



## ANNEX A-1

### RESPONSES OF THE UNITED STATES TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

#### *Questions Posed to the United States*

**Q1. The United States claims that the "CWB Export Regime" is inconsistent with Article XVII:1 of the GATT 1994 (US first written submission, para. 105). The term "CWB Export Regime" is defined at para. 15 of the US first submission as comprising (i) the legal framework of the CWB, (ii) Canada's provision to the CWB of exclusive and special privileges, and (iii) the actions of Canada and the CWB with respect to the CWB's purchases and sales involving wheat exports. In this regard, please provide further clarification as follows:**

**(a) Is the United States claiming that the "legal framework of the CWB" as such (per se) is inconsistent with Article XVII:1?**

1. The US claim is that the CWB's legal structure and its incentives to act in a non-commercial manner necessarily result in the CWB making sales not in accordance with Article XVII standards. This legal framework, when taken together with other aspects of the CWB export regime, is inconsistent with Article XVII.

**(b) What is the United States' claim with respect to "the provision to the CWB of exclusive and special privileges"? Paras. 3 and 50 of the US first written submission appear to recognize that Members may provide exclusive or special privileges to enterprises.**

2. Article XVII is premised on the fact that Members can grant exclusive and special privileges to STEs. However, in recognition of the le XVII isatruct ac29oT Tw 2w Tc 1.46gp  
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approval and guarantee of the initial payment price. These actions, when taken together with other aspects of the CWB export regime, are inconsistent with Article XVII.

**(d) What "actions" of the CWB with respect to the CWB's purchases and sales involving wheat exports are inconsistent with Article XVII:1?**

4. The "actions" of the CWB are the CWB's purchases and sales of wheat on discriminatory and non-commercial terms.

**Q2. In connection with the US argument that Canada is required under Article XVII:1 to "ensure" that the CWB meets the Article XVII:1 standards, please provide clarification as follows:**

**(a) Is the United States arguing that Canada's legislation must require, or mandate, the CWB to meet the Article XVII:1 standards? (US first written submission, paras. 65-66)?**

5. No, the United States is not arguing that statutory language requiring the CWB to meet Article XVII:1 standards would be sufficient to meet Canada's obligations under Article XVII. In any case, it is undisputed that Canada has no such statutory provision in place. We understand that, as a general matter, Members may choose the mechanism that they wish to use to meet their WTO obligations. In this case, because the CWB's legal structure and incentives, absent any countervailing supervision or incentives, necessarily results in the CWB making sales not in accordance with the Article XVII standards, Canada is not meeting its WTO obligations.

**(b) Is the United States arguing that in addition to imposing a statutory requirement on the CWB that it meet the Article XVII:1 standards, Canada would need to supervise CWB operations? (US first written submission, para. 69 and footnote 59) Or is the supervision requirement an alternative to a statutory requirement?**

6. While this question sets forth possible means for Canada to bring itself into compliance with Article XVII, it is undisputed that Canada is not now undertaking such supervision, in accordance with a statute or otherwise. This absence of supervision, taken together with the legal structure of the CWB and the incentives created by the CWB export regime, is not consistent with the Canada's obligations under Article XVII.

**(c) Regarding the supervision requirement, what level and what kind of government supervision would be required to "ensure" compliance with the Article XVII:1 standards?**

7. It would not be appropriate for us to speculate as to whether any particular measures adopted by Canada would bring the CWB export regime into compliance. Whether any particular, hypothetical level of supervision by Canada would actually lead to a conclusion that Canada was in compliance with its obligations under Article XVII would depend on all of the facts and circumstances of the CWB export regime as a whole. The fact that Canada is undertaking *no* such supervision at present, in combination with other aspects of the CWB export regime, is sufficient to conclude that the regime is inconsistent with Article XVII.

**(d) Is Article 18 of the CWB Act insufficient to meet the supervision requirement argued for by the United States?**

8. Yes. In this case, Canada has explained that while it could supervise the CWB under Article 18, it chooses not to do so. That fact of non-supervision, in combination with the other aspects of the CWB export regime established by Canada, means that Canada has failed to meet its obligations under Article XVII.

- (e) **Is the United States arguing that as long as an STE has the ability to engage in conduct proscribed by Article XVII:1, the Member maintaining or establishing it is in breach of Article XVII:1, or is the United States arguing that as long as an STE has this ability, the Member concerned is under an obligation to supervise the STE's operations? (US first written submission, paras. 67, 77-78)**

9. Neither one of these statements captures the US position. It is not the mere fact that the CWB has the ability to engage in conduct proscribed by Article XVII:1 that results in a breach of Article XVII. Rather, the CWB's unique legal structure and incentives, and the lack of any countervailing supervision or incentives, necessarily result in the CWB making sales not in accordance with Article XVII standards. A lack of government supervision is but one element of the CWB regime. If this element, or any other element, were to be modified, the WTO-consistency of the CWB regime would need to be reevaluated.

- (f) **With reference to para. 50 of the US first written submission, why cannot the balance of rights and obligations be preserved by an interpretation of Article XVII:1 according to which, under Article XVII:1, Members have the right to establish and maintain trading enterprises with special or exclusive privileges, but in exchange must do nothing more than assume responsibility under international law for any conduct by such enterprises which has been found not to be in accordance with certain prescribed standards?**

10. It is not entirely clear to us what it would mean, in the context of the WTO Agreement, for Canada to "assume responsibility under international law" if Canada did not, as suggested in paragraph 50 of the first US submission, "ensure that the STE acts in a manner consistent with the general principles of non-discriminatory treatment, to make purchases or sales solely in accordance with commercial considerations, and to allow the enterprises of other Members an adequate opportunity to compete." As described before, in the absence of supervision by the Government of Canada and given its unique structure, the CWB export regime necessarily results in the CWB making sales not in accordance with Article XVII standards. The CWB regime is therefore inconsistent with Article XVII. In these circumstances, Canada cannot be said to have assumed its responsibility under the WTO Agreement.

**Q3. Is the United States arguing that if the CWB used its privileges to make sales on terms which could not or would not normally be offered by privately-held marketing agencies, such sales necessarily would not be in accordance with "commercial considerations"?**

11. e.g., D-16.25 -32.7he

entities regardless of their corporate structure. The CWB is not disciplined by market forces in the same way that commercial enterprises are. For example, a commercial cooperative enterprise has to compete for farmer members, and farmers are free to leave a cooperative and sell their wheat elsewhere if the commercial cooperative does not provide favourable returns. A share-capital corporation must also compete in the marketplace for sales of wheat and must balance commercial risks when making a decision regarding how much the corporation can pay for wheat. Unlike any commercial enterprise disciplined by market forces, the CWB has a guaranteed supply of wheat because farmers have no viable alternative but to sell their wheat for domestic human consumption and export to the CWB. This guaranteed supply of wheat gives the CWB a different risk and pricing structure than a commercial actor.

**Q7. Please indicate whether, in your view, the CWB is a "State enterprise" or an "enterprise" which has been granted "exclusive or special privileges", as these terms are used in Article XVII:1(a), and why.**

13. We consider the CWB to be a state trading enterprise, as Canada acknowledges in its STE notification.<sup>1</sup>

#### *Questions Posed to the United States*

**Q8. Could the United States confirm that, in respect of receipt of foreign grain into Canadian elevators, the United States' claim is that the provisions of section 57 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

14. Yes, section 57 of the Canada Grain Act, as such, is inconsistent with Article III:4.

**Q9. Could the United States confirm that, in respect of the mixing of grain, the United States claim is that the amended provisions of section 56(1) of the Canada Grain Regulations (Exhibit CDA-23), as such, are inconsistent with Article III:4 of the GATT 1994?**

15. Our first submission addresses the measure in effect at the establishment of the March Panel and the July Panel, which is section 56(1) prior to amendment. This measure, as such, is inconsistent with Article III:4. The amended provision, although not within the terms of reference of the Panel, also appears to do exactly the same thing, since, as we understand, US grain cannot qualify as eastern Canadian grain. Accordingly, the amended measure, as such, also appears to be inconsistent with Article III:4.

**Q10. Could the United States indicate whether, in respect of the revenue cap, the United States claim is that the provisions of section 150(1) of the Canada Transportation Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

16. The US claim is that section 150(1) and section 150(2) of the Canada Transportation Act, as such, are inconsistent with Article III:4.<sup>2</sup>

**Q11. Could the United States confirm that, in respect of rail car allocation, the United States claim is that the provisions of section 87 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

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<sup>1</sup> See Working Party on State Trading Enterprises, New and Full Notification [by Canada] Pursuant to Article XVII:4(a) of the GATT and Paragraph 1 of the Understanding on the Interpretation of Article XVII,

17. Section 87 of the Canada Grain Act is inconsistent with Article III:4. Canada's claim that foreign producers may use producer rail cars under section 87 is a hollow one. Only Canadian producers can take advantage of producer rail cars under section 87 because all producer car loading stations are in Alberta, British Columbia, Manitoba, or Saskatchewan.

