Canadian Speaker Session 4: Canada and U.S Approaches to Trade in Agriculture - Canadian Speaker

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Dr. King, thank you very much for inviting me. And Dick [Cunningham], we'll have to see whether I want to thank you for suggesting that I be invited - that depends on how it goes.

It was very illuminating, though not particularly heartening, to listen to Kevin’s presentation. In his introduction Brad [Smith] said I would put things in a microcosm by describing the experiences of the Canadian Wheat Board, where I am General Counsel. You’ve heard Kevin talk about the big picture. I’m going to now give you a taste of what it’s like to be on the receiving end of some of that.

The inimitable Tip O’Neill once said that, “all politics is local.” Jon Jackson, the internationally recognized trade law guru rightly added, “and so is all trade policy” and that is the essence of what we experience on an almost daily basis at the CWB.

Now, it’s no secret that we’ve had our difficulties with North Dakota over the years. In some ways I think we are to North Dakota what softwood lumber is to the Pacific Northwest. However, it’s also important to note that we are in that little 4 percent minority of problems and to remember that 96 percent of Canada-US bilateral trade works extremely well. Kevin pointed to the problems as arising primarily in the agricultural arena. I think that’s fair. So, while my talk necessarily has a somewhat negative tone (given that we are in that unfortunate 4 percent), let’s not lose sight of the bigger picture.

† James McLandress is general counsel at the Canadian Wheat Board, a farmer controlled marketing agency that is one of the world’s largest traders of wheat and barley. With a B.A. (History) from Trent University and an L.L.B. from the University of Manitoba, he was called to the Manitoba Bar in 1989. Mr. McLandress has been responsible for managing all of the most recent U.S. actions in respect of the CWB. These include, the Section 301 case, the AD/CVD petitions with respect to spring wheat and durum, the Article XVII WTO challenge, and the related NAFTA and WTO appeals/challenges. Prior to joining the CWB in 1999, Mr. McLandress conducted a litigation practice as a Partner with Taylor McCaffrey, one of Winnipeg’s leading law firms. He has presented cases at all levels of courts, including the Supreme Court of Canada and various administrative bodies including the Canadian Transportation Agency. He is also a member of the Canadian Bar Association and of the American Bar Association (International Trade Law Section).

1 In particular, the North Dakota Wheat Commission (“NDWC”), a state-created lobbying agency, has been the ultimate source of most, if not all, of the CWB’s bilateral trade issues.
From where we sit it seems as if North Dakota coffee shop politics drives most of our trade issues. I think that’s part of it. In addition though, I wonder whether there’s a broader issue in play – and I will finish off on this note at the end of my talk. Is the source of the clash also a matter of certain cultural differences arising from, or perhaps reflected by, the fundamentally different ways in which Canada and the U.S. have gone about organizing the social and economic programs within their countries?

First, a little bit on the CWB to give you an understanding of who we are, what we do, and how we fit into the world. The CWB is a farmer controlled grain-marketing organization. We are the single desk marketer of Western Canadian wheat, durum and barley. I say “single desk” deliberately – it is an exclusive authority that we have to market those crops though, for reasons I will describe in a moment, it is not a “monopoly”.

Because the focus of our disputes with the U.S. has been almost entirely on wheat and durum wheat (used to make pasta and couscous) my comments will focus there. We are one of the world’s largest marketers of those crops. Our annual revenue is about $4 to $6 billion dollars Canadian. Because of the single desk the CWB is a “state trading enterprise” or “STE” under GATT Article XVII. It also gives us a significant “governmental” flavor –

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3 Wheat: Canada produces approximately 4% of the world’s wheat and is the 6th largest producer behind the EU-25 (20%), China (17%), India (12%), the U.S. (10%), and Australia (4%). Canada exports 14% of the world’s wheat and ranks 4th in wheat exports behind the U.S. (26%), the EU-25 (15%), and Australia (14%). The other major trader is Argentina at 9% of world trade.
4 Durum: Canada produces 13% of the world’s durum and is the 2nd largest producer behind the EU-25 (25%). After Canada, North Africa (9%), Turkey (9%), the U.S. (8%) and Mexico (3%) are the other major producers. Canada exports approximately 51% of the global durum. The U.S. (17%) and the EU-25 (7%) are the other main traders.
5 See WTO The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 20, 446, 485 (Cambridge University Press 1999) excerpted below:
Article XVII (1): State Trading Enterprises
(a) Each contracting party undertakes that if it establishes or maintains a State enterprise, wherever located, or grants to any enterprise, formally or in effect, exclusive or special privileges, 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 for governmental measures affecting imports or exports by private traders.
(b) The provisions of sub-paragraph (a) of this paragraph shall be understood to require that such enterprises shall, having due regard to the other provisions of this Agreement, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other contracting parties adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.
something that is thrown up in our face on both sides of the border. However, we have only one objective. As it says on the slide [#3], our job is to earn the best overall return for Western Canadian farmers from the sale of their grain. Put more simply: every fall, as farmers harvest we get a big pile of grain. Our job is to turn that into the biggest pile of money we possibly can. That’s what we are supposed to do year in year out.

