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Regulating State Trading Enterprises in the GATT: An Urgent Need for Change? Evidence from the 2003-2004 U.S.–Canada Grain Dispute

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Introduction

State Trading Enterprises (STEs) are one of the *bete noirs* of agricultural and other trade relations and trade negotiations. An STE is a government enterprises or quasi government enterprise that operates with special protections and/or privileges granted by its country's central authority. STEs generally exist for one of two main reasons. Sometimes, as with many African parastatals, they are created to tax the domestic industry and/or imports for government revenue generation purposes (or income transfers to members of ruling elites). Alternatively, an STE's mission is often to increase revenues or profits (though not necessarily both) from sales for domestic producers and/or processors and other marketing chain operations. In pursuing these revenue or profit objectives, STEs create trade distortions by implicitly levying tariffs on imports, taxing domestic sales, and subsidizing (or, on rare occasions, taxing) exports to different countries at different rates. They may also be vehicles through which domestic subsidies are more or less discretely funneled to producers, with corresponding implications for the effectiveness of disciplines on domestic supports. Hence, STEs are problematic in the context of trade negotiations.

This paper examines the viability of disciplining trade distortions generated by STEs under the current provisions of the General Agreement on Tariffs and Trade and other WTO agreements. The approach is to review the implications of the language of 1994 WTO agreements for STE disciplines and provide a case study. The case study consists of an examination of the recent trade dispute between the United States and Canada over Canadian grain handling provisions for imports and the role of the Canadian Wheat Board as a state trader.

Disciplining STE Trade Distortions: A Regulatory Challenge

The trade distorting activities of STEs are clearly difficult to regulate. Transparency is one issue. Most STEs are not required to provide clear information, or indeed very much economically relevant information, about their activities. They do not have to provide information to third party monitoring organizations about the prices they pay for the commodities they buy or the prices at which they sell those commodities in different markets. Nor are they required to provide information about the quality of the goods they sell. Often, STEs are not even asked to provide accounts that report information about the government transfers they receive (or, for that matter, funds they may transfer to the government). And even when information on government funding or implicit taxation can be obtained, often it can only be uncovered through what amounts to a forensic economics exercise where, as Goodloe has recently illustrated with respect to the Canadian Wheat Board, the analyst has to dig through and compare the accounts of multiple government agencies. Such exercises are often beyond the scope, interest and perhaps the capacity of many bureaucrats in monitoring agencies or members of dispute resolution panels.

A second problem is that the current version of the General Agreement on Tariffs and Trade contains no meaningful language that can be used to address the issue of STE trade distortions. The text directly relevant to the operations of STEs is incorporated in Article XV11 of the 1994 GATT and contains language that has remained unchanged since it was inserted in the original 1947 GATT. In the late 1940s -- a period in which the United States, Britain, and other European countries were preoccupied with stimulating post World War II economic recovery -- the focus of many countries involved in developing the first GATT was on manufactured commodities. Some countries used STEs to manage key industrial and strategic commodities (for example, steel, steel products, aircraft, and coal) and wanted to ensure that no substantive restrictions were placed on their STE operations. Other countries wished to introduce disciplines on STEs but were also more interested in removing non-tariff barriers such as domestic content requirements and import licensing, replacing them with tariffs (the tariffication process), and then reducing tariff rates across the manufactured commodity board.

It is also worth noting that, by general consent, agriculture policy was not seriously addressed in GATT negotiations in the late 1940s and 1950s, or, for that matter, until the Uruguay Round of GATT negotiations began in 1986.[1] In the late 1940's, many European countries were concerned with food security and sought to expand domestic agricultural production through a variety of policies that raised either only farm gate prices (for example, the United Kingdom) or alternative both farm gate and consumer prices (for example, France, Belgium, Germany and Holland).[2] Some of the key players, such as Australia, Canada, New Zealand and the United Kingdom, also utilized STEs to manage some important agricultural commodity markets.[3]