*Questions Posed to Both Parties*

**Q20. Once a panel has determined that, in making certain export sale(s), an STE did not act in conformity with the standards set forth in Article XVII:1(b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment**

18. Article XVII:1(b) states that the obligations under Article XVII:1(a) "shall be understood to require" that STEs make purchases and sales in accordance with commercial considerations and afford the enterprises of other Members adequate opportunity to compete in accordance with customary business practice. Thus, Article XVII:1(b) sets forth examples of conduct that Article XVII:1(a) requires. To fail to engage in the required conduct under Article XVII:1(b) constitutes a violation of XVII:1. As the *Korea Beef* panel found, "[a] conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on 'commercial considerations,' would also suffice to show a violation of Article XVII."<sup>3</sup>

19. Moreover, on the facts of this case, a finding that the CWB makes sales not in accordance with commercial considerations under Article XVII:1(b) necessarily leads to the conclusion the CWB is not acting in accordance with the general principles of non-discriminatory treatment. Under the CWB's statutory structure and incentives, it uses its pricing flexibility to make sales on non-commercial terms in order to target particular export markets, resulting in a violation of general principles of non-discriminatory treatment.

**Q21. The second clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity "to compete for participation in such purchases or sales".**

- (a) **Is the expression "such purchases or sales" a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

20. In the context of this case, the expression "such purchases or sales" in the second clause of Article XVII:1(b) refers to the opportunity to participate in the CWB's sales of wheat. This is more fully explained in the answer to question 21(b), below.

- (b) **Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (i.e., wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (i.e., wheat sellers) or (iii) other enterprises?**

21. Under Article XVII, an STE has an obligation to afford all enterprises an adequate opportunity to compete for *participation* in its purchases or sales involving either imports or exports.

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<sup>3</sup> *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, (WT/DS161/RWT/DS169/R) (31 July 2000) (hereinafter *Korea Beef*), para. 757.

This, in addition to the first obligation under Article XVII:1(b) to act in accordance with commercial considerations, obliges a Member to ensure that its STEs with special and exclusive benefits and privileges act as commercial actors. Here, the enterprises at issue would include any enterprise that is competing for participation in CWB wheat sales, including enterprises competing to purchase wheat from the CWB (i.e., wheat buyers), as well as those enterprises selling wheat in the same market as the CWB (i.e., wheat sellers).

**Q22. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b):**

- (a) The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

22. We assume for this question that the STE and the subsidized supplier are offering wheat for sale on the same terms, with the exception of price. We also assume that to meet the subsidized price, the STE would be offering wheat for sale at a price that is less than the replacement value for the wheat. Although in the short run both a private supplier and an STE could sell below cost in this manner to meet the subsidized price in export market 2, in the long run a private actor could not sustain this behaviour. If an STE uses its special and exclusive privileges to engage in sustained, long-run price discrimination between export market 2 and export market 1 in these circumstances, the STE is not acting in accordance with commercial considerations.

23. A Member is not permitted to violate its obligations under Article XVII of the GATT 1994 merely because that Member's STE sells in a market where its competitor has received export subsidies. No such exception exists under Article XVII. Price discrimination by an STE using its exclusive and special privileges in a non-commercial, non-transparent manner is not permitted under Article XVII.

- (b) The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or could not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

24. In this case, the STE would not be making its sales in accordance with commercial considerations because it could not price discriminate in export market 2 in the absence of its special and exclusive privileges.

- (c) The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

25. In this case, assuming that both the STE and a private seller without any special and exclusive privileges could both sell at a higher price in export market 1 due to the price-elasticity of import demand, the STE would be acting in accordance with commercial considerations. However, as if

- (d) **Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markets, which it could not do but for its exclusive right to export the product concerned (assume the STE's product is perceived as superior in quality for instance, such that there is no significant competition from other products).**

26. An STE that extracts monopoly rents in both markets, which it could not do but for its special and exclusive benefits and privileges, is no





35. The CWB states that it forecasts “target returns” for each export market in order to maximize overall return to the pool, but fails to explain what considerations are used when setting this target return. Similarly, while Canada states that managers are required to obtain a certain “acceptable return” on each sale, Canada does not provide any information on how this acceptable return is calculated. The CWB has an incentive to use its special and exclusive privileges to discriminate between foreign markets and make some sales in a non-commercial manner.

36. Finally, under paragraph 58, Canada states that “most,” but not all, sales prices are linked to US futures exchange prices and that the CWB “often,” but not always, looks to US exchanges to guide pricing decisions. The CWB also implicitly acknowledges that while differences in prices are “primarily” based on considerations such as grade and protein of grain and transportation costs, other, presumably non-commercial factors also come into play.

37. Indeed, paragraph 58 only tells part of the story, by focusing on Hard Red Spring wheat. Noticeably absent is any discussion of the Durum wheat market, even though the CWB accounts for over fifty per cent of world Durum exports. There is no futures market for Durum wheat, and commercial actors in the Durum wheat market have no basis upon which to judge the CWB’s Durum wheat prices.

**Q28. With reference to para. 80 of the US first written submission, if the CWB tries to sell all wheat it has bought and in doing so seeks out the best markets and tries to obtain the best possible prices, are the sales made in this way in accordance with commercial considerations?**

38. No. The CWB’s mandate under the CWB Act is to obtain “reasonable” prices, considering the objective of promoting sales of wheat. Accordingly, the CWB is driven to maximize sales quantity. In contrast, a commercial actor is only able to take advantage of a “best” price in a given market if that price covers the commercial actor’s replacement value for the wheat sold. The CWB’s special and exclusive privileges, including a government guarantee of all initial purchase price, are not available to commercial actors. The CWB’s mandate is to obtain “reasonable” prices, considering the objective of promoting sales of wheat. Accordingly, the CWB is driven to maximize sales quantity. In contrast, a commercial actor is only able to take advantage of a “best” price in a given market if that price covers the commercial actor’s replacement value for the wheat sold. The CWB’s special and exclusive privileges, including a government guarantee of all initial purchase price, are not available to commercial actors.



grain company would have to pay a tangible cost to obtain the same certainty under commercial conditions.

**Q33. Please provide evidence supporting the existence of the two alleged pool deficits (US first written submission, para. 26). Were these two deficits paid for by the Canadian government?**

45.

49. Since farmers cannot, in practice, privately sell their wheat for domestic human consumption or export without going through the CWB, the fact that some may believe they could receive a higher return through a more competitive marketing structure does not factor heavily into the determination to produce wheat. There is effectively no exit option, as demonstrated by the Western Canadian wheat farmers that have gone to jail for attempting to market their wheat on their own, outside of the costly buy-

rail transportation measures discriminate on the basis of origin – even when all other product characteristics are exactly the same – one must reach the conclusion that the measure at issue applies to like domestic and foreign products. Thus, the structure and design of the Canadian measures alone make clear that like products are subject to the Canadian measures at issue.

**Q44. Are all imported and domestic products falling within each of the categories of "grains"**

producers. It is difficult and costly to access the rail system as an individual producer, rather than through the bulk handling system.

*Questions Posed to the United States*

**Q46. With reference to paras. 207, 217 and 279 of Canada's first written submission, is it correct that Article III:4 of the GATT 1994 does not apply to laws affecting the transportation of goods in-transit?**

59. There is no question that Article III applies to the measures at issue in this case. Canada's references to Article V of the GATT 1994 and in transit shipments are no relevant to this dispute. The laws and regulations at issue in this case – the Canada Grain Act and the Canada Grain Regulations – are measures affecting the internal transportation and distribution of grain. These measures a

**Q50. Does the United States agree with Canada's assertion, at para. 282 of its first written submission, that the only rail movements subject to the revenue cap which affect transportation of imported grain for internal sale are the movements of imported grain to Thunder Bay or Armstrong for domestic use in Canada?**

64. The United States fundamentally disagrees with Canada's assertion that the only relevant rail movements are movements of US-origin grain to Thunder Bay or Armstrong for domestic use in Canada. As stated in Canada's own submission, the revenue cap applies to all grain movements that "originate in Western Canada."<sup>9</sup> Thus, the revenue cap applies to the internal transport of all grain within Canada from points in Western Canada to other Canadian ports. All of these movements are covered by Article III:4.

**Q51. With reference to para. 100 of the US first written submission:**

**(a) Could the United States explain how the revenue cap translates into a competitive advantage for Western Canadian grain over imported grain in respect of the internal transportation of grain?**

65. Because railroads must pay a significant penalty for exceeding the rail revenue cap, railroads price transport for Western Canadian grain subject to the cap at rates below the level that could trigger the railroad to exceed the cap. Rail rates charged for imported grain can be set at a level that exceeds the rail rates charged for domestic grain because the revenue cap does not apply to shipments of foreign grain.

**(b) Why does the revenue cap necessarily constrain the rate-setting of the prescribed railways rather than the volume of grain shipped?**

66. Revenue received per mile is likely far more predictable than volume hauled. Because of the CWB's secrecy, railroads are faced with a great deal of uncertainty regarding the volume of commodities to be moved, as well as the timing and demand for rail equipment during the marketing year. We understand that the railroads have never denied transport of Board grain. As the railroads have little control over volume, rates are set at a low enough level so that adjustments can be made if concerns arise about annual revenues, and there is ample opportunity to raise rates without exceeding the revenue cap.

