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STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain
(AB-2004-3)

July 12, 2004

1. Mr. Chairman and members of the Division, the United States appreciates this opportunity to present its views today. Our written submissions set out the U.S. position in detail. I will speak briefly, emphasizing the issues that are central to this appeal and addressing certain arguments in Canada's submissions. After my statement, I would be happy to address any specific questions you may have.

2. The Panel in this dispute made several fundamental errors with respect to its examination of our claim under GATT Article XVII and its interpretations of the obligations therein. The Panel further erred by failing to objectively assess the facts before it, thus acting inconsistently with Article 11 of the Dispute Settlement Understanding. Unfortunately, many of the Panel's core findings were based on conclusory statements rather than actual analysis. This conclusory approach not only leads to a Panel Report whose logic is difficult to follow, but results in fundamentally flawed findings that the United States respectfully requests be reversed by the Appellate Body.

The Panel Failed to Examine the Measure in its Entirety

3. Perhaps the most fundamental of these errors is the Panel's failure to examine the challenged measure – the Canadian Wheat Board ("CWB") Export Regime – in its entirety.

After first properly defining the challenged measure in its report, the Panel then proceeded to ignore most of the measure. As explained in our Appellant's Submission, this fundamental flaw resulted in incorrect findings under Article XVII. The Panel never analyzed how the CWB's special privileges, which are an integral part of the measure, interact with other elements of the CWB Export Regime, nor did the Panel examine how the CWB Export Regime as a whole affects CWB sales. Thus, the Panel's conclusions that the CWB Export Regime does not result in sales that are not based solely on commercial considerations and that, therefore, Canada has not breached Article XVII, are in error since these findings were based on only a small part of the measure, and not the measure as a whole.

The Panel's Interpretation of Article XVII:1 Is Flawed

4. I will turn next to the Panel's flawed interpretation of the obligations under subparagraph (b) of Article XVII, but before I do so, I would like to correct two significant mischaracterizations that arise in Canada's submissions and some of the third-party submissions related to the interpretation of Article XVII, and also briefly comment on Canada's inappropriate introduction of new factual evidence at this stage in the proceedings.

5. The first mischaracterization relates to whether Article XVII creates both rights and obligations. Contrary to Canada's assertions, Article XVII does not create a positive right to establish state trading enterprises ("STEs") or the right to grant enterprises special and exclusive privileges, and the Panel did not make such a finding. This mischaracterization creates the misleading impression that somehow Article XVII's obligations cannot place any limits on the CWB's exercise of its special and exclusive privileges.

6. Article XVII does not say that Members have the right to establish STEs or the right to grant enterprises special and exclusive privileges. What Article XVII does state is that "if [a Member] establishes or maintains a State enterprise" or if a Member grants an enterprise special or exclusive privileges, that Member has certain obligations to constrain the behavior of that enterprise. The special privileges granted to an STE are exactly as Article XVII states – privileges granted by a Member if it so chooses (from which obligations would then flow), not rights bestowed by WTO Membership. Article XVII is similar to other provisions of the GATT 1994, which do not create a positive right to act, but only set forth obligations of Members should they establish certain measures.

7. The second mischaracterization relates to principles of treaty interpretation. Both Canada and the third parties stray from customary rules of treaty interpretation and mistakenly refer to the object and purpose of Article XVII. However, a treaty provision is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the object and purpose *of the relevant treaty*.[1] The relevant treaty here is the GATT 1994. The text of Article XVII speaks for itself, when read in its context and in light of the object and purpose of the GATT 1994. Any attempt to distort this interpretive approach through trying to divine some unwritten object and purpose of an individual article, such as Article XVII, has no basis in customary rules of treaty interpretation, and would only distort the interpretation of Article XVII itself. Inventing an object and purpose of an individual provision and then using

[1] *See e.g.,* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996 ("*United States – Gasoline*"), pp. 16-17; *see also* Article 31(1), *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"), done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

this invention to interpret the provision invites the interpreter to re-write or paraphrase the provision, rather than to apply the text as agreed.

8. Finally, regarding Canada's exhibits CDA-75 and CDA-76, which are sections of the *Canadian Business Corporations Act* and *Canadian Wheat Board Regulations*, respectively, these are new facts that were not before the Panel and therefore do not form part of the record. Moreover, given that appeals in the WTO are limited to issues of law, we respectfully request that the Appellate Body refrain from considering these two exhibits.