The 1994 Agreement on Agriculture did not address agricultural STEs per se but instead presumed that the language of Article XVII in the GATT would be sufficient unto the needs of the day (or, in this case, the next decade or so). Many economists would argue that this has not been the case and that, given the current language of the GATT and its interpretation by various dispute resolution panels, STEs represent a potential vehicle through which countries can evade WTO disciplines. It should also be noted that some commentators on agricultural trade relationships argue that STEs are gradually disappearing and, in any case, lack effective market power and so the issue is therefore of minor or no real importance.[4]

In principle, however, it seems unwise not to address potential mechanisms for trade distortions and expanded domestic supports. Further, STEs are a particular trade irritant for important interest groups that, at least in some cases, have created substantial political difficulties even if, as some claim, the economic consequences of STE actions have been relatively modest. Political problems tend be more serious than appear warranted by STE economic impacts because the lack of transparency associated with STE operations generates a great deal of uncertainty and suspicion about what those economic consequences may be.

Article XVII of the General Agreement on Tariffs and Trade

The 1947 language of Article XVII, which is replicated in Table 1, represented a compromise that erred on the side of exempting STEs from disciplines on their trade distorting activities. STE operations were to be addressed but with a largely amorphous and ambiguous text. Paragraph 1(a) of Article XVII states that any enterprise granted "formally or in effect, exclusive or special privileges ….shall, in its purchase or sales involving either imports or exports, act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this [General Agreement on Tariffs and Trade] for governmental measures affecting imports or exports by private traders." This seems to imply, for example, that if an export STE sells a commodity to one importer at a specific price, then it should sell the same commodity to another importer at the same price (assuming that the delivery point and time of sale are the same or essentially the same). Unambiguously, export STEs such as the Canadian Wheat Board have openly declared to their domestic constituents that they price discriminate among export markets and their domestic market to increase total revenues (but not necessarily farm profits) from sales. Thus such STEs seem clearly to violate Article XVII's non-discriminatory treatment requirement.

Paragraph 1(b) of Article XVII, however, provides an important loophole in this regard. It states that STEs "shall … make any purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale". In addition, paragraph 1(b) also states that STEs "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." As always with international trade agreements, the devil is in the details, or in this case the lack of details and specificity. The phrases "commercial considerations" and "customary business practice" are vague, imprecise and subject to an enormous range of interpretations. Similarly, the meaning of "enterprise" in section 1(b) is apparently not obvious. It could be interpreted as refereeing only to the STEs of other countries or to all commercial and government enterprises.

Table 1

Article XVII: State Trading Enterprises

1.(*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 subparagraph (*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.

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

2. The provisions of paragraph 1 of this Article shall not apply to imports of products for immediate or ultimate consumption in governmental use and not otherwise for resale or use in the production of goods* for sale. With respect to such imports, each contracting party shall accord to the trade of the other contracting parties fair and equitable treatment.

3. The contracting parties recognize that enterprises of the kind described in paragraph 1 (*a*) of this Article might be operated so as to create serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis designed to limit or reduce such obstacles are of importance to the expansion of international trade.

4. (*a*) Contracting parties shall notify the CONTRACTING PARTIES of the products which are imported into or exported from their territories by enterprises of the kind described in paragraph 1 (*a*) of this Article.

(*b*) A contracting party establishing, maintaining or authorizing an import monopoly of a product, which is not the subject of a concession under Article II, shall, on the request of another contracting party having a substantial trade in the product concerned, inform the CONTRACTING PARTIES of the import mark-up* on the product during a recent representative period, or, when it is not possible to do so, of the price charged on the resale of the product.

(*c*) The CONTRACTING PARTIES may, at the request of a contracting party which has reason to believe that its interest under this Agreement are being adversely affected by the operations of an enterprise of the kind described in paragraph 1 (*a*), request the contracting party establishing, maintaining or authorizing such enterprise to supply information about its operations related to the carrying out of the provisions of this Agreement.

(*d*) The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises.

To put the matter another way, a competent lawyer can argue that almost any import or export STE practice is consistent, and even *solely* consistent, with "commercial considerations" and "customary business practice" when there is no definition of what those terms mean. For example, third order price discrimination among export markets that effectively results in targeted export subsidies can easily be shown to be a "customary business practice" for any firm with market power that is unfettered by internationally agreed anti-trust (or competition) regulations.[5] Moreover, the practice is certainly consistent with commercial considerations when those considerations include revenue or profit maximization goals and the pursuit or protection of market shares. Substantially underselling competitors (whether other exporters or domestic producers) in an export market, fundamentally a classic case of dumping, can also be justified as a "customary business practice" on the grounds that it facilitates market penetration and is a long run profit or revenue maximization strategy based on "commercial considerations."