**(c) Could the United States explain how a system which appears to mandate a maximum average rate translates into a competitive advantage for Western Canadian grain?**

67. For an explanation of how the rail revenue cap translates into a competitive advantage for Western Canadian grain, please see the US answer to question 51(a).

**Q52. Could the United States comment on paras. 290 and 291 of Canada's first written submission?**

68. Paragraphs 290 and 291 discuss grain movements that contain a transportation segment that is not subject to the revenue cap for domestic movements of



railroads do not pay the penalty for exceeding the cap. As a practical matter, therefore, the rail revenue caps keep prices lower for the transport of Western Canadian grain. Shipments of Western Canadian grain that are subject to the rail revenue cap pay lower transportation costs than those shipments would pay without the revenue cap. These lower transportation costs accord domestic grain more favourable treatment than like foreign grain.

69. Further, there is no support for Canada's argument in paragraphs 290 and 291 of its written submission that railroads can charge as high a rate for a non-regulated transportation segment and a low rate on the regulated transportation segment so that the average rate reflects a "market" rate.

**Q53. Could the United States confirm that, in respect of rail car allocation, the United States claim is that the provisions of section 87 of the Canada Grain Act, as such, are inconsistent with Article III:4 of the GATT 1994?**

70. Yes, the United States claims that section 87 of the Canada Grain Act is inconsistent with Article III:4 of the GATT 1994.

**Q54. With reference to para. 101 of its first written submission, could the United States explain how "[m]aking government rail cars available for the transport of domestic grain reduces transportation costs for any grain that receives this benefit."**

71. The provision of railcars from the Government of Canada relieves the railroads of the costs of ownership associated with these rail cars. Therefore, the railroads can charge lower rates than would be the case if the railroads had to lease or purchase the railcars themselves and factor these additional costs into the freight rates. This cost savings is passed on to those transporting domestic grain under the producer car programme.

**Q55. Could the United States explain further and provide further evidence for its assertion in paragraph 101 of its first written submission that the producer car programme "excludes all imported grain."**

72. Despite Canada's statement to the contrary, foreign producers cannot take advantage of the producer rail car programme, as all of the loading sites are in Canada.<sup>10</sup> In addition, the relevant regulations do not state that foreign grain is eligible for the producer rail car programme.

**Q56. With respect to the United States' claims under the TRIMs Agreement, what specifically does the United States mean when it asserts in its first written submission (para. 103) that:**

- (a) **The grain segregation requirements require elevator operators to "use" domestic Canadian grain; that the rail revenue cap requirements require shippers to "use" domestic Canadian grain; and that the producer car programme requirements require shippers to "use" domestic Canadian grain?**
- (b) **What precisely are the "requirements" the United States is challenging for each of the measures being challenged?**

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<sup>10</sup> See Canadian Pacific Railway, "CPR Producer Car Loading Sites," available at <http://www8.cpr.ca/cms/English/Customers/New+Customers/What+We+Ship/Grain/Producer+Cars.htm> (last visited 23 Sept. 2003) (Exhibit US-19); see also CN, "Producer Car Loader Station List," available at [http://www.cn.ca/productsservices/grain/Canadaorigin/en\\_KFGrainCNProducerCarLoaderStationList.shtml](http://www.cn.ca/productsservices/grain/Canadaorigin/en_KFGrainCNProducerCarLoaderStationList.shtml) (last visited 23 Sept. 2003) (Exhibit US-20).

(c) **What "advantage" is the United States asserting the foreign shippers are seeking to obtain?**

73. Answers to (a), (b) and (c) are discussed below for both elevator operators and shippers.

74. "Use" by elevator operators refers to handling of grain in the normal course of business, i.e., handling, storage and transport. The requirements challenged are the Canada Grain Act's prohibition on the receipt of foreign grain into grain elevators under section 57 and the Canada Grain Regulations prohibition on mixing foreign grains under section 56(1). Local content requirements can be facilitated through a variety of regulatory mechanisms, some of which are more transparent than others. Canada's prohibition on the receipt of foreign grain in elevators and prohibition on the mixing of foreign grain are "mandatory" and "enforceable" requirements within the meaning of the TRIMs Agreement Illustrative List. Moreover, they also provide direct cost advantages to those elevator operators that accept Canadian grain over foreign grain because the need for special authorization to accept and/or mix foreign grain and the onerous conditions that are often placed on such authorizations creates a regulatory regime that financially rewards those elevators that accept domestic grain over foreign grain. These matters are described in more detail in paragraphs 100 of the First Written Submission of the United States.

75. "Use" by shippers refers to the shipment of grain by rail. The requirements being challenged here are the requirement that only Canadian grain can be shipped in order to qualify for the rail revenue cap, and the requirement to ship Canadian grain in order to qualify for the producer car programme. Both requirements provide cost advantages in the form of lower rail transport rates to those shippers that choose to ship Canadian grain rather than foreign grain. Again, these matters are described in more detail in paragraph 101 of the First Written Submission of the United States.

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

### LIST OF EXHIBITS

- US - 16. Canada Wheat Board, Annual Report: 1985-86, pp. 46-47; Canada Wheat Board, Annual Report: 1990-91, Table A.
- US - 17. USDA, Foreign Trade Statistics: Foreign Agricultural Service Export Commodity Aggregations for Canada: 1999-2003.
- US - 18. Canada Transportation Act, R.S.C., ch. 10 (1996).
- US - 19. Canadian Pacific Railway, "CPR Producer Car Loading Sites," *available at* <http://www8.cpr.ca/cms/English/Customers/New+Customers/What+We+Ship/Grain/Producer+Cars.htm>.
- US - 20. CN, "Producer Car Loader Station List," *available at* [http://www.cn.ca/productsservices/grain/Canadaorigin/en\\_KFGrainCNProducerCarLoaderStationList.shtml](http://www.cn.ca/productsservices/grain/Canadaorigin/en_KFGrainCNProducerCarLoaderStationList.shtml).

**ANNEX A-2**

**RESPONSES OF CANADA TO QUESTIONS POSED IN THE  
CONTEXT OF THE FIRST SUBSTANTIVE  
MEETING OF THE PANEL**

(24 September 2003)

light of a normal (private) commercial behaviour. Yet, it is clear that any private operator that benefits from special and exclusive rights would make use of them.

4. The question, therefore, would not be whether, in its purchases and sales, an STE acts

9. Commercial enterprises generally take into account similar factors in carrying out purchases or sales. These include the factors listed in Article XVII, namely “price, quality, availability, marketability, transportation and other conditions of purchase or sale.”

10. However, the way that each enterprise responds to such factors depends on the circumstances in which it operates. That is, the size of the enterprise, the market in which it operates, the type of organization that it is, its financial circumstances and any special or exclusive privileges that it may have been granted. For example, a large enterprise with significant assets may be willing to extend supplier credits that a smaller enterprise would not be able to extend because of the economic risks involved. Similarly, two banks of comparable size may have different risk exposures in their portfolios, thus encouraging one to lend to a market that the other would consider an inappropriate client. In both circumstances, each enterprise would be acting consistently with commercial considerations, even though the resulting conduct is opposite.

11. In this respect, Canada’s reference to the nature of the CWB as a “cooperative marketing agency” responded to unsupported US allegations contained in paragraphs 79-85 of its First Written Submission. There, the United States made a distinction between “profit-maximising” conduct by share-capital corporations and “revenue-maximising” conduct allegedly engaged in by the CWB. The United States made no attempt to explain why revenue-maximising is not “commercial conduct” – and indeed, any such attempt would be in vain. Even so, the US reference to “profit-maximising” on behalf of the corporation is, as Canada demonstrated and the United States failed to controvert, inapposite in respect of cooperatives and similar marketing agencies. As indeed the United States Department of Agriculture has observed, revenue maximising for a cooperative marketing agency translates into profit maximising for the farmer.

**7. Please indicate whether, in your view, the CWB is a "State enterprise" or an "enterprise" which has been granted "exclusive or special privileges", as these terms are used in Article XVII:1(a), and why.**

12. Article XVII does not provide a definition of a “state enterprise”. The Article covers “state enterprises” where a Member “establishes or maintains” one.

13. The CWB was established by an Act of Parliament, the *CWB Act*, which also sets out its corporate structure and powers. The CWB is a corporation without share capital and thus has no controlling shareholder. Until the end of 1998, the CWB was governed by a Board of Commissioners appointed by the government. The CWB was also an “agent of Her Majesty” and clearly was a “state enterprise” that had been granted exclusive or special privileges.

14. In 1998, the corporate structure of the CWB was altered so that its governance/is now vested in a Board of Directors, the majority of which are elected by farmers. As a result, the CWB is neither a Crown corporation nor an agent of Her Majesty.

