BEFORE THE PANEL CONVENED PURSUANT TO CHAPTER 18

OF THE CANADA - UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
	)	
THE INTERPRETATION OF	)	CDA-92-1807-01
AND CANADA'S COMPLIANCE WITH	)	
ARTICLE 701.3 WITH RESPECT	)	
TO DURUM WHEAT SALES	)	

FINAL REPORT

February 8, 1993

Panel Members

The Honourable Griffin B. Bell, Chair
The Right Honourable Brian Dickson, P.C.
Mr. E. William Olson, Q.C.
The Honourable Davis R. Robinson
Mr. Robert B. Shanks, Esq.

I INTRODUCTION

A) Procedural matters:

1. On May 11, 1992, the United States of America requested, pursuant to Chapter 18 of the *Canada-U.S. Free Trade Agreement* (the "Agreement"), that a Panel be established to decide certain questions arising from a dispute between the United States and Canada over exports by the latter of durum wheat to the territory of the former. Canada accepted the request on May 18, 1992.

2. Accordingly, a Panel was convened and, pursuant to Article 1807(3) of the Agreement, the United States and Canadian governments agreed on the individuals who would serve as panelists, namely, the Honourable Griffin B. Bell (Chairman), the Right Honourable Brian Dickson, P.C., E. William Olson, Q.C., the Honourable Davis R. Robinson, and Robert B. Shanks, Esq.

3. Following the appointment of the Panel, a timetable was agreed upon by the Parties, as follows:

> August 19, 1992 - United States files initial submission;
>
> September 9, 1992 - Canada files counter-submission;
>
> September 21, 1992 - Oral hearing (Ottawa, Canada);
>
> September 28, 1992 - each Party files a

supplementary submission; November 5, 1992 - Panel issues initial report;

November 19, 1992 - Parties file objections;

December 7, 1992 - Panel issues final report.

4. The United States' initial submission and Canada's counter-submission were received in accordance with the above timetable, and the oral hearing also took place as originally planned.

5. However, at the conclusion of the hearing on the 21st of September, the Parties agreed, at the suggestion of the Panel, to a revised timetable, namely:

October 5, 1992 - each Party files a supplementary submission;

October 15, 1992 - each Party files a response to the other's supplementary submission;

November 16, 1992 - the Panel issues its initial report;

November 25, 1992 - the Parties file objections to the initial report;

January 25, 1992 - the Panel issues its final report.

6. In light of the importance and complexity of the dispute, the Panel decided again to extend the time for filing objections to its Initial Report to Monday, December 7, 1992. In addition, at the request of the Parties, the Panel afforded the Parties until

Friday, January 22, 1993 to answer the Panel's request, made in its Initial Report, that they suggest an information-sharing mechanism which would protect the confidentiality of the information while ensuring compliance with Article 701.3. Consequently, the date for filing this Final Report was extended to February 8, 1993.

B) Nature of the Dispute:

7. The Parties have agreed to the following "Terms of Reference", thus identifying the questions to be addressed:

> (1) The Panel is asked to consider the following:
>
> (a) whether the term "the acquisition price of the goods" in Article 701.3 includes solely the initial payments made by the Canadian Wheat Board, or whether it includes all payments made with respect to a durum wheat crop (initial plus interim and final payments, if any);
>
> (b) whether the term "storage and handling costs" in Article 701.3 includes elevation charges at terminal elevators and other related charges, such as weighing, inspection, and certification of durum wheat for export, which are performed by the Canadian Grain Commission under the authority of the *Canada Grains Act*;
>
> (c) whether the phrase "other costs incurred by it" in Article 701.3 includes freight rate payments made

by the Canadian Government pursuant to the *Western Grain Transportation Act* for the shipment of durum wheat to Thunder Bay, Ontario, for export to the United States;

(d) whether the phrase "other costs incurred by it" in Article 701.3 includes freight costs (for example, those for shipment of durum wheat from Thunder Bay, Ontario, to other locations for subsequent export to the United States), paid by the Government of Canada or public entities that it establishes or maintains, such as the Canadian Wheat Board; and

(e) whether any administrative costs of the Canadian Wheat Board and other public entities established by the Government of Canada, incurred with respect to durum wheat sold for export to the United States, are properly included in the scope of "other costs incurred by it" in Article 701.3.

(2) In light of the determinations made by the Panel under (1), determine whether or not the Government of Canada, including any public entity that it has established or maintained, has sold durum wheat for export to the territory of the United States since the Agreement came into effect on January 1, 1989, at a price below the acquisition price of the durum wheat plus any storage, handling or other costs incurred by it with respect to such durum wheat.

(3) The Panel's report shall include its recommendations, if any, for the resolution of the dispute between the Parties.

8. It is evident from the above Terms of Reference that the United States' complaint essentially involves questions of

interpretation of a key provision of the Agreement, namely, Article 701.3, which states:

> Neither Party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods.

9. As stated above, these questions of interpretation arise in the context of Canadian exports of durum wheat to the United States of America. In particular, the United States alleges in its First Submission (pages 9-10), and this is not contested by Canada, that:

> Since 1986, Canadian production of durum wheat has more than doubled, from 2 million metric tons in 1985/86 to 4.6 million metric tons in 1991/92. Canadian exports of durum wheat [worldwide] have risen substantially, from 2 million metric tons in 1986/87 to 3.2 million metric tons in 1991/92. Although Canada only began to export durum wheat to the United States on a regular basis in 1986, its exports have increased sharply since that time...

10. The United States alleges that in the "crop year (June-May) 1991/92" (sic), Canada exported 363,000 metric tons of durum wheat to the United States. Further, Canada is said to be the world's current leading exporter of durum wheat (ibid., page 10).

11. While prices in the United States appear to have declined over the last few years, the average price of a metric tonne of durum wheat for the 1991-92 crop year was $U.S. 135.12 or $CND 158.72. Given the significant quantities of durum wheat involved (which is only one of myriad agricultural products traded between the Parties), it is self-evident that the resolution of this dispute is of great importance to both the United States and Canada.

12. In this regard, the Panel is of the view that it cannot resolve the specific issues of interpretation identified in the Terms of Reference without, first, deciding upon the general principles of interpretation bearing upon international treaties such as the Agreement.

II APPLICABLE PRINCIPLES OF INTERPRETATION

13. The Agreement came into force in both the United States and Canada as of January 1989. Its enactment was preceded by long and arduous negotiations between the two countries. It is the most comprehensive trade agreement ever concluded between two countries. It obtains between two states each of which is the other's largest trade partner and which, historically, have enjoyed a unique relationship.

14. In construing the meaning of the relevant provisions of the Agreement, the Panel has had regard to the rules of interpretation set out in the *Vienna Convention on the Law of Treaties* ("the Vienna Convention"). Although the United States, unlike Canada, is not a party to this Convention, it agreed, in answering a specific request made of the Parties by the Panel concerning the law applicable to this dispute, that the Panel should refer to "the principles memorialized in the Vienna Convention on the Law of Treaties" (the United States' Response to the Panel's Questions of September 4, 1992, page 3).

15. Section 3 of the Vienna Convention sets out specific principles for the interpretation of treaties such as the Agreement. For convenience, the Panel sets out below the pertinent portions of Articles 31 and 32 of Section 3 of the Vienna Convention:

ARTICLE 31

General rule of interpretation

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> a) any agreement relating to the treaty which was made between all the

parties in connexion with the conclusion of the treaty;

b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

...

