

WORLD TRADE ORGANIZATION

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

(AB-2004-3)

Third Participant Submission Of Australia

Geneva, 28 June, 2004

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Short Title	Full Title
<i>Australia-Salmon</i>	<i>Australia-Measures Affecting the Importation of Salmon</i> , Report of the Appellate Body, WT/DS18/AB/R, adopted 6 November 1998.
<i>EC-Hormones</i>	<i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/R, adopted 13 February 1998
<i>Japan-Agricultural Products II</i>	<i>Japan-Measures Affecting Agricultural Products</i> , Report of the Panel, WT/DS146/R, adopted 19 March 1999.
<i>Korea-Alcoholic Beverages</i>	<i>Korea-Taxes on Alcoholic Beverages</i> , Report of the Appellate Body, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999.
<i>Panel Report</i>	<i>Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , Report of the Panel, WT/DS276/R, circulated 10 February 2004.

I. INTRODUCTION

1. Australia welcomes this opportunity to present its views to the Appellate Body in this appeal on Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain. In this submission Australia has provided legal arguments in support of its position on a number of the allegations of errors on issues of law covered in the panel report¹ and legal interpretations developed by the Panel raised by the United States and Canada as appellants.

II. EXECUTIVE SUMMARY

A. THE RELATIONSHIP BETWEEN ARTICLE XVII:1(A) AND ARTICLE XVII:1(B)

2. The interpretation of Article XVII:1 and, specifically, the relationship between subparagraph (a) and subparagraph (b) is a fundamental issue in this appeal. It is clear from both the construction and explicit text of Article XVII:1 that there is an important relationship between subparagraph (a) and subparagraph (b).

3. The United States appears to have adopted, incorrectly in Australia's view, an expansive interpretation of Article XVII:1, arguing that subparagraphs (a) and (b) contain distinct legal obligations. The United States' interpretation fails to give due recognition to the relationship between subparagraph (a) and subparagraph (b) and is not consistent with the ordinary meaning to be given to the actual text of Article XVII:1, including the defining introductory phrase to subparagraph (b) and the Ad Note to paragraph 1 of Article XVII.

4. The introductory phrase to subparagraph (b) sets the boundaries for the relevance of the disciplines set down in subparagraph (b). Subparagraph (b) has no application beyond the role it plays in qualifying the obligation in subparagraph (a). Subparagraph (b) operates to provide legal tests for determining whether the fundamental "non-discrimination" obligation set forth in subparagraph (a) has been violated, but cannot and does not expand the scope of this obligation.

5. In Australia's view the two legal tests provided in subparagraph (b) qualify but do not expand upon the basic or fundamental legal test provided in subparagraph (a). This interpretation of Article XVII:1 is consistent with the ordinary meaning of subparagraph (a) read together with subparagraph (b) and the Ad Note to paragraph 1.

6. Under this interpretation, in order to establish a violation of Article XVII:1 it would be necessary to establish a violation of the legal test in subparagraph (a) as well as a violation of either of the legal tests in subparagraph (b). Furthermore, if an enterprise has acted consistently with subparagraph (a), then it cannot be found to be in violation of Article XVII:1, even if it has acted inconsistently with either or both of the clauses of subparagraph (b).

B. INTERPRETATION OF ARTICLE XVII:1(B)

¹ *Canada-Measures Relating to Exports of Wheat and Treatment of Imported Grain*, Report of the Panel, WT/DS276/R, circulated 10 February 2004 – hereinafter referred to as the Panel Report.

7. Through its various arguments presented to the Panel and Appellate Body, the United States appears to have sought to preclude the ability of State Trading Enterprises (STEs) from exercising their exclusive or special privileges. Australia considers that the arguments presented by the United States are flawed and are not supported by the text of Article XVII or by GATT 1994, including the working definition of STEs provided in paragraph 1 of the *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*. The United States' arguments, if accepted, would significantly diminish the rights of WTO Members under Article XVII:1.

8. In support of its arguments, the United States claims that a main object and purpose of GATT 1994 is to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce. Australia considers that the arguments of the United States incorrectly attempt to import into Article XVII:1, including subparagraph (b), an object and purpose which was clearly not intended. In doing so, the United States seeks to provide an interpretation of Article XVII:1 which was not intended. The object and purpose of Article XVII:1 can be identified from the text of Article XVII:1 itself. Additionally, it is clear from Article XVII:3 that Article XVII:1 was not expected and therefore not intended to prevent the creation of serious obstacles to trade.

1. Interpretation of the second clause of Article XVII:1(b)

9. Australia does not agree with the arguments presented by the United States that the Panel misinterpreted the term “enterprise” in its context. Australia considers that the United States arguments confuse the two usages of the word “enterprises” in the second clause of Article XVII:1(b) and ignore the Panels reasoning related to the particular circumstances of this dispute, namely that it involved an export STE. In Australia's view, 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.

2. Interpretation of the first clause of Article XVII:1(b)

10. Australia considers that the United States has mischaracterised the Panel's finding with respect to the phrase “solely in accordance with commercial considerations” and the Panel's explanatory remarks at paragraph 6.94 with respect to the first clause being “simply intended to prevent STEs from behaving like ‘political’ actors”.

