important to point out that the United States' view - that the first clause of subparagraph (b) should not be interpreted so as to permit export STEs to use their privileges to the disadvantage of "commercial actors" - takes no account of relevant disciplines set out elsewhere in the *WTO Agreement*. For instance, Members' freedom of action with regard to the nature and extent of privileges they may grant to their export STEs is constrained, in effect, by the provisions of, *inter alia*, the *Agreement on Agriculture* and the *SCM Agreement*. Furthermore, Members whose "commercial actors" have been or may be adversely affected by the conduct of export STEs may under certain conditions take measures in order to offset or prevent such conduct, in accordance with the provisions of, *inter alia*, Article VI of the GATT 1994, the *Anti-Dumping Agreement* and the *SCM Agreement*.

[181] United States' second written submission, para. 19.
[182] United States' reply to Panel question No. 87(a).
[183] We note, however, that an export STE might, for instance, want to charge a lower price than the market would bear in order to deter competitors from entering the market. In our view, such sales might be considered to be based on commercial considerations.

6.105 Also, it should be remembered that there are, in any event, other provisions of the *WTO Agreement* which, if used, could have the effect of enhancing the competitive position of the enterprises of the Member making use of these provisions *vis-à-vis* the "commercial actors" of other Members. To give just one example, the provisions of the *Agreement on Agriculture* as they stand permit Members to grant export subsidies in respect of agricultural products.[184] If a Member chooses to grant such subsidies to its producers, this may put "commercial actors" - the producers of a Member which does not provide such subsidies - at a competitive disadvantage in the marketplace.

6.106 In light of the above, we consider that neither the text of the first clause of subparagraph (b) nor "logic" requires or authorizes us to interpret the first clause so as to prevent export STEs from using their exclusive or special privileges to the disadvantage of "commercial actors".

## 5. Consistency of the CWB Export Regime with Article XVII:1 of the GATT 1994

6.107 The **Panel** now turns to examine whether the United States has established that the CWB Export Regime is inconsistent with Article XVII:1.

6.108 As an initial matter, we note that both parties consider that the CWB is an STE within the meaning of Article XVII:1(a).[185] We are satisfied that the CWB falls within the category of enterprises other than State enterprises which have been granted, formally or in effect, exclusive or special privileges.[186] There is no doubt that at least the CWB's exclusive right to sell Western Canadian wheat for export constitutes an "exclusive or special privilege" within the meaning of Article XVII:1(a).[187] It is clear, therefore, that the CWB Export Regime, the measure at issue here, is subject to the provisions of Article XVII:1.

6.109 The United States' claim is that the CWB Export Regime "necessarily results" in non-conforming CWB export sales.[188] The Panel has asked the United States to elaborate on the meaning of the phrase "necessarily results". It is clear from the United States' response that the United States does not mean to argue that it can be "presumed", in light of the various elements of the CWB Export Regime, that the CWB will make non-conforming export sales. Rather, what the United States argues is that non-conforming CWB export sales are an "inescapable consequence" of the CWB Export Regime.[189] Consistent with the clarification provided by the United States, we will assess whether the CWB Export Regime "necessarily" or "inescapably" results in non-conforming CWB export sales. We commence this task by setting out in broad outline the parties' main arguments.

6.110 The United States' claim essentially rests on four broad assertions. *First*, the **United States** asserts that the privileges enjoyed by the CWB give it more flexibility with respect to pricing and other sales terms than a "commercial actor". Specifically, the United States asserts that the exclusive right to purchase Western Canadian wheat for export or domestic consumption, together with the fact that the CWB does not need to pay Western Canadian wheat producers the market value of their wheat, but only an initial price which is generally equal to 65 to 70 per cent of the estimated final market value of the wheat, gives the CWB a stable supply of wheat at a cost of acquisition well below its market value. According to the United States, the CWB thus enjoys greater flexibility in setting

[184] Certain types of export subsidies are, however, subject to reduction commitments.

[185] Parties' replies to Panel question No. 7; G/STR/N/4/CAN, p. 8.

[186] The CWB is neither a Crown corporation nor an agent of Her Majesty. Canada's reply to Panel question No. 7; Section 4(2) of the *CWB Act*; Exhibit US-11.

[187] The parties are in agreement that the CWB has been granted "exclusive or special privileges". United States' first written submission, para. 2; Canada's first oral statement, para. 82; Canada's first written submission, paras. 4 and 126. Canada also accepts that the CWB's sole responsibility for the sale of Western Canadian wheat in export markets is an exclusive or special privilege. G/STR/N/4/CAN, p. 9.

[188] *See* para. 6.24 above.

[189] United States' reply to Panel question No. 86.

prices than "commercial" grain traders, which must purchase wheat for market prices. Moreover, the United States maintains that the exclusive right to purchase Western Canadian wheat, together with the fact that the initial price the CWB has to pay for such wheat is fixed for an entire marketing year, results in a stable supply of wheat and gives the CWB price certainty, which, in turn, enhances its ability to forward contract or enter into long-term contracts. The United States argues, furthermore, that the government guarantee of the initial price results in less risk exposure which also gives the CWB greater pricing flexibility. Finally, the United States submits that the government guarantees of CWB borrowings allow the CWB to offer more favourable credit terms and to obtain additional revenue which goes into the pool accounts[190], again giving the CWB more flexibility with respect to pricing and other sales terms.

6.111 *Second,* the United States asserts that the alleged pricing flexibility resulting from the CWB's privileges enables the CWB to offer "non-commercial"[191] sales terms (contrary to the first clause of subparagraph (b) of Article XVII:1) and thus to deny "commercial" enterprises of other Members an adequate opportunity to compete (contrary to the second clause of subparagraph (b)). The United States further asserts that the CWB can also use its pricing flexibility to make sales on "non-commercial" terms in order to target particular markets. That is to say, the pricing flexibility gives the CWB the ability to discriminate in its sales between export markets or between its home market and export markets (contrary to subparagraph (a) of Article XVII:1).

6.112 *Third,* the United States asserts that the CWB's legal mandate and structure, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales in a "non-commercial" manner. The United States maintains that it is clear from the CWB's legal mandate and governance structure that the CWB maximizes sales, or revenue, rather than profit. Regarding the CWB's mandate, the United States submits that the CWB is required by law to promote the sale of Western Canadian wheat in world markets and thus is driven to maximize sales quantity, not profit. Regarding the CWB's governance structure, the United States notes that the CWB's Board of Directors is largely elected by Western Canadian farmers. The United States considers that the Board therefore has an incentive to satisfy the greatest possible number of farmers. In the United States' view, these farmers would likely express strong dissatisfaction if the CWB began to maximize profits by refusing to purchase wheat from significant numbers of producers. According to the United States, due to its mandate and structure, the CWB has an incentive to use its privileges, and the pricing flexibility resulting therefrom, to maximize sales by selling wheat in some markets at lower prices than "commercial actors" could offer. According to the United States, this would also deny the "commercial actors" of other Members an adequate opportunity to compete according to customary business practice.

6.113 The United States notes that one example of such "non-commercial" and discriminatory behaviour by the CWB is the protein or quality give-away. According to the United States, the CWB encourages over-production of high-quality wheat in order to ensure it has sufficient quantities of high-quality wheat. The United States asserts that the CWB encourages production of high-quality wheat by rewarding farmers through price premiums, even when such price premiums are not warranted by demand for high-quality wheat in third-country markets. The United States contends that to the extent Western Canadian production of high-quality wheat exceeds world demand for high-quality wheat (with the consequence that the CWB cannot sell the excess production at a premium price), the CWB uses its privileges, including its borrowing privilege, to provide a price discount for certain transactions involving high-quality wheat in order to meet the price competition for lower-quality wheat in a given market. According to the United States, this amounts to a protein or quality give-away, in that the CWB provides wheat at a greater protein or quality level than the commercial terms of the contract require. The United States argues that such a protein or quality give-away

[190] For an explanation of the term "pool accounts", *see* footnote 112 above.
[191] The term "non-commercial" is to be understood here in the sense ascribed to it by the United States.

results in discrimination between markets which 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.

6.114 *Fourth*, the United States asserts that the Government of Canada is not taking any steps to ensure that CWB export sales conform to the principles of subparagraphs (a) and (b) of Article XVII:1. The United States contends that in the absence of any government supervision, the CWB's legal structure and incentives will necessarily result in non-conforming CWB export sales.

6.115 **Canada's** response to the *first* assertion is that the United States has not adduced any evidence to demonstrate that the CWB actually has greater "pricing flexibility" and less "exposure to market risk" than a "commercial actor". In particular, Canada considers that the United States has not established what the pricing flexibility and risk exposure of a "commercial actor" would be. Canada also contends that the CWB does not have a "guaranteed" supply of wheat which allows it to forward contract wheat for future delivery at a fixed price. Canada notes that the supply of wheat is subject to the vagaries of the agricultural market. Also, Canada submits that farmers who feel they can get greater economic returns from other crops will switch away from wheat.

6.116 Regarding the *second* assertion by the United States, Canada agrees that in theory the CWB could act not in accordance with commercial considerations.[192] However, Canada submits that the mere possibility that the CWB may act inconsistently with commercial considerations does not establish that Canada is in violation of its obligations under Article XVII.

6.117 In respect of the *third* assertion, Canada notes that the CWB uses its privileges, as would private sector entities in similar circumstances. But, Canada submits, the United States has not demonstrated that the CWB's use of its privileges necessarily results in the CWB making sales which are not in accordance with Article XVII:1. Canada argues in this regard that nothing in the *CWB Act* requires the CWB to act in a manner inconsistent with the requirements of Article XVII:1, or prevents the CWB from acting in a manner consistent with the requirements of Article XVII:1. The same is true for the mandate the CWB has been given by its Board of Directors. Canada points out in this regard that the CWB's Board of Directors has mandated the CWB to maximize returns to farmers and, therefore, to act commercially. Thus, in Canada's view, the CWB's legal mandate does not "necessarily result" in non-conforming CWB export sales. Canada also considers that the distinction drawn by the United States between revenue maximizing and profit maximizing is artificial.[193] According to Canada, the CWB acts similar to an agricultural marketing cooperative. Canada notes that under a marketing cooperative system, profit maximization for the producer means revenue maximization for the marketing cooperative, because the marketing cooperative may not make profits for itself and does not incur costs of production. Canada submits that the primary objective of a marketing cooperative is to achieve the best price possible for the products that it markets. This results in the highest return to producers, which, in turn, maximizes their profits.

6.118 Canada further argues that the United States has not provided any evidence to demonstrate that the CWB actually uses its privileges to discriminate between particular markets by offering "non-commercial" terms to some "targeted" markets, but not to others. Regarding the United States' allegation in respect of protein over-delivery, and the evidence which purports to support it, Canada submits that the allegation is inadmissible, because it is a factual allegation which, under the Panel's Working Procedures, should have been made and supported no later than the first substantive meeting of the Panel with the parties. Canada notes that, in any event, protein over-delivery is routine commercial practice in the wheat industry, due to efforts made by wheat exporters to avoid contract

[192] Canada's second oral statement, para. 13.

[193] Canada also argues that the United States is incorrect in suggesting that the CWB has a mandate to maximize sales at all costs.

penalties for protein under-delivery. In addition, Canada points out that there would be a give-away only if the final contract price is not adjusted upwards to reflect the additional protein delivered. Canada notes that the United States has not adduced any evidence in this regard.

6.119 Finally, with regard to the *fourth* assertion by the United States, Canada notes that the Government of Canada does not interfere in the day-to-day operations of the CWB. In Canada's view, this non-interference makes the CWB more commercial, not less. Canada points out, however, that if it came to its attention that the CWB was acting inconsistently with Canada's obligations under Article XVII:1, Canada could and would direct the actions of the CWB under Section 18 of the *CWB Act*. Canada further argues that, effectively, the CWB is also supervised and disciplined by the farmers on whose behalf it sells wheat. Western Canadian farmers are not obligated to grow wheat. Canada maintains that if producers are dissatisfied with the returns they receive from the CWB, they can and do grow alternative crops. According to Canada, the farmers will, therefore, ensure that the CWB acts in accordance with commercial considerations.

6.120 The **Panel** understands the United States to argue that the four United States assertions taken together demonstrate that the CWB Export Regime "necessarily results" in non-conforming CWB export sales.[194] Thus, for the United States' claim under Article XVII:1 to be successful, the United States must at least establish each of its four assertions.

6.121 The Panel will begin its analysis with the third assertion put forward by the United States, *viz*., the assertion that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales in a "non-commercial" manner. For the purposes of this analysis, the Panel will assume that the first[195] and second[196] assertions by the United States have been established.

6.122 Under the rubric "legal structure of the CWB", the United States has discussed essentially two elements. One is the governance structure of the CWB. The CWB is currently governed by a 15-person Board of Directors. Ten of the Board's directors are elected by Western Canadian producers of wheat and barley, the remaining five, including the president, are appointed by Canada's Governor in Council, *i.e*., by the Government of Canada.[197] With the exception of the president, directors hold office for a maximum term of four years, and may serve up to three terms.[198] Thus, the CWB is controlled by the producers whose grain the CWB markets.[199] The other structural element referred to by the United States is the uncontested fact that the Government of Canada does not control, or interfere in, the day-to-day operations of the CWB.[200]

6.123 In our view, the two aforementioned elements of the legal structure of the CWB, together with the CWB's privileges, do not establish that the CWB has an incentive to make sales based on considerations which are not exclusively "commercial" in the sense we ascribe to that term in the

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[194] United States' second oral statement, paras. 6-7 and 11-13; United States' second written submission, paras. 3 and 8; United States' reply to Panel question No. 2(e). *See also* para. 6.25 above.

[195] *See* para. 6.110 above.

[196] *See* para. 6.111 above.

[197] Section 3.02(1) of the *CWB Act*; Canada's reply to Panel question No. 36.

[198] Section 3.02(2) of the *CWB Act*.

[199] It appears that, at present, the majority of Board directors are themselves grain producers. Canada's first written submission, para. 48; Exhibit CDA-42.

[200] Pursuant to Section 18(1) of the *CWB Act*, Canada's Governor in Council may, by order, direct the CWB with respect to the manner in which any of its operations, powers and duties are to be conducted, exercised or performed. Canada has noted that it could and would use Section 18 to direct the actions of the CWB if it were to come to its attention that the CWB was acting in a manner inconsistent with Canada's obligations under Article XVII:1. Canada's second written submission, para. 77; Canada's first written submission, para. 118.

context of Article XVII:1(b). As we have noted, the majority of the directors who serve on the CWB's Board are elected by Western Canadian wheat and barley producers and must be re-elected by those producers if they wish to serve for more than one term of office. The United States itself infers from the CWB's governance structure that the CWB's Board has "a strong incentive to satisfy the greatest number of producers".[201] The Board satisfies producers by ensuring that their financial returns from the CWB's sales of their wheat or barley are maximized. The mission the CWB's Board has given the CWB confirms this point: the CWB is to "market[...] quality products and services in order to maximize returns to western Canadian grain producers".[202] Moreover, the *CWB Act* requires that, in the exercise of their responsibilities, directors and officers of the CWB "act honestly and in good faith with a view to the best interests of the [CWB]".[203] For these reasons, we are not persuaded that the CWB has an incentive, because of its "legal structure", to make its wheat sales on the basis of considerations other than price, quality, availability, marketability, etc.[204]

6.124 As we see it, the non-interference by the Government of Canada in the CWB's sales operations reinforces rather than weakens this conclusion. In view of the CWB's current governance structure, which gives Western Canadian producers control over the CWB, the fact that the Government of Canada does not supervise the CWB's sales operations makes it more rather than less likely that the CWB markets wheat solely in accordance with the commercial interests of the producers whose marketing agent it is.[205]

6.125 Turning to the "legal mandate" of the CWB, we note that Section 5 of the *CWB Act* provides that the CWB "is incorporated with the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada". Section 5 of the *CWB Act* must be read together with Section 7(1) of the same *Act*, which deals with "pricing". Section 7(1) stipulates that "[s]ubject 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 sale of grain produced in Canada in world markets".

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[201] United States' first written submission, para. 84.

[202] Exhibits CDA-7; CDA-43B, p.1 and 8; CDA-43C, inside front cover.

[203] Section 3.12(1)(a) of the *CWB Act*.

[204] We note that the United States has submitted a 1998 article from an academic journal (Exhibit US-22), which suggests that the CWB may in the past have overdelivered wheat protein to its customers. The article argues that such behaviour results in higher marketing costs for Western Canadian grain producers, but "presumably" generates political support for the CWB from its customers. Exhibit US-22, pp. 314, 318-319. For the reason indicated below at para. 6.139-6.140, we do not consider that Exhibit US-22 is properly before us. Even disregarding this, we note that the article does not explain how the specified behaviour would generate political support. Moreover, the data relied on to support the conclusion that the CWB may in the past have overdelivered wheat protein in a manner which was contrary to the interests of Western Canadian wheat producers, appears to be limited to the 1984-1994 period. However, in 1998, the CWB's governance structure was reformed, and the CWB was transformed from a Canadian Crown Corporation into the producer-run, mixed corporation that it is today. In view of this major structural reform, we do not consider that we could justifiably draw inferences from the alleged behaviour of the CWB under its former governance structure as to its behaviour under the current governance structure.

[205] As a separate matter, we note that the United States has highlighted the presence in the *CWB Act* of a clause (Section 61.1) which requires the CWB to comply with certain *North American Free Trade Agreement* ("NAFTA") provisions and the absence of a similar "WTO clause". United States' first written submission, para. 66. We do not think that the absence of a "WTO clause", or similar regulatory control, is evidence that the Government of Canada did not intend for the CWB to comply with the principles of subparagraphs (a) and (b) of Article XVII:1. Canada has explained in this regard that the "NAFTA clause" was included in the *CWB Act* in view of the specific wording of the relevant NAFTA provisions, which require Canada to take action to "ensure, through regulatory control, administrative supervision or the application of other measures" that the CWB complies with NAFTA requirements. Canada's reply to Panel question No. 40.

6.126 Thus, the object, or mandate, of the CWB is to market, or promote the sale of, Western Canadian wheat in world markets. We note that the CWB is to market wheat "in an orderly manner". In this regard, a research report by the United States Department of Agriculture (the "USDA") submitted to us by Canada states that "[m]any produce buyers emphasise the importance of working with a reliable, consistent supplier" and that suppliers can, therefore, enhance their competitive position if they can achieve "a more orderly flow" of their agricultural product to the market and thus build relationships with buyers.[206] This suggests to us that, in the case of agricultural products, making sales in an orderly manner is not inconsistent with making sales solely in accordance with "commercial considerations" as we understand that term.

6.127 Similarly, we consider that the object of "promoting the sale" of Western Canadian wheat in world markets is an object which almost by definition is commercial in nature.[207] Therefore, we do not think that this object, *per se*, could be said to require or encourage the CWB to make sales which are not based on commercial considerations. At any rate, in view of the legal structure of the CWB, we see no reason for assuming that the CWB is driven to maximize sales "at all cost", that is to say, without regard for the returns to Western Canadian producers.[208] Also, Canada has confirmed in this respect that the CWB can defer sales if doing so would maximize returns to producers.[209] Finally, there is evidence to suggest that the CWB defers purchases if it considers that no satisfactory returns could be obtained from the sale of the product concerned.[210]

6.128 Pursuant to the pricing "rule" set forth in Section 7(1) of the *CWB Act*, the CWB must sell wheat "for such prices as it considers reasonable with the object of promoting the sale of grain produced in Canada in world markets". The United States contends that Section 7(1) requires the CWB to obtain only "reasonable" prices, not profit-maximizing prices or prices which would cover the replacement value of the wheat sold.[211] The United States appears to deduce from this that the CWB therefore has an incentive to increase its sales of wheat by selling at prices which may be "reasonable" in light of the privileges it enjoys, but which "commercial actors" could not offer.[212]

6.129 Initially, we recall our view that the fact that an export STE like the CWB might, due to the privileges it enjoys, sell wheat at lower prices than "commercial actors" could offer would not, in itself, justify the conclusion that such sales would not be in accordance with commercial considerations.[213] We have also said, however, that if an export STE were to sell into a particular market at a price that is lower than the best price available to it in that market, this might indicate that the STE in question is not charging the lower price for purely commercial reasons.

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[206] Exhibit CDA-5, pp. 3 and 15.

[207] We do not see the United States as disagreeing with this proposition. United States' reply to Panel question No. 29.

[208] This view is supported by a public statement by the CEO of the CWB, which was submitted to us by the United States. The statement is to the effect that "[t]he objective of the Canadian Wheat Board is to maximize returns to producers. […] We intend to market all wheat and barley offered by producers and we will strive to obtain the best possible value for their grain". Exhibit US-13, p. 3.

[209] Canada's reply to Panel question No. 38; G/STR/N/4/CAN, p. 9. Canada has pointed out that in deciding whether or not to defer sales at a particular point in time, the CWB would need to weigh the expected benefit of deferring sales against the extra storage fees the CWB would be charged by private grain handlers. Canada's reply to Panel question No. 38. It is worth noting here, as well, that there is evidence to suggest that the CWB defers purchases on these grounds.

[210] Exhibit CDA-54, p. 5.

[211] United States' second oral statement, para. 13; United States' reply to Panel question No. 28; United States' first oral statement, para. 14.

[212] Ibid.

[213] *See* para. 6.101 above.

6.130 Applying these considerations to Section 7(1) of the *CWB Act*, it is clear that the mere fact that the CWB is mandated to promote sales of wheat and that the "reasonable pricing" standard may allow the CWB to do so by selling at prices which "commercial actors" could not offer does not warrant the conclusion that the CWB has an incentive to make sales which are not in accordance with commercial considerations.

6.131 We do not understand the United States to argue that Section 7(1) encourages the CWB to sell at prices which are lower than the best prices available to it in different markets.[214] In any event, based on the information on the record, we are not convinced that Section 7(1) creates such an incentive. If the CWB were to sell into some markets at prices which are lower than the prices which these markets would have borne, it would diminish returns to Western Canadian producers. In view of the fact that the CWB is a producer-controlled marketing agency, it seems unlikely that the CWB would deliberately make such below-best-price sales.[215] In fact, there is evidence on the record to suggest that, in some cases, the CWB may not be prepared to sell at all, even at the best price possible.[216]

6.132 The United States deduces from Section 7(1) that the CWB's objective is to maximize revenue rather than profit.[217] According to the United States, this means that the CWB has strong incentives to act inconsistently with commercial considerations, because even if the CWB tries to get the best prices, it will not conduct itself like a private grain trader. The United States asserts in this regard that revenue-maximizing firms will tend to make sales in greater volumes and at lower prices than would profit-maximizing firms.[218]

6.133 It is uncontested that the objective of the CWB in selling wheat is not to make a profit for itself.[219] All the revenue obtained by the CWB from the sale of wheat is pooled and returned to Western Canadian wheat producers at the end of the crop year, after deduction of the CWB's marketing costs.[220] In our view, the mere fact that the CWB does not make a profit for itself does not support the conclusion that the CWB has an incentive not to make sales solely in accordance with commercial considerations.[221] As we have said above, because of its governance structure, the CWB has an incentive to maximize returns to the producers whose products it markets. Furthermore, even if the CWB were to make sales in greater volumes and, in some instances, at lower prices than a

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[214] The United States itself has stated that the CWB, in trying to sell the wheat it has purchased, "will presumably try to obtain the best prices". United States' first written submission, para. 80.

[215] It is worth noting here that the CWB's Board of Directors states in the 2001-2002 CWB Annual Report that "[w]e use the tools at our disposal – the single-desk, the pool accounts and government guarantees on credit sales and farmer payments – [...] to ensure that [producers'] returns from the marketplace are *maximized*". Exhibit CDA-43C, p.1 (emphasis added).

[216] Exhibit CDA-54 provides information on CWB acceptance levels for, *inter alia*, 2002-2003 Series C delivery contracts. It is clear from Exhibit CDA-54 that the CWB did not accept delivery of certain lower quality Western Canadian wheat offered to it under the 2002-03 Series C delivery contracts because there was "limited international demand for lower quality wheat at *reasonable* prices". Exhibit CDA-54, p. 5 (emphasis added). *See also* Canada's reply to Panel question No. 38.

[217] United States' first oral statement, para. 14.

[218] United States' first written submission, para. 85-86.

[219] Canada's first oral statement, para. 9; Canada's comments on the United States' reply to Panel question No. 87.

[220] G/STR/N/4/CAN, p. 12 (Exhibit US-1); Canada's first written submission, para. 50.

[221] Indeed, it is important to recall in this context that STEs are not necessarily used only for commercial purposes, but may also be established or maintained to carry out governmental policies or programmes. *See* para. 6.96 above. While the latter type of STE must also make purchases or sales solely in accordance with commercial considerations, such STEs ordinarily do not purchase or sell for the purpose of maximizing profit.

profit-maximizing enterprise, this would not necessarily imply that the CWB's sales[222] would not be based solely on commercial considerations. As noted above, we are not convinced that Section 7(1) creates an incentive for the CWB to sell at prices which are lower than the best prices available to it in different markets. Indeed, if it were to do so, it would not maximize sales revenue.

6.134 Also, we see nothing in Article XVII:1 to suggest that export STEs like the CWB can only meet the "commercial considerations" requirement if their sales operations are structured so as to maximize profit. Nor do we see anything in the text of Article XVII:1 which would indicate that the CWB must conduct itself in the marketplace exactly like privately-held profit-maximizing share-capital corporations would. Indeed, it is not clear why it should. As Canada has pointed out, there are privately-organized agricultural marketing cooperatives which are similar in structure to the CWB and do not maximize profits.[223] Since such privately-organized cooperatives do not enjoy government-conferred privileges, they must make sales based on purely commercial considerations. For all these reasons, we do not consider that merely because the CWB may be a revenue-maximizer the CWB has "strong incentives" to make sales not in accordance with commercial considerations.

6.135 Up to this point, we have examined whether the United States has established based on the text of the *CWB Act*, CWB statements, Canada's notification concerning STEs, etc. that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to make some of its sales not in accordance with commercial considerations. We have found that the United States has failed to establish its assertion in those terms. Below, we will examine whether, notwithstanding our findings up to this point, the United States has adduced factual evidence of actual CWB sales behaviour which supports its assertion.

6.136 We recall in this regard that the United States has alleged that the CWB gives Western Canadian wheat producers a deliberate incentive to over-produce high quality wheat by paying price premiums for such wheat and then sells some of this over-production of high quality wheat in some markets at a price discount in order "to meet the price competition for lower quality wheat" in those markets.[224] According to the United States, such a protein or quality give-away is not in accordance with commercial considerations because "commercial actors" could not afford to sell high quality wheat without getting the full replacement value for such wheat.[225]

6.137 Concerning the alleged incentive to over-produce high quality wheat, the United States has submitted evidence which suggests that, on average, Western Canadian production of high quality wheat has exceeded the demand which has been willing to pay a commercial premium for it.[226] The evidence in question, a 1999 joint study by the Manitoba Rural Adaptation Council Inc. and the CWB on the market competitiveness of Western Canadian wheat, does not indicate whether the abundant supply of high quality wheat in the past was the result of incentives provided by the CWB. The study does note, however, that "the need to be able to service high-quality wheat customers in years of poor-

[222] It should be recalled here that we are focussing in this case on the CWB's sales of wheat, not its "purchases" of wheat. *See* footnote 118 above.

[223] Canada's first written submission, paras. 150-151 and 158. We also note that the USDA research report referred to above, which deals with private cooperative pooling operations, states that the main objective of the sales staff of private agricultural marketing cooperatives is "to maximize the returns to the producer" and that under the marketing agreements or contracts establishing such private marketing cooperatives, the cooperative usually "agrees to sell the member's produce for the best price possible and to return payment to the grower". Exhibit CDA-5, pp. 3 and 4. Thus, the USDA's research report appears to recognize that private cooperatives do not seek to make a profit for themselves. It is nowhere suggested in the report that this gives private marketing cooperatives an incentive not to make sales solely on the basis of commercial considerations.

[224] United States' second oral statement, paras. 9-10; United States' second written submission, paras. 12-14.

[225] United States' second oral statement, para. 11.

[226] Exhibit US-15, p. ix.

quality production is an important marketing consideration".[227] Thus, it would seem that even if the CWB were encouraging over-production of high-quality wheat by offering price premiums, this may well be in accordance with commercial considerations.

6.138 Concerning the alleged CWB practice of selling high-quality wheat in some markets at a discounted price in order to meet the price competition for lower quality wheat in those markets and thus giving away quality, we think that such a sales practice could be viewed as not reflecting commercial considerations if it involved foregoing reasonably available opportunities to sell high quality wheat at premium prices and if it involved selling high quality wheat at prices which are lower than would be necessary to meet the price competition for lower quality wheat. The evidence the United States relies on to support this allegation consists of a 1998 academic article on the CWB (hereafter the "1998 article") and a 1996 brief submitted by the CWB to the Western Grain Marketing Panel (hereafter the "1996 brief"). We address these two elements in turn.

6.139 In relation to the 1998 article, we note, as a preliminary matter, that Canada objects to the Panel considering this article on the grounds that it was introduced in contravention of the provisions of paragraph 12 of the July Panel's Working Procedures. Pursuant to paragraph 12 of the July Panel's Working Procedures, the United States was to have submitted all factual evidence to the Panel no later than during the Panel's first substantive meeting with the parties, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by the other party or the third parties.[228] The 1998 article, which contains factual information regarding the alleged CWB practice of protein or quality give-away, was submitted as an attachment to the United States' second written submission, that is to say, after the Panel's first substantive meeting with the parties. Until the second written submission, the United States never referred to the alleged practice of protein or quality give-away. In its defence, the United States argues that it referred to the alleged protein or quality give-away to "further explain" statements made in its first written submission regarding Canada's excess production of high quality wheat and to "rebut" Canada's allegations in its first written submission that the United States had adduced no evidence of non-commercial behaviour because none exists.[229]

6.140 The United States had an opportunity in its first oral statement to "rebut" allegations made by Canada in its first written submission, including by introducing new factual evidence. Also, while the United States was free to "further explain" its earlier statements in its second written submission, it should have submitted all factual information supporting these earlier statements during or before the Panel's first substantive meeting. It should also be noted that the United States did not indicate that the 1998 article was not accessible to it by the date of the first substantive meeting, nor did the United States otherwise try to show "good cause"[230] for the late submission of new factual evidence. For all these reasons, we agree with Canada that the 1998 article is not properly before us.

6.141 In any event, even if we were to consider that the article in question is properly before us, it would, in our view, be of little evidentiary value. The article does not establish a link between excess production of high quality wheat and the alleged CWB practice of overdelivering protein or quality. Moreover, the article alleges the existence of a CWB practice of overdelivering protein based on data that apparently covers the 1984-1994 time period. In other words, the article purports to describe the

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[227] Ibid., pp. v and ix.

[228] Para. 12 reads:

> Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttals, answers to questions or comments on answers provided by others. Exceptions to this procedure will be granted upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

[229] United States' comments on Canada's second oral statement, para. 6.

[230] Para. 12 of the July Panel's Working Procedures.

CWB's sales behaviour during a period when the CWB had a legal structure which was very different from its present structure, which was adopted in 1998.[231] This difference is important because the article suggests that the alleged CWB practice of overdelivering protein was not in the best commercial interests of Western Canadian wheat producers, but served the political interests of the CWB itself.[232] We do not consider that the statements made in the 1998 article regarding the behaviour and incentives of the CWB under its previous legal structure assist the United States in demonstrating that under the CWB's current legal structure, which gives Western Canadian producers control over the CWB, the CWB has an incentive to use its privileges to make sales which are not solely in accordance with commercial considerations and which do not maximize returns to Western Canadian wheat producers.[233]

6.142 As noted above, the other evidentiary element referred to by the United States is a 1996 brief submitted by the CWB to the Western Grain Marketing Panel on the role of the CWB in the Western Canadian grain marketing system.[234] The United States considers that this brief supports its view that the CWB is selling high quality wheat at a low quality wheat price and confirms that the CWB gives away quality in its sales. Specifically, the issue here is whether one particular paragraph of the 1996 brief may be understood as suggesting that the CWB might in the past have sold all or most No. 2 Canada Western Red Spring ("CWRS") 13.5 per cent protein wheat at lower prices than the prices at which all No. 3 CWRS wheat (a wheat of lower quality than No. 2 CWRS 13.5) was sold.[235]

6.143 The main purpose of the paragraph in question is to explain why the CWB pooling system is not based on the averaging of CWB sales prices for a given type, class and grade of wheat. The

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[231] *See* footnote 204 above.

[232] Exhibit US-22, pp. 314, 318-319.

[233] It should also be noted that the allegation made in the 1998 article of protein overdelivery by the CWB is based essentially on CWB wheat sales to Japan during the 1984-1994 time period. However, it is not clear from the article whether the CWB could in fact have sold the relevant wheat in Japan at higher prices. Nor is it clear from the article whether the CWB could have sold the wheat in question at higher prices in other markets. The article states in this regard that:

> There is a high degree of substitutability among wheats from various exporters and this means the CWB is essentially a price taker in the wheat market. This is reinforced by the fact that 75% to 80% of the wheat is imported by developing countries, whose main consideration is price. Essentially, only Japan, the United Kingdom, and the United States are quality markets, willing to pay for product differentiation and high protein in wheat. (Exhibit US-22, p. 316 (footnote omitted).)

[234] We note that the United States relies on a particular paragraph of this brief, parts of which it quoted in a footnote to the United States' second written submission. United States' second written submission, footnote 15. In that footnote, the United States referred the Panel to the correct page number of the brief in question as well as to Exhibit US-12. Exhibit US-12 contains excerpts of the brief in question, but not the page containing the aforementioned paragraph. We note that Canada did not object to the Panel considering the paragraph in question. For this reason, and in the light of the fact that it is unclear whether the United States was under the impression that it had already submitted the relevant paragraph to the Panel as part of Exhibit US-12, we take the paragraph in question into consideration.

[235] The relevant paragraph reads as follows:

> Pooling is sometimes mistakenly thought of as the (weighted) averaging of CWB sales prices for a given type, class, and grade of grain over a given crop year. If this was what pooling really was, somebody who had delivered No. 2 CWRS 13.5 per cent protein wheat during 1994-95 would have ended up receiving the weighted average of all sales of No. 2 CWRS 13.5 per cent protein wheat during that year. The problem with that type of system would be that all or most of the No. 2 CWRS 13.5 might have been sold at lower prices than the prices at which all the No. 3 CWRS wheat was sold. The result of this would be that the average return for No. 3 CWRS wheat would be higher than that for No. 2 CWRS 13.5 wheat, *even though No. 2 CWRS 13.5 was worth more in the market than No. 3 CWRS at all times throughout that year*. That would obviously not be a proper market relationship between those two grades of wheat. (Exhibit US-24, p. 15 (emphasis in original))

paragraph gives the example of No. 2 CWRS 13.5 to illustrate why averaging would be problematic. However, the paragraph in question does not state that the CWB actually sold No. 2 CWRS 13.5 at a price below the price for No. 3 CWRS.[236] Also, it is not clear from the paragraph at issue whether, independently of the example of No. 2 CWRS 13.5, the type of pricing practice referred to has a basis in fact or whether it is hypothetical. Therefore, we do not agree with the United States that the relevant paragraph admits of the inference that the CWB does, in fact, engage in such "pricing schemes".[237]

6.144 In any event, the paragraph gives no explanation as to why the CWB would choose to engage in such practices. The United States suggests that such practices would be intended to increase the CWB's sales and market share, and to preclude other competitors from competing in the relevant markets. According to the United States, the CWB's competitors could not sell high quality wheat at the price for low quality wheat without incurring a loss.[238] Even if the United States' suggestion was correct, it would not establish that such pricing practices would not be in accordance with commercial considerations. Indeed, the United States itself contends that the CWB would engage in such practices for commercial reasons, namely, to increase the CWB's market share or to deter its competitors from contesting particular markets. Therefore, and in the absence of more detailed information, there is no basis upon which we could conclude that the pricing practices at issue, if adopted by the CWB, would necessarily be inconsistent with commercial considerations.[239]

6.145 In light of the foregoing, we do not consider that the CWB's 1996 brief to the Western Grain Marketing Panel assists the United States in establishing that the CWB has an incentive, due to its mandate and privileges, to make sales which are not based on commercial considerations.

6.146 In summary, for the reasons set out above[240], we are not persuaded that the CWB's legal structure and mandate, together with the privileges enjoyed by the CWB, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations. The factual evidence adduced by the United States regarding actual CWB sales behaviour does not prove otherwise.

6.147 Since it has not been demonstrated that the CWB has an incentive to make sales based on considerations which are not commercial in nature, there is no basis for concluding that the CWB has an incentive to discriminate between markets by selling in some markets (or not selling in some markets) on the basis of considerations which are not solely commercial in nature. At any rate, we see nothing in the legal structure of the CWB, its mandate, or its privileges which would create an

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[236] Indeed, the paragraph is cast in hypothetical terms, as is clear from the phrase "all or most of the No. 2 CWRS 13.5 *might* have been sold at lower prices than the prices at which all the No. 3 CWRS wheat was sold" (emphasis added).

[237] United States' reply to Panel question No. 90.

[238] Ibid.

[239] We note in this regard that it is not clear that the example given in the relevant paragraph of all or most of the No. 2 CWRS 13.5 wheat being sold at lower prices than the prices at which all the No. 3 CWRS wheat was sold would be an example of the CWB giving away protein or quality and thus deliberately making below-best-price sales. A price/quality reversal of the type referred to in the example may occur as a result of price fluctuations during the crop year and differences in the timing of sales of different types of wheat. Thus, even if No. 2 CWRS 13.5 wheat was worth more in the market than No. 3 CWRS wheat at all times throughout a particular year, it may happen, due to contractual commitments, imperfect knowledge, etc., that all of the No. 3 CWRS wheat was sold at a time when the price for such wheat was at its peak, and all or most of the No. 2 CWRS 13.5 wheat was sold at another time of the year when the price for such wheat was below the average price for such wheat during the year in question. In such circumstances, "all or most of the No. 2 CWRS 13.5 might have been sold at lower prices than the prices at which all the No. 3 CWRS wheat was sold" (Exhibit US-24, p. 15).

[240] *See* paras. 6.122-6.134 above.

incentive for the CWB to discriminate between markets for reasons which are not commercial. Nor have we seen any evidence of such sales behaviour by the CWB.[241]

6.148 We therefore conclude that the United States has failed to establish its third assertion, to the effect that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations.

6.149 As we have said, for the United States' claim that the CWB Export Regime necessarily results in non-conforming CWB export sales to be successful, the United States must establish each of its four assertions. Since the United States has failed to establish one of the four assertions, we reach the further and consequential conclusion that the United States has not demonstrated that the CWB Export Regime necessarily results in CWB export sales which are not solely in accordance with commercial considerations (and, hence, inconsistent with the principle of the first clause of subparagraph (b) of Article XVII:1) and which are inconsistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994 for governmental measures affecting exports by private traders (and, hence, inconsistent with the principle of subparagraph (a) of Article XVII:1).

6.150 Before coming to a final conclusion with respect to the United States' claim under Article XVII:1, it is necessary to address one more element of that claim. The United States asserts that the CWB Export Regime necessarily results in the CWB not affording the enterprises of other Members adequate opportunity, in accordance with customary business practice, to compete for participation in its sales, contrary to the provisions of the second clause of subparagraph (b) of Article XVII:1. For reasons we have set out above[242], we consider that the second clause of subparagraph (b) requires that the CWB afford its customers, and not its competitors, adequate opportunity to compete for participation in its wheat sales. The United States has not argued in this case that the CWB does not provide the enterprises of other Members which are interested in buying wheat from the CWB (*i.e.*, the CWB's customers) adequate opportunity to compete for participation in its wheat sales. Nor has the United States submitted any evidence which would support such an argument. In light of this, we conclude that the United States has not established that the CWB Export Regime necessarily results in the CWB not affording the enterprises of other Members adequate opportunity, in accordance with customary business practice, to compete for participation in its sales.

6.151 Having considered all elements of the United States' claim under Article XVII:1, and having regard to the entirety of the foregoing considerations, we conclude as follows:

(a) The United States has not established that the CWB Export Regime necessarily results in non-conforming CWB export sales; and, as a consequence[243]

(b) the United States has not established that Canada has breached its obligations under Article XVII:1 of the GATT 1994.

[241] On the other hand, there is evidence before us which suggests that the CWB may sometimes charge different prices for the same quality of wheat in different export markets for commercial reasons, to "reflect various market factors". Exhibits US-21, p. 2; US-24, p. 10.

[242] *See* paras. 6.66-6.72 above.

[243] We recall that the United States claim is that Canada has breached its obligations under Article XVII:1 because the CWB Export Regime necessarily results in non-conforming CWB export sales.

## D. MEASURES AFFECTING THE TREATMENT OF IMPORTED GRAIN

### 1. Measures at issue

6.152 The United States has challenged four distinct measures as being in violation of Article III:4 of the GATT 1994 and Article 2 of the *Agreement on TRIMs*. Two of these measures concern the treatment of imported grain prior to and following entry into Canadian grain elevators. The other two measures concern the treatment of imported grain in the Canadian rail transportation system.

6.153 In particular, the United States has challenged the following measures that concern the treatment of imported grain prior to and following entry into Canadian grain elevators:

(a) Section 57(c) of the *Canada Grain Act* relating to the receipt of foreign grain into Canadian grain elevators; and

(b) Section 56(1) of the *Canada Grain Regulations* relating to the mixing of certain grain in Canadian transfer elevators.

6.154 The United States has also challenged the following measures that concern the treatment of imported grain in the Canadian rail transportation system:

(a) Sections 150(1) and 150(2) of the *Canada Transportation Act*, which impose a cap on revenue that may be earned by certain railways for the transportation of Western Canadian grain for particular movements identified in the *Act*; and

(b) Section 87 of the *Canada Grain Act*, which allows for producers of grain to apply for a railway car to receive and carry the grain to a grain elevator or to a consignee.

### 2. Claims under Article III:4 of the GATT 1994

(a) General

6.155 Article III:4 of the GATT 1994 requires in relevant part:

> "The products of the territory of any contracting party imported into the territory of any other contracting party 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 use."

6.156 The Panel notes that a complaining party must demonstrate three elements in order to establish a violation of Article III:4 of the GATT 1994. In particular:

(a) the imported products that are allegedly treated less favourably by a particular governmental measure must be "like" the domestic products that are said to enjoy better treatment;

(b) the governmental measure at issue must be a law, regulation or requirement affecting the internal sale, purchase, transportation, distribution or use of the imported products; and

(c) the application of the governmental measure must result in less favourable treatment of the imported products *vis-à-vis* the like domestic products.[244]

6.157 As a preliminary matter, the Panel notes that in respect of three of the four measures that have been challenged by the United States -- namely, Section 57(c) of the *Canada Grain Act*, Section 56(1) of the *Canada Grain Regulations*, and sub-sections (1) and (2) of Section 150 of the *Canada Transportation Act* -- Canada has argued that some of the grain subject to or affected by the challenged measures is not "imported" into Canada but, rather, is "in transit". In Canada's view, grain which is in transit is not within the scope of Article III:4 of the GATT 1994 but, rather, falls within the scope of Article V. The United States has not claimed a violation of Article V of the GATT 1994.

6.158 By its terms, Article III:4 only applies to products "imported into the territory of [a Member]". Therefore, in assessing the United States' claims under Article III:4, the Panel must satisfy itself that the relevant measures apply to grain "imported" into Canada. If the relevant measures apply to "imported" grain, then the possibility that the same measures might also apply to grain "in transit" would not, in the Panel's view, remove those measures from the scope of Article III:4. Accordingly, the Panel need not and does not examine whether the relevant measures also apply to grain that is "in transit" within the meaning of Article V.

(b) Section 57 of the *Canada Grain Act*: receipt of foreign grain

6.159 Section 57 of the *Canada Grain Act* provides that:

> Except as may be authorized by regulation or by order of the [Canada 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;
>
> (c) any foreign grain; or
>
> (d) any grain that the operator has reason to believe is infested or contaminated.

6.160 It is clear from the United States' submissions that the United States is challenging Section 57(c) of the *Canada Grain Act*. The United States claim is that Section 57(c) of the *Canada Grain Act*, as such, is inconsistent with Article III:4 of the GATT 1994.[245]

*(i) Like products*

6.161 The **United States** argues that, even when of the exact same type as domestic Canadian grain, US grain as "foreign grain" is subject to differential treatment under Section 57(c) of the *Canada Grain Act*. According to the United States, given that Section 57(c) discriminates on the basis of origin rather than physical characteristics or end-uses, even when all other product characteristics are exactly the same, one must reach the conclusion that the measure at issue applies to like domestic and foreign products. The United States submits that, in any event, the imported and domestic products at

[244] Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* ("*Korea – Various Measures on Beef*"), WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 133.

[245] United States' reply to Panel question No. 8.

issue, namely those covered by Section 57(c) of the *Canada Grain Act* are identical and are, therefore, "like products". More particularly, all imported and domestic products falling within each of the categories of "grain" as defined in Section 5(1) of the *Canada Grain Regulations* are "like products" for the purposes of Article III:4. The United States further submits that some imported United States grain is the same variety as Canadian grain, the only difference being that the US grain is grown south of the Canadian border.

6.162 **Canada** argues that, for the purposes of the *Canada Grain Act*, not all types of grain are like. Not only is it not sufficient to define "like products" by category, but the grades and varieties of the grain must also be taken into account in certain circumstances because of their different end-uses and end-use characteristics. Accordingly, within each type of grain, there are different "like" products. Canada notes that it is not arguing that no US grain is like Canadian grain simply because of its origin. Canada submits that, rather, because Canadian and US grain are not subject to the same quality assurance system, different treatment of the Canadian and US grain does not amount to less favourable treatment under Article III:4.

6.163 As noted above by the **Panel,** pursuant to Article III:4 of the GATT 1994**,** the imported products that are allegedly treated less favourably by a particular governmental measure must be "like" the domestic products that are said to enjoy better treatment.

6.164 We recall relevant WTO jurisprudence, which supports the view that where a difference in treatment between domestic and imported products is based exclusively on the products' origin, the complaining party need not necessarily identify specific domestic and imported products and establish their likeness in terms of the traditional criteria -- that is, the physical properties, end-uses and consumers' tastes and habits. Instead, it is sufficient for the purposes of satisfying the "like product" requirement, to demonstrate that there can or will be domestic and imported products that are like.[246]

6.165 Section 57(c) of the *Canada Grain Act* provides that foreign grain may not enter Canadian grain elevators unless authorization is first obtained from the Canada Grain Commission ("CGC"). Thus, by its terms, Section 57(c) only applies to foreign grain.[247] By virtue merely of its origin, domestic grain is not subject to the authorization requirement of Section 57(c).

6.166 The United States has established to our satisfaction that, as a result of the origin-based distinction contained in Section 57(c), domestic grain that is like foreign grain would not be subject to

[246] In *Argentina – Hides and Leather*, in dealing with a claim under Article III:2 of the GATT 1994, the panel found that where a Member draws an origin-based distinction in respect of internal taxes, a comparison of specific products is not required and, consequently, it is not necessary to examine the various likeness criteria. Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather* ("*Argentina – Hides and Leather*"), WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 2021, paras. 11.168 – 11.170. While this finding pertained to Article III:2, we consider that the same reasoning is applicable in this case *mutatis mutandis*. Further, in *US – FSC (Article 21.5 – EC)*, in considering a claim under Article III:4, the panel stated that it did not believe that the mere fact that a good had US origin rendered it "unlike" an imported good. Accordingly, the panel did not consider it necessary to have evidence that any particular class of imported goods would be accorded less favourable treatment than a class of like products of national origin. Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities* ("*US – FSC (Article 21.5 – EC)*"), WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW, paras. 8.132–8.134.

[247] It would appear that foreign grain is also subject to the other provisions of Section 57 that apply equally to domestic grain, namely Section 57(a), which applies to grain that has not been weighed before or during receipt into a grain elevator, and Section 57(d), which applies to grain that the elevator operator believes is infested or contaminated. Canada's reply to Panel question No. 103 confirms that at least Section 57(d) applies to foreign grain.

Section 57(c).[248] Indeed, even domestic grain that is identical to foreign grain in all respects except for origin would not be subject to the authorization requirement contained in Section 57(c).

6.167 Accordingly, the Panel considers that, since domestic grain that is like foreign grain is not subject to Section 57(c), the "like products" requirement in Article III:4 of the GATT 1994 is satisfied.

*(ii) Measure affecting internal distribution and/or transportation*

6.168 The **United States** argues that Section 57(c) of the *Canada Grain Act* is a law affecting the distribution and transportation of grain. According to the United States, most grain transported internally in Canada will, at some point, be received and/or stored in a Canadian grain elevator.

6.169 **Canada** argues that the measures at issue regarding the treatment of imported grain may only be examined from the perspective of their effect on the *internal* sale, offering for sale, purchase, transportation, distribution or use of the imported grain. Canada submits that a portion of US grain that enters the Canadian bulk grain handling system is destined for re-export to third countries. To the extent that the authorization requirement of Section 57(c) of the *Canada Grain Act* affects US grain in transit through Canada, it is outside the scope of Article III:4 of the GATT 1994 and of the Panel's terms of reference.

6.170 As the **Panel** recalled previously, Article III:4 of the GATT 1994 requires that the governmental measure at issue be a law, regulation or requirement affecting the internal sale, purchase, transportation, distribution or use of imported products. As noted above, the United States has argued that Section 57(c) of the *Canada Grain Act* is a law affecting the distribution and transportation of grain.[249]

6.171 As to whether Section 57(c) of the *Canada Grain Act* affects *distribution* within the meaning of Article III:4 of the GATT 1994, we note that the GATT 1994 does not contain a definition of "distribution". The New Shorter Oxford English Dictionary defines "distribution" to mean, *inter alia*, "the dispersal of commodities among consumers effected by commerce".[250] We take this to mean that "distribution" entails, *inter alia*, the supply of goods to consumers or to on-sellers.

6.172 Canada has described the Canadian bulk grain handling system as a "distribution channel"[251] for grain, another distribution channel being direct sales to domestic end-users. Given that Section 57(c) of the *Canada Grain Act* directly affects access to the Canadian bulk grain handling system, it is clear to the Panel that Section 57(c) is a measure affecting the internal distribution of foreign grain in Canada.[252] In these circumstances, we do not see the need to determine, in addition, whether Section 57(c) also affects internal transportation.

6.173 With respect to whether Section 57(c) applies to foreign grain "imported" into Canada,[253] the Panel is satisfied that at least some foreign grain is imported into Canada, distributed through the bulk

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[248] We do not exclude the possibility that there might exceptionally be cases in which differences in origin might coincide or correlate with differences in physical properties, end-uses, and consumers' tastes and habits as between imported and domestic products so as to render them "unlike" for the purposes of Article III:4 of the GATT 1994. Nevertheless, based on the information on the record, we are not convinced that *all* foreign grain is unlike Canadian grain.

[249] United States' first written submission, para. 91.

[250] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 709.

[251] Canada's first written submission, paras. 19 and 21.

[252] Neither party has contested that Section 57(c) is an *internal* measure within the meaning of Article III:4 of the GATT 1994.

[253] *See* para. 6.158 above.

grain handling system and domestically consumed.[254] The Panel is satisfied, therefore, that Section 57(c) of the *Canada Grain Act* can and does apply to goods "imported" into Canada and, hence, is subject to the provisions of Article III:4 of the GATT 1994.

*(iii) Less favourable treatment*

6.174 The **United States** argues that Section 57(c) of the *Canada Grain Act*, as such, discriminates against imported grain. More particularly, the United States argues that Section 57(c) prohibits receipt of foreign grain, unless special authorization is granted. The criteria used to decide whether to grant such authorization to foreign grain are not specified. The United States submits that, in contrast, special authorization, being an extra regulatory burden, is not needed for the entry of Canadian grain into grain elevators. Therefore, Canadian grain can move in and out of the bulk grain handling system subject to far less burdensome regulatory requirements than is the case for foreign grain.

6.175 According to the United States, the regulatory prohibition on receipt of foreign grain has a real and negative impact on the ability of imported US grain to move through the Canadian bulk grain handling system, thereby affording protection to Canadian grain. The United States submits, in particular, that the default prohibition impedes commercial opportunities for US grain by making it more costly and burdensome for US grain to move through the bulk grain handling system. The additional regulatory requirements result in real costs to grain elevators and discourage these elevators from handling US grain. This, in turn, limits the access that US grain has to the Canadian market.