Essentially, at least at first brush, it seems as though Article XVII provides a Pandora's box for STEs to pursue any practice they wish. The question is then "Is that really the case?" In the absence of any explicit disciplines on STEs in the 1994 Agricultural Agreement, countries concerned with the trade practices implemented by an STE can only resort to the WTO's dispute resolution process.

Thus, currently, the real issues are (1) how do disputes over STE trade distorting practices play out in the current WTO Trade Dispute procedures and (2) how do WTO Dispute Resolution Panels interpret the language of Article XVII? The answers to these two questions should condition all discussions about the need for changes in the GATT articles with respect to STEs and what those changes should look like. The next section lays out the formal WTO dispute resolution procedure. Its application in dealing with the recent U.S. complaint about Canada's handling of grain imports is then examined.

The 1994 GATT/WTO Dispute Resolution Process[6]

Table 2 presents the WTO's idealized time line for the resolution of disputes under the 1994 WTO Agreements. A dispute arises when one or more of the WTO's member countries consider a trade policy measure or action by another country to violate the WTO agreements. Step 1 in the dispute resolution process requires the plaintive and defendant countries to attempt to resolve the dispute through consultation and mediation over a 60 day period. If consultations and mediation fail to resolve the problem, then within the next 45 days the WTO Dispute Settlement Body (which is the WTO General Council in another guise) must appoint a WTO panel, which usually consists of three members.[7] WTO panel members are most often lawyers, although the occasional economist may creep into the mix.[8] The WTO panel then has six months to prepare its **final report** for the parties involved in the dispute. The process is as follows. The panel holds a **first hearing** at which the parties each make their cases to the panel. Subsequent to the first hearing, each party submits written rebuttals to the other party's arguments. At a **second hearing**, the parties then present arguments concerning the rebuttals.[9] The panel then submits a **first draft** report that contains only descriptive (factual and argument) sections but omits findings and conclusions and the parties have two weeks to comment on the first draft. The panel then submits an **interim** report which also includes findings and conclusions. The parties can then ask for a review within seven days of the issuance of the interim report. During the review period, which is not to exceed 14 days, the panel is permitted to hold additional meetings with the two sides. The panel then submits its **final report** to the parties involved in the dispute.

Table 2: Approximate Time-Line for the WTO Dispute Settlement Procedure

Day 1	Plaintive country files a complaint
Day 1to Day 60 (8-9 weeks)	Consultations, mediation, etc between the parties involved
Day 60 to Day 105 (5-6 weeks)	Panel set up and panelists appointed
Day 106 to Day 289 (6 months)	Final panel report to parties is prepared and presented
Day 289 to Day 310 (3 weeks)	Final panel report to WTO members is prepared and presented
Day 310-Day 365 (8-9 weeks)	Dispute Settlement Body adopts report (if no appeal)
Total ≈ 1 year	**Decision (without appeal)**
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total ≈ 1y 3m	**Decision (with appeal)**

If the panel concludes that the defendant country is violating the WTO agreement or its WTO obligations, it recommends that the measure at issue be changed to conform with WTO rules. The panel may also make suggestions about how this could be accomplished. Absent rejection by a consensus of Dispute Resolution Body members, the report becomes a ruling within 60 days of being issued, approximately one year after the complaint was originally filed.

At this point, either one or all of the parties to the dispute can appeal some or all of the report's findings. Sometimes, a panel's findings are appealed by both plaintive and defendant because of the complex issues involved in the dispute. The appeal process is restricted to a maximum of 90 days, and, according to the WTO, preferably should last no more than 60 days, to ensure a relatively speedy resolution of the dispute within 15 months of the original complaint. The WTO Dispute Settlement Body establishes a permanent Appellate Body consisting of seven members, each of whom serves a four year term. Each Appellate Board member should have "recognized standing in the field of law and international trade," and also have no affiliation with any government. Three members of the Appellate Body are appointed to hear each appeal and can uphold, modify, or reverse any or all of the panel's findings. The appeal findings must be accepted or rejected by the Dispute Settlement Body within 30 days of being presented, and can only be rejected by consensus.