4. A special meaning shall be given to a term if it is established that the parties so intended.

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable.

16. Article 31 makes it plain that a treaty such as the Agreement must be given a contextual and purposive interpretation. In this connection, the Panel wishes to refer to the Preamble to the Agreement which, as Article 31(2) of the Vienna Convention stipulates, may be useful in ascertaining the context and purpose of a treaty:

The Government of Canada and the Government of

the United States of America, resolve:

> to strengthen a unique and enduring friendship between their two nations;
>
> to promote productivity, full employment, and the steady improvement of living standards in their respective countries;
>
> to create an expanded and secure market for the goods and services produced in their territories;
>
> to adopt clear and mutually advantageous rules governing their trade;
>
> to ensure a predictable commercial environment for business planning and investment;
>
> to strengthen the competitiveness of the United States and Canadian firms in global markets;
>
> to reduce government-created trade distortions while preserving the parties' flexibility to safeguard the public welfare;
>
> to build on their mutual rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation; and
>
> to contribute to the harmonious development and expansion of world trade and to provide a catalyst to broaden international cooperation; ... (emphasis added)

17. This Preamble underscores that the Parties have enjoyed a special relationship. Indeed, while it is always the case when treaty obligations between sovereign states are involved that, in

interpreting the terms of an international agreement, the good faith of each Party should be presumed, this is *a fortiori* true between Canada and the United States.

18. The Panel also underscores the parts of the Preamble which show the resolve of each country "to adopt clear and mutually advantageous rules governing their trade" and "to ensure a predictable commercial environment for planning and investment". These principles of clarity and commercial certainty will have a bearing on the way in which the provision at issue in this matter is to be interpreted.

19. With regard to the applicability of Article 32 of the Vienna Convention, the United States took the position that, as the terms of Article 701.3 were clear and unambiguous, the Panel need not resort to Article 32. Canada, on the other hand, suggested that the Panel could resort to Article 32.

20. Resort to Article 32 is not conditional, as the United States has argued, upon a finding that the terms of the Agreement are "ambiguous or obscure" (Second Submission of the United States, October 5, 1992, page 5). Rather, the first circumstance in which the Panel would be justified in having recourse to supplementary means of interpretation is in order to confirm the meaning resulting from the application of Article 31 [see Brownlie, Principles of Public International Law (1990), 630].

21. Moreover, the fact that the Parties were unable, after a series of meetings and communications aimed at resolving the dispute, to settle their differences as to the proper interpretation of Article 701.3, shows that Article 32 is relevant in the case before us and should be resorted to, either to confirm the ordinary meaning of the words or to resolve any ambiguity.

22. Indeed, oral argument reflected very sharp differences between the Parties as to the meaning of Article 701.3.

23. Accordingly, on October 21, 1992, the Panel requested the Parties "to produce copies of any and every document relevant to the interpretation of Article 701.3, including all internal memoranda, briefing notes, drafts of Article 701.3, transcripts of testimony before legislative committees of Parliament and Congress, and official correspondence." Some of these documents had already been provided by the Parties in their various submissions to the Panel. However the Panel wanted, with this directive, to ensure that a complete record, which could assist in the interpretation of Article 701.3, was made available.

III CONSTRUCTION OF ARTICLE 701.3

A) Object of Article 701:

24. In essence, the United States contends that the Panel need only focus on the allegedly clear and unambiguous language of Article 701.3 to resolve the issues of disputed interpretation between the Parties. Yet, the United States' interpretation of the "clear and unambiguous" language of Article 701.3 is opposed in several respects to the Canadian interpretation.

25. Canada also contends that the language of this article is clear and unambiguous, but it has put a greater emphasis on a contextual and purposive analysis.

26. In our view, it is important to consider the specific questions posed in the Terms of Reference in the context of Article 701 as a whole, and of the object of each of its subsections.

27. Chapter 7 of the Agreement deals with the subject of agriculture. Article 701 itself is concerned specifically, as its title indicates, with "Agricultural Subsidies". It will be convenient now to set out in full the text of Article 701:

Article 701: Agricultural Subsidies

1. The Parties agree that their primary goal with respect to agricultural subsidies is to achieve, on a global basis, the elimination of all subsidies which distort agricultural trade, and the Parties agree to work together to achieve this goal, including through multilateral trade negotiations such as the Uruguay Round.

2. Neither Party shall introduce or maintain any export subsidy on any agricultural goods originating in, or shipped from, its territory that are exported directly or indirectly to the territory of the other Party.

3. Neither Party, including any public entity that it establishes or maintains, shall sell agricultural goods for export to the territory of the other Party at a price below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to those goods.

4. Each Party shall take into account the export interests of the other Party in the use of any export subsidy on any agricultural good exported to third countries, recognizing that such subsidies may have prejudicial effects on the export interests of the other Party.

5. Canada shall exclude from the transport rates established under the *Western Grain Transportation Act* agricultural goods originating in Canada and shipped via west coast ports for consumption in the United States of America.

28. Article 701.1 sets out no express or implicit prohibition of subsidies, but simply states the primary goal of each Party to achieve "on a global basis, the elimination of all subsidies which distort agricultural trade". No distinction is made in Article 701.1 between "domestic" and "export" subsidies.

29. Article 701.2, however, does contain an express prohibition of any export subsidy on agricultural goods traded between the territory of each Party. In this regard, the Parties agree that an "export subsidy" is one that is "conditioned" on export, that is to say, a subsidy that is only available if goods are exported to another country. Strictly for the purposes of Article 701, every other form of subsidy is considered to be a "domestic subsidy", even though in fact, goods which are exported may have benefited from the subsidy.

30. Article 701.3 does not make any direct reference to subsidies, either export or domestic. We will address this point presently.

31. Article 701.4 expressly deals with the subject of export subsidies to third countries. To a certain extent, Article 701.4 is similar to Article 701.1, in that it does not contain any express prohibition of export subsidies. Rather it contains hortatory language that Parties must take into account the export interests of the other Party in using export subsidies to third countries.

32. Article 701.5 is the most specific of all the articles, and while it does not in so many words mention subsidies, there is no question that the reference to the transportation rates established under the *Western Grain Transportation Act* ("WGTA") is a

reference to a specific subsidy provided under that legislation. In effect, therefore, Article 701.5 amounts to the prohibition of an export transportation subsidy in respect of agricultural goods originating in Canada but shipped to the United States via west coast ports.

33. The combined effect of Articles 701.1, 701.2, 701.4, and 701.5, therefore, is as follows:

1) in general, neither domestic nor export subsidies are prohibited worldwide;

2) however, export subsidies to the territory of either Party are prohibited;

3) the only subsidy which is explicitly prohibited is that granted by Canada pursuant to the WGTA in respect of grain moving to the United States through west coast ports.

34. While all subsidies are recognized as potentially distorting the agricultural trade, only export subsidies are banned as between the Parties including, most specifically, the west coast transportation subsidy obtaining pursuant to the WGTA.

35. The Panel has concluded that the overall object and purpose of Article 701 is clear - namely, the prohibition of export subsidies to each Party's territory and the tolerance of domestic subsidies - and that this overall object and purpose should inform the analysis of Article 701.3, unless the ordinary meaning of the

words used in that article cannot be reconciled with it.