The CWB has a long history. It started operating in 1935 as an outgrowth of the depression era co-operative movements in Canada. However, our key structural elements – that have been called the “three pillars” over the years – were put in place just after the war, in about 1947. These “pillars” are (1) the single desk, (2) price pooling and (3) certain guarantees from the Government of Canada. I will touch on these in a bit more detail in a moment. But first a comment on how the CWB is governed and on the central importance of its farmer stakeholders.

From 1947 until 1999, there were no significant changes in the structure of the CWB. Then, in 1998 the company underwent a significant governance reform. Effective January 1, 1999 the CWB ceased to be governed through what was very much a government-style structure – a five-person commission in which the people responsible for running the company were all appointed by and answerable to the Federal government. Instead, a corporate-style board of directors, the majority of whom are elected by Western Canadian farmers, now controls the CWB.

At the board level the CWB has a very traditional corporate structure with a CEO, a chair and a board of directors – 15 in our case. Farmers living in ten districts across the Prairies elect ten of the directors. The federal government appoints the other five on the basis of the expertise that they can bring to the board table. Like the directors of all Canadian corporations, the CWB’s directors owe their allegiance to the corporation rather than to any particular stakeholder. And the standard of that allegiance – good faith and prudence – is also the same as that owed by all Canadian directors to their corporations.

(c) No contracting party shall prevent any enterprise (whether or not an enterprise described in sub-paragraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of sub-paragraphs (a) and (b) of this paragraph. (emphasis added)

6 There has also been a strong co-operative movement in the U.S. Certainly, there are some significant co-ops down here—Land O’ Lakes Dairies (who supplied the creamers at the conference), Sunkist, Ocean Spray, and some other very big ones.

7 Canadian Wheat Board Act §§ 3 - 3.13.

8 While the CEO is one of these appointees, the government cannot make the appointment without consulting the remainder of the board of directors and, more importantly, the board sets the CEO’s salary.

9 The Canadian Wheat Board Act § 3.12(1) provides that: The directors and officers of the Corporation in exercising their powers and performing their duties shall (a) act honestly and in good faith with a view to the best interests of the Corporation; and
And to whom does our corporation answer? 85,000 farmers scattered across the Prairie Provinces\textsuperscript{10} and part of British Columbia covering some 123 million acres of productive farmland.\textsuperscript{11}

These farmers are the focus of everything that we do. All of the decisions that the directors of the CWB make come down to one question – how is this adding value for farmers?

As I noted, the CWB is built on an agricultural co-operative model. It is from this model that our use of “price-pooling” originates.\textsuperscript{12} Each fall the CWB takes delivery of the grain that farmers offer for sale. The grain is then pooled according to kind and quality and sold around the world over the course of the marketing year.\textsuperscript{13} Farmers receive 100 per cent of the net sale proceeds – only marketing costs are deducted. Upon delivery they receive

(b)exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

This wording and the obligations that it creates is essentially identical to the language used in all corporate statutes in Canada.

\textsuperscript{10} From east to west there are 13,000 farmers in Manitoba, 49,000 in Saskatchewan, and 22,000 in Alberta.

\textsuperscript{11} The number of Western Canadian acres in production has been relatively constant over the last number of decades – a noteworthy contrast to the dramatic 60 million-acre increase in U.S. production acreage between 1970 and 1981 that Kevin Brosch described.

\textsuperscript{12} The CWB operates four pools—wheat, durum, feed barley and “designated” barley (i.e., barley used for human consumption purposes such as malting or pearling).