9. I will now discuss the Panel's legal errors in its interpretation of subparagraph (b) of Article XVII. In our submissions, we have set forth the proper interpretation of subparagraph (b), using the ordinary meaning of its terms in their context. And, as mentioned earlier, a proper interpretation should also read subparagraph (b) in light of the object and purpose of the GATT 1994 to ensure that the ordinary meaning of the terms in their context do not undermine or somehow contradict the object and purpose of the treaty as a whole.

10. Unfortunately, the Panel's interpretation of subparagraph (b) departed from the customary rules of treaty interpretation and led to an absurd result that would permit STEs like the CWB to exercise their special and exclusive privileges without restraint, as long as sales are made for non-political reasons. This is an interpretation that is not based on the text of subparagraph (b), and reduces subparagraph (b) to nothing but mere hortatory language.

11. The Panel's interpretation of subparagraph (b) contradicts a plain reading of the text. As set forth in detail in our written submissions, the term "enterprise" in the second clause of subparagraph (b) should be interpreted as referring to all businesses, both buyers and sellers in the marketplace. The Panel erred in its determination to the contrary for the reasons set out in

our Appellant's Submission.

12. The Panel's attempt to ground its narrow interpretation of "enterprise" in context by referring to the phrase "participate in" is not persuasive. The Panel argues that only buyers "participate in" sales, while sellers do not. Yet this is illogical, because buyers buy from sellers, so from that perspective both buyers and sellers "participate in" sales. Furthermore, the language in XVIII:1(b) is about affording the opportunity to "compete" for participation in sales, not about allowing other enterprises to participate in the same particular sale. In short, the Panel ignores the ordinary meaning of the term "enterprise" and instead uses supposed context that only contradicts the ordinary meaning. This is inconsistent with customary rules of treaty interpretation and impermissibly narrows the obligation under subparagraph (b) to afford the enterprises of other Members an adequate opportunity to participate in an STE's sales.

13. The Panel also erred in its interpretation of the phrase, "solely in accordance with commercial considerations." The Panel's examination of this obligation is difficult to follow, and results in findings which, yet again, impermissibly narrow the scope of the obligation. Specifically, the Panel equates commercial considerations with non-political considerations, although there is no textual basis for this. There is no basis to assume that any consideration that is non-political (an undefined term not used in the text) is automatically "commercial." The Panel then concludes that STEs, so long as they are not acting in accordance with political considerations, can act in their economic self-interest without restraint. Again, the Panel abandons a plain reading of the text, which is impermissible under the customary rules of treaty interpretation.

14. Commercial considerations are precisely those considerations taken into account by

commercial enterprises when making purchase and sales decisions. Indeed, the Panel correctly set forth the ordinary meaning of the term "commercial," as "engaged in commerce; of, pertaining to, or bearing on commerce" or "[i]nterested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business."[2] And, as described in our submissions and the third-party submission of the European Communities, all of these definitions are linked to the behavior of enterprises in the private sector. Thus, the most logical reading of "commercial considerations" based on the ordinary meaning of the term "commercial" is those considerations faced by private, commercial actors.

15. However, instead of remaining focused on the ordinary meaning of the phrase "commercial considerations," the Panel launches into a tautology of the different types of STEs that might exist, and then grounds its analysis not on the text of subparagraph (b), but on its view that STEs can be created for a variety of purposes. Frankly, why an STE has been established simply is not relevant to an interpretation of treaty text, and the Panel erred in adopting this approach. Members may establish STEs for any number of reasons. But if they choose to do so, they are then subject to the obligations of Article XVII.

16. Finally, the Panel's definition of "commercial considerations" would essentially allow all STEs to exercise their special and exclusive privileges without limitation or restraint. Not only is this contrary to the plain meaning of the text, but – when viewed in light of the object and purpose of the GATT 1994 – this result is untenable, because it would not reduce barriers to

[2] Panel Report, para. 6.84 (citing *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 451.).

trade or eliminate discriminatory treatment in international commerce.[3] Indeed, it would accomplish just the opposite.

17. As Canada itself notes, Article XVII disciplines the conduct of state enterprises in their exercise of their privileges.[4] The ordinary meaning of the terms of Article XVII does not prevent Canada from granting privileges to the CWB. However, if Canada chooses to provide special and exclusive privileges to the CWB, then Canada has an obligation to ensure that the CWB operates within the disciplines of Article XVII. The Panel erred both in its interpretation of Article XVII and in its ultimate determination that Canada is acting consistently with its Article XVII obligations.