11. In Australia's view, the focus on whether the first clause of Article XVII:1(b) is intended to make STEs act like “commercial actors” or “political actors” is unnecessary and unhelpful, and is not supported by the text of Article XVII:1. Engaging in this sort of analysis only serves to distract attention from the more relevant and textually supported consideration of whether an STE has made its purchases “solely in accordance with commercial considerations”. The Panel's explanatory remarks with regard to “political actors” were not critical to the Panel's interpretation of the first clause of subparagraph (b), but rather serve to explain the irrelevancy of the United States' references to “commercial actors”.

C. OBJECTIVE ASSESSMENT OF THE MATTER IN ACCORDANCE WITH ARTICLE 11 OF THE DSU

12. The United States in its Appellant's submission alleges that the Panel conducted a flawed analysis of the identified measure, known as the CWB Export Regime. Australia understands this claim of error made by the United States to be related to, and founded on a

similar basis as, the United States' claims under Article 11 of the DSU. Australia considers that that the CWB Export Regime was considered as a whole and no one element was relied upon to the exclusion of others in the Panel's analysis. The Panel did not ignore the effect of the privileges and examined their interaction with the obligations extant in Article XVII:1.

13. The second aspect of the United States' claim, relating to the Panel's conclusion on incentives, is that it was based on a deliberate disregard of evidence regarding the CWB legal framework. Australia considers that the Panel did not ignore the facts presented by the United States and that the finding was based on the entire measure before the Panel.

14. The United States has alleged that the Panel failed to make an objective assessment of the facts presented by the United States and that this failure resulted in erroneous findings. In Australia's view, the United States's claim lacks merit. The Panel Report indicates that the Panel appropriately considered the factual information before it, and discussed in detail those facts which it understood to be most relevant to an application of the GATT provisions at the centre of the dispute. Even if the Appellate Body considers that the Panel did make some errors in basing its findings on a sub-set of the elements of the measure at issue or by disregarding evidence presented by the United States, Australia would submit that these errors were not sufficiently egregious to amount to a violation of DSU Article 11.

D. COMPLETING THE PANEL'S ANALYSIS OF ARTICLE XVII:1(B)

15. Australia does not agree with the United States that the Panel committed a legal error with respect to the United States' third assertion. However, to address this ground of appeal, Australia proceeds on the assumption that the Appellate Body considers that a legal error has been made and that it is necessary to complete the analysis. Australia's comments are limited to the steps which the Appellate Body would need to complete in order to find a violation with Article XVII:1.

16. Even if the four US assertions were established this would not be sufficient to establish inconsistency with Article XVII:1. The argument of the United States in support of its claim that the CWB Export Regime is inconsistent with paragraph (b) is not logical. As Canada correctly explains in its appellant submission, if proven, the four US assertions would establish that the CWB has "pricing flexibility" that enables it to act "non-commercially"; that the CWB has an incentive to act "non-commercially: and that the Government of Canada has not taken any positive steps to ensure that the CWB does not act "non-commercially". This does not establish that the CWB necessarily acts not in accordance with commercial considerations.

17. The United States' claim is that the CWB Export Regime "necessarily results" in non-conforming CWB export sales. The United States argues that non-conforming CWB export sales are an "inescapable consequence" of the CWB Export Regime. Even if the four US assertions are established, they do not result in an "inescapable consequence" that the CWB export sales will not conform with subparagraph (b).

18. Finally, even if the United States was able to establish that the CWB Export Regime "necessarily results" in CWB export sales which do not conform with subparagraph (b) of Article XVII:1, the Appellate Body would need to consider the relationship between subparagraphs (a) and (b) of Article XVII:1, as discussed above. Consistent with Australia's submission above, the Appellate Body would also have to consider the consistency of the CWB Export Regime with subparagraph (a) of Article XVII:1.

III. ARGUMENT

A. THE RELATIONSHIP BETWEEN ARTICLE XVII:1(a) AND ARTICLE XVII:1(b)

19. The interpretation of Article XVII:1 and, specifically, the relationship between Article XVII:1(a) (hereinafter referred to as “subparagraph (a)”) and Article XVII:1(b) (hereinafter referred to as “subparagraph (b)”) are fundamental issues in this appeal. As Canada correctly identifies, the consistency of the CWB Export Regime with Article XVII:1 cannot be fully resolved without a finding as to the relationship between the two subparagraphs of Article XVII:1.² However, the Panel did not consider the relationship between subparagraph (a) and subparagraph (b).³

20. It is clear from both the construction and explicit text of Article XVII:1 that there is an important relationship between subparagraph (a) and subparagraph (b). This relationship is clearly indicated in the introductory language of subparagraph (b): “*The provisions of subparagraph (a) of this paragraph shall be understood to require...*”. As explained in more detail below, in Australia’s view, this introductory language clause indicates that the fundamental “non-discrimination” obligation set forth in subparagraph (a) is qualified by the provisions of subparagraph (b). This interpretation is consistent with the narrow scope of the disciplines imposed by Article XVII:1.

21. The United States appears to have adopted, incorrectly in Australia’s view, a more expansive interpretation of Article XVII:1, arguing that subparagraphs (a) and (b) contain distinct legal obligations.⁴ In doing so, the United States has failed to give due recognition to the relationship between subparagraph (a) and subparagraph (b). Moreover, the United States’ interpretation is not consistent with the ordinary meaning to be given to the actual text of Article XVII:1. If the drafters of Article XVII:1 had intended subparagraph (a) and subparagraph (b) to provide distinct legal obligations, they would not have included the defining introductory phrase to subparagraph (b) “*The provisions of subparagraph (a) of this paragraph shall be understood to require...*” and they would not have included the Ad Note to paragraph 1 of Article XVII.

