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CANADA – MEASURES RELATING TO EXPORTS OF WHEAT AND TREATMENT OF IMPORTED GRAIN

AB-2004-3

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TABLE OF CASES CITED IN THIS REPORT

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Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – FIRA	GATT Panel Report, *Canada – Administration of the Foreign Investment Review Act*, adopted 7 February 1984, BISD 30S/140
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, circulated to Members 6 April 2004
EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Tariff Preferences	Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
Japan – Apples	Appellate Body Report, *Japan – Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Korea – Various Measures on Beef	Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004

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US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002
US – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Section 337	GATT Panel Report, *United States Section 337 of the Tariff Act of 1930*, adopted 7 November 1989, BISD 36S/345
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

WORLD TRADE ORGANIZATION
APPELLATE BODY

Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain

United States – *Appellant / Appellee*
Canada – *Appellant / Appellee*

Australia – *Third Participant*
China – *Third Participant*
European Communities – *Third Participant*
Mexico – *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – *Third Participant*

AB-2004-3

Present:

Lockhart, Presiding Member
Abi-Saab, Member
Taniguchi, Member

I. Introduction

1. The United States and Canada each appeals certain issues of law and legal interpretations developed in the Panel Reports, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (the "Panel Report").[1]

2. On 6 March 2003, the United States requested the establishment of a panel to consider a complaint against Canada with regard to two categories of measures: one concerning the export of wheat by the Canadian Wheat Board (the "CWB")[2]; and the other involving the treatment accorded by Canada to imports of grain.[3] Specifically, the United States asserted that: (i) the Canadian Wheat Board Export Regime (the "CWB Export Regime") is inconsistent with Canada's obligations under

[1]WT/DS276/R, 6 April 2004. As explained *infra*, two Panels were established by the Dispute Settlement Body (the "DSB") to resolve this dispute. The parties indicated that they did not wish the two Panels to issue separate reports in separate documents. The Panels agreed with the parties and decided to issue their separate Reports in the form of a single document (Panel Report, para. 6.2) On appeal, neither participant objects to the Panels' course of action.

In this Report, we will refer to the Panel Reports in the singular except where it is necessary to draw a distinction between the two Panels.

[2]Canada has notified the CWB to the Working Party on State Trading Enterprises of the World Trade Organization (the "WTO"). According to this notification, the statutory objective of the CWB is the marketing in an orderly manner, in inter-provincial and export trade, of grain grown in Canada. The CWB has exclusive authority for the sale of wheat and barley grown in the designated area in export markets and for human consumption in the domestic market. The "designated area" includes the Canadian provinces of Manitoba, Saskatchewan, Alberta and the Peace River area of the province of British Columbia. (G/STR/N/4/CAN)

[3]WT/DS276/6.

Article XVII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); and (ii) certain measures relating to Canada's bulk grain handling system and to the transportation of grain by rail in Canada are inconsistent with Canada's obligations under Article III:4 of the GATT 1994 and Article 2 of the *Agreement on Trade-Related Investment Measures* (the "*TRIMs Agreement*").[4] The Panel (the "March Panel") was established by the DSB on 31 March 2003.[5]

3. On 13 May 2003, Canada filed a preliminary submission requesting the March Panel to rule that the United States' claim against the CWB Export Regime under Article XVII:1 of the GATT 1994 was not properly before the Panel because the United States' panel request did not meet the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU").[6] On 25 June 2003, the March Panel issued a preliminary ruling finding that the United States' request for the establishment of a panel "did not meet the requirements of Article 6.2 of the DSU because it did not adequately specify the Canadian laws and regulations addressed in the United States' claim under Article XVII of the GATT 1994".[7]

4. The United States filed a second panel request on 30 June 2003.[8] The second Panel (the "July Panel") was established by the DSB on 11 July 2003 and it was agreed that the July Panel would be composed of the same panelists as the March Panel.[9] The proceedings of the March and July Panels were harmonized pursuant to Article 9.3 of the DSU.[10]

5. The Panel Report was circulated to the Members of the WTO on 6 April 2004. The July Panel found that:

> [t]he United States has failed to establish its claim that Canada has breached its obligations under Article XVII:1 of the GATT 1994 because the CWB Export Regime necessarily results in the CWB making export sales that are not in accordance with the principles of subparagraphs (a) or (b) of Article XVII:1.[11]

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[4]Panel Report, para. 3.1.

[5]WT/DSB/M/146.

[6]Canada also filed another preliminary submission requesting the March Panel to adopt special procedures for the protection of strictly confidential information. Panel Report, para. 1.7.

[7]Panel Report, para. 1.8.

[8]WT/DS276/9.

[9]WT/DSB/M/152.

[10]Panel Report, para. 1.11.

[11]*Ibid*., para. 7.4(a).

In addition, the March and July Panels found Section 57(c) of the *Canada Grain Act*, Section 56(1) of the *Canada Grain Regulations*, and Sections 150(1) and (2) of the *Canada Transportation Act* to be inconsistent with Article III:4 of the GATT 1994.[12] The March and July Panels exercised judicial economy with respect to the United States' claims against these measures under Article 2 of the *TRIMs Agreement*.[13] Finally, the March and July Panels found that the United States failed to establish its claim that Section 87 of the *Canada Grain Act* is inconsistent with Article III:4 of the GATT 1994 and Article 2 of the *TRIMs Agreement*.[14]

6. The March and July Panels accordingly recommended that:

> ... the Dispute Settlement Body request Canada to bring the relevant measures into conformity with its obligations under the GATT 1994.[15] (footnote omitted)

7. On 1 June 2004, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the March and July Panels, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal[16] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[17] On 11 June 2004, the United States filed its appellant's submission.[18] On 16 June 2004, Canada filed an other appellant's submission.[19] On 28 June 2004, the United States and Canada each filed an appellee's submission.[20] On that same day, Australia, China, and the European Communities each filed a third participant's submission.[21] Also on 28 June 2004, Mexico and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu each notified the Appellate Body Secretariat of its intention to attend and make statements at the oral hearing.[22]

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[12]Panel Report, paras. 7.1(a)–(c) and 7.4(b)–(d).

[13]*Ibid*., para. 6.378.

[14]*Ibid*., para. 7.1(d) and 7.4(e).

[15]*Ibid*., paras. 7.3 and 7.6.

[16]Notification of an appeal by the United States, WT/DS276/15, 3 June 2004 (attached as Annex 1 to this Report).

[17]WT/AB/WP/7, 1 May 2003.

[18]Pursuant to Rule 21 of the *Working Procedures*.

[19]Pursuant to Rule 23(1) of the *Working Procedures*.

[20]Pursuant to Rule 22(1) and Rule 23(3) of the *Working Procedures*.

[21]Pursuant to Rule 24(1) of the *Working Procedures*.

[22]Pursuant to Rule 24(2) of the *Working Procedures*. Japan notified the Appellate Body Secretariat, on 28 June 2004, that it would not be filing a third participant's submission, nor would it attend the oral hearing. Chile initially notified, on 28 June 2004, its intention to appear at the oral hearing. On 8 July 2004, however, Chile informed the Appellate Secretariat that it would not attend the hearing.

8. The oral hearing was held on 12 July 2004. The participants and third participants each presented oral arguments (with the exception of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu) and responded to questions put to them by the Members of the Division hearing the appeal.

9. This appeal relates to procedural and substantive aspects of the United States' claim against the CWB Export Regime under Article XVII:1 of the GATT 1994. Neither Canada nor the United States has appealed the March and July Panels' findings in respect of the measures concerning Canada's imports of grain.

10. The Panel, in essence, accepted the United States' definition of the CWB Export Regime as consisting of the following three elements, taken collectively: the "legal framework" of the CWB; the "exclusive and special privileges" granted to the CWB by the government of Canada; and certain "actions of Canada and the CWB" relating to the sale of wheat for export.[23]

11. The relevant "legal framework" consists of the *Canadian Wheat Board Act*, which is the governing statute of the CWB.[24] The "exclusive and special privileges" referred to by the United States include: the CWB's exclusive right to purchase and sell Western Canadian wheat for export and for domestic human consumption; its right to set, subject to government approval, the initial price paid to farmers upon delivery of the wheat; and the Canadian government's guarantee of this initial payment, of the CWB's borrowing, and of the CWB's credit sales to foreign buyers.[25] The "actions" that are part of the measure as defined by the United States included Canada's alleged failure to exercise its authority to oversee the CWB, its approval of the CWB's borrowing plan and guarantee of the CWB's borrowing and credit sales, and the approval and guarantee by Canada of the initial payments made to farmers upon delivering Western Canadian wheat to the CWB; as well as the CWB's sales of wheat destined for export on allegedly discriminatory or non-commercial terms.[26]

12. The Panel observed that the United States was challenging the CWB Export Regime *as such*.[27] According to the Panel, the United States is not "complaining about specific CWB export

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[23]Panel Report, para. 6.12. The United States also referred, in its initial submissions before the Panel, to the CWB's *purchases* of wheat. The Panel, however, stated that it would be inappropriate for it to make findings with respect to the CWB's wheat purchases because the United States did not present and develop specific arguments on this point. (Panel Report, footnote 118 to para. 6.24). This has not been appealed by the United States.

[24]Panel Report, para. 6.14.

[25]*Ibid*., para. 6.15.

[26]*Ibid*., para. 6.16.

[27]*Ibid*., para. 6.28.

sale transactions, but the (alleged) fact that the CWB Export Regime necessarily results in non-conforming 'actions of the CWB' with respect to export sales".[28]

13. Before the Panel, and before us, Canada observed that the term "CWB Export Regime" is not found in Canadian law or practice, but did not object to the United States or the Panel using the term to describe the measure at issue.[29]

II. Arguments of the Participants and the Third Participants

A. *Claims of Error by Canada – Appellant*

1. Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

14. Canada argues that the Panel erred by failing to consider the proper relationship between subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994, and in assuming that a breach of subparagraph (b) is sufficient to establish a breach of Article XVII:1. Canada requests the Appellate Body to modify the Panel's findings and conclusions and find instead that: (i) a violation of Article XVII:1 requires a violation of subparagraph (a); (ii) actions that are not discriminatory and do not result in a breach of subparagraph (a) of Article XVII:1 should not be considered under subparagraph (b); and (iii) the Panel erred in not dismissing the United States' case with respect to Article XVII:1 on the basis of the failure by the United States to establish that the CWB Export Regime necessarily results in conduct in breach of Article XVII:1(a).

15. According to Canada, subparagraph (a) is the "principal obligation" in Article XVII:1.[30] Subparagraph (b) "interprets and tempers" the obligation in Article XVII:1(a).[31] Where a measure has been found to be not in accordance with the principles of non-discriminatory treatment under Article XVII:1(a), it is still in conformity with Article XVII:1 if it meets the criteria set out in Article XVII:1(b).

16. Canada finds support for its interpretation in the introductory language of subparagraph (b), which states that "[t]he provisions of subparagraph (a) of this paragraph shall be understood to require ...", as well as in the structure of Article XVII:1. This interpretation is also supported by the object and purpose of Article XVII, which is to prevent WTO Members from doing indirectly through state trading enterprises ("STEs") that which they have contracted not to do directly with respect to

[28]Panel Report, para. 6.27.

[29]*Ibid*., para. 6.17; Canada's appellee's submission, footnote 26 to para. 28.

[30]Canada's other appellant's submission, para. 5.

[31]*Ibid*.

impermissible discrimination. The *ad* Note to Article XVII, by providing an example of the type of discriminatory conduct that is permissible under Article XVII, confirms that subparagraph (b) does not establish separate obligations, but rather tempers the obligation established under subparagraph (a).

17. In Canada's view, its interpretation of the relationship between subparagraphs (a) and (b) is consistent with the interpretation given to Article XVII by previous GATT/WTO panels. In particular, Canada refers to a statement of the panel in *Canada – FIRA* 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 non-discriminatory treatment" prescribed in the GATT.[32] This statement was later endorsed by the panel in *Korea – Various Measures on Beef* when it stated that "the scope of paragraph (b) ... *defines the obligations set out in paragraph* (a)".[33]

18. Canada contends that the Panel proceeded on the incorrect "assumption"[34] that subparagraphs (a) and (b) of Article XVII:1 create separate obligations and that, as a result, a mere breach of Article XVII:1(b) is sufficient to establish a violation of Article XVII:1. The Panel then examined whether the CWB Export Regime conformed to the provisions of Article XVII:1(b). In Canada's view, this constituted legal error. Article XVII:1 has an "inescapable internal logic"[35] according to which panels must *first* determine discriminatory practices under subparagraph (a), and then consider whether *those* practices accord with commercial considerations under subparagraph (b). Nothing in the scheme of Article XVII permits a panel to ignore the core interpretative issue of the relationship between subparagraphs (a) and (b) of paragraph 1, and to proceed to apply the provision on the basis of an assumption that "Articles XVII:1(a) and (b) create separate obligations and that, as a result, a mere breach of Article XVII:1(b) is sufficient to establish a violation of Article XVII:1."[36]

19. Canada asserts that, having failed to interpret the correct relationship between the two subparagraphs, the Panel then erred in not making a finding of discriminatory conduct within the meaning of Article XVII:1(a) before examining the "commerciality" of the conduct of the CWB under Article XVII:1(b).[37] On the basis of the evidence before the Panel and its findings with respect to the

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[32]GATT Panel Report, *Canada – FIRA*, para. 5.16.

[33]Panel Report, *Korea – Various Measures on Beef*, para. 755. (emphasis added)

[34]Canada's other appellant's submission, para. 24.

[35]*Ibid*., para. 39.

[36]*Ibid*., para. 6.

[37]*Ibid*., para. 7.

CWB's legal structure and mandate, the Panel should have concluded that the United States failed to establish a breach of Article XVII:1(a) and should have dismissed the United States' claim solely on this basis without further inquiry as to consistency with Article XVII:1(b). Canada, therefore, submits that the Panel committed legal error by not following the proper sequence of steps required in the interpretation and application of Article XVII:1. Canada adds that such a conclusion does not affect the Panel's findings under subparagraph (b) of Article XVII:1 and that, therefore, these findings should be upheld by the Appellate Body.

20. Finally, Canada submits a conditional appeal in the event the Appellate Body were to consider that the Panel's decision to examine the consistency of the measure with subparagraph (b) of Article XVII:1, without first making a determination under subparagraph (a), amounts to an exercise of judicial economy. In that case, Canada requests the Appellate Body to conclude that the Panel's failure to resolve the interpretative issue regarding the relationship between subparagraphs (a) and (b) of Article XVII:1 was an improper exercise of judicial economy, and to make the "appropriate findings".[38] According to Canada, the relationship between subparagraphs (a) and (b) of Article XVII:1 is a critical threshold issue. Thus, if the Panel's *assumption* that an inconsistency with Article XVII:1 can be demonstrated merely by establishing inconsistency with subparagraph (b) is characterized as an exercise of judicial economy, then this constituted an inappropriate application of judicial economy and a failure to resolve the dispute.

B. *Arguments of the United States – Appellee*

1. Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

21. The United States submits that the Panel properly began its analysis by examining the United States' claim under Article XVII:1(b).

22. The United States accepts that subparagraphs (a) and (b) of Article XVII:1 are "related", but contends that nothing in the text of that Article establishes a "hierarchy" among the obligations set out in each subparagraph.[39] In the United States' view, subparagraphs (a) and (b) of Article XVII:1 "articulate three separate requirements".[40] Subparagraph (b) of Article XVII:1 requires that the CWB make its sales "solely in accordance with commercial considerations." Subparagraph (b) of Article XVII:1 also requires that the CWB afford the enterprises of other Members an "adequate opportunity, in accordance with customary business practice, to compete for participation in such ...

[38]Canada's other appellant's submission, para. 61.

[39]United States' appellee's submission, para. 20.

[40]*Ibid*., para. 2.

sales." Finally, subparagraph (a) of Article XVII:1 requires that the CWB "act in a manner consistent with the general principles of non-discriminatory treatment" in the GATT 1994. A violation of any of these three requirements constitutes a breach of Article XVII.[41]

23. According to the United States, an examination of the ordinary meaning of the terms of Article XVII:1(b), in their context and in light of the object and purpose of the GATT 1994, leads to the inevitable conclusion that a violation of either of the requirements of Article XVII:1(b) results in a breach of Article XVII. The ordinary meaning of "to require" is to compel a particular result in order to secure compliance with a given law or regulation. It follows that Article XVII:1(b) compels Canada to ensure that the CWB makes sales solely in accordance with commercial considerations. In addition, subparagraph (b) of Article XVII:1 states that STEs "shall" make sales solely in accordance with commercial considerations and "shall" afford enterprises of other Members an adequate opportunity to compete for participation in such sales. That subparagraph (b) sets out distinct obligations that STEs must comply with is confirmed by the French and Spanish versions of Article XVII:1(b), which use the terms "*obligation*" and "*obligación*", respectively.[42]

24. The United States adds that the context of Article XVII also supports the conclusion that Article XVII:1(b) contains specific disciplines on the behaviour of STEs that, if violated, would constitute a breach of Article XVII:1. Article XVII:3 recognizes that STEs can be used "so as to create serious obstacles to trade". These potential obstacles are addressed in the three requirements of Article XVII:1. In addition, subparagraph (c) of Article XVII:1 refers to "the principles of subparagraphs (a) and (b) of this paragraph", supporting the ordinary meaning of the terms of subparagraphs (a) and (b) as referring to multiple, distinct obligations. According to the United States, Canada's interpretation undermines the object and purpose of the GATT 1994 because, instead of contributing to the elimination of discriminatory treatment in international commerce, it endorses such discriminatory treatment by STEs to the disadvantage of commercial actors.

25. In addition, the United States asserts that Article XVII:1 "creates a coherent regime designed to discipline STEs that might otherwise engage in trade-distorting conduct".[43] The principle of effectiveness in treaty interpretation requires subparagraphs (a) and (b) to be read together in a harmonious manner. Such a reading leads to the inevitable conclusion that subparagraphs (a) and (b) of Article XVII:1 contain distinct and complementary obligations. The United States emphasizes that the panel in *Korea – Various Measures on Beef* also held that "a conclusion that a decision to

[41]At the oral hearing, the United States asserted that a breach of subparagraph (b) of Article XVII:1 could also lead to violation of subparagraph (a).

[42]United States' statement at the oral hearing.

[43]United States' appellee's submission, para. 7.

purchase or buy was not based on 'commercial considerations', would also suffice to show a violation of Article XVII."[44]

26. For these reasons, the United States requests the Appellate Body to reject Canada's argument that the Panel should have found a breach of Article XVII:1(a) before turning to Article XVII:1(b) and to instead "affirm the Panel's determination that a violation of either of the requirements set forth in Article XVII:1(b) is sufficient to establish a breach of Article XVII".[45]

27. As regards Canada's conditional appeal, the United States submits that the Panel did not fail to decide a threshold issue in this case. Given that subparagraphs (a) and (b) establish distinct obligations, it was proper for the Panel to assume that an inconsistency with Article XVII:1 can be established by demonstrating a violation of subparagraph (b). Indeed, the United States focused its case on the requirement in subparagraph (b) that STEs must make sales solely in accordance with commercial considerations and, therefore, it was proper for the Panel to focus its own analysis on this requirement.

C. *Claims of Error by the United States – Appellant*

1. Interpretation of Subparagraph (b) of Article XVII:1 of the GATT 1994

28. The United States argues that the Panel erred in its interpretation of subparagraph (b) of Article XVII:1. The United States requests the Appellate Body to reverse the Panel's interpretation of the first and second clauses of subparagraph (b). Should the Appellate Body find error in the Panel's interpretation of subparagraph (b), the United States requests that the Appellate Body complete the analysis and find that the CWB Export Regime necessarily results in sales that are not based solely on commercial considerations.

29. First, the United States argues that the Panel incorrectly interpreted the phrase "solely in accordance with commercial considerations" in the first clause of Article XVII:1(b), as "simply intended to prevent STEs from behaving like 'political' actors."[46] This does not correspond to the proper meaning of the phrase "commercial considerations". "Commercial considerations" are those "experienced by commercial actors".[47] Commercial actors are those "engaged in commerce" and they "are interested in financial return."[48] Such actors do not merely act based on "non-political"

[44]Panel Report, *Korea – Various Measures on Beef*, para. 757.

[45]United States' appellee's submission, para. 36.

[46]Quoting Panel Report, para. 6.94.

[47]United States' appellant's submission, para. 3.