Canada's Arguments in its Other Appellant Submission Should Be Dismissed

18. Before discussing the Panel's failure to objectively assess the facts under Article 11 of the DSU, I would like to briefly comment on Canada's Other Appellant's Submission. Quite frankly, Canada's arguments there are without merit and should be summarily dismissed. In effect, Canada argues that subparagraphs (a) and (b) of Article XVII:1 set forth a single, weak requirement – that is, an STE's sales practices may violate principles of non-discriminatory treatment as long as the resulting discriminatory sales are in accordance with commercial considerations.

19. First of all, it is the idea that subparagraph (a) allows STEs to make sales and purchases that are inconsistent with principles of non-discriminatory treatment contradicts the ordinary

[3] *See* preamble of the GATT 1994.

[4] *See* Appellee Submission of Canada, para. 37.

meaning of the text. The language of subparagraph (a) clearly states "such enterprise shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement . . . ." It is impossible to see where Canada comes up with its interpretation that "shall . . . act in a manner consistent with the general principles of non-discriminatory treatment" really means that STEs can act in a manner inconsistent with those principles. Canada's interpretation simply makes no sense.

20. Regarding subparagraph (b), there is no basis in the text for Canada's assertion that the Panel should have found that subparagraph (b) is merely an exception to subparagraph (a). Subparagraph (b) contains distinct obligations. Subparagraph (b) says that enterprises "shall" make purchases and sales "solely in accordance with commercial considerations" and "shall afford" enterprises of other Members adequate opportunity to compete for participation in such purchases and sales. The provisions of subparagraph (b) list requirements that all STEs must observe. The Spanish and French versions of the text are both valuable context, for both texts use the word "obligation" when referring to the two requirements in subparagraph (b). The panel report in *Korea – Beef* also recognized the distinct requirements of subparagraph (b). The Appellate Body should therefore reject an interpretation of Article XVII:1 that has no textual foundation and reduces Article XVII:1 to nothing more than a shield that STEs can use to engage in behavior that flouts commercial norms and deprives both buyers and sellers an adequate opportunity to participate in STE sales.

The Panel Failed to Objectively Assess the Facts Under DSU Article 11

21. Moving to our appeal under DSU Article 11, as the Appellate Body stated in *United*

States – Wheat Gluten, "a panel has the duty to examine and consider all the evidence before it . . . and to evaluate the relevance and probative force of each piece thereof."[5] This Panel failed to do just that. It disregarded evidence presented by the United States, and this failure to objectively assess the facts presented contravenes the Panel's responsibility under Article 11 of the DSU.

22. A close reading of the Panel's report reveals, quite simply, that the Panel inexplicably but intentionally focused on a few facts to the exclusion of all others. Specifically, as set forth in our Appellant's Submission, the Panel ignored relevant provisions of the *Canadian Wheat Board Act* that codify the special privileges and the legal structure of the CWB. The Panel did not bother to examine these facts, but rather completely ignored them. This is precisely what Article 11 of the DSU is designed to prevent.

23. The U.S. Appellant's Submission at paragraphs 50 through 54 outlines in detail facts presented by the United States that were disregarded by the Panel. Indeed, Canada's Appellee's Submission at paragraphs 24 through 26 also outlines in detail the close coordination between the CWB and the Government of Canada with respect to the CWB's management, policies, and budget that are part of the CWB Export Regime, but were not considered by the Panel.

24. The evidence offered by the United States demonstrates that while day-to-day decisions might be made without the involvement of the Government of Canada, the Government of Canada is nevertheless an active participant in the major and critical management decisions

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[5] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS116/AB/R, adopted Jan. 19, 2001, para. 150 (internal quotation omitted).

affecting the CWB's operations. The privileges granted to the CWB and the Government of Canada's actions interact with the CWB's legal structure as a whole – and not simply the composition of the CWB's board of directors – to liberate the CWB from the cost and risk constraints that commercial enterprises must consider when making sales decisions. Thus, the additional aspects of the CWB Export Regime presented by the United States, if the Panel had considered them, would have led to a different conclusion, namely that the CWB Export Regime necessarily results in sales not solely based on commercial considerations.