22. As indicated above, Australia considers that the fundamental “non-discrimination” obligation set forth in subparagraph (a) is qualified by the provisions of subparagraph (b). This relationship is clearly indicated by the introductory phrase to subparagraph (b) which sets the boundaries for the relevance of the disciplines set down in subparagraph (b). Subparagraph (b) has no application beyond the role it plays in qualifying the obligation in subparagraph (a).

23. In interpreting Article XVII, it is useful to distinguish between the scope of the obligation in subparagraph (a) and the legal tests for determining a violation of the obligation contained within subparagraph (a). As explained below, subparagraph (b) operates to provide legal tests for determining whether the fundamental “non-discrimination” obligation set forth in subparagraph (a) has been violated, but cannot and does not expand the scope of this obligation.

² Appellant Submission of Canada, para. 53

³ Panel Report, para 6.59: “The Panel does not consider it necessary to take a position on this issue”.

⁴ Panel Report, para 6.52.

24. The scope of the obligation in Article XVII:1 is set out in subparagraph (a). The following is required for there to be a violation of Article XVII:1:

(i) a Member must have established or maintained a State enterprise, wherever located, or granted to any enterprise, formally or in effect, exclusive or special privileges;

AND

(ii) such an enterprise must have engaged in purchases or sales involving either imports or exports;

AND

(iii) in such purchases or sales, such an enterprise must have acted in a manner inconsistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders.

25. Where a claim of inconsistency with Article XVII:1 is made, there are three relevant legal tests which a Panel must consider in determining whether there has been a violation of this provision:

(i) Whether the relevant enterprise, in its purchases or sales involving either imports or exports, has acted in a manner inconsistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders (see subparagraph (a))

(ii) Whether the relevant enterprise has made such purchases or sales in accordance with non-commercial considerations (see the first clause of subparagraph (b))

(iii) Whether the relevant enterprise has afforded the enterprises of the other WTO Members adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales (see the second clause of subparagraph (b))

26. In applying these legal tests, a panel must take account of the relationship between subparagraphs (a) and (b) of Article XVII.1 which, as explained above, is made clear by the introductory phrase to subparagraph (b). Accordingly, in Australia's view the two legal tests provided in subparagraph (b) qualify but do not expand upon the basic or fundamental legal test provided in subparagraph (a).

27. This interpretation of Article XVII:1 is consistent with the ordinary meaning of subparagraph (a) read together with subparagraph (b) and the Ad Note to paragraph 1. Under this interpretation, the obligation in Article XVII:1 is for an enterprise to act in a manner consistent with the general principles of non-discriminatory treatment by making all purchases and sales solely in accordance with commercial considerations and by affording the enterprises of other WTO Members adequate opportunity to compete for participation in such purchases and sales.

28. Under this interpretation, in order to establish a violation of Article XVII:1 it would be necessary to establish a violation of the legal test in subparagraph (a) as well as a violation of either of the legal tests in subparagraph (b). In other words, Australia considers that if an

enterprise has acted consistently with the first and second clauses of subparagraph (b), then it cannot be found to be in violation of Article XVII:1. And this is so even if the enterprise has acted in a manner inconsistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or exports by private traders. Furthermore, if an enterprise has acted consistently with subparagraph (a), then it cannot be found to be in violation of Article XVII:1, even if it has acted inconsistently with either or both of the clauses of subparagraph (b).

29. Subparagraph (b) cannot and does not expand the scope of the obligation in subparagraph (a). To take an illustrative example, let us assume that there is an irrational STE, who for whatever irrational reason, decides to purchase or sell its products in accordance with non-commercial considerations but in a manner which applied equally to all other Members (for example, giving away products to the enterprises of any and all Members). Such behaviour may well be inconsistent with subparagraph (b) but would be consistent with the general principles of non-discriminatory treatment and would not violate Article XVII:1. One of the three circumstances necessary for a measure at issue to fall within the scope of Article XVII:1 does not exist, namely, discriminatory treatment by the enterprise.

30. The interpretative note to Article XVII:1 provides clear support for this interpretation of the relationship between subparagraph (a) and subparagraph (b). The Ad Note to paragraph 1 of Article XVII provides in part:

The 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.

31. Australia considers that the interpretative note demonstrates that a sale which would be inconsistent with the legal test in subparagraph (a) (i.e. “*the charging by a state enterprise of different prices for its sales of a product in a different market*”) is not inconsistent with Article XVII:1 where it is consistent with subparagraph (b) (i.e. “*that such different prices are charged for commercial reasons*”).

32. As Canada correctly identified in its Appellant submission, Interpretative Notes do not add to or detract from the rights and obligations of the Members. Rather they clarify the provisions and provide additional precision as to the intent of the negotiators.⁵ It is noteworthy that the excerpt of the interpretative note provided above is clearly intended to assist in interpreting the entirety of Article XVII:1 rather than merely subparagraph (b). If the intention had been for the excerpted part of the interpretative note to assist in interpreting only subparagraph (b), then it would have been located under the heading for “Paragraph 1(b)” rather than under the heading for “Paragraph 1”.