36. This interpretation of the overarching purpose of Article 701 can be confirmed (as is permitted by Article 32 of the Vienna Convention) by supplementary means, such as public statements made by high level United States officials. Thus, citing from Canada's submission of September 9, 1992:

> 54. In May 1988, Deputy USTR Alan Holmer explained why the Thunder Bay WGTA had not been addressed in the following terms:
>
> > ... the subsidies that are provided to the wheat going east are not contingent upon export. They are, therefore, under the rules domestic subsidies, and we did not want to put our domestic subsidies on the table with their domestic subsidies as part of these negotiations.
> >
> > We also overall wanted to reserve these issues for the Uruguay round of trade negotiations and not have the United States and Canada both unilaterally disarmed in this area.
>
> 55. When testifying before the Committee on Agriculture, in February, 1988, [U.S. Trade Representative] Ambassador Yeutter repeated this view:
>
> > Canada will cease granting export subsidies under the *Western Grain Transportation Act* (WGTA) which have benefited Canadian exporters (primarily of feed) to the U.S. through west coast ports. The Agreement *does not restrict existing rights of either country to grant domestic subsidies*, so WGTA subsidies on products shipped east from the prairies provinces can be maintained as long as they also

> apply when the product is consumed in Canada. (Emphasis added)
>
> (See also the passage excerpted from a letter of Ambassador Yeutter cited below at paragraph 106).

B) Purpose of Article 701.3:

37. While Article 701.3 does not explicitly deal with export subsidies, it concerns export sales of agricultural goods from one Party's territory to that of the other. Thus, it logically follows after Article 701.2 (which expressly prohibits export subsidies as between the territory of either Party) since Article 701.3 is specifically focused on the export trade between the Parties.

38. Article 701.3 is included, as pointed out above, in an article dealing with agricultural subsidies. And while the word "subsidy" is not mentioned in this subsection, one must assume, given its inclusion in Article 701, that Article 701.3 seeks to prohibit a form of commercial transaction between the two Parties which would be akin to, or have the effect of, an export subsidy. Indeed, since only export subsidies between the two countries are explicitly banned, it is only logical to conclude that Article 701.3, which deals expressly with export sales as between the Parties, should be concerned with the prohibition of export-like subsidies.

39. In simple terms, Article 701.3 prohibits the United States and Canada, either directly or indirectly through public entities that they may have established, from selling agricultural goods for export to the territory of the other Party, at a price below certain costs, including the acquisition price of the goods. While the Terms of Reference make evident that the meaning of certain words used in Article 701.3 requires further elucidation, it is apparent that the *raison d'être* of Article 701.3 is that the Parties wanted to strengthen the general prohibition on export subsidies contained in Article 701.2. Thus, the Panel agrees with the submission of Canada (transcript page 148, lines 16-22) that Article 701.3 was intended to deal with a situation where a government may absorb commercial losses of a public entity selling agricultural goods for export below their acquisition cost (plus any storage, handling or other costs incurred by it) whereby the government would effectively be subsidizing exports. That is what Article 701.3 was intended to prevent.

40. The United States' concerns about pricing by the Canadian Wheat Board ("the Board"), were linked to a two-price system that was in effect in Canada for some years before the Agreement came into force. Under this system, Canada's domestic prices were kept above export prices in certain circumstances. When the Agreement was before Congress, there were repeated references in testimony by U.S. officials to the two-price system as a practice that would be controlled by the new provision (the old two-price system was

thereafter abandoned by Canada). This is evidenced by a document prepared by the U.S. Department of Agriculture for the hearing before the House Ways and Means Committee on 25 March 1988, entitled "Concerns and USDA Rebuttals". This document referred to Article 701.3 and concluded that:

> The United States and Canada have agreed that neither government, including any public entity it establishes or maintains, shall sell agricultural goods to the other country at below the acquisition price of the goods plus any storage, handling or other costs incurred by it with respect to these goods. This provision will prevent the CWB from selling products into the United States below cost. Therefore, the CWB cannot use its dual-pricing system to dump into the United States.
>
> (Tab 16, p. 577, Canada's Counter-Submission)

C) <u>Whose Costs are Covered by 701.3</u>:

41. Since several of the questions posed in the Terms of Reference relate to the scope of the costs covered by Article 701.3, it is important at this stage to ascertain whether the costs to be computed pursuant to that Article are strictly those incurred by the Board, or whether they could include all costs which are incurred either by the government of Canada or <u>any</u> public entity that might be involved in relation to the wheat in question.

42. The United States contends that all costs incurred by the government of Canada, both directly and through any public entity,

which are attributable to the goods exported, must be considered cumulatively in determining the "bright line" price below which Canada cannot sell amber durum wheat into the United States. The United States, stressing in particular the presence of the word "including" in Article 701.3, contends further that this interpretation follows from the plain language of Article 701.3.

43. We disagree. While Article 701.3 prohibits each Party, "including any public entity ...," from *selling* agricultural goods below the acquisition price of the goods plus certain other costs, the emphasis in that Article is upon the entity that does the selling. Such sales may be accomplished either by the Party directly, as a government, or through a "public entity" established for that purpose. In the case before us, the sale is actually effected by the Board through the use of export agents. Canada has not contended that because the sales were not made by the Board itself, the sales are not covered by Article 701.3.

44. Canada established the Board through the *Canadian Wheat Board Act* (Revised Statutes of Canada 1985, C.-24 ("CWBA")) as a body corporate having the capacity to contract in the name of the Board (Section 4(1)). Section 4(2) of the CWBA provides that "the Board is, for all purposes, an agent of Her Majesty in right of Canada, and it may exercise its powers under this Act only as an agent of Her Majesty in right of Canada."

45. Section 5 of the CWBA states: "the Board is incorporated with the object of marketing in an orderly manner, in interprovincial and export trade, grain grown in Canada." Section 6 provides that the Board possesses the power "to buy, take delivery of, store, transfer, sell, ship and otherwise dispose of grain."

46. Thus, a Party, namely Canada, has established by means of the CWBA, a public entity, namely the Board, and has given the Board all requisite powers to sell grain abroad. The selling activity at issue here is that of the Board. Therefore, the costs which the Board, as a delegate of the government of Canada, incurs with respect to the grain must be considered in determining the "bright line".

47. The language of Article 701.3 itself addresses the selling costs attributable to the entity engaged in the selling. Article 701.3 is aimed at prohibiting export-like subsidies, not domestic subsidies. We have seen no evidence that the Canadian government directly incurs any costs with respect to export grain which it does not incur with respect to grain sold within Canada. Including in the computation of the costs referred to in Article 701.3 all costs which the Canadian government may incur, directly or indirectly, in connection with every other activity related to the production and marketing of grain, could clearly sweep in domestic subsidies, i.e., subsidies not conditioned on

export, a result which the Parties did not intend. On the other hand, including in the "bright line" the costs that the Board itself incurs as a result of export sales between the Parties is completely consistent with the general purpose of Article 701.

IV ANSWERS TO THE TERMS OF REFERENCE

1a) Whether the term "the acquisition price of the goods" in Article 701.3 includes solely the initial payments made by the Canadian Wheat Board, or whether it includes all payments made with respect to a durum wheat crop (initial plus interim and final payments, if any);

48. The expression "the acquisition price of the goods" is not defined in the Agreement and the Parties were unable to explain to the Panel precisely why this expression was selected by the drafters, although Canada suggested that they must have wanted to choose an expression which could apply not only to the payments made by the Board, but to any payments regardless of form made by Canada or the United States for the purchase of the goods.

49. It is admitted by both Parties that, currently, Article 701.3 would only apply to Canada, as no export sales of agricultural products are made to Canada by either the government of the United States directly, or through any public entity it has established. That is not to say, obviously, that legally Article

701.3 is not binding on both Parties.