\textsuperscript{13} In Canada, the “crop year” runs from August 1\textsuperscript{st} to July 31\textsuperscript{st}. In the U.S., the “marketing year” runs from July 1\textsuperscript{st} to June 30\textsuperscript{th}.
what is called an “initial payment”. It is in essence a down payment for their grain. The balance is paid over the course of the year.\textsuperscript{14} By year’s-end the farmer will have received the weighted-average per tonne sale price for whatever particular kind and quality of grain that they delivered. Pooling is fundamentally a risk management tool as it relieves farmers of the risks normally associated with delivery timing – it doesn’t matter when they deliver during the crop year, they will receive the same price. The pooling payment model is typical of many co-operatives.\textsuperscript{15}

There is a twist to the co-operative model, however – the legislated single desk.\textsuperscript{16} The single desk gives farmers the ability to capture whatever market premiums are available. As noted earlier, when I call it the “single desk”, I am being very deliberate in the use that term. It is often called “the monopoly.”\textsuperscript{17} However, it really isn’t a monopoly, yet the term is extremely value-laden carrying, as it does, all sorts of negative connotations. The CWB is the exclusive supplier of \textit{Western Canadian} wheat, durum and barley for domestic human consumption (i.e., food-use in Canada) and for export, but the CWB does \textbf{not} have a monopoly anywhere in the world (including Canada). On the contrary, those crops are grown and marketed around the world and

\textsuperscript{14} Initial payments are established on the basis of grain, grade and quality. A list of the current initial payments is available on the CWB’s website. They reflect what the CWB believes will be the final return for that particular kind and quality of grain less a risk factor to account for the fact that the amount of the payment is still only an estimate at this point. The initials are published at the start of the crop year. As grain is sold from the pools, the initial payments are adjusted upwards. Depending on the associated market risks the number of adjustments varies from year-to-year and from pool-to-pool. The amount of any particular adjustment reflects the same considerations that went into establishing the initial payment but with the added certainty that actual sales gives to the accuracy of the estimated final return. Adjustments are made when the corporation feels that it can be done without material risk of incurring a pool deficit. Pool deficits occur when the total paid out to farmers exceeds the total sales proceeds received. In the CWB’s 70-year history, there have been fewer than a dozen deficits across all grains and all pools.


\textsuperscript{16} During the 1930’s a voluntary CWB was tried and failed dismally. By definition, pooled prices are an \textit{averaged} price. Thus, given the constant fluctuations of the market price, the pooled price could, at any given time, be either above or below the prevailing market price. So, when the voluntary Wheat Board offered initial payments that were higher than the prevailing market, it attracted more grain than it could ever expect to sell at those prices. If the posted payments were lower, it had no grain to sell. As a result it was impossible to manage the market risks. In the end, the Canadian government eventually acceded to farmers’ demands for a mandatory wheat-marketing agency.

\textsuperscript{17} On occasion even the CWB has used that term—just look at some of our old literature!
the international wheat, durum and barley markets are among the most highly competitive in the world.\textsuperscript{18}

The CWB no more has a monopoly on wheat sales than Rolls Royce has one on auto sales. Undoubtedly, anyone who wishes to purchase a Rolls Royce can only do so through Rolls Royce. Similarly, if a customer wishes to purchase \textit{Western Canadian} wheat, durum or barley then, they must come to the CWB. Year-in and year-out Western Canada produces some of the highest quality wheat, durum and barley in the world. The product has been developed over many years with the end-users needs in mind. It is consistent, it is reliable and it is well serviced. In short, there is brand-value attached to the fact that these are “Western Canadian” grains. And thus it is the same as when a buyer is prepared to pay more for a Rolls Royce than a Ford simply by virtue of the fact that it is a Rolls Royce. If somebody in the world wants that “brand” then, they’ll have to be prepared to pay a premium for it and the CWB, like Rolls Royce, will capture whatever premium the marketplace determines can be charged for the particular product.

What the single desk gives to Western Canadian farmers is the ability to extract, through the CWB, whatever premium the market has to offer for the products that we sell on their behalf. In the absence of the single desk, i.e., in a multiple-seller environment, the brand value would be arbitraged away. So that’s one of the real strengths of the single desk – it preserves the premiums for the producers.

It also gives farmers some marketing clout in a world that is dominated – and I’ll talked about this later on – by five companies. Five transnational corporations control almost all of the grain trade in the world.\textsuperscript{19}

So that’s where the strength of it lies, and most importantly – I think the thing not to lose sight of – farmers in Western Canada support it. It is theirs. They control it, and the majority of farmers support it. Not everyone of course, you will never get 100 percent support on any organization like this, but the majority certainly support it.

