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

(WT/DS276)

Oral Statement
of the European Communities

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Mr. Chairman, Members of the Panel,

I. INTRODUCTION

1. The EC has intervened in this case because of its systemic interest in the interpretation of Articles III and XVII of the General Agreement on Tariffs and Trade (the “GATT”) and Article 2 of the Agreement on Trade-Related Investment Measures (the "TRIMs Agreement"). It will present its views with respect to each of these claims in turn.

II. THE US CLAIMS UNDER ARTICLE XVII:1 GATT

2. With respect to the US Claim under Article XVII concerning the Canada Wheat Board (hereinafter CWB), the EC will examine three questions:

- the scope and nature of the obligations of Members under Article XVII:1 (a) and (b) GATT;
- the substantive content of the obligations under Article XVII:1 GATT;
- and the compatibility of the CWB's structure and activities with Article XVII:1 GATT.

1. The scope and nature of the Member's obligation under Article XVII GATT

3. The US argues that Article XVII:1(a) GATT imposes on Canada an obligation to ensure that state trading enterprises make their purchases or sales in accordance with the non-discrimination standard set out under this provision. According to the US, Canada has not established "processes and procedures" to ensure that the CWB does not engage in trade-distorting conduct."

4. From the outset, the EC would note that the language of Article XVII:1(a) is unequivocal: Members "undertake" that their STEs comply with the basic non-discriminatory GATT rules, as refined by Article XVII:1(b) GATT. To this extent, Members must "ensure" that STEs do not engage in a special trade-distorting conduct. Thus, a Member may not escape its basic GATT obligations by establishing or maintaining a state trading enterprise.
5. In the EC's view, the nature of this Member's obligation is an "obligation of result" and not an "obligations of means". Indeed, Article XVII:1(a) GATT does not prescribe precise ways and means on how to achieve the objective of compliance with the general principles of non-discriminatory treatment. Yet, the EC considers it as evident that under Article XVII:1(a) and (b) GATT, a Member would have to provide for some kind of mechanism in order to effectively ensure whether its STEs comply with the objective of a non-discriminatory treatment as set out under this provision. In this sense, a failure to employ the necessary means may result in a violation of the "obligation of result".

6. In the EC's view, a violation of the Member's obligation under Article XVII:1(a) GATT could be established in two ways:

- Either because of structural shortcomings due to which a STE will systematically violate in its trade related operations Article XVII:1(a) and (b) GATT.
- Or if a STE acts in specific cases in a matter incompatible with Article XVII:1(a) and (b) GATT.

2. **Content of the obligation under Article XVII:1(a) and (b) GATT**

7. Turning now to the substantive content of the obligations of Article XVII:1 (a) and (b), the EC considers it necessary to first examine the relationship between these subparagraphs of Article XVII:1. In this respect, the EC would submit that, even though they are interrelated, Article XVII:1(a) and (b) GATT do not have an identical scope. In the view of the EC, subparagraph (b) does not give an exhaustive interpretation of subparagraph (a). Indeed, subparagraph (b) does not say that subparagraph (a) shall be understood to require only that STEs should act in accordance with "commercial considerations" and respects the "adequate opportunities" obligations.

8. In the view of the EC, an interpretation which would equate the standards of subparagraph (b) with those of subparagraph (a) would render one of the two provisions superfluous. For these reasons, the EC considers that Articles XVII :1 (a) and (b) establish related, but complementary obligations. In other words, the scope of the obligation of non-discrimination under subparagraph (a) is broader than the
obligation to act in accordance with commercial considerations under subparagraph (b).

9. With regard to the content of Article XVII:1 (a), the EC would agree with the Korea - Beef Panel that this provision encompasses the most favoured nation ("MFN") and the national treatment principle. Yet, the EC would also note that the GATT Ad Note Article XVII modifies the application of the MFN principle because if a STE varies its prices for "commercial reasons" it would not violate the non-discriminatory obligation under Article XVII:1(a) GATT in conjunction with the MFN principle.

10. With regard to the obligations under subparagraph (b), the EC considers that the fact that a STE operates in its trade related activities on the basis of its special and exclusive commercial advantages does not per se prevent it from acting "in accordance with commercial considerations". This notion has to be interpreted in light of normal commercial behaviour. Yet, it is clear that any private operator that benefits from special and exclusive rights would make use of them. However, should an STE use its special privileges in order to act in a way that is not motivated by commercial considerations, this would be incompatible with Article XVII:1 GATT.