6.176 The United States also argues that there is no efficient alternative for most grain producers to the bulk grain handling system since it allows numerous grain farmers to consolidate smaller quantities of grain at elevators into the large bulk shipments that purchasers demand. According to the United States, farmers who cannot take advantage of the bulk grain handling system face prohibitive handling and transportation costs. The United States submits that, in addition, the possibility of alternative distribution channels or exceptional authorizations does not remove the less favourable treatment of foreign grain since Article III:4 of the GATT 1994 protects conditions of competition, not trade flows *per se*. Accordingly, the fact that US exporters can choose to sell grain directly to Canadian end-users is irrelevant to the question of whether discrimination is inherent in the bulk grain handling system.

6.177 **Canada** argues that Section 57(c) of the *Canada Grain Act* distinguishes between Canadian grain and foreign grain but does not mandate less favourable treatment for foreign grain. Canada submits that Section 57(c) is not a prohibition. Rather, the CGC has the discretion to always authorize foreign grain to enter elevators.

6.178 Canada also argues that the United States has not adduced any evidence in support of its contention that Section 57(c) of the *Canada Grain Act* in any way affects the conditions of competition of US grain. Nor has the United States adduced evidence of actual, potential or probable harm. Canada quotes figures to show that a large quantity of US grain is imported into Canada and to argue that, therefore, there is no factual basis for the claim that US grain is shut out of the Canadian market and cut off from "normal" distribution channels.

6.179 In addition, Canada argues that Section 57(c) of the *Canada Grain Act* is an integral part of the quality system for grain. The key objectives of this system are to ensure that high quality grain is produced and that the quality of the grain is maintained as it moves through the Canadian bulk grain handling system. In this way, grain that is delivered meets customers' end-use requirements.

[254] Canada itself acknowledges that some imported (US) grain that enters elevators is for domestic consumption. Canada's first written submission, paras. 190 and 228 and Annex I, p. 6. *See* also Canada's reply to Panel question No. 42.

According to Canada, adequate guarantees in the bulk handling system are necessary to preserve the integrity of the Canadian quality assurance system.

6.180 Canada also submits that US farmers and grain companies can and do sell and deliver their products in large quantities directly to end-users. Less than a third of the grain produced and consumed in Canada in 2001-02 and 2002-03 moved through the elevator system. Accordingly, the "normal" distribution channel for Canadian grain is direct sale to end-users. Canada notes that there are no Section 57 entry authorization requirements in respect of US grain that is sold directly to end-users.

6.181 The **Panel** commences by describing the effect and operation of Section 57(c) of the *Canada Grain Act*. We understand that the effect of Section 57(c) of the *Canada Grain Act* is such that foreign grain may not enter Canadian grain elevators unless authorization, which is the subject of the exercise of discretion by the CGC, is first obtained.[255] While Section 57(c) is not explicit in this regard, Canada has confirmed that the granting of an authorization order by the CGC for receipt of foreign grain into grain elevators is contingent upon a request first being made for such authorization.[256]

6.182 Section 57(c) of the *Canada Grain Act* does not itself dictate the criteria pursuant to which discretion is exercised by the CGC. Nor does Section 57(c) prescribe the conditions according to which receipt of foreign grain may be authorized. It would seem, therefore, that, in principle, receipt of foreign grain may be authorized unconditionally. However, it appears that, in practice, authorization will be made subject to certain conditions in most cases.[257] Indeed, conditions may be imposed requiring that: (i) foreign grain be kept separate from Canadian grain;[258] (ii) foreign grain be labelled to indicate its origin;[259] (iii) equipment be cleaned before and after delivery of foreign grain (such as where foreign grain contains a genetically modified grain not approved in Canada or where there is an SPS concern);[260] (iv) the CGC be notified of further movements of the foreign grain;[261] and/or (v) the CGC monitor receipt or discharge of foreign grain.[262]

6.183 Finally, we note that the receipt authorization orders made under Section 57(c) that were submitted to the Panel indicate that authorization may: (i) apply to a single shipment of foreign grain;[263] (ii) be granted in advance for an extended period of time;[264] (iii) specifically allow for receipt

[255] We also note the possibility that regulations to authorize receipt of grain into Canadian elevators may be issued pursuant to Section 57(c). However, we are not aware of the existence of any such regulations at this point in time. Therefore, for the purposes of our analysis, we will not examine this possibility.

[256] *See*, for example, Canada's second oral statement, para. 65; Canada's reply to Panel question No. 13(a); Canada's first written submission, para. 226.

[257] This is evident from the receipt authorization orders for foreign grain that have been adduced as evidence in this case. Canada has also confirmed this. Canada's first written submission, footnote 118; Canada's replies to Panel question Nos. 13(b) and (d). Canada has stated that the legal authority to impose conditions on the entry of foreign grain into elevators derives from Section 57(c) of the *Canada Grain Act*. Canada argues that, in accordance with Canadian principles of statutory interpretation and administrative law, a discretionary authority to deny entry of foreign grain into elevators includes the authority to permit with conditions the entry of foreign grain into elevators. Canada's reply to Panel question No. 69.

[258] *See*, for example, Exhibit CDA-48.

[259] *See*, for example, Exhibit CDA-59.

[260] *See*, for example, Exhibit CDA-47.

[261] *See*, for example, Exhibit CDA-48.

[262] *See*, for example, Exhibit CDA-28.

[263] *See*, for example, Exhibit CDA-52.

[264] *See*, for example, Exhibit CDA-30.

of multiple shipments of a particular foreign grain;[265] (iv) apply to various categories of foreign grain;[266] and/or (v) apply to shipments from one[267] or a number of regions or States.[268]

6.184 We now turn to the United States' claim that Section 57(c) of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994 because it treats foreign grain less favourably than like domestic grain. It is common ground between the parties that, in order to support a finding that Section 57(c) of the *Canada Grain Act*, as such, treats imported grain less favourably than like domestic grain, the relevant requirement contained in Section 57(c) must adversely affect the competitive opportunities of imported grain *vis-à-vis* like domestic grain.[269] We agree.[270] We note in this regard that in order to establish that Section 57(c) adversely affects the competitive opportunities of imported grain *vis-à-vis* like domestic grain, it is not necessary to demonstrate that Section 57(c) has produced actual adverse effects on trade.[271] Canada is of the view that since the United States in this case is challenging Section 57(c), as such, Section 57(c) would, under GATT/WTO practice, be inconsistent with Article III:4 only if it mandated, or required, less favourable treatment of foreign grain.[272] Canada is referring here to the so-called "mandatory/discretionary" distinction which has been applied by numerous GATT and WTO panels.[273] The United States did not specifically address this point. We note that the Appellate Body has not, as yet, expressed a view on whether the mandatory/discretionary distinction is a legally appropriate analytical tool for panels to use.[274] In this case, our ultimate conclusion with respect to the United States' challenge to Section 57(c) does not depend on whether or not the mandatory/discretionary distinction is valid. This said, we will continue on the assumption that Section 57(c) is inconsistent with Article III:4 only if it mandates, or requires, less favourable treatment of imported grain.

6.185 We examine first whether Section 57(c) adversely affects the competitive opportunities of imported grain *vis-à-vis* like domestic grain. We note that GATT/WTO jurisprudence supports the view that the imposition of additional, or extra, requirements on imported products as compared to like domestic products constitutes less favourable treatment.[275] In the present case, Section 57(c) of

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[265] *See*, for example, Exhibit CDA-50.
[266] *See*, for example, Exhibit CDA-29.
[267] *See*, for example, Exhibit CDA-51.
[268] *See*, for example, Exhibit CDA-53.
[269] United States' first written submission, paras. 92, 96, 100-101; Canada's first written submission, paras. 208-209.
[270] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para 135.
[271] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* ("*Japan – Alcoholic Beverages II* "), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, p. 16. This statement was endorsed by the Appellate Body in *Korea – Taxes on Alcoholic Beverages* ("*Korea – Alcoholic Beverages*"), WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3, para. 119.
[272] Canada's first written submission, paras. 231-237.
[273] *See*, for instance, Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* ("*US – Section 129(c)(1) URAA*"), WT/DS221/R, adopted 30 August 2002, para. 6.22; Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities* ("*US – 1916 Act (EC)*"), WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593, para. 6.84; Panel Report, *United States – Measures Affecting Alcoholic and Malt Beverages* ("*US – Malt Beverages*"), adopted 19 June 1992, BISD 39S/206, para. 5.39; Panel Report, *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* ("*Thailand – Cigarettes*"), adopted 7 November 1990, BISD 37S/200, para. 84; Panel Report, *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* ("*US – Tobacco*"), adopted 4 October 1994, BISD 41S/I/131, para. 118.
[274] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/AB/R, 15 December 2003 , para. 93.
[275] The Appellate Body concluded in para. 268 of its Report in *United States – Section 211 Omnibus Appropriations Act of 1998* ("*US – Section 211 Appropriations Act*"), WT/DS176/AB/R, adopted

the *Canada Grain Act*, on its face, prohibits receipt of foreign grain unless authorized[276], whereas domestic grain that is identical to foreign grain in all respects except for origin is not subject to the authorization requirement contained in Section 57(c). In contrast, neither the *Canada Grain Act* nor any other legal instrument that has been brought to the attention of the Panel in these proceedings contains a requirement applying to domestic grain that is equivalent to the receipt authorization requirement that is applicable to like foreign grain pursuant to Section 57(c).[277] Therefore, by imposing a requirement on foreign grain which is not applicable to like domestic grain, Section 57(c), on its face, treats imported grain less favourably than like domestic grain. Indeed, the fact that imported grain may not be received into an elevator without prior authorization, denies imported grain competitive opportunities that are available to like domestic grain.[278]

6.186 In relation to the second requirement referred to above, namely, that Section 57(c) must mandate, or require, less favourable treatment, it is clear that Section 57(c) prohibits the receipt of foreign grain unless authorized. While the CGC appears to have discretion to authorize such receipt[279], the exercise of this discretion would not allow Canada to avoid treating imported grain less favourably because, regardless of the manner in which the discretion is exercised, a request for authorization to receive imported grain into elevators would still need to be made.[280]

6.187 On the basis of the foregoing, it would appear that Section 57(c) of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994 because imported grain is treated less favourably than like domestic grain. However, Canada has raised a number of defences to suggest that the additional regulatory requirement imposed on imported grain pursuant to Section 57(c) of the *Canada Grain Act* does not impose any burden on imported grain or, at least, does not impose a burden that is not also borne by like domestic grain. We consider those defences below.

Section 57 does not affect the conditions of competition between domestic grain and imported grain

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1 February 2002, that the provision in question imposed an additional obstacle on foreign successors-in-interest that was not faced by US successors-in-interest. The Appellate Body found that, by applying the "extra hurdle" imposed by that provision only to non-US successors-in-interest, the United States had violated the national treatment obligation contained in Article 2(1) of the Paris Convention (1967) and Article 3.1 of the *TRIPS Agreement*. We recognize that this reasoning was based on the national treatment obligation contained in the *TRIPS Agreement*. However, we consider that the Appellate Body's logic is equally applicable when applied in the context of the provisions of Article III:4 of the GATT 1994. Indeed, we note that the panel in *US – Malt Beverages* followed a very similar logic when it found that it was inconsistent with the United States' obligations under Article III:4 for the United States to require that only imported beer use an "additional level of distribution", namely, the wholesale level. More specifically, the panel found that "the requirement that beer imported into the United States be distributed through in-state wholesalers or other middlemen, when no such obligation to distribute through wholesalers exists with respect to in-state like domestic products, results in 'treatment ... less favourable than that accorded to like domestic products' from domestic producers, inconsistent with Article III:4'". Panel Report, *US – Malt Beverages*, *supra*, paras. 5.32 and 5.35.

[276] While Canada has stated that Section 57(c) should not be characterized as a prohibition on the receipt of foreign grain unless authorized, one of the CGC authorization orders that has been adduced as evidence in this case refers to Section 57(c) in these terms. Exhibit CDA-29.

[277] As noted above in footnote 247, Section 57 does require authorization for foreign and domestic grain alike in a number of other cases. However, in none of these cases is the origin of the grain relevant.

[278] This may be illustrated by the hypothetical case where an elevator operator is forced to make a choice between receiving foreign grain and domestic grain that is identical to foreign grain in all respects except for origin, for example, during a period in which the elevator has almost reached its capacity. It would seem that, in such a case, the elevator operator would prefer receiving domestic grain, as such grain would not require him to seek and obtain prior authorization, would not expose him to the risk of a denial of entry authorization, and would not require him to comply with any of the conditions that might be attached to the authorization of the receipt of foreign grain.

[279] *See*, for example, Canada's first written submission, para. 237.

[280] We will return to this point at paras. 6.199 and 6.202 below.

6.188 Canada argues that Section 57(c) of the *Canada Grain Act* does not adversely affect the conditions of competition for imported grain as compared with like domestic grain. More particularly, Canada argues that the authorization process is not onerous; that elevator operators are very familiar with the process; that authorizations are consistently granted; that the CGC has discretion to always authorize receipt of foreign grain; and that advance authorization may be obtained. We deal with each of these arguments below.

*The authorization process is routine and not onerous*

6.189 **Canada** argues that the receipt authorization process associated with Section 57(c) of the *Canada Grain Act* is not onerous. In particular, Canada submits that the process to obtain receipt authorization is routine; there is no form to fill out in order to obtain authorization; and there is no direct cost associated with making authorization requests.

6.190 With respect to these arguments, the **Panel** recalls its view that less favourable treatment in this case results from the imposition of an additional requirement on imported grain that does not apply to domestic grain -- namely, the requirement that authorization be sought and granted before imported grain can be received into Canadian elevators. That the requirement in question may not be very onerous in commercial and/or practical terms does not, in our view, detract from the fact that it is an additional requirement not imposed on like domestic grain.[281]

6.191 In any event, it is clear from Canada's description of how Section 57(c) is being applied that Section 57(c) does impose a burden on elevator operators that adversely affects the competitive conditions for imported grain as compared with like domestic grain. In particular, elevator operators would need to make a written request to the CGC for authorization.[282] While, apparently, no form must be filled in to obtain authorization, it is, nevertheless, necessary to send a letter (faxed or posted) or an e-mail or to make a telephone call to be followed up in writing before authorization can be granted.[283] In making such a request, certain information must be provided to the CGC, including regarding the type of grain, quality of the grain, origin and destination and volume of the grain as well as the anticipated date of receipt.[284] Such information must be collected before it can be provided.

6.192 It should also be noted that the evidence that has been adduced in this case indicates that authorization is not always granted in as routine a manner as Canada suggests. Indeed, in the case of a couple of the authorization orders that have been referred to, delays of up to 10 days existed between the date of request and the date on which authorization was granted.[285]

6.193 In light of the above, we do not consider that the less favourable treatment of imported grain as compared to like domestic grain that results from Section 57(c) of the *Canada Grain Act* is removed by virtue of the fact that the authorization process may be routine and not very onerous.

*The authorization process is familiar to elevator operators*

6.194 **Canada** has argued that elevator operators know that they will be able to receive foreign grain, they know how the authorization process works and they know what the relevant requirements are.

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[281] Neither the text of Article III:4 of the GATT 1994 nor GATT/WTO jurisprudence indicates that there is a *de minimis* exception to the "no less favourable treatment" standard in Article III:4 and Canada has not argued that Article III:4 contains such an exception .

[282] *See*, for example, Canada's second oral statement, para. 65; Canada's reply to Panel question No. 13(a); Canada's first written submission, para. 226.

[283] Canada's reply to Panel question No. 13(a).

[284] Canada's second written submission, para. 93.

[285] Exhibit CDA-49 and Exhibit CDA-59.

6.195 The **United States** has alleged that the criteria according to which the discretion to grant authorization is exercised are unclear.

6.196 As noted by the **Panel** above, Section 57(c), on its face, does not refer to the criteria according to which the receipt of foreign grain is authorized. Therefore, even if elevator operators are familiar with the authorization process, the outcome of the process is subject to uncertainties, in the sense that it may not be clear how long the CGC will take to deal with a request, and in the sense that authorization may be denied[286] or granted subject to conditions.

6.197 Therefore, the Panel does not consider that the less favourable treatment of imported grain as compared to like domestic grain that results from Section 57(c) of the *Canada Grain Act* is removed by virtue of the fact that elevator operators may be familiar with the authorization process.

*Authorization has been consistently granted*

6.198 **Canada** argues that receipt authorization under Section 57(c) has been consistently granted. Canada has asserted, and the United States has not refuted, that no request for authorization of receipt of foreign grain has ever been denied.

6.199 In the **Panel's** view, the fact that the CGC has in the past always granted authorization for receipt of foreign grain does not, in itself, imply that it will continue to do so in the future, particularly given that the criteria according to which authorization is granted are not specified in Section 57(c) of the *Canada Grain Act*. Moreover, Canada has not argued that the CGC, by virtue of its past practice, would no longer be entitled to deny authorization for receipt. To the contrary, Canada has stated that a request for authorization would, in some circumstances, be denied.[287] In any event, even if it were the case that authorization is consistently granted, elevator operators would still need to make and substantiate a request for authorization for receipt of foreign grain.[288] This additional requirement, to which domestic grain is not subject, results in less favourable treatment for imported grain.

6.200 Therefore, the Panel does not consider that the less favourable treatment of imported grain as compared to like domestic grain that results from Section 57(c) of the *Canada Grain Act* is removed merely because authorization under that section may have been consistently granted.

*The CGC has discretion to always authorize receipt of foreign grain*

6.201 **Canada** also argues that the CGC has discretion to always authorize receipt of foreign grain.

6.202 In the **Panel's** view, if the CGC were to grant unconditional advance authorization for all imported grain, this might minimize the adverse effects on competitive opportunities as between imported and like domestic grain. However, there would still be a need to make a request for authorization.[289] As already noted above, the requirement to make a request for authorization is an additional requirement that is imposed exclusively on imported grain and amounts to less favourable treatment.[290]

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[286] Canada has confirmed that authorization for receipt of foreign grain may be denied. Canada's replies to Panel question Nos. 13(b) and 69; Canada's first oral statement, para. 58.

[287] Canada's reply to Panel question No. 13(b).

[288] *See* para. 6.181 above.

[289] Nothing in the text of Section 57(c) suggests, and Canada has not argued, that the CGC has discretion to *not* require some form of initial authorization.

[290] We note that the panel in *US – Malt Beverages* found that certain measures that mandated less favourable treatment of imported products were inconsistent with Article III:4, even though they were not being applied or enforced. Panel Report, *US – Malt Beverages*, *supra*, paras. 5.39 and 5.57. We believe that, *a*

6.203 Therefore, the Panel does not consider that the less favourable treatment of imported grain as compared to like domestic grain that results from Section 57(c) of the *Canada Grain Act* is removed by virtue of the fact that the CGC has discretion to always authorize receipt of foreign grain.

*There is a possibility to obtain advance authorization*

6.204 **Canada** has noted that under Section 57(c), it has the authority to grant advance authorization. Canada has specifically pointed to three different examples of such advance authorization. The first is that available under the so-called *Wheat Access Facilitation Programme* ("WAFP").[291] The second relates to the receipt of US grain into transfer elevators on an annual basis.[292] The third relates to authorizations granted to cover several shipments or an entire crop year.[293]

6.205 As an initial matter, the **Panel** notes that the United States has challenged Section 57(c) of the *Canada Grain Act*, as such. Accordingly, we are not being requested to assess the consistency with Article III:4 of the GATT 1994 of the examples of advance authorization under Section 57(c) that have been referred to by Canada.[294]

6.206 Nevertheless, these examples are evidence that the CGC has discretion to grant advance authorisation for the receipt of foreign grain. In this regard, irrespective of the possibility that these types of advance authorization may diminish the burden imposed upon elevator operators pursuant to Section 57(c) insofar as they might reduce the frequency with which a request for authorization would need to be made, a request would still need to be made, at least initially.[295] As noted above, the requirement to make a request for authorization is an additional requirement that is imposed on imported grain and amounts to less favourable treatment, even if a request need only be made infrequently.

6.207 Therefore, the Panel does not consider that the less favourable treatment of imported grain as compared to like domestic grain that results from Section 57(c) of the *Canada Grain Act* is removed by the possibility to obtain advance authorization under that section.

Different treatment does not imply less favourable treatment

6.208 As noted above, unlike in the case of foreign grain, authorization for the receipt of like domestic grain is not required under Section 57(c) of the *Canada Grain Act* by virtue of its origin alone. **Canada** does not point to another provision that contains the same requirement for domestic

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*fortiori*, under the reasoning followed in *US – Malt Beverages*, the CGC could not avoid an inconsistency with Article III:4 merely by minimizing the effects of the less favourable treatment required by Section 57(c).

[291] Canada has indicated that the WAFP is an example of advance authorization under Section 57(c). Canada's reply to Panel question No. 72. It appears that advance authorization under the WAFP was granted as a result of a bilateral agreement between the Governments of Canada and the United States. Exhibit CDA-27.

[292] Canada's first written submission, paras. 228-229. Two examples of such requests and authorizations are contained in Exhibit CDA-59.

[293] Canada's second written submission, para. 94. For an example, *see* Exhibit CDA-50.

[294] We note that Canada argues that to the extent the United States' claim is that Section 57(c), as such, is inconsistent with Article III:4, the WAFP is not relevant as it is non-mandatory and is only an example of how the authority under Section 57(c) of the *Canada Grain Act* has been implemented. Canada's reply to Panel question No. 72. The United States confirmed that it did not refer to the WAFP as a separate challenged measure, but, rather, as an example of the CGC's regulatory requirements. United States' comments on Canada's reply to Panel question No. 72. In any event, with respect to the WAFP, the scope for advance authorization is rather limited. In particular, advance authorization is only applicable to US wheat and only for receipt into Western Canadian primary elevators. Exhibit CDA-27; Canada's reply to Panel question No. 62.

[295] We note that in the case of the WAFP, it was the US Government that obtained advance authorization on behalf of its wheat exporters for receipt of wheat into primary elevators.

grain in arguing that less favourable treatment within the meaning of Article III:4 of the GATT 1994 does not exist. Rather, Canada identifies other requirements, which, Canada argues, mean that the treatment of imported grain is no less favourable than the treatment accorded to like domestic grain. In support of its argument, Canada points to the Appellate Body Report on *Korea – Various Measures on Beef* which states, in relevant part, that "[a] measure that provides treatment to imported products that is *different* from that accorded to like domestic products is not necessarily inconsistent with Article III:4, as long as the treatment provided by the measure is 'no less favourable'".[296] Regarding these other requirements, Canada essentially argues that the existence of Canada's national quality assurance system, comprising variety registration requirements and grain grading, to which domestic grain but not foreign grain is subject, renders it unnecessary to impose an entry authorization requirement on Canadian grain.

6.209 The **Panel** notes that, in the present case, there may be legitimate reasons for Canada to treat domestic grain and like imported grain differently, for example, because the latter has not been subjected to the Canadian quality assurance system, which imposes certain restrictions and conditions on Canadian grain, including with respect to production.[297] However, as the Appellate Body found in *Korea - Various Measures on Beef*, different treatment as between imported products and like domestic products must not result in the imported products being treated less favourably.[298]

6.210 It is not clear to us how the arguments put forward by Canada to justify the difference in treatment between domestic grain and like imported grain support the conclusion that the authorization requirement contained in Section 57(c) treats imported grain no less favourably than like domestic grain. As we have stated previously, the authorization requirement imposed upon foreign grain pursuant to Section 57(c) of the *Canada Grain Act* is an additional requirement that is not imposed on like domestic grain. Therefore, we consider that the difference in treatment between imported grain and like domestic grain resulting from Section 57(c) leads to imported grain being treated less favourably than like domestic grain.

An alternative, commercially more attractive distribution channel is open to US exporters

6.211 **Canada** argues that US grain producers can and do sell their grain directly to end-users in Canada. Canada has also submitted that direct sale to end-users is a less costly alternative than going through Canadian elevators.

6.212 The **United States**, on the other hand, has suggested that the direct sale to end-users entails prohibitive handling and transportation costs. In addition, the United States has argued that the bulk grain handling system is the only viable option for sale to consumers that have significant demand because such demand can only be satisfied by combining various lots of grain.

6.213 The **Panel** need not determine in this case whether or not direct sale to end-users represents an alternative, commercially more attractive distribution channel that is open to the United States and other Members exporting grain to Canada. Even if this were the case, the fact that many foreign grain producers might prefer to sell directly to Canadian end-users would not alter the fact that Section 57(c) of the *Canada Grain Act* treats imported grain less favourably than like domestic grain in respect of receipt into Canadian grain elevators.[299]

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[296] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, paras. 135-137.

[297] Canada's reply to Panel question No. 15.

[298] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, paras. 135 – 137. We note, however, that less favourable treatment of imported grain may be justifiable under the general exceptions set out in Article XX of the GATT 1994. Indeed, Canada in this case has invoked Article XX. We address Canada's Article XX defence below at paras. 6.215- 6.252.

[299] *See* Panel Report, *US – Malt Beverages*, *supra*, para. 5.31.

Conclusion

6.214 In conclusion, since the Panel is not persuaded by the defences put forward by Canada to suggest that the additional regulatory requirement imposed on imported grain pursuant to Section 57(c) of the *Canada Grain Act* does not impose any burden on imported grain or, at least, does not impose a burden that is not also borne by like domestic grain, the Panel confirms its provisional conclusion above at paragraph 6.187 that Section 57(c) of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994.

*(iv) Defence under Article XX(d) of the GATT 1994*

6.215 Canada has sought to justify Section 57(c) of the *Canada Grain Act* under Article XX(d) of the GATT 1994. Article XX(d) provides:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> […]
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices."

6.216 Consistent with the Appellate Body's guidance in *US - Gasoline*[300] and *Korea – Various Measures on Beef*, [301] we note that a measure found to be inconsistent with one or several of the substantive obligations of the GATT 1994 must be subjected to a two-tiered analysis in order for it to be justified under Article XX. Specifically, that measure must:

(a) fall within the scope of one of the recognized exceptions set out in paragraphs (a) to (j) of Article XX in order to enjoy provisional justification; and

(b) meet the requirements of the introductory provisions of Article XX, the so-called chapeau.

6.217 Accordingly, we will first examine whether Section 57(c) of the *Canada Grain Act* is provisionally justified -- that is whether it falls within the terms of paragraph (d) of Article XX. In the event that it does, we will then proceed to an analysis of the measure under the chapeau of Article XX.

6.218 In determining whether Section 57(c) is provisionally justified under Article XX(d), we note that the text of Article XX(d) requires Canada to demonstrate three elements, namely:

(a) the measure for which justification is claimed must secure compliance with other laws or regulations;

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[300] *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*US – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, p. 22.

[301] *See* Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 156.

(b) those other laws or regulations must not be inconsistent with the provisions of the GATT 1994; and

(c) the measure for which justification is claimed must be necessary to secure compliance with those other laws or regulations.[302]

6.219 We commence our analysis with a consideration of whether requirement (c) has been fulfilled on the provisional assumption that requirements (a) and (b) are met.

Necessity of the measures taken to secure compliance

6.220 **Canada** argues that Section 57(c) of the *Canada Grain Act* is necessary to secure compliance with grading requirements contained in Sections 32, 61 and 70 of the *Canada Grain Act* and Schedule III of the *Canada Grain Regulations*. Canada also argues that Section 57(c) of the *Canada Grain Act* is necessary to secure compliance with Section 52 of the *Competition Act* by ensuring that foreign grain is not misrepresented as Canadian grain in Canada and in third countries. In addition, Canada argues that Section 57(c) of the *Canada Grain Act* is necessary to secure compliance with Sections 5, 7(1), 24, 32 and 45 of the *CWB Act* and Section 16 of the *CWB Regulations*. Canada submits that Section 57(c) is designed to secure a "very high level of compliance" with the relevant provisions of the *Canada Grain Act*, the *Canada Grain Regulations*, the *Competition Act*, the *CWB Act* and the *CWB Regulations*.

6.221 The **United States** argues that Section 57(c) of the *Canada Grain Act*, which amounts to a wholesale prohibition on the entry of foreign grain into grain elevators, is not necessary to secure compliance with the grading provisions of the *Canada Grain Act* and *Regulations* The United States also argues that Canada has failed to demonstrate how Section 57(c) is necessary to secure compliance with Section 52 of the *Competition Act*. Regarding compliance with the *CWB Act* and *CWB Regulations*, the United States submits that Canada has other measures in place to ensure that the CWB only markets Western Canadian grain and barley.

6.222 The **Panel** notes that the Appellate Body in *Korea – Various Measures on Beef* articulated a "weighing and balancing" test as the basis for making a determination as to whether a measure is "necessary" within the meaning of Article XX(d) of the GATT 1994. In particular, the Appellate Body stated that a determination of whether a measure is necessary within the meaning of Article XX(d) of the GATT 1994:

> "[I]nvolves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.
>
> The panel in *United States – Section 337* described the applicable standard for evaluating whether a measure is "necessary" under Article XX(d) in the following terms:
>
> > 'It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent

[302] The Appellate Body in *Korea – Various Measures on Beef* dealt with elements (a) and (b) as a single element. Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 157.

> with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.'[303]

> The standard described by the panel in *United States – Section 337* encapsulates the general considerations we have adverted to above. In our view, the weighing and balancing process we have outlined is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available'".[304]

6.223 In applying the "weighing and balancing" test, the Appellate Body in *Korea – Various Measures on Beef* and, subsequently, in *EC Asbestos* considered the importance of the value or interest pursued by the laws with which the challenged measure sought to secure compliance, whether the objective pursued by the challenged measure contributed to the end that was sought to be realized and whether a reasonably available alternative measure existed.[305] We apply the same approach here in determining whether Section 57(c) of the *Canada Grain Act* is "necessary" for the purposes of Article XX(d) of the GATT 1994.

6.224 With respect to the importance of the interests or values that the statutory and other provisions with which, according to Canada, Section 57(c) secures compliance are intended to protect, Canada has indicated that those objectives are to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation and preserve and enforce the CWB monopoly.[306] In other words, the relevant provisions are said to essentially help maintain the integrity of Canada's grading and quality assurance system and of the CWB's exclusive right to sell Western Canadian grain for domestic sale or export and, thereby, to preserve the reputation of Canadian grain notably in export markets.[307] It is clear that these interests, which appear to be essentially commercial in nature, are important. It seems equally clear, however, that these interests are not as important as, for instance, the protection of human life and health against a life-threatening health risk, an interest which the Appellate Body in *EC – Asbestos* characterized as "vital and important in the highest degree."[308]

6.225 Canada asserts that Section 57(c) of the *Canada Grain Act* contributes to ensuring that Canadian grades are not inadvertently and inappropriately given to non-Canadian grain, that there is no misrepresentation as to origin and as to end-use characteristics of the grain, and that the identity of foreign grain can be properly established and maintained in the bulk grain handling system.[309] In our

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[303](original footnote) Panel report, *United States – Section 337*, *supra*, footnote 69, para. 5.26.

[304] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, paras. 164 - 166.

[305] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 178; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* ("*EC – Asbestos*"), WT/DS135/AB/R, adopted 5 April 2001, para. 172.

[306] *See* Canada's second written submission, paras. 111, 113, 121 – 125; Canada's reply to Panel question No. 80.

[307] *See* Canada's replies to question Nos. 63, 81, 102; Canada's first written submission, para. 186.

[308] Appellate Body Report, *EC – Asbestos*, *supra*, para. 172.

[309] *See* Canada's first written submission, para. 224; Canada's reply to Panel question No. 80. We note that Canada has also argued that the authorization requirement in Section 57(c) is necessary to address situations such as where there is an SPS concern or a concern regarding an unapproved genetically modified organism in shipments of grain. However, as noted below in para. 6.247, Canada has not argued that any of the provisions of the *Canada Grain Act* and *Regulations*, *Competition Act* and *CWB Act* and *Regulations*, which Canada has identified and says Section 57(c) secures compliance with, require Canada to control for SPS or GMO concerns.

view, Section 57(c) can be said to make some contribution to ensuring that foreign grain is not inadvertently confused with Canadian grain, at least in cases where receipt authorisation granted under Section 57(c) is made subject to the conditions that foreign grain be kept separate and that foreign grain be labelled as such. Nevertheless, it must be noted that Section 57(c) is only an instrument to achieve the preservation of the identity of foreign grain so that such grain is not inadvertently confused with Canadian grain.

6.226 Therefore, the question remains as to whether there is an alternative measure to Section 57(c) that is reasonably available. The Appellate Body has indicated that relevant factors for determining whether an alternative measure is "reasonably available" are: (i) the extent to which the alternative measure "contributes to the realization of the end pursued"[310]; (ii) the difficulty of implementation[311]; and (iii) the trade impact of the alternative measure compared to that of the measure for which justification is claimed under Article XX[312].[313] The Appellate Body has also stated that, in addition to being "reasonably available", the alternative measure must also achieve the level of compliance sought.[314] In this regard, the Appellate Body has recognized that "Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations."[315]

6.227 With these considerations in mind, we will now proceed to determine whether Canada has established that no alternative measure is reasonably available at present to secure compliance with the laws and regulations that have been identified by Canada, taking into account the level of compliance that Canada has stated it seeks to achieve with respect to those laws and regulations, namely a "very high level of compliance".

*The provisions of the Canada Grain Act and Regulations*

6.228 **Canada** has indicated that an end that is sought to be furthered through Section 57(c) of the *Canada Grain Act* is to ensure that Canadian grades are not inadvertently and inappropriately given to non-Canadian grain contrary to Sections 32, 61 and 70 of the *Canada Grain Act* and Schedule III of the *Regulations* and that there is no misrepresentation as to origin and as to end-use characteristics of the grain.

6.229 The **Panel** is not persuaded that Section 57(c), as it is, is necessary to secure compliance with the grading provisions of the *Canada Grain Act* and *Regulations*. In particular, Canada has not convinced us that it is necessary for it to maintain an authorization requirement for the receipt of foreign grain. It is not clear to us why Canada could not, for example, allow foreign grain to be

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Indeed, Canada has not demonstrated any link between the SPS and GMO concerns it refers to and the various provisions of the aforementioned Canadian laws and regulations to which it has pointed. Therefore, we do not consider that Canada's SPS and GMO concerns are relevant in the determination of whether Section 57(c) is "necessary" to secure compliance with the laws to which Canada has referred, namely, the *Canada Grain Act* and *Regulations*, the *Competition Act* and the *CWB Act and Regulations*. Accordingly, we do not consider those concerns here. However, we will address these points at paras. 6.245 - 6.249 below.

[310] Appellate Body Report, *EC – Asbestos*, *supra*, para. 172.

[311] Appellate Body Report, *EC – Asbestos*, *supra*, paras. 169 and 170. We believe that this factor calls for an inquiry, *inter alia*, into whether implementing an alternative measure would be unreasonably burdensome, for instance in financial, technical and/or administrative/practical terms.

[312] Appellate Body Report, *EC – Asbestos*, *supra*, para. 172.

[313] The Appellate Body in *Korea – Various Measures on Beef* indicated that the alternative measure may be WTO-consistent or less WTO-inconsistent if a WTO-consistent alternative is not reasonably available. Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 166.

[314] Appellate Body Reports, *Korea – Various Measures on Beef*, *supra*, paras. 178 and 180; *EC – Asbestos*, *supra*, para. 174.

[315] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, para. 176.

received into elevators without a need for prior CGC authorization but subject to the general requirement that foreign grain be kept separate from domestic grain and with the possibility that the CGC may grant an exemption from the segregation requirement upon request.[316] Indeed, when we asked Canada whether there was any reason why such an alternative measure would not secure compliance with the various laws and regulations pointed to by Canada in justifying Section 57(c) under Article XX(d), Canada offered none.[317]

6.230 We consider that a measure such as the above-mentioned alternative measure would contribute to ensuring compliance with the relevant provisions of the *Canada Grain Act* and *Regulations*. In particular, the alternative arrangement would seem to ensure that Canadian grades are not inadvertently and inappropriately given to non-Canadian grain and that misrepresentation as to origin and as to end-use characteristics of the grain is avoided because foreign grain would always have to be kept separate from domestic grain, unless an exemption is granted by the CGC.

6.231 Regarding the difficulty of implementing the alternative measure and its effects on trade, we note that Canada has indicated that, as a matter of practice under Section 57(c), if there is no request for mixing from the elevator operators, the entry authorization requirement includes a condition that foreign grain be kept separate.[318] This indicates to us that a general segregation requirement would not pose significant implementation difficulties and would not be more trade restrictive than Section 57(c) since this is what happens in practice under that provision.[319] Similarly, it seems that it would not be very difficult to implement an arrangement whereby the CGC could grant exemption from the segregation requirement upon request since, in practice, such an arrangement would work in a similar if not identical way to the authorization procedure that currently exists under Section 57(c) of the *Act*.[320]

6.232 As to whether the above-noted alternative measure would achieve a "very high level of compliance" with the relevant provisions of the *Canada Grain Act* and *Regulations*, we note, again, that Canada did not suggest, in response to our question, that it would not. It seems to us that the level of compliance that would be secured if such a measure were adopted would be as high as the compliance level that is achieved under Section 57(c). Indeed, in the absence of the imposition of a condition that foreign grain be kept separate and that foreign grain be labelled as such, the Section 57(c) authorization requirement in itself does not appear to contribute to a great extent to the aim of avoiding that Canadian grades are inadvertently and inappropriately given to non-Canadian grain and that origin and end-use characteristics of the grain are misrepresented.

*Section 52 of the Competition Act*

6.233 **Canada** has also indicated that an end that is sought to be furthered through Section 57(c) of the *Canada Grain Act* is to ensure that foreign grain maintains its identity in the bulk handling system

[316] We put forward this alternative in Panel question No. 81.

[317] Canada did offer reasons as to why the alternative measure referred to by us would not be sufficient to address certain SPS and GMO concerns. However, these reasons did not relate to the provisions of the *Canada Grain Act* or any of the other laws relied on by Canada. Nevertheless, we will discuss these reasons below.

[318] Canada's reply to Panel question No. 71.

[319] It should also be recalled that the alternative measure referred to by the Panel by way of example could allow exemptions from the segregation requirement upon request.

[320] Moreover, in our view, the alternative measure would, at a minimum, be less WTO-inconsistent than Section 57(c). We recall in this regard that the alternative measure would, in effect, be similar to Section 57(c) but would not subject foreign grain to an additional regulatory hurdle that is not applicable to domestic grain.

so that there is no misrepresentation as to origin and misleading representations with respect to end-use characteristics of the grain contrary to Section 52 of the *Competition Act*.[321]

6.234 The **Panel** is not convinced that Section 57(c), as it is, is necessary to secure compliance with Section 52 of the *Competition Act*. Here again, it is not clear to us why Canada could not secure compliance with Section 52 of the *Competition Act*, by following, for example, the alternative approach put forward by the Panel and referred to in paragraph 6.229 above. In the Panel's view, the alternative measure would contribute to ensuring that there is no misrepresentation as to origin and misleading representation with respect to end-use characteristics of grain contrary to Section 52 of the *Competition Act* because foreign grain would always be kept separate from domestic grain, unless an exemption is granted by the CGC. Regarding the difficulty associated with implementing the alternative measure and its effect on trade, our considerations at paragraph 6.231 are equally applicable here.

6.235 Further, it would seem to us that a requirement that foreign grain be kept separate from domestic grain would ensure as high a level of compliance with Section 52 of the *Competition Act* as is the case under Section 57(c) of the *Canada Grain Act*. We reiterate that we are not convinced that in the absence of the imposition of a condition that foreign grain be kept separate and that foreign grain be labelled as such, the Section 57(c) authorization requirement in itself contributes to a great extent to the aim of avoiding misrepresentation as to origin and misleading representations with respect to end-use characteristics of the grain.

*Provisions of the CWB Act and Regulations*

6.236 **Canada** has argued that Sections 5, 7(1), 24, 32 and 45 of the *CWB Act* and Section 16 of the *CWB Regulations* collectively set out the CWB's sole authority to market all wheat and barley produced in the "designated area" that is sold either for export or for domestic human consumption. Canada submits that, in respect of wheat and barley, Section 57(c) of the *Canada Grain Act* ensures that foreign grain maintains its identity so as to ensure, in turn, that the CWB's exclusive jurisdiction over the export of CWB grain is neither eroded nor inadvertently extended contrary to the *CWB Act*. According to Canada, it does so by enabling grain with respect to which the CWB has no exclusive marketing mandate, to be kept separate from the grain that the CWB has been established to market, namely wheat and barley.

6.237 The **Panel** notes that Canada has essentially argued that without Section 57(c) of the *Canada Grain Act*, the CWB would not be able to distinguish foreign wheat and barley from Western Canadian wheat and barley, thereby compromising the CWB's ability to enforce its single desk authority for Western Canadian wheat and barley. In light of this, we consider that, in essence, Canada has relied on the *CWB Act* and *Regulations* to justify Section 57(c) of the *Canada Grain Act* on the basis that, in the absence of Section 57(c), the identity of foreign grain could not be properly established and maintained in the bulk grain handling system.

6.238 The Panel is not convinced that Section 57(c), as it is, is necessary to secure compliance with the provisions of the *CWB Act* and *Regulations* identified by Canada. Again, it is not clear to us why Canada could not secure compliance with these provisions by following, for example, the alternative approach put forward by the Panel and referred to in paragraph 6.229 above. In the Panel's view, the alternative measure would contribute to ensuring that the CWB could distinguish foreign wheat and barley from Western Canadian wheat and barley, because foreign grain would always be kept separate from domestic grain, unless an exemption is granted by the CGC. With respect to the difficulty associated with implementing the alternative measure and its effect on trade, our considerations at paragraph 6.231 are equally applicable here.

[321] Canada's reply to Panel question No. 80.

6.239 Additionally, it would seem to us that a requirement that foreign grain be kept separate from domestic grain would ensure as high a level of compliance with the provisions of the *CWB Act* and *Regulations* as is the case under Section 57(c) of the *Canada Grain Act*. We reiterate that we are not convinced that in the absence of the imposition of a condition that foreign grain be kept separate and that foreign grain be labelled as such, the Section 57(c) authorization requirement in itself contributes to a great extent to the aim of ensuring the identity of foreign grain can be properly established and maintained in the bulk grain handling system.

6.240 In any event, we note that the *CWB Act* and *Regulations* would not provide a justification for Section 57(c) for grain other than wheat and barley.

*Summary*

6.241 In summary, Canada has not convinced us that Section 57(c) of the *Canada Grain Act*, and in particular the authorization requirement it imposes, is necessary to secure compliance with the provisions of the *Canada Grain Act* and *Regulations*, the *Competition Act* or the *CWB Act* and *Regulations* pointed to by Canada. We have identified, by way of example, one alternative measure that we consider is reasonably available to Canada and would allow Canada to secure a "very high level of compliance" with these provisions.[322]

6.242 Canada has, however, pointed to certain SPS and GMO concerns that it says could not be addressed through the alternative put forward by the Panel.[323] We consider the arguments that Canada made in this regard below.

Arguments made by Canada with respect to SPS/GMO concerns

6.243 **Canada** argues that the need for authorization prior to entry into an elevator is necessary to address situations such as where there is an SPS concern or a concern regarding an unapproved genetically modified organism in shipments of grain. Canada submits that this is particularly important given that it is very difficult, if not impossible, to deal with the consequences once such grain enters an elevator. Canada argues that such an occurrence would have a serious negative impact on both the level of consumer confidence in the Canadian quality assurance system and Canada's ability to ensure and guarantee the quality of grain in its export markets. Accordingly, the entry of foreign grain into the bulk handling system that is used to move Canadian grain for export can raise SPS concerns that are additional to any SPS concerns arising from the importation of foreign grain into Canada.

6.244 The **United States** argues that Section 57(c) of the *Canada Grain Act* is not designed to address SPS concerns since Canada already has in place SPS measures that address such concerns. The United States notes that Canada's plant and animal health service, the Canadian Food Inspection Agency ("CFIA"), rather than the CGC, is responsible for SPS measures and enforcement. When the CFIA deems it necessary based on an appropriate risk assessment, grain cannot enter Canada without being accompanied by separate SPS documentation administered by the CFIA. These phytosanitary certificates required by the CFIA ensure that all SPS concerns related to grains are addressed prior to that grain crossing the US-Canadian border. The CFIA requires this documentation whether US grain is destined for the domestic Canadian market or a third-country market.

6.245 The **Panel** notes that Canada claims that the Section 57(c) authorization requirement is necessary in order to allow the CGC to respond effectively to SPS and GMO concerns. Indeed, as

[322] As we have said, in our view, the alternative measure in question would, at a minimum, be less WTO-inconsistent than Section 57(c).

[323] Canada's reply to Panel question No. 81.

noted above, Canada has indicated that receipt authorization for foreign grain may be made subject to the requirement that equipment be cleaned before and after delivery where foreign grain contains a genetically modified grain not approved in Canada or where there is an SPS concern.[324] This is also evident from the receipt authorization orders that have been adduced as evidence in this case.[325]

6.246 However, Canada has not alleged before us that Section 57(c) of the *Canada Grain Act* is an SPS measure within the meaning of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*").[326] Accordingly, in considering Section 57(c), we will not have regard to the provisions of the *SPS Agreement*. In addition, Canada does not seek to justify Section 57(c) under Article XX(b) of the GATT 1994, which provides for the justification of WTO-inconsistent measures where they are "necessary to protect human, animal or plant life or health". Therefore, in considering Canada's SPS and GMO concerns, the Panel will not have regard to Article XX(b) of the GATT 1994. Thirdly, Canada does not seek to justify Section 57(c) under Article XX(d) on the ground that it is a measure to secure compliance with Canada's SPS laws. Therefore, we will not consider whether Section 57(c) is necessary to secure compliance with such laws.

6.247 Moreover, Canada has not argued that any of the provisions of the *Canada Grain Act* and *Regulations*, *Competition Act* and *CWB Act* and *Regulations*, which Canada has identified and says Section 57(c) secures compliance with, require Canada to control for SPS or GMO concerns.[327] Indeed, Canada has not demonstrated any link between the SPS and GMO concerns it refers to and the various provisions of the aforementioned Canadian laws and regulations to which it has pointed.[328] For instance, we have seen no evidence, nor heard argument, to suggest that there is a link between SPS or GMO problems and end-use characteristics of imported grain. In the absence of more information on this, we are unable to assess whether SPS and GMO problems might, for example, affect Canada's ability to comply with Section 32 of the *Canada Grain Act* and issue inspection certificates.

6.248 Canada argues that if certain products, such as GMO grain not approved in Canada, were found in shipments of Canadian grain, this would have deleterious effects on Canadian exports, as it would have a negative impact on consumer confidence in Canada's quality assurance system. We note in this respect that Article XX(d) provides that the WTO-inconsistent measure that is sought to be justified must be "necessary to *secure compliance* with laws and regulations" that are not themselves inconsistent with the provisions of the GATT 1994. The panel in *European Economic Community - Regulations on Imports of Parts and Components* found this phrase to mean "to enforce obligations under laws and obligations" and *not* "to ensure the attainment of the objectives of the laws

[324] Canada's reply to Panel question No. 13(d).

[325] *See*, for example, Exhibit CDA-47.

[326] Annex A, para. 1.

[327] *See* Canada's reply to Panel question No. 80. As mentioned above, according to Canada, Section 57(c) is necessary because it seeks to ensure that: Canadian grades are not inadvertently and inappropriately given to non-Canadian grain contrary to the *Canada Grain Act* and *Regulations* and do not result in misrepresentation as to origin and as to end-use characteristics of the grain; foreign grain maintains its identity in the bulk handling system so that there is no misrepresentation as to origin and misleading representations with respect to end-use characteristics of the grain contrary to Section 52 of the *Competition Act*; and foreign grain maintains its identity so as to ensure that the CWB's exclusive jurisdiction over the export of CWB grain is neither eroded nor inadvertently extended contrary to the *CWB Act* and *Regulations*. In referring to these provisions, Canada makes no mention of any SPS or GMO concern that they are aimed at addressing.

[328] There is no reference whatsoever to SPS/GMO concerns in Canada's reply to Panel question No. 80 and in its reply to Panel question No. 63, both dealing with the justification of Section 57(c) under Article XX(d).

and regulations".[329] Therefore, the fact that Section 57(c) of the *Canada Grain Act* may allow Canada to control for SPS and GMO problems and thus helps Canada preserve consumer confidence which, in turn, helps to ensure the attainment of the objectives of, say, the *Canada Grain Act*, would not be sufficient to bring Section 57(c) within the protective scope of Article XX(d).

6.249 In light of the above, we consider that Canada's arguments regarding SPS or GMO concerns do not demonstrate that the authorization requirement contained in Section 57(c) is necessary to secure compliance with the relevant provisions of the *Canada Grain Act* and *Regulations*, the *Competition Act* or the *CWB Act* and *Regulations*. Having said this, we wish to emphasize that we are not suggesting that Canada cannot impose requirements to control for SPS and GMO concerns.

Conclusion on Canada's Article XX(d) defence

6.250 For the reasons indicated above, the Panel finds that Canada has not established that Section 57(c) of the *Canada Grain Act* is "necessary" to secure compliance with Sections 32, 61 and 70 of the *Canada Grain Act* and Schedule III of the *Regulations*, Section 52 of the *Competition Act* and Sections 5, 7(1), 24, 32 and 45 of the *CWB Act* and Section 16 of the *CWB Regulations*. Since the measure in question is not provisionally justified under Article XX(d) of the GATT 1994 because it is not "necessary", we do not need to determine, in addition, whether Section 57 "secures compliance" with the relevant provisions of the *Canada Grain Act* and *Canada Grain Regulations*, the *Competition Act* and the *CWB Act* and *CWB Regulations*. In addition, we do not need to determine whether those laws and regulations are consistent with the provisions of the GATT 1994. For the same reason, we do not consider that it is necessary to proceed to determine whether the requirements set out in the chapeau to Article XX have been satisfied.

6.251 Therefore, since Canada has failed to establish that the measure in question is provisionally justified under Article XX(d) of the GATT 1994, we conclude that Canada has failed to establish that Section 57(c) of the *Canada Grain Act* is justified under Article XX(d) of the GATT 1994.

*(v) Overall conclusion for Section 57(c) of the Canada Grain Act*

6.252 Since we are unable to accept Canada's claim of justification under Article XX(d) of the GATT 1994, our overall conclusion with respect to Section 57(c) is that Section 57(c) of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994.

(c) Section 56(1) of the *Canada Grain Regulations*: standing mixing authorization for Eastern Canadian grain

*(i) Measure at issue*

6.253 The **United States** argues that the measure under the Panel's consideration is the measure in effect at the time of the establishment of the March Panel and the July Panel, which is Section 56(1) of the *Canada Grain Regulations* prior to amendment. According to the United States, the amended provision, which came into effect after the establishment of the March Panel and the July Panel, although not within the terms of reference of the Panel, appears to do exactly the same thing as the previous version of Section 56(1), since US grain cannot qualify as Eastern Canadian grain under either provision.

6.254 **Canada** did not take a position on whether the Panel should examine the measure in effect at the establishment of the March Panel and the July Panel or the amended provision that came into

[329] Panel Report, *European Economic Community – Regulations on Imports of Parts and Components* ("*EEC – Parts and Components*"), adopted on 16 May 1990, BISD 37S/132, paras. 5.14-5.18.

effect after the establishment of the Panels. However, Canada stated that Section 56(1) of the *Canada Grain Regulations* as it existed at the time the March and July Panels were established incorrectly referred to foreign grain. Canada states that Section 56(1) of the *Regulations* has since been amended to reflect the original intent, which was to allow mixing of Eastern Canadian grain with other Eastern Canadian grain in transfer elevators. Canada notes in this regard that Eastern Canadian grain is, in large part, marketed domestically and is not as quality sensitive as Western Canadian grain, most of which is exported.

6.255 The **Panel** notes that, as at the date of establishment of the March Panel and the July Panel, Section 56(1) of the *Canada Grain Regulations* ("the old Section 56(1)"), being the measure that is being challenged by the United States, provided that:

> 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 grain is western grain or foreign grain.

6.256 Amendments to the *Regulations* came into effect on 1 August 2003, that is, after the establishment of the two Panels and while the Panels' proceedings were under way. Pursuant to those amendments, Section 56(1) was amended[330] ("Section 56(1) as amended") to provide as follows:

> The operator of a licensed transfer elevator may mix any grade of eastern grain being received into or being discharged out of, the elevator, with any other grade of eastern grain of the same class.