33. To summarise, Australia does not agree with the interpretation of Article XVII:1 put forward by the United States that subparagraphs (a) and (b) contain “distinct legal obligations”. In Australia’s view, the correct interpretation of the relationship between these subparagraphs is that the fundamental “non-discrimination” obligation set forth in subparagraph (a) is qualified by the provisions of subparagraph (b). Moreover, for a claim of inconsistency with Article XVII:1 to be established, a Member must be found to have acted inconsistently with the disciplines in both subparagraphs (a) and (b).

⁵ See paragraph 31 of the Appellant Submission of Canada.

B. INTERPRETATION OF ARTICLE XVII:1(b)

34. In its appellant submission, the United States argues that the Panel erred in its interpretation of the term “enterprises” in the second clause of Article XVII:1(b) and the phrase “solely in accordance with commercial considerations” in the first clause of Article XVII:1(b). The United States argues that, as a consequence of these interpretative errors, the Panel erred in concluding that the CWB Export Regime is consistent with Canada’s obligations under Article XVII of GATT 1994.

35. As will be explained below, Australia considers that the Panel did not err in its interpretation of the term “enterprises” in the second clause of Article XVII:1(b) and did not err in its interpretation of the phrase “solely in accordance with commercial considerations” in the first clause of Article XVII:1(b). As a consequence, Australia considers that the Panel did not err in concluding that the CWB Export Regime is consistent with Canada’s obligations under Article XVII of GATT 1994.

36. Before doing so, however, Australia will identify the nature of the United States’ arguments in relation to the exports of wheat and explain how such arguments are inconsistent with the clear intent of Article XVII:1 of GATT 1994.

1. Exercise of exclusive and special privileges

37. Through its various arguments presented to the Panel, and now its arguments presented to the Appellate Body, the United States has sought to preclude the ability of State Trading Enterprises (hereinafter referred to as “STEs”) from exercising their exclusive or special privileges. The United States appears to argue that the exercise of such privileges would necessarily prevent STEs from:

- i. affording the enterprises of other Members adequate opportunity to compete for participation in such purchases or sales in accordance with the second clause of subparagraph (b)
- ii. making such purchases or sales solely in accordance with commercial considerations in accordance with the first clause of subparagraph (b)

38. As will be explained below, Australia considers that the arguments presented by the United States are flawed and are not supported by the text of Article XVII or by GATT 1994. Australia also considers that the United States’ arguments, if accepted, would significantly diminish the rights of WTO Members under Article XVII:1.

39. Article XVII:1(a) confirms a right of WTO Members to grant to any enterprise, formally or in effect, exclusive or special privileges. This right is subject to the “non-discrimination” obligation contained in Article XVII:1(a) as qualified by subparagraph (b) (see Section III.A in our submission above).

40. The existence of a right to grant exclusive or special privileges is supported by the working definition of STEs provided in paragraph 1 of the *Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994*:

In order to ensure the transparency of the activities of state trading enterprises, Members shall notify such enterprises to the Council for Trade in Goods, for review by the working party to be set up under paragraph 5, in accordance with the following working definition:

“Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports.”

41. Given that Article XVII:1 confirms the right to establish and maintain STEs that have been granted exclusive or special rights or privileges, Australia considers that it would be contrary to the ordinary meaning of Article XVII:1 to interpret the obligations under Article XVII:1 in such a way as to prevent or preclude the exercise of such exclusive or special rights or privileges. If Article XVII:1 had been intended to produce such a consequence it would have been constructed in a more explicit manner. The Panel correctly shared this concern.⁶

2. The Object and Purpose of Article XVII:1

42. The US argues in its appellant submission that the Panel misapplied international customary rules of treaty interpretation and, as a result, misinterpreted the obligations set forth in Article XVII:1(b) of GATT 1994.⁷ In support of this argument, the United States claims that a main object and purpose of GATT 1994 is to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce. Littered throughout the arguments relating to the interpretation of Article XVII:1(b) in the United States’ Appellant Submission are varying references to the purpose of Article XVII:1(b) being the creation of disciplines to prevent STEs from being operated so as to create serious obstacles to trade.⁸

43. Australia considers that the arguments of the United States incorrectly attempt to import into Article XVII:1, including subparagraph (b), an object and purpose which was clearly not intended. In doing so, the United States seeks to provide an interpretation of subparagraph (b) which was not intended. An object and purpose of GATT 1994 as a whole may include the substantial reduction of barriers to trade. However, other objects and purposes are enshrined in GATT 1994, including the establishment of predictable and transparent rules for the multilateral trading systems, raising standards of living, expanding the production and exchange of goods, and ensuring non-discrimination. Furthermore, not all of these objects and purposes find reflection in every individual part of GATT 1994. Article XVII:1 is an example which can arguably be said to further the object and purpose of non-discrimination among Members of the WTO rather than simply being aimed at the reduction of barriers to trade.

⁶ Panel Report, para 6.95: “Another concern we have with the United States’ interpretation of the first clause of subparagraph (b) is that for STEs to be able to *act* like “commercial actors”, in many cases, they effectively would need to *be* “commercial actors”, at least with respect to their purchase or sale operations. In order to subject themselves to the same sort of market constraints as those faced by “commercial actors”, they might, for instance, need to refrain from using certain of their privileges when making purchases or sales, or isolate their purchase or sale operations from other operations in respect of which privileges may have been granted (e.g., financial operations). We believe that if the intent behind the “commercial considerations” requirement had been to produce such far-reaching consequences, this intent would have been expressed both with greater clarity and in more detail.”

⁷ Appellant Submission of the United States, para 11.

