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CANADA – MEASURES RELATING TO EXPORTS OF

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
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*

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Article XVII:1 of the

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

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

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 aId.ds-0.14j 222.75 0 7 T

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.

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. F

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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.

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,

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 rnmed St63D -ulto .75 -30.75 fsissertiakburbed by the United Stabef igTw (the Paeal tly, Canada) Tj 0 -18.75 T

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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 Tw (EC) Tj 17.25 0 TD 0.3756jo -241.5ed

subparagraph (b),

(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

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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 eleTD -nj0ecial pNev

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) w

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 57.5 0 TD -0.125 Tc 0e]rhipyng odem 4.5nPie

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).

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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 a 0 T- Tj 34ee f BT 216 114.75 TD /F0 11.25 T's994

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

[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",tood" ether with thnB0 Tords are or to clarify thee

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.

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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 5 sTich diffepjh :3 3

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 al

> ... 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*

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

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—

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*

with respect to

> 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 discriminatory trnsidu va the PaB m

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

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 ru131.

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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.

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.

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.

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

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.

"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 o

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.

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

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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

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> Ten of the Board's directors are elected by Western Canadian producers of wheat and barley, the remaining five, including the president,

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—

government guarantees of certain CWB credit sales to foreign buyers.[266]

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]

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 grecj 3 0 -02/Fi8j 3 0 TD -391057 Tc.3837 Telested undof the ,ecj dedurnt wispeci debuttuajecti

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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

[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 2m (., au.2 which p(290)8., au.opean) Tj -217.5 -12 TD 0.1008 g Tc -0.1875 Tw ( ) Tj 2.25 0 TD 0.1403ean

> 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.
>
> *US – FSC*

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*

> ... 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 (DS5 TD /F0 11.2

(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;[4] 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.[5]

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*.[6] 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.[7] 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,[8] is inconsistent with the Panel's duty to make an objective assessment of the matter before it.

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

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

eview by the Appellate Body, pursuant to Article 11 of the DSU, of the