And just to give you an idea of the CWB’s operations... We have 430 employees scattered around the world. Most are at the Head Office in Winnipeg, Manitoba. We sell grain to several hundred customers located in over 70 countries around the world. We have a logistics office in Vancouver, a couple of sales offices in Asia and some regional offices in Western Canada. We don’t own any hard assets – such as terminals or handling facilities.\textsuperscript{20} The CWB is involved in all of the activities that you would expect us to be in to

\textsuperscript{18} Indeed, economists often cite the global wheat market as a perfect example of supply/demand pricing dynamics at work.

\textsuperscript{19} See discussion re Slide # 16, infra at p. 122.

\textsuperscript{20} The CWB owns its Head Office building at 423 Main St. in Winnipeg and owns approximately 1,800 railcars.
market grain – sales, transportation, market development, payments to farmers, financing, farmer relations, etc.

With that background to give you a flavour of how we operate and where we’re positioned, we come to what brings me here today. Since 1989 there have been some thirteen U.S.-driven trade investigations of the Canadian Wheat Board:

- Jun. 1990 – ITC, s. 332.
- Feb. 1993 – CUSTA Bi-National Panel (Durum audit).
- Jun. 1996 – GAO.
- Nov. 1998 – GAO.
- Oct. 1999 – DOC, Live Cattle CVD.
- Nov. 2001 – ITC, s. 332 (as part of USTR s. 301).
- Feb. 2002 – USTR, s. 301
- Oct. 2003 – ITC (re 13/10/02 AD/CVD petition)
  - Durum (4 - 0 negative injury)
  - Hard Red Spring Wheat (“HRS”) (2 - 2 affirmative injury)

And that completely ignores the numerous academic studies that have been conducted. In all of those investigations there has never been a sound conclusion that the CWB is in violation of any international trade obligations. The closest we get to it, I would say, is in October 2003 when we lost a 2-2 split-decision at the U.S. International Trade Commission (“ITC”) on hard red spring wheat (“HRS”). And just a month ago, Dick (Cunningham)

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21 Although the U.S. did not impose any trade restriction as a result of the “301 Case,” on Feb. 15, 2002 USTR Robert Zoellick announced a four-point plan to “seek relief from the trading practices of the CWB...” The plan promised:
- Examine launching a possible DSU case at the WTO.
- Work with the NDWC and the U.S. wheat industry regarding a possible AD/CVD challenge.
- Work with the U.S. industry to identify impediments to U.S. wheat entering Canada.
- Vigorously pursue comprehensive and meaningful reform of monopoly State Trading Enterprises in the WTO agricultural negotiations

In light of the actions taken over the ensuing 3¼ years and counting, Ambassador Zoellick is nothing if not a man of his word!

22 For years the CWB has been the subject of “dueling economists” and it is probably the most studied institutions I have ever had the pleasure of coming across.

was in front of a NAFTA panel to get that reversed – and I frankly think that it will be reversed. What the ITC is going to do with it we will have to see, but that is about the closest that anybody has come to any kind of finding that we are in violation of any trade obligations.\footnote{On June 7, 2005, the NAFTA Bi-national found that there was “no substantial evidence” to support the ITC’s injury determination and remanded the case for reconsideration by the ITC in accordance with nine specific remand instructions. On October 5, 2005 the ITC issued its remand determination, voting 4-1 that Canadian HRS imports are not causing or threatening to cause injury to U.S. producers.} I will touch briefly on the most recent cases.

The AD/CVD Case.

The chronology of that case is as follows:

- Sept. 13, 2002 - NDWC files AD/CVD petition re HRS & Durum.
- August 2003 - DOC Final AD/CVD tariffs determined:
  - 14.16% on HRS (8.87% AD + 5.29% CVD (4.94% gtees + .35% railcars))
  - 13.55% on Durum (8.26% AD + 5.29% CVD (" " " ))
- October 2003 - ITC Final Injury ruling
- July 29, 2004 - CIT dismisses NDWC appeal of Durum Injury ruling
- March 9, 2005 - NAFTA c. 19 Panel hearing re HRS Injury ruling
- March 10, 2005 - NAFTA c. 19 Panel reverses CVD guarantee determination

