

# CANADA – WHEAT EXPORTS AND GRAIN IMPORTS<sup>1</sup>

## (DS276)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	United States	GATT Arts. XVII:1 and III:4	Establishment of Panels	31 March and 11 July 2003
			Circulation of Panel Report	6 April 2004
Respondent	Canada		Circulation of AB Report	30 August 2004
			Adoption	27 September 2004

### 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** Canadian Wheat Board (CWB) Export Regime<sup>2</sup> and requirements related to the import of grain into Canada.
- **Product at issue:** Wheat and grains from the United States.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS<sup>3</sup>

*GATT Art. XVII:1* (State Trading Enterprise (STE))

- **Relationship between paras. (a) and (b) of Art. XVII:1:** The Appellate Body reasoned that subpara. (a) is the general and principal provision, and subpara. (b) explains it by identifying the types of differential treatment in commercial transactions that are most likely to occur in practice. Therefore, most, if not all, claims raised under Art. XVII:1 will require a sequential analysis of both subparas. (a) and (b). At the same time, because both subparas. (a) and (b) define the scope of that non-discrimination obligation, panels would not always be in a position to make any finding of violation of Art. XVII:1 until they have properly interpreted and applied both provisions. The Appellate Body, however, rejected Canada's contention that the Panel's approach constituted legal error. Although the Panel refrained from explicitly defining the relationship between the first two subparas. of Art. XVII:1 and proceeded on the basis of an assumption that inconsistency with subpara. (b) is sufficient to establish a breach of Art. XVII:1, its analytical approach was nevertheless considered consistent with the Appellate Body's interpretation. The Panel took several analytical steps under subpara. (a), in particular, identifying price differentiation allegedly practiced by the CWB, as conduct that could constitute *prima facie* discrimination under subpara. (a).
- **"Commercial considerations":** The Appellate Body found that the United States' claim was based on a mischaracterization of a statement made by the Panel and, therefore, dismissed this ground of appeal. In examining an additional argument submitted by the United States, the Appellate Body agreed with the Panel that although STEs must act in accordance with "commercial" considerations, this is not equivalent to an outright prohibition on STEs using their privileges whenever such use might "disadvantage" private enterprises.
- **"Enterprises of the other Members":** The Appellate Body also upheld the Panel's finding that the phrase "enterprises of the other Members" in the second clause of (b) includes "enterprises interested in buying the products offered for sale by an export STE" but not "enterprises selling the same product as that offered for sale by the export STE (i.e. competitors of the export STE)". It stated that this phrase refers to the opportunity to become an STE's counterpart but not to replace the STE as a participant in the transaction.
- **DSU Art. 11 (standard of review):** The Appellate Body rejected US allegations that the Panel had not made an objective assessment of the facts and the measure: (i) as for the legal and special privileges granted to the CWB, it found that the Panel properly took them into account but had found them to be of limited relevance; (ii) as regards the CWB's legal framework, it stated that the United States had not put forward arguments demonstrating such an error.

*GATT Art. III:4* (national treatment – domestic laws and regulations) *and GATT Art. XX(d)* (exceptions – necessary to secure compliance with laws)

- The Panel found that Sections 57(c) and 56(1) of the Canada Grain Act were, as such, inconsistent with Art. III:4 and were not justified under Art. XX(d) as a measure necessary to secure compliance with Canada's laws and regulations. It also found that Sections 150(1) and 150(2) of the Canada Transportation Act, taken together, were, as such, inconsistent with Art. III:4. This finding was not appealed.

<sup>1</sup> *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*

<sup>2</sup> The CWB legal framework, provision of exclusive and special privileges to the CWB, and certain actions of Canada and the CWB related to the sale of wheat.

<sup>3</sup> Other issues addressed: judicial economy; timeliness of request for preliminary ruling.