

ANNEX B

RESPONSES TO QUESTIONS OF THE PANEL IN THE CONTEXT OF THE SECOND SUBSTANTIVE MEETING

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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 or 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 or 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

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 lower 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?

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 submission⁹, the CWB’s legal mandate to maximize sales of Canadian wheat at “reasonable” prices¹⁰ 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.

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 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 United 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.

Question 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 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.

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

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.

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

- 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 monopoly”.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 unsupported, 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

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

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).

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

- 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).
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