⁸ Appellant Submission of the United States, paras 21, 24, 27, 28, 30

44. Australia considers that the object and purpose of Article XVII:1 can be identified from the text of Article XVII:1 itself. In summary, its object and purpose is to confirm a right to establish and maintain State enterprises and grant to any enterprise exclusive or special privileges subject to the constraints that the purchases or sales of such enterprises, involving imports or exports, shall be conducted in a manner consistent with the general principles of non-discriminatory treatment in GATT 1994 (as qualified by subparagraph (b)).

45. Additionally, it is clear from Article XVII:3 that Article XVII:1 was not expected and therefore not intended to prevent the creation of serious obstacles to trade. Article XVII:3 provides that:

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

46. Australia shall now turn to consider the correct interpretation of Article XVII:1(b).

3. Interpretation of the second clause of Article XVII:1(b)

47. In its Appellant Submission, the United States argues that the Panel misinterpreted the term “enterprises” in the second clause of Article XVII:1(b) and, in so doing, impermissibly diminished the obligation provided in that provision. In support of this argument, it focuses on the word “enterprises” and the definition of this word.⁹

48. Australia does not agree with the arguments presented by the United States and considers that the Panel correctly interpreted the term “enterprise” in its context. Australia has no difficulties with The New Shorter Oxford English Dictionary definition of “enterprise” cited by the United States in its Appellant Submission.¹⁰ Australia does however consider that the United States arguments confuse the two usages of the word “enterprises” in the second clause of Article XVII:1(b) and ignore the Panels reasoning related to the particular circumstances of this dispute, namely that it involved an export STE.¹¹ In Australia’s view, 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.

49. The word “enterprises” arises in regards to two distinctly different enterprises in relation to the second clause of subparagraph (b). The first occurrence of “enterprises” is in the introductory language of subparagraph (b) in the term “such enterprises”. The second occurrence of “enterprises” is in the phrase “the enterprises of the other contracting parties”. The arguments of the United States fail to differentiate the two types of enterprises referred to in subparagraph (b).¹² In order to remove this confusion, Australia will address the meaning of both distinct usages of the word “enterprises” in Article XVII:1.

50. The phrase “such enterprises” in the introductory language of Article XVII:1(b) clearly refers to the enterprises referred to in subparagraph (a), namely “a State enterprise, wherever located” or “any enterprise” formally or in effect, granted exclusive or special privileges.

⁹ Appellant Submission of the United States, paras 13 – 21.

¹⁰ Appellant Submission of the United States, para 15.

¹¹ Paragraphs 6.66 – 6.72 of the Panel Report

¹² Appellant Submission of the United States, para 16 and 17.

Article XVII:1(a) provides the context for interpreting the meaning of the phrase “such enterprises” in Article XVII:1(b).

51. The phrase “in its purchases or sales involving either imports or exports” in Article XVII:1(a) confirms the logical possibility and actual practice of an STE being either an export STE or an import STE (while not precluding the possibility that an STE could be both). Australia notes that the United States itself acknowledges that in subparagraph (a), “‘enterprises’ is used in the context of State enterprises, which would include both import STEs that act as buyers in the market and export STEs that act as sellers in the market”.¹³

52. Australia understands that an “export STE” enjoys exclusive or special rights or privileges with respect to the purchasing of domestic products for export, and in the exercise of these rights and privileges influences exports by its selling activities.¹⁴ Conversely, an “import STE” enjoys exclusive or special rights or privileges with respect to the selling of imported foreign products, and in the exercise of these rights and privileges influences imports by its buying activities.

53. The Panel correctly identified that the present case concerns an export STE, and as a result, the second clause of subparagraph (b) in this particular case can be restated as “An export STE shall afford the enterprises of the other Members adequate opportunity, in accordance with customary business practice, to compete for participation in its sales”.¹⁵

54. In doing so, the Panel was correctly explaining the meaning of the term “such enterprises” in subparagraph (b). Australia agrees with the Panel’s findings with respect to the phrase “compete for participation in such purchases or sales”¹⁶ and notes that the United States appears to limit its arguments with respect to the second clause of subparagraph (b) to the meaning of “enterprises” and not the phrase “compete for participation in such purchases or sales” in any other respect.

55. Australia will now turn to the meaning in this particular case, of the word “enterprises” in the phrase “enterprises of the other contracting parties”. Australia considers that it is a necessary consequence of determining that the present case concerned an export STE and, thereby, that the transaction relevant to the second clause of subparagraph (b) is a sale by the export STE, that the other party to any such transaction, namely “the enterprises of the other contracting parties”, must be an enterprise wishing to buy from the CWB.

4. Interpretation of the first clause of Article XVII:1(b)

56. In its Appellant Submission, the United States argues that the Panel misinterpreted the phrase “solely in accordance with commercial considerations” in the first clause of Article XVII:1(b). The United States argues that the Panel’s conclusion that the CWB Export Regime was not inconsistent with Article XVII:1(b) was based on a finding that the phrase “solely in accordance with commercial considerations” was “simply intended to prevent STEs from behaving like ‘political’ actors”. The United States proceeds to argue, as a consequence,

¹³ Appellant Submission of the United States, para 16.

¹⁴ See working definition of an STE contained in paragraph 1 of the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, and referred to above.