Once those findings have been accepted, the defendant country has an obligation to follow the recommendations of the Panel or Appeals report to bring its trade policies into compliance with the WTO and must state its intention to do so before the Dispute Settlement Body within 30 days of receiving the report. It must implement the changes within "a reasonable period" but if it fails to act in a timely manner it then becomes subject to trade sanctions that, ideally, affect the same sector involved in the dispute.[10]

The United States-Canada Wheat and Grain Case

The Canadian Wheat Board (CWB) has long been a major source of irritation and frustration to wheat producers in the United States, and perhaps especially so since 1989, when the Canada-United States Free Trade Agreement (CUSTA) was signed. Initially, rightly or wrongly, the perception on the U.S. side of the 49th parallel was that Canada was dragging its feet in meeting its CUSTA commitments to reduce tariffs and trade restrictions on imports of U.S. wheat and barley into Canada. In addition, Great Plains farmers viewed the CWB's avowed intent to maximize revenues by utilizing its government-mandated monopoly on domestic sales and exports of western Canadian wheat and barley as a clear problem for prices both in the domestic U.S. market and in third markets. The U.S. wheat industry also viewed the CWB as being able to compete "unfairly" on price (essentially to dump product in both the U.S. and third country markets) without any constraints on its bottom line performance because of the guarantee provided by Canada's federal government that any annual losses would be made good out the public exchequer. In addition, of course, like many agricultural interest groups in the United States, Canada, and elsewhere, U.S. producers were also not entirely displeased to find a reason to keep Canadian wheat out of domestic markets in order to ensure higher prices for themselves, regardless of free trade considerations.

The upshot was that, between 1990 and 2002, a series of complaints about unfair trading practices on the part of the CWB were brought before the U.S. International Trade Commission and in other forums. Then, in 2002, the North Dakota Wheat Commission filed an anti-dumping petition against the CWB with the U.S. authorities. Soon after, on December 17, 2002, the U.S. government filed a complaint about Canada's grain trading policies with the WTO concerning three general areas: (a) Canada's segregation treatment of grain imported to Canada, (b) Canada's rail revenue cap and producer car program, and (c) the regime for exports of wheat implemented by the CWB. The first two issues concerned potential violations of Article III.4 of the 1994 GATT, which requires imported products to be accorded *no less favorable treatment* than like domestic products.[11]

Following the WTO's dispute settlement procedures, the two countries held consultations over the dispute in January, 2003. To no one's great surprise, no mutually satisfactory resolution of the issues was obtained, and in early March of 2003 the U.S. government requested that a WTO panel be established. The panel consisted of a lawyer (the chairperson, Claudia Orozco), an academic economist (Alan Matthews of the University of Dublin), and a trade policy consultant (Hanspeter Tschani).

In July of 2003, the panel began its work. The first hearing was held in early September of 2003 and the second hearing took place approximately six weeks later on October 21, 2003. The panel's interim report was issued on December 22 of the same year and, after comments had been received from the two parties, its final report was issued on February 10, 2004, almost within the ideal one year time line of the WTO dispute settlement procedure. The panel supported the U.S. claim that Canada's grain handling procedures and the rail revenue cap violated the GATT, but did not accept the U.S. arguments that Canada's rail car allocation procedures and the CWB's STE operations also violated the GATT. Perhaps inevitably, both Canada and the United States then appealed the findings of the WTO panel. Ironically, however, both countries appealed elements of the Panel's findings concerning the Article XVII STE complaint and the Appellate Body issued its final report on August 30, 2004, approximately six months after the final report had been issued by the panel.

(a) Canada's Grain Handling System.

