

LAWRENCE L. HERMAN

BARRISTER & SOLICITOR
ASSOCIATE COUNSEL, CASSELS BROCK & BLACKWELL LLP

SUITE 2200
40 KING STREET WEST
TORONTO, CANADA M5H 3C2

TEL: [416] 869-5983; 488-2696
FAX: [416] 640-3024
E-MAIL: lherman@casselsbrock.com

TRADE LAW MEMORANDUM

CAN WE SAVE CANADIAN WHEAT BOARD?

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Interest groups in the U.S., helped along by the American government, continue to take shots at the Canadian Wheat Board, the ultimate aim being to secure the Board's demise. Canada keeps fighting back and with the August 30th decision of the WTO Appellate Body scored an important victory. Providing Canada and Canadian grain producers with vital legal ammunition to fend off future challenges.

At issue in the latest WTO is the scope of key WTO provisions governing the operations of State Trading Enterprises or "STEs" and the right of these entities to continue to operate in the international marketplace for the benefit of their stakeholders. The U.S. arguments would have emasculated the Board and had potentially serious repercussions for other State monopolies and Canadian Crown corporations.

Of note in this latest Appellate Body decision is how directly and decisively the U.S. appeal was rejected, the Appellate Body even criticizing the U.S. for raising arguments on appeal contrary to positions it had taken before the panel. What also must be noted is the advocacy skill of Canadian counsel from the former Foreign Affairs and International Trade Department in securing this decisive victory.

What this WTO case is all about is this. The WTO Agreement (precisely, Article XVII of the GATT, which is an integral part of the Agreement) permits States to establish STEs and for those enterprises to engage in importing and exporting of goods. However, said the U.S., those activities must be governed purely by market behavior and not by other non-market considerations, such as securing sales through exercising monopoly power over pricing.

The relevant wording of Article XVII:1 that the U.S. latched on to was the requirement that, in its purchases and sales, such enterprises shall follow “the general principles of non-discriminatory treatment” provided for in the GATT.

The U.S. also argued that, as an STE, the Wheat Board was required to comply with the additional requirements that “such enterprises shall, having due regard to the other provisions of this Agreement, make such purchases or sales solely in accordance with commercial considerations”.

The U.S. said that this obligation in Article XVII prevented the Wheat Board from using its exclusive privileges in international sales to the disadvantage of “commercial actors” - - i.e., U.S. grain companies. According to the U.S., the Board was prohibited from engaging in any sales of grain that might be construed as non-competitive in nature.

The original WTO panel decision rejected these U.S. arguments, saying that nothing in the wording of Article XVII prevented the Wheat Board from using its privileges and advantages to benefit Canadian farmers, simply because such privileges might be to the commercial detriment of private-sector enterprises.

The U.S. appeal on this point was also rejected by the Appellate Body. “We see no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs”, it said, whereas “the United States appears to construe [this provision] as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors . . .”.

This saving of the CWB's powers and privileges under WTO provisions has implications well beyond the immediate case. Both the Panel and Appellate Body cast many of the key parts of their findings in general terms, indicating that the decision are intended to apply to STEs in a wider context. This decision, then, is important for other Canadian Crown corporations.

On a more political level, the decision is important. One of the agriculture community's concerns over the framework agreement of July 31st, setting out a roadmap for WTO negotiations in the Doha Round, was that operations of STEs were on the negotiating table. This recent legal interpretation of the WTO Agreement will be important ammunition against renewed onslaughts against the Wheat Board in these talks.