BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2004-3)

APPELLEE'S SUBMISSION OF THE UNITED STATES

June 28, 2004

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SERVICE LIST

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TABLE OF CONTENTS

Table of Reports Cited In This Submission

Short Title	Full Report Title and Citation
Argentina – Footwear Safeguards	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear,* WT/DS121/AB/R, adopted Jan. 12, 2000
Argentina – Textiles and Apparel	Appellate Body Report*, Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, adopted April 22, 1998
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted Nov. 6, 1998
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted March 20, 1997
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted June 19, 2000
Canada – FIRA	Panel Report*, Canada – Administration of the Foreign Investment Review Act*, L/5504 - 30S/140, adopted Feb. 7, 1984
Canada – Patents	Appellate Body Report, *Canada – Term of Patent Protection*, WT/DS170/AB/R, adopted Oct. 12, 2000
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted July 23, 1998
Korea - Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted Jan. 10, 2001
Turkey – Textiles	Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted Nov. 19, 1999
United States - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. Canada's appeal disregards accepted customary rules of treaty interpretation and fails to give proper consideration to the ordinary meaning of the terms of Article XVII:1(b) of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Canada asserts in its other appellant's submission that the Panel erred by examining the U.S. claim under Article XVII:1(b) without first finding under Article XVII:1(a) that the Canadian Wheat Board ("CWB") engaged in sales behavior that violated the general principles of non-discriminatory treatment prescribed in the GATT 1994. Canada further argues that Article XVII actually allows state trading enterprises ("STEs") to engage in such discriminatory conduct. Canada's arguments are without merit, for the reasons discussed below. The Panel properly began its analysis by examining the Article XVII:1(b) claim presented by the United States, and no reasonable interpretation of Article XVII permits sales behavior by STEs that contravenes fundamental GATT principles of non-discriminatory treatment.

2. Subparagraphs (a) and (b) of Article XVII:1 articulate three separate requirements, and Canada must ensure that the CWB complies with each of these requirements. Subparagraph (b) of Article XVII:1 requires that the CWB make its sales "solely in accordance with commercial considerations." Subparagraph (b) of Article XVII:1 also requires that the CWB afford the enterprises of other Members an "adequate opportunity, in accordance with customary business practice, to compete for participation in such . . . 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.

3. 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 so as to secure compliance with a given law or regulation. It follows that Article XVII:1(b) compels Canada to ensure that the CWB make sales solely in accordance with commercial considerations in order to secure Canada's compliance with Article XVII.

4. 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. These are individual requirements establishing specific disciplines that an STE must adhere to. Failure to adhere to those disciplines results in a breach of Article XVII.

5. The context of Article XVII also supports the conclusion that Article XVII:1(b) contains specific disciplines on STE behavior that, if violated, constitute a breach of Article XVII. Article XVII:3 recognizes that STEs may 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.

6. Finally, not only is Canada's novel interpretation of Article XVII:1 unsupported by the ordinary meaning of the text, but Canada's interpretation also undermines the object and purpose of the GATT 1994. Canada's interpretation of Article XVII:1 does not contribute to the

elimination of discriminatory treatment in international commerce, but instead endorses such discriminatory treatment by STEs, to the disadvantage of commercial actors.

7. Article XVII:1 creates a coherent regime designed to discipline STEs that might otherwise engage in trade-distorting conduct. Contrary to Canada's unfounded assertions, subparagraphs (a) and (b) of Article XVII:1 – two subparagraphs of the same treaty provision – are not in conflict, and Canada puts forward no persuasive argument in favor of overturning the presumption against such conflict. 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.

8. Canada's argument that the Panel should have found a breach of Article XVII:1(a) before turning to Article XVII:1(b) is thus without merit. After resolving the threshold issue that the CWB was in fact an STE subject to Article XVII's disciplines, the Panel correctly turned to the U.S. primary claim under Article XVII:1(b).

9. For all of the reasons set forth below, the United States requests that Canada's appeal be rejected in its entirety. The Appellate Body should affirm the Panel's determination that a violation of either of the requirements set forth in Article XVII:1(b) is sufficient to establish Canada's breach of Article XVII.

II. ARGUMENT

A. Canada's Reading Of Subparagraph (b) Of Article XVII:1 Is Not Supported By The Ordinary Meaning Of The Terms Of Subparagraph (b) In Their Context And In Light Of The Object And Purpose Of The GATT 1994

10. Pursuant to subparagraphs (a) and (b) of Article XVII:1 of the GATT 1994, Canada undertakes that the CWB will act in accordance with three obligations. First, Canada undertakes that the CWB will "act in a manner consistent with the general principles of non-discriminatory treatment" prescribed in the GATT 1994. Second, Canada undertakes that the CWB will make its purchases and sales "solely in accordance with commercial considerations." Third, Canada undertakes that the CWB will "afford the enterprises of the other [Members] adequate opportunity . . . to compete for participation in" the CWB's sales. If the CWB fails to adhere to any of these obligations, that failure is sufficient to establish that Canada has breached Article XVII:1. The Panel's analysis in this respect was therefore correct. In other words, if the Panel had found that the CWB had failed to act in accordance with commercial considerations in contravention of Article XVII:1(b),[1/] the Panel would have established that Canada had breached its obligations under Article XVII.