25. Throughout this appeal, Canada has referred to evidence "not" presented by the United States and "not" before the Panel. Article XVII does not specify a particular type of evidence that is required to meet a complainant's burden of proof; beyond that, it is interesting to note that the particular type of evidence referred to by Canada, for example, specific data on CWB sales practices, is not publicly available, and Canada itself repeatedly refused to provide this data when the United States asked for it under the procedures set forth in Article XVII:4 and during consultations. The United States thus chose to present its case using evidence that is publically available, namely the structure and special privileges of the CWB. And it is through this evidence that the United States has met its burden of establishing a breach of Article XVII in this dispute. What was required of the Panel under Article 11 of the DSU, then, was to objectively assess the case presented by the United States. This the Panel failed to do, and that failure is legal error.

Canada Failed to Raise its Objection Under DSU Article 6.2 in a Timely Manner

26. Regarding Article 6.2 of the DSU, our appeal is limited to the question of whether

Canada raised its objection in a timely manner. In *United States – FSC* and other disputes the Appellate Body has stated that a party wishing to raise alleged procedural deficiencies should bring such allegations promptly to the attention of the other party. Specifically, the Appellate Body stated in *FSC* that, in order to promote the fair, prompt, and effective resolution of trade disputes, procedural objections should be raised at the earliest possible opportunity. Canada could have, and therefore should have, raised its objections prior to the Panel's establishment. Indeed, Canada had opportunities at two DSB meetings to raise its procedural objections to the U.S. panel request, yet Canada failed to raise its objections until after the establishment of the Panel, in an attempt to delay the proceedings. Canada thereby engaged in precisely the type of litigation tactics and delays that the Appellate Body has urged disputing parties to avoid.

The Appellate Body Should Complete the Analysis Under Article XVII:1(b)

27. Finally, returning to our claims under Article XVII, if the Appellate Body finds that the Panel's findings and legal interpretation of Article XVII are in error, the United States respectfully requests that the Appellate Body complete the analysis based on the undisputed facts on the record. As the United States has demonstrated in its submissions, and as I have briefly described here today, under a proper reading of subparagraph (b) of Article XVII, the CWB Export Regime, as such, necessarily results in sales that are not based solely on commercial considerations. If the Panel had properly interpreted subparagraph (b) of Article XVII, if it had considered the CWB Export Regime – the measure at issue – in its entirety, and if it had not disregarded facts properly before it, the Panel would have reached this conclusion.

28. Before the Panel, the United States presented ample evidence that through the

comprehensive provisions of the *CWB Act*, the Canadian Government sets the direction, management, budget, policies, and priorities of the CWB. Moreover, we presented ample evidence establishing that the privileges granted to the CWB, combined with other aspects of the CWB Export Regime, liberate the CWB from the cost and risk constraints commercial enterprises consider when making sales decisions.

29. Specifically, we commented before the Panel on the CWB's special monopoly procurement privileges for wheat and the CWB's acquisition of wheat at a known initial price approved by the Government of Canada. The interplay of these privileges ensures that the CWB has access to all wheat supplies used for domestic human consumption and export at a known price for the entire year. For the CWB, there is no risk that its acquisition price of wheat (and therefore the CWB's costs) will increase over the course of a marketing year. As the CWB concludes sales contracts over the course of a marketing year, it knows exactly what its acquisition price for wheat will be. The CWB gets this cost certainty for free as a result of its special and exclusive privileges and the Government of Canada's approval of the initial price. Private traders would have to pay for this cost certainty through hedging or options.

30. Furthermore, if the CWB and the Government of Canada misjudge the market and wheat prices fall below the initial purchase price promised to Canada's farmers, the Government of Canada's guarantee of the initial purchase price means that the CWB can nevertheless pay Canada's wheat farmers an initial price that is higher than the actual market price – which makes Canada's farmers happy – and yet, even if this results in a deficit, the Government of Canada will cover that deficit, resulting in no negative repercussions for the CWB. A commercial actor would have to live with the consequences of that deficit. In this way, too, the CWB Export

Regime leads to CWB sales that are not disciplined by cost constraints that would have to be considered by commercial enterprises engaging in the same sales, because the Government of Canada makes a direct payment to the CWB to make up any shortfall.

31. I will stop here, but these are two examples of how the undisputed facts on the record lead to the logical conclusion that the CWB Export Regime as a whole provides the CWB with pricing flexibility and lower risk exposure than commercial actors and thereby necessarily results in sales that are not based solely on commercial considerations, in violation of subparagraph (b) of Article XVII.

Conclusion

32. This concludes my presentation. I would like to once again thank you for the opportunity to speak this morning, and I look forward to answering any questions you may have.