The United States claimed that Canada's grain handling system, which under Canadian law (Section 57(c) of the *Canadian Grain Act*) requires many grain elevators in Canada not to receive foreign grain even if it is exactly the same as domestic grain, violated the *no less favorable treatment* requirements of Article III.4. The purposes of the CWB lie at the core of Canada's goal to ensure that foreign grains (and most specifically U.S. wheat and barley) remain segregated from grain grown in the Prairie Provinces of Western Canada. For decades, the CWB has claimed that Canadian grain regulations, which involve much more extensive limits on farmers' varietal choices than in the U.S., have enabled the CWB to develop CWB branded wheat and barley products for which buyers are willing to pay premiums.[12] Thus the entire grain handling system in Canada has been regulated to ensure that segregation of foreign grain is maintained and, not co-incidentally, only a few country elevators are authorized to accept foreign grain.

The WTO panel agreed with the United States that Canada was therefore treating imported grain less favorably than domestic grain. They also rejected Canada's claim that the issue was mute because the government's grain segregation policy had only very small adverse impacts on importers.

(b). *Canada's Rail Revenue Cap and Producer Car Program*

For many years, the Canadian government provided a direct subsidy for the transportation of Canadian grain from the Prairie Provinces to ports of exit such as Vancouver. In 1996, the "Crowe Rate" subsidy was abolished and farmers in the Prairie Provinces received a buy out from the program in the form of two years of direct payments from the federal government unrelated to their current production activities. In 1996 and 1997, world wheat prices were relatively high. However, in 1998, a year in which global wheat production reached a new record level, wheat prices plummeted and almost immediately farm interest groups in the Prairies complained about overly high freight rates. In response, the government of Canada commissioned a series of reports on the Canadian grain transportation system and shortly thereafter introduced a cap on the gross revenues that could be obtained from grain transportation by rail out of the western Provinces. These provisions were included in sections 151 and 152 of the *Canada Transportation Act* and implied that, in aggregate, Prairie farmers would pay less for the transshipment of any given amount of wheat and barley.

The United States claimed that the revenue cap resulted in differential treatment of domestic and imported grain because higher freight rates could be charged for imported grain. Canada countered by arguing that, since its introduction, the cap had never been binding in the sense that revenues received by the Canadian railway companies for grain transportation had always been less than the maximum allowed. The United States responded by noting that Canadian railways would be subject to severe penalties if the cap were breached and that total revenues had been very close to the cap (as much as 98 percent of the cap) in some years. The WTO panel found in favor of the United States under the provisions of Article III.4 on the grounds that Canada's rail revenue cap had the *potential* to result in less favorable treatment for foreign grain than domestic grain.

In a similar vein, the United States also claimed that foreign grain received less favorable treatment with respect to access to grain or hopper cars. The issue is as follows. Approximately 30,000 grain cars, originally owned by the government of Canada, had been designated as producer cars and allocated to producers for shipment of their grain by the Canadian Grain Commission under Section 87 of the *Canada Grain Act* at guaranteed lease rates. The U. S. argument was that foreign grain cannot access these cars and has to be transported in other cars at higher lease rates. Therefore, foreign (U.S.) grain is subject to unfavorable treatment. The government of Canada argued that no distinction was made in the language of section 87 between foreign and domestic producers. In fact, Canada's Agricultural and Agri-Food web site stated that only "Canadian grain producers with an adequate quantity of lawfully deliverable grain may apply to the Commission [for an allocation of cars]."[13] In addition, apparently no evidence was provided that these cars had ever been made available for foreign grain at preferential rates. Nevertheless, the WTO panel found in favor of Canada on this issue because the language of section 87 of the *Canada Grain Act* did not discriminate between domestic and foreign producers.

(c). *The CWB Export Regime for Wheat*

The third element of the dispute directly involved Article XVII. The basic U.S. claim was straightforward and simply requested that the WTO Panel find that the CWB's export regime is inconsistent with Canada's obligations under Article XVII. The basis for the claim was that an STE must act in a manner consistent with the general principles of non-discriminatory treatment in sales or purchases involving exports or imports. Given that CWB regularly claims that it uses its market power to practice third order price discrimination and has a mandate to dispose of all grain in any given marketing year, an economist might wonder why the Panel would need to waste more than a few moments finding in favor of the United States. This is especially the case given that the CWB's monopoly market power derives solely and unambiguously from the government of Canada. However, international trade law is not necessarily concerned with economic common sense or even un-coerced confessions from a defendant. Moreover, to make a compelling case, advocates should probably provide convincing evidence and, as we shall see, the United States may not have made the strongest case available to it.