¹⁵ See paragraphs 6.66 and 6.72 of the Panel Report

¹⁶ See paragraph 6.69 of the Panel Report.

that the Appellate Body should reverse this finding and conclude that commercial considerations are those under which commercial actors must operate.¹⁷

57. Australia considers that the United States has mischaracterised the Panel’s finding with respect to the phrase “solely in accordance with commercial considerations” and the Panel’s explanatory remarks at paragraph 6.94 with respect to the first clause being “simply intended to prevent STEs from behaving like ‘political’ actors”. Australia further considers that a conclusion that commercial considerations are those under which commercial actors must operate is not a consequence of a clarification or reversal of the Panel’s explanatory remarks.

58. In Australia’s view, the focus on whether the first clause of Article XVII:1(b) is intended to make STEs act like “commercial actors” or “political actors” is unnecessary and unhelpful, and is not supported by the text of Article XVII:1. Engaging in this sort of analysis only serves to distract attention from the more relevant and textually supported consideration of whether an STE has made its purchases “solely in accordance with commercial considerations”. The Panel’s explanatory remarks with regard to “political actors” were not critical to the Panel’s interpretation of the first clause of subparagraph (b), but rather serve to explain the irrelevancy of the United States’ references to “commercial actors”.

59. It is not possible to equate “commercial considerations” solely with the actions of “commercial actors” and it is not possible to equate “non-commercial considerations” solely with the actions of “political actors”. Nor does the Panel attempt to do so. The Panel elaborates on what constitutes “commercial” and “non-commercial considerations” in the remainder of paragraph 6.94 and the footnote to paragraph 6.94. The Panel clearly and correctly identifies through the inclusion of “etc” throughout the remainder of paragraph 6.94 and in following first footnote to paragraph 6.94, that “non-commercial considerations” are not limited to “political considerations”:

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.* See para. 6.88 above.¹⁸ [emphasis added]

60. Through the device of the “political actors” reference, the United States seeks to re-ignite its argument that the “commercial considerations” requirement is intended to make STEs behave like “commercial actors”. This argument was correctly rejected by the Panel.¹⁹

61. The United States has mischaracterised the Panel’s *explanatory remarks* at paragraph 6.94 as *findings*. The first footnote to paragraph 6.94 makes clear that its reference to “political actors” was used merely to contrast the references of the United States to “commercial actors”:

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. See para. 6.88 above.²⁰ [emphasis added]

62. The Panel correctly observed that, by its terms, the first clause of subparagraph (b) does not require export STEs to act like “commercial actors”. In fact, subparagraph (b) nowhere uses the term “commercial actors”²¹ or for that matter the term “political actors”.

¹⁷ Appellant Submission of the United States, para 31

¹⁸ Panel Report, footnote 175.

¹⁹ See paragraphs 6.94 and 6.100 of the Panel Report.

²⁰ Panel Report, footnote 175.

63. The Panel also correctly noted that “What the first clause actually requires is that export STEs make sales solely in accordance with ‘commercial considerations’”.²² The Panel’s findings with respect to the interpretation of the first clause were correctly based on an analysis of whether the United States was correct in arguing 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. The Panel correctly rejected the argument by the United States.²³

64. The Panel was correct in recognising the need for a case-by-case approach to the interpretation and application of the standard in subparagraph (b).²⁴ The Panel correctly considered that “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””.²⁵

²¹ See Panel Report, para 6.92

²² Panel Report, para 6.92

²³ Panel Report, para 6.101 and 6.100

²⁴ See paragraph 6.103 of the Panel Report

²⁵ See paragraph 6.106 of the Panel Report

**C. OBJECTIVE ASSESSMENT OF THE FACTS IN ACCORDANCE WITH ARTICLE 11
OF THE DSU**

**1. Whether the Panel findings are erroneous because they are based only
on a subset of the elements of the challenged measure, not the
challenged measure in its entirety**

65. The United States in its Appellant's submission alleges that the Panel conducted a flawed analysis of the identified measure, known as the CWB Export Regime.²⁶ After the Panel correctly defined the measure at issue, the United States submits that the Panel ignored the CWB Export Regime as a whole and inappropriately focused on aspects of the measure at issue. Specifically, the United States argues that the Panel did not undertake an analysis of the privileges granted to the CWB, the second facet of the measure at issue identified by the Panel.²⁷

66. Australia understands this claim of error made by the United States to be related to, and founded on a similar basis, as the United States' claims under Article 11 of the DSU. In paragraph 43 of its submission, the United States notes that, "[t]he Panel in this dispute disregarded the mandate of DSU Article 11 in its findings related to the CWB legal framework *and the CWB Export Regime as a whole.*"²⁸

67. In order to determine that the CWB Export Regime necessarily or inescapably results in export sales that do not conform to Art XVII:1, the Panel discerned four broad assertions that the United States, at the least, had the obligation to establish.²⁹ These assertions were based on the United States' claim and are not challenged by the United States in this appeal.

68. The four assertions were an attempt by the Panel to determine the consistency of the CWB Export Regime, *per se* and as a whole, with Article XVII:1 of GATT 1994. The four assertions were cumulative and each focused on a different element, or different combinations of elements, of the measure at issue. The first three assertions identified by the Panel involve an inquiry into the special privileges enjoyed by the CWB. That is, whether the special privileges give the CWB extra pricing flexibility than a 'commercial actor', whether that flexibility enables the CWB to offer 'non-commercial' sales terms and thus to deny other Members' 'commercial' enterprises an adequate opportunity to compete, and whether the legal framework and privileges create an incentive for the CWB to discriminate between markets.