6.257 In two questions posed by the Panel, the United States was requested to indicate whether it was claiming that Section 56(1) of the *Canada Grain Regulations* as amended, as such, is inconsistent with Article III:4 of the GATT 1994[331] or whether it expected the Panel to rule only on the old Section 56(1).[332] The United States responded that, under the terms of reference of the March Panel and the July Panel, the Panel is called on to make findings on the old Section 56(1) of the *Canada Grain Regulations*. In the United States' view, Section 56(1) as amended is not within the Panels' terms of reference. The United States notes, however, that, in terms of substance, Section 56(1) as amended is essentially the same as the old Section 56(1).[333] Canada did not express disagreement with the United States' view that the Panel should rule on the old Section 56(1).

6.258 It is clear to the Panel that the old Section 56(1) of the *Canada Grain Regulations* is within the terms of reference of both the March Panel and the July Panel. This presents the issue of whether the Panel may rule on the WTO-consistency of a measure that has since been replaced by an amended version of the challenged measure. We note in this regard that, in a number of cases, panels have adjudicated claims involving measures that no longer existed or that were no longer being applied.[334] In those cases, the relevant measures typically had been applied in the very recent past.

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[330] Section 56(1) of the *Canada Grain Regulations* was amended pursuant to "Regulations Amending the Canada Grain Regulations" (Exhibit CDA-23). While Section 25 of those Regulations states that the old Section 56(1) is to be "replaced" by the relevant text contained in Section 25, we understand that the effect of Section 25 was to amend the old Section 56(1). This is evident from the title of the Regulations containing Section 25 and from statements made to this effect by Canada in these proceedings. Canada's first written submission, footnote 106 and Canada's comments on the United States' reply to Panel question No. 67.

[331] Panel question No. 9.

[332] Panel question No. 66.

[333] United States' reply to Panel question No. 66.

[334] Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*US – Wool Shirts and Blouses*"), WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343, where the panel ruled on a measure that was revoked after the interim

6.259 In this case, the amendment to the old Section 56(1) came into effect a short period of time after the establishment of the March Panel and the July Panel. Further, a ruling on the old Section 56(1) would appear to be meaningful for purposes of this dispute, given that, in substantive terms, the provisions of the old Section 56(1) seem to be essentially the same as those of Section 56(1) as amended.[335] Finally, we recall that, in this case, the complaining party specifically requested that we rule on the old Section 56(1) and the responding party did not oppose this request. In these circumstances, we see no reason to decline to rule on the old Section 56(1), hereinafter referred to as "Section 56(1)".[336]

*(ii) Like products*

6.260 The **United States** argues that US grain, even when of the exact same type as domestic Canadian grain, is subject to differential treatment as "foreign grain" under Section 56(1) of the *Canada Grain Regulations*. According to the United States, given that Section 56(1) of the *Regulations* discriminates on the basis of origin rather than on the basis of physical characteristics or end-uses even when all other product characteristics are exactly the same, one must reach the conclusion that the measure at issue applies to like domestic and foreign products. In any event, the imported and domestic products at issue, namely those covered by the *Canada Grain Act* and *Regulations* are identical and are, therefore, "like products". More particularly, all imported and domestic products falling within each of the categories of "grain" as defined in Section 5(1) of the *Canada Grain Regulations* are "like products" for the purposes of Article III:4. Some imported US grain is the same variety as Canadian grown grain, the only difference being that the US grain is grown south of the Canadian border.

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review but before issuance of the final report to the parties; Panel Report, *EEC – Measures on Animal Feed Proteins* ("*EEC – Animal Feed Proteins*"), adopted 14 March 1978, BISD 25S/49, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada* ("*US – Canadian Tuna*"), adopted 22 February 1982, BISD 29S/91, para. 4.3, where the panel ruled on the GATT-consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/R, 3 May 2002 adopted 23 October 2002, as modified by the Appellate Body Report, WT/DS207AB/R, paras.7.124-7-125,, where the panel recalled that Article 19.1 of the DSU did not prevent the panel from making findings regarding the consistency of an expired provisional safeguard measure, if the panel were to consider that the making of such findings is necessary "to secure a positive solution" to the dispute. The panel decided to rule on withdrawn measures because the complainant argued that it had suffered nullification or impairment as a result of the withdrawn measures and that it was entitled to a ruling on the matter and because the panel considered that it would be in the interest of a prompt settlement of the overall dispute to make findings regarding the safeguard measures at issue, even though they had been withdrawn in the course of the proceedings.

[335] Canada appears to agree with this view. Canada's comments on the United States' reply to Panel question No. 67.

[336] The Appellate Body in *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products* ("*Chile – Price Band System*"), WT/DS207/AB/R, adopted 23 October 2002, found that, in some circumstances, only the amended measure, not the old measure, was to be looked at. In particular, the Appellate Body found that "[i]f the terms of reference in a dispute are broad enough to include amendments to a measure ... and if it is necessary to consider an amendment in order to secure a positive solution to the dispute ... then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute". Appellate Body Report, *Chile – Price Band System*, *supra*, para. 144. However, among the reasons the Appellate Body adduced in support of its decision was the fact that neither of the parties objected to this approach (para. 143) and that such an approach was necessary to meet the demands of due process for the complaining party (para. 144). We consider that our case is different since the United States as the complaining party has confirmed that it expects the Panel to make findings on Section 56(1) of the *Canada Grain Regulations* as it existed at the time the March Panel and the July Panel were established.

6.261 **Canada** argues that for the purposes of the *Canada Grain Act*, not all grain types are like. Not only is it not sufficient to define "like products" by category, but the grades and varieties of the grain must also be taken into account in certain circumstances because of their different end-uses and end-use characteristics. Accordingly, within each type of grain there are different "like" products. Canada also submits that Section 72 of the *Canada Grain Act* prohibits all mixing of grain between different grades and types, regardless of origin.[337]

6.262 The **Panel** notes that, by virtue merely of their origin, foreign grain and Western Canadian grain are excluded from the standing mixing authorization established under Section 56(1) of the *Canada Grain Regulations*. Therefore, at least implicitly, Section 56(1) of the *Canada Grain Regulations* draws an origin-based distinction between Eastern Canadian grain, on the one hand, and foreign and Western Canadian grain, on the other hand. Given the existence of an origin-based distinction in Section 56(1) of the *Canada Grain Regulations*, the United States need only demonstrate that there can or will be domestic and imported products that are like.

6.263 The United States has established to our satisfaction that, as a result of the origin-based distinction contained in Section 56(1), foreign grain that is like Eastern Canadian grain would not benefit from the standing mixing authorization established under Section 56(1).[338] Indeed, even foreign grain that is identical to Eastern Canadian grain in all respects except for origin would be excluded from the standing mixing authorization set out in Section 56(1).

6.264 Accordingly, the Panel considers that, since foreign grain that is like Eastern Canadian grain does not benefit from Section 56(1) of the *Canada Grain Regulations*, the "like products" requirement in Article III:4 is satisfied.

*(iii) Measure affecting internal distribution and/or transportation*

6.265 The **United States** argues that Section 56(1) of the *Canada Grain Regulations* is a law affecting the distribution and transportation of grain. According to the United States, most grain transported internally in Canada will, at some point, be received and/or stored in a Canadian grain elevator.

6.266 **Canada** argues that the measures at issue regarding treatment of imported grain may only be examined from the perspective of their effect on the *internal* sale, offering for sale, purchase, transportation, distribution or use of the imported grain. Canada submits that a portion of US grain that enters the Canadian bulk grain handling system is destined for re-export to third countries. To the extent that Section 56(1) of the *Regulations* affects US grain in transit through Canada, it is outside the scope of Article III:4 and of the Panel's terms of reference.

6.267 The **Panel** again recalls that Article III:4 of GATT 1994 requires that the governmental measure at issue be a law, regulation or requirement affecting the internal sale, purchase, transportation, distribution or use of imported products. We found in paragraph 6.172 above that the bulk grain handling system, which is the context in which Section 56(1) operates, is a "distribution channel" for grain in Canada. Section 56(1) grants standing regulatory mixing authorization only for Eastern Canadian grain. We note, therefore, that Section 56(1) does not directly affect the internal

[337] Canada's first oral statement, para. 61.

[338] Some varieties grown in Eastern Canada may be different from foreign varieties. However, we have seen no evidence that this is true for all grain grown in Eastern Canada and that no Eastern varieties, or at least like varieties, could be imported. We do not exclude the possibility that there might exceptionally be cases in which differences in origin might coincide or correlate with differences in physical properties, end-uses, and consumers' tastes and habits as between the imported and domestic products so as to render them "unlike" for the purposes of Article III:4 of the GATT 1994. Nevertheless, we are not convinced, based on the information on the record, that *all* foreign grain is unlike Eastern Canadian grain.

distribution of imported grain. Nevertheless, we believe it will affect the conditions of competition between domestic and imported products in the internal Canadian market[339] in the sense that it will disincentivise transfer elevator operators from accepting and distributing imported grain to end-users through the bulk grain handling system.[340] Consequently, we conclude that it is a measure affecting the internal distribution of foreign grain in Canada.[341] In these circumstances, we do not see the need to determine, in addition, whether Section 56(1) also affects transportation.

6.268 With respect to whether Section 56(1) applies to foreign grain "imported" into Canada,[342] the Panel is satisfied that at least some foreign grain that is distributed through the transfer elevators is imported into Canada and is domestically consumed.[343] The Panel is satisfied, therefore, that Section 56(1) affects grain "imported" into Canada and, hence, is subject to the provisions of Article III:4 of the GATT 1994.

*(iv) Less favourable treatment*

6.269 The **United States** submits that Section 56(1) of the *Canada Grain Regulations* prohibits the mixing of imported grain and domestic grain in transfer elevators. According to the United States, the default prohibition impedes commercial opportunities for US grain by making it more costly and burdensome for US grain to move through the bulk grain handling system. 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 opportunities of imported grain to reach Canadian end-users. The United States also argues that Article III:4 of the GATT 1994 protects conditions of competition, not trade flows *per se*, so that it is not necessary to demonstrate any trade effects of Canada's measures in order to establish a violation of Article III:4. Further, the United States argues that the existence of alternative distribution channels or the possibility of exceptional mixing authorization does not remove the less favourable treatment of foreign grain.

6.270 **Canada** argues that Section 56(1) of the *Canada Grain Regulations* does not modify the conditions of competition for grain to the detriment of imported products because mixing restrictions in elevators apply to both domestic and imported grain. More particularly, Section 72 of the *Canada Grain Act* prohibits all mixing of grain between different grades and types, regardless of origin. Section 56(1) of the *Regulations* authorizes the mixing of different grades of Eastern Canadian grain in transfer elevators because it is less quality-sensitive. In addition, Section 72(2) of the *Act* vests discretion in the CGC to allow mixing of foreign grain and Canadian grain. Canada submits that the limitation on mixing of different grades of grain does not result in additional costs for foreign grain[344] since the process to obtain an authorization to mix Canadian and foreign grain is simple and cost free. According to Canada, the only requirements applying to US grain are that it may not be mixed with

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[339] *See* paras. 6.269 - 6.297 below.

[340] The panel in *Italian Discrimination Against Imported Agricultural Machinery* ("*Italy – Agricultural Machinery*") adopted 23 October 1958, BISD 7S/60, stated that "[t]he selection of the word 'affecting' [in Article III:4] would imply [...], in the opinion of the Panel, that the drafters of the Article intended to cover in paragraph 4 not only the laws and regulations which directly governed the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market". Panel Report, *Italy – Agricultural Machinery*, *supra*, para. 12.

[341] Neither party has contested that Section 56(1) is an *internal* measure within the meaning of Article III:4 of the GATT 1994.

[342] *See* para. 6.158 above.

[343] As noted above in footnote 254, Canada has acknowledged that some imported (US) grain that enters elevators is for domestic consumption. Canada's first written submission, paras. 190 and 228 and Annex I, p. 6. Further, Canada has indicated that transfer elevators have historically handled significant quantities of US grain destined for both the Canadian market and the overseas market. Canada's first written submission, para. 228. *See* also Canada's reply to Panel question No. 42.

[344] Canada's first written submission, para. 255.

Canadian grain of different quality and if US grain is mixed with Canadian grain of like quality, it should be identified as mixed grain, and not Canadian grain. The fact that elevators have to make a request to mix Canadian grain and foreign grain so that it is not misrepresented as "Canadian grain" does not amount to less favourable treatment of foreign grain. Further, according to Canada, there is no evidence of elevators being less interested in receiving US grain. Canada also argues that a significant portion of US grain exported to Canada is shipped directly to end-users, by-passing elevators to which Section 56(1) of the *Regulations* applies. Mixing restrictions do not apply outside the bulk grain handling system.

6.271 The **Panel** will first examine whether Section 56(1) of the *Canada Grain Regulations* adversely affects the competitive opportunities of imported grain *vis-à-vis* like domestic grain. Secondly, we will determine whether Section 56(1) mandates or, has the effect of mandating, more favourable treatment of domestic grain as compared to like imported grain. We thus assume that it is appropriate, in assessing the WTO-consistency of legislation, as such, to distinguish between mandatory and discretionary legislation. We note in this regard that our ultimate conclusion does not depend on the correctness of this assumption.[345]

6.272 With respect to the first issue -- that is, whether Section 56(1) of the *Regulations* adversely affects the competitive opportunities of imported grain *vis-à-vis* like domestic grain -- we begin by analysing the meaning and operation of Section 56(1) of the *Regulations.* Initially, we note that we are unable to agree with the United States' assertion that Section 56(1) of the *Regulations* contains, or implies, a prohibition on the mixing of foreign grain with Canadian grain.[346] Section 56(1) of the *Regulations* provides that "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 grain is western grain or foreign grain." We understand these provisions to mean, in effect, that transfer elevator operators may mix different grades of Eastern Canadian grain[347] in transfer elevators.[348] Thus, Section 56(1) authorizes mixing; it does not prohibit mixing. Moreover, it is concerned with the mixing of certain Canadian grain, not with the mixing of foreign grain with Canadian grain.

6.273 That Section 56(1) of the *Regulations* does not contain a prohibition on mixing also becomes clear when it is read together with Section 72 of the *Canada Grain Act*, being the provision pursuant to which Section 56(1) was created. Under Section 72(1) of the *Act*, all mixing of grain of different grades is prohibited unless such mixing is authorized by an order of the CGC or by regulation. Section 56(1) is of the latter type, *i.e.*, it creates a regulatory exception to the mixing prohibition contained in Section 72(1).

6.274 Looking now at how Section 56(1) operates, we note that it provides standing, unconditional authorization for the mixing of certain grain in transfer elevators.[349] As a practical matter, this means that operators of transfer elevators may mix the relevant grain without having to make a prior request for authorization.[350] Thus, the regulatory mixing authorization granted by Section 56(1) confers an

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[345] *See* also our remarks on this issue at para. 6.184 above.

[346] *See*, for example, United States' comments on Canada's reply to Panel question No. 70.

[347] "Eastern grain" is defined in Section 2 of the *Canada Grain Act* as grain grown in the Eastern Division. "Eastern Division" is defined, in turn, as "that part of Canada not included in the Western Division." "Western Division" is defined to mean "all that part of Canada lying west of the meridian passing through the eastern boundary of the City of Thunder Bay, including the whole of the Province of Manitoba".

[348] This appears to be consistent with what Canada says is the effect of Section 56(1). Canada's comments on the United States' reply to Panel question No. 67.

[349] *See* Canada's reply to Panel question No. 101.

[350] Section 72(2) does not explicitly provide that the granting of mixing authorisation is conditional upon a request having first been made. However, Canada has confirmed that such a request is needed. *See*, for

advantage which does not exist with respect to, for instance, mixing authorization granted by order pursuant to Section 72(2) of the *Canada Grain Act*. More particularly, in the case of the latter, authorization must be granted on an on-request basis and may, in principle, be denied or be granted subject to conditions.

6.275 On the basis of our understanding of the meaning and operation of Section 56(1), we now turn to address the principal issue here, namely whether Section 56(1) treats imported grain less favourably than like Eastern Canadian grain. We recall in this regard that the standing and unconditional mixing authorization granted by Section 56(1) only benefits Eastern Canadian grain.[351] More specifically, Section 56(1) permits Eastern Canadian grain of a particular type and grade to be mixed with Eastern Canadian grain of the same type, but of a different grade.[352]

6.276 The United States argues that Section 56(1) treats foreign grain less favourably than like Eastern Canadian grain insofar as, unlike foreign grain, Eastern Canadian grain can be mixed without the need for prior authorization. The United States argues that an elevator operator should be free to mix foreign grain with like Eastern Canadian grain as well as foreign grain with other foreign grain without having to obtain prior authorization.[353]

6.277 We consider that, under the provisions of Article III:4 of the GATT 1994, foreign grain that is like Eastern Canadian grain must, at a minimum, be conferred the same advantage Section 56(1) confers on like Eastern Canadian grain, namely, the advantage of standing mixing authorization, obviating the need to first obtain authorization. More particularly, we think that: (i) Canada must permit foreign grain that is like Eastern Canadian grain to be mixed with Eastern Canadian grain subject to the same conditions that currently apply to mixing under Section 56(1); and (ii) Canada must permit foreign grain that is like Eastern Canadian grain to be mixed with other foreign grain that is like Eastern Canadian grain subject to the same conditions that currently apply to mixing under Section 56(1).

Mixing of foreign grain with like Eastern Canadian grain

6.278 We analyse first whether Canada permits foreign grain that is like Eastern Canadian grain to be mixed with Eastern Canadian grain subject to the same conditions that currently apply to mixing under Section 56(1). We note that there is some uncertainty as to whether such mixing is governed by Section 72(2) or Section 57(c) of the *Canada Grain* Act.[354] In the light of this, the Panel will consider the mixing of foreign grain with Eastern Canadian grain under both provisions.[355]

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example, Canada's reply to Panel question No. 16(a), which refers to Canada's reply to Panel question No. 13(a) and Canada's first written submission, para. 258.

[351] We note that the fact that the standing, unconditional mixing authorization granted by Section 56(1) does not benefit foreign grain does not imply that Section 56(1) mandates the imposition of mixing restrictions with respect to foreign grain. In our understanding, such restrictions may be imposed under other provisions of Canadian law, but such restrictions are not the result of Section 56(1). We do not, therefore, agree with the United States' assertion in its comments on Canada's Reply to Panel question No. 76 that Section 56(1) explicitly mandates the imposition of mixing restrictions with respect to foreign grain.

[352] Canada gives the following example of mixing under Section 56(1) of the *Regulations*: #1 Canada Easter White Winter Wheat may be mixed with #3 Canada Eastern White Winter Wheat. According to Canada, the combined lot may meet the specifications for #2 Canada Eastern White Winter Wheat. Canada's reply to Panel question No. 58. *See* also Canada's first written submission, para. 245.

[353] United States' reply to Panel question No. 67.

[354] The uncertainty derives from the fact that Canada has cast doubt on whether foreign grain falls within the scope of Section 72 of the *Canada Grain Act* because it is not graded under the *Act*. Indeed, Canada has stated that the general prohibition contained in Section 72(1) regarding the mixing of grain of different grades does not apply to foreign grain because foreign grain is not graded under Section 16 of the *Canada Grain*

*Mixing under Section 72(2) of the Canada Grain Act*

6.279 We begin by considering the mixing of foreign grain with Eastern Canadian grain on the assumption that such mixing is governed by Section 72(2) of the *Canada Grain Act*. Section 72(2) of the *Act* provides for authorization on request and possibly subject to conditions. Canada has stated that the process according to which mixing authorization is granted under Section 72(2) is the same as that which applies for the granting of receipt authorization under Section 57(c) of the *Canada Grain Act*. [356] As noted above in relation to Section 57(c) of the *Act*, the authorization process itself involves administrative burdens, even if it does not involve the payment of fees, etc.[357]

6.280 As we previously stated, Section 56(1) of the *Regulations* is a regulatory exception to the general mixing prohibition set out in Section 72(1) of the *Canada Grain Act.* While Section 56(1) does not itself impose additional costs and burdens on foreign grain, it effectively exempts Eastern Canadian grain from the requirement to obtain mixing authorization under Section 72(2), thereby treating imported grain less favourably than like Eastern Canadian grain. Indeed, from the perspective of transfer elevator operators, it is less burdensome to mix Eastern Canadian grain with other Eastern Canadian grain than it is to mix imported grain that is like Eastern Canadian grain with Eastern Canadian grain because authorization is needed in relation to the former but not the latter. In our view, it is clear, therefore, that, as a result of Section 56(1), the competitive opportunities afforded to imported grain are less favourable than those available to like Eastern Canadian grain.

6.281 Canada argues that there is no evidence that elevators are less interested in receiving US grain because authorization is needed under Section 72(2) if that grain is to be mixed.[358] While it is true that the Panel has not seen any evidence of elevators being less interested in receiving US grain as a result of the application of Section 72(2) to imported grain, it is not necessary to demonstrate actual and specific negative effects of a trade measure in order to establish a violation of Article III:4 of the GATT 1994.[359]

6.282 Canada has also argued that the CGC would always authorize the mixing of foreign grain with domestic grain under Section 72(2) of the *Act* provided that the lot of mixed grain is identified as such to ensure that it is not misrepresented as Canadian grain.[360] It may be that the CGC has discretion to always authorize the mixing of foreign grain that is like Eastern Canadian grain with

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*Act*. According to Canada, since the prohibition in Section 72(1) does not apply to foreign grain, neither does the possibility of obtaining an exception to this prohibition by order, which possibility is envisaged in Section 72(2). Canada's reply to Panel question No. 76. Consistent with its statement that Section 72(1) does not apply to foreign grain, Canada has stated that the imposition of mixing restrictions, if any, with respect to foreign grain results from conditions or limitations imposed on the entry of foreign grain into elevators (including transfer elevators) under Section 57(c) of the *Canada Grain Act*. Canada's replies to Panel question Nos. 70 and 76. The uncertainty as to whether Section 72(2) or Section 57(c) applies arises from yet another statement made by Canada regarding the applicability of Section 72(2). Canada has stated that, under Section 72(2), "the CGC has discretion to allow mixing of foreign grain with Canadian grain". Canada's first written submission, para. 258. *See* also Canada's reply to Panel question No. 13. This statement, if correct, appears to suggest that when foreign grain is to be mixed with Canadian grain, the fact that foreign grain is not graded does not remove this type of mixing request from the scope of Section 72(2).

[355] Since we have found that foreign grain that is "like" Eastern Canadian grain does not benefit from Section 56(1) of the *Canada Grain Regulations* and since, in our understanding, the mixing of all foreign grain is subject to Section 72(2) and/or Section 57(c) of the *Canada Grain Act*, it is clear that foreign grain that is "like" Eastern Canadian grain is subject to Section 72(2) and/or Section 57(c).

[356] Canada's reply to Panel question No. 16(a).

[357] *See* our comments above in para. 6.191.

[358] Canada's first written submission, para. 255.

[359] Appellate Body Report, *Japan – Alcoholic Beverages II*, *supra*, p. 16. This statement was endorsed by the Appellate Body in *Korea – Alcoholic Beverages*, *supra*, para. 119.

[360] Canada's reply to Panel question No. 12; Canada's reply to Panel question No. 59(a).

Eastern Canadian grain.[361] If the CGC were to authorize mixing of foreign grain with Eastern Canadian grain in every case, this might minimize the adverse effects on competitive opportunities as between imported and like Eastern Canadian grain but such effects would not be completely eliminated since a request for mixing authorization would still need to be made whereas this is not required for the mixing of Eastern Canadian grain.[362]

6.283 In sum, in our view, the standing, unconditional mixing authorization granted by Section 56(1) confers an advantage on Eastern Canadian grain that is not conferred on imported grain for which mixing authorization by order pursuant to Section 72(2) of the *Canada Grain Act* is needed. It is clear, therefore, that if foreign grain that is like Eastern Canadian grain can only be mixed with Eastern Canadian grain under the provisions of Section 72(2) of the *Act* rather than Section 56(1) of the *Regulations*, imported grain is afforded treatment that is less favourable than the treatment accorded to like Eastern Canadian grain under Section 56(1).

*Mixing under Section 57(c) of the Canada Grain Act*

6.284 As noted above, there is some uncertainty as to whether the mixing of foreign grain with domestic grain is governed by Section 72(2) of the *Canada Grain* Act or by Section 57(c) of the *Canada Grain* Act. [363] If the mixing of foreign grain with Eastern Canadian grain fell to be assessed under Section 57(c) of the *Canada Grain Act* instead of Section 72(2), we think that foreign grain would also be treated less favourably than like Eastern Canadian grain. Initially, we note that we have not been made aware of any regulations promulgated under the authority of Section 57(c) that would address the conditions under which foreign grain may be mixed with Canadian grain. We, therefore, need only consider the possibility, referred to by Canada, that the CGC, in authorizing the receipt of foreign grain into an elevator by order may also authorize the mixing of foreign grain in question with Canadian grain.[364]

6.285 As we have noted above in our examination of Section 57(c), authorization by CGC order requires at least an initial request and may be granted subject to conditions.[365] Thus, in much the same way as Section 72(2), Section 57(c) treats foreign grain that is like Eastern Canadian grain less favourably than Section 56(1) treats Eastern Canadian grain. More particularly, while the mixing of foreign grain with domestic grain under Section 57(c) of the *Canada Grain Act* is contingent upon a request for mixing authorization having first been made, no request for mixing authorization is needed for the mixing of Eastern Canadian grain under Section 56(1) of the *Regulations*.[366]

6.286 In sum, if foreign grain that is like Eastern Canadian grain can only be mixed with Eastern Canadian grain under the provisions of Section 57(c) of the *Act*, imported grain is afforded treatment that is less favourable than the treatment accorded to like Eastern Canadian grain under Section 56(1) of the *Regulations*.

*Conclusion*

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[361] Canada has confirmed that there has been no instance of denial of a request for authorization of mixing of Canadian and foreign grain in transfer elevators. Canada's reply to Panel question No. 59(a).

[362] We consider that this is true even if the CGC were to grant its mixing authorization under Section 72(2) unconditionally, since, even in such cases, a request for receipt would still need to be made, at least initially.

[363] *See* footnote 354 above.

[364] Canada's replies to Panel question Nos. 70 and 76.

[365] *See* paras. 6.181 - 6.182 above.

[366] We consider that this is true even if the CGC were to grant its mixing authorization under Section 57(c) unconditionally, since, at the very least, a request for receipt authorisation would still need to be made, at least initially.

6.287 Therefore, whether we compare Section 56(1) of the *Regulations* to Section 72(2) or Section 57(c) of the *Canada Grain Act*, we find that Section 56(1), as such, confers an advantage on Eastern Canadian grain that is not accorded to like imported grain.

Mixing of foreign grain that is like Eastern Canadian grain with other foreign grain that is like Eastern Canadian grain

6.288 Canada has stated that the general prohibition contained in Section 72(1) of the *Canada Grain Act* regarding the mixing of grain of different grades does not apply to the mixing of different grades and classes of foreign grain because foreign grain is not graded under Section 16 of the *Canada Grain Act*.[367] We further understand that if such mixing occurs, it must occur pursuant to Section 57(c) of the *Canada Grain Act*.[368]

6.289 With respect to whether Section 57(c) of the *Act* would allow foreign grain that is like Eastern Canadian grain to be mixed with other foreign grain that is like Eastern Canadian grain under the same conditions as apply to the mixing of Eastern Canadian grain with other Eastern Canadian grain under Section 56(1) of the *Regulations*, we consider that this would not be the case for the reasons we have indicated in paragraphs 6.284 - 6.285 above. The conditions under which Eastern Canadian grain may be mixed with Eastern Canadian grain are more favourable than the conditions under which relevant foreign grain may be mixed with other relevant foreign grain because authorization for the mixing of Eastern Canadian grain is not needed whereas, at the very least, receipt authorization would be needed under Section 57(c) of the *Canada Grain Act* before foreign grain could be mixed.[369]

General Defences

6.290 On the basis of the foregoing, it would appear that Section 56(1) of the *Canada Grain Regulations* is, on its face, inconsistent with Article III:4 of the GATT 1994 because foreign grain is treated less favourably than Eastern Canadian grain. However, Canada has raised a number of defences, which we consider here.

6.291 Canada has said that the mixing restrictions that apply under Section 72 of the *Canada Grain Act* are just some of the many provisions that serve to maintain quality. According to Canada, Section 72 is necessary to prevent uncontrolled mixing in the bulk grain handling system, which would affect Canada's ability to know the quality of the grain in the system, and its ability as an exporter to guarantee the quality, end-use characteristics and Canadian origin of the grain. Canada suggests that the mixing restrictions contained in Section 72 of the *Canada Grain Act* need not apply to Eastern Canadian grain because such grain is, in large part, marketed domestically and is less quality-sensitive.

6.292 The Panel notes that, in the present case, there may be legitimate reasons for Canada to treat domestic grain and like imported grain differently, for example, because the latter has not been subjected to the Canadian quality assurance system, which imposes certain restrictions and conditions on Canadian grain, including with respect to production.[370] However, as mentioned by us previously, the Appellate Body found in *Korea - Various Measures on Beef* that different treatment as between

[367] Canada's reply to Panel question No. 76.

[368] Canada's replies to Panel question Nos. 70 and 76.

[369] Canada has stated in its reply to Panel question No. 70 that *additional* conditions on mixing of foreign grain and Canadian grain *may* be imposed in orders authorizing receipt of foreign grain under Section 57(c) of the Act. However, even if the CGC were not to impose any restrictions with respect to the mixing of foreign grain, a request for receipt authorization would still need to be made.

[370] Canada's reply to Panel' question No. 15.

imported products and like domestic products must not result in the imported products being treated less favourably.[371]

6.293 It is not clear to us how the arguments put forward by Canada to justify the difference in treatment between domestic grain and like imported grain support the conclusion that in not extending to like foreign grain the advantage granted to Eastern Canadian grain under Section 56(1), foreign grain is not treated less favourably than like domestic grain. As we have stated previously, the conditions under which Eastern Canadian grain may be mixed are more favourable than the conditions under which foreign grain may be mixed because authorization for the mixing of Eastern Canadian grain is not needed whereas, in the case of foreign grain, mixing authorisation is needed under Section 72(2) or Section 57(c) of the *Canada Grain Act*.[372]

6.294 Canada has also argued that Section 56(1) is an exception to a mixing prohibition – Section 72(1) of the *Canada Grain Act* – that applies to all grain, domestic and imported.[373] We note that, indeed, Western Canadian grain is also treated less favourably than Eastern Canadian grain since it, like foreign grain, does not benefit from the standing, unconditional mixing authorization that is granted to Eastern Canadian grain under Section 56(1) of the *Regulations*. However, it is clear from GATT/WTO jurisprudence that where an origin-based difference in regulatory treatment is made between products originating in one area, region or administrative unit of a country and all other like products - that is, like products originating in other areas of the same country or originating in foreign countries - Article III:4 requires that the foreign product be granted treatment no less favourable than that accorded to the most-favoured domestic product.[374] Accordingly, in the specific circumstances of this case, where Canada has drawn a distinction between grain originating in Eastern Canada and all other grain, Canada has to accord like imported grain treatment that is at least as favourable as the treatment afforded to Eastern Canadian grain. In other words, the advantage Section 56(1) confers on Eastern Canadian grain must also be conferred on like imported grain.[375]

6.295 Canada argues, finally, that a significant portion of US grain imported into Canada is shipped directly to end-users, by-passing elevators to which Section 56(1) of the *Regulations* applies. Canada notes that mixing restrictions do not apply outside the bulk grain handling system. The Panel considers that the fact that foreign producers are not obliged to use Canadian transfer elevators and may deliver their grain directly to Canadian end-users does not remove the less favourable treatment accorded to imported grain with respect to mixing in transfer elevators.

6.296 In relation to the second requirement that needs to be fulfilled in establishing that Section 56(1) of the *Canada Grain Regulations* is, as such, inconsistent with Article III:4 of the GATT 1994 - that is, that Section 56(1) must mandate, or require, less favourable treatment - we consider that Section 56(1) is a mandatory provision, in that it gives transfer elevator operators the right to mix Eastern Canadian grain without the need to seek and obtain prior authorization from the CGC.

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[371] Appellate Body Report, *Korea – Various Measures on Beef*, *supra*, paras. 135 – 137. We note, however, that less favourable treatment of imported grain may be justifiable under the general exceptions set out in Article XX of the GATT 1994. Indeed, Canada in this case has invoked Article XX. We address Canada's Article XX defence below at paras. 6.298 - 6.320.

[372] With respect to the mixing of foreign grain under Section 57(c), at the very least, receipt authorization would be needed.

[373] Canada's first written submission, paras. 244-246.

[374] Panel Report, *US – Malt Beverages*, *supra*, paras. 5.17 and 5.33.

[375] We note that foreign grain cannot presently be mixed with Western grain without prior authorization by the CGC even though there may be some Western grain that is like Eastern grain, and foreign grain that is also like Eastern grain. However, this situation would not change if Section 56(1) were repealed. In other words, this situation is not a consequence of Section 56(1).

Conclusion

6.297 In conclusion, since the Panel is not persuaded by the general defences put forward by Canada, the Panel confirms its provisional conclusion above at paragraph 6.290 that Section 56(1) of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994.

*(v) Defence under Article XX(d) of the GATT 1994*

6.298 Canada has sought to justify Section 56(1) of the *Canada Grain Regulations* under Article XX(d) of the GATT 1994.

6.299 For the reasons indicated above in considering Canada's Article XX(d) defence to the United States' claim in respect of Section 57(c) of the *Canada Grain Act*, in determining whether Section 56(1) of the *Canada Grain Regulations* is justified under Article XX(d), we commence by assessing whether Section 56(1) is necessary to secure compliance with the various laws and regulations that Canada has pointed to.

Necessity of the measures taken to secure compliance

6.300 In addition to the arguments made above at paragraph 6.220 in defence of Section 57(c) of the *Canada Grain Act*, which were also made by Canada in relation to Section 56(1) of the *Canada Grain Regulations*, **Canada** has argued that it is concerned with uncontrolled mixing in the bulk grain handling system that would affect Canada's ability to know the quality of the grain in the system, and its ability as an exporter to guarantee the quality, end-use characteristics and Canadian origin of the grain.

6.301 The **United States** argues that Canada already has inspection and grading provisions in place which make the origin of grain known to the purchaser, and this accomplishes Canada's objectives with respect to misrepresentation. Therefore, the prohibition on mixing generally is not necessary to secure compliance with the grading requirements of the *Canada Grain Act*, the *Competition Act*, or any other law or regulation identified by Canada in its submissions.

6.302 In determining whether Section 56(1) of the *Canada Grain Regulations* is "necessary" within the meaning of Article XX(d) of the GATT 1994, the **Panel** will apply the "weighing and balancing" test in the same way as the Appellate Body did in *Korea – Various Measures on Beef* and in *EC – Asbestos*.[376]

6.303 With respect to the importance of the interests or values that the statutory and other provisions with which, according to Canada, Section 56(1) secures compliance are intended to protect, Canada has indicated that those objectives are to ensure the quality of Canadian grain, maintain the integrity of the Canadian grading system, protect consumers against misrepresentation and preserve and enforce the CWB monopoly.[377] As we stated above in relation to Section 57(c) of the *Canada Grain Act*, it is clear that these interests, which appear to be essentially commercial in nature, are important. It seems equally clear, however, that these interests are not as important as, for instance, the protection of human life and health against a life-threatening health risk.[378]

6.304 Canada asserts that Section 56(1) of the *Regulations* contributes to ensuring that the identity and quality of grain can be established and guaranteed insofar as it does not permit uncontrolled mixing of all grain in the bulk grain handling system. Canada argues that without such an assurance,

[376] *See* para. 6.223 above.
[377] *See* Canada's second written submission, paras. 111, 113, 121 - 125.
[378] *See* para. 6.224 above.

its ability to know the quality of the grain in the Canadian grain handling system, its ability as an exporter to guarantee the quality, end-use characteristics and Canadian origin of the grain would be compromised.[379] In our view, Section 56(1) can be said to make some contribution to ensuring that the identity and quality of grain can be established and guaranteed and that foreign grain is not inadvertently confused with Canadian grain. Nevertheless, it must be noted that Section 56(1) is only an instrument to achieve these objectives.

6.305 Therefore, the question remains as to whether there is an alternative measure that is reasonably available to Canada at present to secure compliance with the laws and regulations that Canada has pointed to in justifying Section 56(1) of the *Regulations*, taking into account the level of compliance that Canada has stated it seeks to achieve with respect to those laws and regulations, namely a "very high level of compliance".

*The provisions of the Canada Grain Act and Regulations*

6.306 **Canada** has asserted that uncontrolled mixing of foreign grain with domestic grain would result in an inability on the part of the CGC to grade grain, to attest to the specific end-use characteristics of the grain or to attest to the origin of the grain.

6.307 The **Panel** understands that Canada is suggesting that the advantage of standing, unconditional mixing authorization bestowed upon Eastern Canadian grain under Section 56(1) cannot be extended in the same way to like imported grain because doing so would compromise the CGC's ability to grade grain, to attest to the specific end-use characteristics of the grain or to attest to the origin of the grain.

6.308 We are not persuaded that Section 56(1), as it is, is necessary to secure compliance with the provisions of the *Canada Grain Act* and the *Regulations* that relate to the identification and end-use characteristics of grain. In particular, Canada has not convinced us that it is necessary to limit the standing, unconditional mixing authorization contained in Section 56(1) to Eastern Canadian grain in order to secure compliance with those provisions. It is not clear to us why Canada could not, for example, grant by regulation, standing authorization for the mixing in transfer elevators of Eastern Canadian grain with foreign grain that is like Eastern Canadian grain, and of foreign grain that is like Eastern Canadian grain with other foreign grain that is like Eastern Canadian grain, subject to the condition that mixed grain not be designated as Canadian grain.[380]

6.309 In fact, Canada itself appears to acknowledge that the aforementioned alternative measure could be implemented.[381] Canada has only indicated that any advance mixing authorization given by regulation to foreign grain would have to be conditioned upon the identification of the mixed lot as non-Canadian or of mixed origin.[382] We consider that a regulation that would give standing authorization for the mixing in transfer elevators of Eastern Canadian grain with foreign grain that is like Eastern Canadian grain and foreign grain that is like Eastern Canadian grain with other foreign grain that is like Eastern Canadian grain but which would make such mixing subject to the condition that mixed grain be labelled to indicate that it is not Canadian grain would contribute to ensuring that misrepresentation as to origin and as to end-use characteristics of grain is avoided. We do not

[379] *See* Canada's second written submission, paras. 121 and 125.

[380] The Panel put forward this alternative to Canada in Panel question Nos. 16(b) and 16(c). It seems to us that in those instances where a request for mixing authorization is made together with a request for authorization to receive foreign grain under Section 57(c) (*see* Canada's replies to Panel question Nos. 12 and 76), Canada could grant standing entry authorization for foreign grain that is to be mixed with Eastern Canadian grain or with other foreign grain, subject to the condition that the mixed foreign grain not be designated as Canadian grain, which condition could, in turn, be made subject to exceptions on request.

[381] Canada's replies to Panel question Nos. 16(b) and 16(c).

[382] Canada's reply to Panel question No. 16(c).

consider that such an alternative measure would be more trade restrictive than Section 72(2) or Section 57(c) of the *Canada Grain Act*, pursuant to which the mixing of foreign grain and domestic grain apparently occurs, since it obviates the need for mixing authorisation to be sought and obtained as is the case under both Section 72(2) and Section 57(c).[383] Further, according to Canada, the mixing of foreign grain is, as a matter of practice, already subject to the requirement that it be identified as mixed grain, and not Canadian grain.[384]

6.310 As to whether the abovementioned alternative approach would achieve a "very high level of compliance", the Panel considers that the level of compliance with the provisions of the *Canada Grain Act* and *Regulations* would be as high as is achieved under Section 72(2) and Section 57(c) of the *Canada Grain Act*, given that Canada has indicated that there has been no instance in which a request for mixing authorization was rejected[385] and that it already subjects foreign grain to the requirement that it be identified as mixed grain, and not Canadian grain, when mixed.

*Section 52 of the Competition Act*

6.311 **Canada** argues that Section 56(1) of the *Regulations* is necessary to ensure that the origin of grain is not misrepresented in contravention of Section 52 of the *Competition Act*. Canada has further argued that if Canada were not able to determine and guarantee the origin of the grain in the Canadian bulk grain handling system, it would not be able to provide assurances as to quality and end-use.

6.312 The **Panel** is not convinced that Section 56(1), as it is, is necessary to secure compliance with Section 52 of the *Competition Act*. It is not clear to us why Canada could not secure compliance with Section 52 of the *Competition Act*, by following, for example, the alternative approach put forward by the Panel and described above in paragraph 6.308. In the Panel's view, the alternative measure would contribute to ensuring that there is no misrepresentation as to origin and misleading representation with respect to end-use characteristics of grain contrary to Section 52 of the *Competition Act* because foreign grain that has been mixed would always be labelled as mixed grain rather than Canadian grain. Regarding the difficulty associated with implementing the alternative measure and its effect on trade, our considerations at paragraph 6.309 are equally applicable here.

6.313 Further, it would seem to us that a requirement that mixed foreign grain be labelled as mixed grain rather than Canadian grain would ensure as high a level of compliance with Section 52 of the *Competition Act* as is the case under Section 72(2) and Section 57(c) of the *Canada Grain Act* given that Canada has indicated that there has been no instance in which a request for mixing authorization was rejected[386] and that it already subjects foreign grain to the requirement that it be identified as mixed grain, and not Canadian grain, when mixed.[387]

*The provisions of the CWB Act and Regulations*

6.314 **Canada** has stated that without, *inter alia*, Section 56(1) of the *Canada Grain Regulations*, foreign wheat could not be distinguished from Canadian wheat and the single-desk authority of the CWB could not be enforced.

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[383] As noted above, in respect of Section 57(c), there would be a need, at least, to make a request for receipt authorisation.

[384] Canada's first oral statement, paras. 14, 65; Canada's replies to Panel question Nos. 12, 76, 77; Exhibits CDA-30 and CDA-47. Also, we consider that the alternative measure would, at a minimum, be less WTO-inconsistent because mixing authorization for foreign grain would no longer be necessary under Section 72(2) and Section 57(c) of the *Canada Grain Act*.

[385] Canada's reply to Panel question No. 59(a). *See* also Canada's reply to Panel question No. 12.

[386] Canada's reply to Panel question No. 59(a). *See* also Canada's reply to Panel question No. 12.

[387] Canada's first oral statement, paras. 14, 65; Canada's reply to Panel question No. 12.

6.315 The **Panel** considers that, in essence, the basis for Canada's reliance on the *CWB Act* and *Regulations* to justify Section 56(1) of the *Canada Grain Act* is that, in the absence of Section 56(1), the identity of foreign grain could not be properly established and maintained in the bulk grain handling system. In the Panel's view, the alternative measure discussed above in paragraph 6.308 would contribute to ensuring that the identity of foreign grain is preserved, which would, in turn, assist in preserving the CWB's single desk authority, because foreign grain that has been mixed would always be labelled as mixed grain rather than Canadian grain. We also note that, under the alternative measure which has been referred to above, the mixing of foreign grain and Western Canadian grain in transfer elevators would still be subject to an authorization requirement pursuant to Section 72(2) and 57(c) of the *Canada Grain Act*.[388] With respect to the difficulty associated with implementing the alternative measure and its effect on trade our considerations at paragraph 6.309 are equally applicable here.

6.316 Further, it would seem to us that a requirement that mixed foreign grain be labelled as mixed grain rather than Canadian grain would ensure as high a level of compliance with the relevant provisions of the *CWB Act* and *CWB Regulations* as is the case under Section 72(2) and Section 57(c) of the *Canada Grain Act* given that Canada has indicated that there has been no instance in which a request for mixing authorization was rejected[389] and that it already subjects foreign grain to the requirement that it be identified as mixed grain, and not Canadian grain, when mixed.[390] In any event, we note that the *CWB Act* and *Regulations* would not provide a justification for Section 56(1) in respect of grain other than wheat and barley.

*Summary*

6.317 In summary, Canada has not convinced us that Section 56(1) of the *Canada Grain Regulations* is necessary to secure compliance with the provisions of the *Canada Grain Act* and *Regulations*, the *Competition Act* or the *CWB Act* and *Regulations* pointed to by Canada. We have identified, by way of example, one alternative measure that we consider is reasonably available to Canada and would allow Canada to secure a "very high level of compliance" with these provisions.[391]

6.318 With respect to the SPS and GMO concerns that Canada raised, we note that they appear to be confined to the receipt of foreign grain into Canadian elevators under Section 57(c) of the *Canada Grain Act*.[392] Accordingly, we do not deal with these concerns here.

Conclusion on Canada's Article XX(d) defence

6.319 Therefore, for the reasons indicated above, the Panel finds that Canada has not established that Section 56(1) of the *Canada Grain Regulations* is "necessary" to secure compliance with Sections 32, 61 and 70 of the *Canada Grain Act* and Schedule III of the *Regulations*, Section 52 of the *Competition Act* and Sections 5, 7(1), 24, 32 and 45 of the *CWB Act* and Section 16 of the *CWB Regulations*. Since the measure in question is not provisionally justified under Article XX(d) of the GATT 1994 because it is not "necessary", we do not need to determine, in addition, whether Section 56(1) "secures compliance" with Sections 32, 61 and 70 of the *Canada Grain Act* and

[388] *See* Canada's reply to Panel question No. 108.
[389] Canada's reply to Panel question No. 59(a). *See* also Canada's reply to Panel question No. 12.
[390] Canada's first oral statement, paras. 14, 65; Canada's reply to Panel question No. 12.
[391] As we have said, it is our view that the alternative measure in question would, at a minimum, render Section 56(1) less WTO-inconsistent. We recall in this regard that the alternative measure would not subject transfer elevator operators to any requirement to request authorization for the mixing of foreign grain that is like Eastern Canadian grain with Eastern Canadian grain or with other foreign grain that is like Eastern Canadian grain.
[392] Canada's replies to Panel question Nos. 13(c) and (d), 15, 81 and 102. In any event, we think that, *mutatis mutandis*, our considerations above in paras. 6.243 - 6.249 are also applicable here.

Schedule III of the *Regulations*, Section 52 of the *Competition Act* and Sections 5, 7(1), 24, 32 and 45 of the *CWB Act* and Section 16 of the *CWB Regulations*. In addition, we do not need to determine whether those laws and regulations are consistent with the provisions of the GATT 1994. For the same reason, we do not consider that it is necessary to proceed to determine whether the requirements set out in the chapeau to Article XX have been satisfied.

6.320 Thus, since Canada has failed to establish that the measure in question is provisionally justified under Article XX(d) of the GATT 1994, we conclude that Canada has failed to establish that Section 56(1) of the *Canada Grain Regulations* is justified under Article XX(d) of the GATT 1994.

*(vi) Overall conclusion for Section 56(1) of the Canada Grain Regulations*

6.321 Since we are unable to accept Canada's claim of justification under Article XX(d) of the GATT 1994, our overall conclusion with respect to Section 56(1) is that Section 56(1) of the *Canada Grain Regulations* is, as such, inconsistent with Article III:4 of the GATT 1994.

(d) Sections 150(1) and 150(2) of the *Canada Transportation Act*: rail revenue cap

6.322 Sections 150(1) and 150(2) of the *Canada Transportation Act*, provide as follows:

> "(1) A prescribed railway company's revenues, as determined by the Agency, for the movement of grain in a crop year may not exceed the company's maximum revenue entitlement for that year as 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."

6.323 The "grain" to which Section 150 applies is defined in Section 147 of the *Canada Transportation Act* 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". "Western Division" is, in turn, defined in Section 147 as "the part of Canada lying west of the meridian passing through the eastern boundary of the City of Thunder Bay, including the whole of the province of Manitoba".

6.324 The prescribed railway companies to whom Section 150 applies are also defined in Section 147 as "the Canadian National Railway Company, the Canadian Pacific Railway Company and any railway company that may be specified in the regulations."

6.325 The railway movements covered by Section 150 are defined in Section 147 as "the carriage of grain by a prescribed railway company over a railway line from a point on any line west of Thunder Bay or Armstrong, to:

> (a) Thunder Bay or Armstrong, Ontario, or
>
> (b) Churchill, Manitoba, or a port in British Columbia for export,

but does not include the carriage of grain to a port in British Columbia for export to the United States for consumption in that country."

6.326 Section 151(1) provides that "[a] prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the [Canadian Transportation] Agency in accordance with the following formula:

> [A/B + ((C – D) x $0.022)] x E x F
>
> where
>
> A is the company's revenues for the movement of grain in the base year;
>
> B is the number of tonnes of grain involved in the company's movement of grain in the base year;
>
> C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
>
> D is the number of miles of the company's average length of haul for the movement of grain in the base year;
>
> E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
>
> F is the volume-related composite price index as determined by the Agency."

6.327 The values for A, B and D in the above formula, which are determined in the "base year",[393] are set out for the prescribed railways in Sections 151(1) and (2) respectively. Item F is defined in Section 151(4) of the *Act* and, according to Section 151(5) of the *Act*, is determined on or before 30 April of the crop year preceding the crop year for which the maximum revenue entitlement ("revenue cap"[394]) is to be determined. The rail revenue cap is determined for each prescribed railway following the conclusion of the crop year to which the revenue cap relates.[395]

6.328 The United States has stated that it is challenging Section 150(1) and Section 150(2) of the *Canada Transportation Act* as such.[396] On the basis of this and other statements by the United States, the Panel understands that the United States' claim is that Sections 150(1) and 150(2) of the *Canada Transportation Act*, *taken together*, are inconsistent with Article III:4 of the GATT 1994.[397] According to the United States, the effect of these provisions taken together is that domestic grain is

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[393] It would appear that the "base year" is crop year 2000 – 2001, being the crop year in which the rail revenue cap provisions came into force.

[394] Subsequent references to "the revenue cap" relate to the revenue cap set for each of the prescribed railways.

[395] Canada has confirmed that the maximum revenue entitlement for each railway is determined *ex post* because the maximum revenue entitlement is dependent on the number of tonnes hauled and the average length of haul incurred during the crop year in question. Canada's reply to Panel question No. 78(b). This appears to be consistent with Section 151(5) of the *Canada Transportation Act*.

[396] United States' reply to Panel question No. 10.

[397] In particular, we note that in its second oral statement, the United States refers to the "rail revenue cap programme". *See*, for example, para. 34. We also note that neither the request for establishment of the March Panel nor the request for establishment of the July Panel sheds much light on which sub-sections of Section 150 are at issue. In neither request (WT/DS276/6 and WT/DS276/9) did the United States specify the sub-sections at issue but merely stated that "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".

favoured over like imported grain.[398] More particularly, the United States argues that Sections 150(1) and 150(2) cap the annual revenue that the relevant Canadian railroads may collect for transporting Western Canadian grain and that these railroads must refund, with penalties, any revenues received in excess of the cap. Thus, according to the United States, the relevant Canadian railroads have an incentive to hold their rates for the transportation of Western Canadian grain at a level that will ensure that the railroads do not exceed the revenue cap whereas no comparable incentive exists for setting the rates charged for the transport of imported grain.[399]

*(i) Like products*

6.329 The **United States** argues that US grain, even when of the exact same type as domestic Canadian grain, is subject to differential treatment as "foreign grain" under Canada's transportation measures. Given that Canada's grain transportation measures discriminate on the basis of origin rather than on the basis of physical characteristics or end-uses even when all other product characteristics are exactly the same, one must reach the conclusion that Sections 150(1) and 150(2) apply to like domestic and foreign products. In any event, the imported and domestic products at issue, are identical and are, therefore, "like products". All imported and domestic products falling within each of the categories of "grains" or "crops" as defined in Section 147 of the *Canada Transportation Act* are "like products" for the purposes of Article III:4.

6.330 **Canada** argues that for the purposes of the *Canada Transportation Act*, each type of grain is a different "like product".

6.331 The **Panel** notes that Sections 150(1) and 150(2) of the *Canada Transportation Act* apply to "grain" that is defined in Section 147 of the *Canada Transportation Act* 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". Thus, Sections 150(1) and 150(2) apply to Western Canadian grain to the exclusion, *inter alia*, of imported grain. Therefore, whether or not the movement of certain grain is subject to Sections 150(1) and 150(2) depends upon the origin of the grain that is moved. If the grain is grown in Western Canada, Sections 150(1) and 150(2) apply. However, if the grain is not grown in Western Canada, which includes instances where grain is imported into Canada, Sections 150(1) and 150(2) do not apply.