15. Therefore, even if the CWB were not technically considered to be a “state enterprise” that has been granted exclusive or special privileges, Canada has no doubt that it would fall into the category of “any enterprise” that has been granted special or exclusive privileges. As a result, Canada has no doubt that it has responsibilities under Article XVII with respect to the CWB.

*Canada:*

**12. Is the Panel correct in understanding that once a licensed elevator operator has been authorized to receive foreign grain, such grain can be mixed with Canadian grain of the same type and grade (and need not be identified as mixed grain), but that it cannot be mixed with**

**Canadian grain of a different type, or with Canadian grain of the same type but of a different grade, unless such mixing is authorised pursuant to relevant rules and regulations? Please refer to relevant legal provisions.**

16. Canada is not concerned with the mixing of any given lot of grain with another lot of grain as long as the combined lot is not represented as “Canadian grain”. Canada’s concern is with uncontrolled mixing in the bulk grain handling system that would affect Canada’s ability to know the quality of the grain in the system, and its ability as an exporter to guarantee the quality, end-use characteristics and Canadian origin of the grain.

17. There is no legal provision that specifically regulates mixing of foreign grain with Canadian grain. If an elevator receiving foreign grain wants to mix that foreign grain with Canadian grain, it would make this request either together with the request for authorization to receive foreign grain, or at a later stage (Sections 57 and 72(2) of the *CGA*). The Canadian Grain Commission (“CGC”) would always authorize it, as long as the lot of mixed grain is identified as such to ensure that it is not misrepresented.<sup>2</sup>

18. As a general rule, elevator operators themselves will have no reason to mix different types of grain.

**13. <sup>(1)</sup> With respect to the authorisation of receipt of foreign grain into elevators pursuant to Section 57 of the *Canada Grain Act*:**

**(a) What is the process by which such orders are made by the Commission? How is the process initiated? How long does the process generally take? Does the process involve any documentary requirements, costs, etc.?**

<sup>1</sup>**Note:** Regarding Questions 13, 14 and 16, please provide documentary support for your answer.

19. The elevator operator initiates the process to obtain an authorization to receive foreign grain. It usually does so orally, by placing a telephone call to the CGC, and follows up with a written request. There is no form; the written request for authorization can be made by fax, e-mail, or post. The elevator operator informs the CGC of its intention to receive foreign grain and describes the type of grain, quality of the grain, origin and destination, and volume of the grain, as well as the anticipated date of receipt. Within a working day or two of the request, the CGC issues an order to the elevator authorizing the receipt of the grain. There are no costs involved. A request for authorization could cover several shipments.

20. Exhibits CDA-47 to CDA-53 [**all containing strictly confidential information**] contain examples of authorization requests by elevator operators, including requests covering several shipments and periods of several months, and orders issued by the CGC in response to these requests.

21. The process to obtain an authorization to receive foreign grain is routine, to the point that elevator operators may have already arranged the transport of the grain before making a request.

22. The elevator operators are very familiar with the process to obtain an authorization from the CGC to receive foreign grain. Elevator operators are in constant, and in most cases daily, communication with the CGC.

**(b) What criteria are used to determine whether foreign grain should be received into elevators?**

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<sup>2</sup> For example, see Exhibit CDA-47 [contains strictly confidential information].

23. The authorization is routinely granted. The CGC, however, retains the authority to monitor and control shipments of foreign grain for certain problems, such as where the foreign grain contains a genetically modified grain not approved in Canada or where there is an SPS concern. In such cases, the authorization for entry of the foreign grain of concern may contain conditions to prevent it from contaminating grain in the elevator or the elevator equipment. Authorization would be denied only in very exceptional circumstances, where the imposition of these conditions would not be sufficient or where the risk of contamination would be too high.

**(c) What would be the difference between the prescribed process and a notification system that entails completing a standardized form?**

24. The existing authorization acts essentially like a notification. This is not an onerous process. A standardized form, especially one that would be required at the border, would complicate an existing informal, simple and flexible process and, would result in additional administrative costs for the importer in accordance with the provisions of GATT 1994 and the NAFTA. In addition, a simple notification would not allow the CGC to take appropriate measures where it became aware of certain SPS problems or other unforeseen problems such as the presence of genetically modified grain in the foreign grain that may affect the quality of Canadian grain in the handling system.

**(d) Are there conditional requirements other than those referred to in footnote 118 of Canada's first written submission?**

25. There may be a requiremen 118 n875 3 15 0 Tf 360delis wou(ce with thd9 -30?



28. Primary elevator operators grade Canadian grain on entry and when the grain moves to transfer and terminal elevators it is officially inspected by the CGC and assigned an official grade. The mixing restrictions that apply to Canadian grain under Section 72 of the *CGA*, are just one of many provisions that also serve to maintain quality, (also see Sections 56, 59, 61 and 70 of the *CGA*).

**15. Is there a mechanism equivalent to the section 57 authorisation mechanism that is applied to domestically-produced grain entering the bulk grain handling system? If not, why is such a mechanism necessary?**

29. No authorization is necessary for entry of Canadian grain in elevators. The CGC monitors movement of Canadian grain in elevators based on the elevators' reports and on inspections.

30. An authorization request is necessary for entry of foreign grain into elevators and not for entry of Canadian grain into elevators because Canadian grain is subject to the Canadian quality assurance system, while foreign grain is not.

31. The Canadian quality assurance system starts even before the grain enters the bulk grain handling system, with plant breeding and variety registration. For example, in order to be registered,

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43. Yes. Section 87 of the *CGA* is not limited to Canadian producers. Both Canadian producers and US producers can have access to producer cars. Neither the statute nor the regulations provide otherwise. Both would be required to bring their grain to a producer car-loading site on the Canadian railway system. No Canadian intermediary is necessary for a US producer to obtain a producer car.

***Both parties:***

**20. Once a panel has determined that, in making certain export sale(s), an STE did not act in conformity with the standards set forth in Article XVII:1(b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment?**

44. No. A finding that an STE did not act in conformity with the standards set out in Article XVII:1(b) alone is not enough to find a violation of Article XVII:1. This is because the first step in determining the existence of a violation under Article XVII:1 is a finding that the STE did not act in a manner consistent with the general principles of non-discriminatory treatment.

45. Article XVII:1(a) sets out the substantive obligation under Article XVII:1: state trading enterprises must act in a manner consistent with the general principles of non-discriminatory treatment. The non-discriminatory treatment is then interpreted and amplified by Article XVII:1(b). Article XVII:1(b) recognises that where it does so in accordance with commercial considerations, an STE may discriminate in its purchases and sales. Support for the proposition that Article XVII:1(b) does not contain an independent obligation may be found not only in the opening sentence of Article XVII:1(b), which unambiguously ties that paragraph to the preceding one, but also in the very structure of Article XVII:1. The “undertaking” in Article XVII:1 is set out in paragraph (a) and is not repeated in paragraph (b); without paragraph (a), paragraph (b) would not impose an obligation on Members.

46. Therefore, the more appropriate view is that there can be no violation of Article XVII:1 where the complainant does not demonstrate, and the panel does not find, conduct that is not in accordance with the general principles of non-discriminatory treatment of GATT 1994.

**21. The second clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity "to compete for participation in such purchases or sales".**

- (a) **Is the expression "such purchases or sales" a reference to a given STE's "purchases or sales involving either imports or exports", i.e., the expression used in Article XVII:1(a)? In other words, is "such purchases" a reference to a given STE's purchases abroad (imports) and "such sales" a reference to a given STE's sales abroad (exports)?**

47. Yes. The reference to “such purchases or sales” in Article XVII:1(b) is to “purchases or sales involving either imports or exports” identified in Article XVII:1(a). Accordingly, “such purchases” refers to an STE’s purchases abroad (imports) and “such sales” refers to an STE’s sales abroad (exports).

- (b) **Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (i.e., wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (i.e., wheat sellers) or (iii) other enterprises?**

48. For an export STE, the relevant “enterprises” referred to in the second clause of Article XVII:1(b) are enterprises that are interested in buying wheat from the CWB (that is, wheat buyers). This is clear from the use of the word “participation”. In every purchase and sale there are two sides who participate in the transaction: the seller and the purchaser. The CWB’s competitors do not “participate” in its sales. However, wheat buyers participate in a sales transaction with wheat sellers. Therefore, if the CWB were selling wheat to enterprises in a Member, it must afford “adequate opportunity, in accordance with customary business practice, to compete for participation in such... sales” to wheat purchasers in other Members.

**22.**

55. To the extent that a market is a priority market, it can be expected that a seller would adjust its short-term prices to make long-term gains. This may be done, for example, to build customer loyalty or to familiarize potential customers with the seller's products. Determining the means by which to develop long-term customer relationships is inherently a commercial consideration and is standard commercial practice for any supplier. If the special or exclusive privileges granted to an STE, allow the STE to charge a lower price, doing so is consistent with commercial considerations as it is exactly what any other commercial actor in similar circumstances would do. In fact, for any enterprise to ignore its competitive advantage, however acquired, would be a non-commercial action.

