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TRADE LAW MEMORANDUM

IMPORTANT CONCLUSIONS IN THE WHEAT BOARD LITIGATION

7 April 2004

We were told last February by the Minister of International Trade that a WTO panel adjudicating the U.S. complaint against the Canadian Wheat Board had decided largely in Canada's favour. At least, that was the spin put on the decision by the Department of International Trade commenting on the confidential WTO version of the panel report circulated only to governments.

We now have the benefit of the actual panel decision, released publicly on April 6th. The decision does indeed come down in Canada's favour on key points regarding the operations of Crown corporations and State Trading Enterprises or "STEs". But the ruling also decides in the U.S. favour on some other less dramatic points concerning the treatment of imported products by those agencies.

Because this is the first detailed WTO panel examination of the rights and obligations of governments concerning the operation of STEs, it is an important precedent. Aspects of the decision will have a bearing, not only on the future operations of the CWB, but also on the activities of other Federal and Provincial Crown corporations and monopolies and quasi-monopolies.

CWB'S EXPORT ACTIVITIES AND THE GATT

The U.S. based its complaint largely on GATT Article XVII, a legal obligation requiring STEs, such as the CWB, (1) to act “consistent with the general principles of non-discriminatory treatment” and (2) to make all their purchases and sales “in accordance with commercial considerations”.

The U.S. maintained that the CWB's export activities are both inherently discriminatory and non-commercial in nature. It argued that export sales for other than commercial considerations were an “inescapable consequence” of the CWB export regime under the *Canadian Wheat Board Act* -- and that, as a result, the non-discrimination requirements of GATT Article XVII were directly and indirectly infringed.

The panel rejected allegations concerning the lack of “commercial considerations” in CWB's exports. It noted, first, that the majority of board of the CWB is elected from amongst Canadian wheat producers and are not governmental appointees. Second, it found that the Canadian government did not interfere in the day-to-day operations of the CWB or in any way attempt to influence its export strategy. These two elements removed any motive for the CWB to make sales for political objectives and not in accordance with commercial considerations.

The panel then said that the mere fact the CWB is mandated to promote Canadian wheat exports and is authorized under the *Canadian Wheat Board Act* to sell at prices that commercial parties could not offer did not, in itself, automatically lead to the conclusion that the CWB was not behaving as a commercial actor:

“ . . . we are not persuaded that the CWB's legal structure and mandate, together with the privileges enjoyed by the CWB, create an incentive for the CWB to make

sales which are not solely in accordance with commercial considerations. The factual evidence adduced by the United States regarding actual CWB sales behaviour does not prove otherwise.”

In an important part of the decision, the panel held that the GATT “commercial considerations requirement” did not mean that,

“in deciding whom to sell to and on what terms, export STEs must act as if they were ‘commercial actors’ as the United States has defined this term”.

The U.S. argument, according to the panel, overlooked the fact that STEs are not necessarily used only for commercial purposes but can be legitimately established or maintained as GATT-consistent bodies to carry out governmental policies or programmes.

And while such STEs must make export sales on the basis of commercial considerations, nothing in GATT Article XVII prevents such entities from using their exclusive or special privileges to gain a competitive advantage in the marketplace.

The fact that the CWB was mandated to promote Canadian wheat sales but also required to market wheat in an “orderly manner” also removed any suggestion that it operated contrary to normal commercial considerations.

Moreover, even though the CWB was a not-for-profit entity, this did not make its export activities GATT-inconsistent. As noted by the panel,

. . . because of its governance structure, the CWB has an incentive to maximize returns to the producers whose products it markets. Furthermore, even if the CWB were to make sales in greater volume and, in some instances, at lower prices than

a profit-making enterprise, this would not necessarily imply that the CWB's sales would not be based solely on commercial considerations.”

The significance of this ruling is the panel's endorsement that STEs are allowed to use their special and privileged positions to compete with commercial parties as they might. As stated by the panel, nothing in GATT Article XVII requires STEs to act exactly like privately-held profit-maximizing corporations.

THE CWB IMPORT REGIME

On the treatment of *imported* grain, the U.S. scored a couple of hits, although these are of lesser importance in the overall decision.

The panel agreed that the *Canada Grain Act* prohibition against receiving foreign grain at Canadian elevators without prior authorization of the Canada Grain Commission offended the national treatment rule in GATT Article III. It said that even if authorization was routinely granted, the fact that imported grain was subject to a different approval regime offended the non-discrimination obligation.

On prohibitions against mixing U.S. grain with Canadian grain, the panel also found this to offend national treatment, in that it gave a commercial advantage of domestic product over imports.

GATT EXCEPTIONS AND GMOS

Canada attempted to justify differential treatment of U.S. grain under the so-called GATT “exceptions”, for example, as measures necessary to effectively control and screen out un-approved GMOs. The panel said Canada failed to demonstrate just why and how these GMO concerns, in this instance, fitted within the scope of the GATT exceptions. The finding did not minimize the importance of these concerns. It simply said Canada did not

have sufficient ammunition in this case to support its import mixing restrictions this under these “exceptions”.

OVERALL SIGNIFICANCE OF THE WHEAT BOARD DECISION

The *Wheat Board Case* is the first thorough WTO panel examination of the obligations of governments to regulate STEs under GATT Article XVII. The decision makes it clear that STE governance structures and independence are important considerations in determining whether these entities are behaving in accordance with GATT requirements.

More important, the panel confirmed that, within reasonable limits, STEs are entitled to gain advantages in the marketplace from their special or privileged positions. The mere fact that STEs use their market power to sell advantageously is not, in itself, reason to conclude that they are not behaving in accordance with commercial considerations.

There obviously is a fine line separating reasonable market behaviour and unfair advantage and the decision cannot be read to give *carte blanche* to STEs to stray over the line. But it is an important WTO endorsement for state enterprizes (and, in Canada’s case, Crown corporations) to pursue their governmental mandates.

A note of caution. It is not yet certain if the U.S. will appeal to the WTO Appellate Body. If it does, we will have to await final word on these points, likely to take another six to eight months.

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