The Dump/Countervail case started on Friday, September 13th, 2002, at about 4:00 o’clock. I was thinking I would leave early to go to the block party and saw on the call display “202” as the Area Code and “429” as the prefix. That could only be Steptoe & Johnson (Dick Cunningham’s firm) calling me on a Friday afternoon and I just didn’t have a good feeling about that. I was right. That started us off on a most entertaining and expensive ride – with \textit{fabulous} representation I might add –

(Laughter.)

that is just now nearing conclusion. I don’t need to bore people with the gory detail of trade cases. I think the only interesting notes are really more on the Anti-Dump side than anything else. The Dump case had, I think, two interesting points in it. The first was the allegation of a “particular market situation”. I won’t get into the details of what that is, but what the U.S. Department of Commerce ultimately concluded in dismissing that allegation is
that the CWB’s prices are market set. I think that’s an important point to bear in mind; that they are not “administratively” set as the accusation had been.

The other point of note from the Dump case relates to the difficulty of trade agreements in agriculture generally. In particular, the “cost to production” case that was used with respect to HRS wheat. Out of some 60,000 wheat farmers in Western Canada the Department of Commerce obtained cost information from And those 28 determined the cost of production (“COP”) for all 60-odd thousand. The information gathered had no statistical relevance whatsoever but nonetheless, those are the rules and that’s what you’re stuck with. Moreover, and regardless of the unreliability of the COP calculation as performed by Commerce in our case, the very premise of using COP logic in an agricultural setting is hopelessly flawed. Generally speaking, with a manufactured product the production costs, the market value and the product itself are all known before production begins. With an agricultural product, however, only the production costs are known when “production” (i.e., seeding in the case of cereal grains) commences. Beyond knowing that it will be a particular kind of grain, the specific end-product, i.e., its quality, is in Mother Nature’s hands. The market value will be determined at some point in the future on the basis of a host of factors beyond the farmer’s control. Moreover, for the farmer, the costs themselves are almost all expended well before either the end product or its market value can be known.

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25 Briefly, in a “normal” dump case, the U.S. Department of Commerce (“Commerce”), which is responsible for determining whether sales into the U.S. are being made at “less than fair value,” will compare the seller’s actual sales prices in both the U.S. and in the home market. Any sales to the U.S. that are made for less than comparable sales in the home market are considered to be at “less than fair value” or “dumped”. However, where a “particular market situation” exists, Commerce will use something other than the home-market price as a comparator. A particular market situation exists when the home-market prices are not determined by the market but rather are set on some other “administrated” basis. Commerce’s decision in our case is a public document but is not, as far as I’m aware, posted on its website. The case number is A-122-845, A-122-847 and the decision is contained in a memo dated May 1, 2003 from S. Kuhbach to J. May.

26 Commerce does not consider sales that are made for less than “the cost of production” to be sales made in the normal course of business and therefore excludes them from its calculation of home-market sales. However, below-cost sales are included in calculating the average value of sales in the U.S. This, of course, means that the domestic average price will increase (because lower value sales are excluded) relative to the average U.S. price where the lower value sales have been left in the calculation. This in turn increases both the likelihood that dumping will be found and the margin at which it will be said to be occurring.

27 This is also why we never bothered to appeal the Dump case. With the unpredictability inherent in the process you could never conceivably manage your margins as you could with a manufactured product.

28 This issue is not a function of U.S. law alone as most dumping statutes contemplate the application of COP logic to agricultural products.

29 By analogy, a widget manufacturer should know that a particular manufacturing process
Thus, to apply a COP logic that was designed for manufactured goods to agricultural goods is, to say the least, problematic.

The other case running at the same time was the WTO case that the U.S. teed up. Commenced on December 17, 2002, the core U.S. argument with respect to the CWB really came down to the proposition that the CWB is "genetically incapable" of acting commercially. It sounds funny, but that's pretty much word for word the way it came out at one point. The U.S. rationale for this position was that GATT Article XVII requires all state trading enterprises to act solely in accordance with commercial considerations with respect to all sales and purchases. And because the CWB is driven to maximize revenue (which, incidentally, is typical of any co-op) we are not "profit driven" and therefore cannot act commercially. Translated a little further, the "share capital" model really is the only truly commercial model that would be acceptable in the eyes of the U.S. in that case.