3. The compatibility of the CWB's structure and activities with Article XVII:1 (a) and (b) GATT

11. Against this background, the EC has doubts whether the CWB's structure and activities compatible with Article XVII:1(a) and (b) GATT.

12. First, the EC would refer to the statutory provisions of the Canadian Wheat Board Act, and notably Sections 5 and 7(1) thereof, which describe the overall purpose of the CWB's activities. The first provision merely refers to the "marketing in an orderly manner". This general purpose is further specified by the provision that CWB must charge "reasonable" prices in view of promoting the sale of grain in world markets. In contrast, neither provision contains any requirement that operations should be made "in accordance with commercial considerations" or that they require to afford for "adequate opportunities" for competitors. Similarly, neither provision requires the CWB to act in accordance with general principles of non-discriminatory treatment. On the basis of these provisions, it appears that the mandate of the CWB is not
limited commercial activities, but that it is also mandated to take into account considerations which are not of a commercial nature.

13. Second, the EC would, in principle, agree with the US economic analysis on the impact of CWB exclusive and special rights. In the EC's view, these privileges corroborate its doubts as to whether the CWB's trade-related activities are "in accordance with commercial considerations", and whether they afford "adequate opportunities" to other competitors. In this context, the EC would recall the following elements of the CWB system:

- CWB has monopoly rights for the purchase and sale to exports markets regarding wheat guarantees the CWB with a constant supply of marketable goods. Thus, the CWB is not required to provide for any assurances (contrary to other traders) in case a lack of supply would occur.

- The CWB determines itself the price for the initial payments to producers which are backed by a state guarantee. Thus, it enjoys considerable price flexibility when offering wheat on world markets.

- The Governmental guarantees for borrowings and for (long-term) credit sales put CWB per se in a more advantageous position than private operators as CWB does not bear any risk.

14. Accordingly, the EC shares the US concern that general principles of non-discriminatory treatment in respect of MFN may not be respected. According to the US, the CWB could target particular export markets and harm other Member's wheat sellers by shutting them out of markets.

15. In this context, the EC would also emphasise that an appropriate way of determining whether the CWB is acting in accordance with "commercial considerations" would be to assess the relevant data on prices charged by the CWB on export sales. For the purpose of these proceedings, the EC would therefore encourage the Panel to ask Canada whether it could provide respective data on these export sales.

16. The EC, therefore, is concerned that the structure and activities of the CWB are not in compatibility with Article XVII:1(a) and (b) GATT.
III. THE US CLAIMS UNDER ARTICLE III:4 OF THE GATT

17. The US has raised a number of claims under Article III:4 of the GATT. The EC will first comment on the claims concerning the segregation of Canadian and imported grain in the Canadian grain handling system and then on the claims regarding the differential treatment of Canadian grain in the Canadian transportation system.

1. The Canadian Grain Segregation Requirements

18. With respect to the segregation of Canadian and imported grain in the Canadian grain handling system, the US challenges two measures:

- the prohibition for foreign grain to enter Canadian grain elevators;
- the prohibition on mixing foreign grain with Canadian grain.

a) Compatibility with Article III:4 of the GATT

19. The main issue arising under Article III:4 is whether the Canadian measures can be regarded as granting less favourable treatment to imported wheat. As the US has aptly pointed out, the purpose of Article III:4 GATT must be seen in the light of Article III:1 GATT, from which it results that "internal measures should not be applied to imported or domestic products so as to afford protection to domestic production".

(i) The prohibition for foreign grain to enter Canadian grain elevators

20. When applied to the general Canadian prohibition for foreign grain to enter Canadian grain elevators, the EC considers that this prohibition clearly results in conditions of competition less favourable to foreign grain than to domestic grain. As Canada has itself stated, the Canadian grain handling and transportation system is primarily a bulk system. Moreover, under Canadian law, a grain elevator appears to be any facility for handling or storing grain. Thus, by generally prohibiting the entry of foreign grain into Canadian grain elevators, Canada effectively shuts the Canadian bulk grain handling system to foreign grain. Such a closure of a central part of the handling and distribution network to foreign products must be considered as
constituting less favourable treatment within the meaning of Article III:4 GATT. Support for this interpretation can be found in the Appellate Body Report in Korea-Beef and in the Panel Report in Canada- Alcoholic Drinks II.