50. Further, there is no disagreement as between the Parties that the drafters of this section were well aware of the existence of the CWBA and of the payment scheme thereunder. It is important, therefore, to have a basic understanding of the statutory framework involved.

51. Part III of the CWBA is entitled "Interprovincial and export marketing of wheat by the Board". It deals, inter alia, with the purchase of wheat by the Board and the method by which payments are made to wheat producers for the purchase of this wheat. In the most simple terms, the CWBA makes a distinction between three types of payments, namely, initial payments (which may be adjusted pursuant to Section 32(1)), interim payments (Section 33(3)) and final payments (Section 33(1)).

52. In essence, the initial payment is the amount of money which the Board pays to the producers at the time it buys the wheat from the producers. Specifically, it is identified by the legislation as a "sum certain per tonne basis in storage Thunder Bay", which sum certain is fixed either by regulation of the Governor in Council (in practice, the Canadian government), or by the Board with the approval of the Governor in Council. Historically, this sum certain has averaged 80% of the price which the Board expects the wheat will fetch on the market.

53. The sum certain may be adjusted upward during a pool period (August 1 to July 31) and, in such circumstances, the difference must be remitted to grain producers who had hitherto received the smaller amount (Section 32(1)(c)).

54. On or after January 1 of the year commencing after the end of any pool period, the Board must distribute to grain producers the balance remaining in its account (after making certain deductions provided for by the legislation); this distribution is made on the basis of certificates (acquired when the grain was initially delivered) entitling the producers to a share in the equitable distribution of the surplus, if any, arising from the operations of the Board (Section 32(1)(d)). This is commonly known as the "final payment", which would usually be made no earlier than 17 months after the beginning of the crop year for which the original sum certain of the initial payment was fixed.

55. Prior to any final payment being remitted, the Board may make interim payments, if the Governor in Council is of the opinion that an interim payment can be made without loss by the Board (Section 33(3)). Such payments would be made only after the durum wheat pool was closed (i.e., after July 31) and before the following January.

The meaning of "acquisition price":

56. The United States argues that the "acquisition price of the goods" includes the initial (with adjustments, if applicable), plus any interim and final payments made. Canada, for its part, contends that the "acquisition price of the goods" consists only of the initial payment, including any adjustment that may have been made to the sum certain pursuant to Section 32(1)(c) in respect of sales occurring after such adjustment. However, neither the remittance of an adjustment to the sum certain for export sales occurring prior to the adjustment, nor any interim or final payments can ever be included, because they are in the nature of a distribution of profit.

57. The United States' position is essentially based on the argument that each one of the three payments above-mentioned is manifestly a part of the total price which has to be paid for the acquisition of the goods.

58. Canada, on the other hand, contends that the words "price of the goods" are modified by the term "acquisition" which precedes them, and that together they mean, "what has been paid to acquire the grain at the time the exports are made". (Canada's Supplementary Submission, October 5, 1992, p. 2, para. 4).

59. Canada relies not only on the "ordinary" meaning of

"acquisition price", but also on what it asserts is a qualitative difference between the initial payment, and any interim or final payment. In essence, Canada asserts that the latter two payments are in fact and in law a distribution of profits, as opposed to an amount paid for the acquisition of the grain.

60. There is support in the CWBA for this interpretation. For whereas the initial payment, or more specifically, "the sum certain" calculated pursuant to paragraph 32(1)(b), is the only payment which is made in exchange for the delivery of the grain itself, the interim and final payments, if any, may be made to the producer on account of a certificate issued upon delivering the grain, "which certificate entitles the producer named therein to share in the equitable distribution of the surplus, if any, arising from the operations of the Board with regard to the wheat produced in the designated area sold and delivered to the Board during the same pool period" (Section 32(1)(d)).

61. The distribution of the surplus which the Board is entitled to make pursuant to Section 33(2) of the CWBA, is explicitly referred to as "profits" in Section 7(2) of the CWBA which states the following:

> Profits realized by the Board from its operations in wheat under this Act during any crop year, other than from its operations under Part III [within which Section 33 falls], with respect to the disposition of which no provision is made elsewhere in this

> Act, shall be paid to the Receiver General for the Consolidated Revenue Fund. (emphasis added)

62. The effect of this section is that profits realized in the wheat pool are remitted to producers, after deduction of the Board's expenses. The characterization of the final payment as "a distribution of profits" is also supported by a decision of the Federal Court of Canada in Lacey v. Canada [1990], 1 F.C. 168, at 188.

63. It is evident from the above discussion that an approach to the interpretation of "acquisition price" which focuses solely on dictionary and/or statutory definitions will not yield a definitive answer.

Purposive interpretation of "acquisition price":

64. Section 31 of the Vienna Convention directs that the terms of a treaty must be given their ordinary meaning "in their context and in the light of [the treaty's] object and purpose". Section 31(2) further directs that the purpose of the interpretation of the treaty shall comprise, in addition to the text, its preamble.

65. It is obvious that the purpose of the Agreement is to promote free trade. But, more specifically, in terms of the purpose of Article 701.3, it appears most logical that the aim of

Article 701.3 is to provide an additional protection against government assistance which would have the effect of an export subsidy but which, strictly speaking, may not be labeled as such. Indeed, the United States in its Second Submission (October 5, 1992) stated:

> The Parties also agreed, in Article 701.3, not to sell agricultural goods for export to the territory of the other Party at subsidized prices (i.e., at prices below cost). This is the true meaning and purpose of Article 701.3 (emphasis added)

66. Pursuant to the CWBA, as we have seen, profits realized in the operation of a wheat pool are distributed to the producers pursuant to their proportionate shares of grain sold to the Board. In this case, there is no subsidization by the Canadian government with regard to the amounts paid to the producers for their grain. Such distribution is made through a final payment, which may be preceded by an interim payment.

67. If, on the other hand, the Board sustains a loss in respect of its wheat pool from its operations under Part III, such losses are reimbursed to the Board by the government of Canada pursuant to subsection 7(3)(a) of the CWBA. This, in effect, amounts to a subsidy of the Board's operations, and indirectly, of the price paid to producers for the wheat by the Canadian government.

68. The interpretation of Article 701.3 put forth by the United States is not compatible with the purpose of Article 701.3 to preclude subsidization by the Canadian government in the case of losses on export sales. For, by including in the calculation of the acquisition price, not only the sum certain paid upon acquisition of the goods, but also the interim and final payments, Article 701.3 becomes operative even in the case where the pool is profitable and there is no government subsidization.

69. The Canadian interpretation, on the other hand, effectively means that the Board would not sell to the United States at a price below the initial payment (as it may be adjusted), plus handling, storage and other costs. A sale below that level would likely result in a loss in the pool account and, therefore, require a subsidy by the government of Canada pursuant to Section 7(3) of the CWBA. Any sale over that amount, on the other hand, would not be objectionable because no government subsidy would be triggered.

70. The Panel is of the view that the purpose of Article 701.3, as defined by the United States itself, is better served if the Canadian interpretation of "acquisition price" is adopted.

71. Moreover, the major objection to the United States' interpretation is that it would be impossible practically for the Board to know in advance at what price wheat is likely to be sold

when final payments are made, 17 months after the sum certain was paid.