69. The Panel ultimately considered only the third US assertion in detail, assuming for the purposes of the analysis that the first two assertions were established.³⁰ While the Panel discussed the legal framework aspect of the third US assertion almost exclusively in the Report, it is clear that the special privileges granted to the CWB were an important factor in the Panel's reasoning. Not only were the privileges outlined extensively by the Panel in the factual part of the Report and in describing the measure at issue, they are mentioned as forming part of the Panel's consideration in paras 6.123, 6.129, 6.134-6.135, and 6.145-6.149

²⁶ Appellant submission of the United States, paras 31 - 41

²⁷ Panel Report, para 6.24.

²⁸ Emphasis added; see also para 47 of the United States' appellant submission.

²⁹ Panel Report, paras 6.109-6.114 and 6.120.

³⁰ Panel Report, para 6.121.

of the Report. Importantly, the Panel explicitly recognised that “[t]he view that the United States in this case only challenges the CWB Export Regime “as a whole” is borne out by the fact that the United States does not appear to challenge the constituent elements of the CWB Export Regime separately.”³¹

70. Additionally, the United States’ appellant submission proceeds on the basis that the Panel’s interpretation of Article XVII:1(b) is incorrect. In considering the interpretative issues related to this article the Panel considered in some depth whether the exercise of privileges necessarily prevents STEs from acting consistently with Article XVII:1(b).³² That analysis indicated that the Panel disagreed with the approach taken by the United States on aspects of the language used in Article XVII:1(b). This in turn informed the Panel’s specific discussion of the third US assertion. That is, the privileges granted by Canadian legislation to the CWB do not add to any incentive to discriminate between markets by making sales in a ‘non-commercial’ manner, as that term was interpreted and applied by the Panel. In this sense, there was no need for the Panel to extensively reconsider their operation before coming to its conclusion in paragraph 6.148 that the United States had failed to establish the third US assertion.

71. Therefore, the Panel’s analysis as evidenced in the Report demonstrates that the CWB Export Regime was considered as a whole and no one element was relied upon to the exclusion of others. It is clear that the Panel did not ignore the effect of the privileges and examined their interaction with the obligations extant in Article XVII:1. In Australia’s submission, the finding was based on the measure before the Panel.

2. Whether the Panel Ignored Numerous Facts Presented by the United States, Thereby Making the Erroneous Finding that the CWB’s Legal Framework Does not Create an Incentive for the CWB to Engage in Sales That Are Not Solely in Accordance with Commercial Considerations

72. The second aspect of the United States’ claim, relating to the Panel’s conclusion on incentives, is that it was based on a deliberate disregard of evidence regarding the CWB legal framework.³³ The United States submits that the Panel relied only on two discrete facts, contrary to the United States’ own submissions, which led to the erroneous conclusions that the CWB is controlled by wheat farmers and that its sales are not influenced by other aspects of its legal framework.

73. The United States specifically cites various facts that it claims were ignored by the Panel, including facts that related to:

- the CWB Board of Directors not being truly independent;
- the CWB’s legal structure providing the CWB with greater pricing flexibility and reduced risk compared to commercial actors, and in turn, incentives to make sales in a non-commercial manner; and
- the CWB’s credit sales.

³¹ Panel Report, para 6.26, footnote omitted.

³² Panel Report, paras 6.40-6.41, 6.58-6.59 and 6.90-6.106.

³³ Appellant submission of the United States, paras 44 - 46

74. These facts presented by the United States appear related to a blend of the first two elements of the measure at issue discussed by the Panel in paras 6.14-6.15. Because the exclusive and special privileges derive their legal source from the *CWB Act*, it is difficult to conceptually separate these two elements of the measure.

75. In paragraphs 6.122 to 6.135 the Panel gives consideration to more than just the facts relating to the governance structure and the lack of governmental control or interference in the operations of the CWB. The Panel also discusses the operation of sections 5 and 7 of the *CWB Act* in considerable detail which relate to the reasonable pricing standard available to the CWB.

76. Furthermore, as mentioned above, the Panel analysed in greater detail, in the context of its discussion of the interpretative approach to Article XVII:1(b), the role special privileges play in relation to whether activities of STEs are consistent with Members' obligations under GATT 1994. The United States' appellant submission appears to be founded on the United States' particular interpretation of Article XVII:1. This interpretation would give increased relevance to the special privileges as indicating that the CWB would not be able to act in similar ways to a 'commercial actor'.³⁴ However, according to the Panel's correct and narrower interpretation of 'commercial considerations', special privileges will not necessarily and by themselves lead to inconsistent actions with Article XVII:1. The Panel's interpretation clearly informed its later consideration of the legal framework and special privileges of the CWB in assessing their roles in creating incentives to discriminate between markets.

77. Ultimately, the Panel was satisfied that the legal framework and the privileges accorded to the CWB did not establish that there was an incentive for the CWB to discriminate between markets by making some of its sales in a non-commercial manner. Australia considers that the Panel did not ignore the facts presented by the United States and that the finding was based on the entire measure before the Panel.