21. The fact evoked by Canada that foreign producers are not obliged to use Canadian grain elevators, and may for instance deliver directly to Canadian end users, does not remove the unfavourable effects of the entry into grain elevators. It must be presumed that an efficient bulk grain handling system offers cost advantages compared to other ad hoc distribution possibilities.

22. Finally, Canada argues in defence of its measure that derogations from this general prohibition may be granted by the Canada Grain Commission, and that the latter has never refused the entry into Canadian grain elevators of foreign grain. However, in the EC's view, this possibility of derogation does not remove the less favourable treatment of foreign grain. Already the requirement to obtain an authorisation, which does not apply to domestic products, constitutes a competitive disadvantage, which constitutes less favourable treatment.

23. The fact that the CGC has never refused entry of foreign grain, which was referred to by Canada, similarly does not affect this conclusion. As the Panel held in Korea Beef, it is not necessary to demonstrate actual and specific negative effects of a trade measure in order to establish a violation of Article III:4 GATT. Accordingly, the fact that an authorisation was granted in all cases an application was made does not preclude that the authorisation requirement may have deterred exporters from third countries, who may therefore not even have applied.

(ii) The prohibition on mixing foreign grain with Canadian grain

24. As regards the prohibition on mixing of Canadian and foreign wheat, the EC considers that this equally constitutes less favourable treatment of foreign grain. In a bulk trading system, the quantity of grain supplied by one provider and the quantity demanded may not always coincide. In this situation, it will be natural for grain handlers to mix grain of different origins, as long as it is otherwise identical, in order to meet the quantity demanded. To be excluded from this possibility of mixing is a
significant competitive disadvantage for foreign grain, which constitutes only a minor proportion of the Canadian market.

25. In this context, Canada argues that under certain circumstances defined in its law, the mixing of Canadian and foreign wheat may nevertheless be allowed. However, as already outlined above, the requirement of a special authorisation for mixing of imported grain constitutes a violation of Article III:4 GATT. Moreover, these derogations seem to have been granted only in few narrowly defined cases.

b) Justification under Article XX (d)

26. With respect to the grain segregation measures, Canada also invokes Article XX (d) of the GATT as a justification of its measures. In particular, it argues that its measures are necessary "in order to secure compliance with the grading provisions of the CGA, the CWB Act and the misrepresentations and consumer protection provisions of Canada’s competition laws".

27. From the outset, the EC would recall that the party who invokes Article XX GATT bears the burden of proof. Yet, in the EC's view, Canada fails to prove that the measure is provisionally justified under Article XX (d) GATT. The simple reference to the enforcement of the "CGA, the CWB Act, and the misrepresentations and consumer protection provisions of Canada's competition laws" is not sufficient to establish that these laws and regulations are "consistent with the Agreements", and that the measures would be "necessary" to ensure compliance with such laws.

28. In its submission, Canada describes at some length its "Grain Quality Assurance Scheme", and stresses the importance it attaches to this for ensuring the quality of "Canadian grain". However, the segregation requirements and mixing prohibitions seem to be based on the assumption that Canadian grain is necessarily superior in quality to imported grain. As the US has aptly noted, this is particularly striking in the drafting of Section 57 of the Canada Grain Act, which seems to put foreign grain on a par with infested or contaminated grain.

29. The EC sees no basis for such an assumption of an inferiority of foreign to Canadian grain. Whereas the EC appreciates the need to ensure appropriate protection of traders and consumers with respect the variety, grade, and other relevant
characteristics of grain, the EC does not believe this justifies the segregation measures taken by Canada.

30. For this reason, the EC does not consider the CGA and the CWB "to constitute laws or regulations consistent with the provisions of the GATT". For the same reason, the EC does not consider that the measures in question are necessary for the prevention of deceptive practices.

31. Even if the objective of the CGA to ensure segregation of Canadian and foreign wheat were considered legitimate, the EC still doubts that they could be considered as "necessary".