72. We do not believe that the framers of the Agreement could have intended that the Parties be put in the position of selling agricultural products without knowing the "bright line", i.e. the price below which the product may not be sold into the territory of the other Party, until many months after the sale. The world price of durum wheat is notoriously volatile, as evidenced by the Board's Annual Reports before the Panel. The 1988-89 pool account for amber durum wheat shows an Initial Payment to Producers of $186.652 per tonne and a Balance for Distribution to Producers of $12.072 for a total of $198.724. The 1989-90 pool account reflects an Initial Payment to Producers of $143.706 and a Balance for Distribution to Producers of $13.660 for a total of $157.366. The 1990-91 account shows an entirely different picture: an Initial Payment to Producers of $123.689 and no final distribution to producers. Instead, there was a deficit on operations of $20.364 per tonne.

73. In short, the United States' interpretation would bind Canada to an unworkable rule, having the effect of either a) driving Canada from the marketplace or b) putting Canada in a position where it might not know for 17 months whether or not a particular sale was in breach of Article 701.3 of the Agreement. Neither Party should be faced with the prospect of retroactive

illegality. The United States' interpretation simply cannot be reconciled with the Canadian pooling system.

74. In this connection, the Panel refers, as it is directed to do by Article 31 of the Vienna Convention, to the Preamble to the Agreement which states, *inter alia*, that the Parties resolve "to adopt clear and mutually advantageous rules governing their trade" and to "ensure a predictable commercial environment for business planning and investment". It is evident that these objects are best served if the Board can know at the time it sells its grain into the United States the level below which it may not sell. This can only be done if the acquisition price is taken to be the sum certain stipulated by Section 32 of the CWBA.

75. The Panel concludes, from the application of Article 31 of the Vienna Convention, that the acquisition price of the goods referred to in Article 701.3 includes only the initial payment; or, in the event of an upward adjustment, the acquisition price for goods sold after the adjustment is the initial payment plus such adjustment.

76. Much of the legislative history submitted by the United States, and indeed U.S. counsel's oral and written submissions, reflected that Party's deep concern that defining the "acquisition price" to include only the initial payment (with adjustments), could allow Canada to "manipulate" the initial, interim and final

payments so as to enable Canada to undercut U.S. grain producers in the U.S. market. This could be done by setting low initial payments, and recouping any profits realized in the U.S. market through later interim or final payments to Canadian durum wheat producers.

77. This concern of the United States government was reflected at the most senior level in a 1988 communication from the President of the United States to the Congress. In that communication, the President wrote to the Congress:

> In connection with paragraph three of Article 701, the application of the term "acquisition price" in that paragraph to sales by public entities such as the Canadian Wheat Board (CWB) is not specifically delineated, although such sales are covered by that paragraph. Of particular concern is determining the "acquisition price" of wheat in the context of the initial payment and final payment system used by the CWB. Any manipulation of the pricing system by the CWB would be subject to review by the United States to ensure that Canada's obligations under paragraph three of Article 701 were not being circumvented.
>
> In order to implement Article 701(3), the United States also intends to pursue consultations with Canada regarding the price setting policy of the CWB as it affects goods exported to the United States. These consultations will be directed toward establishing a method to determine the price at which the CWB is selling agricultural goods to the United States and the CWB's acquisition price for those goods. The ideal method would be a public price setting mechanism transparent to the U.S. Government, producers and processors. [Communication from the President of the United States Transmitting

> the Final Legal Text of the U.S.-Canada Free-Trade Agreement, the Proposed U.S.-Canada Free-Trade Agreement Implementation Act of 1988, and a Statement of Administrative Action (Washington D.C.: U.S. Government Printing Office, 1988); p. 194] (emphasis added)

78. In correspondence from the Minister for International Trade of the Government of Canada to the Premier of the Province of Saskatchewan and Minister of Agriculture, the Minister of Trade reviewed Article 701.3 in a letter dated January 19, 1988:

> ... the Agreement provides that neither country shall sell agricultural goods for export to the other country at a price below the acquisition price of the goods plus storage and handling costs. This provision applies to all agricultural products, and although the acquisition cost for Canadian Wheat Board (CWB) grain is not defined in the Act, it is likely that it will be considered to be the initial payment level. U.S. market prices are not expected to be below CWB initial payment levels very frequently since it has been the practice to set the initial payment levels below expected world market price levels. This provision should not, therefore, significantly restrict the government's ability to set appropriate initial payment levels. (emphasis added)

79. This letter from the Minister of Trade raises two points of special significance to the Panel. First, it makes clear that the government of Canada was uncertain as to whether "acquisition price" for purposes of Article 701.3 would be interpreted to mean the "initial payment level". The Minister regarded this result at the end of the negotiating process as only "likely". Secondly, the

last sentence in the Minister's letter could conceivably be misinterpreted as implying that the government of Canada was indeed free to "manipulate" (a term used by the United States in its Submission) the initial payment level by "setting" it at an "appropriate" amount in relation to "world market price levels". This possible misinterpretation might also arise as a result of a December 15, 1987 internal briefing note by the Grain Marketing Bureau of Agriculture Canada that states: "It is not expected that U.S. market prices will be below initial payment levels very frequently and Canada will have the flexibility to set its initial payment levels below U.S. market prices in most market situations." (emphasis added)

80. The Panel has considered this issue with the greatest of care and scrutiny. However, for the following reasons, the Panel believes that the "acquisition price" for purposes of Article 701.3 in this case is as stated in paragraph 75 above.

81. First, the practice envisaged by the United States would be inconsistent with the purposes and past practices of the Canadian pooling system, which was established to provide the Canadian grain producers with price stability and to allow the producers to escape the risks of price fluctuations over the course of each pooling period. We see no evidence that Canada has abused the pricing process mandated by Part III of the CWBA. No evidence was submitted by the United States suggesting that the level of the

initial payment was reflected in the price of Canadian wheat sold into the United States. Rather, it appears that the prices obtained by Canadian durum wheat producers were the prevailing U.S. market prices for grain of comparable quality. Indeed, the evidence suggests that the Board sets the initial payment on the basis of the market price it anticipates for the wheat, not to allow Canadian wheat to sell at a discount from prices set by the market.

82. The United States has argued that the absence of evidence of specific Canadian sales below U.S. market prices is due to Canada's refusal to provide requested market data. This may or may not be true, but it does not relieve a complainant from adducing evidence in support of its complaint. Furthermore, this evidentiary problem should be resolved if the Parties abide by the Panel's recommendations made below (para. 126) regarding an effective information-sharing mechanism.

83. Secondly, the fundamental purpose of Article 701 is to prohibit trade distortions arising from government export subsidies, and in the case of Article 701.3 specifically, from government payments which have the effect of export subsidies. In the case before us, a government export subsidy could occur if the Board set the initial payment at a level which proved to be higher than the price for which it ultimately sold the wheat, thereby creating a shortfall which the Government of Canada would absorb.

Exactly this situation occurred in the 1990-91 crop year.

84. However, the Panel underscores that a shortfall does not necessarily indicate that the Board has violated the terms of Article 701.3 by selling durum wheat into the United States at a price lower than the initial payment (with adjustments). Rather, a shortfall could result even if the Board scrupulously followed the provisions of Article 701.3, selling into the United States at prices at or above the initial payment, but sold into other nations at lower prices.

85. For those reasons, and also on the basis of the information-sharing mechanism recommended below, we do not believe that our interpretation of "acquisition price" affords a license to the Board to "manipulate" its payments so as to allow Canadian producers to compete unfairly in the U.S. durum wheat market at artificially low prices.