56. In theory, any enterprise, whether an STE or a private trader, with some market power may seek to maximize long-term returns by charging a lower price in a market in order to deter competitors, if the enterprise believed that its competitors would, in fact, be deterred from competing in that market. This would be done with the expectation that the enterprise will subsequently recover in profits the cost associated with this strategy by charging prices above competitive levels. In markets with low barriers to entry or re-entry, however, lowering prices to deter competitors would not be a rational action. Canada notes, in this regard, that markets for agricultural products generally, and wheat in particular, are characterized by extremely low barriers to entry. As such, it would be futile for participants in such markets to pursue the pricing strategy set out in this hypothetical.

57. There is a distinction between non-commercial behaviour and anti-competitive behaviour. Article XVII, or indeed the WTO Agreement, does not prohibit anti-competitive behaviour. If the market structure permits (for example, if barriers to entry or re-entry into a market are high), then selling at a price that is intended to deter other exporters from contesting a market may be commercial behaviour, even if it is anti-competitive. Article XVII:1 is concerned with ensuring that Members do not do through STEs that which they may not do directly. Accordingly, state enterprises may only discriminate in their purchases and sales on the basis of commercial considerations. There being no competition rules in the WTO Agreement, nothing in that Agreement prevents state enterprises from engaging in activities that, though by some definitions may be anti-competitive, are perfectly consistent with commercial behaviour. It is precisely because commercial considerations may lead enterprises to engage in anti-competitive behaviour that some Members have adopted laws prohibiting such behaviour. GATT 1994 does not, however, require such laws, nor does it place disciplines on such behaviour.

58. Finally, a WTO Member that believes it has been disadvantaged by a commercial pricing strategy of an STE as set out in the hypothetical (which a strategy that may not be challenged under Article XVII) is not necessarily without a remedy in the WTO. For example, the WTO Member could consider challenging the special or exclusive privileges to which the STE's low prices are attributable under other WTO disciplines, such as the *Agreement on Subsidies and Countervailing Measures* or the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

- (c) **The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

59. Yes. In this situation, the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b). If the economic conditions in market 1 allow the STE to sell at a higher price, then doing so is in accordance with commercial considerations. A private trader in similar circumstances as the STE would also charge a higher price in market 1 to take advantage of the lower price-elasticity of import demand.

- (d) **Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markets, which it could not do but for its exclusive right to export the**

**product concerned (assume the STE's product is perceived as superior in quality for instance, such that there is no significant competition from other products).**

60. Yes. Extracting monopoly rents (price premiums) in export markets is commercial behaviour. Indeed, such an action is, by definition, undertaken in accordance with “commercial considerations”. In fact, exacting such rents is so tempting on the part of private sector enterprises that some WTO Members have competition laws and authorities to regulate precisely such activities.

61. Of course, a state enterprise – or indeed any enterprise – may “exact” monopoly rents only in markets in which it has a monopoly. In this sense, and especially in respect of export monopolies, there is a fundamental distinction between, on the one hand, the exclusive right to export a product and, on the other, a monopoly in an export market for that product. One does not necessarily flow from the other. For one thing, an exclusive right to export a product is in the power of the Member making such a grant. No Member, however, has the right to grant a monopoly in an export market for its products. For another, the existence of a monopoly in an export market depends entirely on the structure of that other market, including demand elasticity and the ease of market entry by other exporters. For example, while the CWB enjoys the exclusive right to export wheat from Western Canada, it does not enjoy a monopoly, either legal or market-based – in any of the markets in which it competes.

62. An export monopolist may, therefore, exact “monopoly rents” in international markets, by virtue of the export monopoly, only in the rare circumstance where the exporting country is the sole source of the commodity or product for the market in question. Otherwise, the export monopolist will be just another commercial player in the international market.

63. An exporter that enjoys market power will exact rents appropriate to its power so as to maximize returns. It will do so irrespective of whether its market power results from an exclusive right granted by the State or whether its market power (the monopoly) has been gained on the market, be it through superior quality, internal growth or through mergers and acquisitions.

64. In circumstances where an STE enjoys both an exclusive right to export and a monopoly in an export market, to consider monopoly rent seeking by that STE as not being in accordance with “commercial considerations” would be an attack against the grant of the exclusive right to export. That Members of the WTO are entitled to grant such an exclusive right is expressly authorized by Article XVII. An interpretation that would negate this right would obviously be erroneous.

65. Canada notes that some WTO Members have competition laws, pursuant to which the

discrimination must be based on commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase and sale.

67. This interpretation is supported by two considerations.

68. First, if the first proposition were to prevail, it would automatically turn any subsidy granted to an STE that can be characterized as a “special and exclusive privilege” and that provided the STE with a commercial advantage into a prohibited subsidy. However, Article XVII is manifestly not a subsidy-regulation provision under GATT 1994; and nothing in GATT 1994 or elsewhere in the WTO Agreement suggests that Article XVII provides for a new category of prohibited subsidies.

69. Second, the commercial considerations requirement cannot properly be interpreted to mean that an STE must use its special or exclusive privilege in such a way that the purchases or sales involving imports or exports are made on terms that are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges because that would nullify Member’s rights under Article XVII. If the first interpretation were to prevail, a Member could grant exclusive or special privileges to an STE, but if the STE utilized those exclusive or special privileges, the Member would be in violation of its obligation under Article XVII.

**24. Pursuant to Article XVII:1(a), each Member undertakes that its STEs "shall" act in a specified manner. Please explain the meaning and usage of the term "shall" in Article XVII:1(a). In particular, what, if any, difference in meaning would there be if Article XVII:1(a) had said that each Member "undertakes" that its STEs "will" act in the specified manner?**

70. The word “undertakes” creates a positive obligation on the part of Members in respect of the conduct of state trading enterprises. In this context, there is no difference between “shall” and “will”, because either way, the Member is answerable in respect of the discriminatory conduct of the STE in question.

*Canada:*

**36. With reference to paras. 46 and 150 of Canada's first written submission, are all Western Canadian wheat farmers automatically members of the CWB?**

71. There is no membership in the CWB. Western Canadian producers who, (a) choose to produce wheat and barley, and (b) wish to sell the wheat and barley they produce for export or for domestic human consumption must apply for a CWB permit book and market such grain through the CWB. These same producers also vote for the Board of Directors of the CWB.

**37. Is the CWB required to purchase all Western Canadian wheat that is offered to it? If not, has the CWB made use of the possibility to refuse to purchase Western Canadian wheat, for instance in a situation where there was an oversupply of wheat in international markets?**

72. The CWB is not required to purchase all Western Canadian wheat that is offered to it. There have been numerous instances in the past where the CWB has not accepted all of the wheat offered to it for delivery, particularly with respect to durum wheat.<sup>3</sup>

**38. Is the CWB required to sell all wheat purchased by it, or could the CWB decide not to market all wheat purchased, for instance if doing so would maximise returns to farmers? If the**

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<sup>3</sup> For example, see Exhibit CDA-54 for Contract Acceptance Levels for 1995-96 to 2001-02.

**CWB is required to sell all wheat purchased, is the CWB required to market wheat within a particular time-period after purchase, or is it free to determine when to sell?**

73. The CWB is not required to sell all of the wheat that it purchases, and it could decide not to market all wheat purchased if doing so would maximize returns to farmers.

74. Any such decision would be driven by considerations such as the cost of storing the grain in the commercial handling system and the logistical implications of retaining those stocks. For example, the CWB does not own grain storage facilities. And so, the benefit of retaining the stocks would have to be weighed against the additional storage fees that the private grain handlers would charge the CWB. Similarly, the capacity of the Canadian grain handling and transportation system is relatively constrained such that it requires regular turnover to remain efficient and effective. Thus, withholding stocks of certain products would lessen the system's capacity to handle other products. That in turn could result in foregone revenue from those other products. So again, the costs and benefits of the decision would have to be weighed.

**39. With reference to para. 31 of the US first written submission, is the income generated by CWB short-term investments financed through government-guaranteed borrowing "pool money" that is "returned" to farmers? If not, is this income at the disposal of the CWB such that it could be used, for instance, to finance export sales, which do not cover the price, paid to farmers less marketing expenses?**

75. Income generated from investments is paid into the pool accounts. Income paid to pool accounts is done in accordance with Section 8 of the *CWB Act*, which specifies that these earnings are to be used to pay "expenses incurred by the Corporation in its operations". Surpluses remaining in the pool accounts must be paid out to producers.

**40. Regarding the 1998 amendment to the *CWB Act* (US first written submission, para. 66), why was it deemed necessary to insert a "NAFTA-clause", but not a "WTO-clause"?**

76. The decision in 1998 was not one of including a "NAFTA-clause" and/or a "WTO-clause". A NAFTA-clause already applied to the CWB as a Crown corporation under the *Financial Administration Act* (the "FAA") and the decision was to continue this requirement for the CWB once it was no longer a Crown corporation.