32. In the current context, it appears that the Canadian restrictions on access to elevators were not necessary, since less restrictive alternatives were available. In order to avoid contact or mixing of foreign and domestic grain, regulations on elevator management and cleaning coupled with on-the-spot checks could easily have achieved the same goal. Indeed, it is not clear why an elevator which has previously received imported grain could not subsequently receive Canadian, and vice versa. This is in line with the findings of the Panel in Korea - Beef, which held that a separate retail system for domestic and imported beef was an excessive measure to prevent deception of consumers as to the origin of beef.

33. Similarly, less restrictive alternatives are also available in respect of the mixing requirement. In particular, appropriate labelling or grading provisions could make the mixed origin of wheat transparent to the purchaser or consumer. This is in fact exactly what was done in the exceptional case in which Canada authorised the mixing of Canadian and US wheat.

2. **Differential Treatment in the Canadian Transportation System**

34. With respect to differential treatment in the Canadian Transportation system, the US challenges two measures:

- a cap imposed by Canadian law on the revenues of Canadian railroads transporting Canadian grain, and which does not apply to transport of foreign grain.
the allocation of so-called "producer railway cars" which the US alleges is available only to domestic producers, not to foreign producers.

35. As regards the revenue cap, the EC considers that to the extent that this measure results in lower charges for the transport of domestic grain compared to imported grain, it constitutes less favourable treatment of imported compared to domestic products. In this context, the EC recalls the findings of the Panel in Canada - Periodicals, which held that the provision of special lower postal rates for the posting of domestic periodicals constituted a violation of Article III:4 GATT.

36. The EC takes note of Canada's defence that the revenue cap has never been reached, and therefore has not had an effect on rates and charges. However, the EC considers that the onus to show that the revenue cap has had no effect on rates should be on Canada. In this context, the EC also notes that the revenues indicated by Canada were not very significantly short of the revenue cap.

37. In respect of the producer railway car allocation, the EC takes note of the Canadian explanation that such railway cars are also available to foreign producers. As a factual question, the EC cannot take a position on this. However, the EC would like to stress that if such railway cars are indeed available only for the transportation of domestic grain, but not for imported products, this would constitute a violation of Article III:4 GATT.

IV. THE US CLAIMS UNDER THE TRIMS AGREEMENT

38. The US has raised the measures discussed under Article III:4 GATT equally under Article 2 of the TRIMs Agreement. In case the Panel should find it necessary to rule on claims under the TRIMS Agreement, the EC therefore succinctly presents its views also on these claims.

39. The EC considers that in order to establish a claim under the TRIMs, the US must demonstrate that the Canadian measures are indeed trade-related investment measures within the meaning of Article 1 of the TRIMs Agreement.

40. The TRIMs Agreement does not contain a definition of the term "investment measure". However, reference can be made to the Panel's findings in Indonesia -
Cars, in which the Panel attached significance to the fact that the measures in question had "investment objectives and investment features" and "were aimed at encouraging the development of a local manufacturing capability".

41. In the present case, the EC does not see in which way the Canadian measures would have a specific "investment objective" or "encourage investment". As for their effect on elevator and rail car operators, they constitute constraints rather than incentives, and would thus discourage rather than encourage investment. As to their effect on wheat farmers, these might be encouraged to grow more wheat since transportation and handling costs may be lower; however, it is doubtful that this is the objective of the measure, and that growing of wheat can be considered an investment within the meaning of Article 1 of the TRIMs Agreement.

42. As to the US reference to point 1 (a) of the Illustrative List, the EC doubts that the Canadian measures fall under this definition. In particular, it should be noted that Point 1 (a) refers to "the purchase or use by an enterprise of products of domestic origin". However, neither grain elevator nor rail car operators normally "purchase or use" the grain; rather, they provide a service with respect to the grain, namely the handling, storage, or transportation thereof.

43. Accordingly, it appears that the Canadian measures are not trade-related investment measures.

V. CONCLUSIONS

44. For the reasons outlined above, the EC submits that

- Canada appears not to comply with the obligations under Article XVII:1(a) and (b) GATT.
- Canada is in violation of Article III:4 GATT with regard to the Canadian grain segregation requirements, and, depending on the clarification of certain factual issues, as well as with regard to the differential treatment of domestic and imported grain under the Canadian transportation system.
- The Canadian measures do not fall under the TRIMs Agreement.

Mr Chairman, Members of the Panel,
Thank you for your attention. The EC is ready to answer any questions the Panel might wish to ask.