Confirmation by supplementary means:

86. Pursuant to Article 32 of the Vienna Convention, our interpretation can be confirmed by recourse to supplementary means of interpretation. It is appropriate to rely on "supplementary means of interpretation", as provided by Article 32 of the Vienna Convention, to confirm the interpretation Canada has proposed. The testimony and statements referred to in the following paragraphs

are relevant because:

a) they are contemporaneous statements of intent from authoritative sources;

b) the U.S. statements are not self-serving, but are "against interest"; and

c) together with the Canadian testimony, they demonstrate a common intention and shared understanding.

87. Canada produced a copy of a Memorandum to File dated July 17, 1987 (prior to the Agreement coming into force and long before this dispute) which records the results of a meeting between the Parties regarding, inter alia, agricultural subsidies. The memorandum contains the following statement:

> Canada undertook to draft language which would include in the coverage the situation where the CWB sells for export at a price lower than the initial price to producers. (Canada's Supplementary Submission, October 5, 1992, para. 37).

88. Subsequent to the meeting of July 15, 1987, Canada and the United States jointly prepared and tabled a draft provision dated August 28, 1987, which included the expression "acquisition price" (see Tab 7 to Canada's Supplementary Submission). While there were some changes in wording made during the drafting of the "legal text" in late 1987, there is no evidence of further substantive discussions between the negotiators on this matter before the Agreement was concluded. In fact, the subject matter of Article

701.3 was omitted from an "Elements of the Agreement" text initialled by both agricultural negotiators on October 3, 1987.

89. A Canadian briefing note, dated December 14, 1987, and prepared in anticipation of a First Ministers' meeting (after the legal text had been completed) contained the following statement:

> ... the Canadian Wheat Board will not be able to sell to the U.S.A. (via the private trade) at below the initial payment price.
>
> (Canada's Supplementary Submission, October 5, 1992, paragraph 39).

90. In January, 1988, in an intergovernmental memorandum, there are listed talking points for "selling the FTA in the U.S.A." and point 6 contained therein reads as follows:

> 6. Sales of grain into the United States will be made at competitive prices and will be prohibited below the acquisition price (i.e., the initial price) for C.W.B. grains.

91. In this regard, the Panel notes the statement made by Ms. Ann Veneman, Deputy Secretary of the United States Department of Agriculture, who, in her testimony before the House of Representatives Subcommittee on Trade of the Committee on Ways and Means, in February/March, 1988, stated in response to a question on the application of Article 701.3 to the Board payment system:

> MR. WATSON. I have several questions for [Ms. Veneman]. No. 1. Would you define acquisition costs as you understand them for the Canadian Wheat Board?
>
> MS. VENEMAN. As I understand it, acquisition cost is the price that the Canadian Wheat Board pays initially for the wheat that comes into its stocks.
>
> ...
>
> MS. VENEMAN. As I understand it, they pay an initial acquisition cost, and then they pay the handling, storage and other costs, and then, at the conclusion of the marketing year, any amount that is left over, they pay out, which is like a bonus rather than an acquisition cost.
>
> (Tab 16, p. 476, Canada's Counter-Submission)

92. The United States has, both in the oral hearing and in its subsequent written submissions, attempted to avoid this statement. Yet, as pointed out in the Reply by Canada to the Second Submission by the United States, no doubt was cast upon the accuracy of Ms. Veneman's testimony in a follow-up written statement, dated March 25, 1988, filed by the U.S. Department of Agriculture (Annexes to Submission by Canada, September 9, 1992, Tab 16).

93. Ms. Veneman's opinion of the meaning of "acquisition price" was conclusively confirmed in answers provided by the U.S. Administration to certain questions posed on the Agreement by the Senate Committee on Finance, which answers were delivered under cover of a letter, dated April 18, 1988, from U.S. Trade Representative Clayton Yeutter to the Honourable Lloyd Bentsen,

Chairman, Committee on Finance:

Question 3 (Senator Wallop):

Both sides have promised not to sell grain to each other at less than "acquisition price." However, Canada has some particularities in its price support system which could potentially be manipulated to cheapen Canadian wheat by considering only the initial price the Canadian Wheat Board pays the Canadian farmer, and not the final price. How would the FTA protect American wheat growers from this kind of manipulation?

Response:

In the Administration's view, as we understand the current system in Canada, the term "acquisition price" would not include the final payments made after the crop is marketed. However, any change in that system would be reviewed to determine if this position was still appropriate, as well as to determine whether action would be appropriate pursuant to the nullification and impairment provisions of Article 2011 of the FTA. If necessary, we would invoke the dispute settlement mechanism of the Agreement to resolve the issue.

Question 3 (Senator Baucus):

Both sides in the FTA agree not to export to the territory of the other at less than "acquisition price ... plus any storage, handling or other costs incurred by it."

Question 3 (a):

In the Administration's view, does the term "acquisition price" include not only the initial payment made to Canadian farmers for their grain, but also any final payments made after the crop is marketed?

Response

In the Administration's view, as we understand the current system in Canada, the term "acquisition price" would not include the final payments made after the crop is

> marketed. However, any change in that system would be reviewed to determine if this position were still appropriate, as well as to determine whether action would be appropriate pursuant to the nullification and impairment provisions of article 2011 of the FTA.

94. The Panel concludes that the extraneous evidence, which it was entitled to review pursuant to Article 32 of the Vienna Convention, supports and confirms the interpretation of Article 701.3 which follows by application of Article 31 of the Vienna Convention.

> **1b) whether the term "storage and handling costs" in Article 701.3 includes elevation charges at terminal elevators and other related charges, such as weighing, inspection, and certification of durum wheat for export, which are performed by the Canadian Grain Commission under the authority of the** *Canada Grains Act*;

95. The United States takes the position that all storage and handling costs which have been incurred in connection with grain eventually exported to the United States, even though not incurred or paid for by the Board, should be computed for the purposes of Article 701.3. Canada responds that such costs should not be included, as they have not been incurred or paid for by the Board.

96. We do not agree with the interpretation proposed by the United States. The purpose of Article 701.3 is to preclude what can amount in effect to export subsidies on sales of grain to the United States or to Canada. In the case before us, the only Party which is charged with the mandate of marketing grain in the United

States is the Board. To include in the required computation costs which may be incurred by another public entity could have the effect of sweeping domestic subsidies within the ambit of Article 701.3. Services performed by the Canadian Grain Commission, while they may amount to domestic subsidies, are clearly not export subsidies since they apply to all grain regardless of destination.

97. Further, the plain language used in Article 701.3 focuses on the cost of the entity selling the agricultural goods. Therefore, the Panel believes that only storage and handling charges paid by the Board, the seller, should be included in determining Article 701.3 costs.

98. The United States raises the spectre that, unless its interpretation were adopted, Canada could set up a structure whereby most costs which may be related to export sales of grain to the United States would be absorbed by myriad public entities other than that which ultimately effects the sale. There is no evidence, however, that Canada has modified its statutory marketing scheme after the implementation of the Agreement in an attempt to circumvent Article 701.3.

1c) whether the phrase "other costs incurred by it" in Article 701.3 includes freight rate payments made by the Canadian Government pursuant to the *Western Grain Transportation* Act for the shipment of durum wheat to Thunder Bay, Ontario, for export to the United States;

99. The Panel is of the view that the freight rate payments made by the Canadian Government pursuant to the WGTA to Thunder Bay are not included in the phrase "other costs incurred by it".