[48]*Ibid*., para. 26.

considerations. Rather, they must also act within the limits of their cost constraints, which are established by the market. The United States relies on the example of an STE that may be able to use its special privileges to gain market share through long-run price under-cutting. For such an STE to act as a commercial actor, it would have to sell at prices that, at a minimum, would equal the replacement value of a good. By requiring that STEs act solely in accordance with commercial considerations, Article XVII:1(b) serves to prevent them from using their privileges to the disadvantage of commercial actors. This is consistent, the United States submits, with the object and purpose of the GATT 1994, namely reducing barriers to trade and eliminating discriminatory treatment.

30. The United States alleges that the Panel based its interpretation of "commercial considerations" on the premise that not all STEs are used only for commercial purposes. Thus, the Panel "effectively assumed away the very question it was tasked to examine".[49] Finally, the United States argues that the Panel's interpretation permits STEs to use their special privileges to the full extent possible, even if this causes discrimination or other serious obstacles to trade. The United States asks the Appellate Body to reverse the Panel's finding and to conclude that commercial considerations are those under which commercial actors must operate.

31. Secondly, the United States contends that the Panel misinterpreted the term "enterprises" in the second clause of Article XVII:1(b), concluding that it referred to enterprises that wish to *buy* from an STE but not to enterprises that wish to *sell* in competition with an STE. In so finding, the Panel failed to give due consideration to the ordinary meaning of the term, in its context and in the light of the object and purpose of the GATT 1994.

32. The United States notes that the term "enterprise" is defined as a "business firm" or a "company" and, contrary to the Panel's conclusion, this definition is not limited to entities that are buyers.[50] Moreover, the United States points to the context provided in subparagraphs (a) and (c) of Article XVII:1, where the term "enterprise" is used without any indication that its meaning should be limited to buyers. Article XVII:3, which recognizes that STEs "might be operated so as to create serious obstacles to trade", also provides contextual support, because the characterization of the potential obstacles that may result from STEs as "serious" argues against narrowing the ordinary meaning of "enterprises"; otherwise, many of these serious obstacles would escape the disciplines of Article XVII:1. The United States adds that the Panel's interpretation of the term "enterprises" as limited to buyers is also inconsistent with the object and purpose of the GATT 1994.

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[49]United States' appellant's submission, para. 28.

[50]The United States cites in support, *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press 1993), Vol. I, p. 828.

33. The United States contends that the Panel's examination of the relevant context focused solely on the phrase "participation in" in the second clause of Article XVII:1(b), without examining other contextual elements of Article XVII or considering the object and purpose of the GATT 1994. This led the Panel to adopt an incorrect interpretation of the term "enterprises" that impermissibly narrows "the reach of Article XVII's disciplines".[51] The United States, therefore, requests the Appellate Body to reverse this interpretation and to find that the term "enterprises" in the second clause of subparagraph (b) includes both buyers and sellers.

2. Assessment of the Measure

34. The United States argues that the Panel erred in considering only certain aspects of the challenged measure and not basing its findings on the measure in its entirety.[52] Although the Panel properly defined the measure at issue in this dispute, the Panel then proceeded to ignore *the privileges granted to the CWB* when it examined the United States' assertion that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations.

35. According to the United States, the Panel only refered to the privileges granted to the CWB in a "conclusory" manner[53], but it is not evident from the Panel Report that the Panel actually examined these privileges. Specifically, the Panel never analyzed how the CWB's special privileges, which are an integral part of the measure, interact with other elements of the CWB Export Regime, nor did the Panel examine how the CWB Export Regime as a whole affects CWB sales.[54] Therefore, the Panel's conclusion that the CWB Export Regime does not result in sales that are not based solely on commercial considerations is in error, because this finding was based on an assessment of only part of the measure, and not the measure in its entirety.

3. Assessment of the Evidence

36. The United States contends that the Panel failed to assess objectively the facts, as required by Article 11 of the DSU, because the Panel deliberately disregarded or refused to consider evidence submitted by the United States.

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[51]United States' appellant's submission, para. 20.

[52]In response to questioning at the oral hearing, the United States asserted that its claim of error relates to the Panel's application of Article XVII:1.

[53]United States' statement at the oral hearing.

[54]*Ibid*.

37. According to the United States, even though the Panel itself defined the *Canadian Wheat Board Act* as the "legal framework of the CWB", the Panel ignored evidence on how provisions of that Act constrain the independence of the CWB's Board of Directors and the CWB's operations. The United States explains that it presented evidence before the Panel showing that the President of the CWB's Board of Directors is appointed by the Canadian government and holds office for a term determined by the Canadian government; that the Board of Directors reports directly to a Minister of the Canadian government and provides detailed information about CWB activities, holdings, purchases, and sales on a monthly basis; that the Board of Directors is required "to act as agent for or on behalf of any minister or agent of Her Majesty in right of Canada in respect of any operations that it may be directed to carry out by the Governor in Council"[55]; and, that CWB profits are to be paid into a revenue fund of the Canadian government. According to the United States, the Panel disregarded this evidence and chose instead to rely solely on the fact that ten of the fifteen directors of the CWB Board are elected by farmers rather than appointed by the government, along with the fact that the Canadian government does not exercise day-to-day control over CWB operations, to incorrectly conclude that the CWB is "controlled by" wheat farmers.

38. In addition, the United States submits that the Panel ignored significant facts related to the financial operations of the CWB, including the CWB's monopoly right to purchase Western Canadian grain for domestic human consumption and export, the approval and guarantees of initial payments to farmers by the Canadian government, and the reimbursement by the Canadian Parliament of losses sustained by the CWB. The United States argues that these elements play a fundamental role in establishing incentives in the marketplace because they provide the CWB with greater pricing flexibility and reduced risk compared to commercial actors. The United States also alleges that the Panel further disregarded the United States' submissions regarding the Canadian government's guarantee of all CWB borrowings. This guarantee allows the CWB to borrow at more favourable rates and then loan funds at a higher rate, thereby generating interest income. This additional revenue, the United States submits, is a key element of the CWB's legal framework that gives the CWB increased pricing flexibility and, in turn, creates incentives to make sales in a non-commercial manner. Finally, the United States asserts that the Panel ignored facts relating to the CWB's credit sales pursuant to Section 19(6) of the *Canadian Wheat Board Act*.

39. The United States contends that, had the Panel considered the evidence presented by the United States, the Panel would properly have concluded that "the CWB's legal structure and mandate,

[55]Quoting from Section 6(1)(j) of the *Canadian Wheat Board Act*, submitted by the United States to the Panel as Exhibit US-2.

together with the privileges enjoyed by the CWB, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations."[56]

4. Article 6.2 of the DSU

40. The United States asserts that the March Panel erred in finding that Canada's request for a preliminary ruling under Article 6.2 of the DSU was filed in a timely manner. The United States points out that the Appellate Body has previously stated that a party must raise procedural objections at the earliest possible opportunity[57], something that Canada failed to do in this case.

41. The United States explains that it made its panel request on 6 March, 2003, yet Canada failed to raise any concerns or object to the sufficiency of the request at either the 18 March or the 31 March 2003 meeting of the DSB, in which the request was considered. Instead, Canada waited until 13 May 2003, more than two months after the United States' panel request, to raise its objections.

42. According to the United States, the facts in this case are analogous to those in *US – FSC* and in *Mexico – Corn Syrup (Article 21.5 - US)*. The March Panel erred in failing to apply the rationale developed by the Appellate Body in those two cases to the facts of this case. The United States relies on *US – FSC*, where the Appellate Body concluded that the United States had failed to raise its procedural objections in a timely manner because it had not raised them at the earliest opportunity possible, namely, at the DSB meetings where the request for establishment of the panel was considered.[58] Furthermore, in *Mexico – Corn Syrup (Article 21.5 - US)*, the Appellate Body noted that because Mexico waited four months after the United States submitted its communication seeking recourse to Article 21.5 of the DSU to raise its objections, "Mexico's objections could have been viewed as untimely".[59] In this case, because Canada failed to raise its objection under Article 6.2 of the DSU at either of the two DSB meetings held after Canada received the United States' panel request, the March Panel should have determined that Canada's objection was untimely.

43. Finally, the United States submits that the March Panel placed undue weight on Canada's letter of 7 April 2003 seeking clarification of the United States' panel request.[60] A response to that

[56]United States' appellant's submission, para. 44.

[57]Appellate Body Report, *US – Carbon Steel*, para. 123; and Appellate Body Report, *US – FSC*, para. 166.

[58]Appellate Body Report, *US – FSC*, para. 165.

[59]United States' appellant's submission, para. 65, referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5)*, paras. 49–50.

[60]United States' statement at the oral hearing.

letter by the United States could not have "cured" the alleged procedural defect in the panel request, as recognized by the Appellate Body in *EC – Bananas III*.[61]

D. *Arguments of Canada – Appellee*

1. Interpretation of Subparagraph (b) of Article XVII:1 of the GATT 1994

44. Canada submits that the Panel correctly interpreted both the first and the second clause of subparagraph (b) of Article XVII:1 of the GATT 1994. Canada, therefore, requests that the Appellate Body uphold the Panel's interpretation of subparagraph (b).

45. Canada argues that the Panel correctly found that the term "commercial considerations" should be understood as meaning considerations pertaining to commerce and trade, or considerations that involve purchases or sales "as mere matters of business".[62] This interpretation is supported by the ordinary meaning of the word "commercial" and by its context. In particular, the Panel was correct in relying on the illustrative list in Article XVII:1(b) of types of "commercial considerations" that an STE may take into account (that is, price, quality, availability, marketability, transportation and other conditions of purchase or sale). The Panel determined that, if an STE makes purchases or sales based solely on elements such as those listed in Article XVII:1(b), its purchases or sales would be based solely on considerations that relate to, and are characteristic of, commerce and trade.

46. Canada contends that the Panel's interpretation is also supported by the object and purpose of Article XVII, which, as the Panel recognized, is to prevent WTO Members from doing indirectly through STEs that which they have contracted not to do directly under the GATT 1994. Nothing in Article XVII, or the GATT 1994, suggests that STEs are to be put at a disadvantage in their purchases and sales as compared to private traders—especially in view of the fact that the definition of "STEs" includes private sector actors that are granted exclusive or special privileges.

47. According to Canada, the United States mischaracterizes the Panel's reference to "non-political" considerations as a finding, even though the Panel's reference was meant simply by way of contrast. Furthermore, Canada argues that the United States attempts, through its proposed interpretation, to read competition disciplines into Article XVII where none exists. Neither Article XVII, nor indeed the *Marrakesh Agreement Establishing the World Trade Organization*, prohibits "anti-competitive behaviour". In sum, Article XVII:1(b) does not prevent STEs from using their exclusive and special privileges, so long as they do so like a rational market actor.

[61]Appellate Body Report, *EC – Bananas III*, para. 143.

[62]Panel Report, para. 6.85.

48. As regards the second clause of Article XVII:1(b), Canada contends that the Panel correctly found that, where an export STE is at issue, the phrase "enterprises of the other Members" in Article XVII:1(b) refers only to enterprises of the other Members that are interested in purchasing the products offered for sale by the STE. The phrase "compete for participation" provides context for the interpretation of the phrase "enterprises of other Members". It is the seller and the purchaser who "participate" in a transaction. Competitors do not participate in the same "transaction"; rather they compete against each other. Similarly, the phrase "in accordance with customary business practice" provides relevant context. It is not customary business practice for competitors to "participate" in each other's sales, or to assist or cooperate with competitors. Rather, customary business practice is when an enterprise wins sales at the expense of its competitors. Finally, Canada observes that the United States' argument that the second clause of paragraph (b) requires STEs to allow their competitors to participate in their sales contradicts its own argument that STEs must act like "commercial actors".

49. In the event, however, that the Appellate Body were to reverse the Panel's finding that the CWB Export Regime does not create an incentive to make sales not in accordance with commercial considerations, Canada would request the Appellate Body to complete the analysis and find that the United States failed, in any event, to establish that the CWB Export Regime *necessarily results* in sales not in accordance with Article XVII:1(b).

2. Assessment of the Measure

50. Canada contends that the United States' claim that the Panel did not examine the measure in its entirety does not appear to be a claim of legal error by the Panel in the interpretation or application of Article XVII:1. Instead, although not expressly mentioned by the United States, its claim would appear to fit more properly under Article 11 of the DSU as an allegation that the Panel did not make an objective assessment of the matter. In this sense, the United States' failure to cite a legal provision in relation to this claim should be sufficient grounds for its dismissal.

51. Nevertheless, Canada considers that, in the interest of resolving the dispute, the Appellate Body should address the United States' claim, but under the correct legal provision, namely, Article 11 of the DSU. Contrary to the United States' assertion, the Panel correctly assessed the relevance of the privileges at issue in the light of its interpretation of Article XVII:1(b). The Panel found that "the mere existence" of privileges is not relevant for determining whether STEs act in accordance with commercial considerations.[63]

[63]Canada's appellee's submission, para. 121.

3. Assessment of the Evidence

52. Canada disagrees with the United States' contention that the Panel failed to assess objectively the facts of the case, and requests the Appellate Body to dismiss this ground of the United States' appeal.

53. Canada states that the facts described by the United States as "related to the financial operations of the CWB"[64] are nothing other than what the United States alleged to be privileges in themselves. Given that the existence of these privileges was not disputed, and that the United States' characterization of how these privileges operate was assumed to be correct by the Panel, the United States' assertion that the Panel "ignored" the privileges cannot succeed. As to the facts that the Panel allegedly ignored and that purport to show that the CWB is not "truly independent"[65], Canada responds that the United States never mentioned to the Panel the specific provisions of the *Canadian Wheat Board Act* that it now alleges the Panel ignored. Neither has the United States offered any basis on which to conclude that this evidence would outweigh other evidence considered by the Panel.

54. Canada also notes that, to succeed in its claim that the Panel violated Article 11 of the DSU, the United States would have to establish that the Panel deliberately disregarded or willfully distorted the evidence[66], a burden that the United States has failed to meet in this case. Finally, Canada observes that the United States' contention on appeal that the government of Canada exercises control over the CWB is contrary to the position taken by the United States before the Panel that Canada acted inconsistently with its obligations under Article XVII:1 because of its alleged lack of supervision over the operations of the CWB.[67]

4. Article 6.2 of the DSU

55. Canada requests that the Appellate Body dismiss the United States' claim that the March Panel erred in finding that Canada's request for a preliminary ruling was filed in a timely manner.

56. According to Canada, there is no legal basis for the United States' contention that Canada had to raise its procedural objection at the DSB meetings in which the panel request was considered. First, the United States' reliance on the Appellate Body Report in *US – FSC* is misplaced because the issue in that appeal related to a request for consultations and not to whether a request for the

[64]United States' appellant's submission, para. 51.

[65]*Ibid*., para. 50.

[66]Canada relies in this regard on Appellate Body Report, *EC – Hormones*, para. 133.

[67]Canada's statement at the oral hearing.

establishment of a panel met the requirements in Article 6.2 of the DSU. Secondly, the United States fails to recognize that whether a panel request meets the requirements of Article 6.2 is an issue that becomes relevant only once a panel is established. In any event, the DSB has no mandate and no procedure for ruling on the adequacy of a panel request, as acknowledged by the Appellate Body in *EC – Bananas III*.[68]

57. In addition, Canada points out that it did ask the United States for clarification of the panel request on 7 April 2003, one week after the establishment of the March Panel. The United States did not reply to this request and, in the absence of a reply, Canada had no choice but to seek redress from the Panel. Canada filed its request for a preliminary ruling only one day after the composition of the March Panel was determined. This was the earliest opportunity at which there was a body in place with authority to decide on the adequacy of the United States' panel request.

58. Finally, Canada asserts that, although the United States may be correct in arguing that any deficiencies in the panel request could not have been "cured", the argument is irrelevant. Had the United States responded favourably to Canada's letter of 7 April 2003, then Canada and the United States could have sought to agree on new terms of reference for the Panel, as permitted by Article 7 of the DSU.

E. *Arguments of the Third Participants*

1. Australia

(a) Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

59. Australia submits that Article XVII is, in essence, an anti-circumvention provision designed to ensure that Members are not able to evade their non-discrimination obligations under the GATT 1994 through the creation and operation of STEs.[69] The fundamental obligation in Article XVII:1 is one of non-discriminatory treatment. This fundamental obligation is qualified by subparagraph (b). In order to establish a violation of Article XVII:1, it would be necessary to establish a violation of subparagraph (a) as well as a violation of subparagraph (b). Therefore, there cannot be a violation of Article XVII:1 without some form of discriminatory activity by an STE related to purchases or sales, even if that STE fails to act solely in accordance with commercial considerations, or if the enterprises of other Members are not afforded adequate opportunity to participate in purchases or sales. This interpretation finds textual support in the introductory phrase of

[68]Appellate Body Report, *EC – Bananas III*, para. 142.

[69]Australia's statement at the oral hearing.

subparagraph (b), which reads "[t]he provisions of subparagraph (a) of this paragraph shall be understood to require...", and is further confirmed by the interpretative note to Article XVII:1.

(b) Interpretation of Subparagraph (b) of Article XVII:1 of the GATT 1994

60. Australia submits that the United States has mischaracterized the Panel's finding in respect of the phrase "solely in accordance with commercial considerations" and the Panel's remark that the first clause of Article XVII:1(b) is intended to prevent STEs from behaving like political actors. The Panel used the term "political actors" merely to contrast its understanding of the provision with the United States' contention that "commercial considerations" are those under which commercial actors must operate. As the Panel correctly observed, the term "commercial actors" is not used in Article XVII:1(b). Nothing in Article XVII supports the proposition that export STEs are prevented from using their exclusive or special privileges to the disadvantage of "commercial actors".

61. According to Australia, the Panel correctly interpreted the term "enterprises" in the second clause of Article XVII:1(b). Although a broad definition may be given to the term "enterprise", the interpretation of this term in the context of Article XVII:1(b) must be conditioned by the type of enterprise established or maintained by a WTO Member. This case concerns an STE involved in export sales. Consequently, the other party to any such transaction—that is, "the enterprises of the other Members"—must be an enterprise wishing to buy from the CWB.

(c) Assessment of the Measure

62. Australia states that it understands the United States' claim that the Panel did not examine the measure in its entirety as one grounded in Article 11 of the DSU. Furthermore, Australia submits that, contrary to the United States' assertion, the Panel examined the CWB Export Regime as a whole and did not rely on one element of the measure to the exclusion of others. The Panel neither ignored the effect of the privileges granted to an STE nor failed to examine their interaction with the obligations stemming from Article XVII:1.

(d) Assessment of the Evidence

63. Australia submits that the Panel did not fail to make an objective assessment of the facts presented by the United States. The fact that the Panel did not accord the same weight as the United States to certain privileges granted to the CWB, whether part of the CWB's legal framework or not, is not sufficient in itself to establish a violation of Article 11 of the DSU. In addition, even if the Appellate Body were to find that the Panel erred by disregarding evidence submitted by the United

States, the error would not be egregious enough to rise to the level required to demonstrate that the Panel did not fulfill its obligations under Article 11.

2. China

(a) Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

64. China submits that, if an STE is found, under subparagraph (b) of Article XVII:1, to have made its purchases or sales solely on the basis of commercial considerations and to have afforded to the enterprises of the other WTO Members an adequate opportunity to compete, then the non-discrimination requirement set out in subparagraph (a) would have been met by the WTO Member maintaining or establishing that STE.

(b) Interpretation of Subparagraph (b) of Article XVII:1 of the GATT 1994

65. China states that the United States mischaracterizes the Panel's interpretation of the term "commercial considerations" in the first clause of Article XVII:1(b). The Panel did not equate "commercial considerations" only to "non-political" considerations. China points to paragraph 6.94 of the Panel Report, where the Panel uses the term "etc." to mean that there may be other non-commercial considerations besides those that are political in nature. China also takes issue with the example used by the United States to illustrate its arguments. In China's view, gaining market share is a commercial consideration, and replacement value is not always a reliable indicator of commercial conduct because there are situations in which a commercial actor does not sell its products at or above replacement value, such as the disposition of perishables, inventory liquidation, or market penetration.

66. China agrees, moreover, with the Panel's interpretation of the term "enterprises" as qualified by the other terms in the second clause of Article XVII:1(b) of the GATT 1994, such as the phrase "to compete for participation in such purchases or sales". In this context, and when examining an STE involved in exports, the term "enterprises" can refer only to "buyers".

67. Finally, China contends that the interpretation of Article XVII:1(b) must be consistent with the object and purpose of Article XVII, which gives WTO Members the right to establish STEs and grant them exclusive and special privileges. The interpretation of the terms "enterprises" and "commercial considerations" proposed by the United States would nullify these rights.