6.332 In the present case, the United States has established to our satisfaction that, as a result of the origin-based distinction in Sections 150(1) and 150(2), foreign grain that is like "grain" as defined in Section 147 of the *Canada Transportation Act* would not be subject to Sections 150(1) and 150(2). In fact, even for movements of foreign grain that would be identical to "grain" as defined in Section 147 in all respects except for origin, the prescribed railway companies would not be subject to a revenue cap.

6.333 Accordingly, the Panel considers that, since foreign grain that is like domestic grain is not subject to Sections 150(1) and 150(2), the "like products" requirement in Article III:4 of the GATT 1994 is satisfied.

*(ii) Measure affecting internal transportation*

6.334 The **United States** argues that the rail revenue cap, which relates to transportation, concerns laws, regulations and requirements affecting transportation within the meaning of Article III:4 of the GATT 1994. The United States also submits that the revenue cap applies to all grain movements that "originate in Western Canada." Thus, the revenue cap applies to the internal transportation of all

[398] United States' first written submission, para. 100.
[399] United States' first written submission, para. 46.

grain within Canada from points in Western Canada to other Canadian destinations. All of these movements are covered by Article III:4 of the GATT 1994.

6.335 **Canada** argues that a number of rail movements that are the subject of the revenue cap do not fall within the scope of Article III:4 of the GATT 1994 because they would be in-transit movements under GATT 1994 Article V - namely, movements for export from Western Canada to Vancouver or Prince Rupert and from Western Canada to Thunder Bay or Armstrong, Ontario. According to Canada, railway movements covered by the revenue cap that are relevant for analysis under Article III:4 of the GATT 1994 are movements, in Canada, of US grain destined for the Canadian domestic market. In particular, these would be movements through Thunder Bay or Armstrong, originating in Western Canada, to domestic customers further east. Railways would charge market prices both for Canadian and US grain on these movements. Canada argues that there are virtually no rail movements of US grain to Thunder Bay or Armstrong for domestic sale in Canada. Therefore, the United States' case is essentially hypothetical.

6.336 The **Panel** notes that there is an argument to be made that Sections 150(1) and 150(2) do not regulate the transportation of grain directly. However, as will become clear from the discussion below regarding whether Sections 150(1) and 150(2), taken together, entail less favourable treatment for imported grain,[400] these provisions, nevertheless, affect the internal transportation of imported grain insofar as Sections 150(1) and 150(2) may result in lower railway transportation costs for Western Canadian grain than for like imported grain.[401] For these reasons, we conclude that the rail revenue cap mechanism set out in Sections 150 (1) and 150(2), is a measure affecting the internal transportation of grain.[402]

6.337 With respect to whether Sections 150(1) and 150(2) apply to foreign grain "imported" into Canada[403], the Panel is satisfied that these sections concern at least some movements of grain destined for the Canadian domestic market, in particular, movements to Thunder Bay or Armstrong, Ontario.[404] The Panel is satisfied, therefore, that Sections 150(1) and 150(2) of the *Canada Transportation Act* can and do affect the internal transportation of grain "imported" into Canada and, hence, are subject to the provisions of Article III:4.

*(iii) Less favourable treatment*

6.338 The **United States** argues that the rail revenue cap only applies to the shipment of Western Canadian grain. According to the United States, imported grain is not eligible to receive the benefits of this programme, thereby creating more favourable conditions of competition for Canadian domestic grain as compared with imported grain. The United States submits, in particular, that railroads shipping Western Canadian grain must choose a tariff for transport so that the total revenue does not exceed the government-mandated rail revenue cap so as to avoid paying a significant penalty for exceeding the cap. In contrast, railways are free to charge higher tariffs for grain other than Western Canadian grain in order to boost revenues not subject to the revenue cap. In other words, shipments of Western Canadian grain that are subject to the rail revenue cap entail lower transportation costs than would be the case without the revenue cap.

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[400] *See* paras. 6.338 - 6.359 below.

[401] We recall in this context that the panel in *Italy – Agricultural Machinery* found that a measure need not regulate a product directly in order to fall within the scope of Article III:4 of the GATT. *See* footnote 340 above.

[402] Canada has not contested that Sections 150(1) and 150(2), taken together, are *internal* measures within the meaning of Article III:4 of the GATT 1994.

[403] *See* para. 6.158 above.

[404] Canada does not contest that there are, or can be, movements of foreign grain for domestic sale in Canada that are subject to Sections 150(1) and 150(2). Canada's first written submission, paras. 282-283.

6.339 **Canada** argues that US grain is not accorded less favourable treatment than that accorded to domestic grain under the rail revenue cap because the revenue cap regulates the revenues earned by prescribed railways but does not regulate the rates for shipping. In addition, Canada argues that the revenue cap does not confer treatment that is less favourable for movements of US grain that originate and/or terminate outside the geographic parameters of the revenue cap. Canada submits that this is essentially the case for all movements to Eastern Canada because there are no provisions in the *Canada Transportation Act* that set limits on rates for individual grain movements that are not covered by the revenue cap provisions, including the portion of movements that originate or terminate outside the geographic territory covered by the revenue cap. For these movements, railways use differential pricing practices - that is, they charge what the market will bear. Canada also argues that the revenue cap has never been met and is unlikely to be met in the future. According to Canada, the United States' case in respect of the revenue cap is theoretical since the cap has never been reached and the railways set rates commercially. Canada submits that, even according to the United States' own methodology of calculating benefits, the US Department of Commerce found that the revenue cap does not confer a benefit to domestic producers.

6.340 The **Panel** understands the United States' claim to be that Sections 150(1) and 150(2) of the *Canada Transportation Act*, taken together, are, as such, inconsistent with Article III:4 of the GATT 1994.[405] As with our analysis of the other measures being challenged under Article III:4, we will first examine whether the relevant provisions, taken together, adversely affect the competitive opportunities of imported grain *vis-à-vis* like domestic grain. As a second step, we will consider whether Sections 150(1) and (2), taken together, mandate or, have the effect of mandating, more favourable treatment for domestic grain as compared to like imported grain. We, thus, assume that it is appropriate, in assessing the WTO-consistency of legislation, as such, to distinguish between mandatory and discretionary legislation. We note in this regard that our ultimate conclusion does not depend on the correctness of this assumption.[406]

6.341 With respect to the question of whether Sections 150(1) and 150(2), taken together, adversely affect the competitive opportunities of imported grain *vis-à-vis* like domestic grain, we first consider whether and how the revenue cap may affect the rates charged by the prescribed railways for the transportation of Western Canadian grain, as the United States suggests it does. In considering this preliminary issue, it is useful to recall at the outset how the revenue cap is determined. In our understanding, the Canadian Transportation Agency must establish a revenue cap for each crop year and in respect of each prescribed railway company. It does so based on a statutorily prescribed formula set out in paragraph 6.326 above. Significantly, some of the elements included in that formula are fixed.[407] The remaining elements are known at the time that the revenue cap is determined for a particular crop year.[408]

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[405] United States' reply to Panel question No. 10.

[406] *See* also our remarks on this issue at para. 6.184 above.

[407] Namely, "A" representing the railway company's revenues for the movement of grain in the base year; "B" representing the number of tonnes of grain involved in the company's movement of grain in the base year; and "D" being the number of miles of the company's average length of haul for the movement of grain in the base year.

[408] Namely, "C" representing the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Canadian Transportation Agency and "E" being the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency. It is apparent from the example of the determination of the revenue cap for crop year 2001 – 2002 that was provided to the Panel (Exhibit CDA-36) that the reference to the "determination by the Agency" in relation to these elements – "C" and "E" – refers to the auditing and verification function that the Agency performs with respect to statistics that are provided by the prescribed railway companies. Element F, which is the volume-related composite price index as determined by the Agency, is also known at the time that the revenue cap is determined for a particular crop year.

6.342 Bearing in mind how the revenue cap is determined, we now turn to analyse whether the revenue cap may affect the rates charged by the prescribed railways for the transportation of Western Canadian grain. We note in this regard that Sections 150(1) and 150(2) of the *Canada Transportation Act* do not contain an explicit link between the revenue cap and the rates charged by the prescribed railways. Moreover, as explained by Canada, the railways have discretion to charge whatever rates they wish. Nevertheless, we consider that the nature of the revenue cap formula is such that the revenue cap effectively constrains, or is capable of constraining, the rates charged.

6.343 It might be argued that a prescribed railway company could stay within the revenue cap either by adjusting the rates charged for the transportation of Western Canadian grain or by adjusting the volume shipped. However, it is clear to us, on the basis of the formula according to which the revenue cap is determined, that the revenue cap would constrain the prescribed railways' rates rather than the volume of grain transported by those railways. Changes in volume of grain shipped in a given crop year, represented by element "E" in the revenue cap formula, result in corresponding changes in the revenue cap. That is to say, if the volume shipped in a given crop year is lower than for the previous crop year, the cap decreases proportionately for the current year. Therefore, we believe that a railway company would seek to comply with the revenue cap by adjusting rates rather than the volume of grain shipped.

6.344 This inference is consistent with other evidence that has been adduced in respect of Sections 150(1) and 150(2). In particular, Canada explained that the purpose of the revenue cap when it was established was to provide railways with greater flexibility in setting rates in order to encourage competition and efficiencies in the railway transportation system while giving protection to farmers by limiting total revenues that railways could earn from moving grain.[409] The United States also pointed to a press release issued by Transport Canada announcing "the establishment of a revenue cap that provides for an annual estimated $178 million reduction in railway revenues, which represents an estimated 18 per cent reduction in grain freight rates from 2000-2001 levels."[410] It would appear from the foregoing that the revenue cap is not designed to require or encourage the prescribed railways to transport smaller volumes than was the case under the old rate system, but to ensure that an effective constraint would continue to be imposed on the railways' rate-setting. Indeed, as we see it, the revenue cap formula effectively prescribes a maximum average rate for the transportation of Western Canadian grain in a given crop year.

6.345 Since we agree with the United States that the revenue cap may affect the rates charged for the transportation of Western Canadian grain, we need to go on to examine whether this adversely affects the competitive opportunities of imported grain *vis-à-vis* like Western Canadian grain.

6.346 Based on the foregoing considerations, it is clear to us that Sections 150(1) and 150(2) will, in some circumstances, limit the prescribed railway companies' commercial options with respect to Western Canadian grain insofar as these sections effectively prescribe a maximum average rate for the transportation of such grain. For instance, as noted by the United States[411], circumstances might arise - such as a case where Canada experiences a bumper grain crop - where there is a scarcity of capacity to move domestic grain, which would result in significant upward pressure on rates. In such circumstances, it can be presumed that the prescribed railways would charge the rate for movements of Western Canadian grain dictated by the revenue cap, not least because they would be required to pay out the amount by which the cap had been exceeded and because of the possibility that penalties might be imposed.

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[409] Canada's comments on United States' reply to Panel question No. 94. *See* also Exhibit CDA-34, page 36.

[410] Transport Canada, Press Release No. HO34/000 contained in Exhibit US-26.

[411] United States' second written submission, para. 38.

6.347 In contrast, neither Sections 150(1) and 150(2), nor, as we understand it, any other provision of Canadian law, prescribes, actually or in effect, maximum average rates to be charged by the prescribed railways for the movement of imported grain that is like Western Canadian grain. We note that Sections 150(1) and 150(2) do not require the prescribed railways to charge higher rates for imported grain whenever the rates for Western Canadian grain are effectively constrained by the revenue cap. However, Canada itself has stated that the relevant railway companies are profit-maximizers who charge rates commercially and, thus, will charge the highest rates the market will bear.[412] We consider that it can be presumed that, in such circumstances, the prescribed railways would, at least in some instances, such as in the above-noted example of a bumper grain crop in Canada, charge higher rates for imported grain.[413]

6.348 Accordingly, we think that, in some circumstances, and for movements originating and terminating within the geographical scope of the revenue cap, lower transportation rates would be charged for Western Canadian grain than for like imported grain, even if the latter were transported on the same route under like conditions. In other words, for movements effectuated by the prescribed railways and entirely within the geographical scope of the revenue cap, the revenue cap adversely affects the competitive opportunities of imported grain inasmuch as it will, in some instances, make it more costly to transport imported grain by rail. Therefore, we consider that, at least in some instances, Sections 150(1) and 150(2) will result in less favourable treatment being accorded to imported grain than to like Western Canadian grain

6.349 We note that the revenue cap does not preclude the prescribed railways from charging at certain times of the crop year or for certain movements rates that are higher than the maximum average rate dictated by the revenue cap (and not lower than the rates charged for imported grain) as long as they also charge rates below the maximum average rate at other times of the crop year or for other movements. However, the possible absence of less favourable treatment of like imported grain in some instances does not detract from the fact that there might be less favourable treatment in other instances.

6.350 We also note that Sections 150(1) and 150(2) draw an origin-based distinction between Western Canadian grain and all other grain, including other Canadian grain. However, as we have stated above with respect to Section 56(1) of the *Canada Grain Regulations*[414], it is our view that, in such circumstances, Canada has to accord imported grain treatment that is at least as favourable as the treatment afforded to like Western Canadian grain.

6.351 With respect to the question of whether Sections 150(1) and 150(2) mandate or require less favourable treatment, we note that these sections taken together require that revenues earned by the prescribed railway companies do not exceed the companies' revenue cap in respect of the transportation of Western Canadian grain for particular movements covered by the revenue cap. In addition, we are not aware of any discretion conferred on the Canadian Transportation Agency to make upward adjustments to the cap in situations where it might otherwise be exceeded, thereby preventing the revenue cap from imposing a constraint on the prescribed railways' revenues.[415] We acknowledge that, over time, the revenue cap may be adjusted upwards because the revenue cap

[412] Canada's first written submission, para. 298.

[413] For instance, it may be that the maximum rate railways can charge on Western Canadian grain is x because of the existence of the rail revenue cap whereas the maximum rate they can charge on imported grain because of intermodal competition (i.e., competition between providers of different modes of transportation) is x+ y. In such a case, it would appear that a railway company would charge a higher rate for imported grain than for Western Canadian grain without losing the business of those who want to ship imported grain to providers of substitutable transportation services (transportation by truck, etc.). Exhibit CDA-34 contains information regarding the pricing behaviour of railways.

[414] *See* para. 6.294 above.

[415] We note that Canada has not argued that the Canada Transportation Authority has such discretion.

formula includes an upward adjustment for inflation (through element "F") but not a downward adjustment for productivity.[416] However, in our understanding, this adjustment to the level of the revenue cap is not the result of the exercise of discretion by the Canadian Transportation Agency.

6.352 On the basis of the foregoing, it would appear that Sections 150(1) and 150(2) of the *Canada Transportation Act*, taken together, are, on their face, inconsistent with Article III:4 of the GATT 1994 because imported grain is treated less favourably than like Western Canadian grain. However, Canada has put forward a number of defences to suggest that, in reality, imported grain is not treated less favourably than Western Canadian grain. We consider those defences below.

The revenue cap has not been constraining so far and will not be constraining in the future

6.353 **Canada** argues that the revenue cap has never been met and is unlikely to be met in the future.

6.354 The **Panel** notes that it may be the case that the revenue cap does not currently constrain railway rates, and that it is unlikely to do so in the future. However, as noted by the Panel above, it is not necessary to demonstrate actual adverse trade effects in establishing a violation of Article III:4 since Article III:4 protects conditions of competition and not trade effects. We also recall that, according to GATT/WTO jurisprudence on Article III:4, the mere fact that an imported product is exposed to a risk of discrimination is sufficient to conclude that it has been treated less favourably.[417] In any event, as noted previously by us, the revenue cap will constrain railway rates given the right circumstances.

6.355 **Canada** also submits that while the proceedings of the March Panel and the July Panel were ongoing, the US Department of Commerce stated, in its *Issues and Decision Memorandum for the Final Countervailing Duty Determinations of the Investigations of Certain Durum Wheat and Hard Red Spring Wheat from Canada* of 28 August 2003, that "there is no evidence on the record to indicate that the revenue cap resulted in lower revenues on capped routes."

6.356 The **Panel** considers that it is sufficient to note in this regard that it is reviewing Sections 150(1) and 150(2), as such, and not their application during some particular time period. The fact that Sections 150(1) and 150(2) may not have "resulted in lower revenues on capped routes" in the past, and, thus, may not have constrained the rates applied by the prescribed railway companies for the transportation of Western Canadian grain is not conclusive in establishing that they cannot adversely affect the competitive conditions of like imported grain in the future.

For movements originating and/or terminating outside the geographical scope of the revenue cap, Sections 150(1) and 150(2) have no relevance or effect

6.357 **Canada** argues that the revenue cap does not confer treatment that is less favourable for movements of imported grain that originate and/or terminate outside the geographic parameters of the revenue cap. More particularly, Canada submits that for such movements, the rates applied by railways will not be affected at all by the revenue cap since prices will be driven by what the market will bear for the entire journey, completely independently of rates charged for components of the journey that are covered by the cap.

[416] Canada's first written submission, para. 295; Canada's reply to Panel question No. 17.

[417] Panel Report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds I*"), adopted 25 January 1990, BISD 37S/86, para. 141.

6.358 The **Panel** considers that it may well be that for the types of movements referred to by Canada, the railway companies do and will charge identical rates for domestic and imported grain. However, the fact that the rates for movements originating and/or terminating outside the geographical scope of the revenue cap might be unaffected by the existence of the revenue cap would not remove the less favourable treatment of imported grain in respect of railway movements within the geographical scope of the rail revenue cap.

Conclusion

6.359 In conclusion, since the Panel is not persuaded by the defences put forward by Canada, the Panel confirms its provisional conclusion above at paragraph 6.352 that Sections 150(1) and 150(2) of the *Canada Transportation Act*, taken together, are, as such, inconsistent with Article III:4 of the GATT 1994.

(e) Section 87 of the *Canada Grain Act* : producer railway cars

6.360 Section 87 of the *Canada Grain Act* provides that:

> "(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.
>
> (2) 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."

6.361 The United States' claim is that the provisions of Section 87 of the *Canada Grain Act* are, as such, inconsistent with Article III:4 of the GATT 1994.[418] More particularly, the United States indicated that it is claiming that Section 87 is inconsistent with Article III:4 because producers of foreign grain are legally precluded from gaining access to producer railway cars and are, thereby, accorded less favourable treatment than producers of like Canadian grain. The United States' claim rests on the assertion that producers of foreign grain are legally precluded from gaining access to producer railway cars. As a threshold matter, the Panel needs to determine whether this assertion has been sufficiently established.[419]

6.362 In so doing, the Panel recalls that the United States has the burden of adducing argument and evidence as to the meaning of Section 87 to substantiate its assertion that the provisions of Section 87 have the effect of precluding producers of foreign grain from gaining access to producer railway cars. In this regard, we note that the Appellate Body in *US – Carbon Steel* held:

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[418] United States' reply to Panel question No. 11. Since the United States is challenging Section 87 of the *Canada Grain Act* as such, we do not examine whether any of the actual allocation orders that have been issued pursuant to Section 87 of the *Act* might have been inconsistent with Article III:4.

[419] We note in this regard that the Appellate Body in *US – Corrosion-Resistant Steel Sunset Review* stated that "when a measure is challenged 'as such', the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required". Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, *supra*, para. 168. In this case, the meaning of the measure at issue is in dispute.

> "The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case."[420]

6.363 Below, we will examine the evidence introduced and discussed by the parties.

*(i) Text of Section 87 of the Canada Grain Act*

6.364 The **United States** relies, first, upon the text of Section 87. The United States submits that Section 87 does not state that foreign grain is eligible for the producer rail car programme and that, therefore, it does not apply to foreign grain.

6.365 **Canada**, on the other hand, argues that the term "producer" is not defined in the *Canada Grain Act*. According to Canada, there is no indication in Section 87 of the *Canada Grain Act*, the *Regulations* or the practice of the CGC that Section 87 only applies to producers of Canadian grain.

6.366 The **Panel** notes that Section 87 is directed at "producers of grain". We agree that it is possible that this term might be interpreted to mean "domestic producers of grain" or "producers of domestic grain" as suggested by the United States. However, in our view, it is also possible that the term "producers of grain" could be interpreted to mean "domestic and foreign producers" of grain or "producers of domestic and foreign grain". The term "producers" as it appears in Section 87 is unqualified. Moreover, the term "producers" is not defined in the *Canada Grain Act*. The term "grain", on the other hand, is defined in Section 2 of the *Act* as "any seed designated by regulation as a grain for the purposes of this Act". However, neither this definition, nor the definition contained in Section 5(1) of the *Canada Grain Regulations* suggests that grain should be interpreted as only applying to domestic grain.[421] In fact, Section 57(c) of the *Canada Grain Act* -- a provision which is contained in the same statute as Section 87 and has been extensively discussed before this Panel -- explicitly refers to "foreign grain" whereas other provisions of Section 57, which apply equally to domestic and foreign grain, use the unqualified term "grain".[422] This suggests that where Canada wanted to restrict the application of a provision to grain of a particular origin, it did so explicitly.

6.367 For these reasons, we are not persuaded that it is clear from the text of Section 87 that foreign producers of grain, or producers of foreign grain, cannot have access to producer railway cars as envisaged in Section 87.

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[420] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* ("*US – Carbon Steel*"), WT/DS213/AB/R and Corr.1, adopted 19 December 2002, para. 157. *See* also Panel Report, *US – Section 129(c)(1) URAA*, *supra*, para. 6.28.

[421] We note in passing that, based on Canada's reply to a question from the Panel, it may be that, given the fact that the text is susceptible of being read to also cover foreign producers of grain or producers of foreign grain, a Canadian court could, in accordance with relevant jurisprudence by Canada's Supreme Court, interpret Section 87 in this way if it were of the view that this is necessary to ensure conformity with Canada's WTO obligations. Canada's reply to Panel question No. 41.

[422] For instance, Section 57(d) applies to "grain" that the elevator operator believes is infested or contaminated. Canada's reply to Panel question No. 103 confirms that Section 57(d) applies to foreign grain.

*(ii) Agriculture and Agri-Food Canada web site*

6.368 The **United States** also relies upon the Agriculture and Agri-Food Canada web site, which stated that only "Canadian grain producers with an adequate quantity of lawfully deliverable grain may apply to the Commission."

6.369 **Canada** argues that, under Canadian law, web site information is irrelevant to the interpretation of a law. While governments use web sites to provide information to the public, these web sites are of no relevance to the interpretation of the law and cannot modify or restrict the terms of the law. In addition, Canada has indicated that the Section of the web site to which the United States points in support of its argument was incorrect and has since been corrected.

6.370 The **Panel** does not consider that the web site referred to by the United States has much evidentiary value for three reasons. First, the fact that the web site in question refers only to Canadian producers does not necessarily mean that Agriculture and Agri-Food Canada was of the view that railway cars are not available to foreign producers because it cannot be excluded that the information provided on the web site was targeted at domestic users of the railway car programme. Secondly, the web site in question was not maintained by the agency responsible for the producer car programme, namely the CGC. In this regard, we note that the CGC web site refers to "producers" rather than "Canadian producers" when identifying who can apply for railway cars from the CGC.[423] Thirdly, the United States has not provided any evidence to show that Canadian courts, in ascertaining the meaning of federal statutes, would attach weight to statements made by government agencies on their public web sites.

*(iii) Location of loading stations for producer railway cars*

6.371 The **United States** argues that it has shown that producer railway cars are only available to Canadian grain producers located in certain Canadian provinces. More particularly, the United States argues that only Canadian producers can take advantage of producer railway cars under Section 87 because all producer railway car loading stations are in Alberta, British Columbia, Manitoba, or Saskatchewan.

6.372 **Canada** argues that Section 87 of the *Canada Grain Act* does not limit "eligible loading sites" to these provinces but simply limits producer railway cars to "producers". There is no geographical limitation in law, regulation, or in the CGC Producer Car Allocation Orders. Canada also submits that the location of producer railway car loading sites is determined by the railways – that is, private commercial operators, and not the Government of Canada – taking into account requests by producers. Canada has also indicated that no Canadian intermediary is necessary for a US producer to obtain a producer railway car.

6.373 The **Panel** is not convinced by the United States' argument that foreign producers of grain cannot obtain producer railway cars at the loading stations referred to by the United States. It is not clear to the Panel why foreign grain could not be imported into Canada and taken to the nearest loading site. Further, even if the existing loading sites are located in areas that primarily benefit Canadian producers, this would not, in itself, establish that foreign producers cannot obtain producer railway cars or that it was not intended that foreign producers would be eligible to obtain such cars. We note in this regard that the United States has not contested Canada's contention that the location of the existing car loading sites were not determined by the Government of Canada.

[423] Exhibit US-10.

*(iv) Allocation orders*

6.374 We also note that Canada has exhibited two CGC orders made pursuant to Section 87, one pertaining to 2002-2003 and the other pertaining to 2003-2004. [424] While the orders appear to distinguish between, on the one hand, applications made by producers of "grain deliverable to the CWB" and, on other hand, applications made by all other producers, there is nothing in those orders that suggests that foreign grain producers are not entitled to make an application for a producer railway car under Section 87.

*(v) Conclusion*

6.375 Having considered and weighed the evidence before us, including the text of Section 87, Canadian government web sites and elements relating to the application of Section 87, we conclude that the United States has not met its burden of establishing that Section 87 of the *Canada Grain Act* legally precludes producers of foreign grain or foreign producers of grain from gaining access to producer railway cars. Since the success of the United States' claim in respect of Section 87 of the *Canada Grain Act* depends on the United States establishing its assertion that Section 87 precludes producers of foreign grain or foreign producers of grain from gaining access to producer railway cars, in view of the Panel's findings on this issue, it is not necessary to examine the United States' claim further. The Panel, therefore, concludes that the United States has failed to establish that Section 87 of the *Canada Grain Act* is, as such, inconsistent with Article III:4 of the GATT 1994.

**3. Claims under Article 2 of the *TRIMs Agreement***

6.376 Article 2 of the *TRIMs Agreement* provides:

> "1. 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. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement."

6.377 Paragraph 1(a) of the Annex to the *TRIMs Agreement*, which was relied upon by the United States in making its claim of violation of Article 2 of the *TRIMs Agreement* 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:
>
> (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."

[424] Exhibits CDA-40 and CDA-41.

(a) Section 57 of the *Canada Grain Act*, Section 56(1) of the *Canada Grain Regulations and* Sections 150(1) and (2) of the *Canada Transportation Act*

6.378 Given the Panel's conclusions above with respect to the US claim that Section 57(c) of the *Canada Grain Act*, Section 56(1) of the *Canada Grain Regulations* and Sections 150(1) and 150(2) of the *Canada Transportation Act*, taken together, are inconsistent with Article III:4 of the GATT 1994, the Panel has decided to exercise judicial economy with respect to the claim that these measures are also in violation of Article 2 of the *TRIMs Agreement*. Accordingly, the Panel will not examine the US claims under Article 2 of the *TRIMs Agreement* in respect of these measures.

(b) Section 87 of the *Canada Grain Act*

6.379 The **United States** claims that Section 87 of the *Canada Grain Act* is an investment measure related to trade in goods within the meaning of Article 1 of the *TRIMs Agreement*. The United States argues that, since imported grain is accorded less favourable treatment than that accorded to like domestic grain under Section 87 of the *Canada Grain Act* in violation of Article III:4 of the GATT 1994, Section 87 is also inconsistent with Article 2.1 of the *TRIMS Agreement*. The United States also argues that Section 87, which requires shippers to use domestic Canadian grain in order to obtain an advantage, falls within paragraph 1(a) of the Illustrative List of trade-related measures annexed to the *TRIMs Agreement*. In particular, Section 87 is "mandatory" and "enforceable". Canadian grain and its purchasers/sellers who use the rail transportation system to ship Canadian grain obtain an advantage under Section 87 in the form of obtaining "government railway cars", which entail lower transportation costs. This advantage is only obtained when domestic rather than foreign grain is transported and it is an advantage that is covered by paragraph 1(a) of the Illustrative List.

6.380 **Canada** argues that the United States has not established that Section 87 of the *Canada Grain Act* is a trade-related investment measure within the meaning of Article 1 of the *TRIMS Agreement*. In addition, Canada argues that Section 87 is not covered by paragraph 1(a) of the Illustrative List. Canada argues that Section 87 of the *Canada Grain Act* does not require use of Canadian grain in order to obtain a producer railway car. Moreover, in Canada's view, shippers do not "use" grain when they ship it by rail. Rather, they are using the railways to provide them with transport services.

6.381 The **Panel** recalls its previous findings at paragraph 6.375 above that the United States has not established that foreign grain cannot benefit from Section 87 of the *Canada Grain Act* and that, therefore, the United States has not established that Section 87 is inconsistent with Article III:4 of the GATT 1994. In view of these findings, it is clear that, even if Section 87 could be considered an investment measure related to trade in goods within the meaning of the *TRIMs Agreement*, the United States has not established that Section 87 is, as such, inconsistent with Article 2.1 of the *TRIMs Agreement*. Moreover, since the United States has not established that Section 87 of the *Canada Grain Act* legally precludes producers of foreign grain or foreign producers of grain from gaining access to producer railway cars, the United States has also failed to establish that Section 87 requires the use by an enterprise of products of domestic origin or from any domestic source within the meaning of paragraph 1(a) of the Annex to the *TRIMs Agreement*.

6.382 Accordingly, the Panel dismisses the United States' claim that Section 87 of the *Canada Grain Act* is, as such, inconsistent with Article 2 of the *TRIMs Agreement*

## VII. CONCLUSIONS[425]

### A. CONCLUSIONS OF THE MARCH PANEL

7.1 For the reasons set forth in its Report, the March Panel concludes as follows:[426]

(a) Section 57(c) of the *Canada Grain Act* is inconsistent with Article III:4 of the GATT 1994 and is not justified under Article XX(d) of the GATT 1994;

(b) Section 56(1) of the *Canada Grain Regulations*, as it existed at the time that the March Panel was established, is inconsistent with Article III:4 of GATT 1994 and is not justified under Article XX(d) of the GATT 1994;

(c) Sections 150(1) and (2) of the *Canada Transportation Act* are inconsistent with Article III:4 of GATT 1994;

(d) The United States has failed to establish its claim that Section 87 of the *Canada Grain Act* is inconsistent with Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

7.2 Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment". Canada failed to rebut this presumption. Therefore, to the extent Canada has acted inconsistently with its obligations under the GATT 1994, it must be presumed to have nullified or impaired benefits accruing to the United States under the GATT 1994.

7.3 In the light of these conclusions, the March Panel recommends that the Dispute Settlement Body request Canada to bring the relevant measures into conformity with its obligations under the GATT 1994.[427]

### B. CONCLUSIONS OF THE JULY PANEL

7.4 For the reasons set forth in its Report, the July Panel concludes as follows:

(a) The United States has failed to establish its claim that Canada has breached its obligations under Article XVII:1 of the GATT 1994 because the CWB Export Regime necessarily results in the CWB making export sales that are not in accordance with the principles of subparagraphs (a) or (b) of Article XVII:1;

(b) Section 57(c) of the *Canada Grain Act* is inconsistent with Article III:4 of the GATT 1994 and is not justified under Article XX(d) of the GATT 1994;

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[425] For an explanation of the structure of this Section, *see* paras. 6.1-6.3 above.

[426] The March Panel made no findings with respect to the "measure relating to exports of wheat" (*i.e.*, the CWB Export Regime) which the United States claimed to be inconsistent with Article XVII:1 of the GATT 1994. *See* para. 32 of the preliminary ruling reproduced in para. 6.10.

[427] We note that Section 56(1) of the *Canada Grain Regulations*, as it existed at the time that the March Panel was established, was amended, effective as of 1 August 2003. As a result, for the purposes of the March Panel's recommendation, Section 56(1) is not a "relevant measure". *See* Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products* "), WT/DS165/AB/R, adopted 10 January 2001, paras. 81 and 129. Nevertheless, the Panel notes that Canada has confirmed that the substantive effect of Section 56(1) as amended is the same as that under Section 56(1) as it existed at the time that the March Panel was established. Canada's comments on the United States' reply to Panel question No. 67.

(c) Section 56(1) of the *Canada Grain Regulations*, as it existed at the time that the July Panel was established, is inconsistent with Article III:4 of GATT 1994 and is not justified under Article XX(d) of the GATT 1994;

(d) Sections 150(1) and (2) of the *Canada Transportation Act* are inconsistent with Article III:4 of GATT 1994;

(e) The United States has failed to establish its claim that Section 87 of the *Canada Grain Act* is inconsistent with Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.

7.5 Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment". Canada failed to rebut this presumption. Therefore, to the extent Canada has acted inconsistently with its obligations under the GATT 1994, it must be presumed to have nullified or impaired benefits accruing to the United States under the GATT 1994.

7.6 In the light of these conclusions, the July Panel recommends that the Dispute Settlement Body request Canada to bring the relevant measures into conformity with its obligations under the GATT 1994.[428]

[428] We note that Section 56(1) of the *Canada Grain Regulations*, as it existed at the time that the July Panel was established, was amended, effective as of 1 August 2003.. As a result, for the purposes of the July Panel's recommendation, Section 56(1) is not a "relevant measure". *See* Appellate Body Report, *US – Certain EC Products*, *supra*, paras. 81 and 129. Nevertheless, the Panel notes that Canada has confirmed that the substantive effect of Section 56(1) as amended is the same as that under Section 56(1) as it existed at the time that the July Panel was established. Canada's comments on the United States' reply to Panel question No. 67.

# ANNEX A

## RESPONSES TO QUESTIONS OF THE PANEL IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING

# ANNEX A-1

## RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

***Questions Posed to the United States***

**Q1. The United States claims that the "CWB Export Regime" is inconsistent with Article XVII:1 of the GATT 1994 (US first written submission, para. 105). The term "CWB Export Regime" is defined at para. 15 of the US first submission as comprising (i) the legal framework of the CWB, (ii) Canada's provision to the CWB of exclusive and special privileges, and (iii) the actions of Canada and the CWB with respect to the CWB's purchases and sales involving wheat exports. In this regard, please provide further clarification as follows:**

**(a) Is the United States claiming that the "legal framework of the CWB" as such (per se) is inconsistent with Article XVII:1?**

1. The US claim is that the CWB's legal structure and its incentives to act in a non-commercial manner necessarily result in the CWB making sales not in accordance with Article XVII standards. This legal framework, when taken together with other aspects of the CWB export regime, is inconsistent with Article XVII.

**(b) What is the United States' claim with respect to "the provision to the CWB of exclusive and special privileges"? Paras. 3 and 50 of the US first written submission appear to recognize that Members may provide exclusive or special privileges to enterprises.**

2. Article XVII is premised on the fact that Members can grant exclusive and special privileges to STEs. However, in recognition of the fact that these benefits and privileges may enable STEs to engage in trade-distorting practices to the detriment of other Members, Article XVII imposes specific obligations on Members that establish STEs. The United States alleges that the CWB export regime as a whole, including the actions of the CWB resulting from the unchecked exercise of its exclusive and special privileges, violates Canada's obligations by necessarily resulting in the CWB making sales that are not in accordance with the standards set forth in Article XVII:1.

**(c) What "actions" of Canada with respect to the CWB's purchases and sales involving wheat exports are inconsistent with Article XVII:1?**

3. The "actions" of the Government of Canada that affect the purchases and sales of wheat are: (1) Canada's failure to exercise its authority to oversee the CWB, (2) Canada's approval of the CWB's borrowing plan and guarantees of all borrowings as well as credit sales, and (3) Canada's

approval and guarantee of the initial payment price. These actions, when taken together with other aspects of the CWB export regime, are inconsistent with Article XVII.

**(d) What "actions" of the CWB with respect to the CWB's purchases and sales involving wheat exports are inconsistent with Article XVII:1?**

4. The "actions" of the CWB are the CWB's purchases and sales of wheat on discriminatory and non-commercial terms.

**Q2. In connection with the US argument that Canada is required under Article XVII:1 to "ensure" that the CWB meets the Article XVII:1 standards, please provide clarification as follows:**

**(a) Is the United States arguing that Canada's legislation must require, or mandate, the CWB to meet the Article XVII:1 standards? (US first written submission, paras. 65-66)?**

5. No, the United States is not arguing that statutory language requiring the CWB to meet Article XVII:1 standards would be sufficient to meet Canada's obligations under Article XVII. In any case, it is undisputed that Canada has no such statutory provision in place. We understand that, as a general matter, Members may choose the mechanism that they wish to use to meet their WTO obligations. In this case, because the CWB's legal structure and incentives, absent any countervailing supervision or incentives, necessarily results in the CWB making sales not in accordance with the Article XVII standards, Canada is not meeting its WTO obligations.

**(b) Is the United States arguing that in addition to imposing a statutory requirement on the CWB that it meet the Article XVII:1 standards, Canada would need to supervise CWB operations? (US first written submission, para. 69 and footnote 59) Or is the supervision requirement an alternative to a statutory requirement?**

6. While this question sets forth possible means for Canada to bring itself into compliance with Article XVII, it is undisputed that Canada is not now undertaking such supervision, in accordance with a statute or otherwise. This absence of supervision, taken together with the legal structure of the CWB and the incentives created by the CWB export regime, is not consistent with the Canada's obligations under Article XVII.

**(c) Regarding the supervision requirement, what level and what kind of government supervision would be required to "ensure" compliance with the Article XVII:1 standards?**

7. It would not be appropriate for us to speculate as to whether any particular measures adopted by Canada would bring the CWB export regime into compliance. Whether any particular, hypothetical level of supervision by Canada would actually lead to a conclusion that Canada was in compliance with its obligations under Article XVII would depend on all of the facts and circumstances of the CWB export regime as a whole. The fact that Canada is undertaking *no* such supervision at present, in combination with other aspects of the CWB export regime, is sufficient to conclude that the regime is inconsistent with Article XVII.

**(d) Is Article 18 of the CWB Act insufficient to meet the supervision requirement argued for by the United States?**

8. Yes. In this case, Canada has explained that while it could supervise the CWB under Article 18, it chooses not to do so. That fact of non-supervision, in combination with the other aspects of the CWB export regime established by Canada, means that Canada has failed to meet its obligations under Article XVII.

**(e) Is the United States arguing that as long as an STE has the ability to engage in conduct proscribed by Article XVII:1, the Member maintaining or establishing it is in breach of Article XVII:1, or is the United States arguing that as long as an STE has this ability, the Member concerned is under an obligation to supervise the STE's operations? (US first written submission, paras. 67, 77-78)**

9. Neither one of these statements captures the US position. It is not the mere fact that the CWB has the ability to engage in conduct proscribed by Article XVII:1 that results in a breach of Article XVII. Rather, the CWB's unique legal structure and incentives, and the lack of any countervailing supervision or incentives, necessarily result in the CWB making sales not in accordance with Article XVII standards. A lack of government supervision is but one element of the CWB regime. If this element, or any other element, were to be modified, the WTO-consistency of the CWB regime would need to be reevaluated.

**(f) With reference to para. 50 of the US first written submission, why cannot the balance of rights and obligations be preserved by an interpretation of Article XVII:1 according to which, under Article XVII:1, Members have the right to establish and maintain trading enterprises with special or exclusive privileges, but in exchange must do nothing more than assume responsibility under international law for any conduct by such enterprises which has been found not to be in accordance with certain prescribed standards?**

10. It is not entirely clear to us what it would mean, in the context of the WTO Agreement, for Canada to "assume responsibility under international law" if Canada did not, as suggested in paragraph 50 of the first US submission, "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." As described before, in the absence of supervision by the Government of Canada and given its unique structure, the CWB export regime necessarily results in the CWB making sales not in accordance with Article XVII standards. The CWB regime is therefore inconsistent with Article XVII. In these circumstances, Canada cannot be said to have assumed its responsibility under the WTO Agreement.

**Q3. Is the United States arguing that if the CWB used its privileges to make sales on terms which could not or would not normally be offered by privately-held marketing agencies, such sales necessarily would not be in accordance with "commercial considerations"?**

11. Yes. This is supported by the provision in Article XVII:1(b) concerning allowing enterprises of other Members an adequate opportunity to compete.

***Questions Posed to Both Parties***

**Q6. Do the "commercial considerations" referred to in Article XVII:1(b) vary depending on what type of entity (e.g., co-operatives, share-capital corporations, etc.) is conducting the purchase or sales operations?**

12. No. Commercial entities, whether cooperatives or share-capital corporations, make decisions in an environment that is constrained by market forces. These market forces discipline commercial

entities regardless of their corporate structure. The CWB is not disciplined by market forces in the same way that commercial enterprises are. For example, a commercial cooperative enterprise has to compete for farmer members, and farmers are free to leave a cooperative and sell their wheat elsewhere f the commercial cooperative does not provide favourable returns. A share-capital corporation must also compete in the marketplace for sales of wheat and must balance commercial risks when making a decision regarding how much the corporation can pay for wheat. Unlike any commercial enterprise disciplined by market forces, the CWB has a guaranteed supply of wheat because farmers have no viable alternative but to sell their wheat for domestic human consumption and export to the CWB. This guaranteed supply of wheat gives the CWB a different risk and pricing structure than a commercial actor.

**Q7. Please indicate whether, in your view, the CWB is a "State enterprise" or an "enterprise" which has been granted "exclusive or special privileges", as these terms are used in Article XVII:1(a), and why.**

13. We consider the CWB to be a state trading enterprise, as Canada acknowledges in its STE notification.[1]

***Questions Posed to the United States***

**Q8. Could the United States confirm that, in respect of receipt of foreign grain into Canadian elevators, the United States' claim is that the provisions of section 57 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

14. Yes, section 57 of the Canada Grain Act, as such, is inconsistent with Article III:4.

**Q9. Could the United States confirm that, in respect of the mixing of grain, the United States claim is that the amended provisions of section 56(1) of the Canada Grain Regulations (Exhibit CDA-23), as such, are inconsistent with Article III:4 of the GATT 1994?**

15. Our first submission addresses the measure in effect at the establishment of the March Panel and the July Panel, which is section 56(1) prior to amendment. This measure, as such, is inconsistent with Article III:4. The amended provision, although not within the terms of reference of the Panel, also appears to do exactly the same thing, since, as we understand, US grain cannot qualify as eastern Canadian grain. Accordingly, the amended measure, as such, also appears to be inconsistent with Article III:4.

**Q10. Could the United States indicate whether, in respect of the revenue cap, the United States claim is that the provisions of section 150(1) of the Canada Transportation Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

16. The US claim is that section 150(1) and section 150(2) of the Canada Transportation Act, as such, are inconsistent with Article III:4.[2]

**Q11. Could the United States confirm that, in respect of rail car allocation, the United States claim is that the provisions of section 87 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

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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 (Exhibit US-1).

[2] *See* First Written Submission of the United States, para. 45.

17. Section 87 of the Canada Grain Act is inconsistent with Article III:4. Canada's claim that foreign producers may use producer rail cars under section 87 is a hollow one. Only Canadian producers can take advantage of producer rail cars under section 87 because all producer car loading stations are in Alberta, British Columbia, Manitoba, or Saskatchewan.

***Questions Posed to Both Parties***

**Q20. Once a panel has determined that, in making certain export sale(s), an STE did not act in conformity with the standards set forth in Article XVII:1(b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment**

18. Article XVII:1(b) states that the obligations under Article XVII:1(a) "shall be understood to require" that STEs make purchases and sales in accordance with commercial considerations and afford the enterprises of other Members adequate opportunity to compete in accordance with customary business practice. Thus, Article XVII:1(b) sets forth examples of conduct that Article XVII:1(a) requires. To fail to engage in the required conduct under Article XVII:1(b) constitutes a violation of XVII:1. As the *Korea Beef* panel found, "[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."[3]

19. Moreover, on the facts of this case, a finding that the CWB makes sales not in accordance with commercial considerations under Article XVII:1(b) necessarily leads to the conclusion the CWB is not acting in accordance with the general principles of non-discriminatory treatment. Under the CWB's statutory structure and incentives, it uses its pricing flexibility to make sales on non-commercial terms in order to target particular export markets, resulting in a violation of general principles of non-discriminatory treatment.

**Q21. The second clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity "to compete for participation in such purchases or sales".**

**(a) Is the expression "such purchases or sales" a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

20. In the context of this case, the expression "such purchases or sales" in the second clause of Article XVII:1(b) refers to the opportunity to participate in the CWB's sales of wheat. This is more fully explained in the answer to question 21(b), below.

**(b) Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (i.e., wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (i.e., wheat sellers) or (iii) other enterprises?**

21. Under Article XVII, an STE has an obligation to afford all enterprises an adequate opportunity to compete for *participation* in its purchases or sales involving either imports or exports.

[3] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (WT/DS161/RWT/DS169/R) (31 July 2000) (hereinafter *Korea Beef)*, para. 757.

This, in addition to the first obligation under Article XVII:1(b) to act in accordance with commercial considerations, obliges a Member to ensure that its STEs with special and exclusive benefits and privileges act as commercial actors. Here, the enterprises at issue would include any enterprise that is competing for participation in CWB wheat sales, including enterprises competing to purchase wheat from the CWB (i.e., wheat buyers), as well as those enterprises selling wheat in the same market as the CWB (i.e., wheat sellers).

**Q22. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b):**

**(a) The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

22. We assume for this question that the STE and the subsidized supplier are offering wheat for sale on the same terms, with the exception of price. We also assume that to meet the subsidized price, the STE would be offering wheat for sale at a price that is less than the replacement value for the wheat. Although in the short run both a private supplier and an STE could sell below cost in this manner to meet the subsidized price in export market 2, in the long run a private actor could not sustain this behaviour. If an STE uses its special and exclusive privileges to engage in sustained, long-run price discrimination between export market 2 and export market 1 in these circumstances, the STE is not acting in accordance with commercial considerations.

23. A Member is not permitted to violate its obligations under Article XVII of the GATT 1994 merely because that Member's STE sells in a market where its competitor has received export subsidies. No such exception exists under Article XVII. Price discrimination by an STE using its exclusive and special privileges in a non-commercial, non-transparent manner is not permitted under Article XVII.

**(b) The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or could not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

24. In this case, the STE would not be making its sales in accordance with commercial considerations because it could not price discriminate in export market 2 in the absence of its special and exclusive privileges.

**(c) The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

25. In this case, assuming that both the STE and a private seller without any special and exclusive privileges could both sell at a higher price in export market 1 due to the price-elasticity of import demand, the STE would be acting in accordance with commercial considerations. However, if the STE alone was able to engage in price discrimination in this manner due to its exercise of special and exclusive privileges, the STE would not be acting in accordance with commercial considerations.

**(d) Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markets, which it could not do but for its exclusive right to export the product concerned (assume the STE's product is perceived as superior in quality for instance, such that there is no significant competition from other products).**

26. An STE that extracts monopoly rents in both markets, which it could not do but for its special and exclusive benefits and privileges, is not acting according to commercial considerations. Although a commercial actor may be able to extract some monopoly rents if it faces little competition in the marketplace, the fact that an STE is able to use its special and exclusive benefits and privileges to extract monopoly rents in markets regardless of the price elasticity of demand means that the STE is not acting in accordance with commercial considerations.

**Q23. Is the "commercial considerations" requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases or sales involving imports or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the "commercial considerations" requirement essentially intended to make sure that STEs act like rational economic operators, i.e., that, in their purchase or sale decisions, they are guided only by the consideration of their own economic interest?**

27. Article XVII:1(b) requires STEs to act *commercially*, not merely rationally. Therefore the "commercial considerations" requirement in Article XVII:1(b) is intended to ensure that STEs do not use their special privileges to the disadvantage of commercial actors. A Member could not meet the second obligation under Article XVII:1(b) – to afford enterprises of other Members adequate opportunity to compete – if an STE's special privileges could be used to gain special advantages in the marketplace. Article XVII:1(b) must be read in its entirety, and the first obligation under XVII:1(b) cannot render moot the second obligation under Article XVII:1(b). These two obligations must be read together. Therefore, the "commercial considerations" requirement in Article XVII:1(b) must be intended to ensure that commercial enterprises without special and exclusive privileges are able to adequately compete for participation in the STE's purchases and sales involving imports and exports.

**Q24. Pursuant to Article XVII:1(a), each Member undertakes that its STEs "shall" act in a specified manner. Please explain the meaning and usage of the term "shall" in Article XVII:1(a). In particular, what, if any, difference in meaning would there be if Article XVII:1(a) had said that each Member "undertakes" that its STEs "will" act in the specified manner?**

28. Here the term "shall" should be given its ordinary meaning. "Shall" implies an obligation. According to the New Shorter Oxford Dictionary, in relation to statutes, regulations, etc., "shall" is "equivalent to an imperative."[4] Similarly, according to the Merriam-Webster Dictionary, "shall" is "used in laws, regulations, or directives to express what is mandatory."[5] Simply put, the obligation of each Member under Article XVII:1(a) is a mandatory requirement that STEs granted special or exclusive privileges act according to the general principles of non-discriminatory treatment prescribed in the GATT 1994.

29. The language of Article XVII, as with many articles in the GATT 1994, sets forth obligations using the term "shall." The United States cannot address how different language not found in Article XVII might or might not change the nature of the obligations at issue in this case.

[4] New Shorter Oxford English Dictionary (1993), at 2808.
[5] Merriam-Webster's Collegiate Dictionary: Tenth Edition (2001), at 1072.

***Questions Posed to the United States***

**Q25. With reference to para. 58 of the US first written submission, please elaborate on how the Note to Articles XI, XII, XIII, XIV and XVIII supports the view that Article XVII:1(a) requires non-discrimination as between sales in the domestic market and sales in export markets.**

30. The scope of the obligation under Article XVII:1(a) to "act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement" is a broad one. It does not refer to a specific article or specific obligation, but, rather, refers to the general principles of non-discrimination reflected in the obligations of the GATT 1994. This broad reference to non-discriminatory treatment would encompass discrimination between sales in the domestic market and sales in export markets.

31. Previous panels have concluded that the purpose of the Note to Articles XI, XII, XIII, XIV and XVIII of the GATT 1994 "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 operations."[6] Indeed, the *Korea Beef* panel found that the Ad Note's broad purpose – to ensure that Members cannot escape their WTO obligations by establishing state-trading enterprises – led to the conclusion that the "general principles of non-discriminatory treatment" under Article XVII:1(a) must include national treatment, i.e., discrimination between imported and domestic products.

32. The same logic can be extended to export restrictions and the behaviour of a state export monopoly. Article XI generally states that no prohibitions or restrictions may be placed on exports. In other words, a Member may not withhold goods from export markets. The Ad Note makes clear that a Member cannot circumvent its obligations under Article XI by acting through a state-trading enterprise, thus establishing that the obligations of Article XVII:1(a) include non-discrimination between sales in the domestic market and sales in the export market.

**Q26. With reference to paras. 17 and 65 of the US first written submission, is there anything in the CWB Act, or any other statute or regulation, which legally precludes the CWB from making its sales involving wheat exports in accordance with Article XVII:1?**

33. The CWB is required by law to promote the sale of Canadian wheat in world markets. This statutory mandate and the actions of Canada and the CWB with respect to purchases and sales of wheat, along with the special and exclusive privileges granted to the CWB through laws and regulations, necessarily preclude the CWB from making sales in a non-discriminatory manner, according to commercial considerations, and in a manner that provides enterprises from other Members an adequate opportunity to compete. If the CWB were to act otherwise, it would violate its statutory mandate. Furthermore, Canada has not taken any steps to ensure that the CWB adheres to the Article XVII requirements.

**Q27. Could the United States comment on the description of CWB export sale operations provided by Canada at paras. 54-58 of Canada's first written submission?**

34. Paragraphs 54 through 58 do not provide any evidence that the CWB is acting in a non-discriminatory manner, is acting according to commercial considerations, or is allowing enterprises of other Members an opportunity to compete.

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[6] *Korea Beef*, para. 749 (quoting *Japan - Restrictions on Certain Agricultural Products* (L/6253-35S/163) (2 February 1988), para. 5.2.2.2).

35. The CWB states that it forecasts "target returns" for each export market in order to maximize overall return to the pool, but fails to explain what considerations are used when setting this target return. Similarly, while Canada states that managers are required to obtain a certain "acceptable return" on each sale, Canada does not provide any information on how this acceptable return is calculated. The CWB has an incentive to use its special and exclusive privileges to discriminate between foreign markets and make some sales in a non-commercial manner.