The United States pursued the following strategy in its Article XVII claim against the CWB. First, it argued that (a) the CWB pays a preliminary price to producers for their wheat that is only 65% to 75% of the average pool price it expects to pay them and (b) any potential CWB pool losses (defined as the differences total revenues from sales less initial payments to farmers for a given type of wheat) are guaranteed by the government of Canada. This claim was not disputed by the WTO panel or, for that matter, the subsequent Appellate Board.

Second, the United States argued that therefore the CWB has "more pricing flexibility" than any commercial entity in the North American grain handling business and this flexibility enables the CWB to deny commercial enterprises adequate opportunity to compete. The WTO panel and Appellate Board did not challenge this assertion either. However, the WTO Appellate Board was sympathetic to Canada's argument in its appeal that in Article XVII(b) the word "enterprise" was only intended to refer to the STEs of other WTO member countries and not to private grain handling companies that might compete for such sales. In other words, unfair competition that disadvantaged any non-government commercial entity was eventually ruled to be irrelevant.

More worryingly, in this context, the WTO panel found that the CWB's only obligation under Article XVII 1(b) was to ensure that "[T]he CWB afford its customers, and not its competitors, adequate opportunity to compete for participation in its wheat sales" (WTO (1994), page 169, paragraph 6.150). From the perspective of regulating trade distortions, this conclusion is patently nonsense, regardless of the legal reasoning for the conclusion. Essentially it implies that an export STE can offer a quantity of product at a very low price as long as it gives its customers a chance to compete to receive the low price on the specific sale (although not necessarily to be able to buy at that price). In this part of its findings, therefore, one could view the WTO panel as declaring open season for dumping practices as long as they are implemented by export STEs. The entities that are damaged by dumping, of course, are the competitors of the STE in the markets in which it is dumping its exports in the first place, not the consumers in that market.

Third, the United States asserted that the CWB's legal mandate and structure creates an incentive for the CWB to price discriminate and therefore unfairly differentiate among buyers by making its sales in a non-commercial manner. However, the United States only pointed to a very limited number of examples of non-commercial practices, citing the CWB's widely acknowledge practice of protein give-aways (over-delivering on protein specifications in export contracts) that had been documented by, among others, Carter and Loyns. The key components of this element of the U.S. case were that (a) the CWB's mandate was to maximize revenues from sales rather than the commercial goal of maximizing profits as a grain handler and (b) the ability to exercise monopoly power derived from government legislation.

The WTO panel found that this was not a sufficient argument. Essentially, the panel concluded that (a) any sales could be viewed as commercial because revenue (not just profit) maximization was a commercial goal and (b) the structure of the CWB's Board of Directors, as amended by Bill C4 in 1998 to include 10 agricultural producer representatives on a 15 member board, was likely to mitigate the incidence of non-commercial sales. Therefore, the Panel concluded, the United States had not made a sufficiently good argument that to show that the CWB necessarily violated Article XVII because of its export regime, even thought the Panel did agree that the CWB "could act not in accordance with commercial considerations" (WTO Panel Report, page 159).

Absent empirical evidence of price discrimination and below market price sales, therefore, the WTO panel was not willing to find in favor of the United States.[14] However, the lawyers for the United States made a deliberate choice not to provide empirical evidence of below market price sales by the CWB in U.S. markets (partly, it seems, because the U.S. Trade Representative's Office had limited resources available for the case and partly as a matter of strategy).[15] Thus the United States made the government of Canada's rebuttal job relatively straightforward.

A reasonable person might view both of the Panel's specific conclusions with some skepticism. With respect to the CWB board structure, this is not least because the CWB has a five member executive Committee that deals with major policy related issues, the majority of whose members are selected by the government of Canada. Moreover, neither the WTO panel nor the Appellate Committee discussed the export subsidy implications of price discrimination. The Appellate Committee simply noted that an STE could sell the same product in different markets at different prices when commercially considerations warranted such sales. What those commercial considerations would be were not identified. Nor did the Appellate Committee recognize that an STEs behavior could in fact be the cause of such price differences in the first place.