(c) Assessment of the Measure

68. China contends that the Panel did examine the measure identified by the United States in its entirety and that this examination included an analysis of the privileges granted to the CWB.

(d) Assessment of the Evidence

69. China asserts that the Panel made an objective assessment of the facts of the case as required by Article 11 of the DSU. The Panel considered the privileges granted to the CWB and concluded that these privileges, together with the CWB's legal structure and mandate, could not create an incentive for the CWB to make some of its sales in a non-commercial manner. In assessing the evidence submitted to it, the Panel was not under an obligation to make the United States' case.

3. European Communities

(a) Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

70. According to the European Communities, a violation of Article XVII:1 does not necessarily require that the consistency with subparagraph (a) be examined before addressing the consistency with subparagraph (b). In its view, subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994 do not have identical scope, although they are inter-related. Subparagraph (b) does not contain a separate obligation, however, but rather defines the non-discrimination obligation in subparagraph (a). Hence, if it is established that an STE does not make purchases or sales in accordance with commercial considerations as required by subparagraph (b), then it follows logically that the STE did not act consistently with the general principles of non-discriminatory treatment, as required by subparagraph (a).

(b) Interpretation of Subparagraph (b) of Article XVII:1 of GATT 1994

71. The European Communities agrees with the Panel's interpretation of the phrase "commercial considerations" in the first clause of Article XVII:1(b), but finds that the Panel's reference to "non-political" considerations "rather diffuses than clarifies" the scope of the phrase.[70] The phrase "commercial considerations" should be interpreted in the light of normal (private) commercial behaviour. The ordinary meaning of this phrase, as well as its context, illustrate that an STE should act just as a private company would react on the market. An STE may have a different market power due to its exclusive and special rights, but the text of Article XVII:1(b) of the GATT 1994 does not state that these advantages should be disregarded when interpreting the term "commercial

[70]European Communities' third participant's submission, para. 16.

considerations". In fact, such a premise would be difficult to apply as the determination of "commercial considerations" would then require all kinds of adjustments that are not even contemplated under Article XVII:1(b) of the GATT 1994. For this reason, the European Communities considers that the sole benchmark for interpreting the term "commercial considerations" is to determine whether the market behaviour of an STE is in accordance with normal private commercial behaviour.

72. The European Communities disagrees, however, with the Panel's interpretation of the term "enterprises" in the second clause of Article XVII:1(b) as limited, in the case of an export STE, to buyers. It concedes that on the basis of the ordinary meaning of the term "participation" as "having a part or share", the application of the second clause of Article XVII:1(b) to "sellers" in a case involving an export STE, while not being excluded, might appear difficult. Nevertheless, the phrase "to compete" in the second clause of subparagraph (b) would support the conclusion that the term "enterprises" includes sellers. The inclusion of "sellers" within the scope of the second clause of subparagraph (b), moreover, is necessary to counterbalance an STE's special privileges, especially considering that the use of such privileges is permitted by the first clause of that subparagraph.

(c) Article 6.2 of the DSU

73. The European Communities disagrees with the United States' contention that, if a defending party does not raise an objection regarding the sufficiency of a panel request at the meetings of the DSB at which the panel request is considered, it is precluded from raising such an objection before the panel. Such an interpretation does not find support in the jurisprudence of the Appellate Body regarding Article 6.2 of the DSU.

74. In the present case, Canada made its request for a preliminary ruling immediately after the composition of the March Panel was determined. This was the earliest possible moment at which the objection could meaningfully have been raised during the panel proceedings. The DSB has no mandate to deal with this kind of objection. Moreover, the March Panel did not err in attaching significance to the fact that the United States failed to respond to Canada's request for clarification of 7 April 2003. A response by the United States to Canada's letter of 7 April 2003 might have contained elements that could have assisted the March Panel in the interpretation of the United States' request. Nor was the March Panel unjustified in recalling that the good faith obligations under Article 3.10 of the DSU apply to both parties. The fact that the United States did not react to Canada's letter would seem to suggest that the United States was not willing to correct the legal problems that were the subject of Canada's objection and, hence, it cannot be said that the timing of Canada's request caused prejudice to the United States.

75. The European Communities submits, therefore, that the Appellate Body should uphold the March Panel's finding that Canada's request for a preliminary ruling was filed in a timely manner.

III. Issues Raised in This Appeal

76. The following issues are raised in this appeal:

(a) whether the July Panel erred in not considering the "proper" relationship between subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994 and in proceeding to examine the consistency of the CWB Export Regime with Article XVII:1(b) without first having found a breach of Article XVII:1(a);

(b) whether the July Panel erred in its interpretation of subparagraph (b) of Article XVII:1 and, specifically, in its interpretation of the phrase "solely in accordance with commercial considerations" in the first clause of that provision, and of the term "enterprises" in the second clause;

(c) whether the July Panel failed to examine the CWB Export Regime in its entirety;

(d) whether the July Panel failed to discharge properly its duties under Article 11 of the DSU by disregarding evidence submitted by the United States in relation to the CWB's legal framework; and

(e) whether the March Panel erred in refusing to dismiss Canada's request for a preliminary ruling under Article 6.2 of the DSU on the grounds that the request was not raised in a timely manner.

IV. Relationship Between Subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994

77. Canada and the United States each appeals aspects of the Panel's interpretation and application of Article XVII:1 of the GATT 1994. Canada's appeal relates to the *relationship* between subparagraph (a) and subparagraph (b) of Article XVII:1 and the analytical approach adopted by the Panel in this regard. The United States' appeal relates to the Panel's *interpretation of subparagraph (b)* of Article XVII:1; to the Panel's *application* of this interpretation *to the CWB Export Regime*; and to the Panel's ultimate finding that the United States had not established any inconsistency with the principles of subparagraphs (a) or (b) of Article XVII:1 of the GATT 1994.[71]

[71]Panel Report, paras. 6.151 and 7.4(a).

We analyze first the issue appealed by Canada and consider the issues appealed by the United States in Sections V to VIII of this Report.

78. In considering Canada's appeal, we first analyze the relationship between subparagraphs (a) and (b) of Article XVII:1. Next, we consider when the order of analysis adopted by a panel may constitute legal error. Then we examine the approach taken by the Panel in this case in order to assess whether that approach was consistent with our view of the relationship between subparagraphs (a) and (b) of Article XVII:1 and whether the sequence of analysis amounted to legal error. Finally, we address a separate, conditional, appeal made by Canada relating to "judicial economy".

A. *Analysis of the Relationship Between Subparagraphs (a) and (b) of Article XVII:1*

79. The Panel began its analysis of subparagraph (b) of Article XVII:1 by setting out the positions of the parties on the relationship between subparagraph (a) and subparagraph (b). The Panel contrasted the United States' view that these subparagraphs each contains separate, independent obligations, with Canada's view that subparagraph (b) does not create separate, independent obligations, but simply "interpret[s] and temper[s]" the "operative" obligation set out in subparagraph (a).[72] The Panel decided that, in the light of its ultimate finding that the United States had not, in any event, established that the CWB Export Regime is inconsistent with the principles of subparagraph (b) of Article XVII:1, it did not need to take a view on the relationship between the two subparagraphs.[73] The Panel thus explained its approach to deciding the issues before it as follows:

> ... for the sake of argument, the Panel will proceed [to examine the allegations made by the United States under subparagraph (b) of Article XVII:1] on the *assumption* that an inconsistency with Article XVII:1 can be established merely by demonstrating that an STE is acting contrary to the principles of subparagraph (b).[74] (footnote omitted; emphasis added)

80. Canada challenges the approach taken by the Panel. In Canada's view, the Panel erred in failing to consider the proper relationship between subparagraphs (a) and (b) of Article XVII:1, and in assuming that a breach of subparagraph (b) is sufficient to establish a breach of Article XVII:1.

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[72]Panel Report, paras. 6.52–6.57.

[73]*Ibid*., paras. 6.58–6.59.

[74]*Ibid*., para. 6.59.

81. For Canada, subparagraph (a) is the "principal obligation" in Article XVII:1.[75] Article XVII:1 has an "inescapable internal logic"[76] according to which panels must *first* "determine the existence of discriminatory practices under Article XVII:1(a)", and, "[w]here such practices have been found, it must then determine whether *those* practices are not in accordance with commercial considerations" under subparagraph (b).[77] In this case, having failed to interpret the correct relationship between the two subparagraphs, the Panel erred because it did not make a finding of discriminatory conduct within the meaning of Article XVII:1(a) before examining the "commerciality" of the conduct of the CWB under Article XVII:1(b).[78] According to Canada, the Panel should have concluded that the United States had failed to establish a breach of Article XVII:1(a) and should have dismissed the United States' claim solely on this basis, without further inquiry as to consistency with Article XVII:1(b).

82. The United States "agrees that subparagraph (b) and subparagraph (a) are related"[79], but contends that nothing in the text of that Article establishes a "hierarchy" among the obligations set out in each subparagraph.[80] Relying on a statement from the panel in *Korea – Various Measures on Beef*, the United States argues that a breach of either of the requirements in subparagraph (b), or a breach of subparagraph (a), establishes a breach of Article XVII:1.[81] The United States argues that "[s]ubparagraph (a)'s general prohibition on discriminatory treatment addresses one obstacle to trade [and] subparagraph (b) is properly understood as placing additional constraints on STE behavior to address the multiple obstacles to trade that STEs can create."[82] The United States suggests that:

> Whether characterized as a separate obligation or as an additional requirement that flows from subparagraph (a), the commercial considerations requirement is a specific discipline on STE behavior that is mandated by subparagraph (b).[83]

83. Furthermore, the United States underlines that the case it made before the Panel focused on the requirement in subparagraph (b) that STEs must make sales solely in accordance with commercial

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[75]Canada's other appellant's submission, para. 5.

[76]*Ibid*., para. 39.

[77]*Ibid*., para. 39. (original emphasis)

[78]Canada's other appellant's submission, para. 7.

[79]United States' appellee's submission, para. 20.

[80]*Ibid*.

[81]*Ibid*., paras. 14 and 17.

[82]*Ibid*., para. 21.

[83]*Ibid*., para. 19.

considerations.[84] Accordingly, it was proper for the Panel to focus its own analysis on this requirement.

84. Before assessing the approach taken by the Panel in this case, we consider the relationship between the first two subparagraphs of Article XVII:1, which provide:

> (*a*) Each Member 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 Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

85. Subparagraph (a) of Article XVII:1 contains a number of different elements, including both an acknowledgement and an obligation. It recognizes that Members may establish or maintain State enterprises or grant exclusive or special privileges to private enterprises, but requires that, *if they do so*, such enterprises must, when they are involved in certain types of transactions ("purchases or sales involving either imports or exports"), comply with a specific requirement. That requirement is to act consistently with certain principles contained in the GATT 1994 ("general principles of non-discriminatory treatment ... for governmental measures affecting imports or exports by private traders"). Subparagraph (a) seeks to ensure that a Member cannot, through the creation or maintenance of a State enterprise or the grant of exclusive or special privileges to any enterprise, engage in or facilitate conduct that would be condemned as discriminatory under the GATT 1994 if such conduct were undertaken directly by the Member itself. In other words, subparagraph (a) is an "anti-circumvention" provision.[85]

[84]United States' appellee's submission, para. 35.

[85]Australia expressed a similar sentiment in its statement at the oral hearing, as did the Panel in para. 6.39 of the Panel Report and footnote 133 thereto.

86. Each of the elements of subparagraph (a) raises, in turn, a number of interpretative questions, including: (i) *which enterprises* are subject to the requirement set forth in subparagraph (a); (ii) *what transactions* qualify as "purchases or sales involving either imports or exports"; and (iii) *which principles* of the GATT 1994 fall under the "general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders". The first two of these interpretative questions define the scope of application of the requirement in subparagraph (a). The third question goes to the nature of the requirement itself.

87. This requirement, which lies at the core of subparagraph (a), is a requirement that STEs not engage in certain types of discriminatory conduct. When viewed in the abstract, the concept of discrimination may encompass both the making of distinctions between similar situations, as well as treating dissimilar situations in a formally identical manner.[86] The Appellate Body has previously dealt with the concept of discrimination and the meaning of the term "non-discriminatory"[87], and acknowledged that, at least insofar as the making of distinctions between similar situations is concerned, the ordinary meaning of discrimination can accommodate both drawing distinctions *per se*, and drawing distinctions *on an improper basis*.[88] Only a full and proper interpretation of a provision containing a prohibition on discrimination will reveal which type of differential treatment is prohibited. In all cases, a claimant alleging *discrimination* will need to establish that differential treatment has occurred in order to succeed in its claim.

88. In this case, the Panel did not consider which types of discrimination are covered by the reference to "the principles of non-discriminatory treatment" in Article XVII:1(a).[89] Nor has any participant in this appeal asked us to do so.

89. Instead, the question we are asked to consider is how subparagraph (a) relates to subparagraph (b) of Article XVII:1. In our view, the answer to that inquiry is not found in the text of subparagraph (a). Rather, the words that bear most directly on the relationship between the first two paragraphs of Article XVII:1 are found in the opening phrase of subparagraph (b), which states that the "provisions of subparagraph (*a*) of this paragraph *shall be understood to require* that such enterprises shall ...". (emphasis added) This phrase makes it abundantly clear that the remainder of subparagraph (b) is dependent upon the content of subparagraph (a), and operates to clarify the scope

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[86]See the reasoning of the Appellate Body with respect to Article III:4 of the GATT 1994 in its Report in *Korea – Various Measures on Beef*, para. 136, referring to the GATT Panel Report, *US – Section 337*. As this case does not include any claim based on discrimination arising from *formally identical treatment*, we do not address this type of discrimination in our discussion.

[87]Appellate Body Report, *EC – Tariff Preferences*, paras. 142–173. In that case, the Appellate Body examined the meaning of the term "non-discriminatory" in footnote 3 to paragraph 2(a) of the Enabling Clause.

[88]Appellate Body Report, *EC – Tariff Preferences*, para. 153.

[89]Except to the extent identified *infra*, para. 115.

of the requirement not to discriminate in subparagraph (a). We note, particularly, the use of the words "shall be understood". Elsewhere in the GATT 1994[90], and throughout the covered agreements[91], these words are used, together with the verb "to mean", to define the scope or to clarify the *meaning* of the term that precedes it. In our view, the words "shall be understood" serve the same purpose when used together with the verb "to require", that is, to define the scope of or to clarify the *requirement* in the preceding provision.[92] Thus, the opening phrase in subparagraph (b) of Article XVII:1 supports Canada's view that the *principal source* of the relevant obligation(s) in Article XVII:1(a) and (b) is, indeed, found in "[t]he provisions of subparagraph (*a*)".[93]

90. Subparagraph (b) also refers to "*such* enterprises", which can mean only the STEs defined in subparagraph (a). In addition, subparagraph (b) twice refers to " *such* purchases or sales". It is clear that the word "such" in this phrase must refer to the purchases and sales identified in subparagraph (a), namely the "purchases or sales [of STEs] involving either imports or exports".[94] Thus, the word "such" in subparagraph (b) confirms the link between the two subparagraphs, and ties the content of subparagraph (b) back to subparagraph (a).

91. Having examined the text of subparagraphs (a) and (b) of Article XVII:1, it is our view that subparagraph (b), by defining and clarifying the requirement in subparagraph (a), is dependent upon, rather than separate and independent from, subparagraph (a). We now turn to the context of these provisions to see whether it confirms this preliminary view.

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[90]See, for example: Article VI:3 ("[t]he term 'countervailing duty' shall be understood to mean..."); Article XXIV:2 ("a customs territory shall be understood to mean..."); Article XXIV:8(a) ("[a] customs union shall be understood to mean..."); Article XXIV:8(b) ("[a] free-trade area shall be understood to mean ..."); and Article XXXII:1 ("[t]he Members to this Agreement shall be understood to mean ...").

[91]See, for example: Article 1 of the *Agreement on Safeguards* ("[t]his Agreement establishes rules for the application of safeguard measures which shall be understood to mean those measures provided for in Article XIX of GATT 1994"); Article 4.1(a), (b) and (c) of the *Agreement on Safeguards* ("'serious injury' shall be understood to mean ...", "'threat of serious injury' shall be understood to mean ...", and "a 'domestic industry' shall be understood to mean ..."); footnote 36 to Article 10 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") ("[t]he term 'countervailing duty' shall be understood to mean ..."); paras. 2 and 4 of the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994* ("[price-based measures] shall be understood to include ...", and "[t]he term 'essential products' shall be understood to mean ..."); and Article 1.3 and footnote 9 to Article 36 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("the nationals of other Members shall be understood as ...", and "[t]he term 'right holder' in this Section shall be understood as having the same meaning as ...").

[92]We need not decide, in this appeal, whether subparagraph (b) *exhaustively* defines the scope of the requirement set out in subparagraph (a).

[93]In our view, the French and Spanish versions of the opening phrase of subparagraph (b) also support the view that the basis of the *obligation* placed on STEs is found in the provisions of subparagraph (a): "[l]es dispositions de l'alinéa *a)* du présent paragraphe devront être interprétées comme imposant à ces entreprises l'obligation ... de ...."; "[l]as disposiciones del apartado *a)* de este párrafo deberán interpretarse en el sentido de que imponen a estas empresas la obligación ... de ...".

[94]We note that both participants expressed this same view in response to questioning at the oral hearing.

92. The United States argues that its position concerning the relationship between subparagraphs (a) and (b) is supported by the text of subparagraph (c) of Article XVII:1, which provides that:

> No Member 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.

The United States emphasizes the use of the plural word "principles" in this provision, arguing that it supports the United States' position that subparagraphs (a) and (b) contain "multiple, distinct obligations".[95] In our view, however, the United States' reliance on the word "principles" is misplaced. On the one hand, subparagraph (a) itself refers, in the plural, to certain "general principles of non-discriminatory treatment". Arguably, the reference made in subparagraph (c) could be read as a reference to precisely these "principles" set out in subparagraph (a).[96] On the other hand, the word "principles" in subparagraph (c) may well refer to principles in subparagraph (a) along with *other* principles in subparagraph (b). Even then, such principles could be principles derived from and dependent on the principles in subparagraph (a).[97] In other words, the mere use of the plural word "principles" does not reveal the nature of such principles or the relationship among them.

93. To us, reference in subparagraph (c) to "the principles of subparagraphs (*a*) and (*b*)" simply highlights that the two provisions must be read together in order to ensure that account is taken of all the principles relevant to the scope of the non-discrimination requirement. This is further reinforced by a similar reference to "the provisions of subparagraphs (a) and (b)" in the first sentence of the *ad* Note to Article XVII:1.[98] Indeed, throughout Article XVII, whenever subparagraph (b) is referred to, it is always referred to *together with* subparagraph (a). In contrast, subparagraph (a) is referred to,

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[95]United States' appellee's submission, para. 5. See also para. 22.

[96]We are not suggesting that the word "principles" in subparagraph (c) should be read in this manner, but rather that the mere use of the plural form of the word does not have the significance that the United States seeks to attach to it.

[97]We observe that subparagraph (c) uses the word "principles" and not "requirements" or "obligations". This stands in contrast to subparagraph (b), which refers to the provisions of subparagraph (a) as "requir[ing]" particular conduct from STEs. This contrast is even more marked in the French and Spanish versions of the text, which in subparagraph (b) explicitly refer to "l'obligation" and "la obligación" imposed by the provisions of subparagraph (a), but in subparagraph (c) refer to the "principes énoncés aux alinéas *a)* et *b)*" and "los principios enunciados en los apartados *a)* y *b)*", respectively.

[98]The first sentence of that *ad* Note explains that:

> The operations of Marketing Boards, which are established by Members and are engaged in purchasing or selling, are subject to the provisions of subparagraphs (a) and (b).

alone, in certain provisions of Article XVII.[99] We see these references as confirming that subparagraph (b) is dependent on, rather than separate from, subparagraph (a).

94. We note also the last sentence of the *ad* Note to Article XVII:1, which provides:

> [t]he charging by a state enterprise of different prices for its sales of a product in different markets is not precluded by the provisions of this Article, provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets.

This *ad* Note is attached to Article XVII:1 as a whole, rather than to either subparagraph (a) or subparagraph (b) alone. This sentence of the *ad* Note confirms that at least one type of differential treatment—price differentiation—is consistent with Article XVII:1 *provided that* the reasons for such differential prices are commercial in nature, and gives an example of such commercial reasons ("to meet conditions of supply and demand in export markets"). Thus, this Note also contemplates that determining the consistency or inconsistency of an STE's conduct with Article XVII:1 will involve an examination of *both* differential treatment and of commercial considerations.