That argument was resoundingly dismissed both at the panel level and at the appeal. Ultimately, the conclusion was that the CWB is farmer-controlled. Its incentive is to maximize returns. Both the Panel and the AB recognized the agricultural co-op model upon which the CWB is based and that ultimately it is indeed commercially driven. The AB also expressly

will produce, for example, "#6 Green Widgets." It will also know what they cost to make and what they can sell for before production begins. The farmer, however, can only know what the production process costs and that it will produce "widgets". Whether they are "#6 Red Widgets", "#5 White Widgets" or "#2 Blue Widgets" is beyond his or her control. And as for their value, that will depend on what sort of widgets they turn out to be and on what the world thinks they're worth if and when they are harvested. That world price will, in turn, depend, among other things, on how all the rest of the farmers in the world fared in their equally unpredictable farming operations.

The case also raised issues regarding alleged violations of GATT Article 3 (National Treatment) and the TRIMs agreement. These issues focused on certain Canadian government practices, in particular, the so-called "rail revenue cap" related to the movement of Western Canadian grains and oilseeds and certain elements of Canada's grain quality-control system.

See Article XVII (1), supra note 5.

See generally http://www.wto.org (follow "Disputes" hyperlink; then follow "Find disputes documents" hyperlink) (directing readers to the U.S. arguments are summarized in the decisions of the Panel and of the Appellate Body available on the World Trade Org. website).

The Panel Report was released publicly on April 6, 2004. The AB Report was released on August 30, 2004.

The Panel Report said:

"In view of the CWB's current governance structure, which gives Western Canadian producers control over the CWB ... the CWB has an incentive to maximize returns to the producers whose products it markets."

"...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."
rejected what it saw as an attempt by the U.S. to introduce a "competition-law" regime into Article XVII that was never intended by the parties.

So now, on to Doha, which is the next battleground for us. It seems that the NDWC doesn’t feel that it can win playing by the rules and is now saying, “Well, if that doesn’t work, change the rules.” But, as a backdrop to that, consider some recent wheat subsidy support numbers:

<table>
<thead>
<tr>
<th>2003 Wheat Support</th>
<th>United States</th>
<th>Canada</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$3.7 billion</td>
<td>$632 million</td>
</tr>
</tbody>
</table>

Any complaints from the NDWC about the CWB and subsidies are a little galling in face of things like that. That’s just for 2003.\(^{35}\) It is almost six times the support that comes to Canadian wheat farmers.

The Doha Round negotiations were officially launched in November 2001. Significantly, the structure of STEs was never in the mandate given to the negotiators. Nonetheless, as a result of the July 31, 2004 Framework Agreement reached in Geneva we ended up with this:

“...

18. The following will be eliminated by the end date to be agreed:

...

Trade distorting practices with respect to exporting STEs including eliminating export subsidies provided to or by them, government financing, and the underwriting of losses. The issue of the future use of monopoly powers will be subject to further negotiation.

…”

So what we end up stuck with is not only the loss of the guarantees that had been – particularly the initial payment guarantee – a price floor for Western Canadian farmers, but they must also face the prospect of what happens to the CWB. And, as another bit of background on this, the way in which the U.S. has managed the negotiations makes it clear that this is about the CWB and not really anybody else. The U.S. has frankly done a great job managing this part of the negotiations. By exempting Developing Countries from these provisions, they managed almost all of the potential allies so that it came down to the Australian Wheat Board, the CWB and maybe New Zealand. In the end we were left relatively isolated on the issue. Now, that’s just a good

\(^{35}\) In each of the last three years the U.S. has spent about $23 billion on trade-distorting domestic farm subsidies.
job on the part of the U.S. negotiators, but nonetheless, that's what we are faced with.

And the *quid pro quo*? Simply some vague commitments on production supports. A “substantial reduction” is totally undefined in terms of what the U.S. will be giving up – and the depth of those cuts have yet to be determined. The U.S. notion of cuts in “allowable support” – up to, I think, a 20 percent cut – will be totally meaningless in light of the payments that they are already making to U.S. producers. If you wanted to get a meaningful cut that even begins to make a difference, you would have to be in the 50 to 60 percent range. So we are a little cynical about it and that cynicism is only made a little bit worse when we see Bob Zoellick’s letter to Tom Daschle in August of last year. Essentially, what he is saying is U.S. farmers aren’t going to be impacted by this at all.

MR. BROSCH: If I might note, that was written before the Brazil decision came down.

MR. McLANDRESS: Yes, that’s true, and I don’t know whether theoretically the *Brazil-Cotton* decision will create problems for it, but the track record of implementation so far is not great. So we will have to see where that takes us.