The fourth and final element of the U.S. case was that the government of Canada did not intervene in the CWB's operations to guarantee that its export sales conformed to Canada's Article XVII obligations. Thus, the United States was in fact claiming that the government of Canada was failing to adequately monitor the CWB, as paragraph 2 of the 1994 GATT memorandum, *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade, 1994* required. Ironically, the government of Canada turned the U.S. position on its head by arguing that lack of oversight by the government of Canada meant that the CWB was operating commercially. The WTO panel did not comment on this particular spat in any detail.

Summary

Article XVII of the GATT was not originally intended to be a mechanism for providing effective disciplines over either export or import STEs. The language that matters (in paragraphs 1(a) and 1(b) of Article XVII) is vague and subject to many different legal interpretations. It seems strange to an economist, for example, that a revenue maximization objective for a state marketing board can be viewed by a WTO panel as the commercial equivalent of either the profit maximization or "utility of profits maximization" objective normally attributed to commercial corporations. Regardless of whether or not such is the case, in the specific WTO dispute between Canada and the United States over the CWB's operation, the WTO panel refused to accept the U.S. arguments that the CWB made non-commercial sales mainly because the U.S. lawyers provided almost no empirical evidence of such sales. This does not seem to be an unreasonable legal position.

However, the findings of the WTO Panel and Appellate reports do shed some insights about the utility of Article XVII as a tool for providing disciplines on trade distorting behaviors by STEs. Putting sanitary and phyto-sanitary issues to one side, in the context of the 1994 WTO Agreement on Agriculture such behaviors include export subsidies, import tariffs and non-tariff barriers, and domestic supports. Article XVII is essentially useless as a means of regulating domestic supports and, at the very least, can only be viewed as providing an oblique approach to the disciplining of explicit or implicit export subsidies and import barriers. The issue of what constitutes a commercial consideration is one problem. But, more importantly, the Article contains no workable definitions of what constitute export subsidies or import barriers in the context of STEs. In contrast, the WTO agreements are far from silent on what constitute such behaviors in non-STE environments.

Some have argued that simply requiring transparency (lots of information and data) about STE operations would be sufficient. Transparency may be a necessary condition for the implementation of effective STE disciplines, but it will probably not be a sufficient condition, not least because transparency by itself provides no additional guidance to WTO dispute resolution panels and appellate committees about how to evaluate STE behaviors. Thus, if STE import and export behaviors are to be effectively disciplined by the WTO, Article XVII needs to be re-written and (at least from the evidence in the 2004 WTO Canada grains dispute) some of the current "case law" associated with existing WTO panel and appellate board findings needs to be invalidated.

At a minimum, the following general steps should be taken. First, Article XVII should be rewritten so that STE operations are subject to the same disciplines as direct government programs with respect to market access, domestic supports and export subsidies. Second, mechanisms should be created that force STEs to provide transparency about their operations. One potential approach to this issue is as follows. When an STE's behavior is the subject of a WTO dispute, currently the plaintive country is required to provide evidence of the STE's behavior in order to win its case. However, the preponderance of the data needed to prove or disprove the case is controlled by the STE itself. Typically the STE claims that the data are confidential and that such confidentiality is essential for their business operations. This stonewalling, or unwillingness to provide transparency, is generally successful.

What is needed, therefore, is a mechanism for "encouraging" the STE to provide the data required for determining its "guilt" or "innocence". One simple mechanism is to presume that failure by the STE to provide such data constitute prima facie evidence of guilt and to allow the plaintive country to impose the requested sanctions until the STE makes the data available to the WTO panel. While important issues concerning confidentiality would have to be resolved, such an approach would be a major step forward, creating incentives for transparency and a reasonable approach resolving WTO disputes over STE behaviors.

Endnotes

1. The story with respect to agriculture is really somewhat more complicated than is implied by the text. A very useful account of the history of agriculture in GATT negotiations between the late 1940s and the mid 1990s is provided by Josling, Tangerman and Warley.