36. Finally, under paragraph 58, Canada states that "most," but not all, sales prices are linked to US futures exchange prices and that the CWB "often," but not always, looks to US exchanges to guide pricing decisions. The CWB also implicitly acknowledges that while differences in prices are "primarily" based on considerations such as grade and protein of grain and transportation costs, other, presumably non-commercial factors also come into play.

37. Indeed, paragraph 58 only tells part of the story, by focusing on Hard Red Spring wheat. Noticeably absent is any discussion of the Durum wheat market, even though the CWB accounts for over fifty per cent of world Durum exports. There is no futures market for Durum wheat, and commercial actors in the Durum wheat market have no basis upon which to judge the CWB's Durum wheat prices.

**Q28. With reference to para. 80 of the US first written submission, if the CWB tries to sell all wheat it has bought and in doing so seeks out the best markets and tries to obtain the best possible prices, are the sales made in this way in accordance with commercial considerations?**

38. No. The CWB's mandate under the CWB Act is to obtain "reasonable" prices, considering the objective of promoting sales of wheat. Accordingly, the CWB is driven to maximize sales quantity. In contrast, a commercial actor is only able to take advantage of a "best" price in a given market if that price covers the commercial actor's replacement value for the wheat sold. The CWB's special and exclusive privileges, including a government guarantee of all initial payments for wheat (which translates into a fixed, guaranteed, and known acquisition cost), means that the CWB does not need to obtain a price that covers its costs in every market. In addition, the CWB's special and exclusive privileges allow the CWB to sell wheat at lower prices than commercial actors could ever offer.

**Q29. With reference to section 7(1) of the CWB Act, is the "object of promoting the sales of grain produced in Canada in world markets" an objective which is commercial in nature? (US first written submission, para. 65)**

39. Sales promotion is not *per se* inconsistent with commercial objectives. However, the objective of sales promotion is just one of many objectives a commercial enterprise would need to balance when acting in accordance with the realities and disciplines of the commercial marketplace. Canada has given the CWB special and exclusive privileges that can be used to promote sales without regard for other commercial considerations. With the Government of Canada guaranteeing CWB's cost of acquisition of wheat (i.e., the initial payments made to farmers), the CWB can promote sales without being restrained by commercial considerations, thereby violating the obligations under Article XVII:1.

**Q30. With reference to footnote 12 of the US first written submission, please provide support for the assertion that the CWB sets the "buy-back" price sufficiently high so as to make the "buy-back" programme commercially insignificant.**

40. Under the CWB's "buy-back" programme, wheat farmers who wish to export their wheat independently must both buy back their wheat from the CWB at a premium and receive an export license from the CWB to sell that wheat abroad. The premium price is set by the CWB and is the

price the CWB determines the wheat farmer would get if selling in the foreign market for which the export license is issued. This means that the wheat farmer must pay the CWB not only for the cost of the wheat, but also for the expected return that wheat will earn when sold in a foreign market. The CWB sets this artificial price, and it is not based on any publicly available rate.

41. Section 46(d) of the CWB Act provides for the "buy-back" programme. That provision states, in relevant part, that the "buy-back" programme requires:

> recovery from the [farmer] by the [CWB] . . . of a sum that, in the opinion of the [CWB], represents the pecuniary benefit enuring to the [farmer] pursuant to the granting of a licence, arising solely by reason of the prohibition of exports of wheat and wheat products and then existing differences between prices of wheat and wheat products inside and outside of Canada.

42. The only farmers who participate in the buy-back programme are those who think they can sell their wheat for an artificial price above the price the CWB determines that farmers should earn abroad. It is not surprising that few, if any farmers, choose to accept this risk. Effectively, the CWB has used its special and exclusive privileges to negate any benefit a farmer might be able to receive through the independent sale of his wheat in foreign markets. A similar buy-back programme is available for independent wheat sales to the domestic market for human consumption.

**Q31. The United States asserts that on average the CWB's initial payment to farmers has been between 65 and 75 per cent of the expected final value of the wheat sold (US first written submission, para. 25). Does the United States argue that any marketing arrangement which involves an initial payment plus a revenue-sharing arrangement is necessarily inconsistent with commercial behaviour? If not, please indicate what would be a "commercial" initial payment (as a percentage of the expected final value of the wheat sold), taking account of the marketing and other services provided under such a marketing arrangement.**

43. Marketing arrangements that involve an initial payment are not per se inconsistent with commercial behaviour. However, the CWB is afforded the special and exclusive privileges that enable the CWB to use pooling in a manner that is inconsistent with commercial considerations. The Government of Canada guarantees the CWB's initial payment price and effectively requires farmers to sell their wheat to the CWB, giving the CWB greater pricing flexibility than a commercial actor would have. The CWB's decision to set its initial payment price is not governed by commercial considerations since the Government of Canada's guarantee of those payments ensures that any potential pool deficits are covered and farmers cannot opt out of the CWB regime without facing significant costs. In other words, the CWB is not governed by the commercial reality of facing an actual economic loss on sales or of losing its source of supply. No commercial actor can determine its purchase price for wheat knowing that the purchase price will not affect the commercial entity's bottom line. The Government of Canada removes market risk from the CWB's decision to procure wheat.

**Q32. With reference to para. 25 of the US first written submission, please explain further how the fact that the initial price is set by the CWB and the Government of Canada, as distinct from possible government guarantees of the initial payments, gives the CWB greater pricing flexibility than other grain trading companies.**

44. A commercial actor does not face a guaranteed supply of wheat at a known, fixed price of acquisition throughout the marketing year. The only way for a commercial actor to obtain such a price guarantee is to purchase futures or options to ensure against price fluctuations. Price certainty gives the CWB greater pricing flexibility than other grain trading companies because the CWB faces a completely different price risk structure that is not driven by commercial considerations. A private

grain company would have to pay a tangible cost to obtain the same certainty under commercial conditions.

**Q33. Please provide evidence supporting the existence of the two alleged pool deficits (US first written submission, para. 26). Were these two deficits paid for by the Canadian government?**

45. Exhibit US-16 includes relevant pages of CWB Annual Reports which document two pool deficits.[7] These two pool deficits were paid for by the Government of Canada.[8]

**Q34. The United States has stated that when the CWB makes a sale on credit, the credit is extended at a commercial rate (US first written submission, para. 36). At the same time, the United States has stated that government guarantees of CWB borrowings allow the CWB to provide more favourable credit terms than those provided by commercial grain traders (US first written submission, para. 75). Please explain how these statements can be reconciled.**

46. The CWB, benefiting from its special and exclusive privileges, has an opportunity to offer credit terms that are far more favourable than those offered by commercial grain sellers who do not benefit from guaranteed government borrowing at below-market rates. The CWB can take greater risks in extending credit than a commercial grain trader because the CWB is getting *its* financing at below commercial rates. In paragraph 75, the United States observes that all other terms being equal, as a direct result of the CWB's special and exclusive borrowing privileges, the CWB will be able to capture a sale by taking a greater credit risk than would be warranted if the CWB was acting under the commercial considerations of a private grain trader. When the CWB extends credit at commercial interest rates, it can take additional credit risks, such as offering a longer term for the loan than would be offered by a commercial actor. This has the effect of denying enterprises of other Members an adequate opportunity to compete, since a private grain trader acting according to commercial considerations and without the special and exclusive privileges of the CWB would not be able to make the sale on the same terms.

47. It should be noted that the CWB also has an arbitrage opportunity as a direct result of its government-guaranteed borrowing privileges. We do not mean to imply that the CWB never seizes upon this opportunity. Indeed, if the CWB lends at commercial rates and borrows at below commercial rates, it profits from interest rate arbitrage in a way that a commercial enterprise of another Member, acting according to customary business practice, could not.

**Q35. The United States argues that because the CWB is required to sell all Western Canadian wheat which is produced, it will tend to export larger quantities of wheat at a lower price than would a competitive marketing structure. But if Canadian wheat production were to decrease because the CWB returns a lower price to Canadian farmers than would a competitive marketing structure, can the United States produce any evidence, in theory or otherwise, and in addition to Exhibit US-15, that CWB export supplies over time would be higher with the current marketing structure?**

48. In accordance with its legislative mandate, the CWB attempts to maximize all sales of Western Canadian wheat produced in a current marketing year. Through its special privileges the CWB has more pricing flexibility than a commercial entity and can reduce prices in order to export larger quantities of wheat.

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[7] *See* Canada Wheat Board, Annual Report: 1985-86, pp. 46-47; Canada Wheat Board, Annual Report: 1990-91, Table A. (Exhibit US-16.)

[8] *Id.*

49. Since farmers cannot, in practice, privately sell their wheat for domestic human consumption or export without going through the CWB, the fact that some may believe they could receive a higher return through a more competitive marketing structure does not factor heavily into the determination to produce wheat. There is effectively no exit option, as demonstrated by the Western Canadian wheat farmers that have gone to jail for attempting to market their wheat on their own, outside of the costly buy-back programme that effectively precludes farmers from operating outside of the CWB's marketing structure.

50. If some farmers did reduce their wheat production, the CWB would still continue to have access to practically all wheat produced in Western Canada because of the CWB's monopsony privilege and thus would always have a relatively stable supply of high quality wheat for sale. Indeed, the CWB has paid farmers a premium for high quality wheat even when such a premium is not justified by demand, giving Western Canadian farmers an incentive to over-produce high quality wheat. **A CWB and Manitoba Rural Adaptation Council Inc. study (Exhibit US-15) found that during the base period (1992-1997),** on average, the production of high quality Canadian Red Spring Wheat exceeded the market demand that has been willing to pay a commercial price premium for wheat of that quality. In particular, the analysis suggests that Canadian high-quality wheat production exceeded demand by 32 per cent over 1992-1997. Western Canadian wheat farmers respond to the realities of the CWB-dominated wheat market and, with no alternative marketing structure available, continue to produce and sell wheat to the CWB of a quality and in a quantity that is responsive to the CWB rather than to market demand.

***Questions Posed to Both Parties***

**Q42. As a supplement to Exhibit CDA-24, could the parties provide an estimate of the volume and proportion of US grain imported into Canada for domestic consumption as compared to that imported for re-export?**

51. Attached as Exhibit US-17 is information on total US grain shipments to Canada. The United States does not collect data on Canadian use of US grain and therefore is unable to provide an estimate of the proportion of US grain imported for domestic consumption or re-export.

**Q43. Are the findings at para. 11.169 of the panel report on Argentina - Hides and Leather *mutatis mutandis* and at paras. 8.133-8.134 of the panel report on US - FSC (Article 21.5 - EC) relevant to this Panel's assessment of whether the grain segregation and rail transportation measures give rise to differential treatment as between "like" products within the meaning of Article III:4 of the GATT 1994?**

52. The reasoning in both reports is relevant. The panel in *US – FSC (Article 21.5 - EC)* explicitly found that a good is not "unlike" merely because of its origin. The panel went on to find that for measures of general application, "there is no need to demonstrate the existence of actually traded like products in order to establish a violation of Article III:4." US origin grain, even when of the exact same type as domestic Canadian grain, is subject to differential treatment as "foreign grain" under Canada's grain segregation and transportation measures. Because origin alone cannot serve as a basis for a determination that two commodities are not like products, Canada's challenge that US grain is not "like" Canada origin grain fails.

53. Regarding the reasoning in *Argentina - Hides and Leather*, that panel found that where the structure and design of the measure at issue differentiates among products based not on physical characteristics or end-uses but, instead, based on factors which are not relevant to the definition of likeness, the evidence required for a party to discharge its burden of establishing that a measure applies to products is minimal. And, as the *FSC* panel noted, product origin cannot serve as a basis for a determination that two products are not "like." Here, because Canada's grain segregation and

rail transportation measures discriminate on the basis of origin – even when all other product characteristics are exactly the same – one must reach the conclusion that the measure at issue applies to like domestic and foreign products. Thus, the structure and design of the Canadian measures alone make clear that like products are subject to the Canadian measures at issue.

**Q44. Are all imported and domestic products falling within each of the categories of "grains" as defined in section 5(1) of the Canada Grain Regulations "like products" for the purposes of Article III:4 of the GATT 1994, or are there different "like" products within each of the categories of grain? Are all imported and domestic products falling within each of the categories of "grains" or "crops" as defined in section 147 of the Canada Transportation Act "like products" for the purposes of Article III:4 of the GATT 1994, or are there different "like" products within each of the grain or crop categories?**

54. All imported and domestic products falling within each of the categories of "grains" as defined in section 5(1) of the Canada Grain Regulations are "like products" for the purposes of Article III:4 (i.e. foreign durum wheat and Canadian durum wheat, foreign canola and Canadian canola, foreign barley and Canadian barley).

55. The same holds true for like products falling within each of the categories of "grains" or "crops" as defined in section 147 of the Canada Transportation Act.

**Q45. Could the parties respond to the EC's assertion in paragraph 43 of its third party written submission that a bulk grain handling system, such as that covered by the Canada Grain Act, "offers cost advantages compared to other ad hoc distribution possibilities."**

56. The EC's assertion that a bulk grain handling system, such as that covered by the Canada Grain Act "offers cost advantages compared to other ad hoc distribution possibilities" must be viewed in the context of the entire paragraph of the EC submission, paragraph 43, which states:

> In contrast, the fact evoked by Canada that foreign producers are not obligated to use Canadian grain elevators, and may for instance deliver directly to Canadian end users does not remove the unfavourable effects of the entry into grain elevators. It must be presumed that an efficient bulk grain handling system offers cost advantages compared to other ad hoc distribution possibilities. Equally, the fact that an exceptional authorization for using the elevators is a "well known and used" process does not remove the less favourable treatment of foreign grain.

57. We believe that the key phrase in this paragraph is that the possibility of alternative distribution channels or exceptional authorizations "does not remove the less favourable treatment of foreign grain." Canadian grain can move in and out of the bulk grain handling system subject to far less burdensome regulatory requirements than foreign grain. If foreign grain was treated as favourably as like Canadian grain in the bulk handling system, foreign grain could be transported at far less cost.

58. There is a reason that the vast majority of grain in Canada travels through the bulk grain handling system – there is no efficient alternative for most grain producers. The majority of grain in the market is sold to large-quantity purchasers whose demands cannot be met by individual farmers shipping small lots of grain directly to end users outside of the bulk grain handling system. The bulk grain handling system allows numerous grain farmers to consolidate smaller quantities of grain at elevators into the large bulk shipments that purchasers demand. Farmers who cannot take advantage of the bulk grain handling system face prohibitive handling and transportation costs. For example, trucking rates are significantly higher than rail rates and are not a viable economic alternative for most

producers. It is difficult and costly to access the rail system as an individual producer, rather than through the bulk handling system.

***Questions Posed to the United States***

**Q46. With reference to paras. 207, 217 and 279 of Canada's first written submission, is it correct that Article III:4 of the GATT 1994 does not apply to laws affecting the transportation of goods in-transit?**

59. There is no question that Article III applies to the measures at issue in this case. Canada's references to Article V of the GATT 1994 and in transit shipments are no relevant to this dispute. The laws and regulations at issue in this case – the Canada Grain Act and the Canada Grain Regulations – are measures affecting the internal transportation and distribution of grain. These measures affect all foreign and domestic grain that arrives at a bulk handling facility. Any foreign grain or domestic grain entering Canada's bulk grain handling system is subject to Canada's internal grain regulation from the moment that grain arrives at an elevator in Canada, regardless of the final destination of the product.

60. There is a limited scenario in which US grain is truly "in transit" through Canada and is not subject to Canada's internal regulatory process. US grain shipped from the US State of Montana by rail on sealed rail cars that travel through Canada and do not stop until they reach their final destination in the US State of Washington are not subject to Canada's internal measures because that grain never enters the Canadian grain handling system. Any Canadian regulations in connection with such traffic in transit are not at issue in this case.

**Q47. With reference to para. 91 of the US first written submission, please explain how section 57 of the Canada Grain Act and section 56 of the Canada Grain Regulations affect the "transportation" of grain.**

61. Canada's bulk grain handling system is the internal distribution and transport network for grain in Canada. The Canada Grain Act and the Canada Grain Regulations comprise the regulatory structure for the bulk grain handling system, including the receipt and treatment of grains by elevators throughout Canada. Most grain transported internally in Canada will, at some point, be received and/or stored in a Canadian grain elevator. The language in the two passages referenced in the Canada Grain Act and Canada Grain Regulations state that Canadian elevators must not receive foreign grain, except as authorized, and must not mix foreign grain with Canadian grain. Since elevators comprise the main transport and distribution network for grains, these regulations necessarily affect both the transportation and distribution of grain.

**Q48. What is the United States' reaction to the assertion by Canada in its first written submission (para. 238) that "since the entry into force of the WTO Agreement, the CGC has never refused entry of foreign grain into Canadian elevators"?**

62. The issue in this dispute is not whether the CGC has refused entry of foreign grain into Canadian grain elevators. The regulations administered by the CGC result in less favourable treatment for foreign grain than for like domestic grain. The CGC may grant licenses, but these licenses are conditionally granted and require elevators to satisfy additional onerous regulatory requirements that are not imposed on like domestic grain.

**Q49. Could the United States submit a complete version of the Canada Transportation Act (Exhibit US-9)?**

63. A complete version is attached as Exhibit US-18.

**Q50. Does the United States agree with Canada's assertion, at para. 282 of its first written submission, that the only rail movements subject to the revenue cap which affect transportation of imported grain for internal sale are the movements of imported grain to Thunder Bay or Armstrong for domestic use in Canada?**

64. The United States fundamentally disagrees with Canada's assertion that the only relevant rail movements are movements of US-origin grain to Thunder Bay or Armstrong for domestic use in Canada. As stated in Canada's own submission, the revenue cap applies to all grain movements that "originate in Western Canada."[9] Thus, the revenue cap applies to the internal transport of all grain within Canada from points in Western Canada to other Canadian ports. All of these movements are covered by Article III:4.

**Q51. With reference to para. 100 of the US first written submission:**

**(a) Could the United States explain how the revenue cap translates into a competitive advantage for Western Canadian grain over imported grain in respect of the internal transportation of grain?**

65. Because railroads must pay a significant penalty for exceeding the rail revenue cap, railroads price transport for Western Canadian grain subject to the cap at rates below the level that could trigger the railroad to exceed the cap. Rail rates charged for imported grain can be set at a level that exceeds the rail rates charged for domestic grain because the revenue cap does not apply to shipments of foreign grain.

**(b) Why does the revenue cap necessarily constrain the rate-setting of the prescribed railways rather than the volume of grain shipped?**

66. Revenue received per mile is likely far more predictable than volume hauled. Because of the CWB's secrecy, railroads are faced with a great deal of uncertainty regarding the volume of commodities to be moved, as well as the timing and demand for rail equipment during the marketing year. We understand that the railroads have never denied transport of Board grain. As the railroads have little control over volume, rates are set at a low enough level so that adjustments can be made if concerns arise about annual revenues, and there is ample opportunity to raise rates without exceeding the revenue cap.

**(c) Could the United States explain how a system which appears to mandate a maximum average rate translates into a competitive advantage for Western Canadian grain?**

67. For an explanation of how the rail revenue cap translates into a competitive advantage for Western Canadian grain, please see the US answer to question 51(a).

**Q52. Could the United States comment on paras. 290 and 291 of Canada's first written submission?**

68. Paragraphs 290 and 291 discuss grain movements that contain a transportation segment that is not subject to the revenue cap for domestic movements of grain. However, Canada ignores cases where the revenue cap applies for the full route, i.e. shipments westward for export or shipments eastward that stop at Thunderbay. Whether the rail revenue cap applies to part of the route or the full route, railroads provide lower rates to Western Canadian grain shipments subject to the cap so that the

[9] Canada First Submission, para. 269.

railroads do not pay the penalty for exceeding the cap. As a practical matter, therefore, the rail revenue caps keep prices lower for the transport of Western Canadian grain. Shipments of Western Canadian grain that are subject to the rail revenue cap pay lower transportation costs than those shipments would pay without the revenue cap. These lower transportation costs accord domestic grain more favourable treatment than like foreign grain.

69. Further, there is no support for Canada's argument in paragraphs 290 and 291 of its written submission that railroads can charge as high a rate for a non-regulated transportation segment and a low rate on the regulated transportation segment so that the average rate reflects a "market" rate.

**Q53. Could the United States confirm that, in respect of rail car allocation, the United States claim is that the provisions of section 87 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

70. Yes, the United States claims that section 87 of the Canada Grain Act is inconsistent with Article III:4 of the GATT 1994.

**Q54. With reference to para. 101 of its first written submission, could the United States explain how "[m]aking government rail cars available for the transport of domestic grain reduces transportation costs for any grain that receives this benefit."**

71. The provision of railcars from the Government of Canada relieves the railroads of the costs of ownership associated with these rail cars. Therefore, the railroads can charge lower rates than would be the case if the railroads had to lease or purchase the railcars themselves and factor these additional costs into the freight rates. This cost savings is passed on to those transporting domestic grain under the producer car programme.

**Q55. Could the United States explain further and provide further evidence for its assertion in paragraph 101 of its first written submission that the producer car programme "excludes all imported grain."**

72. Despite Canada's statement to the contrary, foreign producers cannot take advantage of the producer rail car programme, as all of the loading sites are in Canada.[10] In addition, the relevant regulations do not state that foreign grain is eligible for the producer rail car programme.

**Q56. With respect to the United States' claims under the TRIMs Agreement, what specifically does the United States mean when it asserts in its first written submission (para. 103) that:**

**(a) The grain segregation requirements require elevator operators to "use" domestic Canadian grain; that the rail revenue cap requirements require shippers to "use" domestic Canadian grain; and that the producer car programme requirements re quire shippers to "use" domestic Canadian grain?**

**(b) What precisely are the "requirements" the United States is challenging for each of the measures being challenged?**

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[10] *See* Canadian Pacific Railway, "CPR Producer Car Loading Sites," *available at* http://www8.cpr.ca/cms/English/Customers/New+Customers/What+We+Ship/Grain/Producer+Cars.htm (last visited 23 Sept. 2003) (Exhibit US-19)*; see also* CN, "Producer Car Loader Station List," *available at* http://www.cn.ca/productsservices/grain/Canadaorigin/en_KFGrainCNProducerCarLoaderStationList.shtml (last visited 23 Sept. 2003) (Exhibit US-20).

**(c) What "advantage" is the United States asserting the foreign shippers are seeking to obtain?**

73. Answers to (a), (b) and (c) are discussed below for both elevator operators and shippers.

74. "Use" by elevator operators refers to handling of grain in the normal course of business, i.e., handling, storage and transport. The requirements challenged are the Canada Grain Act's prohibition on the receipt of foreign grain into grain elevators under section 57 and the Canada Grain Regulations prohibition on mixing foreign grains under section 56(1). Local content requirements can be facilitated through a variety of regulatory mechanisms, some of which are more transparent than others. Canada's prohibition on the receipt of foreign grain in elevators and prohibition on the mixing of foreign grain are "mandatory" and "enforceable" requirements within the meaning of the TRIMs Agreement Illustrative List. Moreover, they also provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain because the need for special authorization to accept and/or mix foreign grain and the onerous conditions that are often placed on such authorizations creates a regulatory regime that financially rewards those elevators that accept domestic grain over foreign grain. These matters are described in more detail in paragraphs 100 of the First Written Submission of the United States.

75. "Use" by shippers refers to the shipment of grain by rail. The requirements being challenged here are the requirement that only Canadian grain can be shipped in order to qualify for the rail revenue cap, and the requirement to ship Canadian grain in order to qualify for the producer car programme. Both requirements provide cost advantages in the form of lower rail transport rates to those shippers that choose to ship Canadian grain rather than foreign grain. Again, these matters are described in more detail in paragraph 101 of the First Written Submission of the United States.

**LIST OF EXHIBITS**

US - 16. Canada Wheat Board, Annual Report: 1985-86, pp. 46-47; Canada Wheat Board, Annual Report: 1990-91, Table A.

US - 17. USDA, Foreign Trade Statistics: Foreign Agricultural Service Export Commodity Aggregations for Canada: 1999-2003.

US - 18. Canada Transportation Act, R.S.C., ch. 10 (1996).

US - 19. Canadian Pacific Railway, "CPR Producer Car Loading Sites," *available at* http://www8.cpr.ca/cms/English/Customers/New+Customers/What+We+Ship/Grain/Producer+Cars.htm.

US - 20. CN, "Producer Car Loader Station List," *available at* http://www.cn.ca/productsservices/grain/Canadaorigin/en_KFGrainCNProducerCarLoaderStationList.shtml.

# ANNEX A-2

## RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

"CWB" stands for "Canadian Wheat Board".

"STE" stands for "State Trading Enterprise" and is intended to cover the type of enterprises covered by Article XVII.

***Canada:***

**4. Canada appears to be saying that the CWB's sales should be compared to sales of a privately-held cooperative marketing agency (Canada's first written submission, para. 85 read together with para. 89). Privately-held enterprises do not normally enjoy privileges like those enjoyed by the CWB, however. Is Canada arguing that if the CWB used its privileges to make sales on terms which could not or would not normally be offered by privately-held marketing agencies, such sales would not be in accordance with "commercial considerations"?**

1. "Exclusive or special privileges" by definition provide STEs with certain privileges (or advantages) that are either not enjoyed by other enterprises, or have a special character. The right of Members to grant such privileges implies necessarily a right on the part of the recipients of such privileges to use such privileges, including in their business activities. For example, if a Member has the right to grant to an enterprise an import monopoly, the recipient of such a monopoly privilege must also have the right to exercise and enjoy the advantage of having a monopoly in the market in which it has such an exclusive privilege.

2. Accordingly, the inquiry into whether an STE is acting consistently with Article XVII in its use of such privileges can only be undertaken by reference to a private sector entity with similar attributes. Otherwise, it would be impossible to determine whether the complained of behaviour was simply a reflection of the mere use of the privileges, which, in and of itself, is not prohibited, as opposed to the impermissible discriminatory conduct of an STE when using those privileges, which is prohibited.

3. The EC acknowledges this point at paragraph 13 of its Written Submission, where it states:

> With regard to the obligations under subparagraph (b), the EC considers that the fact that a STE operates in its trade related activities on the basis of its special and exclusive commercial advantages does not *per se* prevent it from acting "in accordance with commercial considerations". This notion has to be interpreted in

light of a normal (private) commercial behaviour. Yet, it is clear that any private operator that benefits from special and exclusive rights would make use of them.

4. The question, therefore, would not be whether, in its purchases and sales, an STE acts commercially relative to any other enterprise that does not enjoy a similar privilege. Rather, the inquiry would concentrate on whether in making such purchases and sales, the STE acts as would a private enterprise that has the same rights and privileges. Because, after all, it is axiomatic that the use of a "privilege" implies some sort of competitive advantage relative to those that do not have such a privilege.

5. Finally, Canada notes that certain privately-held enterprises do enjoy privileges like those enjoyed by the CWB. For example, Cargill, a privately held US wheat trader, enjoys the privilege of utilizing US government export credit guarantee programmes (commonly known as GSM 102/103) to maintain or increase sales. Would the United States suggest that Cargill acts "non-commercially" every time it resorts to the lavish export credit guarantee programmes of the US government?

**5. With reference to para. 29 of the US first written submission, what are the criteria for the approval by the Minister of Finance of the CWB annual borrowing plan? Please explain the approval process.**

6. The CWB submits annually a borrowing plan for the Minister of Finance to approve as required under Section 19 of the *Canadian Wheat Board Act* (the "*CWB Act*"). The plan contains the details of the CWB's proposed borrowing programmes for the upcoming crop year.

7. In evaluating the borrowing plan, the Department of Finance officials examine:

- the level of borrowing in the plan as compared to previous years;
- the level of borrowing as compared to the CWB's forecasted needs related to credit receivables, grain purchases and spring and fall cash advances to producers under the cash advance programmes that the CWB administers on behalf of the Government of Canada;
- whether there have been any changes in the CWB's financing needs arising from the corporation's business activities; and
- whether the CWB's risk management framework is consistent with the Minister of Finance's Risk Management and Credit Policy Guidelines for Crown Corporations.

8. Once the borrowing plan is approved, the CWB must comply with the terms and conditions of the borrowing approval letter.[1] The Department of Finance does not approve individual borrowing transactions. The CWB must also comply with the Minister of Finance's reporting requirements in that it must report on its borrowing activity on a quarterly basis.

***Both Parties:***

**6. Do the "commercial considerations" referred to in Article XVII:1(b) vary depending on what type of entity (e.g., Cooperatives, share-capital corporations, etc.) is conducting the purchase or sales operations?**

[1] See Exhibit CDA-46 **[contains strictly confidential information]** for an example of a borrowing approval letter.

9. Commercial enterprises generally take into account similar factors in carrying out purchases or sales. These include the factors listed in Article XVII, namely "price, quality, availability, marketability, transportation and other conditions of purchase or sale."

10. However, the way that each enterprise responds to such factors depends on the circumstances in which it operates. That is, the size of the enterprise, the market in which it operates, the type of organization that it is, its financial circumstances and any special or exclusive privileges that it may have been granted. For example, a large enterprise with significant assets may be willing to extend supplier credits that a smaller enterprise would not be able to extend because of the economic risks involved. Similarly, two banks of comparable size may have different risk exposures in their portfolios, thus encouraging one to lend to a market that the other would consider an inappropriate client. In both circumstances, each enterprise would be acting consistently with commercial considerations, even though the resulting conduct is opposite.

11. In this respect, Canada's reference to the nature of the CWB as a "cooperative marketing agency" responded to unsupported US allegations contained in paragraphs 79-85 of its First Written Submission. There, the United States made a distinction between "profit-maximising" conduct by share-capital corporations and "revenue-maximising" conduct allegedly engaged in by the CWB. The United States made no attempt to explain why revenue-maximising is not "commercial conduct" – and indeed, any such attempt would be in vain. Even so, the US reference to "profit-maximising" on behalf of the corporation is, as Canada demonstrated and the United States failed to controvert, inapposite in respect of cooperatives and similar marketing agencies. As indeed the United States Department of Agriculture has observed, revenue maximising for a cooperative marketing agency translates into profit maximising for the farmer.

**7. Please indicate whether, in your view, the CWB is a "State enterprise" or an "enterprise" which has been granted "exclusive or special privileges", as these terms are used in Article XVII:1(a), and why.**

12. Article XVII does not provide a definition of a "state enterprise". The Article covers "state enterprises" where a Member "establishes or maintains" one.

13. The CWB was established by an Act of Parliament, the *CWB Act*, which also sets out its corporate structure and powers. The CWB is a corporation without share capital and thus has no controlling shareholder. Until the end of 1998, the CWB was governed by a Board of Commissioners appointed by the government. The CWB was also an "agent of Her Majesty" and clearly was a "state enterprise" that had been granted exclusive or special privileges.

14. In 1998, the corporate structure of the CWB was altered so that its governance/is now vested in a Board of Directors, the majority of which are elected by farmers. As a result, the CWB is neither a Crown corporation nor an agent of Her Majesty.

15. Therefore, even if the CWB were not technically considered to be a "state enterprise" that has been granted exclusive or special privileges, Canada has no doubt that it would fall into the category of "any enterprise" that has been granted special or exclusive privileges. As a result, Canada has no doubt that it has responsibilities under Article XVII with respect to the CWB.

***Canada:***

**12. Is the Panel correct in understanding that once a licensed elevator operator has been authorized to receive foreign grain, such grain can be mixed with Canadian grain of the same type and grade (and need not be identified as mixed grain), but that it cannot be mixed with**

**Canadian grain of a different type, or with Canadian grain of the same type but of a different grade, unless such mixing is authorised pursuant to relevant rules and regulations? Please refer to relevant legal provisions.**

16. Canada is not concerned with the mixing of any given lot of grain with another lot of grain as long as the combined lot is not represented as "Canadian grain". Canada's concern is with uncontrolled mixing in the bulk grain handling system that would affect Canada's ability to know the quality of the grain in the system, and its ability as an exporter to guarantee the quality, end-use characteristics and Canadian origin of the grain.

17. There is no legal provision that specifically regulates mixing of foreign grain with Canadian grain. If an elevator receiving foreign grain wants to mix that foreign grain with Canadian grain, it would make this request either together with the request for authorization to receive foreign grain, or at a later stage (Sections 57 and 72(2) of the *CGA*). The Canadian Grain Commission ("CGC") would always authorize it, as long as the lot of mixed grain is identified as such to ensure that it is not misrepresented.[2]

18. As a general rule, elevator operators themselves will have no reason to mix different types of grain.

**13. ([1]) With respect to the authorisation of receipt of foreign grain into elevators pursuant to Section 57 of the *Canada Grain Act*:**

**(a) What is the process by which such orders are made by the Commission? How is the process initiated? How long does the process generally take? Does the process involve any documentary requirements, costs, etc.?**

[1] **Note: Regarding Questions 13, 14 and 16, please provide documentary support for your answer.**

19. The elevator operator initiates the process to obtain an authorization to receive foreign grain. It usually does so orally, by placing a telephone call to the CGC, and follows up with a written request. There is no form; the written request for authorization can be made by fax, e-mail, or post. The elevator operator informs the CGC of its intention to receive foreign grain and describes the type of grain, quality of the grain, origin and destination, and volume of the grain, as well as the anticipated date of receipt. Within a working day or two of the request, the CGC issues an order to the elevator authorizing the receipt of the grain. There are no costs involved. A request for authorization could cover several shipments.

20. Exhibits CDA-47 to CDA-53 **[all containing strictly confidential information]** contain examples of authorization requests by elevator operators, including requests covering several shipments and periods of several months, and orders issued by the CGC in response to these requests.

21. The process to obtain an authorization to receive foreign grain is routine, to the point that elevator operators may have already arranged the transport of the grain before making a request.

22. The elevator operators are very familiar with the process to obtain an authorization from the CGC to receive foreign grain. Elevator operators are in constant, and in most cases daily, communication with the CGC.

**(b) What criteria are used to determine whether foreign grain should be received into elevators?**

[2] For example, see Exhibit CDA-47 [contains strictly confidential information].

23. The authorization is routinely granted. The CGC, however, retains the authority to monitor and control shipments of foreign grain for certain problems, such as where the foreign grain contains a genetically modified grain not approved in Canada or where there is an SPS concern. In such cases, the authorization for entry of the foreign grain of concern may contain conditions to prevent it from contaminating grain in the elevator or the elevator equipment. Authorization would be denied only in very exceptional circumstances, where the imposition of these conditions would not be sufficient or where the risk of contamination would be too high.

**(c) What would be the difference between the prescribed process and a notification system that entails completing a standardized form?**

24. The existing authorization acts essentially like a notification. This is not an onerous process. A standardized form, especially one that would be required at the border, would complicate an existing informal, simple and flexible process and, would result in additional administrative costs for the importer in accordance with the provisions of GATT 1994 and the NAFTA. In addition, a simple notification would not allow the CGC to take appropriate measures where it became aware of certain SPS problems or other unforeseen problems such as the presence of genetically modified grain in the foreign grain that may affect the quality of Canadian grain in the handling system.

**(d) Are there conditional requirements other than those referred to in footnote 118 of Canada's first written submission?**

25. There may be a requirement that the foreign grain be identified on documents according to its origin and that the CGC be notified in respect of further movements of the foreign grain so that it can be tracked. In certain specific circumstances, certain conditions may be attached to an authorisation for an elevator to receive foreign grain in order not to compromise the quality of the grain within the bulk handling system. These may include the cleaning of equipment before and after delivery (for example if there were SPS concerns or in the case of shipments containing Starlink Corn) or CGC monitoring of receipt or discharge.

**14. With reference to para. 224 of Canada's first written submission, how does Canada:**

**(a) keep track of domestically-produced grain entering the bulk handling system;**

26. Elevators are required to report and account for all grain received and shipped (Sections 23-27 of the *Canada Grain Regulations* and Sections 79 and 80 of the *CGA*).

**(b) ensure that domestically-produced grain is not "misrepresented"; and**

27. Canada maintains the quality of Canadian grain in the system through the Canadian quality assurance system, which starts with variety registration before the grain is produced and enters the bulk handling system, and continues with various quality control mechanisms in the system such as inspections and grading standards and procedures. These quality control mechanisms applied to Canadian grain ensure that end-users get a consistent quality of grain from year-to-year and shipment-to-shipment. Because of this quality assurance system, the grades assigned to the grain serve to identify the quality, origin and end-use characteristics of the grain. It is also for this reason that Eastern grain and Western grain are handled separately in the system.

**(c) maintain the quality of Canadian grain in the bulk handling system whenever domestically produced grain enters the bulk handling system?**

28. Primary elevator operators grade Canadian grain on entry and when the grain moves to transfer and terminal elevators it is officially inspected by the CGC and assigned an official grade. The mixing restrictions that apply to Canadian grain under Section 72 of the *CGA*, are just one of many provisions that also serve to maintain quality, (also see Sections 56, 59, 61 and 70 of the *CGA*).

**15. Is there a mechanism equivalent to the section 57 authorisation mechanism that is applied to domestically-produced grain entering the bulk grain handling system? If not, why is such a mechanism necessary?**

29. No authorization is necessary for entry of Canadian grain in elevators. The CGC monitors movement of Canadian grain in elevators based on the elevators' reports and on inspections.

30. An authorization request is necessary for entry of foreign grain into elevators and not for entry of Canadian grain into elevators because Canadian grain is subject to the Canadian quality assurance system, while foreign grain is not.

31. The Canadian quality assurance system starts even before the grain enters the bulk grain handling system, with plant breeding and variety registration. For example, in order to be registered, a wheat variety must be visually similar and have the same end-use characteristics as other wheat varieties in its class – this means it will be visually distinguishable from wheat in other classes that have different end-use characteristics. Wheat grown in other countries is not subject to this requirement. Therefore a foreign variety of wheat may look like CWRS (Canada Western Red Spring) wheat but have very different end-use characteristics. There is, therefore, a risk that foreign grain may be misrepresented when entering the bulk grain handling system and affect the quality of Canadian grain exports.

32. Foreign grain may be suffering from certain plant diseases such as *tilletia indica* (Karnal bunt) and *tilletia contraversa kuhn* (TCK or dwarf bunt), or contain certain weed seeds that are not present in Canadian grain, or certain genetically modified grains not authorized in Canada. The CGC monitors shipments deemed to be at risk of contamination and may impose certain conditions such as cleaning of elevators after they have received such foreign grain, in order to ensure that other grain in the system is not contaminated and that it does not affect the quality of Canadian grain exports.

33. Because foreign grain is not subject to the same restrictions and conditions as Canadian grain with respect to production, the Section 57 authorisation mechanism is necessary.

**16. With respect to section 72(2) of the Canada Grain Act:**

**(a) What is the process by which orders issued under section 72(2) are made by the Commission? How is the process initiated? How long does the process generally take? Does the process involve any documentary requirements, costs, etc.?**

34. The process is the same as the process for an entry authorization under Section 57 (see description in response to question 13(a)).

**(b) Could the Canadian Grain Commission authorise, by regulation, the mixing, in transfer elevators, of all or some Canadian grain with foreign grain of the same type, and/or all or some foreign grain with foreign grain of the same type?**

35. The CGC may authorize mixing either by regulation or by order. There is no authorisation requirement for the mixing of different grades and classes of foreign grain. Authorizations to mix foreign grain with Canadian grain in transfer elevators are given by order of the CGC upon request.

**(c) If so, could such a regulation make the mixing of relevant grain subject to certain conditions, such as appropriate grading designed to ensure consistent quality?**

36. Currently, foreign or mixed grain does not have to meet Canadian grading standards. Foreign grain can be, and almost always is, sold under the grading standard of its own country of origin. If requested, the CGC provides letters of assurance to attest to the quality of foreign grain or of mixed grain. This requires testing of the grain. Such a letter could also include a reference to a comparable Canadian variety and/or grade, where possible.

37. Any advance mixing authorization given by regulation would have to be conditioned upon the identification of the mixed lot as non-Canadian or of mixed origin. In addition, if the CGC were asked to ensure the consistent quality of the grain, additional extensive testing would be required because the CGC has no control over the varieties registered and produced in other countries and would not otherwise be in a position to ensure consistent quality. This would result in additional costs.

**17. With reference to paras. 295-300 of Canada's first written submission, is it possible that circumstances might arise where a revenue cap determined by the Canadian Transportation Agency for a particular crop year would constrain the prescribed railways' rate-setting in the course of that year?**

38. The railways have been significantly below their revenue caps for the two crop years to date. In total, both railways were $5,740,944 and $22,185,969 below their combined revenue caps in crop years 2000/01 and 2001/02.

39. The United States' own findings in the CVD investigation (Exhibit CDA-45) were that the revenue cap provided no benefit. In other words, any constraint on railway revenues is driven by the market, not by the revenue cap.

40. It is expected that the gap between the railways' grain revenues and their revenue entitlement will increase over time because the revenue cap provision includes an upward adjustment for inflation but not a downward adjustment for productivity. This has been the experience to date.

41. Absent unforeseen developments, and in light of the experience of the first two years of the revenue cap regime, we project that the revenue cap will not constrain the prescribed railways' rate-setting in the future.

**18. With reference to para. 46 of the US first written submission, is it correct that the railway cars to be allocated by the Canadian Grain Commission under the authority of section 87 of the Canada Grain Act are "government railcars"?**

42. No. Any car in the railways' common fleet of cars can be allocated as a producer car. The railway's common fleet of cars comprises cars owned or leased by the railways, cars owned or leased by the Government of Canada and cars owned by the Government of Saskatchewan, by the Government of Alberta and by the CWB. Whether any particular railcar will be assigned to an allocation for a "producer car" is a decision of the railways. Thus, producer cars may or may not be "government railcars".

**19. With reference to paras. 312-313 of Canada's first written submission, is Canada arguing that the term "producer" should be construed to mean "Canadian or foreign producer of grain"? If so, does this mean that a US producer, based in the United States, could apply to the Canadian Grain Commission for a railway car without any Canadian intermediary?**

43. Yes. Section 87 of the *CGA* is not limited to Canadian producers. Both Canadian producers and US producers can have access to producer cars. Neither the statute nor the regulations provide otherwise. Both would be required to bring their grain to a producer car-loading site on the Canadian railway system. No Canadian intermediary is necessary for a US producer to obtain a producer car.

***Both parties:***

**20. Once a panel has determined that, in making certain export sale(s), an STE did not act in conformity with the standards set forth in Article XVII:1(b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment?**

44. No. A finding that an STE did not act in conformity with the standards set out in Article XVII:1(b) alone is not enough to find a violation of Article XVII:1. This is because the first step in determining the existence of a violation under Article XVII:1 is a finding that the STE did not act in a manner consistent with the general principles of non-discriminatory treatment.

45. Article XVII:1(a) sets out the substantive obligation under Article XVII:1: state trading enterprises must act in a manner consistent with the general principles of non-discriminatory treatment. The non-discriminatory treatment is then interpreted and amplified by Article XVII:1(b). Article XVII:1(b) recognises that where it does so in accordance with commercial considerations, an STE may discriminate in its purchases and sales. Support for the proposition that Article XVII:1(b) does not contain an independent obligation may be found not only in the opening sentence of Article XVII:1(b), which unambiguously ties that paragraph to the preceding one, but also in the very structure of Article XVII:1. The "undertaking" in Article XVII:1 is set out in paragraph (a) and is not repeated in paragraph (b); without paragraph (a), paragraph (b) would not impose an obligation on Members.

46. Therefore, the more appropriate view is that there can be no violation of Article XVII:1 where the complainant does not demonstrate, and the panel does not find, conduct that is not in accordance with the general principles of non-discriminatory treatment of GATT 1994.

**21. The second clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity "to compete for participation in such purchases or sales".**

**(a) Is the expression "such purchases or sales" a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

47. Yes. The reference to "such purchases or sales" in Article XVII:1(b) is to "purchases or sales involving either imports or exports" identified in Article XVII:1(a). Accordingly, "such purchases" refers to an STE's purchases abroad (imports) and "such sales" refers to an STE's sales abroad (exports).

**(b) Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (i.e., wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (i.e., wheat sellers) or (iii) other enterprises?**

48. For an export STE, the relevant "enterprises" referred to in the second clause of Article XVII:1(b) are enterprises that are interested in buying wheat from the CWB (that is, wheat buyers). This is clear from the use of the word "participation". In every purchase and sale there are two sides who participate in the transaction: the seller and the purchaser. The CWB's competitors do not "participate" in its sales. However, wheat buyers participate in a sales transaction with wheat sellers. Therefore, if the CWB were selling wheat to enterprises in a Member, it must afford "adequate opportunity, in accordance with customary business practice, to compete for participation in such… sales" to wheat purchasers in other Members.

**22. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b):**

**(a) The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

49. Yes. In this situation, the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b). Commercial actors, generally, do not give up on a market simply because their competitors are subsidised. If this were the case, the mere grant of an export subsidy in respect of a market would result in an effective monopoly on the part of the recipient of the subsidy.

50. Of course, in contesting the market with a supplier who benefits from an export subsidy, an STE would charge the lower price only if it made commercial sense to do so.

51. In the hypothetical posed, the STE would be reacting to market conditions in a manner envisaged in paragraph 1 of *Ad* Article XVII. The supplier who has benefited from the export subsidy has altered the "conditions of supply and demand" in that market. And, as with any other private enterprise, the STE, in charging a lower price in export market 2, would be responding to those changed market conditions.

52. Accordingly, where a competitor sells at a lower price in one market as opposed to another market, for whatever reason, including because it benefits from an export subsidy, for the STE to compete effectively it too must sell at a similar price in that market. The price at which competitors sell in a market is a commercial consideration in determining the price at which the STE will sell on that market.

**(b) The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or could not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

53. Yes, in certain circumstances.

54. Charging a lower price in export market 2 than in export market 1 because (a) market 2 is a priority market (for example, because of expected growth in import demand), and (b) the lower price is intended to deter other exporters from contesting export market 2, may be "commercial" behaviour depending on the nature of the market and the other enterprises competing in the market.

55. To the extent that a market is a priority market, it can be expected that a seller would adjust its short-term prices to make long-term gains. This may be done, for example, to build customer loyalty or to familiarize potential customers with the seller's products. Determining the means by which to develop long-term customer relationships is inherently a commercial consideration and is standard commercial practice for any supplier. If the special or exclusive privileges granted to an STE, allow the STE to charge a lower price, doing so is consistent with commercial considerations as it is exactly what any other commercial actor in similar circumstances would do. In fact, for any enterprise to ignore its competitive advantage, however acquired, would be a non-commercial action.

56. In theory, any enterprise, whether an STE or a private trader, with some market power may seek to maximize long-term returns by charging a lower price in a market in order to deter competitors, if the enterprise believed that its competitors would, in fact, be deterred from competing in that market. This would be done with the expectation that the enterprise will subsequently recover in profits the cost associated with this strategy by charging prices above competitive levels. In markets with low barriers to entry or re-entry, however, lowering prices to deter competitors would not be a rational action. Canada notes, in this regard, that markets for agricultural products generally, and wheat in particular, are characterized by extremely low barriers to entry. As such, it would be futile for participants in such markets to pursue the pricing strategy set out in this hypothetical.

57. There is a distinction between non-commercial behaviour and anti-competitive behaviour. Article XVII, or indeed the WTO Agreement, does not prohibit anti-competitive behaviour. If the market structure permits (for example, if barriers to entry or re-entry into a market are high), then selling at a price that is intended to deter other exporters from contesting a market may be commercial behaviour, even if it is anti-competitive. Article XVII:1 is concerned with ensuring that Members do not do through STEs that which they may not do directly. Accordingly, state enterprises may only discriminate in their purchases and sales on the basis of commercial considerations. There being no competition rules in the WTO Agreement, nothing in that Agreement prevents state enterprises from engaging in activities that, though by some definitions may be anti-competitive, are perfectly consistent with commercial behaviour. It is precisely because commercial considerations may lead enterprises to engage in anti-competitive behaviour that some Members have adopted laws prohibiting such behaviour. GATT 1994 does not, however, require such laws, nor does it place disciplines on such behaviour.

58. Finally, a WTO Member that believes it has been disadvantaged by a commercial pricing strategy of an STE as set out in the hypothetical (which a strategy that may not be challenged under Article XVII) is not necessarily without a remedy in the WTO. For example, the WTO Member could consider challenging the special or exclusive privileges to which the STE's low prices are attributable under other WTO disciplines, such as the *Agreement on Subsidies and Countervailing Measures* or the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.*

**(c) The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

59. Yes. In this situation, the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b). If the economic conditions in market 1 allow the STE to sell at a higher price, then doing so is in accordance with commercial considerations. A private trader in similar circumstances as the STE would also charge a higher price in market 1 to take advantage of the lower price-elasticity of import demand.

**(d) Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markets, which it could not do but for its exclusive right to export the**

**product concerned (assume the STE's product is perceived as superior in quality for instance, such that there is no significant competitio n from other products).**

60. Yes. Extracting monopoly rents (price premiums) in export markets is commercial behaviour. Indeed, such an action is, by definition, undertaken in accordance with "commercial considerations". In fact, exacting such rents is so tempting on the part of private sector enterprises that some WTO Members have competition laws and authorities to regulate precisely such activities.

61. Of course, a state enterprise – or indeed any enterprise – may "exact" monopoly rents only in markets in which it has a monopoly. In this sense, and especially in respect of export monopolies, there is a fundamental distinction between, on the one hand, the exclusive right to export a product and, on the other, a monopoly in an export market for that product. One does not necessarily flow from the other. For one thing, an exclusive right to export a product is in the power of the Member making such a grant. No Member, however, has the right to grant a monopoly in an export market for its products. For another, the existence of a monopoly in an export market depends entirely on the structure of that other market, including demand elasticity and the ease of market entry by other exporters. For example, while the CWB enjoys the exclusive right to export wheat from Western Canada, it does not enjoy a monopoly, either legal or market-based – in any of the markets in which it competes.

62. An export monopolist may, therefore, exact "monopoly rents" in international markets, by virtue of the export monopoly, only in the rare circumstance where the exporting country is the sole source of the commodity or product for the market in question. Otherwise, the export monopolist will be just another commercial player in the international market.

63. An exporter that enjoys market power will exact rents appropriate to its power so as to maximize returns. It will do so irrespective of whether its market power results from an exclusive right granted by the State or whether its market power (the monopoly) has been gained on the market, be it through superior quality, internal growth or through mergers and acquisitions.

64. In circumstances where an STE enjoys both an exclusive right to export and a monopoly in an export market, to consider monopoly rent seeking by that STE as not being in accordance with "commercial considerations" would be an attack against the grant of the exclusive right to export. That Members of the WTO are entitled to grant such an exclusive right is expressly authorized by Article XVII. An interpretation that would negate this right would obviously be erroneous.

65. Canada notes that some WTO Members have competition laws, pursuant to which the extraction of monopoly rents by dominant suppliers may be prohibited under certain circumstances. For the time being, however, the WTO, and more specifically Article XVII, contains no competition rules.

**23. Is the "commercial considerations" requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases or sales involving imports or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the "commercial considerations" requirement essentially intended to make sure that STEs act like rational economic operators, i.e., that, in their purchase or sale decisions, they are guided only by the consideration of their own economic interest?**

66. The "commercial considerations" requirement is intended to make sure that STEs act like rational economic operators. If an STE discriminates in its purchases or sales decisions (for example, sells to one purchaser but not another because of the country of origin of the purchaser) the

discrimination must be based on commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase and sale.

67. This interpretation is supported by two considerations.

68. First, if the first proposition were to prevail, it would automatically turn any subsidy granted to an STE that can be characterized as a "special and exclusive privilege" and that provided the STE with a commercial advantage into a prohibited subsidy. However, Article XVII is manifestly not a subsidy-regulation provision under GATT 1994; and nothing in GATT 1994 or elsewhere in the WTO Agreement suggests that Article XVII provides for a new category of prohibited subsidies.

69. Second, the commercial considerations requirement cannot properly be interpreted to mean that an STE must use its special or exclusive privilege in such a way that the purchases or sales involving imports or exports are made on terms that are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges because that would nullify Member's rights under Article XVII. If the first interpretation were to prevail, a Member could grant exclusive or special privileges to an STE, but if the STE utilized those exclusive or special privileges, the Member would be in violation of its obligation under Article XVII.