95. The United States also relies on the first part of Article XVII:3, which provides:

> Members 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;

The United States emphasizes that this text constitutes explicit recognition by Members of the risk that STEs might be operated to create serious obstacles to trade.[100] Moreover, according to the United States, the object and purpose of the GATT 1994 *inter alia*, is "to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce".[101] Thus, reasons the United States, subparagraph (b) of Article XVII:1 cannot, as Canada suggests, be interpreted as "tempering" the obligation in subparagraph (a). Rather, this provision must be interpreted as *adding* constraints—in addition to the prohibition on discriminatory treatment—to the behaviour of STEs.

96. We are unable to accept the United States' view. We agree that Article XVII:3 forms part of the relevant context for determining the relationship between subparagraphs (a) and (b) of Article XVII:1. Yet we see as much significance in the *second* part of Article XVII:3 as in the first.

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[99]In addition to the opening phrase of paragraph 1(b), paragraph (3) and subparagraphs 4(a) and (c) refer to "enterprise[s] of the kind described in paragraph 1(*a*)" of Article XVII.

[100]United States' appelllee's submission, para. 21.

[101]*Ibid*., para. 23.

Immediately following the "recognition" that STEs might cause serious obstacles to trade, the provision continues:

> ... 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.

97. To us, this provision explicitly recognizes that, *notwithstanding* the existence of certain disciplines on STEs in Article XVII:1, these alone may not suffice to prevent the various ways in which STEs might create obstacles to trade, and that additional measures to limit or reduce such obstacles should therefore be pursued through negotiation. Thus, this provision constitutes acknowledgement by the GATT contracting parties of the *limitations* inherent in Article XVII:1, and recognizes that Article XVII:1 cannot serve as the sole legal basis for eliminating *all* potential obstacles to trade relating to STEs. The United States argument, however—that we should use Article XVII:3 to read Article XVII:1 as a complete code governing STEs—would turn Article XVII:3 on its head.

98. As we have seen, through its reference to the "general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders", Article XVII:1 imposes an obligation on Members not to use STEs in order to discriminate in ways that would be prohibited if undertaken directly by Members. Yet even if Article XVII:1 itself did not exist, this would not imply that STEs would be subject to no disciplines under the GATT 1994. For example, the express provisions of Article II:4 of the GATT 1994[102] and the *ad* Note to Articles XI, XII, XIII, XIV and XVIII[103] constrain the behaviour of STEs. Other

[102]Article II:4 provides:

> If any Member establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by Members of any form of assistance to domestic producers permitted by other provisions of this Agreement.

[103]The *ad* Note to Articles XI, XII, XIII, XIV and XVIII provides:

> Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations.

provisions of the GATT 1994, notably Article VI, also apply to the activities of STEs.[104] We need not identify, for purposes of this appeal, all of the provisions of the GATT 1994 that may apply to STEs, nor consider how these disciplines interact with and reinforce each other. We do, however, believe that these other provisions reveal that, even in 1947, the negotiators of the GATT created a number of complementary requirements to address the different ways in which STEs could be used by a contracting party to seek to circumvent its obligations under the GATT. The existence of these other provisions of the GATT 1994 also supports the view that Article XVII was never intended to be the sole source of the disciplines imposed on STEs under that Agreement. This is also consistent with the view that Article XVII:1 was intended to impose disciplines on one particular type of STE behaviour, namely discriminatory behaviour, rather than to constitute a comprehensive code of conduct for STEs. Moreover, as the Panel observed, since the conclusion of the Uruguay Round, a number of additional obligations, under different covered agreements, operate to further constrain the behaviour of STEs.[105]

99. Having thus reviewed the relevant context, we are confirmed in our view that subparagraphs (a) and (b) are necessarily related to each other. Subparagraph (a) is the general and principal provision, and subparagraph (b) explains it by identifying types of differential treatment in commercial transactions. It appears to us that these types of differential treatment would be the most likely to occur in practice and, therefore, that most if not all cases under Article XVII:1 will involve an analysis of both subparagraphs (a) and (b).

100. For all these reasons, we are of the view that subparagraph (a) of Article XVII:1 of the GATT 1994 sets out an obligation of non-discrimination[106], and that subparagraph (b) clarifies the scope of that obligation. We therefore disagree with the United States that subparagraph (b) establishes separate requirements that are independent of subparagraph (a).

101. We observe that the participants in this appeal highlight the different positions taken by previous panels with respect to the relationship between subparagraphs (a) and (b) of Article XVII:1. Canada relies in particular on the statement in the 1984 GATT panel report in *Canada – FIRA* that:

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[104]We note that different views exist as to whether, or the extent to which, Article III of the GATT 1994 would also apply to STEs, although we take no view on this issue for purposes of this appeal. These different views are discussed in W. Davey, "Article XVII GATT: An Overview" in T. Cottier and P. Mavroidis (eds.), *State Trading in the Twenty-First Century* (The University of Michigan Press, 1998), p. 17 at 26. (Exhibit CDA-13 submitted by Canada to the Panel)

[105]Panel Report, paras. 6.104–6.105, referring to the *Agreement on Agriculture*, the *SCM Agreement*, and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

[106]Specifically, subparagraph (a) requires that STEs "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".

> ... sub-paragraph (b) does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding sub-paragraph ... For these reasons, the Panel considers 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 non-discriminatory treatment prescribed by the General Agreement.[107]

102. In contrast, the United States relies on the following statements of the WTO panel in *Korea – Various Measures on Beef*[108]:

> A conclusion that the principle of non-discrimination was violated would suffice to prove a violation of Article XVII; similarly, *a conclusion that a decision to purchase or buy was not based on "commercial considerations", would also suffice to show a violation of Article XVII.*[109] (emphasis added)

103. In our view, it is not clear that the panel in *Korea – Various Measures on Beef* intended this statement to have the meaning that the United States seeks to ascribe to it. In the same section of its report, that panel also made the following statements: "Article XVII.1(a) establishes the general obligation on [STEs] to undertake their activities in accordance with the GATT principles of non-discrimination"[110] and "[t]he GATT jurisprudence has also made clear that the scope of paragraph (b), which refers to commercial considerations, defines the obligations set out in paragraph (a)."[111]

104. Moreover, immediately before it made the statement quoted by the United States in support of its view of the relationship between subparagraphs (a) and (b), the panel in *Korea – Various Measures on Beef* stated that:

> [t]he list of variables that can be used to assess whether a state-trading action is based on commercial consideration (prices, availability etc…) are to be used to facilitate the assessment whether the state-trading enterprise has acted in respect of the general principles of non-discrimination.[112]

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[107]GATT Panel Report, *Canada – FIRA*, para. 5.16.

[108]The report in *Canada – FIRA* was adopted in 1984, and the report in *Korea – Various Measures on Beef* was adopted in 2001.

[109]Panel Report, *Korea – Various Measures on Beef*, para. 757. The panel's findings under Article XVII:1 of the GATT 1994 did not form part of the appeal in that case.

[110]Panel Report, *Korea – Various Measures on Beef*, para. 753.

[111]*Ibid*., para. 755.

[112]*Ibid*., para. 757.

These sentences emphasize the link between subparagraphs (a) and (b), rather than their separate nature. Moreover, that same panel also quoted, with emphasis and apparent approval, the sentence from the panel report in *Canada – FIRA* that includes the following statement: "[subparagraph (b)] does not establish a separate general obligation to allow enterprises to act in accordance with commercial considerations, but merely defines the obligations set out in the preceding subparagraph".[113]

105. We are therefore not persuaded that the panel in *Korea – Various Measures on Beef* meant to adopt an interpretative approach at odds with the one taken by the panel in *Canada – FIRA*, or to suggest that subparagraph (b) contains obligations independent of the obligation in subparagraph (a). We consider both the approach set out by the panel in *Canada – FIRA* as well as the overall approach of the panel in *Korea – Various Measures on Beef* to accord with our own view of the relationship between subparagraphs (a) and (b) of Article XVII:1.

106. Our conclusions regarding the relationship between subparagraphs (a) and (b)[114] imply that a panel confronted with a claim that an STE has acted inconsistently with Article XVII:1 will need to begin its analysis of that claim under subparagraph (a), because it is that provision which contains the principal obligation of Article XVII:1, namely the requirement not to act in a manner contrary to the "general principles of non-discriminatory treatment prescribed in [the GATT 1994] for governmental measures affecting imports or exports by private traders." At the same time, because both subparagraphs (a) and (b) define the scope of that non-discrimination obligation, we would expect that panels, in most if not all cases, would not be in a position to make any finding of violation of Article XVII:1 until they have properly interpreted and applied both provisions.[115]

B. *The Significance of a Panel's Order of Analysis*

107. Canada asserts that the Panel failed to carry out an analysis under subparagraph (a), and that it committed an error of law by proceeding to analyze the United States' claim under subparagraph (b), without having found an inconsistency under subparagraph (a). In its argument, Canada invokes *Canada – Autos*, where the Appellate Body held that the panel had "erred in its interpretative

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[113]Panel Report, *Korea – Various Measures on Beef*, para. 756.

[114]*Supra*, paras. 99 and 100.

[115]We are not asked, in this appeal, to rule on whether it might be possible for a panel to find a violation of Article XVII:1 based solely on an analysis undertaken under subparagraph (a)—without conducting any analysis under subparagraph (b)—and we make no finding in this regard. The question before us is, rather, whether it might be possible for a panel to find a violation of Article XVII:1 based solely on an analysis undertaken under subparagraph (b)—without conducting any analysis under subparagraph (a). In other words, although we accept that subparagraph (b) identifies two examples of conduct *consistent* with the obligation set forth in subparagraph (a), we make no finding as to whether subparagraph (b) also serves to define, exhaustively, the type of conduct that is *inconsistent* with the obligation in subparagraph (a).

approach"[116] in determining whether the measure at issue was inconsistent with the most-favoured-nation ("MFN") obligation contained in Article II of the *General Agreement on Trade in Services* (the "*GATS*"), without having completed, as the first step of its analysis, an examination of whether the measure at issue constituted a "measure[ ] … affecting trade in services" within the meaning of Article I:1 of the *GATS*. We note that, in so finding, the Appellate Body recalled its ruling in *US – Shrimp*. There the Appellate Body found the panel to have erred in examining the *chapeau* of Article XX *before having* determined that the measure at issue was provisionally justified by virtue of falling within the scope of one of the sub-paragraphs of Article XX, and cautioned that a panel may not ignore the "fundamental structure and logic" of a provision in deciding the proper sequence of steps in its analysis.[117]

108. In contrast to these two cases, in *US – FSC*, the Appellate Body declined to find that the panel had erred by beginning its examination of the European Communities' claim under Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") with the general definition of "subsidy" set forth in Article 1.1 to that Agreement, rather than with the last sentence of footnote 59 to the Agreement.[118] The Appellate Body explained that:

> ... the relationship between Article 1.1 and footnote 59 of the *SCM Agreement* is, therefore, different in this way from the relationship between the chapeau of Article XX of the GATT 1994 and the particular exceptions listed in sub-paragraphs (a) to (j) of that Article. In ... *United States – Shrimp* ... we observed that the application of the general standards of the chapeau of Article XX of the GATT 1994 is rendered very difficult, if not impossible, if the treaty interpreter does not, first, identify and examine the specific exception at issue.[119]

109. Thus, in each case it is the nature of the relationship between two provisions that will determine whether there exists a mandatory sequence of analysis which, if not followed, would amount to an error of law. In some cases, this relationship is such that a failure to structure the analysis in the proper logical sequence will have repercussions for the substance of the analysis itself. As the Appellate Body explained in *Canada – Autos*, "a panel may not ignore the 'fundamental structure and logic' of a provision in deciding the proper sequence of steps in its analysis, *save at the peril of reaching flawed results*".[120] In addition, as noted in *US – Shrimp*, it is imperative that a panel

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[116]Appellate Body Report, *Canada – Autos*, para. 152.

[117]Appellate Body Report, *US – Shrimp*, para. 119. See also Appellate Body Report, *US –Gasoline*, p. 22, DSR 1996:1 at 20.

[118]Appellate Body Report, *US – FSC*, para. 89.

[119]*Ibid*., footnote 99 to para. 89.

[120]Appellate Body Report, *Canada – Autos*, para. 151. (footnote omitted; emphasis added)

identify the type of measure that has been provisionally justified under a particular subparagraph of Article XX before analyzing it under the *chapeau* of that Article because:

> When applied in a particular case, the actual contours and contents of these standards will vary as the kind of measure under examination varies. ... The standard of "arbitrary discrimination", for example, under the chapeau may be different for a measure that purports to be necessary to protect public morals than for one relating to the products of prison labour.[121]

110. In this case, we have already determined that the two subparagraphs of Article XVII:1 are closely interrelated. As we have said, a panel faced with a claim of inconsistency with Article XVII:1(a) and (b) will, in most if not all cases, need to analyze and apply *both* provisions in order to assess the consistency of the measure at issue. Subparagraph (b) sets forth two specific conditions with which an STE must comply if allegedly discriminatory conduct falling, *prima facie*, within the scope of subparagraph (a) is to be found consistent with Article XVII:1. Yet, in order to know whether the conditions in (b) are satisfied, a panel must know *what* constitutes the conduct alleged to be inconsistent with the principles of non-discriminatory treatment in the GATT 1994. A panel will need to identify at least the differential treatment at issue. The outcome of an assessment under subparagraph (b) of whether the differential treatment is consistent with commercial considerations may depend, in part, upon whether the alleged discrimination relates to pricing, quality, or conditions of sale, and whether it is discrimination between export markets or some other form of discrimination.

111. It follows that, logically, a panel cannot assess whether particular practices of an allegedly discriminatory nature accord with commercial considerations without first identifying the key elements of the alleged discrimination. We emphasize that we are *not* suggesting that panels are always obliged to make specific factual and legal findings with respect to each element of a claim of discrimination under subparagraph (a) before undertaking *any* analysis under subparagraph (b). Rather, because a panel's analysis and application of subparagraph (b) to the facts of the case is, like subparagraph (b) itself, dependent on the obligation set forth in subparagraph (a), panels must identify the differential treatment alleged to be discriminatory under subparagraph (a) in order to ensure that they are undertaking a proper inquiry under subparagraph (b).

112. For these reasons, we are of the view that a failure to identify *any* conduct alleged to constitute discrimination contrary to the general principles of the GATT 1994 for governmental measures affecting imports or exports by private traders *before* undertaking an analysis of the

[121] Appellate Body Report, *US – Shrimp*, para. 120.

consistency of an STE's conduct with subparagraph (b) of Article XVII:1 would constitute an error of law. Had the Panel in this case simply *ignored* the issue of possible discrimination within the meaning of Article XVII:1(a) and passed immediately to its analysis under subparagraph (b), we would have no difficulty—based on our analysis above of the relationship between the two provisions—concluding that the Panel erred in its interpretative approach. Yet this does not appear to us to be what the Panel did. We set out in the next sub-section our understanding of how the Panel conducted its analysis in this case.

C. *The Approach Taken by the Panel in This Case*

113. In assessing the approach taken by the Panel to the first two subparagraphs of Article XVII:1, we begin with the claim that was before it. In its requests for establishment of the panels, the United States claimed that the "CWB Export Regime" is:

> - *inconsistent with paragraph 1(a) of Article XVII* of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB, in its purchases or sales involving wheat exports, shall act in a manner consistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994; *and*
>
> - *inconsistent with paragraph 1(b) of Article XVII* of the GATT 1994, pursuant to which the Government of Canada has undertaken that the CWB shall make such purchases or sales solely in accordance with commercial considerations and shall afford the enterprises of other WTO Members adequate opportunity, in accordance with customary business practice, to compete for such purchases or sales.
>
> The apparent inconsistency of the CWB Export Regime with Canada's obligations under Article XVII of the GATT 1994 includes the absence of any mechanism, and the failure of the Government of Canada to take actions, to ensure that the CWB makes purchases or sales involving wheat exports in accordance with *the requirements set forth in paragraphs 1(a) and 1(b) of Article XVII.*[122] (emphasis added)

114. As a preliminary matter we emphasize that the Panel did not, in its analysis, simply ignore subparagraph (a) and commence with subparagraph (b) of Article XVII:1. Instead, the Panel began its analysis of the United States' claim by considering subparagraph (a) of Article XVII:1. The Panel identified two interpretative issues arising thereunder in the context of this dispute: (i) the obligation imposed on Members establishing or maintaining an STE; and (ii) the meaning of the phrase in

[122]WT/DS/276/9, pp. 1–2. See also WT/DS/276/6, p. 1.

subparagraph (a) "the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders".[123] The Panel noted that, like the parties, it would use the term "STE" to denote both State enterprises established or maintained by, as well as enterprises granted exclusive or special privileges by, Members.[124] On the first issue, the Panel found that "under Article XVII:1(a), non-conforming conduct by a Member's STE engages that Member's responsibility under international law, even in the absence of intervention of the Member itself".[125]

115. Turning to the second interpretative question arising under subparagraph (a), the Panel referred to the two allegedly discriminatory practices of the CWB challenged by the United States: "(i) discrimination in the terms of sale between different export markets; and (ii) discrimination in the terms of sale between export markets, on the one hand, and the domestic market of the Member establishing or maintaining the STE, on the other hand."[126] As regards the meaning of the phrase "the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders" in subparagraph (a), the Panel agreed with the parties that:

> ... the phrase "the general principles of non-discriminatory treatment prescribed [in the GATT 1994] for governmental measures affecting imports or exports by private traders" includes the general principles of most-favoured-nation treatment as enshrined in Article I:1 of the GATT 1994.[127]

116. At this stage of its analysis, the Panel could have chosen a number of possible analytical approaches. For example, the Panel could have decided to focus more closely on the first logical step of the analysis, namely subparagraph (a). However, the Panel chose not to do so. Instead, it proceeded to analyze the United States' arguments under subparagraph (b) of Article XVII:1 "on the assumption that the United States' view [that the general principles of non-discriminatory treatment in subparagraph (a) also refer to discrimination between export markets and an export STE's home market] is correct"[128], and assuming that subparagraph (b) contains separate, independent obligations.[129]

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[123]Panel Report, para. 6.33.

[124]*Ibid*., footnote 128 to para. 6.33.

[125]*Ibid*., para. 6.43.

[126]*Ibid*., para. 6.45.

[127]*Ibid*., para. 6.48.

[128]*Ibid*., para. 6.50.

[129]*Ibid*., para. 6.59.

117. The Panel did so, however, after having interpreted some elements of subparagraph (a) and having identified the differential treatment alleged to constitute discrimination inconsistent with subparagraph (a). Moreover, the United States' request for the establishment of the panel specifically alleged inconsistency with subparagraph (a) *and* with subparagraph (b). This request, along with the United States' arguments, identified, in broad outline, a number of elements that the United States alleged would, if proven, have established inconsistency with the requirement of non-discrimination set forth in subparagraph (a). It was thus only within this broader analytical framework that the Panel chose to focus its analysis, as the United States had focused its arguments, on the provisions of subparagraph (b).[130]

118. Furthermore, the Panel emphasized that it was able to take such an approach only *because of the particular nature of the allegation made by the United States in this case*.[131] Specifically, the United States had argued that the *discriminatory treatment* in CWB sales was the *necessary result* of the CWB's non-commercial behaviour.[132] Moreover, the Panel expressly acknowledged that *if*, in its analysis under subparagraph (b), it found that the CWB engaged in behaviour inconsistent with commercial considerations, then this alone would not suffice to find a violation of Article XVII:1. Rather, the Panel reasoned that, in such an eventuality, it would have had to reconsider its analysis

[130]In other words, the Panel did not focus on the provisions of subparagraph (b) *to the complete exclusion* of subparagraph (a). To have done so would not have been consistent with our view of the relationship between those two provisions.

[131]Panel Report, paras. 6.58–6.59.

[132]In so characterizing the United States' arguments, the Panel relied on a number of statements made by the United States, such as:

> ... on the facts of this case, a finding that the CWB makes sales not in accordance with commercial considerations under Article XVII:1(b) necessarily leads to the conclusion the CWB is not acting in accordance with the general principles of non-discriminatory treatment. Under the CWB's statutory structure and incentives, it uses its pricing flexibility to make sales on non-commercial terms in order to target particular export markets, resulting in a violation of general principles of non-discriminatory treatment.

