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

(WT/DS276)

Executive Summary of the Oral Statement of the United States of America at the First Meeting of the Panel

September 19, 2003

GATT Article XVII Claims

1. The GATT 1994 does not prohibit Members from establishing and maintaining a State Trading Enterprise ("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.

2. 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 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.

3. 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 U.S. panel request was premised on the notion that Article XVII:1(a) and (b) had distinct obligations.

4. Canada, like all Members who establish STEs and grant them special benefits and privileges, must fulfill its obligations under Article XVII and ensure that the Canadian Wheat Board ("CWB") does not engage in trade-distorting conduct. Canada has not met this obligation.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. Fourth, the CWB is given more favorable 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 favorable credit terms to high-risk buyers.

11. 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.

12. 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.

13. 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 U.S. 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 *Marrakesh 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."

14. The U.S. submission does not, as Canada claims, argue that Article XVII contains "obligations of process." The reason that the U.S. 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.

15. The United States has not, as Canada has claimed, asked the Panel to reverse the burden of proof. To the contrary, the entire first U.S. submission is dedicated to meeting the U.S. 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.

16. 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 U.S. 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.

17. 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 U.S. 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 and during the consultations in this case under Article XXII. 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.

GATT Article III:4 and TRIMs Article 2 Claims

18. 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 program 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.

19. 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 favorably than like Canadian grain – a violation of Canada's obligations under Article III:4 of the GATT 1994.

20. 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 U.S. grain is the same variety as Canadian grown grain, the only difference being that the U.S. grain is grown south of the Canadian border.

21. 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.

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

23. Canada responds that in certain cases the Canada Grain Commission ("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 labeling requirements that are not imposed on like domestic grain.

24. 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 *Korean 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."

25. Canada's argument that U.S. 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.

26. Canada's reference to the Wheat Access Facilitation Program ("WAFP") does not counter the argument that imported grain is subject to discriminatory treatment. Under the WAFP, grain

elevators that receive U.S. wheat must satisfy numerous onerous regulatory requirements and seek CGC approval. In fact, no U.S. wheat has ever been shipped under the WAFP because of these onerous requirements.

27. Canada also makes a half-hearted attempt to invoke an Article XX(d) defense 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.

28. The United States submits that the rail revenue cap and the producer car program also violate Article III:4 by according treatment to imported grain that is less favorable than the treatment granted to like products of national origin. Only Western Canadian grain, not imported grain, benefits from the rail revenue cap program. This favors 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.

29. Similarly, the producer car program 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 U.S. 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 U.S. farmers are not in Canada, we fail to see how U.S. grain can take advantage of the producer car program.

30. 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 favor 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.