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Comment

Canada–Wheat: discrimination, non-commercial considerations, and the right to regulate through state trading enterprises

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Paragraph (a) of Article XVII: 1 of the GATT provides that state trading enterprises shall, in their purchases or sales involving imports or exports, act in a manner 'consistent with the general principles of non-discriminatory treatment' prescribed by the GATT for government measures affecting imports or exports by private traders. According to paragraph (b) of Article XVII: 1, paragraph (a) shall be understood to mean that state trading enterprises shall make their purchases or sales involving imports or exports 'solely in accordance with commercial considerations'.

In *Canada – Wheat Exports and Grain Imports*, the Appellate Body made clear that paragraph (b) does not establish an independent obligation to ensure that state trading enterprises act solely in accordance with commercial considerations; it merely defines the obligation set out in paragraph (a). The Appellate Body thereby endorsed the finding of the GATT Panel on *Canada – FIRA*, which had ruled in 1984 that 'the commercial considerations criterion becomes relevant only after it has been determined that the governmental action at issue falls within the scope of the general principles of nondiscriminatory treatment prescribed by the General Agreement'. The ruling of the Appellate Body confirms that the Members of the WTO may use state trading enterprises to pursue noncommercial policy objectives provided they act consistently with GATT's general principles of nondiscriminatory treatment. The fundamental question that has been left

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open by the Appellate Body is: what are the principles of nondiscriminatory treatment covered by paragraph (a)? It is undisputed that they include the principles set out in the most-favored-nation (MFN) clause of Article I and other MFN-type provisions in the GATT (such as Articles V: 5 and IX: 1). However, does it also apply to the principles set out in the national-treatment provisions of Article III?

Hoekman and Trachtman discuss the issue in their paper but provide no definitive answer. I would like to offer some additional observations on this point.

An enterprise under the control of the government that has been accorded the exclusive right to import or export or other privileges not enjoyed by other potential importers or exporters can be used for the same purposes as tariffs, quotas, variable levies, and other instruments regulating the trade of enterprises independent of the government. For instance, if the government creates a monopoly for the import of sugar and instructs that monopoly to resell imported sugar with a mark-up of 100%, it effectively levies an import tariff on sugar; if it instructs the monopoly not to resell imported sugar below a fixed price, it effectively imposes a variable levy; if it instructs it to import only a limited amount of sugar, it effectively establishes an import quota for sugar.

The drafters of the GATT established a system of rules that permit the use of state trading as an instrument of trade policy and attempted to ensure that state trading operations are not used to circumvent the provisions governing the application of tariffs, quotas, variable levies, and other measures regulating the trade of enterprises independent of the government. Article II: 4 provides that an import monopoly for a product subject to a tariff binding may not operate to afford protection in excess of the protection that can be provided consistently with the tariff binding. A note to Articles XI–XIV and XVIII states that the terms 'import restrictions' and 'export restrictions' used in these Articles cover also restrictions made effective through state trading operations. A note to Article 4 of the Agreement on Agriculture provides that variable import levies and other nontariff measures maintained through state trading enterprises on agricultural products are prohibited. All these provisions are intended to capture state trading operations that do not constitute tariffs, quotas, or variable levies but have *effects equivalent* to such trade-policy instruments.

In the case of the MFN clause, the drafters adopted, for good reasons, a different approach. The MFN clause requires, in respect of customs duties and other related matters, the extension of any advantage to any product originating in any country to like products from all Members. A note extending the application of Article I to state trading operations with effects equivalent to the denial of MFN treatment would not have made sense. A state trading enterprise could not operate if it were not permitted to take actions that have the effect of denying an advantage granted to products of one country to like products of other origins. It must, for instance, be allowed to purchase products from one country and deny that advantage to products from other countries.

For these reasons, state trading enterprises had to be permitted to make distinctions between goods of different origins on the basis of criteria consistent with the basic objectives of the MFN clause. The function of Article XVII: 1 is to provide that permission and to define those criteria. If a Member applies the same customs duty to like products from all other Members, private importers will make their choice among products of different origins in accordance with commercial considerations. Article XVII: 1 ensures that state trading enterprises do the same. Articles I: 1 and XVII: 1 achieve the same objective with different standards of nondiscriminatory treatment: the former with the requirement not to make any distinctions between like products of different origins, the latter with the requirement to make such distinctions solely on the basis of defined criteria.

The national-treatment provisions of Articles III: 2 and III: 4 – unlike the provisions governing tariff, quotas, and variable levies – are sufficiently broadly worded to capture the denial of national treatment to imported products through state trading operations. They cover all internal charges levied, directly or indirectly, on imported products and hence also charges levied through state trading operations. And they cover all requirements affecting the internal sale of imported products and hence also requirements imposed through state trading operations. If the drafters of the GATT had been of the view that Articles III: 2 and III: 4 do not apply to state trading operations, they would have added a note to these provisions extending them to state trading operations with effects equivalent to national-treatment violations. The absence of such a note confirms that they meant these provisions to apply to the denial of national treatment by any means, including state trading operations.

The national-treatment provisions have consistently been interpreted to require Members to accord conditions of competition to imported products no less favorable than those accorded to domestic products. It makes sense that this standard would also apply to internal requirements imposed through state trading operations. All GATT Panels that examined claims of denial of national treatment through state trading operations have addressed those claims under Article III rather than XVII. Unlike the MFN principle, therefore, the national-treatment principle does not need to be redefined for state trading operations, and there is consequently no reason to give Article XVII: 1 that function. If one were to apply Articles III: 2 and III: 4 solely to denials of national treatment through measures affecting private traders and Article XVII: 1 to denials of national treatment through state trading operations, one would make a distinction without a rationale.

My answer to the question left open by Hoekman and Trachtman is for these reasons that it would be neither necessary nor appropriate to apply Article XVII: 1(a) to the denial of national treatment through state trading operations. This does not mean that state trading operations can be used to violate the national-treatment principle. The standards set out in Articles III: 2 and III: 4 can and should be applied to prevent this.