**24. Pursuant to Article XVII:1(a), each Member undertakes that its STEs "shall" act in a specified manner. Please explain the meaning and usage of the term "shall" in Article XVII:1(a). In particular, what, if any, difference in meaning would there be if Article XVII:1(a) had said that each Member "undertakes" that its STEs "will" act in the specified manner?**

70. The word "undertakes" creates a positive obligation on the part of Members in respect of the conduct of state trading enterprises. In this context, there is no difference between "shall" and "will", because either way, the Member is answerable in respect of the discriminatory conduct of the STE in question.

***Canada:***

**36. With reference to paras. 46 and 150 of Canada's first written submission, are all Western Canadian wheat farmers automatically members of the CWB?**

71. There is no membership in the CWB. Western Canadian producers who, (a) choose to produce wheat and barley, and (b) wish to sell the wheat and barley they produce for export or for domestic human consumption must apply for a CWB permit book and market such grain through the CWB. These same producers also vote for the Board of Directors of the CWB.

**37. Is the CWB required to purchase all Western Canadian wheat that is offered to it? If not, has the CWB made use of the possibility to refuse to purchase Western Canadian wheat, for instance in a situation where there was an oversupply of wheat in international markets?**

72. The CWB is not required to purchase all Western Canadian wheat that is offered to it. There have been numerous instances in the past where the CWB has not accepted all of the wheat offered to it for delivery, particularly with respect to durum wheat.[3]

**38. Is the CWB required to sell all wheat purchased by it, or could the CWB decide not to market all wheat purchased, for instance if doing so would maximise returns to farmers? If the**

[3] For example, see Exhibit CDA-54 for Contract Acceptance Levels for 1995-96 to 2001-02.

**CWB is required to sell all wheat purchased, is the CWB required to market wheat within a particular time-period after purchase, or is it free to determine when to sell?**

73. The CWB is not required to sell all of the wheat that it purchases, and it could decide not to market all wheat purchased if doing so would maximize returns to farmers.

74. Any such decision would be driven by considerations such as the cost of storing the grain in the commercial handling system and the logistical implications of retaining those stocks. For example, the CWB does not own grain storage facilities. And so, the benefit of retaining the stocks would have to be weighed against the additional storage fees that the private grain handlers would charge the CWB. Similarly, the capacity of the Canadian grain handling and transportation system is relatively constrained such that it requires regular turnover to remain efficient and effective. Thus, withholding stocks of certain products would lessen the system's capacity to handle other products. That in turn could result in foregone revenue from those other products. So again, the costs and benefits of the decision would have to be weighed.

**39. With reference to para. 31 of the US first written submission, is the income generated by CWB short-term investments financed through government-guaranteed borrowing "pool money" that is "returned" to farmers? If not, is this income at the disposal of the CWB such that it could be used, for instance, to finance export sales, which do not cover the price, paid to farmers less marketing expenses?**

75. Income generated from investments is paid into the pool accounts. Income paid to pool accounts is done in accordance with Section 8 of the *CWB Act*, which specifies that these earnings are to be used to pay "expenses incurred by the Corporation in its operations". Surpluses remaining in the pool accounts must be paid out to producers.

**40. Regarding the 1998 amendment to the *CWB Act* (US first written submission, para. 66), why was it deemed necessary to insert a "NAFTA-clause", but not a "WTO-clause"?**

76. The decision in 1998 was not one of including a "NAFTA-clause" and/or a "WTO-clause". A NAFTA-clause already applied to the CWB as a Crown corporation under the *Financial Administration Act* (the "*FAA*") and the decision was to continue this requirement for the CWB once it was no longer a Crown corporation.

77. Section 61.1 of the *CWB Act* (the "NAFTA-clause") is an identical provision to that of Section 154.1(1) of the *FAA*.[4] Section 154.1(1) of the *FAA* applies to all Crown corporations. On 31 December 1998, when the first elected CWB directors assumed office, the CWB ceased to be a Crown corporation. Therefore, in order for this provision to continue to apply to the CWB, it was incorporated into the *CWB Act*. The wording of the two provisions is identical except for changes that were necessary to alter a general provision (i.e., applying to all Crown corporations) to a particular one (i.e., applying to a particular corporation, the CWB).

78. A "NAFTA-clause" was inserted in the *FAA* and, subsequently, in the *CWB Act*, because of the nature of the obligation in NAFTA. The relevant provisions are Article 1502(2) and 1503(2), which both begin with the phrase "[e]ach Party shall ensure, through regulatory control, administrative supervision or the application of other measures…". The wording of Articles 1502(2) and 1503(2) of the NAFTA is significantly different from that of Article XVII of GATT 1994. Accordingly, Canada's implementation of those obligations through a "NAFTA clause" is of limited relevance in determining the scope and nature of the obligation set out in Article XVII. The repeated reference by the United States to the "NAFTA clause" in the *CWB Act* as proof that Canada is in

[4] Exhibit CDA-55.

violation of its WTO obligations is nothing less than an impermissible attempt to import the language of NAFTA into the WTO Agreement, an attempt that the Panel should resist.

79. In any event, to the extent that a "WTO clause" might be relevant to the performance of Canada's obligations under Article XVII, the Panel might wish to consider that Article 103(1) of the NAFTA affirms the rights and obligations of the Parties to each other under GATT 1994. This includes Article XVII. A requirement to respect the NAFTA, in the context of a "NAFTA clause", also necessarily incorporates a requirement to respect the requirements of GATT 1994, including those of Article XVII.

80. Therefore, not only is "WTO clause" not required by Article XVII, but it would be redundant in the face of a "NAFTA clause".

**41. If a particular provision of the *CWB Act* were open to more than one interpreting and one of these interpretations would result in an inconsistency with Article XVII, would a Canadian judge need to construe the *CWB Act* so as to conform to Canada's obligations under Article XVII?**

81. Canada is a dualist parliamentary common law jurisdiction. Canada "receives" customary international law through judicial interpretation and application of the common law. However, treaty obligations require implementing legislation to be in force domestically and are not incorporated into domestic law upon ratification.

82. In the past, having due regard to Canada's parliamentary tradition, Canadian courts applied the law laid down by statute even if inconsistent with a treaty binding on Canada. In such rare circumstances, Canada would have been liable internationally for any consequent breach of its treaty obligations.

83. The situation has, however, evolved. In recognition of Canada's extensive web of international obligations, courts have been prepared to interpret domestic law so as to conform as far as possible with international law. Recent examples of this include *Baker* v. *Canada (Minister of Citizenship and Immigration)*[5] and *114957 Canada Ltee. (Spraytech, Societe d'arrosage)* v. *Hudson (Town)*.[6] In both cases, the Supreme Court of Canada endorsed the following statement[7] from a prominent commentator on statutory construction:

> [T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.[8]

84. Accordingly, where treaty obligations are not directly incorporated into Canadian law, Canadian courts consider international treaty obligations as "relevant context" in interpreting constitutional and statutory provisions.

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[5] [1999] 2 S.C.R. 817 (Exhibit CDA-56).
[6] [2001] 2 S.C.R. 241 (Exhibit CDA-57).
[7] Found at pp. 861 and 266 respectively [emphasis added by courts].
[8] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994), p. 330 (Exhibit CDA-58).

***Both Parties:***

**42. As a supplement to Exhibit CDA-24, could the parties provide an estimate of the volume and proportion of US-origin grain imported into Canada for domestic consumption as compared to that imported for re-export?**

| VOLUME OF US-ORIGIN GRAIN IMPORTS (TONNES)[9] | | | |
|---|---|---|---|
| **Year Ended** | **Domestic Consumption (Proportion)** | **Re-export (Proportion)** | **Total** |
| | | | |
| 31 July 2003 | 5,385,196 (79%) | 1,474,092 (21%) | 6,859,288 |
| 31 July 2002 | 5,138,744 (71%) | 2,064,337 (29%) | 7,203,081 |
| 31 July 2001 | 3,562,392 (66%) | 1,854,785 (34%) | 5,417,177 |

**43. Are the findings at para. 11.169 of the panel report on Argentina - Hides and Leather[10] mutatis mutandis and at paras. 8.133-8.134 of the panel report on US - FSC (Article 21.5 - EC)[11] relevant to this Panel's assessment of whether the grain segregation and rail transportation measures give rise to differential treatment as between "like" products within the meaning of Article III:4 of GATT 1994?**

85. The findings of the panel in *Argentina - Hides and Leather* and of the panel in US - *FSC (Article 21.5 – EC)* are not applicable. Canada does not argue that no US-origin grain is like Canadian-origin grain simply because of its origin. However, because Canadian and US-origin grain are not subject to the same quality assurance system, different treatment of the Canadian and US-origin grain does not amount to "treatment less favourable" under Article III:4.

**44. Are all imported and domestic products falling within each of the categories of "grains" as defined in section 5(1) of the Canada Grain Regulations "like products" for the purposes of Article III:4 of GATT 1994, or are there different "like" products within each of the categories of grain? Are all imported and domestic products falling within each of the categories of "grains" or "crops" as defined in section 147 of the Canada Transportation Act "like products" for the purposes of Article III:4 of GATT 1994, or are there different "like" products within each of the grain or crop categories?**

86. For the purposes of the *CGA*, not all grain types are like. For example canola is not like wheat as they have different characteristics and end-uses. In addition, within each type of grain there are different "like" products. For example, the top quality of barley is used for malting whereas the lower quality is used for feed purposes only. The sale prices as well as end-uses of these two products are different. Elevators would therefore ensure that these two qualities of barley are kept separate from one another. There are many different classes of wheat produced in Canada that have different inherent characteristics and are grown for different uses, such as hard red spring wheat (for bread) as

[9] Statistics Canada and Canadian Grain Commission data.

[10] Panel Report, Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather ("Argentina – Hides and Leather"), WT/DS155/R and Corr.1, adopted 16 February 2001.

[11] Panel Report, United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities ("US – FSC (Article 21.5 – EC) "), WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW.

opposed to soft white winter wheat (for cookies). Some varieties of sunflower seed are grown for oil and others for food use.

87. For the purposes of the *CTA*, each type of grain is a different "like product".

**45. Could the parties respond to the EC's assertion in paragraph 43 of its third party written submission that a bulk grain handling system, such as that covered by the Canada Grain Act, "offers cost advantages compared to other ad hoc distribution possibilities."**

88. We understand the EC to suggest that it is more cost efficient for a farmer to go through the Canadian bulk grain handling system than to sell its grain directly to end-users. It is not clear on what basis the EC makes such an assertion, as it provides no evidence in support.

89. The EC allegation is not correct and reflects a misunderstanding of the economic realities of the North American grain market.

90. Bulk grain handling facilities such as primary elevators are efficient at accumulating grain from many local grain producers (who deliver relatively small lots by truck) and loading it on railway cars, which are then transported over long distances in multi-car blocks. Both Canada and the United States have bulk handling systems. In the vast majority of cases, a US farmer is closer to a US primary elevator than to a Canadian primary elevator. It is therefore more efficient (and cost-effective) for US-origin grain to be accumulated in US elevators and for US rail cars to deliver the grain directly to rail car unloading facilities operated by end-users, than it is for a US farmer to truck grain to a Canadian elevator. As well, using primary elevators is not cost free. Canadian primary elevators charge a minimum of $10-$15/tonne (roughly twice as much as US elevators). Storage, drying and other services, if required, would result in additional costs. Therefore, given that in the majority of cases US-origin grain has already been delivered through a primary elevator in the United States, there would be no reason to incur a second handling charge by delivering grain to a Canadian primary elevator.

91. A US shipper would not normally want to incur extra charges if grain could be shipped directly to an end-user. In fact, most grain destined for the Canadian market, whether of US or Canadian origin, goes directly to end-users.

***Canada:***

**57. Does Canada have a way of knowing whether imported grain, once it enters the bulk grain handling system, is destined for domestic consumption/use, or for re-export?**

92. In the case of a primary elevator, the destination of the grain is provided to the CGC with the request for authorisation to receive foreign grain.

93. When imported grain is received into a terminal or transfer elevator it is registered on the CGC's electronic registration system. At this point the destination of the grain is unknown. Once the grain leaves the elevator, the elevator is required to register the destination of the grain on the CGC's electronic registration system. The CGC would then know if the grain is destined to a domestic end-user or is being re-exported. The same process applies to domestic grain.

**58. With respect to section 56(1) of the Canada Grain Regulations, how is Eastern Canadian grain which has been mixed graded? For instance, is it graded as "Eastern Canadian Soybeans - Mixed" in a case where soybeans of different grades are mixed?**

94. In the case of some types of grain, such as wheat or corn, there are grades established for grain produced in Western Canada (western grain) and grain produced in Eastern Canada (eastern grain), because these types of grain are produced in both regions, but are of different varieties and quality or end-use characteristics. The "Eastern" or "Western" designation identifies the regional origin of the grain. In the case of some other kinds of grain, like soybeans, which are only produced in significant volumes in eastern Canada, the established grades do not specify eastern or western, but simply identify the grain as Canada origin. Due to the differences in quality between eastern grain and western grain, they are not mixed together in the handling system, unless specifically authorized by CGC.

95. If different grades of a class of eastern grain, for example White Winter Wheat, have been mixed together, the combined lot would be graded according to the specifications the lot meets. For example, if #1 Canada Easter White Winter Wheat is mixed with #3 Canada Eastern White Winter Wheat, the combined lot may meet the specifications for #2 Canada Eastern White Winter Wheat and would be graded as such.

**59. With respect to the section 72(2) orders by the Canadian Grain Commission that are contained in Exhibits CDA-28, 29 and 30:**

**(a) Have there been orders pursuant to which the mixing in transfer elevators of Canadian and foreign grain or of foreign grain only was rejected?**

96. No request for mixing of Canadian and foreign grain in transfer elevators has been denied.

97. No authorization is necessary for mixing of foreign grain with foreign grain.

**(b) have there been instances where domestic grain was granted mixing authorisation under section 72(2) in situations not covered by the authorisations contained in section 56 of the Canada Grain Regulations?**

98. Yes, requests to mix the top two grades of milling wheat at terminal elevators are frequently made by the CWB, and granted by the CGC.

**60. Do any procedures apply for the mixing of Eastern Canadian grain pursuant to section 56 of the Canada Grain Regulations? If so, what are they?**

99. Subsequent to mixing, Eastern Canadian grain has to be inspected to determine the grade of the mixed lot, subject to Section 50 of the *Regulations.*

**61. In para. 228 of its first written submission, Canada states that there is a process whereby the Canadian Grain Commission allows receipt of US-origin grain into transfer elevators on an annual basis. Could Canada provide further information and evidence regarding such orders? Is this process available to foreign grain other than US-origin grain?**

100. At present, annual consent has been given for US-origin grain only. Annual consent was given for all foreign grain until 2002, when Canada encountered some phyto-sanitary problems with imports of Ukrainian-origin grain. Consent could be given for an elevator to handle several shipments of foreign grain or a series of shipments over the course of a period of time, on request, and that request would be granted if the CGC did not have any phyto-sanitary concerns and was given information regarding its destination. Two examples of such requests and authorizations are attached as Exhibit CDA-59 **[both contain strictly confidential information]**.

101. Advance consent orders are automatically issued to transfer elevators year after year, although they are often adjusted on request.

**62. With respect to the Wheat Access Facilitation Programme referred to at paras. 196 and 229 of Canada's first written submission, please answer the following questions:**

**(a) Has the programme ever been used by US grain producers? (see Canada's first written submission, para. 239)**

102. US-origin grain producers have never availed themselves of this Programme. Although about thirty Canadian elevators registered in the programme to receive US-origin wheat, US producers did not deliver any wheat to these elevators. Economic realities are the most likely explanation: for any number of reasons, including the weakness of the Canadian dollar, wheat prices at elevators were simply too low in Canada, or alternatively, handling charges too high compared to US handling charges. It has been more attractive for US farmers to deliver their wheat to US elevators.

103. Indeed, as part of a 6-month review of the *Canada-US Record of Understanding*, Agriculture and Agri-Food Canada contacted Canadian primary elevators to seek their views on the WAFP. Canadian elevator operators noted that:

- US producers had not used the programme because of the price spread between Minneapolis and Canadian values;
- they could not find customers wanting US wheat, or willing to pay the company's margins to get it; and
- prices in Canada were not good enough to persuade a US farmer to participate.

**(b) Is this programme applicable to grain other than wheat?**

104. No. The programme was implemented at the request of the US government in respect of wheat.

**(c) Is this programme applicable only to Western Canadian primary elevators? (Exhibit CDA-27, p.7)**

105. Yes. The programme was designed at the request of the US government to facilitate access of US-origin grain into Western Canadian primary elevators.

**(d) Is this programme applicable to foreign grain other than US-origin grain?**

106. No. This programme was specifically designed to respond to a US government request.

**(e) How does the "advance consent" system work in practice? How do elevator operators wishing to import US wheat proceed?**

107. An explanation of how the programme works is contained in the CGC Memorandum to the Trade (Exhibit CDA-60).

**63. With reference to para. 263 of Canada's first written submission, could Canada elaborate on why the grain segregation measures are "necessary" in order to "secure compliance" with the grading provisions of the Canada Grain Act, the Canada Wheat Board**

**Act and what Canada refers to as the misrepresentations and consumer protection provisions of Canada's competition laws?**

108. Because foreign grain is not subject to the same quality assurance system as Canadian grain, if US wheat, for example, were mixed with Canadian wheat, the CGC would no longer be able to visually grade Canadian wheat. Unlike Canadian-origin wheat, US-origin wheat is not subject to the same requirement for visual distinguishability between varieties with different end-use characteristics. Thus, the Canadian visual grading system cannot function properly and maintain segregation in the system according to particular qualities desired by end-users if US-origin wheat is commingled with Canadian-origin wheat.

109. In addition, most US wheat is grown from varieties not registered in Canada. If mixing occurred with no restrictions, the specific end-use characteristics could no longer be ensured. In Canada, if a variety does not perform well (that is, meet the acceptable criteria and end-use characteristics for its class) it will not be registered. For example, at the end of two years of testing in Canada, the Alsen wheat variety was refused registration because of poor quality performance. This variety is grown extensively in the United States. Segregation requirements for foreign grain that is not subject to the Canadian quality assurance system is necessary to maintain the integrity of the Canadian grading system.

110. In addition, the measures are necessary to secure compliance with Canada's unfair competition and consumer protection because, in order to determine the origin of the grain in the grain handling system, it is necessary to keep grain of different origins separate from one another and to identify them properly if they are mixed so as not to misrepresent them. This is particularly important where the grain is exported as the importing country often requires a certification that the grain is Canadian origin grain. If Canada were not able to determine the origin of the grain in its grain handling system, it would not be able to provide this assurance to countries purchasing its grain and to comply with section 32 of the *CGA*. No other measure is reasonably available that would ensure strict compliance with the prohibition against misrepresentation of origin.

111. Finally, the measures are necessary to secure compliance with the provisions establishing the CWB as a single desk exporting STE, as contained in the *CWB Act*, because the relevant CWB privileges apply to the sale of Canadian wheat for export or for domestic human consumption; if foreign wheat were not distinguished from Canadian wheat, the monopoly authority of the CWB could not be enforced.

**64. Could Canada please provide support for its assertion at paras. 286 and 287 of its first written submission that (i) the setting of rates is left entirely to the prescribed railways; and (ii) that for all movements that include a non-revenue cap portion, the railways have the discretion to charge what the market will bear, regardless of what the rate may be for the revenue cap portion of the movement?**

112. (i) Railways charge differential rates, that is, what the market will bear, as referenced in reports of the Canada Transportation Act Review Panel and the US Surface Transportation Board.[12] There are no provisions in the revenue cap section of the *Canada Transportation Act* (see Part III of Exhibit US-9) or elsewhere that set rate limits on individual grain movements with the following minor exceptions (which are not at issue in this case):

(a) single car rates for revenue cap movements from branch lines cannot exceed single car rates for substantially similar revenue cap movements from mainline points by more than 3 per cent;

[12] See para. 289 of Canada's First Written Submission and Exhibits CDA-34 and CDA-45.

(b) the Canadian Transportation Agency (the "Agency") sets "interswitching" rates for all traffic that originates within 30 kilometres of a point where traffic can be inter-changed between two railways; and

(c) the Agency has a limited ability to set rates for all traffic that is inter-changed between two railways outside the 30 kilometre "interswitching" limit in the event the two railways and/or shipper cannot agree on the rate.

113. (ii) Railways charge differential rates, i.e. what the market will bear, as referenced in reports of the Canada Transportation Act Review Panel and the US Surface Transportation Board.[13] There are no provisions in the *CTA* (see Part III of Exhibit US-9) that set rate limits on individual grain movements that are not covered by the revenue cap provisions, including the portion of movements that originate or terminate outside the geographic territory covered by the revenue cap, with the following minor exceptions (which are not at issue in this case):

(a) the Agency sets "interswitching" rates for all traffic that originates within 30 kilometres of a point where traffic can be inter-changed between two railways; and

(b) the Agency has a limited ability to set rates for all traffic that is inter-changed between two railways outside the 30 kilometre "interswitching" limit in the event the two railways and/or shipper cannot agree on the rate.

**65. Could Canada please explain why the statement at page 36 of Exhibit CDA-34 that "the cap was to allow flexibility in grain transportation rates while simultaneously giving protection to farmers by constraining the total revenues the railways could capture from moving grain" does not suggest that foreign producers would be treated less favourably with respect to movements covered by the cap?**

114. The purpose of the revenue cap when it was established was indeed to give protection to farmers while providing flexibility in setting rates in order to encourage competition and efficiencies. The revenue cap was only one element of government policy reforms that were aimed making the system more commercial, competitive and accountable.

115. The Agency's analysis, which was accepted by the United States in the CVD case, is evidence that the Canadian government's policy reforms have achieved this objective and that any constraint on railway revenues is now driven by the market, not by the revenue cap.

116. Because the revenue cap does not constrain railway revenues, it does not result in less favourable treatment for foreign producers.

[13] Ibid.

# ANNEX A-3

## RESPONSES OF AUSTRALIA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

**Question 1**

1. As noted in the submission of Australia to the Panel, Australia considers that subparagraph XVII:1(b) is to be viewed as a component of the obligation defined in subparagraph XVII:1(a). The elements of subparagraph XVII:1(b) are to be applied to assist a Panel in determining whether the standard of behaviour laid down in subparagraph XVII:1(a) has been met. Subparagraph XVII:1(b)is not a separate standard for STE behaviour and does not found a separate obligation on Members.

2. The first task of any Panel therefore is to determine whether the MFN and National Treatment principles are applicable to the act in question within the factual context of the dispute. In then applying these principles to the facts, the Panel is to utilise, as appropriate to the principle being applied, the definitional assistance provided in subparagraph XVII:1(b).

**Questions 2 and 3**

3. Both questions 2 and 3 appear to consider the meaning and application to various hypothetical situations of the elements of subparagraph XVII:1(b) in isolation from the general principles of non-discriminatory treatment which they further define and elaborate. As noted above, Australia does not consider this to be appropriate. Further, application of Article XVII:1 should be undertaken on a case by case basis, having regard to the actual facts at issue. However Australia does wish to make the following points concerning interpretation and application of Article XVII:1(a) and (b) which would be applicable to such questions.

4. Australia submits that in examining any act complained of under Article XVII it is first necessary to consider which non-discriminatory principle/s are applicable to the particular purchasing or selling situation. They are not both necessarily applicable to every situation. When this is determined, it must be considered which of the elements of subparagraph XVII:1(b) are applicable to the behaviour subject to complaint, including their appropriate relationship to each general principle. They may then be applied, having regard to all the facts of the case, as part of examining whether the STE has acted in a manner consistent with the applicable general principles.

5. A particular purchase or sale by an STE for import or export to which the principle of MFN or the principle of National Treatment is *not* applicable cannot be separately tested for its 'commerciality' or whether adequate opportunity has been provided to other Member's enterprises to compete in that purchase or sale.

6. As an STE's exporting behaviour has not before been considered under Article XVII, and the issue of export behaviour has hardly been considered in terms of the application of MFN or National Treatment under GATT 1994, the appropriate application of either principle has not been examined in regard to a similar factual situation as this dispute.

7. With regard to the application of the MFN principle to sales for export, Australia notes that pursuant to the Interpretive Ad Note to Article XVII, price discrimination between export markets for commercial reasons will not fall foul of this principle. Moreover it does not appear consistent with how MFN has been applied and interpreted under GATT 1994 for an exporting Member's (or its STE's) MFN obligation to be considered to include a concurrent obligation to all other Members to afford them adequate opportunities to compete for participation in the market for which that Member's exports are destined.

8. Australia would also note that the way in which special or exclusive privileges have been considered in the hypotheticals does not properly distinguish the key issue - that it is not what privileges or monopoly rights (which are permissible under GATT 1994) may *enable* an STE to do, but whether what it actually *does* (in terms of purchases or sales involving either imports or exports) is consistent with the general principles of non-discriminatory treatment of GATT 1994.

9. Application of Article XVII to any STE purchase or sale must be undertaken on a case by case basis, having full regard to the particular commercial circumstances of the case. The hypothetical scenarios do not capture the complex interaction between the many factors that influence world market prices for agricultural products, including factors such as the market structure, the impact of government policies, variations in product quality, and other changes in variables influencing demand/supply for a particular product in a particular market.

**Questions 4 and 5**

10. As with the response to questions 2 and 3, Australia does not consider that the content and meaning of 'the commercial considerations' requirement can be considered in isolation from the applicable general principle of non-discrimination that it is used to further define.

11. Article XVII is not intended to place STEs with such privileges on the same footing as non-privileged enterprises. Each form of enterprise is equally consistent with GATT 1994. Australia considers the purpose of Article XVII:1 was simply to require that all STEs, whether exercising such privileges or not, act in a way that is not inconsistent with the general principles of non-discriminatory treatment governing international trade under GATT 1994 – including by acting consistently with commercial considerations.

12. Australia considers that the particular factual situation of the case at issue is of relevance in considering the action complained of in terms of 'commercial considerations'. This would include consideration of the type of STE undertaking such purchases or sales for import or export as well as the particular commercial context in which that STE operates and the nature of the actions subject to complaint.

**Question 6**

13. The current text is unambiguous. The word 'shall' signifies the treaty- level obligation that Members are here undertaking concerning the acts of their STEs. It is used for all substantive obligations of Members under GATT 1994. There is little relevance in considering whether the use of the word 'will' would make a difference in meaning to Article XVII.

**Question 7**

14. As was stated in the Australian submission to the Panel, the undertaking of Members in Article XVII:1(a) concerning the behaviour of their STEs does not impose any direct obligation on a Member beyond an obligation of result. It cannot be interpreted to imply further obligations concerning how an individual Member should meet this undertaking.

**Question 8**

15. Australia does not see how the National Treatment principle can be considered to prohibit discrimination by an STE in terms of sale between its export market and its domestic market - that is discrimination between internal and external markets. The essence of National Treatment is the prevention of discrimination within the internal marketplace. The nexus to what happens in the external marketplace would not seem relevant to an inquiry into such discrimination.

16. Australia would also note that domestic and export markets are driven by different and particular conditions of supply and demand which will impact on the price that can be realised in each market. Different behaviour, including as regards pricing, by an STE in its domestic and in its export markets does not *per se* equate to or signify some form of 'discrimination'.

# ANNEX A-4

## RESPONSES OF CHINA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

**MEASURES RELATING TO EXPORTS OF WHEAT**

**1. Once a panel has determined that, in making certain export sale(s), a STE did not act in conformity with the standards set forth in Article XVII:1 (b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment.**

Answer

On this point we agree with the Panel on *Korea – Beef* that took the view that "…the terms 'general principle of non-discrimination treatment prescribed in this Agreement' (Art. XVII:1(a)) should be equated with 'make any such purchases or sales solely in accordance with commercial consideration' (Art. XVII:1(b)). 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."[1]

We think that the Panel on Korea – Beef case gave the proper interpretation of the relation between Article XVII:1(a) and Article XVII:1(b).

**2. The second Clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity to "to compete for participation in such purchases or sales "**

**(a) Is the expression "such purchases or sales " a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

Answer

Under Article XVII: 1 (a), WTO Members undertake that if they establish or maintain a state enterprise, or grant exclusive or special privileges to any enterprise, such enterprise shall , in its purchases or sales involving either imports or exports, act in a manner consistent with the general

[1] Panel report on Korea – Various Measures on Beef, para. 757.

principles of non-discriminatory treatment, which is further required by explanation in Article XVII:1(b) to mean that such enterprises shall make any such purchases and sales solely on the basis of commercial considerations and shall afford the enterprises of the other Members adequate opportunity, in accordance with customary business practices, to compete for participation in such purchases or sales.

Therefore, the expression "such purchases or sales " is a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a).

**(b) Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises, which are interested in buying wheat from the CWB (i.e., wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (i.e., wheat sellers) or (iii) other enterprises?**

Answer

Our position is that the relevant "enterprises" are (i) buyers of Canadian wheat, and (iii) other enterprises— e.g., wheat suppliers to CWB. Article XVII:1(b) states that "such enterprises shall … afford the enterprises of the other contracting parties adequate opportunity … in such purchases or sales." In the case of CWB, "purchases" mean the purchases of CWB from its suppliers and "sales" mean the exports made by CWB. To comply with Article XVII:1(b), CWB must give adequate competing opportunity to buyers in its sales( i.e. exports), and suppliers in its purchases. With respect to (ii) competitors, CWB has no such obligation, because it is not in a superior position than its competitors for sales to the same wheat buyers. They are on the same line competing with each other.

**3. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b).**

**(a) The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

Answer

Yes, this is in compliance with commercial consideration requirement within the context of Article XVII:1(b). The *Ad* Article XVII paragraph 1 states:

> "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."

If a subsidized supplier charges a low price, it will be certain that the original equilibrium of demand and supply in this market will be broken and will be forced to shift to a new market situation favourable to the subsidized suppliers, which means that the situation of demand and supply will change. To meet this new situation of demand and supply, i.e., the new market competition situation, a STE has to quote and charge a competing price. This situation falls just within the scope of the above *Ad* note.

**(b) The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth**

**in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or would not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

Answer

To charge a competing price, which might be lower than that charged in market 1, to deter other exporters from contesting export market 2 for maintaining a priority market or its prior market share is a normal practice based on the commercial considerations according to the market competition situation even if the price would not be charged in the absence of the special or exclusive privileges. If maintaining a priority market by deterring competitors is solely based on commercial considerations, the special privileges underlying them cannot alter the nature of it. If the exclusive rights or special privileges are not in violation of Article XVII in themselves, the using of them by a STE in accordance with commercial considerations is not a violation, either. If a privilege or a right cannot be used, it will not be a privilege or right at all.

**(c) The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

Answer

Yes, this is a commercial consideration. If the price-elasticity of import demand is lower in export 1, a STE could increase the price without running the risk of reducing demand. This is in conformity with the economic rational, and certainly the "commercial considerations" requirement.

**(d) Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markers, which it could not do but for its exclusive right to export the product concerned (assume the STE's product is perceived as superior in quality for instance such that there is no significant competition from other products).**

Answer

Yes, this is a commercial consideration. To pursue monopoly profit is a commercial consideration. To go a step further, to pursue monopoly rents by the using of the exclusive rights or special privileges is also a commercial consideration. If this line of reasoning was defied, the natural result would be that the granting of exclusive rights or special privileges is a violation of Article XVII in itself and Members would be deprived of the right to establish STEs.

**4. Is the "commercial considerations" requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases of sales involving import or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the "economic considerations" requirement essentially intended to make sure that STEs act like rational economic operators, i.e., that in their purchase or sale decisions, they are guided only by the consideration of their own economic interest?**

Answer to the first question

No. If this was the intention of Contracting Parties of GATT or Members of WTO, they would have made a clear and express statement in this regard in Article XVII. As to the meaning of the phrase "commercial considerations", the interpretative notes and the drafting history indicate that

Article XVII:1 (b) would not preclude the charging by a state trading enterprise of different prices in different export markets;[2] nor consideration of the advantages of receiving a "tied loan" in connection with a purchase.[3] Moreover, it was understood that the phrase "customary business practice" as used in Article XVII:1 (b) was intended to cover business practices customary in the respective line of trade.[4]

Answer to the second question

Yes. This illustrates the proper interpretation of "commercial considerations".

**5. Do the "commercial considerations" requirement in Article XVII:1 (b) vary depending on what type of entity (e.g., co-operatives, share-capital corporations, etc.) is conducting the purchase or sales operations?**

Answer

First, we think that it is clear that no matter what type of entity a STE is, it should make purchases and sales in accordance with commercial consideration. Second, the elements of "commercial considerations" or the weight of each element to be given to may vary with the type of entities conducting the purchase or sales operation. Article XVII:1(b) provides that a STE shall "…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…" This provision lists some elements of commercial considerations and allows a STE to consider "other conditions of purchase or sale". Different type of commercial entities may take different elements into account in their operation or give different weight to each of the element listed. The standard should be that a STE shall take the same considerations into account as what a private-sector enterprise of the same type of entity should do. If in private sector a cooperative and a share holding company have different considerations in the ordinary course of their business, then STEs in form of cooperative or in form of share holding company may do the same thing, which is not against the "commercial considerations" requirement provided in Article XVII:1.

**6. Pursuant to Article XVII:1(a), each Member undertakes that its STEs "shall" act in a specified manner. Please explain the meaning and usage of the term "shall" in Article XVII:1(a). In particular, what if any, difference in meaning would there be if Article XVII:1(a) had said that each Member "undertakes" that as STEs "will" act in the specified manner?**

Answer

According to Black's Law Dictionary, "shall" ,when used in statutes, contracts or the like, is "generally imperative or Mandatory", "and in common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning; as denoting obligation", but "it may be construed as merely permissive or directory (as equivalent to 'may'), to carry out the legislative intention and in case where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense."[5] In the same dictionary, "will" is "an auxiliary verb commonly having the mandatory sense of "shall" or "must." [6] We can see that in legal

[2] Interpretative note to Article XVII:1.
[3] Interpretative note to Article XVII:1(b).
[4] Analytical index, op. cit., 477.
[5] Black's Law Dictionary (1979), at 1233.
[6] Id, at 1433.

uses, these two words carry almost the same meaning. In the context of Article XVII:1, with the preceding word "undertake", these two words will not make any significant differences. Members undertake that a STE "shall" act in a specified manner or "will" act in this kind of manner both means that Members shall assume responsibilities if a STE they established fails to act in this specified manner.

**7. Do the third parties agree with the United States' view that Article XVII:1(a) imposes an obligation on Members to take affirmative measures to ensure that their STEs comply with the Article XVII:1(a) standards? [US first written submission, paras.50-52,67-69]**

Answer

No. We agree to Canada's view that the obligation of Members under this provision is an "obligation of result". We think that GATT Article XVII does not impose an obligation on governments to involve in STE's everyday operation. If a government were imposed such an obligation, it would be too burdensome and not practical. Moreover, such an obligation runs afoul of the objective of GATT Article XVII.

**8. With references to Para 55 of the US first written submission, do the third parties agree that Article XVII:1(a) 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"?**

Answer

No. Our position is that no support could be found for the US allegation in this regard neither in Article XVII:1(a) nor in the whole context of Article XVII.

**MEASURES RELATING TO TREATMENT OF IMPORTED GRAIN**

**9. With reference to paras 207, 217 and 279 of Canada's first written submission, is it correct that Article III:4 of the GATT 1994 does not apply to laws affecting the transportation of goods in-transit?**

Answer

It is correct that Article III:4 does not apply to laws affecting goods in-transit. The text of Article III:4 is that:

> The products of the territory of any contracting party *imported* into the territory of any other contracting party 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 use*……(emphasis added)

Therefore, Article III:4 applies only to laws affecting the imported goods.

Moreover, Article V of GATT 1994 provides for the freedom of transit of goods, and also vessels and other means of transport. There is no point of stretching Article III:4 to cover the transit goods.

# ANNEX A-5

## RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

## I. MEASURES RELATING TO EXPORTS OF WHEAT

For all Third Parties:

**1. Once a panel has determined that, in making certain export sale(s), an STE did not act in conformity with the standards set forth in Article XVII:1(b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment.**

According to the wording of Article XVII:1(b), the provisions of subparagraph (a) "shall be understood" to require that STEs make any purchases or sales solely in accordance with commercial considerations. In the view of the EC, a finding that the standard of subparagraph (b) has not been met automatically entails the finding that subparagraph (a) has been violated. This means that if a panel establishes that an STE has not acted in accordance with commercial considerations in its purchases or sales, it may make a finding of a violation on that basis alone.

The EC would like to add that, as it has set out previously[1], it considers that subparagraphs (a) and (b) of Article XVII:1, even though interrelated, are not identical in scope. This means that inversely, if a Panel does not find a violation of the standard of Article XVII:1(b), it should still examine whether the STE has also complied with the standards of Article XVII:1(a).

**2. The second clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity "to compete for participation in such purchases or sales".**

**(a) Is the expression "such purchases or sales" a reference to a given STE's "purchases or sales involving either imports or exports", *i.e.*, the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

The EC considers that the term "such purchases or sales" in subparagraph (b) is to be considered as a reference to the term "purchases or sales involving either imports or exports" in subparagraph (a). However, the EC would like to specify that in its view, sales may also be said to involve "imports" if the product sold has previously been imported, and purchases may be said to involve "exports" if the products purchased are subsequently exported. In this way, the term

[1] EC Third Party Submission, para. 9.

"purchases or sales involving either imports or exports" encompasses the entire trading activity of an STE.

**(b) Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (*i.e.*, wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (*i.e.*, wheat sellers) or (iii) other enterprises?**

Article XVII:1(b) does not further define the "enterprises" of the other contracting parties to which "adequate opportunities" must be afforded. For this reason, the EC considers that the relevant enterprises can be (i) the enterprises which are interested in buying wheat from the CWB (*i.e.*, wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (*i.e.*, wheat sellers), or also (iii) other enterprises which offer wheat to the CWB for sales abroad.

**3. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b):**

**(a) The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

The export subsidy would constitute a factor influencing supply which is outside the control of the STE, and which will tend to lower market price in market 2. By charging a lower price in market 2, the STE would therefore be acting in accordance with commercial considerations.

**(b) The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or could not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

The term "commercial considerations" should be defined in the light of normal commercial behaviour. Normal commercial behaviour involves the setting of prices on the basis of the conditions of supply and demand, which are taken as given constraints. Setting prices below normal market levels in order to exclude competitors and thereby influencing the constraints on the market cannot be regarded as normal commercial behaviour. This is independent of whether the prices could have been charged in the absence of the special and exclusive privileges of the STE.

**(c) The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

The price elasticity of import demand constitutes an external factor outside control of the STE. By charging a higher price in export market 1 than in export market 2, the STE would therefore act in accordance with commercial considerations.

**(d) Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markets, which it could not do but for its exclusive right to export the product concerned (assume the STE's product is perceived as superior in quality for instance, such that there is no significant competition from other products).**

The EC considers that it must be distinguished whether the STE is able to charge premium prices because its product is perceived as superior in quality to other products, or merely because of its exclusive rights. If the price premiums are due to superior quality of the product, then the STE acts in accordance with normal considerations in charging a higher price. In contrast, if the STE charges premium prices in the absence of an objective justification, such as superior quality, it no longer acts as a participant subject to the constraints of the market, and does not act in accordance with commercial considerations.

**4. Is the "commercial considerations" requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases or sales involving imports or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the "commercial considerations" requirement essentially intended to make sure that STEs act like rational economic operators, *i.e.*, that, in their purchase or sale decisions, they are guided only by the consideration of their own economic interest?**

Article XVII does not affect the right of WTO Members to establish STEs and to endow them with special and exclusive rights. Therefore, the mere use of such special rights does not constitute a violation of Article XVII:1(b). However, the EC also considers that "commercial considerations" cannot be regarded as purely requiring economic rationality. Rather, "commercial considerations" should be defined in terms of normal commercial behaviour of economic actors subject to market constraints.

**5. Is the term "commercial considerations" a concept which is neutral in its application? Or do the "commercial considerations" vary depending on what type of entity is conducting the purchase or sales operations?**

In the view of the EC, the term "commercial considerations" is a concept which refers to normal commercial behaviour of a market participant subject to the constraints of the market.

**6. Pursuant to Article XVII:1(a), each Member undertakes that its STEs "shall" act in a specified manner. Please explain the meaning and usage of the term "shall" in Article XVII:1(a). In particular, what, if any, difference in meaning would there be if Article XVII:1(a) had said that each Member "undertakes" that its STEs "will" act in the specified manner?**

In the view of the EC, Article XVII:1(a) establishes, for the Member concerned, an obligation of result with respect to the behaviour of the STE it has established. This means that if the STE acts in a manner not in accordance with Article XVII, the Member will be in violation of Article XVII:1(a), regardless of whether and how the Member involved has influenced the behaviour of its STE.

In the view of the EC, the terms "shall" or "will" both express a firm commitment. There would therefore not be any difference in meaning if Article XVII:1(a) used the term "will" instead of "shall".

**7. Do the third parties agree with the United States' view that Article XVII:1(a) imposes an obligation on Members to take affirmative measures to ensure that their STEs comply with the Article XVII:1 standards? (US first written submission, paras. 50-52, 67-69)**

In the view of the EC, Article XVII:1(a) establishes an obligation of result with respect to the behaviour of STEs. In contrast, Article XVII:1(a) does not specify specific measures which the WTO

Member. However, if the WTO Member fails to take the necessary measures, and the STE acts in violation of Article XVII:1, it will be responsible for this violation.

**8. With reference to para. 55 of the US first written submission, do the third parties agree that Article XVII:1(a) 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"?**

The EC considers that if the CWB discriminates in its terms of sale between exports markets, and such discrimination is not justified by commercial considerations, it acts in violation of Article XVII:1(b). This is explicitly confirmed by the last paragraph of the Ad Note to Article XVII:1. In the view of the EC, it is not decisive whether the discrimination is made possible by the exclusive privileges of the CWB or not.

## II. MEASURES RELATING TO TREATMENT OF IMPORTED GRAIN

For all Third Parties:

**9. With reference to paras. 207, 217 and 279 of Canada's first written submission, is it correct that Article III:4 of the GATT 1994 does not apply to laws affecting the transportation of goods in-transit?**

The EC notes that Article III:4 establishes an obligation of national treatment in respect of laws, regulations and requirements affecting the "internal sale, offering for sale, purchase, transportation, distribution or use". In contrast, the transit of goods across the territory of a party is governed by the disciplines of Article V GATT. The EC therefore agrees that Article III:4 does not affect the transportation of goods in transit.

For the EC:

**10. With reference to footnote 11 of the EC's written submission, please indicate what types of trade-distorting conduct would *not* be covered by Article XVII.**

The EC meant to recall that Article XVII does not affect the right of WTO Members to establish STEs. Accordingly, trade distortions which result directly from the establishment of the STE, but are not attributable to any specific trade-related conduct of the STE, are not contrary to Article XVII:1.

**12. Could the EC please elaborate on its arguments in paragraph 37 of its third party submission relating to claims made under GATT Article III:4. In particular, why does the EC state that "some US wheat may not be like Canadian wheat, for instance if it is of a different variety, grade, and quality" while at the same time arguing that domestic and imported wheat must be "like" because such wheat "but for the difference in origin, is otherwise identical."**

The EC intended to clarify that wheat of a certain variety, grade, or quality, is not "like" wheat which is of a different variety, grade, or quality. The EC therefore discussed the Canadian segregation measures only to the extent that they concern wheat of identical variety, grade, and quality. Under this hypothesis, however, the EC considers that Canadian and foreign wheat must be considered as like products, regardless of origin.

# ANNEX A-6

## RESPONSES OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

**Question 1**

1. Article XVII:1(b) of GATT 1994 provides in part that "[t]he provisions of subparagraph (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..." A literal reading of this provision suggests that the provision is not intended as a separate independent obligation on Members. Instead, it serves as a further elaboration of the obligation under 1(a). By examining the scope established under 1(b), a determination can then be made whether a violation of the obligation under 1(a) has occurred. In other words, if an STE does not make its purchases or sales in accordance with commercial considerations, the Member in question would be in violation of 1(a), as interpreted by 1(b).

2. Previous Panel rulings support our reading. In *Korea-Measures Affecting the Import of Fresh, Chilled and Frozen Beef*, the Panel clarified the relationship between non-discrimination under subparagraph (a) and commercial considerations under subparagraph (b). It stated that,

> [t]he 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. (Korea Beef, para. 757.)

In *Canada-Administration of the Foreign Investment Review Act* of 1984, the panel also confirmed that Article XVII:1(b) is not to establish an independent obligation. Instead, it is to interpret the scope of the non-discrimination principle under Article XVII:1(a). The panel report of this case states that,

> [t]he fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words 'The provisions of sub-paragraph (a) of the paragraph shall be understood to require...' (L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.)

The panel should be in a position to find a violation of Article XVII:1 by the said Member on the basis of non-conformity with "commercial consideration" alone.

**Question 2**

3. Article XVII:1(a) of the GATT regulates purchases or sales involving either imports or exports of STEs. If an STE's activities do not have anything to do with import or export, it should not be within the scope of the provision of Article XVII of the GATT. Since subparagraph (b) is a further elaboration of subparagraph (a), the phrase "such purchases or sales" refers to purchases or sales involving exports or imports, as indicated in subparagraph (a).

4. Given above interpretation, the CWB itself as an STE would have to provide enterprises of other Members opportunities with regard to its purchases or sales, taking into account customary business practice. The enterprises of other Members include the buyers of wheat and the sellers of wheat in so far as they seek participation in the purchases and sales involving the STE in question.

**Question 3**

5. There is no definition of the phrase "commercial considerations" either in Article XVII or in other GATT provisions. The question of whether an STE is making decisions on purchases and sales based on commercial consideration must be assessed on a case by case basis. In particular, the structure of the markets, competitions, and other situations particular to the market would determine whether the STE is acting in accordance with commercial considerations.

6. Furthermore, considerations on pricing policy by any enterprise is closely related to the dynamics of competition within a relevant market. How an enterprise determines its behaviour *vis-à-vis* its pricing involves complex considerations such as, *inter alia*, market structure, the intensity of price competition, supply and demand, the value provided to the enterprise in matching/undercutting the prices of competitors, etc. Is an STE selling its excessive stock at a substantial discount in order to minimize losses acting in accordance with commercial considerations? The answer could be in the affirmative. Therefore, the question of whether an STE acts in a manner solely in accordance with commercial considerations can only be answered by reviewing the circumstances surrounding the action in question.

7. With respect to the factors of supply and demand, Ad Article XVII states that,

> [t]he 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.

Thus the condition of supply and demand is another one of the factors to consider when deciding whether commercial considerations have been followed.

8. In any event, it is for the complaining Member to prove that the "inconsistent act" complained of lacks the requisite commercial considerations. We do not consider it appropriate to base an analysis of the term "commercial considerations" purely on hypothetical scenarios which seem to focus solely on the pricing policy of an STE.

9. Nevertheless, it may still be useful to apply the above explanations to see whether the given factors are the possible bases of charging different prices. With regard to the first hypothetical question, the competitive structure of the two markets are different. This "could" be a valid basis for the STE to apply different prices in each market. In other words, the different prices do not

automatically mean that the STE did not act in accordance with commercial considerations. For the second through fourth hypothetical questions, we recognize that the STE might abuse its market position in deciding the sale prices. However, since differential pricing could be a legitimate way of generating of profits, we might not be able to determine whether the STE is setting its prices in accordance with commercial considerations purely by fact that the STE uses different prices to compete in the relevant markets.

**Question 5**

10. We do not consider the type of entity conducting the sale and purchase to be relevant. The Panel should make its determination on a case-by-case basis, taking into account the particular circumstances of the markets in question.

**Question 7**

11. As stated in our Third Party Submission, Article XVII: 1(a) poses only an obligation of result the means of which is the prerogative of the Member concerned.

# ANNEX B

## RESPONSES TO QUESTIONS OF THE PANEL IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING

# ANNEX B-1

## RESPONSES OF CANADA TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(29 October 2003)

***For Canada:***

**69. With reference to the possibility to condition the receipt of foreign grain on it being kept separate from Canadian grain in authorising such receipt under section 57(c) of the *Canada Grain Act* (see, e.g., Canada's second written submission, para. 95), does the power to impose such a condition derive from section 57 itself or is there a provision elsewhere in the Act and/or regulations that provides for this?**

1. The legal authority to impose conditions on the entry of foreign grain into elevators is derived from Section 57 of the *Canada Grain Act* ("*CGA*"). Section 57 of the *CGA* gives discretion to the Canadian Grain Commission ("CGC") to deny entry of foreign grain into elevators. In accordance with Canadian principles of statutory interpretation and administrative law, a discretionary authority to *deny* entry of foreign grain into elevators includes the authority to *permit with conditions* the entry of the foreign grain into elevators. There are no other provisions in the *CGA* or *Canada Grain Regulations* ("*Regulations*") that provide for imposition of conditions on entry of foreign grain into elevators.

**70. With reference to the separate keeping in elevators of domestic grain of different types, grades, protein content and origin, as referred to at paras. 247 and 248 of Canada's first written submission, is such segregation/separate keeping a commercial practice by elevators or a legal requirement? If the latter, please provide the relevant legal text. Also, please indicate whether there is a difference in this regard between different types of elevators (primary, etc.).**

2. The legal restrictions on mixing of grain are found in Section 72 of the *CGA* and Section 56 of the *Regulations* and relate to grain in transfer and terminal elevators. Additional conditions on mixing of foreign grain and Canadian grain *may* also be imposed in orders authorizing entry of foreign grain made pursuant to Section 57 of the *CGA*, though there are no *legal* requirements that such conditions are imposed.

3. Various segregations are also made in primary, transfer and terminal elevators as a result of commercial imperatives to meet grading standards, customer demand or contractual obligations.

**71. With reference to Canada's reply to Question 63 and also to sections 57 of the Canada Grain Act and section 56 of the Canada Grain Regulations, have there been instances where no requirement was imposed that foreign grain be kept separate from Canadian grain, or where mixing of foreign grain with domestic grain was allowed without a requirement that it not be designated as "Canadian grain"? Could Canada indicate/estimate in relative terms (percentage terms) how common an occurrence this is? (For the written answer: Please provide supporting evidence.)**

4. Nothing in Canadian law or regulations mandates segregation of foreign and Canadian grain. Where elevators purchase foreign grain with an intention to mix it with Canadian grain, they generally indicate this in their entry authorization request; in these circumstances, the CGC has agreed with the mixing request and required that the mixed grain not be designated as Canadian grain.

5. In 2002-2003, for example, about 12% of entry requests received by the CGC also contained a request to mix the foreign grain with Canadian grain. All these requests for entry and mixing were granted.

6. As a matter of practice, if there is no request for mixing from the elevator, the entry authorization requirement includes a condition that the foreign grain be kept separate.

**72. What is the legal relationship between the Wheat Access Facilitation Programme and section 57(c) of the *Canada Grain Act*? In particular, has the Wheat Access Facilitation Programme been established under the authority of section 57(c)? Please provide documentary support.**

7. An authorization order under Section 57 of the *CGA* may be provided either ad hoc on request by the elevator, or in advance for multiple shipments over a specified period. One of the examples of such advance authorization under Section 57 of the *CGA* is the authorization given under the Wheat Access Facilitation Programme ("WAFP") for entry of US-origin wheat into certain participating Canadian primary elevators.

8. Elevators may either avail themselves of the advance consent provided by the Canadian Grain Commission under the WAFP, if they meet the requirements of the Programme, or use the normal Section 57 entry authorization process (either for one shipment or for multiple shipments of wheat). Therefore, to the extent the US claim is that Section 57 as such is inconsistent with Article III, the WAFP is not relevant as it is non-mandatory and is only an example of how the authority under Section 57 of the *CGA* has been implemented.

9. To the extent that the United States has concerns about the exercise by the CGC of its discretion under Section 57 in specific instances - including pursuant to the WAFP - it should have raised these matters in its request for the establishment of the Panel. It did not do so. In fact, it did not even raise the WAFP as a measure until its second written submission. The US attempt at expanding the scope of this dispute at a late stage of the proceedings should be resisted.

10. Finally, Canada recalls that the governments of Canada and the United States negotiated the WAFP in response to concerns raised by the US Government. Indeed, the WAFP is annexed to a Record of Understanding between the two governments.[1] Canada questions the extent to which, in the light of the principle of good faith in international law as implied in the maxim *Pacta Sunt Servanda*, the United States should be permitted to challenge the very agreement it has negotiated.