77. Section 61.1 of the *CWB Act* (the "NAFTA-clause") is an identical provision to that of Section 154.1(1) of the *FAA*.<sup>4</sup> Section 154.1(1) of the *FAA* applies to all Crown corporations. On 31 December 1998, when the first elected CWB directors assumed office, the CWB ceased to be a Crown corporation. Therefore, in order for this provision to continue to apply to the CWB, it was incorporated into the *CWB Act*. The wording of the two provisions is identical except for changes that were necessary to alter a general provision (i.e., applying to all Crown corporations) to a particular one (i.e., applying to a particular corporation, the CWB).

78. A "NAFTA-clause" was inserted in the *FAA* and, subsequently, in the *CWB Act*, because of the nature of the obligation in NAFTA. The relevant provisions are Article 1502(2) and 1503(2), which both begin with the phrase "[e]ach Party shall ensure, through regulatory control, administrative supervision or the application of other measures...". The wording of Articles 1502(2) and 1503(2) of the NAFTA is significantly different from that of Article XVII of GATT 1994. Accordingly, Canada's implementation of those obligations through a "NAFTA clause" is of limited relevance in determining the scope and nature of the obligation set out in Article XVII. The repeated reference by the United States to the "NAFTA clause" in the *CWB Act* as proof that Canada is in

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<sup>4</sup> Exhibit CDA -55.



violation of its WTO obligations is nothing less than an impermissible attempt to import the language of NAFTA into the WTO Agreement, an attempt that the Panel should resist.

79. In any event, to the extent that a “WTO clause” might be relevant to the performance of Canada’s obligations under Article XVII, the Panel might wish to consider that Article 103(1) of the NAFTA affirms the rights and obligations of the Parties to each other under GATT 1994. This includes Article XVII. A requirement to respect the NAFTA, in the context of a “NAFTA clause”, also necessarily incorporates a requirement to respect the requirements of GATT 1994, including those of Article XVII.

80. Therefore, not only is “WTO clause” not required by Article XVII, but it would be redundant in the face of a “NAFTA clause”.

**41. If a particular provision of the *CWB Act* were open to more than one interpreting and one of these interpretations would result in an inconsistency with Article XVII, would a Canadian judge need to construe the *CWB Act* so as to conform to Canada's obligations under Article XVII?**

81. Canada is a dualist parliamentary common law jurisdiction. Canada “receives” customary international law through judicial interpretation and application of the common law. However, treaty obligations require implementing legislation to be in force domestically and are not incorporated into domestic law upon ratification.

82. In the past, having due regard to Canada’s parliamentary tradition, Canadian courts applied the law laid down by statute even if inconsistent with a treaty binding on Canada. In such rare circumstances, Canada would have been liable internationally for any consequent breach of its treaty obligations.

83. The situation has, however, evolved. In recognition of Canada’s extensive web of international obligations, courts have been prepared to interpret domestic law so as to conform as far as possible with international law. Recent examples of this include *Baker v. Canada (Minister of Citizenship and Immigration)*<sup>5</sup> and *114957 Canada Ltee. (Spraytech, Societe d'arrosage) v. Hudson (Town)*.<sup>6</sup> In both cases, the Supreme Court of Canada endorsed the following statement<sup>7</sup> from a prominent commentator on statutory construction:

[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.<sup>8</sup>

84. Accordingly, where treaty obligations are not directly incorporated into Canadian law, Canadian courts consider international treaty obligations as “relevant context” in interpreting constitutional and statutory provisions.

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<sup>5</sup> [1999] 2 S.C.R. 817 (Exhibit CDA-56).

<sup>6</sup> [2001] 2 S.C.R. 241 (Exhibit CDA-57).

<sup>7</sup> Found at pp. 861 and 266 respectively [emphasis added by courts].

<sup>8</sup> Ruth Sullivan, *Driedger on the Construction of Statutes*, 3<sup>rd</sup> ed. (Toronto: Butterworths, 1994), p. 330 (Exhibit CDA-58).

***Both Parties:***

**42. As a supplement to Exhibit CDA-**

opposed to soft white winter wheat (for cookies). Some varieties of sunflower seed are grown for oil and others for food use.

87. For the purposes of the *CTA*, each type of grain is a different "like product".

**45. Could the parties respond to the EC's assertion in paragraph 43 of its third party written submission that a bulk grain handling system, such as that covered by the Canada Grain Act, "offers cost advantages compared to other ad hoc distribution possibilities."**

94. In the case of some types of grain, such as wheat or corn, there are grades established for grain produced in Western Canada (western grain) and grain produced in Eastern Canada (eastern grain), because these types of grain are produced in both regions, but are of different varieties and quality or end-use characteristics. The “Eastern” or “Western” designation identifies the regional origin of the grain. In the case of some other kinds of grain, like soybeans, which are only produced in significant volumes in eastern Canada, the established grades do not specify eastern or western, but

101. Advance consent orders are automatically issued to transfer elevators year after year, although they are often adjusted on request.

**62. With respect to the Wheat Access Facilitation Programme referred to at paras. 196 and 229 of Canada's first written submission, please answer the following questions:**

**(a) Has the programme ever been used by US grain producers? (see Canada's first written submission, para. 239)**

102. US-origin grain producers have never availed themselves of this Programme. Although about thirty Canadian elevators registered in the programme to receive US-origin wheat, US producers did not deliver any wheat to these elevators. Economic realities are the most likely explanation: for any number of reasons, including the weakness of the Canadian dollar, wheat prices at elevators were simply too low in Canada, or alternatively, handling charges too high compared to US handling charges. It has been more attractive for US farmers to deliver their wheat to US elevators.

103. Indeed, as part of a 6-month review of the *Canada-US Record of Understanding*, Agriculture and Agri-Food Canada contacted Canadian primary elevators to seek their views on the WAFP. Canadian elevator operators noted that:

- US producers had not  
not de0as

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**Act and what Canada refers to as the misrepresentations and consumer protection provisions of Canada's competition laws?**

108. Because foreign grain is not subject to the same quality assurance system as Canadian grain, if US wheat, for example, were mixed with Canadian wheat, the CGC would no longer be able to visually grade Canadian wheat. Unlike Canadian-origin wheat, US-origin wheat is not subject to the same requirement for visual distinguishability between varieties with different end-use characteristics. Thus, the Canadian visual grading system cannot function properly and maintain segregation in the system according to particular qualities desired by end-users if US-origin wheat is commingled with Canadian-origin wheat.

109. In addition, most US wheat is grown from varieties not registered in Canada. If mixing occurred with no restrictions, the specific end-use characteristics could no longer be ensured. In Canada, if a variety does not perform well (that is, meet the acceptable criteria and end-use characteristics for its class) it will not be registered. For example, at the end of two years of testing in Canada, the Alsen wheat variety was refused registration because of poor quality performance. This variety is grown extensively in the United States. Segregation requirements for foreign grain that is not subject to the Canadian quality assurance system is necessary to maintain the integrity of the Canadian grading system.

110. In addition, the measures are necessary to secure compliance with Canada's unfair competition and consumer protection because, in order to determine the origin of the grain in the grain handling system, it is necessary to keep grain of different origins separate from one another and to identify them properly if they are mixed so as not to misrepresent them. This is particularly important where the grain is exported as the importing country often requires a certification that the grain is Canadian origin grain. If Canada were not able to determine the origin of the grain in its grain handling system, it would not be able to provide this assurance to countries purchasing its grain and to comply with section 32 of the *CGA*. No other measure is reasonably available that would ensure strict compliance with the prohibition against misrepresentation of origin.

111. Finally, the measures are necessary to secure compliance with the provisions establishing the CWB as a single desk exporting STE, as contained in the *CWB Act*, because the relevant CWB privileges apply to the sale of Canadian wheat for export or for domestic human consumption; if foreign wheat were not distinguished from Canadian wheat, the monopoly authority of the CWB could not be enforced.

**64. Could Canada please provide support for its assertion at paras. 286 and 287 of its first written submission that (i) the setting of rates is left entirely to the prescribed railways; and (ii) that for all movements that include a non-revenue cap portion, the railways have the discretion to charge what the market will bear, regardless of what the rate may be for the revenue cap portion of the movement?**

112. (i) Railways charge differential rates, that is, what the market will bear, as referenced in reports of the Canada Transportation Act Review Panel and the US Surface Transportation Board.<sup>12</sup> There are no provisions in the revenue cap section of the *Canada Transportation Act*

- (b) the Canadian Transportation Agency (the “Agency”) sets “interswitching” rates for all traffic that originates within 30 kilometres of a point where traffic can be inter-changed between two railways; and
- (c) the Agency has a limited ability to set rates for all traffic that is inter-changed between two railways outside the 30 kilometre “interswitching” limit in the event the two railways and/or shipper cannot agree on the rate.