United States' reply to Panel question No. 20; Panel Report, Annex A-1, para. 19. The Panel also referred, in footnote 150 to paragraph 6.58, to: the United States' second written submission, paras. 7 and 11; the United States' first written submission, para. 78; and to the United States' second oral statement, para. 12, where the United States argued that the CWB's alleged practice of selling its excess of high quality wheat at a price discount to meet price competition for lower quality wheat in certain markets (the alleged "protein giveaway") also "demonstrates how, in this case, a violation of the standards set forth in Article XVII:1(b) necessarily leads to a violation of the non-discriminatory treatment standard in Article XVII:1(a)."

with respect to the relationship of that provision with subparagraph (a) before making any definitive finding of violation of Article XVII:1.[133]

119. We emphasize that the above reasoning by the Panel established the analytical framework within which the remainder of its analysis was conducted. Although certain subsequent statements made by the Panel could, if read in isolation, suggest that it was undertaking a distinct inquiry into whether or not the CWB Export Regime creates an incentive for the CWB to make sales that do not accord with commercial considerations[134], such statements were made in the context of an inquiry into alleged *discriminatory practices*. When examining the consistency of the CWB Export Regime with Article XVII:1(b), the Panel began its analysis with the third of the four assertions made by the United States, namely:

> ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate betwen markets by making some of its sales in a "non-commercial" manner.[135]

Due to its finding that this assertion had not been established, the Panel never reached any of the other assertions made by the United States.

120. Furthermore, the overarching theme of discrimination was recalled by the Panel itself in reaching its conclusions:

> Since it has not been demonstrated that the CWB has an incentive to make sales based on considerations which are not commercial in nature, there is no basis for concluding that the CWB *has an incentive to discriminate* between markets by selling in some markets (or not selling in some markets) on the basis of considerations which are not solely commercial in nature. ...

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[133]At para. 6.58 of its Report, the Panel explained that:

> ... if the United States succeeded in demonstrating that the CWB Export Regime necessarily leads to the CWB not making sales solely in accordance with commercial considerations, this case would present the interpretative issue whether an inconsistency with Article XVII:1 could be established merely by showing that an STE is acting contrary to the principles of subparagraph (b) of Article XVII:1.

[134]For example, at para. 6.135 ("Up to this point, we have examined whether the United States has established ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to make some of its sales not in accordance with commercial considerations"); and para. 6.146 ("we are not persuaded that the CWB's legal structure and mandate, together with the privileges enjoyed by the CWB, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations").

[135]Panel Report, para. 6.121. The Panel assumed, for the purposes of this analysis, that the first two assertions of the United States had been established.

> We therefore conclude that the United States has failed to establish its third assertion, to the effect that the CWB's legal structure and mandate, together with the privileges granted to it, *create an incentive for the CWB to discriminate* between markets by making some of its sales not solely in accordance with commercial considerations.
>
> ... Since the United States has failed to establish one of the four assertions, we reach the further and consequential conclusion that the United States has not demonstrated that the CWB Export Regime necessarily results in CWB export sales which are not solely in accordance with commercial considerations (and, hence, inconsistent with the principle of the first clause of subparagraph (b) of Article XVII:1) *and which are inconsistent with the general principles of non-discriminatory treatment prescribed in the GATT 1994 for governmental measures affecting exports by private traders (and, hence, inconsistent with the principle of subparagraph (a) of Article XVII:1)*.[136] (emphasis added)

121. That the inquiry never departed in nature from an inquiry into differential treatment of an allegedly discriminatory nature was also confirmed by the Panel's observation that:

> ... there is evidence before us which suggests that the CWB may sometimes charge different prices for the same quality of wheat in different export markets for commercial reasons, to "reflect various market factors".[137]

122. The above excerpts reveal that, even in undertaking its analysis under subparagraph (b) of Article XVII:1, the Panel focused on the differential treatment that constituted the allegedly discriminatory conduct by the CWB. Although the Panel stated that it would conduct its analysis "on the *assumption* that an inconsistency with Article XVII:1 can be established merely by demonstrating that an STE is acting contrary to the principles of subparagraph (b)"[138], in our view, the Panel identified the differential treatment alleged to constitute discrimination under subparagraph (a) in a way that ensured that its inquiry under subparagraph (b) remained within the appropriate context.

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[136]Panel Report, paras. 6.147–6.149.

[137]Panel Report, footnote 241 to para. 6.147, referring to the following Exhibits submitted by the United States to the Panel: Exhibits US-21, p. 2; and US-24, p. 10. Canada itself referred to this footnote at the oral hearing in this appeal, and stated that, at least to this extent, "the CWB does engage in price discrimination between different markets". We observe that the position taken by Canada in this regard, as we understand it, appears to have some logical inconsistencies. On the one hand, Canada requests us to rule that the Panel erred in analyzing subparagraph (b) in the absence of a finding of violation under subparagraph (a), and in not dismissing the United States claim on the basis of the United States' failure to establish that the CWB Export Regime necessarily resulted in conduct in breach of Article XVII:1(a). (Canada's other appellant's submission, para. 60) Yet, at the same time, Canada admits that the CWB engages in price discrimination and asks us to uphold the findings that the Panel did make under subparagraph (b) of Article XVII:1. (Canada's response to questioning at the oral hearing)

[138]Panel Report, para. 6.59. (emphasis added)

For this reason, the approach taken by the Panel in this case must be distinguished from the approach taken by the panels in *US – Shrimp* and *Canada – Autos*. Those panels proceeded directly to an analysis under one provision, without having engaged in *any* analysis under, or made any assumptions relating to, a provision setting forth a logically prior analytical step.

123. Having thus set out, in some detail, the approach taken by the Panel, we turn to consider whether the Panel's order or method of analysis amounted to an error of law. It is true, as Canada asserts, that the Panel stated that it would proceed on the basis of an *assumption*.[139] Yet this statement taken in isolation does not convey a full sense of the approach taken by the Panel. Rather, the assumption made by the Panel is informed and supplemented by both the preceding and subsequent parts of its analysis.

124. Considering the entirety of the analysis undertaken by the Panel, we first note that, although the Panel stated that it would evaluate the claim using the interpretation of Article XVII:1(b) put forward by the United States, the Panel used this approach for only *part* of its analysis, namely its interpretation of subparagraph (b). Given that the Panel found that *even* using the United States' interpretation, the United States had not established its claim, the assumption ultimately proved immaterial. Secondly, the Panel did *not* ignore subparagraph (a), as it had dealt with it previously when it determined that the MFN principle in Article I of the GATT is included within the reference to the "general principles of non-discriminatory treatment prescribed in [the GATT 1994] for governmental measures affecting imports or exports by private traders" in subparagraph (a)[140] and referred to evidence of the price differentiation practiced by the CWB in its export markets.[141] In our view, these facts reveal that the Panel identified differential treatment that could constitute *prima facie* discrimination under subparagraph (a), before moving to its analysis under subparagraph (b). In any event, in applying its interpretation of subparagraph (b) in this case, the Panel's examination was essentially the same as the evaluation that the Panel would have been required to make if it had chosen first to interpret the relationship between subparagraphs (a) and (b), and had explicitly found that the CWB engages in price differentiation between export markets and that such differentiation could constitute *prima facie* discrimination falling within the scope of subparagraph (a). Therefore, although the Panel refrained from explicitly defining the relationship between the first two subparagraphs of Article XVII:1, its approach was consistent with our interpretation of that relationship.

[139]Panel Report, para. 6.59.

[140]*Ibid*., para. 6.48.

[141]*Ibid*., footnote 241 to para. 6.147.

125. In sum, we find that, in the particular circumstances of this case, the Panel did not err in not considering the "proper" relationship between subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994, or in proceeding to examine the consistency of the CWB Export Regime with Article XVII:1(b) without first having found a breach of Article XVII:1(a). It follows that we decline Canada's request to find that the Panel erred in failing to dismiss the United States' claim under Article XVII:1 on the basis that the United States failed to establish that the CWB Export Regime is inconsistent with Article XVII:1(a).[142]

126. Notwithstanding this finding, we wish to express some concern about the manner in which the Panel conducted its analysis of the consistency of the CWB Export Regime with Article XVII:1(a) and (b). As a general principle, panels are free to structure the order of their analysis as they see fit. In so doing, panels may find it useful to take account of the manner in which a claim is presented to them by a complaining Member. Furthermore, panels may choose to use assumptions in order to facilitate resolution of a particular issue or to enable themselves to make additional and alternative factual findings and thereby assist in the resolution of a dispute should it proceed to the appellate level.[143]

127. At the same time, panels must ensure that they proceed on the basis of a properly structured analysis to interpret the substantive provisions at issue. As the Appellate Body found in *US – Shrimp* and *Canada – Autos*, panels that ignore or jump over a prior logical step of the analysis run the risk of compromising or invalidating later findings. This risk is compounded in the case of two legally interrelated provisions, where one of those provisions must, as a matter of logic and analytical coherence, be analyzed before the other, as is the case with subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994.

128. Furthermore, an over-reliance on the use of assumptions as an aid to analysis can detract from the clarity of a panel's analysis or have other adverse effects at the appellate stage. For example, the Appellate Body has observed that:

> [w]e do not see anything improper *per se* in panels making ... assumptions .... We note, however, that the cumulation of several inter-related assumptions could have affected our ability to complete the Panel's legal analysis ... .[144]

[142]Canada's other appellant's submission, para. 60.

[143]Appellate Body Report, *US – Softwood Lumber IV*, para. 118.

[144]Appellate Body Report, *US – Steel Safeguards*, footnote 494 to para. 481.

129. The intertwining of analysis and assumption may, in some cases, create a degree of uncertainty as to the precise findings that a panel did make. This could pose difficulties for parties in deciding whether and what to appeal. We thus recommend that when using assumptions as a tool to facilitate analysis—which we recognize can be useful—panels ensure that they are clear and explicit as to exactly what is assumed and what they have concluded based on these assumptions.

130. In this case, the Panel made a number of different assumptions, some of which were layered one on top of another.[145] In consequence, it is at times difficult, when reading the Panel Report, to distinguish clearly between the Panel's own *analysis* of the issues before it, and the Panel's use of *assumptions* taken from the various arguments put forward by the United States. As we have seen, however, these difficulties were not fatal to the Panel's legal analysis.

D. *Canada's Conditional Appeal*

131. In its other appeal, Canada refers to the possibility that we might characterize the Panel's refusal to rule on the proper relationship between subparagraphs (a) and (b) of Article XVII:1 as an exercise of judicial economy. Should we so characterize the Panel's approach, then Canada requests that we find that such approach constituted "an improper use of judicial economy", and that we "make the appropriate findings."[146] Canada emphasizes that a panel may not exercise judicial economy on a *threshold* issue.

132. We observe, first, that this ground of Canada's appeal is in the nature of a conditional appeal. The appeal is predicated on the condition that we consider that the Panel exercised judicial economy in declining to make any finding as to the relationship between subparagraphs (a) and (b) of Article XVII:1. If we do not consider that the Panel exercised judicial economy in so proceeding, then we need make no finding with respect to this ground of Canada's appeal.

133. The practice of judicial economy, which was first employed by a number of GATT panels, allows a panel to refrain from making multiple findings that the same measure is *inconsistent* with

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[145]The Panel assumed: that the phrase "the general principles of non-discriminatory treatment prescribed in [the GATT 1994] for governmental measures affecting imports or exports by private traders" requires that, in their sales, export STEs not discriminate between export markets, on the one hand, and their home market, on the other hand (Panel Report, para. 6.50 and footnote 146 thereto); "that an inconsistency with Article XVII:1 can be established merely by demonstrating that an STE is acting contrary to the principles of subparagraph (b)" (Panel Report, para. 6.59, and footnotes 135 and 136 to paras. 6.41 and 6.42, respectively); that the CWB's privileges give it more flexibility with respect to pricing and other sales terms than a commercial actor and that the pricing flexibility resulting from the CWB's privileges enables the CWB to offer "non-commercial" sales terms and to deny "commercial" enterprises of other Members an adequate opportunity to compete. (Panel Report, para. 6.121 and footnotes 195–196 thereto)

[146]Canada's other appellant's submission, para. 61. Canada does not explain what it considers might be such "appropriate findings".

various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute.[147] Although the doctrine of judicial economy *allows* a panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a panel to exercise such restraint.[148] At the same time, if a panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law. [149]

134. In this case, the Panel itself did not claim to be exercising judicial economy when it made an assumption concerning the relationship between subparagraphs (a) and (b) of Article XVII:1. The Panel made *no* finding of inconsistency with respect to the CWB Export Regime that would have entitled it to exercise judicial economy with respect to other claims. Moreover, neither Canada nor the United States argues that the Panel's approach is properly classified as an exercise of judicial economy, nor that the concept of judicial economy must be understood otherwise than as set out above.[150] In sum, we see no reason to characterize the Panel's use of an assumption concerning the relationship between subparagraphs (a) and (b) of Article XVII:1 as an exercise of judicial economy. Accordingly, the condition on which this aspect of Canada's other appeal is made is not satisfied and we need make no finding in this regard.

V. Interpretation of Subparagraph (b) of Article XVII:1 of the GATT 1994

135. In this Section we deal with the United States' appeal relating to the findings of the Panel under subparagraph (b) of Article XVII:1 of the GATT 1994, as well as a request for "guidance" by Canada.

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[147]In tracking the history of the practice of judicial economy, the Appellate Body observed, in *US – Wool Shirts and Blouses*, that:

> ... if a panel found that a measure was *inconsistent* with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also *inconsistent* with other GATT provisions that a complaining party may have argued were violated.

(Appellate Body Report, p. 18, DSR 1997:1, p. 323 at 339. (emphasis added))

[148]Appellate Body Report, *US – Lead and Bismuth II*, para. 71.

[149]Appellate Body Report, *Australia – Salmon*, para. 223.

[150]Of the third participants, only the European Communities, at the oral hearing in this appeal, suggested that the Panel's approach could be viewed as an exercise of judicial economy.

136. Article XVII:1(b) provides:

> 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 Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

The United States' arguments, as well as the Panel's findings, focus on the two discrete clauses that comprise subparagraph (b). The Panel decided to consider the second clause of subparagraph (b) before the first clause, observing that the "order in which the Panel analyses the two clauses is ... of no particular importance."[151] Although we agree that, in this instance, the order of the Panel's analysis was inconsequential, we will nevertheless consider the two clauses in the order in which they are set out in subparagraph (b).

A. *Making Purchases and Sales Solely in Accordance with Commercial Considerations*

137. Before the Panel, the United States argued that the first clause of subparagraph (b) must be interpreted as prohibiting STEs from using their exclusive or special privileges to the disadvantage of "commercial actors". Having examined the relevant clause, the Panel declined to accept the interpretation put forward by the United States.[152] On appeal, the United States challenges, in particular, the following statement made by the Panel as part of its reasoning on this issue:

> In our view, the circumstance that STEs are not inherently "commercial actors" does not necessarily lead to the conclusion that the "commercial considerations" requirement is intended to make STEs behave like "commercial" actors. Indeed, we think it should lead to a different conclusion, namely, that the requirement in question is simply intended to prevent STEs from behaving like "political" actors.[153]

138. According to the United States, this statement does not correspond to the proper meaning of the phrase "commercial considerations" in the first clause of Article XVII:1(b). The United States contends that "commercial considerations" are "those experienced by commercial actors"[154] and that

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[151]Panel Report, para. 6.60.

[152]*Ibid*., para. 6.106.

[153]*Ibid*., para. 6.94.

[154]United States' appellant's submission, para. 3.

commercial actors are those "engaged in commerce" and "are interested in financial return."[155] Such actors do not act merely on the basis of "non-political" considerations. Rather, they must also act within the limits of their cost constraints, which are established by the market. According to the United States, by requiring that STEs act solely in accordance with commercial considerations, Article XVII:1(b) serves to prevent them from using their privileges to the disadvantage of commercial actors. The United States thus asks us to reverse the Panel's finding and to conclude that commercial considerations are those under which commercial actors must operate.

139. We observe that the United States' appeal of this issue is based on the alleged error made by the Panel in interpreting the obligation to make sales solely in accordance with commercial considerations as equivalent to an obligation to make "non-political" decisions.[156] The only "finding" under the first clause of Article XVII:1(b) that the United States asks us to reverse is the Panel's statement in paragraph 6.94 of the Panel Report concerning "political actors". In our view, however, the United States mischaracterizes the statement made by the Panel.

140. In examining the United States' appeal on this issue, it is important to view the challenged statement made by the Panel in its proper context. The Panel began its analysis by considering the meaning of the term "commercial considerations" in subparagraph (b) and found that this term should be understood as meaning "considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales 'as mere matters of business'."[157] The Panel also determined that the requirement that STEs act solely in accordance with such considerations "must imply that they should seek to purchase or sell on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc."[158] Thus, the Panel interpreted the term "commercial considerations" as encompassing a range of different considerations that are defined in any given case by the type of "business" involved (purchases or sales), and by the economic considerations that motivate actors engaged in business in the relevant market(s).[159]

141. The Panel then turned to address several arguments advanced by the United States with respect to the interpretation of the first clause of subparagraph (b). It was in responding to the United States' assertion that the requirement that STEs act "solely in accordance with commercial considerations" is equivalent to a requirement that STEs act like "commercial actors" that the Panel

[155]United States' appellant's submission, para. 26.

[156]*Ibid*., para. 21.

[157]Panel Report, para. 6.85.

[158]*Ibid*., para. 6.87.

[159]The Panel referred, in this regard, to the illustrative list found in subparagraph (b) itself: "including price, quality, availability, marketability, transportation and other conditions of purchase or sale". (Panel Report, para. 6.86)

made the statement that "the requirement in question is simply intended to prevent STEs from behaving like 'political' actors".[160] Yet in so doing the Panel expressly stated that it was *not* , as the United States now suggests that it did, equating "non-commercial" actors with political actors. It did so in a footnote attached to the sentence deemed objectionable by the United States:

> We use the word "political actors" here merely to contrast our understanding of the first clause with that of the United States. *Non-commercial considerations include, but are not limited to, political considerations*.[161] (emphasis added)

142. Throughout the remainder of the paragraph in which the challenged statement is found, the Panel consistently referred to non-commercial considerations as "political, *etc.*", thereby reinforcing its explicit recognition that the universe of non-commercial considerations includes, but is not limited to, political considerations. Accordingly, when the statement is viewed in context, the Panel clearly did *not*, as the United States' argument suggests, interpret the first clause in subparagraph (b) to mean that an STE is free to act in any manner it pleases so long as it is not motivated by "political" considerations.

143. We conclude, in the light of the above, that this part of the United States' appeal is founded on a mischaracterization of the statement made by the Panel in paragraph 6.94 of its Report. We, therefore, dismiss this ground of appeal.

144. We nevertheless think it important to observe that the Panel's interpretation of the term "commercial considerations" necessarily implies that the determination of whether or not a particular STE's conduct is consistent with the requirements of the first clause of subparagraph (b) of Article XVII:1 must be undertaken on a case-by-case basis, and must involve a careful analysis of the relevant market(s). We see no error in the Panel's approach; only such an analysis will reveal the type and range of considerations properly considered "commercial" as regards purchases and sales

[160]Panel Report, para. 6.94. (footnote omitted)

[161]*Ibid*., footnote 175 to para. 6.94.

made in those markets, as well as how those considerations influence the actions of participants in the market(s).[162]

145. At the same time, our interpretation of the relationship between subparagraphs (a) and (b) of Article XVII:1[163] necessarily implies that the scope of the inquiry to be undertaken under subparagraph (b) must be governed by the principles of subparagraph (a). In other words, a panel inquiring whether an STE has acted solely in accordance with commercial considerations must undertake this inquiry with respect to the market(s) in which the STE is alleged to be engaging in discriminatory conduct. Subparagraph (b) does not give panels a mandate to engage in a broader inquiry into whether, in the abstract, STEs are acting "commercially". The disciplines of Article XVII:1 are aimed at preventing certain types of discriminatory behaviour. We see no basis for interpreting that provision as imposing comprehensive competition-law-type obligations on STEs, as the United States would have us do.