**73. With reference to section 57(c) of the *Canada Grain Act*, once the receipt of foreign grain has been authorised, does a CGC employee have to be physically present, in most or all cases, to monitor the flow of the foreign grain into the elevator bins? If so, do CGC employees similarly monitor the flow of Canadian-origin grain into elevator bins?**

11. Canadian law does not require CGC inspectors to be present at either primary or transfer elevators to monitor receipt of grain into the elevator. And indeed, it is rare that CGC inspectors are present at either of these elevators for that purpose. This is true both for foreign and Canadian grain.

[1] See paras. 229-230 of Canada's First Written Submission for a description of the WAFP.

The *CGA* requires that CGC inspectors be present at terminal elevators to monitor the flow of grain into elevators, for both Canadian and foreign grain.[2]

**74. With reference to Canada's reply to Question 13(d), how common is CGC monitoring of receipt or discharge and who pays for this in cases where such a requirement is imposed?**

12. Nothing in Canadian law or regulations requires CGC monitoring of receipt or discharge of grain at elevators and indeed it is very rare that the CGC imposes this type of condition either for Canadian grain or for foreign grain. In those rare cases where an inspection condition is imposed, for example in the case of Starlink maize, the elevator pays the cost of CGC monitoring.

**75. With reference to Canada's reply to Question 14(c), at what stage and where do the type of inspections referred to in section 32 of the *Canada Grain Act* occur?**

13. Official inspections are always required for grain going into and out of terminal elevators. At transfer elevators, official inspections are generally required on discharge from the transfer elevator, and on request, are conducted on receipt of the grain into the elevator. Official inspections may also occur at primary elevators on request.

**76. Canada indicates in its responses to Questions 16(b) and 59(a) that there is no authorisation requirement for the mixing of different grades and classes of foreign grain. Could Canada explain why section 72(2) of the *Canada Grain Act* does not apply in such cases? Furthermore, if there is no requirement for the mixing of different grades and classes of foreign grain, would Canada nevertheless impose a requirement that such mixed foreign grain not be designated as "Canadian" grain, etc. If so, what would be the legal basis for such a designation requirement?**

14. The prohibition in Section 72(1) does not apply to foreign grain.

15. Section 72(1) by its terms only applies to grain of a certain "grade". Foreign grain is not graded under the *CGA*: Section 16(1) authorizes the CGC to establish grades for "western grain" and for "eastern grain". Eastern grain and Western grain are defined in Section 2 of the *CGA* respectively as being grain grown in the Eastern part of Canada and grain grown in the Western part of Canada. As a result, grades are not set for foreign grain under the *CGA*. Therefore, the prohibition under Section 72(1) regarding mixing of grain of different "grades" does not apply to foreign grain. Because the prohibition in Section 72(1) does not apply to foreign grain, neither does the authorization requirement in Section 72(2).

16. Nothing in Canadian law mandates the imposition of mixing restrictions; any such restrictions result from conditions or limitations imposed upon entry of foreign grain into the system under Section 57 of the *CGA*. In order to avoid misrepresentation, any entry authorization that allows mixing of foreign grain would also contain a requirement that the mixed foreign grain not be designated as Canadian.

**77. Does section 72(1) of the *Canada Grain Act* allow the mixing of foreign grain with Canadian grain of the same grade?**

17. As explained in answer to Question 76, the prohibition in section 72(1) does not apply to foreign grain. The CGC authorizes mixing of Canadian grain with foreign grain regardless of the foreign grain's quality, as long as the mixed lot is not represented as being Canadian grain.

[2] This is because CGC inspectors are required by the *CGA* to conduct official inspections on all grain received into terminal elevators.

**78. With reference to section 151 of the *Canada Transportation Act,* please clarify element "E". In particular:**

**(a) Does element E mean that the number of tonnes to be moved per crop year are fixed by the Canadian Transportation Agency?**

18. Element E (tonnage) is not fixed by the Canadian Transportation Agency ("CTA"). Rather, the number of tonnes moved in a crop year depends on market factors such as grain production and sales. After the crop year has ended, the railways report the number of tonnes moved in the crop year to the CTA. The CTA reviews, audits and adjusts (if necessary) the number submitted by the railways to make a determination as to the value of element E.

**(b) Is the maximum revenue entitlement determined in advance of the crop year or ex post? How is this taken into account by the relevant railroad companies in setting rates for the current crop year?**

19. The Maximum Revenue Entitlement for each railway is determined *ex post*, because the Maximum Revenue Entitlement is dependent on the number of tonnes hauled and the average length of haul incurred during the crop year in question. The Maximum Revenue Entitlement is also dependent on the allowable inflation factor (as reflected by Element F in the formula). This factor is determined by the CTA in advance of the crop year and is not adjusted ex post.

20. The Maximum Revenue Entitlement is not taken into account by railways in setting rates for the current crop year. Railways set rates based on market factors as is apparent from the growing difference between the Maximum Revenue Entitlement and the actual railway revenues – a difference that is expected to continue into the future. The Maximum Revenue Entitlement does not constrain the railway's ability to set their railway rates.

**79. According to para. 85 of Canada's second written submission, around 20 per cent of US grain that passes through the Canada grain handling system is for re-export. With reference to Article V of the GATT 1994, please indicate:**

**(a) What processes and/or transformation, if any, does US grain undergo in Canada before re-export?**

21. The 20 per cent of US-origin grain referred to in Canada's table is mostly grain transiting through Canada and not grain "imported" into Canada for re-export *as grain*.

22. This grain does not undergo any process or transformation.

**(b) Under Canadian law, what processes and transformation confer origin on the types of grain covered by the *Canada Grain* Act?**

23. Under the *CGA*, "Canadian grain" is grain grown in the Eastern or Western region of Canada.[3] No process or transformation would confer Canadian origin to foreign grain.

**(c) Can grain be considered to be "in-transit" within the meaning of Article V of the GATT 1994 where (i) it is temporarily stored in elevators, (ii), in addition to being stored, is also cleaned in elevators, and (iii) is mixed with other grain?**

24. Article V of GATT 1994 applies to goods "in transit across the territory of a Member when the passage across such territory, with or without … warehousing … is only a portion of the complete

[3] See Section 2 of the *CGA* (Exhibit US-7).

journey…". [emphasis added] Grain temporarily stored in an elevator is the equivalent of warehousing. Accordingly, temporary storage does not remove the goods in transit from the application of Article V.

25. US-origin grain that is "in-transit" is neither cleaned nor mixed. The grain can be stored for any period of time but would remain "in-bond".

**(d) With reference to footnote 38 of Canada's second written submission, is Canada suggesting that, for instance, foreign grain that enters a Canadian primary elevator which is then sent to a transfer elevator for re-export is always accompanied by a long term storage form?**

26. No. US-origin grain entering primary elevators is generally destined for the domestic market or, on rare occasions, may be re-exported but it is not "in-transit". However, Canada notes that most US-origin grain that enters Canada destined for a third country goes directly to a transfer elevator and is "in bond".

**80. With respect to Canada's defence of section 57 of the *Canada Grain Act* and section 56(1) of the *Canada Grain Regulations* under GATT Article XX(d), and with reference to the panel report on *European Economic Community - Regulations on Imports of Parts and Components* (BISD 37S/132, paras. 5.14-5.18) which suggests that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws with which compliance is sought to be secured, please identify for each of the laws referred to (*Canada Grain Act,* etc.), and provide the text of, the obligations with which sections 57 and 56 seek to secure compliance. In addition, please provide details of how sections 56 and 57 are necessary to secure compliance with the relevant provisions of the laws in question.**

27. As a threshold matter, Canada notes that in a case subsequent to *EEC - Parts and Components*, the WTO panel in *Korea - Beef* recognized that a measure designed to "secure compliance" need not have enforcement of the justifying law as its sole objective.[4] With this in mind, Section 57 of the *CGA* and segregation requirements are necessary to secure compliance with the following provisions:

- Sections 32, 61 and 70 of the *CGA*[5] and Schedule III of the *Regulations*:[6] Section 32 of the *CGA* provides that where a CGC inspector makes an official inspection it shall issue an inspection certificate assigning a grade, where the grain is grown in Canada, and stating the country of origin where the grain was grown outside Canada. Sections 61 and 70 of the *CGA* and Schedule III of the *Regulations* provide for grading of grain and inspections. Section 57 of the *CGA* and segregation requirements ensure that Canadian grades are not inadvertently and inappropriately given to non-Canadian grain (contrary to the *CGA)* and result in misrepresentation as to origin and as to end-use characteristics of the grain.

- Sections 5, 7(1), 24, 32 and 45 of the *Canadian Wheat Board Act* ("*CWB Act*")[7] and Section 16 of the *Canadian Wheat Board Regulations* ("*CWB Regulations*"):[8] These provisions collectively set out the CWB's sole authority to market all wheat and barley produced in the "designated area" (the Provinces of Manitoba, Saskatchewan, Alberta

[4] *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, Report of the Panel, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 656-658 and n. 363.

[5] Exhibit US-7.

[6] Exhibit CDA-22.

[7] See Exhibit US-2.

[8] Exhibit CDA-68.

and the Peace River area of the Province of British Columbia) that is sold either for export of for domestic human consumption. In respect of wheat and barley, Section 57 of the *CGA* and segregation requirements ensure that foreign grain maintains its identity so as to ensure that the CWB's exclusive jurisdiction over the export of CWB grain is neither eroded nor inadvertently extended contrary to the *CWB Act*. They do so by enabling wheat and barley, with respect to which the CWB has no exclusive marketing mandate, to be kept separate from the grain that the CWB has been established to market.

- Section 52 of the *Competition Act*:[9] Section 52 of the *Competition Act* prohibits false *or* misleading representations to the public with respect to a product. Section 57 of the *CGA* and segregation requirements ensure that foreign grain maintains its identity in the bulk handling system so that there is no misrepresentation as to origin and misleading representations with respect to end-use characteristics of the grain contrary to Section 52 of the *Competition Act*.

28. Canada refers the Panel to paragraphs 114-125 of Canada's Second Written Submission for further details as to the necessity of the measures at issue to ensure compliance with these provisions.

**81. With reference to Canada's reply to Question 63, is there any reason why Canada could not secure compliance with the relevant laws and could not maintain the integrity of its grading system if foreign grain could be received into elevators without a need for prior CGC authorisation, but subject to the general requirement that foreign grain be kept separate from domestic grain, unless the CGC grants an exemption from this requirement on request?**

29. The need for authorization prior to entry into an elevator is necessary to address situations such as where there is an SPS concern or a concern regarding an unapproved genetically modified event in shipments of grain. This is particularly important as once the grain enters an elevator, it is very difficult, if not impossible, to deal with the consequences. Such an occurrence would have a serious negative impact on both the level of consumer confidence in the Canadian quality assurance system, and indeed the ability of Canada to ensure and guarantee the quality of grain it is exporting.

30. The importance of this was highlighted recently by the discovery in Canada of a *single* cow with BSE, with significant and continuing negative consequences. As a result, many countries around the world banned the importation of beef from Canada. In the case of grain, if certain products (for example, even trace amounts of GMO grain) not approved in Canada or other countries were found in shipments of Canadian grain, it would have a deleterious effect on Canadian exports. Millions of tonnes of grain pass through the bulk grain handling system and are transported in tens of thousands of rail cars. Given that, Canada must be aware of grain entering the system that has not been subject to the Canadian quality assurance system and have the capacity to address any problems in order to assure the quality of its exports.

31. Accordingly, the entry of foreign grain into the bulk handling system that is used to move Canadian grain for export can raise SPS concerns that are additional to any SPS concerns arising from the importation of foreign grain into Canada.

***For both parties:***

**82. Please elaborate on what is an investment measure related to trade in goods within the meaning of Article 1 of the TRIMs Agreement.**

32. There is no definition for an "investment measure related to trade in goods" in the TRIMs Agreement. Accordingly, this phrase must be interpreted in accordance with the principles of treaty

[9] Exhibit CDA-69.

interpretation in customary international law. The ordinary meaning of the words indicates that this requires: (1) an investment measure, that is, a measure that has an investment objective such as encouraging the development of local capacity; and (2) that this investment measure be related to trade in goods and not, for example, trade in services. This phrase, which defines the scope of the TRIMs Agreement, can also be understood in light of the Illustrative List, which is part of its context and provides examples of the type of investment measures related to trade in goods that are contemplated as falling within the scope of the Agreement.

33. An example of a trade related investment measure is the measure at issue in *Indonesia - Autos*.[10] In making the determination that there was an investment measure at issue, the panel noted that the car programme was

> aimed at encouraging the development of a local manufacturing capability for finished motor vehicles and parts and components in Indonesia. Inherent to this objective is that these measures necessarily have a significant impact on investment in these sectors ... we emphasize that our characterization of the measures as "investment measures" is based on an examination of the manner in which the measures at issue in this case relate to investment.[11]

34. In this case, the measures at issue deal with handling of grain in elevators and with transportation of grain and are not aimed at "encouraging investment".

35. Canada also refers the Panel to its First Written Submission at paragraphs 316-321.

**83. With reference to paras. 1 and 2 of the Illustrative list annexed to the TRIMs Agreement which contain the word "local production", is the investment contemplated in these paras. investment pertaining to local production of goods, or could investment pertaining to the local supply of a service also qualify as "investment" within the meaning of the TRIMs Agreement?**

36. Article I of the TRIMs Agreement limits the scope of the Agreement to investment measures related to *trade in goods*. Items 1(a) and 2(a) of the Illustrative List of the TRIMs Agreement contemplate requirements for "*use*" of products, whether specified in terms of particular products, in terms of volume of value of products, or in terms of a proportion of volume or value of *its* local production. The term "its local production" refers to the production of the "products" being used, that is, the goods, and both must be read together.

**84. With respect to the rail revenue cap, it would appear that an advantage, if any, could accrue to Western Canadian grain and its purchasers/sellers, but not to the railway companies transporting it. Is such an advantage covered by the provisions of Item 1(a) of the Illustrative List annexed to the TRIMS Agreement?**

37. No. Given that the revenue cap is not an investment measure, it does not even come within the scope of the TRIMs Agreement. In addition, the purpose of local content requirements is to favour use of domestic products over imported products in production processes and that is why they are considered to be trade distorting. If the advantage does not accrue to the person "using" the product there would be no encouragement to "use" the domestic product. In any event, Canada notes that in the recently concluded countervailing duty investigation of Canadian wheat exports to the United States, the Department of Commerce found that there was no advantage being given by the revenue cap.[12] Even assuming that Canadian grain is more attractive to domestic purchasers/sellers

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[10] *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998 ("*Indonesia-Autos*").

[11] *Indonesia – Autos*, para. 14.80.

[12] Exhibit CDA-45.

because of the rail revenue cap, Canada recalls the finding of the *Indonesia-Autos* panel that "[t]he TRIMs Agreement is not concerned with subsidies … as such but rather with local content requirements, compliance with which may be required through providing any type of advantage."[13]

**85. How do the parties define the term "use" in Item 1(a) of the Illustrative List contained in the Annex to the TRIMS Agreement?**

38. The term "use" in Item 1(a) of the Illustrative List can be understood as consuming, processing or transforming the product. Grain elevators and railways do not "use" grain but rather provide a service (handling, cleaning or transportation) in respect of grain. In contrast, a flourmill would be "using" wheat to produce flour and an oil seed crushing facility would be "using" soybeans to produce vegetable oil. The US interpretation of the term "use" as including transportation and handling is contrary to the ordinary meaning of the word: it cannot be said that the driver of a truck transporting toothbrushes "uses" those toothbrushes.

***For Canada:***

**96. What is the purpose of the second clause of Article XVII:1(b) ("afford … adequate opportunity … to compete for participation in such purchases or sales")? What does the second clause add to the first clause ("commercial considerations")?**

39. Article XVII:1(a) sets out the primary obligation of the Members in respect of state trading enterprises, while Article XVII:1(b) defines the scope of that obligation by setting out circumstances in which discrimination that is otherwise caught by subparagraph (a) would not come within the scope of Article XVII:1 at all.

40. The type of discrimination that would be caught by Article XVII:1(a) is that set out in Article I of GATT 1994. This is where an advantage, favour, privilege or immunity is extended to one Member, but not to others. Where a product is purchased from a Member (in the case of an import monopoly) or exported to a Member (in the case of an export monopoly), this "advantage" may amount to discrimination in one of two ways:

- **first**, other Members (and, perforce their enterprises) could be denied this opportunity outright; or

- **second**, the terms and conditions of the transactions under which other Members are given this opportunity could be less advantageous than those provided to the initial purchasers or sellers.

41. Where such distinctions are established, and they are not in accordance with the provisions of Article XVII:1(b), such advantages are inconsistent with Article XVII:1.

42. Admittedly, Article XVII:1(b) is not a model of clarity. However, the structure of Article XVII:1(b) reflects the reality of the two types of discrimination that may exist and, more specifically, the object of each element.

43. We begin with the words of the first clause of subparagraph (b). It applies to situations where a state trading enterprise "*makes* […] purchases or sales…". By definition, therefore, the first clause of subparagraph (b) *presupposes* that the state trading enterprise has already decided to enter into a business relationship – whether of purchase or sale – and the question is the *terms and conditions* of the resulting agreement. The clause thus places discipline on the considerations that the state trading

[13] *Indonesia-Autos*, para. 14.73.

enterprise must take into account in imposing terms and conditions on the transaction they *make*: these considerations must be *commercial.* If the terms and conditions for one sale are different from those for another, the difference must be in accordance with commercial considerations, such as the factors set out in the subparagraph.

44. This, however, leaves the other situation of potential discrimination: where a Member and its enterprises are entirely excluded from even *competing* for purchases (from export monopolies) or sales (to import monopolies). In these circumstances, the issue is not the *terms and conditions* of a purchase or sales agreement (in which the factors mentioned in the first clause would be highly relevant), but rather the very chance, the opportunity to compete for such transactions. The second clause of subparagraph (b) addresses a situation where no purchase or sale has taken place because a state trading enterprise refuses to consider even allowing a purchaser or seller the opportunity to compete for participation in its purchases or sales. In this context, the factors set out in the first clause – such as price and quality of the product at issue – are not immediately relevant. And so, Article XVII:1(b) provides that for such an *exclusion from consideration* to be consistent with Article XVII:1, it must be in accordance with customary business practice. Accordingly, refusal by a state trading enterprise to consider even the opportunity for such purchases or sales by enterprises of a Member *not* based on customary business practice would result in the violation of Article XVII:1.

**97. With reference to para. 39 of Canada's second written submission, is Canada suggesting that in respect of export sales by an STE, the MFN principle set out in Article I would not prohibit the selling at a <u>lower</u> price or under less stringent terms and conditions in one market than when selling in another?**

45. The most-favoured-nation principle under Article I provides that any "advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in, or destined for, the territories of all other contracting parties."

46. Under Article XVII, the application of the most-favoured-nation principle in respect of exports sales by a state trading enterprise would require that the state trading enterprise provide any *advantage*, *favour* or *privilege* granted in respect of products destined for purchasers in one WTO Member immediately and unconditionally to products destined to purchasers in other WTO Members. In the context of this question, the "advantage, favour or privilege" is the lower price or less stringent terms and conditions. In other words, the most-favoured-nation principle would prohibit the selling at a higher price or under more stringent terms and conditions in one market than in another.

47. Left untempered by Article XVII:1(b), the application of the most-favoured-nation principle under Article XVII:1(a) would require the state trading enterprise to charge the same lower price or impose the same less stringent terms and conditions in all markets. Without Article XVII:1(b) a state trading enterprise would be required to sell at the same price and under the same terms and conditions in all markets regardless of varying market conditions. State trading enterprises would, therefore, be placed at a *disadvantage* as compared to private traders. Such an outcome does not accord with common sense.

48. Article XVII:1(b) interprets the obligation under Article XVII:1(a) to the effect that an export state trading enterprise may discriminate in its sales, that is, charge different prices or impose different terms and conditions in different markets, as long as it does so based on "commercial considerations". Only where an export state trading enterprise fails to offer the lower price or less stringent terms or conditions to other Members because of *non-commercial considerations* would the export state trading enterprise violate Article XVII.

49. Further, this interpretation is supported by Note *Ad* Article XVII, which provides that

> [t]he 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.

The Note makes clear that the charging of different prices in different markets is not discrimination under Article XVII:1, as long as it is based on commercial reasons.

**98. With reference to para. 95 of Canada's second written submission, does not, or might not, a condition to keep foreign grain separate from domestic grain entail costs for an elevator operator, including the costs of separate/additional bins, etc.?**

50. The requirement to keep foreign grain separate from Canadian grain does not entail extra costs for an elevator operator. Elevators in Canada are constructed to be able to handle numerous segregations of grain – for example, between different *types* of grain as well as different *grades* of a type – and elevator operators are experienced in managing elevator capacity to handle a large number of segregations. Being required to keep foreign grain separate from Canadian grain is simply one segregation amongst many that occur in elevators.

**99. Could Canada elaborate upon, including by providing the legislative basis for and the practicalities associated with, the inspection and reporting requirements with respect to Canadian grain referred to in response to Questions 14(c) and 15? Do these requirements apply to foreign grain as well?**

51. Official inspection and other grading requirements are found at Sections 61 of the CGA for primary elevators and at Section 70 of the *CGA* for terminal and transfer elevators. With respect to Section 70 of the *CGA*, official inspections at terminals are required both upon receipt of the grain into the terminal and upon discharge from the terminal; for transfer elevators, official inspection is only required upon discharge.

52. Foreign grain is not graded by the elevator on receipt into primary elevators, nor is it officially inspected by the CGC at transfer and/or terminal elevators.

53. The reporting requirements are based on Sections 79-80 of the *CGA* and Sections 23-27 of the Regulations. Details of reporting requirements, reporting forms and instructions can be found at http://www.grainscanada.gc.ca/regulatory/licensees/forms-e.htm.

54. Reporting requirements also apply to foreign grain. However, because foreign grain is not subject to the same quality assurance system prior to its entry into Canadian elevators, relying on reporting is not sufficient in the case of foreign grain to address potential concerns.

**100. With reference to section 32 of the Canada Grain Act:**

**(a) Does this section cover cases where grain has been mixed? If so, what types of mixing are covered (i.e., mixing foreign grain with domestic grain, etc.)?**

55. Section 32(1)(a) covers cases where Canadian grain has been mixed with other Canadian grain. Section 32(1)(b) covers cases where Canadian grain has been mixed with foreign grain or foreign grain mixed with other foreign grain.

**(b) Are section 32 inspections undertaken only in case of grain destined for export?**

56. No. Official inspections are conducted for export of grain but they are also conducted where grain moves to domestic end-users through a terminal elevator. A significant volume of grain

destined from Western Canada to the domestic market in Eastern Canada moves via the terminal elevators in Thunder Bay and is therefore inspected. Official inspections also occur on request for grain not destined for export; for example, in order to meet customer demand.

**101. With reference to section 56(1), are there any conditions that operators of transfer elevators need to satisfy in order to benefit from the advance mixing authorisation other than the fact that grain needs to be "eastern grain"?**

57. No, but the mixed Eastern grain will be officially inspected upon discharge and will be assigned the grade for which it qualifies.

**102. With reference to Canada's replies to Questions 13(b), 13(c) and 15, how does Canada control shipments of foreign grain for GMO and SPS problems where foreign grain is shipped to the end-user directly rather than through the bulk grain handling system?**

58. SPS problems are usually dealt with at the border. There is a requirement for an SPS certificate both for grain going to end-users and for grain entering elevators. However, no country's border controls are infallible. Given the importance of maintaining the quality and reputation of Canadian grain exports, there are greater concerns for grain entering the bulk grain handling system (which is geared towards exports) than for grain, whether domestic or imported, shipped directly to an end-user. The entry of foreign grain into the bulk grain handling system can raise SPS concerns that are additional to any SPS concerns arising from the mere importation of foreign grain into Canada.

59. Similarly, as regards GMOs, Canada may not have concerns about certain GMOs going directly to end-users. However, Canada may want to protect grain in the bulk grain handling system from genetically modified events not approved in Canada or in other countries, given that most of the grain entering the system is destined for export, including to countries that do not accept GMOs and that have a very low tolerance level for GMO "contamination". Canadian exports could be compromised if even a trace of a genetically modified event not approved in Canada or in other countries were introduced into the bulk grain handling system.

**103. With reference to section 57(c) and para. 196 of Canada's first written submission, why does the CGC not rely on section 57(d) with respect to foreign grain for which there is an SPS concern?**

60. Elevator operators in Canada are experienced in identifying problems with contaminations and infestations and, as a result, such problems within Canada are relatively rare. However, there are disease, weed and insect pests in other countries that do not exist in Canada and with which the Canadian industry may be unfamiliar. Therefore, an elevator operator may not know or "have reason to believe" that there are SPS concerns with respect to specific foreign grain. The CGC possesses more knowledge about SPS concerns and is in a better position to determine what level of protection is necessary.

61. In addition, not all SPS or GMO issues would cause the grain to fall within the definition of "contaminated" grain within the meaning of Section 2 of the *CGA*. For example, although a particular shipment of US wheat may not be "contaminated" (within the meaning of the *CGA*) with a fungal disease such as karnal bunt, for SPS reasons, all wheat from an affected region in the United States would need to be strictly scrutinized.

**104. With reference to para. 161 of Canada's first written submission, are there SPS controls in respect of imports of foreign grain at the border as well, or are the controls in cases of foreign grain entering the bulk grain handling system limited to those the CGC may undertake under section 57?**

62. Foreign grain is also subject to SPS controls at the border.

63. No importer or exporter of US grain to Canada has to apply for an import permit in respect of plant health issues, unless the grain originates in the states of California, Arizona, New Mexico or Texas. Therefore, while US grain shipments are accompanied by phytosanitary certificates indicating freedom from certain diseases or pests, they are not subject to the same scrutiny as imports from most other countries where import permits are required by CFIA.

**105. Why are Alberta, British Columbia, Manitoba and Saskatchewan the only provinces with loading sites eligible for the producer railcar programme?**

64. Section 87 of the *CGA* does not limit "eligible loading sites" to these provinces but simply limits producer cars to "producers". There is no geographical limitation in law, regulation, or in the CGC Producer Car Allocation Orders.

**106. With reference to Canada's Article XX defence, please provide your views on the alternative measures referred to by the EC in its written third party submission at paras. 31 and 32.**

65. Paragraphs 31 and 32 of the EC submission seem to rely on a misunderstanding of Sections 57 of the *CGA* and Section 56 of the *Regulations*. At paragraph 56, the EC notes that: "it is not clear why an elevator which has previously received imported grain could not subsequently receive Canadian, and vice versa". This is not correct. Elevators that receive foreign grain can also receive Canadian grain. Requiring cleaning of the bin after receipt of foreign grain would be imposing significant additional burdens that do not exist under the current system. Furthermore, it would not achieve the objective of avoiding misrepresentation regarding the origin and end-use characteristics of the product. With respect to the reference to "spot checks", it is unclear what the EC is referring to and how this could achieve the same objective.

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

66. There are very minimal amounts of non-registered varieties of wheat grown in Canada whereas most wheat grown in the United States is of varieties not registered in Canada. Non-registered varieties of wheat grown in Canada cannot be graded as milling quality wheat (they are only eligible for feed grades). As a result, production of non-registered varieties of wheat is discouraged in Canada. Elevators would suffer monetary penalties if a shipment of milling quality wheat was found to contain a non-registered variety (in excess of established tolerances). Elevator operators are familiar with varieties grown on farms in the area and will be cautious in order to avoid these monetary penalties. In addition, if an elevator operator has concerns that a shipment may contain unregistered varieties, it can submit a sample to the CGC for testing.

**108. With reference to para. 125 of Canada's second written submission, how does Canada secure compliance with the CWB Act *vis-à-vis* eastern Canadian grain?**

67. Compliance with the *CWB Act* with respect to Eastern Canadian wheat is secured through the requirement in the *CWB Act* (Sections 45 and 46(c)) that exporters of wheat grown outside the CWB designated area must obtain an export licence from the CWB.

68. Eastern wheat is fundamentally different from Western wheat -- Eastern wheat is predominantly soft wheat and it fits in different wheat classes than Western wheat.

69. In any event, in order to mix Eastern grain and Western grain in transfer elevators (the only location where there is both Eastern grain and Western grain) an authorization from the CGC is necessary pursuant to Section 72 of the *CGA* and Section 56 of the *Regulations*.

***ADDITIONAL PANEL QUESTION POSED AFTER THE SECOND MEETING***

***For Canada:***

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

70. Canada takes significant steps to protect the quality and reputation of Canadian grain exports. Canada is also committed to protecting the CWB's exclusive jurisdiction over the export and sale for domestic consumption of Western Canadian wheat and barley. In addition, Canada prohibits misrepresentation of products: it does not want to reduce the level of misrepresentation but to eliminate all misrepresentation with respect to grain. In light of this, Section 57 of the *CGA* and the segregation requirements are designed to secure a very high level of compliance with the grading provisions of the *CGA*, the *CWB Act* and the *Competition Act*.

# ANNEX B-2

## RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(29 October 2003)

***Questions for the United States:***

**Question 66: With reference to the US reply to Question 9, could the United States please confirm that it expects the Panel to rule only on section 56(1) of the *Canada Grain Regulations* as it existed at the time the March and July 2003 panels were established, and not section 56(1) as amended.**

1. Under the Panel's terms of reference, the Panel is called to make findings on Section 56(1) of the Canada Grain Regulations as it existed at the time the March and July 2003 panels were established. We note, however, that Section 56(1) as amended, which is not within the Panel's terms of reference, is essentially the same as Section 56(1) as it was drafted at the time of the panel request. Prior to the amendment, Section 56(1) was written as an explicit prohibition on the mixing of foreign grain. Section 56(1) as amended also prohibits the mixing of foreign grain by stating that only eastern Canadian grain can be mixed. The result is the same, and only the form differs.

**Question 67: With reference to the US claim in respect of section 56(1) of the *Canada Grain Regulations*, please clarify further why an inconsistency with Article III:4 is alleged to arise. In particular, is the United States' argument that if Canada intends to maintain the advance mixing authorisation represented by section 56(1), it should also give advance authorisation for the mixing of foreign grain that is like eastern grain, on the one hand, with eastern grain, on the other hand?**

2. Section 56(1) prohibits a transfer elevator from mixing foreign grain. At the same time, Section 56(1) allows the mixing of eastern Canadian grain.[1] In order to be compliant with its Article III:4 obligations, foreign grain should be treated as like eastern Canadian grain.

3. Section 56(1) does not refer to any advance mixing authorization requirement for eastern Canadian grain. Eastern Canadian grain, a product of national origin for Canada, is like certain foreign grain. Therefore, no advance mixing authorization requirement should be imposed on like foreign grain. An elevator operator should be free to mix foreign grain with foreign grain, as well as foreign grain with like eastern grain, without obtaining prior authorization. Ultimately, it is up to Canada to determine precisely how to comply with a panel finding that Section 56(1) is inconsistent with Canada's obligations under Article III:4.

[1] This is true under Section 56(1) prior to amendment, as well as Section 56(1) as amended. Section 56(1) prior to amendment states that mixing is allowed "if neither of the grains is western grain or foreign grain." Canada Grain Regulations Section 56(1). The only grain that can be mixed, then, is eastern grain. As amended, Section 56(1) reaches the same result and affirmatively states that eastern grain may be mixed. *See* Regulations amending the Canada Grain Regulations, Exhibit CDA-23.

**Question 68: With reference to the US reply to Question 11 and para. 19 of the US second oral statement, is the United States claiming that section 87 is inconsistent with Article III:4 because producers of foreign grain are legally precluded, pursuant to section 87, from having access to producer cars, or because they are in fact denied such access in view of the fact that the producer car loading sites are located in certain areas?**

4. The United States is claiming that Section 87 is inconsistent with Article III:4 because foreign grain is legally precluded from having access to producer cars and is thereby accorded less favourable treatment than like Canadian grain.

5. As evidence that foreign grain is legally precluded from having access to producer cars and is thereby accorded less favourable treatment than like Canadian grain, the United States has shown that producer cars are only available to Canadian grain producers located in certain Canadian provinces. The United States also has pointed out Canadian Government statements that the producer car benefit is only available to producers of Canadian grain.[2] It can therefore be concluded from this evidence – indeed, there is no other logical conclusion that can be drawn – that US grain is legally precluded from receiving the producer car benefit, since Canadian grain producers do not produce US grain.

***Questions for both Parties:***

**Question 82: Please elaborate on what is an investment measure related to trade in goods within the meaning of Article 1 of the TRIMs Agreement.**

6. At the outset, we wish to note that it is not clear whether the TRIMs Agreement requires a separate analysis of whether a measure is a trade-related investment measure. The panel in *Indonesia – Autos* expressly declined to reach this issue.[3] Nevertheless, whether or not the TRIMs Agreement in fact demands a separate analysis of this issue, the measures in this dispute are investment measures related to trade in goods within the meaning of Article 1 of the TRIMs Agreement. Because Canada's grain segregation and transportation measures require elevator operators, shippers and sellers/purchasers of grain to use domestic grain in order to obtain cost advantages, these measures necessarily have investment consequences for those enterprises and are investment measures for purposes of the TRIMs Agreement. These grain segregation and transportation measures also are clearly related to trade in goods, as they affect the sale, purchase, transportation, distribution and/or use of grain and favour use of domestic grain over foreign grain.

**Question 83: With reference to paras. 1 and 2 of the Illustrative list annexed to the TRIMs Agreement which contain the word "local production", is the investment contemplated in these paras. investment pertaining to local production of goods, or could investment pertaining to the local supply of a service also qualify as "investment" within the meaning of the TRIMs Agreement?**

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[2] The United States has offered the web page of Agriculture and Agri-Food Canada as evidence that Section 87 of the Canada Grain Act provides less favourable treatment for foreign grain, and Exhibit US-23 should remain before the Panel for consideration, notwithstanding Canada's attempts to suggest otherwise. Canada repeatedly referred to government web sites during consultations as authoritative descriptions of Canadian measures. Canada also has itself provided the Panel with numerous web pages as evidence (*see, e.g.*, Exhibits CDA-60, CDA-61, CDA-62, and CDA-66). At the second panel hearing, Canada attempted to blur the distinction between measures on the one hand and evidence on the other by referring to Exhibit US-23 as a "measure." The measure at issue here is Canada Grain Act Section 87, and the web page provided by the United States, Exhibit US-23, is evidence of the scope of that measure.

[3] *See Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (25 Sept. 1997), para. 14.71.

7. Only paragraph 1(a) of the Illustrative List is relevant to this dispute, and the phrase "local production" is not applicable to the measures at issue here. In this dispute, the grain segregation and rail transportation measures require the purchase or use of domestic grain. These measures do not state this requirement in terms of a proportion of the value of local production. The Panel need not examine the term "local production" in order to conclude that Canada's grain segregation and transportation measures fall under paragraph 1(a) of the Illustrative List and inconsistent with Article 2 of the TRIMs Agreement.

**Question 84: With respect to the rail revenue cap, it would appear that an advantage, if any, could accrue to Western Canadian grain and its purchasers/sellers, but not to the railway companies transporting it. Is such an advantage covered by the provisions of Item 1(a) of the Illustrative List annexed to the TRIMS Agreement?**

8. Canadian grain and its purchasers/sellers who use the rail transport system to ship Canadian grain obtain an advantage under the rail revenue cap in the form of lower rail transport rates for Canadian grain. This advantage is only obtained when domestic rather than foreign grain is transported, and it is an advantage that is covered by paragraph 1(a) of the Illustrative List. Compliance with the rail revenue cap measure is necessary in order for Canadian grain and its purchasers/sellers to obtain this advantage. The fact that the railway companies must comply with the measure in order for the advantage to be conferred does not place the rail revenue cap measure outside the scope of paragraph 1(a) of the Illustrative List.

**Question 85: How do the parties define the term "use" in Item 1(a) of the Illustrative List contained in the Annex to the TRIMS Agreement?**

9. For purposes of this dispute, and as discussed in our response to the Panel's first set of questions, "use" refers to the handling of grain in the normal course of business, *i.e.*, handling, storage and transport.

***Questions for the United States:***

**Question 86: Could the United States elaborate on what it means when it says that the CWB Export Regime "necessarily results" in CWB export sales that are not in accordance with the Article XVII standards? (*see* US second written submission, para. 3; US reply to Question 1(a))? Is the United States arguing that non-conforming CWB export sales are an inescapable consequence of the CWB Export Regime, or is the United States arguing that it can be presumed, in the light of the various aspects of the CWB Export Regime discussed by the United States, that the CWB will make sales that are not in accordance with the Article XVII standards (*see* US first written submission, para. 70)?**

10. Non-conforming CWB export sales are an inescapable consequence of the CWB Export Regime. The CWB has a statutory mandate to maximize sales of Canadian wheat on the world market. When the CWB fulfills this mandate through the use of its special and exclusive privileges and in the absence of any constraints on the CWB's non-commercial pricing and risk structure, what results are CWB actions that are necessarily inconsistent with Canada's obligations under Article XVII.

**Question 87: With reference to the word "commercial" in Article XVII:1(b), please provide answers to the following questions:**

**(a) How should the word "commercial" be interpreted?**

11. Canada has undertaken under Article XVII:1(b) that the CWB *shall* make its sales *solely in accordance with commercial considerations.* The word "commercial" must be read not in isolation,

but in the context of Article XVII:1(b), which places specific constraints on the actions of the CWB. Consistent with the customary rules of interpretation of public international law, which are reflected in Article 31 of the *Vienna Convention*,[4] the word "commercial" must be interpreted according to its ordinary meaning, in context and in light of the object and purpose of the GATT 1994.

12. Article XVII:1(b) does not caveat or qualify the word "commercial." Nevertheless, recognizing that the CWB does not in fact make sales in accordance with commercial considerations, Canada attempts to read an additional, qualifying phrase into Article XVII:1(b), arguing that "commercial considerations" really means the considerations of a private grain trader in similar circumstances to the CWB.[5] This interpretation frustrates the structure of Article XVII:1, which limits the actions of STEs and sets forth the obligations of Members that chose to establish and maintain STEs. In interpreting the word "commercial" in Article XVII:1(b), one must therefore keep this structure in mind. Furthermore, Canada's interpretation of "commercial" would require the Panel to read into the text words which simply are not there, in contravention of customary rules of treaty interpretation.[6]

**(b) The US can be understood as arguing that it may be "rational" for an export STE to use its special privileges to gain a competitive advantage in the marketplace *vis-à-vis* its competitors, but that export sales made in this manner would not be based on "commercial" considerations. In other words, the US appears to argue that the "commercial considerations" criterion requires more than rational competitive behaviour. (*see* US reply to Question 23, US second written submission, para. 19) If that is correct, could the United States explain how the word "commercial" in Article XVII:1(b) supports this view?**

13. The "commercial considerations" criterion under Article XVII:1(b) requires more than mere rational competitive behaviour. As explained above, one must keep in mind the structure of Article XVII. Article XVII states that Members may establish and maintain STEs and grant them exclusive privileges. However, if a Member chooses to establish such an STE, that Member undertakes that the STE will act in accordance with certain standards of behaviour. Under Article XVII:1(b)'s standards, STEs must make sales solely in accordance with commercial considerations. Nowhere does Article XVII:1(b) state or imply that an STE must merely make its sales as a rational actor with special privileges.

14. Acting rationally and acting commercially are not the same thing, especially when the actor has been afforded special and exclusive privileges and a mandate to promote the sale of Canadian grain in world markets at reasonable prices. Indeed, Merriam-Webster's Collegiate Dictionary confirms this view, listing "reasonable" as a synonym for "rational."[7] Article XVII is clear – Canada undertakes that the CWB will act according to "commercial" considerations, not merely "rational" or "reasonable" considerations. "Commercial" is defined by The New Shorter Oxford Dictionary as "[i]nterested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business."[8] As explained in our first submission[9], the CWB's legal mandate to maximize sales of Canadian wheat at "reasonable" prices[10] leads the CWB to make sales in greater volumes and at lower prices than a normal, profit-maximizing firm. The CWB is not focused on profit and "mere matter[s] of business." Canada has established the CWB and has directed the CWB to act, not in accordance

[4] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331.

[5] *See, e.g.,* Canada's Opening Statement at the Second Meeting of the Parties, para. 33.

[6] *See United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 Feb. 2002), para. 250.

[7] *Merriam-Webster's Collegiate Dictionary: Tenth Edition* (2001), p. 967.

[8] *The New Shorter Oxford English Dictionary* (1993), p. 451.

[9] *See* First Written Submission of the United States, paras. 85-86.

[10] *See* Canadian Wheat Board Act (Exhibit US-2), sec. 7(1).

with commercial considerations, but, instead, to act consistently with the policy objectives set forth in the Canadian Wheat Board Act. The CWB does in fact act according to this legal mandate. The CWB's rational behaviour under the Canadian Wheat Board Act results in the CWB maximizing sales, rather than profits, in furtherance of Canada's policy objectives but not in accordance with commercial considerations. This behaviour is inconsistent with the obligations set forth in Article XVII:1(b).

15. An STE may make full use of its special and exclusive privileges to gain market share in particular markets, for example, by discounting prices to make sales – but that behaviour would not be commercial. "Commercial considerations" in XVII:1(b) specifically references consideration of price, quality, availability, etc. Commercial behaviour driven by these considerations would result in actions that reflect market realities and are consistent across all actors in a given industry or market sector. The special and exclusive privileges granted to the CWB permit it to operate without the normal commercial constraints faced by a fully commercial actor – for example, the reduced risk faced by the CWB because of the government-guaranteed initial payment to farmers and government-guaranteed borrowings. Commercial entities face an entirely different risk structure and would therefore have to act differently in commercial settings. The CWB may act rationally in light of its special and exclusive privileges, but its actions would not be in accordance with commercial considerations. The CWB makes decisions that are not driven by commercial considerations, but are driven by the unique qualities of the CWB export regime, including the CWB's special and exclusive privileges and its policy mandate to maximize sales not profits.

16. Finally, private enterprises must make decisions according to commercial considerations in order to stay in business. For example, a private enterprise cannot engage in long-run predatory pricing or the enterprise will be unable to cover its costs. The CWB, with its special and exclusive privileges and special mandate, however, does not face these commercial market constraints and could therefore engage in sales that are rational (they increase the quantity of wheat sold) but are not commercial in nature (the replacement value of the wheat sold is not recovered). Article XVII:1(b) restores a balance and ensures that STEs like the CWB engage in sales not according to a rational set of criteria, but solely in accordance with commercial considerations.

**(c) With reference to the US reply to Question 22(d), would the United States accept that a private monopolist that is able, due to barriers to entry, to extract monopoly rents in its home market is acting on the basis of what is described as "commercial considerations" in Article XVII:1(b)?**

17. Assuming that the barriers to entry are beyond the monopolist's control, we would agree that a private monopolist may be able to extract rents in its home market and such behaviour would be commercial. However, such pure or natural monopolies are rare, and do not exist in the industry of concern here, *i.e.*, bulk grains. A pure or natural monopoly, of course, differs considerably from a government-granted right of monopsony.

**<u>Question 88</u>: What is the United States' reaction to the Canadian argument, set out at para. 63 of its second written submission, that under the US interpretation of Article XVII:1(b), Members could grant special or exclusive privileges, but STEs would not be able to use them without violating Article XVII?**

18. Canada's argument is without merit. Article XVII expressly provides that Members may establish and maintain enterprises with special and exclusive privileges. However, every Member that chooses to establish or maintain such an enterprise undertakes that the enterprise will act according to the standards set forth in Article XVII:1. For example, under Article XVII:1(b), the CWB must not act in a way that denies the enterprises of other Members an adequate opportunity to compete for participation in the CWB's sales, and the CWB must make its sales solely in accordance with commercial considerations.

19. Contrary to Canada's assertions, Article XVII:1(b) permits the use of special and exclusive privileges within certain parameters. For example, the CWB can exercise its government-granted monopoly privilege related to the sale of western Canadian wheat for domestic human consumption and export. Article XVII:1(b) does not require the CWB to let other entities sell western Canadian wheat, it merely requires the CWB to sell western Canadian wheat in accordance with commercial considerations and in a manner that affords the enterprises of other members an adequate opportunity to compete for participation in those sales.

20. Indeed, the Ad Note to Article XVII supports the US interpretation and provides an example of an STE's use of special and exclusive privileges that is consistent with Article XVII:1(b). The Ad Note states that an STE with special and exclusive privileges is not precluded from price discrimination between markets as long as "such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets."[11]

**Question 89: Would the United States agree that export STEs compete not only with private enterprises that enjoy no government-conferred privileges and are constrained by market forces, but possibly also with private enterprises that may be dominant firms with market power in their home markets, private enterprises that engage in sustained or repeated dumping in third country markets within the meaning of Article VI of the GATT 1994 (but cause no material injury or cause material injury in a country that has no anti-dumping legislation or chooses not to counter such dumping), private enterprises that export agricultural products the exportation or production of which has been subsidized (and do so consistently with the Agreement on Agriculture, for instance), etc.?**

21. In theory, both an export STE and a private corporation compete with the enterprises described above. But the nature of the players in the market does not in any way caveat or alter the obligation under Article XVII:1(b) to act in accordance with commercial considerations. Just as a private corporation would have no choice but to act according to commercial considerations regardless of the players in the market, an STE also must act solely according to commercial considerations. The Article XVII:1(b) standard remains the same whether or not the enterprises listed above compete in the market.

22. In practice, regarding private enterprises that are dominant firms with market power in their home markets and private enterprises engaged in sustained and repeated dumping in third country markets, the United States does not agree that the CWB is in fact competing with such enterprises. These two hypothetical scenarios are unlikely to exist in the world bulk grain sector. This is because private enterprises selling grain on the world market do not have a guaranteed access to supply and must compete with other entities in order to secure a supply of grain. In countries without monopoly STE's, all enterprises exporting grain must compete for supplies to sell. The grain export sector in most major grain exporting countries includes major international grain companies, as well as small, more specialized exporters who trade in only a few grain commodities and sell to selected markets. Given the nature of the grain market, none of these private enterprises can be characterized as a dominant firm with market power in its home market.

23. Concerning a private enterprise that engages in sustained or repeated dumping in third country markets in the wheat sector, we would first note that Members have condemned dumping that causes or threatens material injury under Article VI:1 of the GATT 1994. That condemnation exists whether or not a particular importing Member has anti-dumping legislation or chooses to take corrective action. Accordingly, the United States would hope that this would be a rare enterprise and there would not be sustained or repeated dumping.

[11] *Ad Note Article XVII*, para. 1.

**Question 90: With reference to footnote 15 of the US second written submission, please provide a complete copy of CWB Marketing Panel Report (exhibit US-12). Also, please explain how the passage quoted in footnote 15 supports the view that No. 2 CWRS was actually sold at prices below No. 3 CWRS. Finally, if it did do so, why did the CWB have sold No. 2 CWRS at prices below No. 3 CWRS?**

24. A complete copy of the CWB Marketing Panel Report is provided as Exhibit US-24.

25. In the passage quoted in footnote 15 of the US second written submission, the CWB describes the "value" of CWB pooling for the Canadian wheat farmer. Canada explains that a farmer should *not* assume that just because he delivered No. 2 CWRS to the CWB, his return is equal to the weighted average of all CWB sales of No. 2 CWRS during a given year. The CWB explains that this would be a false assumption because No. 2 CWRS (a higher quality wheat) might have been sold by the CWB at lower prices than the prices at which all the No. 3 CWRS (a lower quality wheat) was sold. Considered in context, one can infer that the CWB does in fact engage in such pricing schemes. The description is not posed merely as a hypothetical, but as an explanation of CWB activities. This statement also corroborates other evidence that the CWB gives away quality and protein in its sales. Given the CWB's secrecy surrounding its sales data, relying on such CWB statements is one means of demonstrating that the CWB engages in sales that are inconsistent with Article XVII:1.

26. Regarding why the CWB would sell No. 2 CWRS at prices below No. 3 CWRS in a given market, such behaviour precludes another competitor from competing in that market because the competitor cannot sell comparable high-quality wheat at a low-quality wheat price without taking a loss. The CWB engages in such behaviour to increase its sales and market share. It is able to do so without concern for the losses faced by private competitors because the CWB's special and exclusive privileges provide the CWB with mechanisms to adjust its pools in a way a private enterprise cannot. For example, the CWB adds its net interest earnings to its pool accounts, using the net interest earnings to inflate the pool revenue so that the CWB can increase returns to farmers irrespective of the actual revenue earned from current grain sales.[12]

**Question 91: At para. 25 of the US first written submission, the Unites States asserts that, over the past 15 years, the CWB's initial payments have been "well below full market value". On the other hand, at paras. 12 and 13 of the US second written submission and in its reply to Question 35, the United States asserts that the CWB during 1992-1997 paid premiums to Western Canadian farmers for high-quality wheat, thus giving an incentive for farmers to over-produce such wheat. Could the United States explain how "below-full-market value" initial prices have induced over-production of high-quality wheat?**

27. These two CWB behaviours demonstrate how the CWB's sales are inconsistent with Article XVII:1 standards. Initially, the advantage gained by the CWB as a result of the initial price payment mechanism should be analyzed separately from the CWB practice of encouraging excess production of high-quality wheat. Under the initial price payment mechanism, the CWB can acquire wheat for as little as two-thirds of the expected full market value of the wheat. This provides the CWB with maximum pricing flexibility in making sales. The initial price payment mechanism means that the CWB – for an entire marketing year – knows at exactly what price it can acquire wheat, and its monopsony procurement right means the CWB knows approximately how much wheat is available for purchase. This provides the CWB with significant pricing flexibility and decreased risk exposure.

28. To ensure there are sufficient quantities of high-quality wheat, the CWB's pooling mechanism, in combination with the varietal control system, encourages production of high quality wheat (see response to question 90, above). "On average, the amount of high-quality wheat produced in Western Canada has been larger than the demand that has been willing to pay a commercial

[12] *See* US Second Written Submission, paras. 16-17.

premium for it."[13] To the extent that such production exceeds world demand, the CWB engages in price discounting to move the high-quality wheat into export markets.

29. It is only through the combination of special and exclusive privileges that this seemingly anomalous situation occurs. The CWB pays less than full value to acquire wheat from producers, and depending on its selling practices and supply and demand conditions in a particular marketing year, the CWB will return to the farmer a higher price than the CWB sold the wheat for in an export market. The CWB has a large supply of high quality wheat that it can "price to move," depending on world market conditions. The CWB continues to encourage the excess production of high-quality wheat by rewarding farmers through price premiums, even if those price premiums are not warranted by market conditions.

30. For example, the CWB states that it bases its pricing on the Minneapolis Grain Exchange (MGE). Therefore one can assume that the premiums for high-protein wheats offered by the CWB should be similar to the premiums posted at the MGE. However, this is not the case. For marketing years 1995/96, 1996/97 and 1997/98, the protein premium spreads in Canada for No. 1 Canadian Western Red Spring were over 20 per cent greater than the similar protein premium spreads offered for No. 1 Dark Northern Spring in the United States. This pattern continued in the 2002/03 marketing year when the spread between low and high protein wheat in Canada was over three times that which existed in the US market.[14] Thus, the higher premiums offered by the CWB are not merely reflective of market conditions and market prices. The CWB therefore has incredible pricing flexibility.

**<u>Question 92</u>: What is the significance under Canadian law of the reference on the Agriculture and Agri-Food Canada website (contained in exhibit US-23) to the fact that Canadian grain producers may apply to the Commission for producer railway cars and the absence of a reference to foreign grain producers on that site?**

31 As mentioned in our answer to question 68, the United States submitted the Agriculture and Agri-Food Canada website as evidence that foreign grain is denied the producer car benefit afforded to like Canadian grain. As Exhibit US-23 demonstrates, as of March 13, 2003, it is the position of Agriculture and Agri-Food Canada that only "Canadian grain producers with an adequate quantity of lawfully deliverable grain" are eligible for the producer car programme.

**<u>Question 93</u>: With reference to the US reply to Question 54, is there evidence that the railway companies are in fact charging lower rates for government rail cars than for other types of rail cars?**

32 Yes. The provision of government rail cars results in lower freight rates, and, according to the CWB, these rates will increase if the government-owned rail cars are privatized and sold to the railway companies. When the sale of the federal producer car fleet was contemplated in 2002, the CWB made the following statement in opposition to the sale of the government rail cars:

> The CWB is concerned that selling the hopper car fleet will result in added costs for farmers. Regardless of who purchases the cars from the federal government, there will be new costs in the transportation system that will eventually have to be picked up by farmers. . . . [R]egardless of whether the railways incur leasing costs on the

[13] Canadian Wheat Board, "The Role of the Canadian Wheat Board in the Western Grain Marketing System (23 Feb. 1996) (Exhibit US-24), p. ix.