And so this really touches on something that Sue Esserman talked about this morning. Where is the problem coming from? It seems to start with NAFTA. From where we sit, NAFTA is doing what it’s designed to do, namely, give Canadian goods open access to the U.S. market place and vice-versa. But in North Dakota they seem to feel otherwise. As the senior U.S. Senator from N. Dakota, Mr. Byron Dorgan, said before the ITC on September 4, 2003: “I was in the U.S. House when the U.S.-Canada Free Trade

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“... *Canadian Wheat Board*. The framework agreement also commits to disciplines, for the first time ever, on monopoly state trade enterprises like the Canadian Wheat Board that hurt wheat growers in your home state and in others. It even advances negotiations toward our goal of eliminating the monopoly power of state trading enterprises...”

“... *Impact on Current Farm Programs*. Your letter asserts that the framework will require cuts in current farm programs in the first year of the agreement. That is not the case. Moreover, the 20-percent reduction in domestic support that you cite in your letter applies to all forms of trade-distorting domestic support, which is more than double our current $19.1 billion ceiling for one category of our domestic support. Therefore, this reduction will not weaken our ability to support our farmers, as you erroneously claim. In fact, as noted above, the framework opens an opportunity to give more security to the countercyclical payments in the 2002 Farm Bill...”

37 The *Brazil-Cotton* case. A WTO panel-decision subsequently upheld in substantial part by the WTO’s Appellate Body.

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Agreement was passed. I think it was incompetently negotiated, and I think the interests of American farmers were largely sold out in that negotiation.\textsuperscript{38}

But, while there is definite hostility to that, there is also some logic to why there would be a concern. Canadian marketing efforts have been pretty good selling wheat and durum into the U.S. We have a high quality product. Our focus is customer service, and there is a natural market there.

That said, however, it is also interesting to note that from about 1994-95 to 2001-02, it is a relatively flat line. There is a natural limit to how much Canadian grain will ever come into the U.S.\textsuperscript{39}

But now, a little bit of context on the market in which we operate on behalf of Western Canadian farmers...

These are the players in the global grain business:

\textsuperscript{38} And Senator Dorgan is certainly not alone in his views. See Letter from Kent Conrad, U.S. Sen., N.D., to U.S. Int'l Trade Comm'n (2003) ("Before the passage of the U.S.-Canada Free Trade Agreement, the U.S. imported virtually no Canadian grain. None. Since the negotiation of the Canadian Free Trade Agreement, imports of Canadian durum have grown to 20 to 25 percent of the U.S. market").

“North Dakota wheat farmers' problems with the Canadian Wheat Board date back to the negotiations for the Canada-U.S. Free Trade Agreement and later NAFTA.” – Jack Dalrymple, Lt. Governor, N. Dakota to U.S. ITC, Sept. 4, 2003

According to a recent Boston Consulting Group study, 73 percent of the global grain trade is controlled by the first five companies on this chart – Cargill (which is privately held), ADM (Archers Daniels Midland), Louis Dreyfus, Bunge, and Conagra. And that number is up from some 60 percent a few years ago.

And as for relative market share:

* five-year average from 1999-00 to 2003-04
Interestingly, Canada's share of the wheat market has been on a slow downward trend over the past quarter-century. Over the years it has declined from about 20 percent to its current 14 per cent. And so, aside from what's grown in Australia and Canada, almost every kernel of wheat traded on the world market — no matter where it was grown — is going to be controlled by one of those five companies.

And finally a note on world wheat prices:

As noted earlier, the world wheat market is one of the most competitive in the world. This chart shows prices for wheat around the world. They are prices for standard wheat products in the key marketplaces: Rotterdam, Minneapolis, U.S. Gulf, Kansas City, Australia, St. Lawrence. The most important message in this graph is that these prices are almost perfectly correlated. Given that fact, if the CWB were indeed distorting trade I would think that it would show up somewhere — but it does not.

The products and markets shown on this time-series are:
(1) U.S. “No. 2 Hard Red Winter, Ordinary” priced at U.S. Gulf ports, (2) “No. 1 Canada Western Red Spring, 13.5% protein” priced at the St. Lawrence Seaway ports, (3) “Australian Prime Hard, 14% protein” priced at Australian export ports, (4) U.S. “No. 1 Hard Red Winter, 13% protein” priced at the Kansas City Board of Trade, (5) U.S. “No. 2 Dark Northern Spring, 14% protein” priced at Rotterdam, Denmark, (6) U.S. “No. 1 Dark Northern Spring, 14% protein” priced at the Minneapolis Grain Exchange, and (7) U.S. “No. 2 Dark Northern Spring, 14% protein” priced at U.S. Gulf ports.
So what does this all mean for Canadian farmers? It means a whole bunch of time, a whole bunch of money and a whole bunch of frustration when the rules, the law and the precedents don’t seem to matter. The U.S. political structure is such that North Dakota and its small special interest groups have significant political clout in the U.S. and therefore significant power on the world stage. By the time the Doha Round is done Western Canadian farmers will be worse off than when we started the process.