100. First, the evidence is clear that those transportation payments, which amount to approximately Cdn $20.00 per metric tonne, far outweigh the payments specifically mentioned in Article 701.3, namely, handling and storage costs which, together, add up to less than Cdn $2.00 for crop year 1991-92 (Table 6 to Canadian Submission, September 9, 1992). It would be anomalous, indeed, if the Parties had intended to cover such transportation costs by the catch-all phrase, "other costs incurred by it".

101. More important, the WGTA subsidy payments through Thunder Bay are clearly domestic subsidies. Subsidy payments, as pointed out earlier, are prohibited only when they are export subsidy payments and occur in connection with export shipments to the United States through Canada's western ports pursuant to Article 701.5. Indeed, the overall purpose of Article 701.3 was clearly not to prohibit domestic subsidies.

102. Furthermore, we do not believe that the Agreement's drafters, who specifically referred to the WGTA in Article 701.5, would nevertheless have intended a similar prohibition against domestic subsidies for goods exported through Thunder Bay without any explicit mention of the WGTA.

103. The United States responds to this concern by stating that Article 701.3, unlike Article 701.5, does not prohibit subsidized transport rates through Thunder Bay; it simply means that such subsidies (or costs) have to be taken into account in computing the costs associated with export sales to the United States. Yet, the effect is exactly the same in practice: as a matter of commercial reality, it would be impossible, and this assertion by Canada is not contradicted, for the Board to successfully market durum wheat in the United States if the WGTA domestic subsidies were included in the calculation.

104. One of the objects referred to in the Preamble to the Agreement is the resolve of both Parties "to create an expanded and secure market for the goods and services produced in their territories". Clearly, were Canada to have agreed indirectly and tacitly to include the WGTA domestic subsidy in computing the cost of the durum wheat exported to the United States from Thunder Bay, it would not expand or secure any market in the United States, but would reduce and probably eliminate that export market for durum wheat.

105. Furthermore, it is clear that the domestic subsidies in question are incurred by the Canadian Government and not the Board, whose costs, as we found earlier, are the only ones which should be taken into account in relation to the purchase and sale of goods into the United States for the purposes of Article 701.3.

106. Again, our interpretation may be confirmed by reference to extraneous means of interpretation, as permitted pursuant to Section 32 of the Vienna Convention. Thus, the U.S. Trade Representative, Ambassador Yeutter, stated in relation to Article 701 and the WGTA:

> Neither the United States nor Canada gives up its right to provide domestic support and domestic subsidies.
>
> In addition, Canada agreed expressly to eliminate its export subsidies on agricultural products shipped into the United States through west coast ports. Although wheat growers are disappointed that this did not extend to shipments through Thunder Bay, we have lived with that program for decades. Those subsidies are not conditioned on export. Neither the United States nor Canada gives up its right to provide domestic support and domestic subsidies. (Quoted at page 16 of Canada's Submission, September 9, 1992).

107. Ambassador Yeutter's opinion is completely consistent with the U.S. Administration's formal answer to the following question from Senator Baucus:

> Question 3 (b):
>
> In the Administration's view, does the "acquisition price ... plus ... other costs" include the value of any transportation subsidies that may have benefited a particular shipment of Canadian grain?
>
> Response:
>
> In the Administration's view, the value of the transportation subsidies is not included. However, these may be addressed by our countervailing duty legislation.

(see attachment to Ambassador Yeutter's letter dated April 18, 1988, para. 93 above)

108. In our view, this authoritative statement confirms that WGTA payments for shipments through Thunder Bay are to be excluded from any cost calculation required by Article 701.3.

1d) whether the phrase "other costs incurred by it" in Article 701.3 includes freight costs (for example, those for shipment of durum wheat from Thunder Bay, Ontario, to other locations for subsequent export to the United States), paid by the Government of Canada or public entities that it establishes or maintains, such as the Canadian Wheat Board;

109. For the reasons expressed above (paragraphs 41-47), only the costs incurred by the public entity which is involved in the marketing and sale of durum wheat into the United States, namely the Board, are eligible for the purposes of the computation required by Article 701.3.

110. Whether, specifically, "freight costs" incurred by the Board are to be included in the calculation as falling within the words "other costs incurred by it" depends on whether such costs are of the same type or "genus" as the costs expressly mentioned in Article 701.3. Thus, pursuant to the doctrine of *ejusdem generis*, which is equally applied by Canadian and American domestic courts and by international courts and tribunals (see references in Canada's Submission, September 9, 1992, page 38, paras. 139-140),

general words following specific words are limited to the class indicated by the specific words.

111. It is evident that the common denominator of "storage" and "handling" costs is that they are direct costs associated with specific activities required to bring to market specific shipments of the goods to be sold.

112. In this regard, Canada concedes that freight costs absorbed by the Board for shipping the grain into the United States do fall within the requisite genus and should be included within Article 701.3.

113. In practice, freight costs are normally borne by the accredited exporters through whom the sales are consummated in the United States. However, where the Board is actually responsible for paying the cost of shipping durum wheat to a designated point in the United States ("track USA sales") or to a transfer elevator on the St. Lawrence Seaway for export to the United States on an "in store St. Lawrence" basis, such costs must be taken into account.

1e) whether any administrative costs of the Canadian Wheat Board and other public entities established by the Government of Canada, incurred with respect to durum wheat sold for export to the United States, are properly included in the scope of "other costs incurred by it" in Article 701.3.

114. Again, for the reasons articulated above (paragraphs 41-47), the Panel concludes that only the costs of the public entity actually involved in the marketing and selling of the durum wheat, namely, the Board, come within the ambit of Article 701.3. Accordingly, even if administrative costs were eligible for inclusion in Article 701.3, only those of the Board could be included.

115. There appeared to be a common understanding between the Parties that administrative costs involved fixed charges (e.g., rent, management staff, utilities) which do not vary with the amount of goods purchased and sold. Thus, administrative costs are to be understood in contradistinction to direct and variable costs, such as storage and handling costs, which vary more or less in direct correlation with the quantities of goods handled by the Board.

116. The Panel does not believe that administrative costs were intended to be included in the expression "any other costs incurred by it". First, administrative costs, being fixed and not direct costs, are qualitatively different from the types of costs specifically mentioned in Article 701.3, namely, storage and handling costs. As such and pursuant to the doctrine of *ejusdem generis* mentioned earlier, the drafters cannot be assumed to have intended their inclusion in Article 701.3 as "other costs".

117. Moreover, Article 701.3 prohibits the sale of agricultural goods at a price "below the acquisition price of the goods, plus any storage, handling and other costs incurred by it (a Party) with respect to those goods" (emphasis added).

118. The words, "with respect to those goods", clearly qualify the earlier words "other costs incurred", and suggest the necessity of a direct linkage between the goods sold and the costs associated with such sales. Yet, as earlier noted, the singular characteristic of administrative costs is that they are not directly attributable to any sales. Therefore, in the Panel's view, administrative costs are not covered in Article 701.3.

119. In its comments on the Initial Report, the United States suggested that this finding contradicted an earlier Panel's decision In the Matter of Article 304 and the Definition of Direct Costs of Processing (June 8, 1992). In our view, there is no contradiction. What that Panel found was that a list of illustrations did not constitute an "exhaustive code": p. 20, para. 42. That is not inconsistent with this Panel's opinion that, while the list of "costs" specifically mentioned in Article 701.3 (i.e. storage and handling) was clearly not exhaustive, it should be narrowed by application of the doctrine of *ejusdem generis* and because of the limiting expression, "with respect to those goods".