113. (ii) Railways charge differential rates, i.e. what the market will bear, as referenced in reports of the Canada Transportation Act Review Panel and the US Surface Transportation Board.<sup>13</sup> There are no provisions in the *CTA* (see Part III of Exhibit US-9) that set rate limits on individual grain movements that are not covered by the revenue cap provisions, including the portion of movements that originate or terminate outside the geographic territory covered by the revenue cap, with the following minor exceptions (which are not at issue in this case):

- (a) the Agency sets “interswitching” rates for all traffic that originates within 30 kilometres of a point where traffic can be inter-changed between two railways; and
- (b) the Agency has a limited ability to set rates for all traffic that is inter-changed between two railways outside the 30 kilometre “interswitching” limit in the event the two railways and/or shipper cannot agree on the rate.

65. Could Canada please explain why the statement at page 36 of Exhibit CDA-34 that “the  
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(b)

## ANNEX A-3

### RESPONSES OF AUSTRALIA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

#### Question 1

1. As noted in the submission of Australia to the Panel, Australia considers that subparagraph XVII:1(b) is to be viewed as a component of the obligation defined in subparagraph XVII:1(a). The elements of subparagraph XVII:1(b) are to be applied to assist a Panel in determining whether the standard of behaviour laid down in subparagraph XVII:1(a) has been met. Subparagraph XVII:1(b) is not a separate standard for STE behaviour and does not found a separate obligation on Members.

2. The first task of any Panel therefore is to determine whether the MFN and National Treatment principles are applicable to the act in question within the factual context of the dispute. In then applying these principles to the facts, the Panel is to utilise, as appropriate to the principle being applied, the definitional assistance provided in subparagraph XVII:1(b).

#### Questions 2 and 3

3. Both questions 2 and 3 appear to consider the meaning and application to various hypothetical situations of the elements of subparagraph XVII:1(b) in isolation from the general principles of non-discriminatory treatment which they further define and elaborate. As noted above, Australia does not consider this to be appropriate. Further, application of Article XVII:1 should be undertaken on a case by case basis, having regard to the actual facts at issue. However Australia does wish to make the following points concerning interpretation and application of Article XVII:1(a) and (b) which would be applicable to such questions.

4. Australia submits that in examining any act complained of under Article XVII it is first necessary to consider which non-discriminatory principle/s are applicable to the particular purchasing or selling situation. They are not both necessarily applicable to every situation. When this is determined, it must be considered which of the elements of subparagraph XVII:1(b) are applicable to the behaviour subject to complaint, including their appropriate relationship to each general principle. They may then be applied, having regard to all the facts of the case, as part of examining whether the STE has acted in a manner consistent with the applicable general principles.

5. A particular purchase or sale by an STE for import or export to which the principle of MFN or the principle of National Treatment is *not* applicable cannot be separately tested for its 'commerciality' or whether adequate opportunity has been provided to other Member's enterprises to compete in that purchase or sale.





### **Question 7**

14. As was stated in the Australian submission to the Panel, the undertaking of Members in Article XVII:1(a) concerning the behaviour of their STEs does not impose any direct obligation on a Member beyond an obligation of result. It cannot be interpreted to imply further obligations concerning how an individual Member should meet this undertaking.

### **Question 8**

15. Australia does not see how the National Treatment principle can be considered to prohibit discrimination by an STE in terms of sale between its export market and its domestic market - that is discrimination between internal and external markets. The essence of National Treatment is the prevention of discrimination within the internal marketplace. The nexus to what happens in the external marketplace would not seem relevant to an inquiry into such discrimination.

16. Australia would also note that domestic and export markets are driven by different and particular conditions of supply and demand which will impact on the price that can be realised in each market. Different behaviour, including as regards pricing, by an STE in its domestic and in its export markets does not *per se* equate to or signify some form of 'discrimination'.

## ANNEX A-4

### RESPONSES OF CHINA TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

#### MEASURES RELATING TO EXPORTS OF WHEAT

**1. Once a panel has determined that, in making certain export sale(s), a STE did not act in conformity with the standards set forth in Article XVII:1 (b), can the panel find a violation of Article XVII:1 on that basis alone, or is it necessary for the panel to make a separate and additional determination whether, in making the export sale(s) in question, the relevant STE did not act in a manner consistent with the general principles of non-discriminatory treatment.**

#### Answer

On this point we agree with the Panel on *Korea – Beef* that took the view that “...the terms ‘general principle of non-discrimination treatment prescribed in this Agreement’ (Art. XVII:1(a)) should be equated with ‘make any such purchases or sales solely in accordance with commercial consideration’ (Art. XVII:1(b)). A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on ‘commercial considerations’, would also suffice to show a violation of Article XVII.”<sup>1</sup>

We think that the Panel on *Korea – Beef* case gave the proper interpretation of the relation between Article XVII:1(a) and Article XVII:1(b).

**2. The second Clause of Article XVII:1(b) requires STEs to afford enterprises of other Members adequate opportunity to “to compete for participation in such purchases or sales”**

- (a) **Is the expression “such purchases or sales” a reference to a given STE’s “purchases or sales involving either imports or exports”, i.e., the expression used in Article XVII:1(a)? In other words, is “such purchases” a reference to a given STE’s purchases abroad (imports) and “such sales” a reference to a given STE’s sales abroad (exports)?**

#### Answer

Under Article XVII: 1 (a), WTO Members undertake that if they establish or maintain a state enterprise, or grant exclusive or special privileges to any enterprise, such enterprise shall , in its purchases or sales involving either imports or exports, act in a manner consistent with the general

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<sup>1</sup> Panel report on *Korea – Various Measures on Beef*, para. 757.



**in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or would not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

Answer

To charge a competing price, which might be lower than that charged in market 1, to deter other exporters from contesting export market 2 for maintaining a priority market or its prior market share is a normal practice based on the commercial considerations according to the market competition situation even if the price would not be charged in the absence of the special or exclusive privileges. If maintaining a priority market by deterring competitors is solely based on commercial considerations, the special privileges underlying them cannot alter the nature of it. If the exclusive rights or special privileges are not in violation of Article XVII in themselves, the using of them by a STE in accordance with commercial considerations is not a violation, either. If a privilege or a right cannot be used, it will not be a privilege or right at all.

- (c) **The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

Answer

Yes, this is a commercial consideration. If the price-elasticity of import demand is lower in export 1, a STE could increase the price without running the risk of reducing demand. This is in conformity with the economic rational, and certainly the “commercial considerations” requirement.

- (d) **Same as (c), but the STE in addition extracts monopoly rents (price premiums) in both markers, which it could not do but for its exclusive right to export the product concerned (assume the STE’s product is perceived as superior in quality for instance such that there is no significant competition from other products).**

Answer

Yes, this is a commercial consideration. To pursue monopoly profit is a commercial consideration. To go a step further, to pursue monopoly rents by the using of the exclusive rights or special privileges is also a commercial consideration. If this line of reasoning was defied, the natural result would be that the granting of exclusive rights or special privileges is a violation of Article XVII in itself and Members would be deprived of the right to establish STEs.

**4. Is the “commercial considerations” requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases of sales involving import or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the “economic considerations” requirement essentially intended to make sure that STEs act like rational economic operators, i.e., that in the ir purchase or sale decisions, they are guided only by the consideration of their own economic interest?**

Answer to the first question

No. If this was the intention of Contracting Parties of GATT or Members of WTO, they would have made a clear and express statement in this regard in Article XVII. As to the meaning of the phrase “commercial considerations”, the interpretative notes and the drafting history indicate that

Article XVII:1 (b) would not preclude the charging by a state trading enterprise of different prices in different export markets;<sup>2</sup> nor consideration of the advantages of receiving a “tied loan” in connection with a purchase.<sup>3</sup> Moreover, it was understood that the phrase “customary business practice” as used in Article XVII:1 (b) was intended to cover business practices customary in the respective line of trade.<sup>4</sup>

Answer to the second question

Yes. This illustrates the proper interpretation of “commercial considerations”.

**5. Do the “commercial considerations” requirement in Article XVII:1 (b) vary depending on what type of entity (e.g., co-operatives, share-capital corporations, etc.) is conducting the purchase or sales operations?**

Answer

First, we think that it is clear that no matter what type of entity a STE is, it should make purchases and sales in accordance with commercial consideration. Second, the elements of “commercial considerations” or the weight of each element to be given to may vary with the type of entities conducting the purchase or sales operation. Article XVII:1(b) provides that a STE shall “...make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale...” This provision lists some elements of commercial considerations and allows a STE to consider “other conditions of purchase or sale”. Different type of commercial entities may take different elements into account in their operation or give different weight to each of the element listed. The standard should be that a STE shall take the same considerations into account as what a private-sector enterprise of the same type of entity should do. If in private sector a cooperative and a share holding company have different considerations in the ordinary course of their business, then STEs in form of cooperative or in form of share holding company may do the same thing, which is not against the “commercial considerations” requirement provided in Article XVII:1.

**6. Pursuant to Article XVII:1(a), each Member undertakes that its STEs “shall” act in a specified manner. Please explain the meaning and usage of the term “shall” in Article XVII:1(a). In particular, what if any, difference in me Article(a).0.065 Tc 6112348 T089**

uses, these two words carry almost the same meaning. In the context of Article XVII:1, with the preceding word “undertake”, these two words will not make any significant differences. Members undertake that a STE “shall” act in a specified manner or “will” act in this kind of manner both means that Members shall assume responsibilities if a STE they established fails to act in this specified manner.