146. Before leaving this issue, we refer to an additional argument advanced by the United States. The United States observes that Article XVII recognizes the risk that STEs with special privileges may be able to use those privileges to the disadvantage of commercial actors in a given market. According to the United States, to eliminate that risk, Article XVII:1(b), therefore, constrains STEs to act "solely in accordance with commercial considerations." For the United States, because commercial actors naturally conduct their business on the basis of commercial considerations, the first clause of Article XVII:1(b) necessarily must prevent an STE from using its privileges in a way that creates serious obstacles to trade and disadvantages such commercial actors.[164] The United States emphasizes that the Panel's interpretation, that the first clause of subparagraph (b) does not prohibit STEs from using their privileges, must be wrong because it "permits STEs to use their special privileges to the full extent possible, even if this causes discrimination or other serious obstacles to trade" and that "[t]his is no discipline at all".[165]

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[162]We note, for example, Canada's observation that:

> [t]he way that a particular enterprise weighs and applies "commercial considerations" depends on the circumstances in which it operates, including the size of the enterprise, the characteristics of the market in which it operates, the type of organisation it is, its financial circumstances and the degree of competition in the market. For example, a large enterprise with significant assets may be willing to sell on credit terms that a smaller enterprise would not. Both enterprises would be acting in accordance with commercial considerations, even though their conduct is opposite. (Canada's appellee's submission, para. 56)

[163]*Supra*, Section IV:A.

[164]United States appellant's submission, para. 23.

[165]*Ibid*., para. 29.

147. Canada, Australia, China, and the European Communities all disagree with the United States' reasoning. Essentially, they argue that accepting the United States' view of Article XVII:1(b) would force STEs to refrain from using *any* of the special rights or privileges that they may enjoy and, thereby, put them at a competitive *disadvantage* as compared to private enterprises, which can and do exercise any and all market power they can muster. These participants argue that any such interpretation would be inconsistent with the explicit recognition, in Article XVII:1, that Members are entitled to establish and maintain STEs and to grant them exclusive or special privileges.

148. The Panel found that it could not accept the United States' position for two main reasons. First, it was not supported by the text of subparagraph (b) itself. Rather:

> ... the only constraint the first clause of subparagraph (b) imposes on the use by export STEs of their exclusive or special privileges is that these privileges must not be used to make sales which are not driven exclusively by "commercial considerations" as we understand that term. Whether particular sales by an export STE are driven exclusively by commercial considerations must be assessed in light of the specific circumstances surrounding these sales, including the nature and extent of competition in the relevant market.[166]

149. We agree with this statement by the Panel, and observe that it does not imply, as the United States suggests, that Article XVII:1 contains "no discipline at all".[167] In fact, the Panel's approach emphasizes that whether an STE is in compliance with the disciplines in Article XVII:1 must be assessed by means of a market-based analysis, rather than simply by determining whether an STE has used the privileges that it has been granted. In arguing that Article XVII:1(b) must be interpreted as prohibiting STEs from using their exclusive or special privileges to the disadvantage of "commercial actors", the United States appears to construe Article XVII:1(b) as requiring STEs to act not only as commercial actors in the marketplace, but as *virtuous* commercial actors, by tying their own hands. We do not see how such an interpretation can be reconciled with an analysis of "commercial considerations" based on market forces. In other words, we cannot accept that the first clause of subparagraph (b) would, as a general rule, require STEs to refrain from using the privileges and advantages that they enjoy because such use might "disadvantage" private enterprises. STEs, like private enterprises, are entitled to exploit the advantages they may enjoy to their economic benefit. Article XVII:1(b) merely prohibits STEs from making purchases or sales on the basis of non-commercial considerations.

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[166]Panel Report, para. 6.103.

[167]United States' appellant's submission, paras. 3 and 29.

150. Moreover, we see force in the second reason that the Panel gave for rejecting the purposive interpretation put forward by the United States: that such an interpretation, which attributes a very broad scope to Article XVII:1, takes no account of the disciplines that apply to the behaviour of STEs elsewhere in the covered agreements.[168] The Panel referred, in this regard, to the provisions of the *SCM Agreement*, Article VI of the GATT 1994 and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, and the *Agreement on Agriculture*.[169]

151. It follows that we also agree with the Panel's ultimate conclusion that it could not accept the arguments put forward by the United States because:

> ... neither the text of the first clause of subparagraph (b) nor "logic" requires or authorizes us to interpret the first clause so as to prevent export STEs from using their exclusive or special privileges to the disadvantage of "commercial actors".[170]

B. *Affording Other Members' Enterprises Adequate Opportunity to Compete for Participation in Purchases or Sales*

152. Before the Panel, the United States argued that the second clause of subparagraph (b), which requires STEs to "afford the enterprises of the other Members adequate opportunity ... to compete for participation in such purchases or sales" should in this case be interpreted to mean that the CWB must offer the requisite opportunity to "any enterprise that is competing for participation in CWB wheat sales, including enterprises competing to purchase wheat from the CWB (*i.e.*, wheat buyers) and those enterprises selling wheat in the same market as the CWB (*i.e.*, wheat sellers)."[171] The Panel, however, was:

> ... unable to accept the United States' view that, in the case of an export STE, the "enterprises of the other [Members]" may include enterprises selling the same product as that offered for sale by the export STE in question (*i.e.*, the competitors of the export STE).[172]

153. The United States appeals this finding by the Panel. According to the United States, the Panel failed to interpret the term "enterprises" according to its ordinary meaning, read in its context and in the light of the object and purpose of the GATT 1994. The United States asserts that the Panel's incorrect interpretative approach led it to the erroneous conclusion that this term referred to

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[168]Panel Report, paras. 6.104–6.105.

[169]See also *supra*, para. 98 and footnote 105 thereto.

[170]Panel Report, para. 6.106.

[171]*Ibid.*, para. 6.61.

[172]*Ibid.*, para. 6.72.

enterprises that wish to *buy* from an STE, but not to enterprises that wish to *sell* in competition with an STE.[173] In so finding, the Panel adopted an interpretation that, according to the United States, "impermissibly narrows the reach of Article XVII's disciplines".[174] The United States requests us to reverse this interpretation and to find that the term "enterprises" in the second clause of subparagraph (b) includes both buyers and sellers.

154. The second clause of Article XVII:1(b) provides:

> [the provisions of subparagraph (a) are to be understood to require that STEs] shall afford the enterprises of the other Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales.

155. The United States correctly points out that the ordinary meaning of the word "enterprises", which is used in this phrase, includes both enterprises that buy and enterprises that sell.[175] This observation alone, however, does not resolve the interpretative question raised. The meaning of the word must also be examined within its context, particularly the phrase "compete for participation in such purchases or sales".

156. In the abstract, competition to participate in purchases and sales could include competition to participate as a buyer, as a seller, or both. However, the clause under examination does not refer, in the abstract, to *any* purchases and sales. Rather, it refers to "*such* purchases or sales", repeating the phrase found in the first clause of subparagraph (b). As discussed in our analysis above[176], this phrase in subparagraph (b) of Article XVII:1 refers back to the activities identified in subparagraph (a), namely the purchases and sales of an STE involving imports or exports.

157. In other words, the second clause of subparagraph (b) refers to purchases and sales transactions where: (i) one of the parties involved in the transaction is an STE; and (ii) the transaction involves imports to or exports from the Member maintaining the STE. Thus, the requirement to afford an adequate opportunity to compete for participation (*i.e.*, taking part with others[177]) in "such" purchases and sales (import or export transactions involving an STE) must refer to the opportunity to become the STE's counterpart in the transaction, *not* to an opportunity to replace the STE as a participant in the transaction. If it were otherwise, the transaction would no longer be

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[173]United States appellant's submission, para. 12.

[174]*Ibid.*, para. 20.

[175]Indeed, the Panel itself made a similar observation at para. 6.68 of its Report. See *infra*, para. 159.

[176]*Supra*, para. 90.

[177]The word "participation" is defined as "[t]he action or an act of taking part with others (*in* an action or matter)". (*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 2107)

the type of transaction described by the phrase "*such* purchases or sales" in the second clause of Article XVII:1(b), because it would not involve an STE as a party. Thus, in transactions involving two parties, one of whom is an STE seller, the word "enterprises" in the second clause of Article XVII:1(b) can refer *only* to buyers.[178]

158. Turning to the reasoning of the Panel on this issue, it is important, as a first step, to consider how the Panel approached this issue. The United States' appeal focuses on the word "enterprises" and suggests that the Panel's ruling, that "enterprises" means enterprises that buy and not enterprises that sell, is plainly erroneous. However, this is not what the Panel ruled. Rather, the Panel engaged in an interpretation of the second clause of Article XVII:1(b), *not* simply of the word "enterprises" within that clause.

159. The Panel began by observing that, taken alone, the word "enterprises" in the second clause of Article XVII:1(b) could encompass both the enterprises of other Members seeking to buy from an exporting STE, as well as the enterprises of other Members seeking to sell a product in competition with an exporting STE.[179] The Panel read the remainder of the second clause of Article XVII:1(b), however, as consistent with a narrower meaning of the word "enterprises" within that clause. In particular, the Panel found that the interpretation of the term "enterprises" was informed by the stipulation, within the same clause, that the relevant "enterprises" be afforded an adequate opportunity "to compete for *participation* in such purchases or sales". (emphasis added) The Panel took account of the fact that the types of enterprise falling within the scope of the second clause of Article XVII:1(b) will be influenced by whether the STE involved in the purchase or sale is a buyer or a seller. In the light of this observation, the Panel considered that the phrase "compete for

[178]We also note that the text of the second clause of Article XVII:1(b) qualifies the obligation to provide "adequate opportunity ... to compete for participation" with the phrase "in accordance with customary business practice." In this regard, Canada argues, in paragraph 76 of its appellee's submission, that:

> ... customary business practice is not for competitors to "participate" in each other's sales, or to assist or cooperate with competitors (except, perhaps, in consortiums, but then they would no longer be "competitors" in the specific context of such a transaction). Rather, customary business practice is for an enterprise to win sales at the expense of its competitors.

[179]Panel Report, para. 6.68.

participation" (emphasis added) was critical in ascertaining the meaning of "enterprises" in the preceding phrase:

> ... we think it cannot equally be said that enterprises selling the same product as an export STE compete to "participate", or to "have a part or share", in an export STE's sales. To be sure, enterprises selling the same product as an export STE may "compete" with an export STE for sales in general. But we are not persuaded that, in their capacity as sellers, such enterprises "compete for participation in [the relevant export STE's] sales".[180]

160. The Panel's analysis of the second clause of Article XVII:1(b), thus, closely resembles our own, and we agree with it. At the same time, we wish to highlight that, in interpreting the second clause of Article XVII:(b), the Panel set itself a narrow task, based on the case before it. The Panel limited its interpretation of the requirement in the second clause of subparagraph (b) to the extent necessary to answer the question whether the United States was correct in asserting that the obligation to afford adequate opportunity to compete for participation in purchases or sales extended to enterprises selling wheat in the same market as the CWB (*i.e.*, wheat sellers), or whether that obligation extended only to enterprises competing to purchase wheat from the CWB (*i.e.*, wheat buyers). The Panel did not determine the full ambit of the requirement to "afford adequate opportunity ... to compete for participation" in relevant purchases and sales. Nor do we. The Panel expressly recognized the possibility that, in other circumstances, particular enterprises could act both as a buyer and as a seller.[181] The Panel also explicitly stated that it was not asked to, and was *not*, ruling on the scope of the obligation in this clause with respect to STEs that act as *purchasers*, rather than as *sellers*.[182]

161. It follows that the Panel interpreted the second requirement in subparagraph (b) of Article XVII:1 only to the extent necessary to resolve the specific case before it and to dispose of the United States' argument that the CWB was required, under the second clause of Article XVII:1(b), to afford adequate opportunity to compete to "those enterprises selling wheat in the same market as the CWB (*i.e.*, wheat sellers)".[183] To that extent, we uphold the Panel's findings that the term "enterprises of the other Members" in the second clause of subparagraph (b) of Article XVII:1 includes "enterprises interested in buying the products offered for sale by an export STE"[184] but not

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[180]Panel Report, para. 6.69. (footnote omitted)

[181]See Panel Report, footnotes 157 and 161 to paras. 6.69 and 6.71, respectively. We note that none of the participants or third participants has suggested that this is the case in the markets in which the CWB was alleged to be engaging in discriminatory conduct.

[182]See Panel Report, para. 6.73 and footnote 164 thereto.

[183]Panel Report, para. 6.61.

[184]*Ibid.*, para. 6.73.

"enterprises selling the same product as that offered for sale by the export STE in question (*i.e.*, the competitors of the export STE)."[185]

C. *Canada's Request for Guidance*

162. Canada states that it would welcome "guidance" from the Appellate Body as to whether a conditional request to complete the analysis of a particular issue should be raised in an appellee's submission filed pursuant to Rule 22 of the *Working Procedures*, or in an other appellant's submission filed pursuant to Rule 23.[186] Canada seeks this guidance in connection with a conditional request that it made in both its other appellant's submission and its appellee's submission.[187] The request is that, if the Appellate Body reverses the Panel's interpretation of Article XVII:1(b), the Appellate Body complete the analysis and find that the United States has not established that the CWB Export Regime necessarily results in a breach of Article XVII:1(b).[188]

163. As we have not reversed the Panel's interpretation of subparagraph (b) of Article XVII:1[189], the condition on which Canada's request to complete the analysis is made has not been satisfied. We note that neither the United States nor any of the third participants has addressed the issue of the proper method for raising a conditional request to complete the analysis in their submissions in this appeal. Nor does Canada offer its own view on this issue. In the circumstances of this appeal, it is neither necessary nor appropriate for us to provide "guidance" on the issue of how conditional requests to complete the analysis are properly brought before the Appellate Body.[190]

VI. Assessment of the Measure

164. We examine next the United States' argument that the Panel erred by failing to examine the CWB Export Regime in its entirety. According to the United States, although the Panel correctly

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[185]Panel Report, para. 6.72.

[186]Canada's other appellant's submission, para. 56.

[187]*Ibid*., paras. 56–58; Canada's appellee's submission, para. 170.

[188]Canada's other appellant's submission, paras. 57–58 and 64. In paragraph 56, Canada explained that it was making the conditional request in its other appellant's submission in "the interest of ensuring that full notice is given to the Parties and possible third participants of the issues that may arise in this proceeding."

[189]*Supra*, paras. 143, 151 and 161.

[190]We observe, in this respect, that Article 17.9 of the DSU provides for the Appellate Body to consult with the Director-General of the WTO and the Chair of the DSB in amending its *Working Procedures.* In accordance with the DSB Decision of 19 December 2002 (WT/DSB/31), the DSB Chair also consults with WTO Members on amendments proposed by the Appellate Body. The Appellate Body monitors the operation of the *Working Procedures* closely, and recognizes that a need for revision may arise from time to time. We believe that issues such as the one referred to by Canada in this appeal could usefully be addressed in the context of future revision.

defined the measure at issue as consisting of three elements, the Panel failed to analyze one of those elements, namely the exclusive and special privileges granted to the CWB.[191] The United States alleges that this constituted legal error by the Panel in its application of Article XVII:1 to the facts of the case.[192]

165. Canada argues that this ground of the United States' appeal should be examined under Article 11 of the DSU because "the United States claims not a legal error as such, but rather that the Panel did not adequately, correctly, or objectively assess the matter before it".[193] Canada requests us to find that the Panel did not fail to make an objective assessment of the matter before it in accordance with Article 11 of the DSU.[194]

166. As we explained above, the Panel identified the measure at issue as the CWB Export Regime.[195] It defined this as including: the legal framework of the CWB, the exclusive and special privileges granted to the CWB by the government of Canada, and certain actions by Canada and the CWB relating to the sale of wheat for export.[196] The Panel further identified the privileges at issue as: (i) the exclusive right to purchase and sell Western Canadian wheat for export and domestic human consumption; (ii) the right to set, subject to government approval, the initial price payable for Western Canadian wheat destined for export or domestic human consumption; (iii) the government guarantee of the initial payment to producers of Western Canadian wheat; (iv) the government guarantee of the CWB's borrowing; and (v) government guarantees of certain CWB credit sales to foreign buyers.[197] In addition, the Panel understood the United States as challenging the CWB Export Regime "as a whole"[198] and as arguing that "it is the combination of the various elements of the CWB Export Regime, not any one element taken in isolation, that necessarily results in the CWB making non-conforming export sales".[199] Finally, the Panel noted that the United States is challenging the

[191]United States' appellant's submission, paras. 35 and 37.

[192]United States' response to questioning at the oral hearing.

[193]Canada's appellee's submission, para. 88. This view is shared by Australia and China. (Australia's third participant's submission, para. 66; China's third participant's submission, para. 23)

[194]Canada's appellee's submission, para. 171.

[195]*Supra*, paras. 10–12.

[196]Panel Report, para. 6.12.

[197]*Ibid*., para. 6.15.

[198]*Ibid*., para. 6.26.

[199]*Ibid*., para. 6.25.

CWB Export Regime as such.[200] On appeal, the United States acknowledges that the Panel "correctly defined th[e] measure".[201] Thus, the Panel's identification of the measure at issue is not before us.

167. At the outset of its examination of the consistency of the CWB Export Regime with Article XVII:1, the Panel explained that the United States' claim rested on "four broad assertions"[202], and that the United States would have to demonstrate each of its four assertions in order to succeed in its claim. As we have seen[203], the Panel proceeded in its analysis beginning with the third assertion, namely:

> ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate betwen markets by making some of its sales in a "non-commercial" manner.[204]

The United States is not alleging, on appeal, that the Panel erred by adopting this approach.

168. The United States' claim on appeal is that, in analyzing the third assertion, the Panel examined the legal structure and mandate of the CWB[205], but did not examine the privileges granted to the CWB. Before addressing the point raised by Canada about the legal basis of the United States' claim, we will examine whether the Panel, in fact, "ignored" the privileges granted to the CWB, as the United States contends.[206]

169. We observe, first, that the Panel did not overlook the privileges granted to the CWB. As we have seen, the Panel identified the relevant privileges correctly, and in some detail.[207] Thereafter, the

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[200]Panel Report, para. 6.28.

[201]United States' appellant's submission, para. 31.

[202]Panel Report, para. 6.110. These "four broad assertions" are: (i) that the privileges enjoyed by the CWB give it more flexibility with respect to pricing and other sales terms than a "commercial actor"; (ii) that the alleged pricing flexibility resulting from the CWB's privileges enables the CWB to offer "non-commercial" sales terms (contrary to the first clause of subparagraph (b) of Article XVII:1) and thus to deny "commercial" enterprises of other Members an adequate opportunity to compete (contrary to the second clause of subparagraph (b)); (iii) that the CWB's legal mandate and structure, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales in a "non-commercial" manner; and (iv) that the government of Canada is not taking any steps to ensure that CWB export sales conform to the principles of subparagraphs (a) and (b) of Article XVII:1. (Panel Report, paras. 6.110–6.114)

[203]*Supra*, para. 119.

[204]Panel Report, para. 6.121. The Panel assumed, for the purposes of this analysis, that that first two assertions of the United States had been established.

[205]The United States, however, makes a separate claim that, in examining the legal structure and mandate of the CWB, the Panel disregarded facts presented by the United States. We address this claim in the next section of this Report.

[206]United States' appellant's submission, paras. 4 and 35–40.

[207]*Supra*, para. 166.

Panel expressly and repeatedly referred to the CWB's privileges. At the outset of its analysis, the Panel explained that it would examine "the assertion that the CWB's legal structure and mandate, *together with the privileges granted to it*, create an incentive for the CWB to discriminate between markets by making some of its sales in a 'non-commercial' manner."[208] In the paragraphs following this statement, the Panel frequently referred to the existence, if not the details of, such privileges.[209]

170. For example, the Panel explicitly mentioned, at paragraph 6.129 of its Report, that "the CWB might, *due to the privileges it enjoys*, sell wheat at lower prices than 'commercial actors' could offer". (emphasis added) Furthermore, as it reached the end of its reasoning on the third pillar of the United States' claim, the Panel explained that:

> In summary, ... we are not persuaded that the CWB's legal structure and mandate, *together with the privileges enjoyed by the CWB*, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations.[210] (emphasis added)

The Panel concluded that it:

> ... [saw] nothing in the legal structure of the CWB, its mandate, *or its privileges* which would create an incentive for the CWB to discriminate between markets for reasons which are not commercial.[211] (emphasis added)

Thus, we cannot agree with the United States that the Panel "ignored" the privileges accorded to the CWB in examining the consistency of the CWB Export Regime with Article XVII:1.