[14] Comparison based on CWB final payment statistics available on the CWB website and publicly available MGE pricing data.

> cars or ownership costs like depreciation and interest, farmers will ultimately bear these costs *through higher rates*."[15] (Emphasis added.)

**Question 94: With reference to the US reply to Question 51(b), para. 36 of the US second oral statement ("shippers have an incentive to charge lower fees") and para. 135 of Canada's second submission, please provide further support for your assertion that prescribed railway companies have an incentive to respond to the revenue cap by adjusting their rates?**

33 The purpose of the rail revenue cap is to move away from government-regulated freight rates to a system that, by design, gives the railways the ability to make adjustments in freight rates. The Government of Canada's announcement of the new rail revenue cap programme made perfectly clear that the purpose of the rail revenue cap was to reduce rail rates below the rates that would prevail without the cap. The press release issued by Transport Canada directly ties the revenue cap to lower rates, announcing "the establishment of a revenue cap that provides for an annual estimated $178 million reduction in railway revenues, which represents an estimated 18 per cent reduction in grain freight rates from 2000-2001 levels[.]"[16]

34 In Canadian Pacific Railway's Second Quarter Report for 2001, it notes that "revenue growth for the quarter more than offset the combined negative impacts of the revenue cap on Canadian grain[.]"[17] With the revenue cap having a negative impact on revenue growth, railway companies have an incentive to adjust rates on shipments that are not subject to the cap in order to boost revenues.

**Question 95: Could the United States please comment on exhibit CDA-67?**

35 At the second panel hearing, Canada chose to selectively read from Exhibit CDA-67, noting that, in general, very small amounts of protein over-delivery are standard industry practice. However, the excerpt from the USITC report goes on to state that *"a higher frequency of protein over-delivery in the higher ranges was found for the CWRS wheats.*" (Emphasis added.) Indeed, the exhibit submitted by Canada itself makes clear that protein over-delivery occurs with a higher frequency for Canadian versus US wheat.

36 It is important to note that US references to the CWB's quality giveaway practices are not confined to over-delivery of protein. A quality giveaway can be in many different forms. For example, as referenced in our response to question 90, a quality giveaway can involve grade as well, offering a high-grade wheat for a lower-grade price.

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[15] Canadian Wheat Board, "Grain Matters: Sale of the Federal Hopper Car Fleet," (July-Aug. 2002) (Exhibit US-25).

[16] Transport Canada, Press Release No. H034/00, "Government of Canada Announces Measures to Improve Western Grain Handling and Transportation System," (10 May 2000) (Exhibit US-26).

[17] Canadian Pacific Railway, "CPR Reports Increased Second Quarter Operating Income of $206 Million," (19 July 2001) (Exhibit US-27).

## LIST OF EXHIBITS

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| US-24 | Canadian Wheat Board, "The Role of the Canadian Wheat Board in the Western Grain Marketing System (23 Feb. 1996). |
| US-25 | Canadian Wheat Board, "Grain Matters: Sale of the Federal Hopper Car Fleet," (July-Aug. 2002). |
| US-26 | Transport Canada, Press Release No. H034/00, "Government of Canada Announces Measures to Improve Western Grain Handling and Transportation System," (10 May 2000). |
| US-27 | Canadian Pacific Railway, "CPR Reports Increased Second Quarter Operating Income of $206 Million," (19 July 2001). |

# ANNEX B-3

## CANADA'S COMMENTS ON THE ANSWERS OF THE UNITED STATES TO THE PANEL'S QUESTIONS FROM THE SECOND SUBSTANTIVE MEETING

(4 November 2003)

The answers provided by the United States in response to the Written Questions of the Panel in Connection with the Second Panel Meeting ("US Answers") do not clarify or provide further support for the US claims. However, for greater certainty as to Canada's position, and to avoid any misunderstanding, Canada makes the following brief remarks on the US Answers. The fact that Canada does not provide comments on all the US Answers does not indicate that Canada agrees with those answers. Equally, the fact that Canada does not specifically deny, refute or correct US factual assertions or mischaracterizations of Canadian positions does not indicate that Canada agrees with those assertions or mischaracterizations.

***For the United States:***

**66. With reference to the US reply to Question 9, could the United States please confirm that it expects the Panel to rule only on section 56(1) of the *Canada Grain Regulations* as it existed at the time the March and July 2003 panels were established, and not section 56(1) as amended.**

**67. With reference to the US claim in respect of section 56(1) of the *Canada Grain Regulations*, please clarify further why an inconsistency with Article III:4 is alleged to arise. In particular, is the United States' argument that if Canada intends to maintain the advance mixing authorisation represented by section 56(1), it should also give advance authorisation for the mixing of foreign grain that is like eastern grain, on the one hand, with eastern grain, on the other hand?**

1. Section 56 of the *Canada Grain Regulations* ("*Regulations*") as it existed at the time the March and July panels were established incorrectly referred to foreign grain. The prohibition against mixing in Section 72 of the *Canada Grain Act* ("*CGA*"), to which Section 56 of the *Regulations* is an exception, does not apply to foreign grain. Accordingly, the reference to "foreign grain" in Section 56 of the *Regulations* was a drafting error of no practical significance. Section 56 of the *Regulations* has now been amended to reflect the original intent, which was to allow mixing of eastern grain with other eastern grain in transfer elevators.

**68. With reference to the US reply to Question 11 and para. 19 of the US second oral statement, is the United States claiming that section 87 is inconsistent with Article III:4 because producers of foreign grain are legally precluded, pursuant to section 87, from having access to producer cars, or because they are in fact denied such access in view of the fact that the producer car loading sites are located in certain areas?**

2. The United States continues to assert that foreign grain is "legally" precluded from having access to producer cars. However, the United States does not point to a single provision of Canadian

law that prohibits or restricts access to producer cars for either foreign grain or foreign grain producers. In advancing its case, the United States provides an interpretation of Canadian law that is not based on any accepted principle of statutory interpretation. Rather, it relies exclusively on an Agriculture and Agri-Food Canada website as evidence for its interpretation of Section 87 the *CGA*. As a preliminary matter, information materials on a website cannot and do not limit the scope of Canadian legislation. In addition, Agriculture and Agri-Food Canada is not responsible for the producer car programme and so any information on its website is of limited relevance to the administration of the programme. Finally, the information contained on the website has now been removed because it was incorrect.[1]

3. Canada notes that the US argument has evolved in the course of these proceedings. It now claims that Canada is in violation of Article III:4 because *Canadian* producer cars are not available *in the United States* to goods *not imported* into Canada. There are at least three problems with this line of argumentation. First, nothing in the WTO Agreement provides that a Member may be found in violation of its obligations because its measures do *not* apply extra-territorially. Second, Canada recalls the findings of the panel in *Canada – FIRA* in respect of the scope of coverage of Article III:

> [T]he General Agreement distinguishes between measures affecting the "importation" of products, which are regulated in Article XI:1, and those affecting "imported products", which are dealt with in Article III.[2]

4. The fact that producer cars are not available for the transport of grain *of whatever origin* that has not yet been imported into Canada is simply irrelevant under Article III. Third, the location of producer car loading sites is determined by the railways – that is, private commercial operators, and not the Government of Canada – taking into account requests by producers.

5. The US case has no merit and should be dismissed.

***Questions for both parties:***

**82. Please elaborate on what is an investment measure related to trade in goods within the meaning of Article 1 of the TRIMs Agreement.**

6. Canada is puzzled by the US argument that a panel may apply the TRIMs Agreement to a measure without first determining whether the measure is an "investment measure." The United States does so even as it repeatedly asserts, without support, that the measures at issue "necessarily" are "investment measures".

7. The United States has the burden of establishing not only the facts of the case, but also that the facts as established result in a violation of an *applicable* treaty provision, as interpreted in accordance with the principles of treaty interpretation in customary international law. In the case of a claim under the TRIMs Agreement, Article 1 ("coverage") sets out the scope of coverage of the Agreement: it "applies to investment measures related to trade in goods only". Therefore, for a claim of violation under the TRIMs Agreement to succeed, the United States must first establish, and the Panel find, that a measure is an "investment measure" and subject to the provisions of the TRIMs Agreement. It is axiomatic that before a treaty provision may be applied, it must be properly interpreted, and the term "investment measure" is no exception to this overriding principle. Contrary

[1] With respect to continuing reference to consultations by the United States, Canada recalls that the content of discussions during consultations is not relevant to the Panel process. That being said, and given the US insistence on raising the issue, Canada notes that the web page of Agriculture and Agri-Food Canada on producer cars was never referred to during consultations.

[2] 30S/140, at para. 5.14.

to the US assertion, therefore, the Panel should interpret the term "investment measure" before it proceeds to apply the Agreement.

8. The United States is, of course, well aware of this logical sequence, even as it invites the Panel to ignore its responsibilities by failing to properly interpret the terms of a "coverage" provision. While it exhorts the Panel not to interpret the term "investment measure" in accordance with principles of treaty interpretation, it proffers a definition of its own. According to the United States, an "investment measure" is any measure with "investment consequences". The United States does not tell the Panel *how* it arrives at this interpretation. In addition to being unsupported assertion, the US interpretation is overbroad and unreasonable: Canada cannot conceive of a domestic or export measure that does *not* have an "investment consequence" in some way. The US interpretation would thus expand the coverage of the TRIMs Agreement to include almost any measure. Such an outcome could not possibly have been intended by the Members.

9. Canada refers the Panel to its answers to Question 82 and to the discussion in *Indonesia - Autos* of what constitutes an investment measure.[3] The measures at issue in this case are not investment measures.

**83. With reference to paras. 1 and 2 of the Illustrative list annexed to the TRIMs Agreement which contain the word "local production", is the investment contemplated in these paras. investment pertaining to local production of goods, or could investment pertaining to the local supply of a service also qualify as "investment" within the meaning of the TRIMs Agreement?**

10. The United States still does not explain or demonstrate how the measures at issue "require the purchase or use" of domestic grain, even though this is the basis for its claim that the measures fall within the Illustrative List. The United States has also declined to explain how measures regulating the provision of services could be brought under the TRIMs Agreement, which covers investment measures related to trade in goods only.

11. The revenue cap and the grain handling provisions at issue do not fall under paragraph (1)(a) of the Illustrative List.

**84. With respect to the rail revenue cap, it would appear that an advantage, if any, could accrue to Western Canadian grain and its purchasers/sellers, but not to the railway companies transporting it. Is such an advantage covered by the provisions of Item 1(a) of the Illustrative List annexed to the TRIMS Agreement?**

12. The United States essentially argues that the phrase "compliance with which is mandatory to obtain an advantage" means "compliance by *one* enterprise is necessary for *another* enterprise to obtain an advantage". The Panel should reject this proposed US interpretation as unsupported by the principles of treaty interpretation and by common sense. Any US argument based on this proposition should, therefore, fail.

**85. How do the parties define the term "use" in Item 1(a) of the Illustrative List contained in the Annex to the TRIMS Agreement?**

13. The United States persists in pursuing a definition for the word "use" that is contrary to the ordinary meaning of the word and defies logic. An airline company that transports passengers does not "use" them or their luggage. A truck that carries milk "uses" the diesel oil in its tank but not the

[3] *Indonesia – Certain Measures Affecting the Automobile Industry*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WTDS264/R, adopted 23 July 1998, para. 14.80 ("*Indonesia-Autos*").

milk in the tanker. A moving and storage company that stores furniture and personal goods of the people it moves does not "use" their beds, dining tables, linen and cutlery.[4]

***For the United States:***

**86. Could the United States elaborate on what it means when it says that the CWB Export Regime "necessarily results" in CWB export sales that are not in accordance with the Article XVII standards? (*see* US second written submission, para. 3; US reply to Question 1(a))? Is the United States arguing that non-conforming CWB export sales are an inescapable consequence of the CWB Export Regime, or is the United States arguing that it can be presumed, in the light of the various aspects of the CWB Export Regime discussed by the United States, that the CWB will make sales that are not in accordance with the Article XVII standards (*see* US first written submission, para. 70)?**

14. The United States asserts that the CWB has a statutory mandate to "maximize sales of Canadian wheat on the world market". The United States does not cite where in the *Canadian Wheat Board Act* ("*CWB Act*") or any other Canadian statute such a mandate is set out.

15. The US assertion is factually incorrect. Section 5 of the *CWB Act* provides that the CWB is incorporated with "the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada." Section 7(1) of the *CWB Act* provides that 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 sale of grain produced in Canada in world markets." Under no rule of statutory interpretation may either provision be read as requiring the CWB to maximize sales at all costs. Accordingly, the US argument that in fulfilling its mandate, the CWB's use of its special and exclusive privileges necessarily results in a violation of Article XVII has no factual foundation.

16. As well, the "necessarily results" assertion of the United States has no basis in logic. The United States repeatedly undermines its own arguments in this respect by alleging an element of voluntariness in respect of the actions of the CWB. After all, if the CWB has the discretion to do something that would result in a breach of the requirements of Article XVII, it also has the discretion to do something that would not result in such a breach. Accordingly, even in accordance with US assertions, the CWB's actions cannot "necessarily result" in one thing rather than another.

17. The latest example of this is contained in paragraph 16 of the US Answers. There the United States alleges that:

> [t]he CWB, with its special and exclusive privileges and special mandates, however, does not face these commercial market constraints and *could* therefore engage in sales that are rational (they increase the quantity of wheat sold) but are not commercial in nature (the replacement value of the wheat sold is not recovered). [emphasis added]

18. The United States expressly affirms that the CWB has *discretion*. The United States thus implicitly concedes that the CWB is under no *mandate* to act not in accordance with the standards set out in XVII. Without such a mandate, there can be no "as such" violation of Article XVII.

**87. With reference to the word "commercial" in Article XVII:1(b), please provide answers to the following questions:**

[4] Canada refers the Panel to its answer to Question 85 and to its Second Written Submission, para. 20.

**(a) How should the word "commercial" be interpreted?**

**(b) The US can be understood as arguing that it may be "rational" for an export STE to use its special privileges to gain a competitive advantage in the marketplace *vis-à-vis* its competitors, but that export sales made in this manner would not be based on "commercial" considerations. In other words, the US appears to argue that the "commercial considerations" criterion requires more than rational competitive behaviour. (*see* US reply to Question 23, US second written submission, para. 19) If that is correct, could the United States explain how the word "commercial" in Article XVII:1(b) supports this view?**

**(c) With reference to the US reply to Question 22(d), would the United States accept that a private monopolist that is able, due to barriers to entry, to extract monopoly rents in its home market is acting on the basis of what is described as "commercial considerations" in Article XVII:1(b)?**

19. Article XVII:1(b) provides that a state trading enterprise that engages in discriminatory practices not in accordance with Article XVII:1(a), is nevertheless acting consistently with Article XVII if it acts in accordance with commercial considerations. The United States has not at any point given a proper interpretation of what constitutes "commercial considerations". It has repeatedly stated that a state trading enterprise that does not have the same commercial constraints of certain private traders *necessarily* does not act in accordance with commercial considerations. It has also asserted that "revenue maximising" and "maximising sales" are not "commercial considerations", and in support it has adduced a study that has noted that "revenue maximising" conduct potentially results in higher production than "profit maximising conduct". The United States has not adduced evidence or argument why the report in question, even if correct, is in any way support for the proposition that revenue maximising conduct is not acting in accordance with commercial considerations. Finally, although the United States repeatedly refers to what private traders can or cannot do, it has not once adduced any evidence of such conduct. Indeed, when faced with evidence that *its own* multinationals *in the same sector* use programmes that are substantially similar to the measures at issue, the United States has adopted an attitude of stony silence.

20. From the outset, the position of Canada, amply supported by the language of the treaty and by common sense, has been that Article XVII:1(b) does not set out a standard of specific behaviour (for example, profit maximising or revenue maximising). The conduct of a private trader in the market is dictated by any number of short-term and long-term considerations based on market conditions, as well as its structure and objectives – the total ensemble of these considerations is referred to as "commercial considerations." A state trading enterprise is no different. "Revenue maximization" may be perfectly commercial conduct for one private trader, but ruinous to another; a trader in possession of a highly perishable commodity at the end of its life has every incentive to "maximise sales" for reasons that a coal dealer would not have to deal with. Finally, as any business model based on "rational" conduct sets out, to seek short-term profit maximisation at the cost of long-term consumer loyalty could be disastrous to a private trader. Thus, a trader – whether private or a state trading enterprise – that does not act rationally but rather "commercially" in the very narrow US sense of "profit maximization" may well find itself out of business soon after the profits are realised.

21. What Article XVII:1(b) requires, then, is simply that state trading enterprises take into account certain factors ("commercial considerations") in making purchases or sales, and not others (non-commercial considerations – for example, political ones). That is, they should base their decisions on the same sort of factors that private traders take into account in making purchases or sales. These factors include, but are not limited to, "price, quality, availability, marketability, transportation and other conditions of purchase or sale." In the same vein, the manner in which a state trading enterprise, or any enterprise for that manner, responds to such factors depends on the

environment and circumstances in which it operates. For a state trading enterprise, its environment and circumstances necessarily include the exclusive or special privileges that it enjoys.

22. The United States asserts that the CWB does not act in accordance with commercial considerations because it is "not focussed on profit". Canada has already demonstrated that the assertion has no legal basis and, by opposing "commercial conduct" to "rational conduct", is manifestly absurd and unreasonable. The assertion is also outright false and irrelevant. For one thing, the CWB operates as a cooperative marketing agency *for* Western Canadian farmers. Its objective is to make money for those farmers and, unlike Cargill or ADM, not to make a profit for itself. Accordingly, in one sense the CWB is very much "focussed on profit": "profit" for the farmers. In any event, the object of a cooperative marketing system is not to make profits for *itself*, and so in this sense, the US assertion is entirely irrelevant.

23. Further, Canada does not consider the US distinction between "rational" and "commercial" to be viable. In particular, "to act in accordance with commercial considerations" is not at all the same as "to face commercial market constraints": any subsidized firm by definition does not face the full force of the market. And yet applying for a subsidy, accepting it, and using it to gain market advantage is so commercial that since 1896 the United States has had an increasingly complicated regime for combating it.

24. Finally, the United States states that "of course" a "pure or natural monopoly" differs considerably from a "government-granted monopsony".[5] The US assertion is problematic for three reasons. First, it is not at all clear under what standard non-governmental monopolies are "purer" than governmental ones. The offhand "of course" should not mask the absence of any analysis of this unsupported, and indeed unsupportable, assertion. And the distinction is all the more curious as it is advanced before the Panel by a country that has one of the most developed anti-trust regimes in the world and whose courts have broken up such "pure or natural monopolies" as AT&T and Standard Oil and even pondered the break-up of Microsoft. Second, to the extent that the United States proposes to use the term "government-granted" as an opprobrium in contradistinction to "pure or natural", it suffices to state that whether "impure" or "unnatural", government-granted exclusive privileges are expressly permitted by the WTO Agreement – and the United States has repeatedly protested that it is not challenging the right to grant such privileges. The degree of "purity" or of "naturalness" of a monopoly is, then, irrelevant to the *legal* question before the Panel. Third, aside from the question of characterisation, the very assertion of a distinction between "pure or natural" monopolies and government-granted ones – unfounded and undeveloped as it is – is simply incorrect under Article XVII. For the purpose of determining whether or not a monopolist state trading enterprise is acting in accordance with "commercial" considerations, the only logical comparison *in the market* is to a "pure or natural" monopoly. Otherwise, as Canada has demonstrated, at question would no longer be the *conduct* of the state trading enterprise, but rather the initial grant of the exclusive or special privileges.

**90. With reference to footnote 15 of the US second written submission, please provide a complete copy of CWB Marketing Panel Report (exhibit US-12). Also, please explain how the passage quoted in footnote 15 supports the view that No. 2 CWRS was actually sold at prices below No. 3 CWRS. Finally, if it did do so, why did the CWB have sold No. 2 CWRS at prices below No. 3 CWRS?**

25. Canada regrets that yet again, it must correct a manifest mischaracterization of the evidence before the Panel. As with its earlier outright misquotation of Canada's Article 6.2 submission or the quotation out of context of "primarily", in its response to Question 90 and in footnote 15 of its Second

[5] US Answers, para. 17.

Written Submission, the United States again wilfully misrepresents the statement at page 15 of the CWB Marketing Panel Report.[6]

26. By creatively dropping certain words, the United States completely changes the meaning of the text. Read in its entirety, the meaning is clear: the CWB's statement corrects a *hypothetical misunderstanding* that pooling is the weighted averaging of CWB sales prices for a given type, class, and grade of grain over a given year. The CWB explains that *if* pooling were indeed (and it is not) the weighted averaging of CWB sales, then:

> … somebody who had delivered No. 2 CWRS 13.5 per cent protein wheat during 1994-95 would have ended up receiving the weighted average of all sales of No. 2 CWRS 13.5 per cent protein wheat during that year. The problem with that type of system would be that all or most of the No. 2 CWRS 13.5 might have been sold at lower prices than the prices at which all the No. 3 CWRS wheat was sold. The result of this would be that the average return for No. 3 CWRS wheat would be higher than that for No. 2 CWRS 13.5 wheat, *even though No. 2 CWRS 13.5 was worth more in the market than No. 3 CWRS at all times throughout that year*. That would obviously not be a proper market relationship between these two grades of wheat.
>
> The averaging of prices is not what happens in the CWB pooling system. Instead, as the CWB sells wheat and barley throughout the crop year, the revenue from those sales is deposited into four pool accounts: the wheat account or "pool", the durum wheat pool, the designated barley pool (barley sold for human consumption purposes, primarily malting barley), and the feed barley pool. Revenues from the sales of each of these four commodities are pooled separately in the appropriate account.
>
> Pooling is a mechanism both for collecting and – more to the point – for distributing to farmers who delivered to the CWB in the course of the year the results of sales the CWB made on their behalf. All farmers in the wheat pool, for instance, will end up sharing in the results of all wheat sales made throughout the crop year. The actual pool return that is established for any particular class, grade, or protein level of wheat, on the other hand, will be determined by the price relationships for the various wheats that existed in the world markets over the course of that year. The CWB keeps track of these price relationships in the market as it makes sales throughout the year to ensure that when the crop year is over and everything is paid out of the pool accounts, it will have reflected to farmers the proper market relationships between the various classes and grades.[7]

27. The United States asserts that its selective quotation of this statement "corroborates other evidence that the CWB gives away quality and protein in its sales."[8]

28. The United States has once again undermined its own arguments. The Marketing Report proves the opposite of what the US claims: the CWB does not give away quality and protein in its sales. Rather, the CWB maintains the proper market relationship between different grades of wheat in its pooling system and returns to farmers reflect the price relationship in the market between various classes and grades of wheat.

**92. What is the significance under Canadian law of the reference on the Agriculture and Agri-Food Canada website (contained in exhibit US-23) to the fact that Canadian grain**

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[6] Exhibit US-24.
[7] Exhibit US-24, pp. 15-16 [italics in original; underline added for emphasis].
[8] US Answers, para. 25.

**producers may apply to the Commission for producer railway cars and the absence of a reference to foreign grain producers on that site?**

29. Under Canadian law, web site information is irrelevant to the interpretation of a law. While governments use web sites to provide information to the public, these web sites are of no relevance to the interpretation of the law and cannot modify or restrict the terms of the law.

**93. With reference to the US reply to Question 54, is there evidence that the railway companies are in fact charging lower rates for government rail cars than for other types of rail cars?**

30. The US Panel Request did not include a challenge to the provision of *government railcars* but only the provision of *producer cars*. In fact, the second bullet of Claim 2 of the request refers specifically to Section 87 of the *CGA*, which deals with *producer cars* not with *government railcars*.

31. Producer cars may or may not be government railcars.[9] Moreover, the fact that a government railcar is used in a given instance as a "producer car" will not affect the railway's rates.

32. Accordingly, the US answer to the Panel's question is irrelevant to the claim before the Panel.

**94. With reference to the US reply to Question 51(b), para. 36 of the US second oral statement ("shippers have an incentive to charge lower fees") and para. 135 of Canada's second submission, please provide further support for your assertion that prescribed railway companies have an incentive to respond to the revenue cap by adjusting their rates?**

33. The purpose of the revenue cap when it was established was indeed to give protection to farmers while providing flexibility in setting rates in order to encourage competition and efficiencies. The revenue cap was only one element of government policy reforms that were aimed at making the system more commercial, competitive and accountable.

34. The Canadian Transportation Agency's analysis, which was accepted by the US Department of Commerce in the countervailing duty case,[10] is evidence that the Canadian government's policy reforms have achieved this objective and that any constraint on railway revenues from revenue cap movements is now driven by the market, not by the revenue cap.

35. Rail rates for both revenue cap and non-revenue cap movements are established based on market conditions and the railways charge differential prices, i.e. what the market will bear.

**95. Could the United States please comment on exhibit CDA-67?**

36. As with its demonstrated misrepresentation of Canadian statements and other evidence before it, the United States persists in reading exhibit CDA-67 selectively. This is particularly evident when examining the underlying portions of the study that are then summarized in CDA-67.

37. That study examined the selling practices of the CWB and US wheat merchants in the United States market, and sales by US exporters of Canadian and US wheat in eight separate third-country markets. The excerpt cited in CDA-67 addressed the findings of the International Trade Commission (ITC) in respect of non-US export markets only, for which it had limited data. Those data, as the excerpt in CDA-67 states, demonstrated that over-delivery of protein tended to be "small" and "occurred in both US and Canadian contracts." The reference to "higher frequency of protein over-delivery in the higher ranges" for Canadian CWRS wheat was based on a very small sample of

[9] See Canada's Answer to Question 18 and Canada's First Written Submission, paras. 301-307.
[10] See Exhibit CDA-45, p. 34.

contracts that was skewed because it included contracts for *two* classes of Canadian wheat, but only *one* class of US wheat.[11]

38. In any event, over-delivery of protein amounts to a "giveaway" as the United States alleges *only* if the final contract price is not adjusted upwards to reflect the additional protein delivered. The United States adduces no evidence to support such a conclusion, which would, in any event, be incorrect. Indeed, the ITC study showed that for the export markets examined, the contract price was adjusted upwards in 47 per cent (43 of 92) of contracts involving Canadian wheat, but only 13 per cent (15 of 117) of contracts involving US wheat.[12] To the extent, therefore, that the data in this study permit any conclusions about protein "giveaways" in the eight export markets, the practice was more common in contracts for US wheat than Canadian wheat.

39. In addition, with respect to the US market, for which the underlying data were much more robust, the results of the study unambiguously refute the US allegation that the CWB consistently over-delivers protein. The data demonstrated a *lower* percentage of over-delivery for Canadian wheat, as the following passage attests:

> To assess the extent of over-delivery of protein content in domestic wheat purchases, the Commission analyzed differences in contracted and delivered protein in 615 Durum, HRS, and CWRS wheat contracts reporting both sets of data. For all but # 1 CWRS wheat, most contracted purchases were shown to have a tendency toward over-delivery of protein content. However, all contracts for all comparable wheat grades and classes tended to meet or exceed the contracted protein specification for final delivery of the product. Out of 510 reported US shipments of HRS and US Durum wheat, 65 per cent reported protein over-delivery, while 54 per cent of 105 reported CWRS and Canadian Durum contracts reported over-delivery of protein. Most of these differences were found to be within a 1.0 percentage points range above the contracted protein specification, and nearly all were within 1.5 percentage points, for both US and Canadian wheat.[13]

[11] See Exhibit CDA-70, Table 5-9.
[12] See Exhibit CDA-70, Table 5-7.
[13] See Exhibit CDA-71.

# ANNEX B-4

## UNITED STATE'S COMMENTS ON THE ANSWERS OF CANADA TO THE PANEL'S QUESTIONS FROM THE SECOND SUBSTANTIVE MEETING

(4 November 2003)

***Questions for Canada:***

**Question 69: With reference to the possibility to condition the receipt of foreign grain on it being kept separate from Canadian grain in authorising such receipt under section 57(c) of the *Canada Grain Act* (see, e.g., Canada's second written submission, para. 95), does the power to impose such a condition derive from section 57 itself or is there a provision elsewhere in the Act and/or regulations that provides for this?**

1. The United States wishes to emphasize, as mentioned in paragraph 26 of our second written submission, that Section 57(c) of the Canada Grain Act ("CGA"), on its face, prohibits the entry of all foreign grain into Canadian grain elevators. If an elevator operator wishes to receive foreign grain, Section 57 provides for an exception to this general prohibition. The elevator operator must apply to the Canadian Grain Commission ("CGC") and request a special entry authorization for the foreign grain. This special authorization is a regulatory hurdle not required for like domestic grain.

**Question 70: With reference to the separate keeping in elevators of domestic grain of different types, grades, protein content and origin, as referred to at paras. 247 and 248 of Canada's first written submission, is such segregation/separate keeping a commercial practice by elevators or a legal requirement? If the latter, please provide the relevant legal text. Also, please indicate whether there is a difference in this regard between different types of elevators (primary, etc.).**

2. Section 56(1) of the Canada Grain Regulations ("CGR"), on its face, prohibits transfer elevators from mixing foreign grain. This prohibition is a legal requirement and is based solely on origin. As for the segregation requirements in Section 72 of the CGA, these are based on grade only. Neither Section 56(1) of the CGR or Section 72 of the CGA refer to type, class or protein content as referred to at paras. 247 and 248 of Canada's first written submission.

**Question 71: With reference to Canada's reply to Question 63 and also to sections 57 of the Canada Grain Act and section 56 of the Canada Grain Regulations, have there been instances where no requirement was imposed that foreign grain be kept separate from Canadian grain, or where mixing of foreign grain with domestic grain was allowed without a requirement that it not be designated as "Canadian grain"? Could Canada indicate/estimate in relative terms (percentage terms) how common an occurrence this is? (For the written answer: Please provide supporting evidence.)**

3. The United States does not understand how Canada can state that "[n]othing in Canadian law or regulations mandates segregation of foreign and Canadian grain," since Section 57 of the CGA and Section 56(1) of the CGR provide clear and explicit prohibitions on entry of foreign grain into grain

elevators and the mixing of foreign grain. Any special authorization required to overcome these *de jure* prohibitions is an additional burden placed on foreign grain that is not placed on Canadian grain.

4. It is not surprising that, as Canada states, "if there is no request for mixing from the elevator, the entry authorization requirement includes a condition that the foreign grain be kept separate," since under Section 56(1) there is a legal prohibition on the mixing of foreign grain. The United States disagrees with Canada's characterization that this prohibition occurs "as a matter of practice." Section 56(1) clearly sets forth a legal requirement that mixing may only take place if neither of the grains to be mixed is foreign grain.

5. As for Canada's assertion that 12 per cent of entry authorization requests include a request to mix foreign grain with Canadian grain, Canada provides no evidentiary support for this figure.

**Question 72: What is the legal relationship between the Wheat Access Facilitation Programme and section 57(c) of the *Canada Grain Act*? In particular, has the Wheat Access Facilitation Programme been established under the authority of section 57(c)? Please provide documentary support.**

6. Canada's answer to the Panel's question mis-characterizes the United States' reference to the Wheat Access Facilitation Programme. We have not referred to the WAFP as a separate challenged measure, but, rather, we refer to it to provide a concrete example of the CGC's onerous regulatory requirements. This does not expand the scope of the proceedings.

7. The CGC characterizes the WAFP not as a separate authorization, but as a document that "clarifies the Canadian Grain Commission's (CGC) requirements for Canadian licensed primary elevators handling wheat from the United States (US)."[1] (Emphasis added.) The WAFP also states that primary elevators may receive US wheat "subject to participation in the Wheat Access Facilitation Programme and adherence to the requirements set out in this Memorandum."[2] (Emphasis added.) Moreover, not adhering to the WAFP requirements has serious consequences for the primary elevator. The Memorandum states that "[f]ailure to comply with the requirements in this Memorandum could result in revocation of license, prosecution, or the CGC refusing to give further permission to facilities to receive US wheat."[3] (Emphasis added.) Finally, the Importer's Declaration form, a form required under the WAFP, specifically refers to Section 57(c) of the CGA, indicating that Section 57(c) is indeed the legal authority under which the WAFP operates.[4]

8. In short, the CGA violates GATT Article III:4, and the WAFP is but one clear example of this. This is true regardless of the origin of the WAFP, which is irrelevant to the dispute and does not excuse Canada from maintaining an otherwise WTO-inconsistent measure.

**Question 73: With reference to section 57(c) of the *Canada Grain Act*, once the receipt of foreign grain has been authorised, does a CGC employee have to be physically present, in most or all cases, to monitor the flow of the foreign grain into the elevator bins? If so, do CGC employees similarly monitor the flow of Canadian-origin grain into elevator bins?**

9. Canada provides no evidence for its assertion that it is "rare" that CGC inspectors are present to monitor receipt of grain into primary and transfer elevators. Indeed, Canada's response is contrary to the requirements of the CGC as clarified by the WAFP, which states that the CGC will not

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[1] Canadian Grain Commission, "Memorandum to the Trade: Canadian Licensed Primary Elevators Handling United States Wheat," (22 Feb. 2001), *available at* www.grainscanada.gc.ca/Views/Tradenotices/uswheat99-e.htm (Exhibit CDA-60).

[2] *Id.*

[3] *Id.*

[4] *See id.*

authorize the entry of US wheat unless there is a CGC employee on site to monitor the flow of US wheat into bins.

**Question 76: Canada indicates in its responses to Questions 16(b) and 59(a) that there is no authorisation requirement for the mixing of different grades and classes of foreign grain. Could Canada explain why section 72(2) of the *Canada Grain Act* does not apply in such cases? Furthermore, if there is no requirement for the mixing of different grades and classes of foreign grain, would Canada nevertheless impose a requirement that such mixed foreign grain not be designated as "Canadian" grain, etc. If so, what would be the legal basis for such a designation requirement?**

10. Despite statements to the contrary in paragraph 16 of Canada's answer, Section 56(1) of the CGR does explicitly mandate the imposition of mixing restrictions with respect to foreign grain.

**Question 78: With reference to section 151 of the *Canada Transportation Act*, please clarify element "E". In particular:**

**(a) Does element E mean that the number of tonnes to be moved per crop year are fixed by the Canadian Transportation Agency?**

11. As Canada notes in its second written submission, " the railways are in contact with the major shippers, including the Canadian Wheat Board ("CWB"), before and during each crop year and are sophisticated at predicting volumes of movement in order to plan for and optimize the use of railway resources."[5] Thus, while element "E" is not fixed by the CTA, it is nevertheless an element that can be estimated by the railways.

**(b) Is the maximum revenue entitlement determined in advance of the crop year or ex post? How is this taken into account by the relevant railroad companies in setting rates for the current crop year?**

12. Contrary to Canada's statements, railroad companies do take into account the maximum revenue entitlement when setting rates for the current crop year. Because of the way the rail revenue cap is set and implemented, with penalties for exceeding the revenue cap, railroad companies have a strong incentive not to exceed the revenue cap. The main way to do this is to adjust rail rates throughout the crop year.

13. Under the revenue cap formula, element C (average length of haul), E (number of tonnes hauled), and F (price index) are adjusted each year, with other factors referring to the base year. Data regarding elements C and E are in the hands of the railroad companies. As stated in Canada's answer, element F is determined by the CTA before the beginning of the crop year, so the railroad companies know how element F will affect the rail cap. This leaves one element – the freight rate – that the railroad companies adjust in order to ensure that they do not exceed the revenue cap. For example, if tonnage during the crop year (element E) was to exceed earlier projections (for example, because of an unanticipated increase in Canadian Wheat Board sales), the railroad company, in order to avoid paying a penalty, would have to lower freight rates to avoid exceeding the revenue cap.

14. Indeed, for the 2000-01 crop year, the first year the rail revenue cap was in effect, rail revenues were only 0.7 per cent below the revenue cap.[6] Contrary to Canada's unsupported assertions

[5] Second Written Submission of Canada, para. 135.

[6] *See* Adrian Ewins, "Railways Below Revenue Cap, But Slightly," The Western Producer (2 Jan. 2003) (*hereinafter* "The Western Producer"), *available at* www.producer.com/articles/20030102/news/20030102news06.html (Exhibit US-28).

that railway companies do not take the revenue cap into account, railroad company executives have stated that they see it as their obligation to stay below the rail revenue cap.[7]

**Question 80: With respect to Canada's defence of section 57 of the *Canada Grain Act* and section 56(1) of the *Canada Grain Regulations* under GATT Article XX(d), and with reference to the panel report on *European Economic Community - Regulations on Imports of Parts and Components* (BISD 37S/132, paras. 5.14-5.18) which suggests that Article XX(d) covers only measures designed to prevent actions that would be illegal under the laws with which compliance is sought to be secured, please identify for each of the laws referred to (*Canada Grain Act*, etc.), and provide the text of, the obligations with which sections 57 and 56 seek to secure compliance. In addition, please provide details of how sections 56 and 57 are necessary to secure compliance with the relevant provisions of the laws in question.**

15. Canada has not met its burden with respect to its Article XX(d) defence. Section 57 and Section 56(1), which are wholesale prohibitions on the entry into grain elevators and mixing of foreign grain, are not necessary to secure compliance with the grading provisions of the CGA and CGR. Canada has not adequately explained how the *per se* prohibition on the entry of foreign grain into grain elevators under Section 57 and the *per se* prohibition on the mixing of foreign grain under Section 56(1) prevent actions that would be illegal or are otherwise designed to secure compliance with Sections 32 (inspection certificates), 61 (grading and inspection procedures on receipt of grain for primary elevators) and 70 (grading and inspection procedures on receipt of grain for transfer and terminal elevators). Canada appears to argue that Sections 57 and 56(1) ensure that inspectors do not make mistakes and assign Canadian-specific grades to foreign grain. Yet Canada provides no evidence that Section 57 and 56(1) are designed to eliminate such errors.

16. Even if Canada had demonstrated that Sections 57 and 56(1) were designed to secure compliance with Sections 32, 61, and 70, the *per se* prohibitions under Sections 57 and 56(1) are not necessary to secure compliance with Sections 32, 61, and 70. The grading provisions of the CGA and CGR themselves, described in Canada's own submissions, along with the enforcement provisions under the CGA and CGR, are adequate to ensure that "that Canadian grades are not inadvertently and inappropriately given to non-Canadian grain."[8] Indeed, as Canada itself points out, Section 32 already distinguishes between grain grown in Canada and grain grown outside Canada. Canada has not shown that proper inspection and grading cannot be accomplished in the absence of Sections 57 and 56(1).

17. Regarding compliance with the CWB Act and the CWB Regulations, Canada has other measures in place to ensure that the CWB only markets western Canadian wheat and barley. There is no reason to establish a prohibition on the entry of all types of foreign grain into all grain elevators throughout Canada under Section 57 in order to secure compliance with the CWB Act and the CWB Regulations. The grading requirements under the CGA are adequate to ensure that foreign wheat and barley are not mistaken for western Canadian wheat and barley and marketed by the CWB. In these proceedings Canada has portrayed the CWB as a sophisticated entity, and it is difficult to see – and Canada does not adequately explain – why a *per se* prohibition on the entry of all foreign grain into all grain elevators is needed in order to secure compliance with the CWB Act and the CWB Regulations. Indeed, Canada has no such *per se* prohibition in place with respect to the entry into grain elevators of eastern Canadian wheat and barley, grains which are also outside of the CWB's mandate under the CWB Act and the CWB Regulations. The CWB can ensure that it is only supplied western Canadian wheat and barley by writing that requirement into its contracts with grain elevator operators, or using the measures that are in place for eastern Canadian wheat and barley. The *per se* mixing prohibition for foreign grain under Section 56(1) also is not necessary to secure compliance with the CWB Act

[7] *See id.*

[8] Canada's Responses to the Panel's Questions from the Second Substantive Meeting, Response to Question 80, para. 27.

and CWB Regulations. Section 56(1) already includes a prohibition on mixing western Canadian grain, and this prohibition alone is sufficient to secure compliance with the CWB Act and CWB Regulations.

18. Finally, regarding compliance with Section 52 of the Competition Act, Canada fails to demonstrate how Sections 57 and 56(1) are necessary to secure compliance with a general misrepresentation statute, especially in light of the fact that there are specific inspection provisions of the CGA that "ensure that foreign grain maintains its identity in the bulk handling system."[9] Furthermore, Canada fails to explain why Canada does not find it necessary to segregate all products according to origin in order to secure compliance with the general prohibitions on misrepresentation contained in Section 52 of the Competition Act.

**Question 81: With reference to Canada's reply to Question 63, is there any reason why Canada could not secure compliance with the relevant laws and could not maintain the integrity of its grading system if foreign grain could be received into elevators without a need for prior CGC authorisation, but subject to the general requirement that foreign grain be kept separate from domestic grain, unless the CGC grants an exemption from this requirement on request?**

19. Canada's implication that the provisions of the CGA and CGR at issue in this dispute are SPS measures is patently false. Section 57 of the CGA and Section 56(1) of the CGR are not designed to address SPS concerns.

20. Canada already has SPS measures that address its SPS concerns in place. As referenced by the United States at the second panel hearing, Canada's plant and animal health service, the Canadian Food Inspection Agency ("CFIA"), not the CGC, is responsible for SPS measures and enforcement. When the CFIA deems it necessary based on an appropriate risk assessment, grain cannot enter Canada without being accompanied by separate SPS documentation administered by the CFIA. These phytosanitary certificates required by the CFIA ensure that all SPS concerns related to grains are addressed prior to that grain crossing the US-Canadian border. The CFIA requires this documentation whether US grain is destined for the domestic Canadian market or a third-country market. The examples Canada provides in its answer to the Panel's question are irrelevant. Canada provides the Panel with no explanation for why prior authorization for entry of foreign grain into grain elevators or the prohibition on mixing foreign grain is necessary to comply with any relevant law.

***Questions for both Parties:***

**Question 82: Please elaborate on what is an investment measure related to trade in goods within the meaning of Article 1 of the TRIMs Agreement.**

21. As Canada admits in its answer and as the United States explains in its own answer to question 82, the TRIMs Agreement does not include a definition of "investment measure." Canada's reference to measures with investment "objectives" finds no support in the text of the TRIMs Agreement. While *Indonesia - Autos* provides one example of a trade-related investment measure, the panel in that dispute does not suggest that the TRIMs Agreement covers only the types of measures that were at issue in the *Indonesia - Autos* dispute. As stated in our answer to question 82, the measures in this dispute have investment consequences for those enterprises that must comply with them, and these measures therefore are trade-related investment measures under the TRIMs Agreement.

**Question 84: With respect to the rail revenue cap, it would appear that an advantage, if any, could accrue to Western Canadian grain and its purchasers/sellers, but not to the railway**

[9] *Id.*

**companies transporting it. Is such an advantage covered by the provisions of Item 1(a) of the Illustrative List annexed to the TRIMS Agreement?**

22. Regarding Canada's reference to the US Department of Commerce countervailing duty investigation, as noted in paragraph 38 of our second written submission, the US Department of Commerce analysis is not relevant to this proceeding.

**Question 85: How do the parties define the term "use" in Item 1(a) of the Illustrative List contained in the Annex to the TRIMS Agreement?**

23. Canada conveniently refers to only one, narrow concept of the word "use" in its answer. However, the word "use" is not limited to consumption, processing and transformation. Indeed, the word use has a much broader meaning, including "to put into action or service" or to "employ."[10] This broader definition of "use" clearly encompasses the handling, storage and transport of grain referred to in the US answer to question 85.

***Questions for Canada:***

**Question 96: What is the purpose of the second clause of Article XVII:1(b) ("afford ¼ adequate opportunity ¼ to compete for participation in such purchases or sales")? What does the second clause add to the first clause ("commercial considerations")?**

24. As set forth in our written submissions,[11] the United States fundamentally disagrees with Canada's interpretation of the second clause of Article XVII:1(b). Contrary to Canada's assertions, the second clause of Article XVII:1(b) sets forth a specific obligation that requires Canada to ensure that the CWB provides both buyers and sellers an adequate opportunity to compete for participation in CWB sales. This means that when the CWB engages in sales in export markets, the enterprises of other Members, including both wheat buyers and sellers, should be able to compete in those sales in accordance with customary business practice. Canada's interpretation - that this second clause of Article XVII:1(b) would apply only to situations in which the CWB fails to enter into a transaction altogether - is not supported by the text of Article XVII:1(b). Canada ignores the word "compete" in the second clause of Article XVII:1(b). Article XVII:1(b) does not require Members to ensure that their STEs to engage in certain transactions. Rather, the second clause of Article XVII:1(b) provides that Members must ensure that when their STEs do engage in transactions, the enterprises of other members have an adequate opportunity to compete in those sales in accordance with customary business practice. As set forth in our written submissions, Canada has failed to meet this obligation.

**Question 97: With reference to para. 39 of Canada's second written submission, is Canada suggesting that in respect of export sales by an STE, the MFN principle set out in Article I would not prohibit the selling at a lower price or under less stringent terms and conditions in one market than when selling in another?**

25. The MFN principle set out in Article I would prohibit the selling at a lower price or under less stringent terms and conditions in one market than when selling in another.

26. As we have stated in our written submissions and as supported by the *Korea Beef* panel report, Article XVII:1(a) and Article XVII:1(b) contain distinct obligations. Nevertheless, in this particular dispute, the CWB's sales that are not in accordance with commercial considerations under Article XVII;1(b) also lead to the type of discrimination that violates the MFN principle under Article XVII:1(a).

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[10] *Merriam-Webster's Collegiate Dictionary: Tenth Edition* (2001), p. 1297.

[11] *See, e.g.,* US Answers to First Set of Panel Questions, paras. 20-21; Second Written Submission of the United States, paras. 4, 19.

**Question 98: With reference to para. 95 of Canada's second written submission, does not, or might not, a condition to keep foreign grain separate from domestic grain entail costs for an elevator operator, including the costs of separate/additional bins, etc.?**

27. Contrary to Canada's assertions, Canada's grain segregation requirements do in fact entail costs for elevator operators. Keeping foreign grain separate regardless of commercial demand for such segregation leads to inefficiencies in the grain handling system. For example, it would be more efficient for an elevator operator to store US corn and like Canadian corn in the same bin, since the end user who purchases the corn (*e.g.*, a feed lot) does not care if it is mixed. Instead, an elevator operator may have a bin half full of US corn and be unable to utilize the excess capacity because he only has Canadian corn that needs storage.

28. The grain segregation requirements extend to rail car and truck shipments, which leads to additional inefficiencies. Because US grain and Canadian like products must be kept separate, an elevator operator may find that he has to ship a partially full rail car of US corn, since he is not permitted to add like Canadian corn to the rail car in order to fill it. This results in additional costs for the elevator operator. With costs for handling foreign grain higher than the costs of handling like Canadian grain, foreign grain faces less competitive conditions than like Canadian grain, as elevator operators will be more likely to accept like Canadian grain over foreign grain in order to avoid the additional handling costs associated with foreign grain.

**Question 99: Could Canada elaborate upon, including by providing the legislative basis for and the practicalities associated with, the inspection and reporting requirements with respect to Canadian grain referred to in response to Questions 14(c) and 15? Do these requirements apply to foreign grain as well?**

29. If, as Canada states, foreign grain is not officially inspected at terminal elevators,[12] it is difficult to understand why CGC inspectors must be present to monitor the flow of foreign grain into terminal elevators.[13] This contradiction highlights the fact that throughout its submissions Canada makes misleading statements about its grain segregation system in an attempt to obscure the legal requirements under the CGA and make it difficult to assess whether Canada's measures are consistent with its WTO obligations.

30. Canada maintains a highly comprehensive reporting system that, as Canada admits, also extends to foreign grain. Canada's statement that "relying on reporting is not sufficient in the case of foreign grain to address potential concerns," is a baseless assertion and is not supported by the extensive documentation listed at www.grainscanada.gc.ca/regulatory/licensees/forms-e.htm.

**Question 102: With reference to Canada's replies to Questions 13(b), 13(c) and 15, how does Canada control shipments of foreign grain for GMO and SPS problems where foreign grain is shipped to the end-user directly rather than through the bulk grain handling system?**

31. Again, as with Canada's answer to Question 81, Canada misleadingly implies that the provisions of the CGA and CGR at issue in this dispute are SPS measures. This is patently false. As we discuss in our comments on Question 81, phytosanitary issues with respect to grain imports are handled by the Canadian Food Inspection Agency (CFIA). For example, CFIA Directive "Barley, Oat, Rye, Triticale and Wheat -- Phytosanitary Requirements on Import, Transshipped, In-Transit and Domestic Movement," effective November 2000, specifies the plant protection requirements for

[12] *See* Canada's Responses to the Panel's Questions from the Second Substantive Meeting, Response to Question 99, para. 52.

[13] *See id*., Response to Question 73, para. 11, note 2.

imported, transshipped, in-transit and domestic movements of barley, oats, rye, triticale, and wheat into and through Canada.[14]

**Question 103: With reference to section 57(c) and para. 196 of Canada's first written submission, why does the CGC not rely on section 57(d) with respect to foreign grain for which there is an SPS concern?**

32. Please see US comments on Questions 81 and 102. Section 57 of the CGA and Section 56(1) of the CGR are not SPS measures. To the extent that Canada wishes to "strictly scrutinize" foreign grain due to SPS concerns, such a function is outside the purview of the CGA and the CGC.

**Question 104: With reference to para. 161 of Canada's first written submission, are there SPS controls in respect of imports of foreign grain at the border as well, or are the controls in cases of foreign grain entering the bulk grain handling system limited to those the CGC may undertake under section 57?**

33. Here, Canada admits that the CFIA, not the CGC, has responsibility for SPS controls related to foreign grain imports. As stated by Canada, the CFIA, not the CGC, implements SPS measures that may, depending on the CFIA's assessment, include requirements for import permits and/or phytosanitary certificates.

**Question 105: Why are Alberta, British Columbia, Manitoba and Saskatchewan the only provinces with loading sites eligible for the producer railcar programme?**

34. As demonstrated by Exhibits US-19 and US-20, the railways only offer producer cars at sites located in certain provinces.

**Question 106: With reference to Canada's Article XX defence, please provide your views on the alternative measures referred to by the EC in its written third party submission at paras. 31 and 32.**

35. Canada fails to address the point made at paragraph 32 of the EC's submission. Under paragraph 32, the EC suggests that labelling or grading provisions could accomplish the same goals as Canada's prohibition on mixing all foreign grain. Indeed, as noted in our comments on Question 80, Canada already has inspection and grading provisions in place which make the origin of the wheat known to the purchaser, and this accomplishes Canada's objectives with respect to misrepresentation. Therefore, the prohibition on mixing generally is not necessary to secure compliance with the grading requirements of the CGA, the Competition Act, or any other law or regulation identified by Canada in its submissions.

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

36. Canada's statement that "most wheat grown in the United States is of varieties not registered in Canada" is misleading in the context of its answer to Question 107. Furthermore, Canada provides no citations or evidence in support of this assertion. In US states that are adjacent to the Canadian border (and whose farms are often nearer to a Canadian grain elevator than a US grain elevator), registered Canadian varieties are quite commonplace. In the US state of Montana, for example,

[14] *See* Canadian Food Inspection Agency, "Barley, Oat, Rye, Triticale and Wheat – Phytosanitary Requirements on Import, Transshipped, In-Transit and Domestic Movement, D-99-01 (1 Nov. 2000) *available at* http://www.inspection.gc.ca/english/plaveg/protect/dir/d-99-01e.pdf (Exhibit US-29).

fifty per cent of durum wheat planted in the spring of 2000 was of a Canadian variety.[15] Even so, this wheat is treated as "foreign" and is given less favourable treatment than like Canadian wheat.

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

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

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

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

**LIST OF EXHIBITS**

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|---|---|
| US-28 | Adrian Ewins, "Railways Below Revenue Cap, But Slightly," The Western Producer (2 Jan. 2003), *available at* www.producer.com/articles/20030102/news/20030102news06.html. |
| US-29 | Canadian Food Inspection Agency, "Barley, Oat, Rye, Triticale and Wheat – Phytosanitary Requirements on Import, Transshipped, In-Transit and Domestic Movement, D-99-01 (1 Nov. 2000), *available at* http://www.inspection.gc.ca/english/plaveg/protect/dir/d-99-01e.pdf. |
| US-30 | Montana Agricultural Statistics Service, Montana Wheat Varieties 2003 (18 July 2003). |