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

Answers of the United States of America
to Written Questions of the Panel
in Connection with the Second Panel Meeting

October 29, 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

[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.

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.

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 favorable 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 favorable 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 U.S. grain is legally precluded from receiving the producer car benefit, since Canadian grain producers do not produce U.S. 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

[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 favorable 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.

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 favor 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?

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

[3] *See Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (Sept. 25, 1997), para. 14.71.

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),

[4] *Vienna Convention on the Law of Treaties,* 23 May 1969, 1155 U.N.T.S. 331.

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 behavior. 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 behavior. 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;

---

[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 (Feb. 15, 2002), para. 250.

[7] *Merriam-Webster's Collegiate Dictionary: Tenth Edition* (2001), p. 967.

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 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 behavior 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 behavior 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 behavior would not be commercial. "Commercial considerations" in XVII:1(b) specifically references consideration of price, quality, availability, etc. Commercial behavior 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.

---

[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).

(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 behavior 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.

Question 88: 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 U.S. 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

[11] *Ad Note Article XVII*, para. 1.

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.

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 U.S. 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 behavior 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 behavior 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 behaviors 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

[12] *See* U.S. Second Written Submission, paras. 16-17.

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 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 percent 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 U.S. 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

[13] Canadian Wheat Board, "The Role of the Canadian Wheat Board in the Western Grain Marketing System (Feb. 23, 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.

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 program.

Question 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?

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 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 program 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

[15] Canadian Wheat Board, "Grain Matters: Sale of the Federal Hopper Car Fleet," (July-Aug. 2002) (Exhibit US-25).

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 U.S. wheat.

36. It is important to note that U.S. 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.

[16] Transport Canada, Press Release No. H034/00, "Government of Canada Announces Measures to Improve Western Grain Handling and Transportation System," (May 10, 2000) (Exhibit US-26).

[17] Canadian Pacific Railway, "CPR Reports Increased Second Quarter Operating Income of $206 Million," (July 19, 2001) (Exhibit US-27).

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

Answers of the United States of America
to Written Questions of the Panel
in Connection with the Second Panel Meeting

October 29, 2003

LIST OF EXHIBITS

US-24 Canadian Wheat Board, "The Role of the Canadian Wheat Board in the Western Grain Marketing System (Feb. 23, 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," (May 10, 2000).

US-27 Canadian Pacific Railway, "CPR Reports Increased Second Quarter Operating Income of $206 Million," (July 19, 2001).