171. The United States acknowledged at the oral hearing that the Panel referred to the CWB's privileges, but contends that the Panel did not consider them beyond their mere mention. We are not persuaded that the Panel's examination of the privileges was inadequate, especially in the light of the Panel's definition of the measure at issue and its interpretation that Article XVII:1(b) does not prevent an STE from using its special privileges, an interpretation that we have confirmed on appeal.[212]

172. In rejecting the interpretation of Article XVII:1(b) put forward by the United States, the Panel stated that it could not "interpret the first clause so as to prevent export STEs from using their exclusive or special privileges to gain a competitive advantage in the marketplace".[213] The Panel,

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[208]Panel Report, para. 6.121. (emphasis added)

[209]See, for example, Panel Report, paras. 6.128–6.129, 6.135, 6.141, and 6.145–6.147.

[210]Panel Report, para. 6.146.

[211]*Ibid*., para. 6.147.

[212]*Supra*, para. 151.

[213]Panel Report, para. 6.100.

moreover, explained that it did not believe "that particular sales by an export STE could be regarded as not in accordance with 'commercial' considerations merely because the specific terms of these sales could not have been offered in the absence of the exclusive or special privileges granted to the export STE".[214] It would appear that, in the light of its interpretation of Article XVII:1(b), the Panel considered that the special privileges had limited relevance for its analysis of the United States' assertion that the legal mandate and structure of the CWB, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales in a "non-commercial" manner. Although the Panel could have been more explicit in explaining the limited relevance that the special privileges had for its analysis of the possible incentive to discriminate between markets, the Panel did say:

> ... that the fact that an export STE like the CWB might, *due to the privileges it enjoys*, sell wheat at lower prices than "commercial actors" could offer would not, in itself, justify the conclusion that such sales would not be in accordance with commercial considerations.[215] (emphasis added)

173. We observe, moreover, that the United States argued before the Panel that the "non-conforming" sales of the CWB were the result of the various elements of the CWB Export Regime operating in combination.[216] According to the Panel, the United States acknowledged that "not any one element taken in isolation" would lead to the "non-conforming" sales.[217] The United States' contention on appeal that the Panel failed to make a discrete analysis of one aspect of the measure, that is, the special privileges granted to the CWB, thus appears inconsistent with its position before the Panel that the three constituent elements of the CWB Export Regime operate in combination. As we see it, given the arguments of the United States, the Panel accorded the privileges appropriate attention in its analysis and there was no reason why the Panel had to examine the CWB's special privileges in isolation.[218]

174. In sum, we are not persuaded that the Panel "ignored" the CWB's privileges or that the Panel's analysis of these privileges was inadequate in the light of its definition of the measure at issue and its interpretation of Article XVII:1(b).

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[214]Panel Report, para. 6.101.

[215]*Ibid*., para. 6.129, referring in footnote 213 thereto to para. 6.101 of the Panel Report.

[216]Panel Report, para. 6.25.

[217]*Ibid*.

[218]As the Panel explained, the United States does not challenge the fact that the CWB has been granted the special privileges and acknowledged that "Article XVII does not forbid a WTO Member from providing an STE with such extensive privileges [as those enjoyed by the CWB], even if such privileges could distort markets to the detriment of other WTO Members." (Panel Report, footnote 123 to para. 6.26 thereto, quoting from the United States' first written submission to the Panel, para. 3)

175. Before concluding on this issue, we consider Canada's submission that the United States' claim that the Panel did not examine the measure in its entirety should have been made under Article 11 of the DSU.[219] Although the United States recognized that it could also have pursued its claim under Article 11 of the DSU, it chose in this case to characterize its claim as an error by the Panel in the application of Article XVII:1.[220]

176. We agree with Canada that this claim of error fits more properly under Article 11 of the DSU. The Appellate Body has stated previously that the measure at issue (and the claims made by the complaining Member) make up the "*matter* referred to the DSB" for the purpose of Article 7 of the DSU.[221] In this sense, the United States' argument that the Panel did not examine the measure in its entirety relates to the Panel's examination of the "matter". Article 11 of the DSU sets out the duties of a panel, including that it "should make an objective assessment of the *matter* before it". (emphasis added) Therefore, as we see it, the United States' allegation that the Panel did not examine the measure in its entirety amounts to an allegation that the Panel did not "make an objective assessment of the matter" under Article 11 of the DSU.

177. Although an appellant is free to determine how to characterize its claims on appeal[222], at the same time due process requires that the legal basis of a claim be sufficiently clear to allow an appellee to respond effectively. This is especially the case when the claim is an allegation that the panel did not make an objective assessment of the matter as required by Article 11 of the DSU because, by definition, such a claim will not be found in the request for the establishment of the panel and, therefore, the panel will not have referred to it in the panel report.[223]

178. In this appeal, Canada expressly requests that we examine the United States' claim, albeit under Article 11 of the DSU, even though Canada considers that the failure to cite the proper legal basis would be sufficient grounds for dismissal.[224] In the preceding paragraphs, however, we rejected

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[219]Australia and China agree with Canada's position. (Australia's third participant's submission, para. 66; China's third participant's submission, para. 23)

[220]United States' response to questioning at oral hearing.

[221]Appellate Body Report, *Guatemala – Cement I*, para. 72. (emphasis added)

[222]In *Japan – Apples*, the Appellate Body stated that "a party has the prerogative to pursue whatever legal strategy it wishes in conducting its case". (Appellate Body Report, para. 136). This statement was made in the context of discussing how a party pursues its claims at the panel stage.

[223]Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74. The Appellate Body has emphasized that "a claim, by an appellant, that a panel erred under Article 11 of the DSU, and a request for a finding to this effect, must be included in the Notice of Appeal, and clearly articulated and substantiated in an appellant's submission with specific arguments." (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 60 to para. 71; see also Appellate Body Report, *Japan – Apples*, para. 127; and Appellate Body Report, *US – Steel Safeguards*, para. 498)

[224]Canada's appellee's submission, para. 89.

the United States' claim that the Panel failed to examine the measure in its entirety. Therefore, there is no need for us to make a ruling under Article 11 of the DSU in this regard.[225]

VII. Assessment of the Evidence

179. We will now examine the United States' assertion that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, because the Panel "deliberately disregarded" evidence submitted by the United States in relation to the CWB's legal framework.[226] Specifically, the United States contends that, even though the Panel itself defined the *Canadian Wheat Board Act* as an essential element of the measure at issue, the Panel "ignored evidence" on how provisions of that Act limit the independence of the CWB's Board of Directors and the CWB's operations.[227] In addition, the United States submits that the Panel "ignored significant facts" related to the financial operations of the CWB[228] and "deliberately disregarded" the fact that the Canadian government guarantees CWB borrowing.[229] Finally, the United States contends that the Panel "ignored" facts relating to the CWB's credit sales.[230] According to the United States, the Panel's disregard of these facts led the Panel to conclude erroneously that the CWB is "controlled by" wheat farmers and that the CWB's legal framework does not provide an incentive for the CWB to make sales that are not solely in accordance with commercial considerations.[231]

180. Canada rejects the United States' contention that the Panel ignored facts submitted by the United States. In Canada's submission, the facts that the United States describes as related to the financial operations of the CWB are nothing other than what the United States alleged to be the special privileges granted to the CWB, which the Panel did not "ignore".[232] Canada states, moreover, that the United States' assertion on appeal that the Panel erred in finding that the CWB is controlled by farmers contradicts the United States' allegation before the Panel that Canada did not meet its

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[225]We examine, in the following section of this Report, the United States' allegation that the Panel failed to discharge its duty under Article 11 of the DSU because the Panel disregarded facts submitted by the United States.

[226]United States' appellant's submission, para. 5. The United States relies on the Appellate Body's reasoning in *EC – Hormones* to support its claim. (United States' appellant's submission, paras. 41–43, referring to Appellate Body Report, *EC – Hormones*, para. 133)

[227]United States' appellant's submission, para. 47. See also, United States' appellant's submission, para. 50.

[228]United States' appellant's submission, para. 51.

[229]*Ibid*., para. 53.

[230]*Ibid*., para. 54.

[231]*Ibid*., para. 55.

[232]Canada's appellee's submission, para. 142.

obligations under Article XVII:1 of the GATT 1994 because of the *lack* of government supervision over the CWB.[233]

181. Article 11 of the DSU states that "a panel should make an objective assessment of the matter before it, *including an objective assessment of the facts of the case*". (emphasis added) The Appellate Body has explained that:

> ... Article 11 requires panels to take account of the evidence put before them and forbids them to wilfully disregard or distort such evidence. Nor may panels make affirmative findings that *lack a basis in the evidence* contained in the panel record. Provided that panels' actions remain within these parameters, however, we have said that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings", and, on appeal, we "will not interfere lightly with a panel's exercise of its discretion".[234] (emphasis added)

As for the standard of review that is applicable on appeal, the Appellate Body has further stated that:

> [i]n assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. [235]

Although in *EC – Hormones* the Appellate Body recognized that the deliberate disregard of the evidence could constitute a failure by the panel to make an objective assessment of the facts under Article 11 of the DSU, the Appellate Body went on to explain that "disregard" of the evidence:

> ... impl[ies] not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel. A claim that a panel disregarded or distorted the evidence submitted to it is, in effect, a claim that the panel, to a greater or lesser degree, denied the party submitting the evidence fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice.[236] (footnote omitted)

182. Consistent with the Appellate Body's reasoning in *US – Carbon Steel*, we will examine first whether the findings of the Panel being challenged on appeal by the United States had a "basis in the

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[233]Canada's statement at the oral hearing.

[234]Appellate Body Report, *US – Carbon Steel*, para. 142 quoting from Appellate Body Report, *EC – Hormones*, and Appellate Body Report, *US – Wheat Gluten*. (footnotes omitted)

[235]Appellate Body Report, *US – Wheat Gluten*, para. 151.

[236]Appellate Body Report, *EC – Hormones*, para. 133.

evidence". We will then examine whether the Panel disregarded evidence submitted by the United States.

183. The two findings of the Panel that the United States asserts are erroneous as a result of the Panel having disregarded evidence are that: (i) "the CWB is controlled by the producers whose grain the CWB markets"[237], and (ii) the United States "failed to establish ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations".[238] The Panel based its first finding on the fact that the majority of the CWB's Board of Directors are elected by wheat farmers and the fact that the government of Canada "does not control, or interfere in, the day-to-day operations of the CWB".[239] On appeal, the United States has acknowledged that it does not dispute either of these facts.[240] We also see no obvious flaw in the Panel's reliance on these two facts and conclude, therefore, that the Panel had a factual basis for its finding that "the CWB is controlled by the producers whose grain the CWB markets".

184. In respect of the second finding challenged by the United States, we note that the Panel discussed several facts that it found relevant in reaching its conclusion that the United States "failed to establish ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations". These facts included its prior finding that the CWB is controlled by wheat farmers; the duties imposed on the Board of Directors by the *Canadian Wheat Board Act*[241]; the CWB's mandate[242]; evidence that the CWB can defer sales and purchases depending on market conditions[243]; the existence of evidence in the record "to suggest that, in some cases, the CWB may not be prepared to sell at all, even at the best price possible"[244]; and the factual evidence adduced by the United States regarding actual CWB sales behaviour, which the Panel found did not prove the United States' allegation that the CWB has an incentive to make sales that are not solely in accordance with commercial considerations.[245] Again, the United States does not contest any of these factual findings in this appeal. We find, therefore, that the Panel did not err in

[237]Panel Report, para. 6.122.

[238]*Ibid*., para. 6.148.

[239]*Ibid*., para. 6.122.

[240]United States' response to questioning at the oral hearing.

[241]Panel Report, para. 6.123.

[242]*Ibid*., para. 6.127.

[243]*Ibid*., para. 6.127.

[244]*Ibid*., para. 6.131.

[245]*Ibid*., para. 6.146.

concluding, on the basis of the facts that it examined, that the United States "failed to establish ... that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations".

185. We now turn to the specific facts that the United States alleges the Panel disregarded. As we explained earlier, the United States does not dispute the Panel's findings that a majority of the CWB's Board of Directors are elected by farmers rather than appointed by the government, and that the government of Canada does not exercise day-to-day control over the activities of the CWB.[246] Rather, the United States argues that the Panel disregarded other facts submitted by the United States that demonstrate that the CWB Board of Directors is not "truly independent"[247], namely that: (i) the President of the CWB's Board of Directors is appointed by the Canadian government and holds office for a term determined by the Canadian government; (ii) the Board of Directors of the CWB reports to a Minister of the Canadian government and provides information concerning CWB activities, holdings, purchases and sales on a monthly basis; (iii) the CWB Board of Directors is required to "act as agent for or on behalf of any minister or agent of Her Majesty in right of Canada in respect of any operations that it may be directed to carry out by the Governor in Council"[248]; and (iv) that CWB profits are to be paid into a revenue fund of the Canadian government.[249] These facts were evident, according to the United States, from the provisions of the *Canadian Wheat Board Act*, which the United States submitted as evidence to the Panel as Exhibit US-2.

186. As we said earlier[250], the Appellate Body has previously held that "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings".[251] Accordingly, the Panel's decision not to rely on some of the facts that the United States claims to have submitted would not, by itself, constitute legal error. To succeed in its claim that the Panel disregarded the evidence submitted to it, the United States would have to demonstrate that the Panel

[246]United States' response to questioning at the oral hearing.

[247]United States' appellant's submission, para. 50.

[248]*Ibid*., quoting from Section 6(1)(j) of the *Canadian Wheat Board Act*, submitted by the United States to the Panel as Exhibit US-2.

[249]United States' appellant's submission, para. 50.

[250]*Supra*, para. 181, quoting from Appellate Body Report, *US – Carbon Steel*, para. 142.

[251]Appellate Body Report, *EC – Hormones*, para. 135. The Appellate Body further observed that "[t]he Panel cannot realistically refer to all statements made by the experts advising it and should be allowed a substantial margin of discretion as to which statements are useful to refer to explicitly." (Appellate Body Report, *EC – Hormones*, para. 138)

exceeded its discretion and that the Panel made, in effect, an "egregious error".[252] In our view, the United States has not put forward arguments that demonstrate such an error.

187. With respect to the Panel's findings that the CWB is controlled by wheat farmers, Canada asserts that the United States "never mentioned the provisions that it now alleges that the Panel ignored", but rather "simply submitted the entirety of the *CWB Act*".[253] Our review of the panel record confirms that the United States did not make specific arguments on the provisions that it now alleges were disregarded by the Panel. Rather, as Canada asserts, the United States focused its arguments before the Panel on demonstrating that the Canadian government acted inconsistently with Article XVII:1 of the GATT 1994 because it did *not* adequately supervise the CWB.[254] As the following excerpt illustrates, before the Panel, the United States emphasized the influence of wheat farmers, rather than of the Canadian government, on the CWB's Board of Directors:

> ... since 1998, the CWB has been governed by a 15-person Board of Directors. The Board president and four directors are selected by Canada, and the remaining ten directors are elected by grain producers. Thus, the CWB is currently governed by a Board of Directors the majority of whom are elected by producers.[255] (footnote omitted)

This excerpt contrasts with the United States' allegation, on appeal, that the Panel erred by finding that the CWB Board of Directors is "controlled by" wheat farmers, and that the Panel would have concluded otherwise had it not disregarded the fact that the President of the Board of Directors of the CWB is appointed by the Canadian government and the fact that the President's term is determined by the Canadian government. In any event, the following statement from the Panel Report clearly demonstrates that the Panel was aware that the President of the CWB's Board of Directors is appointed by the Canadian government and that the President's term of office is determined by the Canadian government:

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[252]Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 177.

[253]Canada's appellee's submission, para. 144.

[254]See, for example, Panel Report, para. 4.193, and the Requests for Establishment of the Panel, WT/DS276/6 and WT/DS276/9. In paragraph 64 of its first written submission to the Panel, the United States argued: "[i]f, as Canada asserts, Canada has no control or influence over the CWB, than [sic] Canada has not complied–and, under its current regulatory structure, cannot comply—with its obligation to ensure that the CWB meets the standards in Article XVII regarding wheat exports."

[255]United States' first written submission to the Panel, para. 18. See also Panel Report, para. 6.112.

> Ten of the Board's directors are elected by Western Canadian producers of wheat and barley, the remaining five, including the president, are appointed by Canada's Governor in Council, *i.e.*, by the Government of Canada. With the exception of the president, directors hold office for a maximum term of four years, and may serve up to three terms.[256] (footnotes omitted; underlining added)

188. As for the provision of the *Canadian Wheat Board Act* that provides for directions from Canada's Governor in Council to the CWB's Board of Directors[257], we have not found any indication in the panel record that the United States specifically raised this provision to support its arguments. Furthermore, contrary to what the United States contends, the Panel did not disregard the fact that the CWB may receive instructions from Canada's Governor in Council, as it expressly referred to such possibility in footnote 200 to paragraph 6.122 of the Panel Report.[258] This footnote suggests that the Panel referred to this provision, not because it was specifically raised by the United States, but rather because it was raised by Canada as part of its defence.

189. We have not found any indication in the panel record that the United States raised, before the panel, the fact that the Board of Directors of the CWB reports and provides information to a Minister of the Canadian government as evidence that the CWB Board of Directors is controlled by the Canadian government.[259] Neither has the United States indicated, on appeal, where it made such an argument in its submissions before the Panel.[260]

190. Neither do we find any indication in the panel record that the United States specifically raised the alleged fact that CWB profits are to be paid into a revenue fund of the Canadian government. The United States did make arguments relating to the profits of the CWB, but it did so in the context of arguing that the CWB has an incentive to make sales not solely in accordance with commercial considerations because its objective is to maximize revenues rather than profit.[261] This argument was

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[256]Panel Report, para. 6.122.

[257]The United States is referring to Section 6(1)(j) of the *Canadian Wheat Board Act*.

[258]The Panel referred to Section 18(1) of the *Canadian Wheat Board Act*, which deals specifically with directions from the Governor in Council to the CWB. Section 6(1)(j) of the *Canadian Wheat Board Act*, the provision raised on appeal by the United States, provides that the powers of the CWB include acting as an agent in respect of any operations directed to be carried out by the Governor in Council.

[259]This may be due to the fact that the United States chose to focus its arguments before the Panel on demonstrating that the Canadian government did not adequately supervise the CWB. Before the Panel, the United States did mention that the CWB's borrowing plan is submitted to the Canadian Minister of Finance on an annual basis. (United States' first written submission to the Panel, para. 29) However, this was mentioned in relation to the Canadian government's guarantee of CWB borrowing. The United States' allegation relating to this subject is examined below. See *infra*, para. 192.

[260]The portions of the panel record indicated by the United States in response to questioning at the oral hearing do not refer to this point. (United States' response to questioning at the oral hearing)

[261]Panel Report, para. 6.112.

addressed and rejected by the Panel.[262] In rejecting the United States' argument, the Panel observed that "the objective of the CWB in selling wheat is not to make a profit for itself", but that instead "[a]ll the revenue obtained by the CWB from the sale of wheat is pooled and returned to Western Canadian wheat producers at the end of the crop year".[263]

191. In our view, it is incumbent upon a party to identify in its submissions the relevance of the provisions of legislation—the evidence—on which it relies to support its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position. We are not satisfied that the United States argued the relevance before the Panel of the various provisions of the *Canadian Wheat Board Act* on which it now relies. In any event, its position before the Panel appears at odds with the one that it has adopted in this appeal, namely that the Canadian government exercises considerable influence on the CWB. Therefore, we do not agree with the United States that the Panel disregarded facts relevant to the independence of the CWB and we see no failure by the Panel in this respect to comply with its duty under Article 11 of the DSU.

192. The other category of facts that the United States contends the Panel disregarded relates to the CWB's financial operations, borrowing and sales of grain on credit. Specifically, the United States alleges that the Panel ignored the following facts: (i) the CWB's monopoly right to purchase Western Canadian wheat and to sell that wheat for domestic human consumption and export; (ii) the approval and guarantee of the initial payments to farmers by the Canadian government; and (iii) the reimbursement by the Canadian Parliament of losses sustained by the CWB.[264] In addition, the United States asserts that the Panel disregarded the Candian government's guarantee of CWB borrowing and of the CWB's sales of grain on credit pursuant to Section 19 of the *Canadian Wheat Board Act*.[265]

193. As Canada argues, however, the facts described by the United States as related to the CWB's financial operations, borrowing and sales of grain on credit correspond exactly with what the United States described as the CWB's special privileges, namely: (i) the exclusive right to purchase and sell Western Canadian wheat for export and domestic human consumption; (ii) the right to set, subject to government approval, the initial price payable for Western Canadian wheat destined for export or domestic human consumption; (iii) the government guarantee of the initial payment to producers of Western Canadian wheat; (iv) the government guarantee of the CWB's borrowing; and (v)

[262]Panel Report, paras. 6.133–6.134.