**7. Do the third parties agree with the United States’ view that Article XVII:1(a) imposes an obligation on Members to take affirmative measures to ensure that their STEs comply with the Article XVII:1(a) standards? [US first written submission, paras.50-52,67-69]**

Answer

No. We agree to Canada’s view that the obligation of Members under this provision is an “obligation of result”. We think that GATT Article XVII does not impose an obligation on governments to involve in STE’s everyday operation. If a government were imposed such an obligation, it would be too burdensome and not practical. Moreover, such an obligation runs afoul of the objective of GATT Article XVII.

**8. With references to Para 55 of the US first written submission, do the third parties agree that Article XVII:1(a) prohibits the CWB from “making use of its exclusive privileges to discriminate in its terms of sale between export markets and the Canadian domestic market”?**

Answer

No. Our position is that no support could be found for the US allegation in this regard neither in Article XVII:1(a) nor in the whole context of Article XVII.

**ANNEX A-5**

**RESPONSES OF THE EUROPEAN COMMUNITIES TO  
QUESTIONS POSED IN THE CONTEXT OF THE FIRST  
SUBSTANTIVE MEETING OF THE PANEL**

(24 September 2003)



"purchases or sales involving either imports or exports" encompasses the entire trading activity of an STE.

- (b) **Taking the case of an export STE like the CWB, are the relevant "enterprises" of other Members (i) the enterprises which are interested in buying wheat from the CWB (*i.e.*, wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (*i.e.*, wheat sellers) or (iii) other enterprises?**

Article XVII:1(b) does not further define the "enterprises" of the other contracting parties to which "adequate opportunities" must be afforded. For this reason, the EC considers that the relevant enterprises can be (i) the enterprises which are interested in buying wheat from the CWB (*i.e.*, wheat buyers); (ii) those enterprises competing with the CWB for sales to the same wheat buyers (*i.e.*, wheat sellers), or also (iii) other enterprises which offer wheat to the CWB for sales abroad.

**3. Assume a Member has an export STE which has the exclusive right to sell a particular agricultural product for export and domestic consumption. Please indicate whether in the following situations the STE would be making its export sales in accordance with "commercial considerations" within the meaning of Article XVII:1(b):**

- (a) **The STE charges a lower price in export market 2 than in export market 1 because market 2 is contested by a supplier who benefits from an export subsidy, while market 1 is not.**

The export subsidy would constitute a factor influencing supply which is outside the control of the STE, and which will tend to lower market price in market 2. By charging a lower price in market 2, the STE would therefore be acting in accordance with commercial considerations.

- (b) **The STE charges a lower price in export market 2 than in export market 1 because market 2 is a priority market for the STE (e.g., due to expected growth in import demand) and the lower price is intended to deter other exporters from contesting export market 2. The price charged by the STE in export market 2 would not or could not have been charged in the absence of the special or exclusive privileges enjoyed by the STE.**

The term "commercial considerations" should be defined in the light of normal commercial behaviour. Normal commercial behaviour involves the setting of prices on the basis of the conditions of supply and demand, which are taken as given constraints. Setting prices below normal market levels in order to exclude competitors and thereby influencing the constraints on the market cannot be regarded as normal commercial behaviour. This is independent of whether the prices could have been charged in the absence of the special and exclusive privileges of the STE.

- (c) **The STE charges a higher price in export market 1 than in export market 2 because the price-elasticity of import demand is lower in export market 1 than in export market 2.**

The EC considers that it must be distinguished whether the STE is able to charge premium prices because its product is perceived as superior in quality to other products, or merely because of its exclusive rights. If the price premiums are due to superior quality of the product, then the STE acts in accordance with normal considerations in charging a higher price. In contrast, if the STE charges premium prices in the absence of an objective justification, such as superior quality, it no longer acts as a participant subject to the constraints of the market, and does not act in accordance with commercial considerations.

**4. Is the "commercial considerations" requirement in Article XVII:1(b) essentially intended to make sure that STEs use their special or exclusive privileges in such a way that their purchases or sales involving imports or exports are made on terms which are no more advantageous for the STE than they would have been if the STE did not have any special or exclusive privileges? Or is the "commercial considerations" requirement essentially intended to make sure that STEs act like rational economic operators, *i.e.*, that, in their purchase or sale**

Member. However, if the WTO Member fails to take the necessary measures, and the STE acts in violation of Article XVII:1, it will be responsible for this violation.

**8. With reference to para. 55 of the US first written submission, do the third parties agree that Article XVII:1(a) prohibits the CWB from "making use of its exclusive privileges to discriminate in its terms of sale between export markets and the Canadian domestic market"?**

The EC considers that if the CWB discriminates in its terms of sale between exports markets,

## ANNEX A-6

### RESPONSES OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU TO QUESTIONS POSED IN THE CONTEXT OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

(24 September 2003)

#### Question 1

1. Article XVII:1(b) of GATT 1994 provides in part that “[t]he provisions of subparagraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations...” A literal reading of this provision suggests that the provision is not intended as a separate independent obligation on Members. Instead, it serves as a further elaboration of the obligation under 1(a). By examining the scope established under 1(b), a determination can then be made whether a violation of the obligation under 1(a) has occurred. In other words, if an STE does not make its purchases or sales in accordance with commercial considerations, the Member in question would be in violation of 1(a), as interpreted by 1(b).

2. Previous Panel rulings support our reading. In *Korea-Measures Affecting the Import of Fresh, Chilled and Frozen Beef*, the Panel clarified the relationship between non-discrimination under subparagraph (a) and commercial considerations under subparagraph (b). It stated that,

[t]he list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability etc.) are to be used to facilitate the assessment whether the state-trading enterprise has acted in respect of the general principles of non-discrimination. A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, a conclusion that a decision to purchase or buy was not based on ‘commercial considerations’, would also suffice to show a violation of Article XVII. (Korea Beef, para. 757.)

In *Canada-Administration of the Foreign Investment Review Act* of 1984, the panel also confirmed that Article XVII:1(b) is not to establish an independent obligation. Instead, it is to interpret the scope of the non-discrimination principle under Article XVII:1(a). The panel report of this case states that,

[t]he fact that sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph, is made clear through the introductory words ‘The provisions of sub-paragraph (a) of the paragraph shall be understood to require...’ (L/5504, adopted on 7 February 1984, 30S/140, 163, para. 5.16.)

The panel should be in a position to find a violation of Article XVII:1 by the said Member on the basis of non-conformity with “commercial consideration” alone.

### Question 2

3. Article XVII:1(a) of the GATT regulates purchases or sales involving either imports or exports of STEs. If an STE’s activities do not have anything to do with import or export, it should not be within the scope of the provision of Article XVII of the GATT. Since subparagraph (b) is a further elaboration of subparagraph (a), the phrase “such purchases or sales” refers to purchases or sales involving exports or imports, as indicated in subparagraph (a).

4. Given above interpretation, the CWB itself as an STE would have to provide enterprises of other Members opportunities with regard to its purchases or sales, taking into account customary business practice. The enterprises of other Members include the buyers of wheat and the sellers of wheat in so far as they seek participation in the purchases and sales involving the STE in question.

### Question 3

5. There is no definition of the phrase “commercial considerations” either in Article XVII or in other GATT provisions. The question of whether an STE is making decisions on purchases and sales based on commercial consideration must be assessed on a case by case basis. In particular, the structure of the markets, competitions, and other situations particular to the market would determine whether the STE is acting in accordance with commercial considerations.

6. Furthermore, considerations on pricing policy by any enterprise is closely related to the dynamics of competition within a relevant market. How an enterprise determines its behaviour *vis-à-vis* its pricing involves complex considerations such as, *inter alia*, market structure, the intensity of price competition, supply and demand, the value provided to the enterprise in matching/undercutting the prices of competitors, etc. Is an STE selling its excessive stock at a substantial discount in order to minimize losses acting in accordance with commercial considerations? The answer could be in the affirmative. Therefore, the question of whether an STE acts in a manner solely in accordance with commercial considerations can only be answered by reviewing the circumstances surrounding the action in question.

7. With respect to the factors of supply and demand, Ad Article XVII states that,

[t]he charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such

automatically mean that the STE did not act in accordance with commercial considerations. For the second through fourth hypothetical questions, we recognize that the STE might abuse its market position in deciding the sale prices. However, since differential pricing could be a legitimate way of generating of profits, we might not be able to determine whether the STE is setting its prices in accordance with commercial considerations purely by fact that the STE uses different prices to compete in the relevant markets.

**Question 5**

10. We do not consider the type of entity conducting the sale and purchase to be relevant. The Panel should make its determination on a case-by-case basis, taking into account the particular circumstances of the markets in question.

**Question 7**

11. As stated in our Third Party Submission, Article XVII: 1(a) poses only an obligation of result the means of which is the prerogative of the Member concerned.