Non-Confidential Version

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

(WT/DS276)

Comments of the United States
on the Preliminary Ruling Request of Canada
Regarding Article 6.2 of the DSU

May 27, 2003

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I. INTRODUCTION

1. Canada provides no legitimate basis for its request for a preliminary ruling that certain claims set forth in the U.S. panel request fail to meet the requirements of Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU"). To the contrary, as required by Article 6.2, each of the U.S. claims properly "identif[ies] the specific measures at issue and provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

2. Rather than relying on the text of Article 6.2 of the DSU and Appellate Body analyses of that provision, Canada instead asks this Panel to find that the U.S. panel request must go beyond the requirements of Article 6.2 to summarize the legal arguments to be presented in the first U.S. submission. The Appellate Body in *EC Bananas*[1] has already rejected the suggestion that a complaining party must summarize its legal arguments in the panel request, and this Panel should do so as well.

II. STATEMENT OF FACTS

3. The United States presented its consultation request to Canada in this dispute on December 17, 2002.[2] Canada agreed to hold consultations, and indicated no concerns with the specificity of the matters raised in the United States request.

4. The United States and Canada agreed to hold consultations on January 31, 2003, in Ottawa, Canada. In advance of the consultations, the United States sent to Canada a list of 49 detailed questions concerning the Canadian measures at issue in this dispute.[3]

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[1] Report of the Appellate Body, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted September 25, 1997 ("*EC Bananas*").

[2] WT/DS276/1.

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

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[4] The United States recalls the obligation in Article 4.3 of the DSU to enter into consultations in "good faith." The United States finds it difficult to reconcile Canada's approach to these consultations with this good faith obligation.

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

14. Nearly six weeks after the consultations, and *after* the U.S. March 6 panel request, on March 12, 2003, the Government of Canada finally provided responses to the few questions it had agreed to answer in writing.[5] [[

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

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

III. THE REQUIREMENTS OF DSU ARTICLE 6.2

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

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

17. The Canadian request for a preliminary ruling quotes at length from two Appellate Body reports -- *Korea Dairy*[6] and *EC Bananas* -- that examine this provision. Canada's discussion of

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[6] Report of the Appellate Body, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted January 12, 2000 ("*Korea Dairy*").

these reports, however, is fundamentally misleading: Canada has omitted the two principles in those reports that are *most* pertinent to Canada's arguments regarding the sufficiency of the U.S. panel request. Canada also fails to consider the emphasis of the *FSC* Appellate Body report on the need to raise procedural objections at the earliest opportunity.[7]

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

> In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[8]

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

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.[9]

20. In *Korea Dairy* – the second report relied upon by Canada – the Appellate Body confirmed this construction. In *Korea Dairy*, the problem with the panel request was that it cited too broadly to the *Agreement on Safeguards* and Article XIX of the GATT 1994, so that it was difficult to determine which obligations in those provisions were at issue.[10] The U.S. panel

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[7] Report of the Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted March 20, 2000, para. 165 ("*FSC*").

[8] *EC Bananas*, para. 141.

[9] *Id.*

[10] The Appellate Body explained:

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

request, in contrast, cites to specific provisions of the WTO agreement at issue, and cannot be said to suffer a similar defect.

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

> In assessing whether the European Communities' request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.[11]

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

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

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

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Korea Dairy, para. 129.

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

> Communities' claims . . should have been dismissed.[12]

24. Likewise, at no time prior to the establishment of this Panel did Canada so much as intimate that it considered the panel request in any way deficient, waiting until after the panel was established to offer its objection. In upholding the panel's rejection of the U.S. request for a preliminary ruling in *FSC* under very similar circumstances, the Appellate Body stated, "The procedural rules of the WTO dispute settlement system are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[13] This Panel should reject Canada's effort to avoid the fair, prompt and effective resolution of this dispute through its groundless – and untimely – objections to the U.S. panel request. Canada's resort to litigation techniques must not stand in the way of consideration of the substantive issues in this dispute.

IV. THE CANADIAN ARGUMENTS

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

A. GATT Article XVII Claim

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

> The foundation for the U.S. claim is in various "laws, regulations and actions" that are nowhere described.[14]

27. This argument is plainly false. Any person reading this phrase would take note of the immediately preceding paragraph in the U.S. panel request, which identifies specific measures at issue:

> The Government of Canada has established the Canadian Wheat Board ("CWB"), and has granted to this enterprise exclusive and special privileges. These exclusive and special privileges include the exclusive right to purchase western Canadian wheat for export and domestic human consumption at a price determined by the Government of

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[12] *FSC*, para. 165.

[13] *Id.*, para. 166.

[14] Canadian Request for Preliminary Ruling, para. 20.

> Canada and the CWB; the exclusive right to sell western Canadian wheat for export and domestic human consumption; and government guarantees of the CWB's financial operations, including the CWB's borrowing, the CWB's credit sales to foreign buyers, and the CWB's initial payments to farmers.

Moreover, the panel request goes on to clarify that the measures at issue include "the failure of the Government of Canada to ensure that the CWB makes such purchases or sales in accordance with the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII."[15]

28. The Canadian request for preliminary ruling supports its argument with a statement that is meritless. In particular, Canada argues that, "Any number of laws, regulations and actions may be related to the export of wheat but have no relevance to the instant claim." In the context of the panel request, however, any reader would fairly realize that the laws, regulations, and actions referenced here are those concerning wheat sales practices of the State-trading enterprise, Canadian Wheat Board. Moreover, Canada knows *precisely* what is at issue in this dispute: from the consultation request, from the detailed questions that the United States presented in advance of the consultations, from the discussions at the consultations, and from the U.S. panel request.[16]

29. Canada next expresses concern that the panel request does not specify which of the two obligations in Article XVII(1)(b) are covered in the panel request.[17] But the panel request is completely clear on this point: the request cites both obligations because the United States submits that the Canadian measures are inconsistent with both of these obligations.

30. Finally, Canada argues that the United States 'must set out a brief summary of its legal case" under Article XVII(1)(b). Although Canada cites to *Korea Dairy,* the requirement suggested by Canada differs substantially from the findings of the Appellate Body in *Korea Dairy* and from the language of Article 6.2 of the DSU. What the DSU requires is instead "a brief summary of the legal *basis* of the complaint sufficient to present the problem clearly" (emphasis added). As illustrated in both *Korea Dairy* and *EC Bananas*, a panel request may even satisfy this requirement simply by listing the provisions of the WTO agreements with

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

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

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

respect to which the measures at issue are allegedly inconsistent. And in fact, the U.S. Article XVII claim in the panel request goes well beyond a simple listing of the pertinent provisions of the WTO agreement.

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

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[18]

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

B. Claim Regarding Rail Car Allocation

32. Canada argues that the rail car allocation claim in the U.S. panel request is inadequate to meet the requirements of DSU Article 6.2, apparently because of an alleged failure to "identify the specific measures at issue." This argument is without merit. Moreover, in light of Canada's conduct with regard to the consultations addressed to this issue,[19] Canada's argument is disingenuous.

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[18] *EC Bananas*, para. 141.

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

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35. Whether or not the CGC rules do indeed discriminate against imported grain is an issue to be decided on the merits in the normal course of this dispute. But, in light of these circumstances, there can be no legitimate confusion over the rail car allocation measures at issue. In fact, Canada must certainly be aware of the content of CGC grain car allocation orders, and its contention – that "it is not possible for Canada to prepare a defence against this claim without being alerted in *some* detail to the provisions that are alleged to violate Article III:4" – is simply not credible.

C. Claims Under Article 2 of the TRIMs Agreement

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

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

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V. CONCLUSION

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