[263]*Ibid*., para. 6.133. (footnote omitted)

[264]United States' appellant's submission, para. 51.

[265]*Ibid*., paras. 53–54.

government guarantees of certain CWB credit sales to foreign buyers.[266] On the one hand, when the United States laid out the elements that comprise the CWB Export Regime before the Panel, the United States chose to portray the CWB's special privileges as an element that is separate from the legal framework of the CWB.[267] On the other hand, the United States now contends that the Panel disregarded certain provisions of the *Canadian Wheat Board Act*. These provisions are, themselves, the source of the CWB privileges challenged by the United States In our view, the United States cannot have it both ways: it cannot succeed in faulting the Panel's assessment of the facts by seeking to blur the separation that the United States itself drew between the CWB's legal framework and the CWB's special privileges.[268]

194. In the previous section of this Report, we found that, contrary to the United States' claim, the Panel did not fail to examine the special privileges of the CWB.[269] The United States is asking us, under the appearance of a claim that the Panel overlooked the legal provisions that give rise to them, to review for a second time whether the Panel examined the CWB's special privileges. Having found that the Panel did not fail to examine the privileges, we see no basis for us to find now that the Panel failed to meet the requirements of Article 11 of the DSU by disregarding them.

195. In sum, we are not persuaded that the Panel disregarded or ignored the evidence submitted to it, or committed an "egregious error" in the appreciation of the evidence.[270] Nor do we conclude that the Panel exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence.[271]

196. We, therefore, reject the United States' assertion that the Panel did not make an objective assessment of the facts of the case as required by Article 11 of the DSU.

VIII. Article 6.2 of the DSU

197. We turn, finally, to the United States' claim that the Panel erred in declining to dismiss Canada's preliminary objection to the adequacy of the request for the establishment of the panel on the grounds that it was not made in a timely manner.

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[266]United States' appellant's submission, para. 33; United States' first written submission to the Panel, paras. 21–36; and Panel Report, para. 6.15.

[267]Panel Report, para. 6.12.

[268]Canada expressed a similar view in its appellee's submission, para. 138.

[269]*Supra*, para. 174.

[270]Appellate Body Report, *EC – Hormones*, para. 133.

[271]Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *US – Wheat Gluten*, para. 151.

198. First, we set out briefly the facts relevant to this issue. The United States filed its request for the establishment of the panel on 6 March 2003.[272] The United States' panel request was considered at DSB meetings held on 18 March and 31 March, and the March Panel was established on 31 March 2003.[273] On 7 April 2003, Canada sent a letter to the United States indicating that the United States' panel request did not meet the requirements of Article 6.2 of the DSU and requesting that the United States "promptly identify the specific measures at issue and provide a brief summary of the legal basis for its complaint".[274] The United States did not respond to this request.[275] The Director-General determined the composition of the March Panel on 12 May 2003.[276]

199. The day after the composition of the March Panel was determined, Canada requested that the Panel rule, as a preliminary matter, that the United States' claim under Article XVII of the GATT 1994 was not properly before it because the United States had failed to identify the specific measures at issue as required by Article 6.2 of the DSU.

200. Following the receipt of preliminary written submissions on this issue, the March Panel ruled, on 25 June 2003, as follows:

> ... taken as a whole, the United States' panel request does not sufficiently establish the identity of the "laws" and "regulations" at issue in the Article XVII claim. In particular, the identification of the measure at issue in this claim is inadequate because it creates significant uncertainty regarding the identity of the precise measures at issue and thus impairs Canada's ability to "begin preparing its defence" in a meaningful way.[277] (footnotes omitted)

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[272]WT/DS276/6.

[273]WT/DSB/M/145 and WT/DSB/M/146.

[274]Panel Report, para. 6.10, subpara. 55, quoting from Canada's preliminary written submission to the Panel, para. 30.

[275]Panel Report, para. 6.10, subpara. 55.

[276]The Director-General determined the composition of the March Panel, pursuant to Article 8.7 of the DSU, in response to a request made by Canada on 2 May 2003. (WT/DS276/7) Article 8.7 provides, in relevant part:

> If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel ...

[277]Panel Report, para. 6.10, subpara. 28. The March Panel, however, rejected Canada's allegations that the United States' claims under Article 2 of the *TRIMs Agreement* and the claim against one of the measures related to the transportation of grain did not meet the requirements of Article 6.2 of the DSU. (Panel Report, para. 6.10, subparas. 46 and 52)

201. The March Panel also refused to "decline Canada's request for a preliminary ruling on the grounds that it was not raised in a timely manner"[278], reasoning that:

> ... in the circumstances of the present case, we cannot reasonably conclude that *solely* because Canada did not raise its objections at the relevant DSB meetings, Canada's request for a preliminary ruling should be denied.[279] (emphasis added)

In its reasoning, the March Panel referred to the letter sent by Canada to the United States on 7 April 2003, observing that:

> ... Canada's letter of 7 April 2003 was not answered by the United States. If the United States had provided sufficient clarification of its panel request to Canada, Canada might, for instance, have refrained from requesting a preliminary ruling.[280]

202. On appeal, the United States does not challenge the March Panel's finding that the request for the establishment of the panel did not conform to the requirements in Article 6.2 of the DSU. Rather, the United States' appeal relates to the Panel's finding in respect of the *timeliness* of Canada's request for a preliminary ruling.

203. The United States contends that Canada should have put forward its objections to the panel request at the DSB meetings of 18 and 31 March 2003 in which the request was considered.[281] At the oral hearing, the United States explained that it is not arguing that, as a general rule, preliminary objections to a panel request must be raised at the DSB meeting in which the panel request is considered. Instead, the United States submits that, in this particular case, Canada should have raised its preliminary objection earlier and that the DSB meetings in which the panel request was considered presented earlier opportunities to raise the objection. The United States also states that the Panel gave undue weight to the fact that the United States did not respond to Canada's letter of 7 April 2003.[282] Canada responds that there is no legal basis for the United States' contention that Canada should have

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[278]Panel Report, para. 6.10, subpara. 64.

[279]*Ibid*., subpara. 63.

[280]*Ibid*., subpara. 60.

[281]United States' appellant's submission, para. 62.

[282]In its appellant's submission, the United States asserts that the March Panel erred by implying that the United States could have "cured" any deficiencies in the panel request by responding to Canada's letter of 7 April. (United States' appellant's submission, para. 66) See *infra*, para. 212.

At the oral hearing, however, the United States clarified that it was not raising this point as a separate claim of error. Rather, the United States argued that the March Panel placed too much weight on the fact that Canada sent the letter of 7 April requesting clarification. (United States' response to questioning at the oral hearing)

raised its objections at the DSB meetings in which the panel request was considered.[283] According to Canada, its objection was timely because it was raised only one day after the composition of the Panel was determined, which was "the earliest opportunity at which there was a body in place with the authority to decide the issue".[284]

204. The issue before us in this appeal is whether the March Panel was correct in concluding that, under the particular circumstances of this case, Canada's preliminary objection, which was filed the day after the composition of the March Panel was determined, was timely.

205. Article 3.10 of the DSU provides that WTO Members will engage in dispute settlement procedures in good faith in an effort to resolve the dispute. In *US – FSC*, the Appellate Body stated that the:

> ... principle of good faith requires that responding Members *seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel*, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes.[285] (emphasis added)

The Appellate Body has also held that "in the interests of due process, parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity".[286]

206. As regards objections to the *adequacy* of panel requests, the Appellate Body has stated that compliance with the requirements of Article 6.2 of the DSU must be determined on the merits of each case.[287] Similarly, it would appear to us that a determination as to the *timeliness* of an objection raised under Article 6.2 must be examined on a case-by-case basis. This is consistent with the discretion given to panels, under the DSU, to deal with specific situations that may arise in a particular case and that are not explicitly regulated.[288] Furthermore, under Article 12 of the DSU, it is the panel that sets the timetable for the panel proceedings and, therefore, it is the panel that is in the

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[283]Canada's appellee's submission, para. 160. The European Communities expresses a similar view. (European Communities' third participant's submission, para. 38)

[284]Canada's appellee's submission, para. 163.

[285]Appellate Body Report, *US – FSC*, para. 166.

[286]Appellate Body Report, *US – Carbon Steel*, para. 123.

[287]*Ibid*., para. 127. See also Appellate Body Report, *Korea – Dairy*, para. 127.

[288]Appellate Body Report, *EC – Hormones*, footnote 138 to para. 152. See also Appellate Body Report, *US – FSC (Article 21.5)*, paras. 247–248.

best position to determine whether, under the particular circumstances of each case, an objection is raised in a timely manner.

207. Having said this, we agree with the March Panel that, in the particular circumstances of this case, Canada's objection was not filed in an untimely manner. Canada raised its written objection only one day after the composition of the March Panel was determined.[289] We see no error in the March Panel's view that this constituted the "earliest possible opportunity" in which Canada could have raised its objection and sought a ruling from the Panel.[290] Indeed, only a month and a half had passed between the establishment and the composition of the March Panel, and a little over two months had passed since the request for the establishment of the panel was submitted by the United States.

208. As the March Panel observed[291], this stands in sharp contrast with the situation in *US – FSC*, on which the United States relies to support its view that the objection should have been raised at the DSB meetings in which the panel request was considered. In that case, the United States raised an objection to the European Communities' request for consultations a year after it had received the request for consultations.[292] Moreover, that panel expressly found that "the United States consciously chose not to seek clarification ... at the point it received the request for consultations".[293]

209. In this case, Canada sought clarification from the United States, by letter of 7 April 2003, before making its request for a preliminary ruling. Although Canada's letter of 7 April was sent seven

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[289]Before the March Panel, Canada claimed to have raised the issue during consultations, but the United States disputed this claim. The March Panel noted that there appeared to be no formal record of the consultations and, as a consequence, it was "unable to determine whether or not Canada raised an objection during the consultations". (Panel Report, para. 6.10, subpara. 55 and footnotes 49 and 50 thereto.)

[290]Panel Report, para. 6.10, subpara. 58.

[291]*Ibid*., subpara. 62.

[292]Appellate Body Report, *US – FSC*, para. 165. The European Communities requested consultations on 18 November 1997 and the United States raised its objection in a Request for Preliminary Findings filed before the panel on 4 December 1998, prior to the filing of the parties' first written submissions. (Panel Report, *US – FSC*, para. 1.1 and footnote 19 to para. 4.7) Specifically, the United States argued that the European Communities' request for consultations was defective because it did not meet the requirements of Article 4.2 of the *SCM Agreement*, which provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

Moreover, in *US – FSC*, the parties held three separate rounds of consultations over a period of nearly five months. (See Appellate Body Report, *US – FSC*, para. 162 and footnote 167 thereto) In the present case, the parties held only one round of formal consultations, on 31 January 2003. (Panel Report, para. 1.2)

[293]Appellate Body Report, *US – FSC*, para. 162, quoting from Panel Report, *US – FSC*, para. 7.10. It is unnecessary for us to decide, in this case, whether different considerations may be relevant to the determination of the timeliness of an objection to a request for consultations as opposed to the timeliness of an objection to a request for the establishment of a panel.

days after the Panel had been established, it was sent several weeks before the Panel's composition was determined.[294] The United States did not respond to Canada's request for clarification.[295]

210. For all these reasons, we find that, in the particular circumstances of this case, the Panel did not err in declining to dismiss Canada's preliminary objection on the grounds that it was untimely.[296]

211. We do not mean to suggest that a responding party is foreclosed from seeking clarification of a panel request during the DSB meetings at which the panel request is considered, or that it would never be useful to do so.[297] In the particular circumstances of this case, however, the March Panel found that it would have been unreasonable to conclude that Canada's objection was untimely *solely* because Canada had not raised the objection at the DSB meetings.[298] The Panel observed, in this respect, that it could not assume "that the United States would have amended its panel request if Canada had raised concerns at a relevant DSB meeting".[299] In these circumstances, we see no reason to disturb the March Panel's finding that Canada's failure to raise its objection at the DSB meetings in which the panel request was considered was not sufficient, on its own, to render the request for a preliminary ruling untimely.

212. Before leaving this issue, we turn to the United States' assertion that the March Panel erred by implying that "if the United States had responded to Canada's letter of April 7, 2003 ... the United States could have cured the alleged procedural defect in that panel request".[300] The United States contends that this is the "implication"[301] that flows from the following statement by the Panel:

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[294]Canada explained that it used the time between the filing of the request for the establishment of the panel and the DSB meeting at which the Panel was established "to hold interdepartamental consultations on the panel request which it considered unclear". (Panel Report, para. 6.10, footnote 55 to subpara. 59)

[295]According to Canada, the United States explained before the Panel that it had not responded to the letter of 7 April 2003 because it had considered that Canada was engaging in "litigation techniques". (Canada's appellee's submission, para. 163)

[296]Panel Report, para. 6.10, subpara. 64.

[297]Canada and the European Communities assert that it is futile for a party to raise an objection at a DSB meeting because the DSB has no mandate to entertain an objection to a panel request. (Canada's appellee's submission, para. 162; European Communities' third participant's submission, para. 40). Although the Appellate Body has previously stated that "a panel request is normally not subjected to detailed scrutiny by the DSB", this does not imply that a responding party is barred from seeking clarification of a panel request at a DSB meeting. (Appellate Body Report, *EC – Bananas III*, para. 142.)

[298]Panel Report, para. 6.10, subpara. 63.

[299]*Ibid*., subpara. 60.

[300]United States' appellant's submission, para. 66.

[301]*Ibid*., para. 7.

> ... Canada's letter of 7 April 2003 was not answered by the United States. If the United States had provided sufficient clarification of its panel request to Canada, Canada might, for instance, have refrained from requesting a preliminary ruling. Indeed, Canada stated so at the preliminary hearing.[302] (footnote omitted)

We do not find that this statement carries the "implication" alleged by the United States. In fact, as the United States acknowledges[303], the March Panel expressly rejected such an implication when it stated that "the United States *could not have 'cured'* any inconsistencies with Article 6.2 of its panel request subsequent to the establishment of this Panel".[304] In any event, at the oral hearing, the United States stated clearly that it is not pursuing this allegation as a separate claim of error.[305] Accordingly, we need not address this issue further.

213. Having upheld the March Panel's refusal to dismiss Canada's preliminary objection on the grounds that it was untimely[306], we also uphold the March Panel's conclusion, reproduced in subparagraph 32 of paragraph 6.10 of the Panel Report, that "those portions of the United States' panel request which deal with the Article XVII claim fail to satisfy the requirements of Article 6.2 [of the DSU] insofar as they do not 'identify the specific measures at issue'".

IX. Findings and Conclusions

214. For the reasons set out in this Report, the Appellate Body:

(a) (i) finds that the July Panel did not err in not considering the "proper" relationship between subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994; and, therefore, declines Canada's request to find that the Panel erred by examining the consistency of the CWB Export Regime with Article XVII:1(b) without first having found a breach of Article XVII:1(a);

(ii) finds no error in the July Panel's interpretation, in paragraph 6.94 of the Panel Report, of the phrase "solely in accordance with commercial considerations" in the first clause of Article XVII:1(b), nor in the Panel's interpretation, in

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[302]Panel Report, para. 6.10, subpara. 60.

[303]United States' appellant's submission, footnote 66 to para. 66.

[304]Panel Report, para. 6.10, footnote 57 to subpara. 60. (emphasis added)

[305]United States' response to questioning at the oral hearing.

[306]*Supra*, para. 210.

paragraphs 6.72 and 6.73 of its Report, of the term "enterprises" in the second clause of that provision;

(iii) finds that the July Panel did not fail to examine the CWB Export Regime in its entirety;

(iv) finds that the July Panel did not disregard evidence submitted by the United States in relation to the CWB's legal framework and, therefore, did not act inconsistently with its duty under Article 11 of the DSU to make an objective assessment of the facts of the case; and consequently

(v) upholds the July Panel's finding, in paragraphs 6.151 and 7.4(a) of the Panel Report, that the United States failed to establish its claim that Canada is in breach of its obligations under Article XVII:1 of the GATT 1994; and

(b) upholds the March Panel's finding, in subparagraph 64 of paragraph 6.10 of the Panel Report, refusing to dismiss Canada's request for a preliminary ruling under Article 6.2 of the DSU on the ground that it was not raised in a timely manner and, consequently, also upholds the March Panel's conclusion, in subparagraph 32 of paragraph 6.10 of the Panel Report, that with respect to the claim under Article XVII of the GATT 1994, the United States' request for establishment of a panel failed to satisfy the requirement of Article 6.2 of the DSU to "identify the specific measures at issue".

215. As the Panel's findings of inconsistency under Article III:4 of the GATT 1994 were not appealed, it is not for us to make any recommendation regarding those findings. Given that we have upheld the Panel's findings that the United States failed to establish that Canada has acted inconsistently with its obligations under Article XVII:1 of the GATT 1994, we do not make any additional recommendation to the DSB pursuant to Article 19.1 of the DSU.

Signed in the original at Geneva this 13th day of August 2004 by:

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John Lockhart
Presiding Member

_____ _____

Georges Abi-Saab
Member

Yasuhei Taniguchi
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS276/15
3 June 2004

(04-2364)

Original: English

CANADA – MEASURES RELATING TO EXPORTS OF WHEAT AND TREATMENT OF IMPORTED GRAIN

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 1 June 2004, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the March Panel and July Panel[307] on *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain* (WT/DS276/R) and certain legal interpretations developed by the March Panel and July Panel in this dispute.

1. The United States seeks review by the Appellate Body of the March Panel's legal conclusion in its preliminary ruling of June 25, 2003, that Canada's request for a preliminary ruling on Article 6.2 of the *Understanding of Rules and Procedures Governing the Settlement of Disputes* ("DSU") was filed in a timely manner and that by implication a response to Canada's letter of April 7, 2003 could "cure" any breach of Article 6.2 of the DSU. These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations, including those found in paragraphs 53 to 64 of the Panel's preliminary ruling.[308]

2. The United States seeks review by the Appellate Body of the July Panel's legal conclusion that the Canadian Wheat Board ("CWB") Export Regime is consistent with Canada's obligations under Article XVII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). This finding is in error, and is based on erroneous findings on issues of law and related legal interpretations, including, for example:

(a) that the phrase "enterprises of the other [Members]" in Article XVII:1(b) is limited to those enterprises that wish to purchase products from a state trading enterprise ("STE");[309]

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[307]As distinguished in the Panel Report, paras. 1.4 and 1.10.

[308]*See* Panel Report, para. 6.10.

[309]*See*, *e.g.*, Panel Report, paras. 6.66 – 6.73; 6.150.

(b) that the phrase "solely in accordance with commercial considerations" in Article XVII:1(b) is a narrow requirement "simply intended to prevent STEs from behaving like 'political' actors" and not intended to prevent STEs from using their special and exclusive privileges to the disadvantage of commercial actors;[310] and

(c) that "the CWB's legal structure and mandate, together with the special and exclusive privileges granted to it," does not create an incentive for the CWB to make sales which are not "solely in accordance with commercial considerations," and that this finding alone is sufficient to determine that therefore the CWB Export Regime as a whole does not necessarily result in making sales which are not "solely in accordance with commercial considerations," as required by Article XVII:1.[311]

3. The United States seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the July Panel's assessment of the CWB's legal framework as being limited solely to the structure of the CWB's Board of Directors and the lack of day-to-day government control over the operations of the CWB, and not including the special and exclusive privileges granted under the *CWB Act*.[312] The United States further seeks review by the Appellate Body, pursuant to Article 11 of the DSU, of the July Panel's assessment that the CWB is "controlled by" grain producers.[313] In both situations, the Panel's complete disregard for other evidence submitted by the United States, such as elements of the *CWB Act* and Canada's control and influence over the CWB,[314] is inconsistent with the Panel's duty to make an objective assessment of the matter before it.

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[310]*See*, *e.g.*, Panel Report, paras. 6.86 – 6.106.

[311]*See*, *e.g.*, Panel Report, paras. 6.110 – 6.135; 6.146 – 6.149.

[312]*See*, *e.g.*, Panel Report, paras. 6.122 – 6.124.

[313]*See*, *e.g.*, Panel Report, paras. 6.122 – 6.124.

[314]*See*, *e.g.*, U.S. First Submission, paras. 22, 24 (referring to CWB monopoly right of purchase and sale under *CWB Act*); U.S. First Submission, para. 24 (referring to prices established jointly by CWB and the Government of Canada under *CWB Act*); U.S. First Submission, para. 16 n. 19 (referring to Government of Canada's absorption of any losses sustained by the CWB under *CWB Act*).