2) In light of the determinations made by the Panel under (1), determine whether or not the Government of Canada, including any public entity that it has established or maintained, has sold durum wheat for export to the territory of the United States since the Agreement came into effect on January 1, 1989, at a price below the acquisition price of the durum wheat plus any storage, handling or other costs incurred by it with respect to such durum wheat.

120. The Panel is of the view, in light of the evidence presented by the United States and the Panel's answers to questions 1(a) - (e), that it is not possible nor desirable at this stage that it make any finding as to whether Canada has violated Article 701.3. Moreover, since the Parties - as is explained below - have agreed on an audit of the Board retrospective to January 1, 1989, the United States will have access to the best evidence to assess whether Canada has violated Article 701.3 since the implementation of the Agreement, rather than having to rely on information and assumptions of dubious quality.

121. Indeed, in its written submissions and during oral argument, counsel for the United States complained forcefully about Canada's lack of cooperation in furnishing the information required to ascertain whether a breach had taken place.

122. Canada replied that it had no duty to provide <u>any</u> information to the Party making the complaint. It further asserted that it had furnished substantial information, notwithstanding the

lack of obligation to do so.

123. Clearly, there are two competing values at stake: on the one hand, disclosure is critical to verifying compliance (especially in light of the concerns expressed by the United States as witnessed by the previously cited legislative history); on the other, confidentiality is essential in order to protect commercial viability and competitive advantages.

124. At the time the Parties submitted this dispute for the Panel's consideration, they had been unable to agree on a mutually acceptable information-sharing mechanism which would satisfy each Party's concerns. Considering that it ought not to be beyond the bounds of the Parties' imagination to devise adequate mechanisms, the Panel invited them to suggest, by January 22, 1993, a method for sharing relevant information on a retrospective basis and within a prompt period, so as to provide a timely assurance of compliance.

125. The Panel also suggested that the Parties may find it helpful, in this regard, to consider Article 1802.4 of the Agreement, which permits the Canada-United States Trade Commission to "establish, and delegate responsibilities to, ad hoc or standing committees or working groups and seek the advice of non-governmental individuals or groups".

126. The Panel has carefully reviewed the submissions received from the United States and Canada and makes the following recommendations with regard to information-sharing:

a) Establishment of working group:

A bilateral working Group should be established under Article 1802.4 of the Agreement for the general purpose of overseeing periodic audits of the Board;

b) Initial audit:

The initial audit would be retrospective and cover the period from January 1, 1989 to July 31, 1992 and should take place before June 1, 1993;

c) Subsequent audits:

Thereafter, audits of the Board should be conducted retrospectively and annually, on the basis of the crop year as reflected in the Board's annual reports, namely, August 1st to July 31st.

The Panel does not believe, contrary to the U.S. submissions, that quarterly audits are warranted. An annual audit is consistent with the Board's reporting practices. Quarterly audits would, in practice, amount to permanent policing of the Board. We believe that, particularly between Canada and the United States, such extreme measures are inappropriate.

Moreover, it is inconceivable that Canada would take advantage of an annual audit to "hide", for a few months

only, transactions that violated Article 701.3. Whatever short-term market advantages might result from such a practice would obviously be outweighed by the significant disadvantages of a finding, after the annual audit, of violations of Article 701.3 by Canada.

d) Semi-annual pricing data:

In addition to annual audits, Canada has offered to provide semi-annual pricing data on an aggregate basis. The Panel agrees that such information should be made available to the United States, if the latter wishes to have it.

e) Confidentiality:

The need to protect the confidentiality of the information obtained through the Board's audit was acknowledged by both Parties, but they could not agree on means to do so. While each of the Parties outlined in great detail their respective views in this regard, complete confidentiality of either the Board's documents or information drawn from them could not be guaranteed if the audit were carried out by United States government employees.

Although, in practice, the risk of disclosure may be small, the Panel reiterates its view that "confidentiality is essential in order to protect commercial viability and competitive advantages." Indeed, the Panel believes that the full access to the Board's financial records afforded to the United States through an annual audit ought to be granted only in return for an assurance of confidentiality which Canada finds acceptable.

Canada initially sought an undertaking that the United

States would always assert executive privilege to preclude any release of the Board's confidential information. The United States convincingly responded that such an assurance could not be given.

Ultimately, Canada forwarded to the United States an "Alternative Canadian Proposal for an Information-Sharing System for the Purposes of Article 701.3", dated January 13, 1993. (The text is annexed to this Final Report and marked Attachment "A"). This comprehensive proposal, which incorporates most of the matters we have already recommended, solves the confidentiality problem through the appointment of a "major international accounting company with offices in Canada" as Auditor. The Auditorwould be supervised by, take direction from, and report to the Audit Committee, established pursuant to Article 1802.4 of the Agreement. Canada proposes that the cost of employing the Auditor would be shared equally by the Parties.

The United States' only apparent objection to this alternative proposal is that "it would be an abuse of taxpayer funds..." (The United States Submission Concerning Information-Sharing Procedures, p. 4). The Panel is of the view that, given the commercial interests of the United States in ensuring compliance, the extra cost of employing outside auditors on an annual basis would not be very significant, particularly given Canada's offer to assume half of this cost. Moreover, it is likely that the Parties would eventually find the need to refer the audit to an independent accounting firm, a possibility explicitly contemplated by the United States' proposal. The Panel believes that it would be more cost efficient to have the external auditors involved from the outset.

Accordingly, the Panel is of the view that Canada's Alternative Proposal is acceptable and recommends that the Parties endorse it, with the exception that the notes made by the Audit Committee members be kept in a confidential file in the Binational Secretariat's office in Ottawa, and that the Audit Committee consist of six members.

3) The Panel's report shall include its recommendations, if any, for the resolution of the dispute between the Parties.

127. In effect, the Panel's answers to questions 1(a) - (e) amount to a declaratory judgment, without damages, given that the United States was not seeking compensation from Canada in the event that the Panel found violations of Article 701.3. The Panel believes, therefore, that its rulings on the question of interpretation raised by the Terms of Reference should be sufficient to resolve the dispute between the Parties, and that the information-sharing method recommended in answer to question (2) will both maximize compliance with Article 701.3 and ensure effective monitoring.

128. Finally, the Panel wishes to make a suggestion which transcends the resolution of the specific dispute between the Parties, but which arises from its attempt to adjudicate it. Thus, the Panel believes that panels of a more permanent nature, rather than ad hoc panels, would be very beneficial in developing

expertise and consistent interpretation of the Agreement. The Panel therefore recommends that such panels be appointed for the purpose of resolving disputes falling within Chapter 18 of the Agreement.

Respectfully Submitted:

Date	The Honourable Griffin B. Bell (Chairman)
Date	The Right Honourable Brian Dickson, P.C.
Date	E. William Olson, Q.C.
Date	The Honourable Davis R. Robinson
Date	Robert B. Shanks, Esq.

BEFORE THE PANEL CONVENED PURSUANT TO CHAPTER 18

OF THE CANADA - UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
	)	
THE INTERPRETATION OF	)	CDA-92-1807-01
AND CANADA'S COMPLIANCE WITH	)	
ARTICLE 701.3 WITH RESPECT	)	
TO DURUM WHEAT SALES	)	

FINAL REPORT

February 8, 1993

Panel Members

The Honourable Griffin B. Bell, Chair
The Right Honourable Brian Dickson, P.C.
Mr. E. William Olson, Q.C.
The Honourable Davis R. Robinson
Mr. Robert B. Shanks, Esq.