3. Whether the Panel Failed to make an Objective Assessment of the Facts Presented by the United States

78. The United States has alleged that the Panel failed to make an objective assessment of the facts presented by the United States and that this failure resulted in erroneous findings.³⁵

79. In Australia's view, the United States's claim lacks merit. A close reading of the entire Panel Report indicates that the Panel appropriately considered the factual information before it, and discussed in detail those facts which it understood to be most relevant to an application of the GATT provisions at the centre of the dispute. The special privileges that the United States' claims the Panel ignored or deliberately disregarded, whether part of the legal framework or not, were not given the same weight by the Panel as the United States' argued they deserved. However, this is not sufficient in itself to establish a violation of DSU Article 11.³⁶

80. Even if the Appellate Body considers that the Panel did make some errors in basing its findings on a sub-set of the elements of the measure at issue or by disregarding evidence

³⁴ Panel Report, paras 6.92-6.96.

³⁵ Appellant submission of the United States, paras 42 - 59

³⁶ EC-Hormones, AB report, para 133, and Australia – Salmon, AB report, para 133.

presented by the United States, Australia would submit that these errors were not sufficiently egregious to amount to a violation of DSU Article 11.³⁷

³⁷ *EC – Hormones*, AB Report, para 133; see also *Korea – Alcoholic Beverages*, AB Report, para 164, and *Japan – Agricultural Products II*, AB Report, para 141

D. COMPLETING THE PANEL’S ANALYSIS OF ARTICLE XVII:1(b)

81. In its appellant submission, Canada requests the Appellate Body, in the event that the Appellate Body agrees with the United States that the Panel committed legal error in determining whether the CWB Export Regime creates an “incentive” for the CWB to make sales not in accordance with commercial considerations, to complete the analysis and find that the United States has failed in any event to establish that the CWB Export Regime necessarily results in sales not in accordance with Article XVII:1(b).³⁸

82. On the basis of, *inter alia*, the views expressed above, Australia does not agree with the United States that the Panel committed a legal error. However, to address this ground of appeal, Australia will proceed on the assumption that the Appellate Body considers that a legal error has been made and that it is necessary to complete the analysis. Australia comments are limited to the steps which the Appellate Body would need to complete in order to find a violation with Article XVII:1 and are not intended to express any view on whether the factual record is sufficient to allow the Appellate Body to complete the analysis.

83. The Panel correctly recognised at paragraph 6.120 that for the United States’ claim under Article XVII:1 to be successful, the United States must at least establish each of its four assertions. The four assertions of the United States were described in paragraphs 6.110, 6.111, 6.112 and 6.114 of the Panel Report. The four assertions are respectively referred to below as “the first US assertion”, “the second US assertion”, “the third US assertion”, and “the fourth US assertion” or collectively, as the “four US assertions”. Australia notes, as does Canada in its appellant submission³⁹, that the United States does not appeal the Panel’s characterization of its own arguments.

84. As will be explained below, Australia does not consider that establishment of the four assertions would be sufficient to establish a violation of Article XVII:1 (nor relevant to determining consistency with Article XVII:1(b)). Australia therefore does not offer any view on whether the facts presented by the United States establish the four US assertions. Australia does however note that the Panel did not consider that the United States had established any of its four assertions. The Panel merely assumed for the purposes of the analysis that the United States had established the first and second US assertions.⁴⁰ The Panel was not persuaded that the third US assertion had been established⁴¹ and, as a result, was not required to consider the fourth US assertion. Australia would also note the need for a case-by-case approach to the application of Article XVII:1(b).

85. Even if the four US assertions were established this would not be sufficient to establish inconsistency with Article XVII:1. The Panel had not conceded that the four US assertions would be sufficient to establish inconsistency with paragraph (b) of Article XVII:1. The Panel merely stated at paragraph 6.120 that for the United States’ claim under Article XVII:1 to be successful, the United States must at least establish each of its four assertions. This is simply a logical conclusion that in order to establish a claim, a complaining party must at

³⁸ Appellant Submission of Canada, para 10.

³⁹ Appellant Submission of Canada, para 55

⁴⁰ See paragraph 6.121 of the Panel Report

⁴¹ See paragraphs 6.146 and 6.147 of the Panel Report as well as, in this Australian Third Participant submission, the related paragraphs above.

least establish its arguments and the supporting factual assertions. It does not pass comment on the logic of the argument of the United States, which is based on the four US assertions.

86. The argument of the United States in support of its claim that the CWB Export Regime is inconsistent with paragraph (b) is not logical. As Canada correctly explains in its appellant submission,⁴² if proven, the four US assertions would establish that the CWB has “pricing flexibility” that enables it to act “non-commercially”; that the CWB has an incentive to act “non-commercially; and that the Government of Canada has not taken any positive steps to ensure that the CWB does not act “non-commercially”. This does not establish that the CWB necessarily acts not in accordance with commercial considerations.

87. The United States’ claim is that the CWB Export Regime “necessarily results” in non-conforming CWB export sales.⁴³ The United States argues that non-conforming CWB export sales are an “inescapable consequence” of the CWB Export Regime.⁴⁴ Even if the four US assertions are established, they do not result in an “inescapable consequence” that the CWB export sales will not conform with subparagraph (b).

88. Finally, even if the United States was able to establish that the CWB Export Regime “necessarily results” in CWB export sales which do not conform with subparagraph (b) of Article XVII:1, the Appellate Body would need to consider the relationship between subparagraphs (a) and (b) of Article XVII:1, as discussed above. Consistent with Australia’s submission above, the Appellate Body would also have to consider the consistency of the CWB Export Regime with subparagraph (a) of Article XVII:1.

⁴² Appellant Submission of Canada, para 58

⁴³ Panel Report, para 6.109

⁴⁴ Panel Report, para 6.109