Given the situation in which the CWB finds itself, I found the following comments interesting. The first are from Michael Adams’ book FIRE AND ICE:

“In [America] there is little tolerance for subtlety, nuance or shades of grey... Canadians, however, have found themselves throughout their history to be in an interdependent world... Our founding ideas, our institutions, and the experience of building our two nations [Canada & the U.S.] have been very different; one by conquest, the other by compromise.”

Adams is a pollster, one of the founders of Environics, and has drawn his conclusions from some 25 years worth of “social values” surveys conducted in the U.S. and Canada. The second is from Thomas Friedman’s fascinating work, THE LEXUS AND THE OLIVE TREE: “Unlike most traditional conquerors, [Americans] are not content merely to subdue others. We insist that they be like us. And, of course, for their own good.”

There will be others around the world who might share these views, but I just want to leave you with this thought.

From our perspective – as I think is borne out by the cases and what not – the CWB is not trade-distorting. We are commercially driven. We don’t compete with U.S. farmers; we compete with those five big guys I showed on that graph. And, the world market sets the prices that we can obtain for our

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41 The CWB has spent some $17 million CAD plus countless hours addressing these trade issues. The NDWC has also spent multiple millions of dollars. Indeed, late last year they were found to have violated State funding rules and had to obtain special approval from the State legislature to increase a farmer “check-off” to cover their costs. See Wheat Checkoff Increase Among Top Legislative Ag Issues, GRAND FORKS HERALD, Dec. 13, 2004. See also Letter from Wayne Stenejhem, Attorney General, North Dakota, to Mr. H. Klein., NDWC Chair, (Dec. 29, 2004).


43 See generally Peter J. Schoomaker, For Senior Leaders Above Brigade; From My Bookshelf, 86 MIL. REV. 81, (reviewing THOMAS FRIEDMAN, THE LEXUS & THE OLIVE TREE: UNDERSTANDING GLOBALIZATION Anchor (2000)).

44 This fact was confirmed in the ITC’s first injury ruling (Oct.’03) at p. 14 where, on this
products. However, the CWB is undeniably “different”. It is a quintessentially collectivist institution, unlike the structure of the U.S. industry. Most importantly, the CWB’s allegiance is to its farmers, as opposed to the U.S. grain trade where their allegiance is quite rightly to their shareholders. If I am Cargill, ADM, Bunge, I have one job – to maximize shareholder value and that obviously changes my motivations in dealing with the farmer. The market only has so much to offer for any given bushel of wheat. The trader for a share-capital corporation is necessarily (and properly) on the opposite side of the negotiating table from the farmer – he or she is motivated to pay as little as possible for that bushel. The CWB, on the other hand, has no such motivation, since the net sale proceeds will all be returned to farmers in any event. Our goal is simply to focus on getting as much as we can for the grain that we sell and to get that money back to farmers. Now, we obviously have a connection to the Government of Canada and farmers don’t have a choice as to whether they are going to participate in the Canadian Wheat Board. But, that’s something for them to control. If Western Canadian farmers want to get rid of the CWB, they will vote us out. It is not for the U.S. or any other nation to force that change upon us.

And so the question sometimes gets asked, “What happens if the Wheat Board disappears?” The answer, “Canadian grain will be controlled by the transnationals, same as in the rest of the world.” That to me would be a certainty. In the meantime what can we make of these different ways of organizing our respective wheat industries? Nothing, they are just differences. That’s all. The path that Canada has chosen is no less commercial than that chosen by the U.S., it’s just different.

Thank you very much.

(Applause.)

point the entire Commission found that, “In general, subject imports of HRS wheat and durum wheat do not compete with domestic producers for sales to local grain elevators. Instead, importers sell subject imports downstream to milling firms.” The ITC’s opinions are available at: http://hotdocs.usitc.gov/docs/pubs/701_731/pub3639.pdf