2. Until the late 1960s, the UK was willing to operate deficiency payments schemes funded by tax revenues and government borrowing to provide price supports for domestic producers of cereals, livestock, and other commodities. Two objectives dominated policy formation over this period: a desire to keep consumer prices low and a desire to ensure export markets for Commonwealth countries such as Australia, Canada and New Zealand. Exchequer costs were relatively low as the UK imported approximately fifty percent of its food needs during much of this period. When domestic production began to expand in the 1960s, however, exchequer costs associated with deficiency payments schemes became more burdensome and, at the same time, successive British governments became increasingly interested in joining the European Community. Thus, by the late 1960s, the UK was shifting away from deficiency payments policies. In contrast, in the aftermath of World War II, most European countries faced extensive demands from sectors other than agriculture for tax-funded programs. Thus, in the late 1940s and throughout the 1950s these countries generally choose to implement various price support policies that raised consumer prices, effectively transferring income to farmers through indirect taxes on consumers, often linked to tariffs on imports or subsidies on exports. Not surprisingly, these policies were then essentially co-opted by the EC, incorporated in the Treaty of Rome in 1958, and became the foundation for the Common Agricultural Policy, which was formally implemented in 1969.

3. Examples of export STEs in these countries included the Australian Wheat Board, the Canadian Wheat Board, and the New Zealand Dairy Board, each of which are export STEs. The United Kingdom Milk Marketing Board, which was disestablished in 1994, was effectively an import STE.

4. The validity of this argument is certainly open to question. COFCO and the Japanese Food Agency, prime examples of import STEs, are scarcely unimportant economic agents in both their domestic and world markets for the commodities in which they trade.

5. See Alston, Carter and Smith and Alston, Smith and Vercammen for recent discussions of the theoretical issues involved with implicit export subsidies.

6. Much of this section draws from the WTO's website description of the WTO dispute resolution procedure (World Trade Organization, 2005).

7. The General Council consists of representatives (usually ambassadors or individuals of equivalent status) from all member country governments. The General Council has the authority to act on behalf of the ministerial conference which only meets about every two years and is the highest decision making body in the WTO.

8. The defendant country may veto the creation of a panel on the first occasion the panel is proposed but must accept the panel if it is proposed at a second meeting of the Dispute Settlement Body.

9. The panel has the right to consult its own experts or to appoint an expert review panel to develop an advisory report if scientific or other technical matters are raised by either side in the dispute at the first or second hearings.

10. So, for example, the United States could impose substantial tariffs on EC wine if the EC did not comply with WTO panel recommendations on the importation of cattle injected with beef hormones.

11. The text of Article III.4 of the 1994 GATT is as follows: *The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.*

12. The CWB argument that it has established a unique branded product in wheat through its role in influencing the current Canadian wheat and barely regulatory structure seems, to put it kindly, implausible. Carter, Berwald, and Lyons and Carter and Loyns argue convincingly that what the CWB calls premiums are really payments by buyers for over-delivery on quality specifications (such as protein, foreign matter content, etc), more favorable financial contract arrangements, and other services. Wilson and Dahl and Carter, Berwald and Lyons have also shown that farm gate prices in western Canada are not different that farm gate prices at comparable Northern Great Plains locations. The only relatively recent empirical studies of which the author is aware that claim the CWB generates substantial premiums from its operations as a price discriminating STE are ones that rely on confidential data provided to the analysts by the CWB itself (for example, Kraft, Tyrchiewicz and Furtan and, much more recently, Lavoie).

13. Almost surely, the term “lawfully deliverable grain” meant that, in the case of wheat and barley, only wheat and barley under the marketing control of the CWB could be carried in these cars.

14. In several places in its report, the WTO panel made clear that it would have needed convincing empirical evidence of non-commercial sales. See, for example, paragraphs 6.147 (WTO, 2004, 168) and 6.150 (WTO, 2004, 169). Evidence of such sales can be gathered, as illustrated by Goodwin, Smith and Holt.

15. The USTR was concerned that it would be very difficult to provide price comparisons for similar sales because of the CWBs well-documented record of failing to provide detailed information about its operations. Their concern highlights the need for effective tools that require STEs to provide such detailed information. In the extreme, for example, the GATT could be rewritten so that in certain circumstances trade sanctions could be levied against countries whose STEs withheld required information in WTO trade dispute cases.

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