11. The interpretation that Article XVII:1(b) provides obligations independent of Article XVII:1(a) is not novel, as the same conclusion was reached by the panel in *Korea – Beef*. In that dispute, the panel stated unequivocally that:

> 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.[2/]

[1/] For the reasons set forth in the *Appellant's Submission of the United States*, the Panel should have found that the CWB Export Regime necessarily results in sales that are not solely in accordance with commercial considerations, thereby resulting in Canada's breach of Article XVII.

[2/] *Korea – Beef*, para. 757.

12. Canada, disregarding the plain text of Article XVII and the customary rules of interpretation of public international law, argues that subparagraph (b) of Article XVII:1 does not set forth specific requirements for STEs such as the CWB. Canada first begins with the wrong premise that Article XVII:1 contains "the right to establish and maintain state enterprises and to grant these or other enterprises exclusive and special privileges."[3/] However, the very text of Article XVII:1 confirms that it is *not* establishing a "right" to maintain STEs, but instead – through the phrase in subparagraph (a), "*if* [a Member] establishes or maintains a State enterprise . . . or grants to any enterprise . . . exclusive or special privileges" (emphasis added) – is establishing constraints on STEs should a Member decide to set one up and grant it exclusive or special privileges. Indeed, it is illogical to suggest that a Member cannot establish an STE without the existence of Article XVII.

13. Canada next argues that "Article XVII:1(b) interprets Article XVII:1(a) to the effect that state trading enterprises may 'discriminate' as long as such discrimination is based on 'commercial considerations.'"[4/] This interpretation of Article XVII:1(b) has again no foundation in the ordinary meaning of the terms of that provision read in their context, and squarely contradicts the object and purpose of the GATT 1994.[5/]

[3/] *Other Appellant's Submission of Canada*, para. 21.

[4/] *Other Appellant's Submission of Canada*, para. 22.

[5/] Indeed, Canada's position is surprising given that one of Canada's arguments for dismissing the U.S. panel request under Article 6.2 of the *Dispute Settlement Understanding* was premised on the notion that subparagraph (b) of Article XVII:1 contains multiple obligations. *See* Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, circulated April 6, 2003 ("Panel Report"), para. 4.24 (summarizing Canada's preliminary ruling submission) ("Article XVII:1(b) contains two obligations. The first obligation relates to the operations of STEs generally; the other imposes an obligation on a

14. Article XVII should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[6/] As explained below, a proper interpretation leads to the conclusion, consistent with the Panel's findings, that a breach of any of the disciplines of subparagraphs (a) or (b) of Article XVII:1 constitutes a breach of Article XVII. The Panel's determination that a breach of subparagraph (b) of Article XVII:1 would have been sufficient to establish a breach of Article XVII, as well as the *Korea – Beef* panel's conclusion regarding what is necessary to prove a breach of Article XVII, is supported by this proper interpretation. Canada's interpretation of Article XVII:1 as a limited obligation that permits discriminatory behavior, on the other hand, is simply not plausible.

15. Subparagraph (b) of Article XVII:1 states that the provisions of subparagraph (a) "shall be understood to require" that STEs must: (1) make purchases and sales solely in accordance with commercial considerations; and (2) provide the enterprises of other Members with an adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

16. The ordinary meaning of "to require" in a legal context is to "[d]emand (a thing, *that*) or call on (a person *to do*), in order to comply with a law, regulation, custom, etc."[7/] or "[t]o direct,

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Member to afford to the enterprises of other WTO Members the opportunity to compete for the business of STEs.")

[6/] *See, e.g., United States – Gasoline*, pp. 16-17; Article 31(1), *Vienna Convention on the Law of Treaties*, done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

[7/] *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press (1993)), v.1, p. 2556.

order, demand, instruct, command, claim, compel, request, need, exact."[8/] Thus, subparagraph (b) of Article XVII:1 demands or compels the CWB to adhere to specific disciplines in order for Canada to comply with Article XVII. This is not only reasonable, it is the only conclusion supported by the ordinary meaning of the text.

17. As for subparagraph (b)'s introductory phrase, "[t]he provisions of subparagraph (a) of this paragraph shall be understood to require,"[9/] its ordinary meaning makes clear that a breach of either of the two requirements set forth in subparagraph (b) establishes a breach of subparagraph (a). Canada thus has an obligation under Article XVII:1 to ensure that the CWB does not breach any of the requirements set forth in both subparagraphs (a) and (b). Contrary to Canada's arguments,[10/] there is no basis to conclude that subparagraph (b) allows the CWB to engage in discriminatory sales practices that violate the general principles of non-discriminatory treatment of the GATT 1994. Nothing in the text supports an interpretation of subparagraph (b) as merely a list of permissible ways that the CWB may engage in discriminatory sales practices. If subparagraph (b) permitted sales that violate the principles of non-discriminatory treatment of the GATT 1994, there would be no need to include subparagraph (a) at all.[11/] Thus, Canada's

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[8/] *Black's Law Dictionary*, B.A. Garner (ed.) (West Group (1990)), p. 1304.

[9/] Article XVII:1(b), GATT 1994.

[10/] Canada seems to believe that the disciplines of Article XVII:1 allow STEs to violate principles of non-discriminatory treatment, as long as such a violation can be justified by basing decisions, in part, on commercial considerations. *See Other Appellant's Submission of Canada*, para. 27 ("where a state trading enterprise makes distinctions in its purchasing or sales decisions that are caught by Article XVII:1(a), those distinctions would not be in violation of Article XVII:1 if they are based on commercial considerations. . . ").

[11/] As noted above, Canada – or any other WTO Member – does not need the WTO to first provide it a "right" to establish an STE before doing so, yet this is essentially Canada's interpretation of Article XVII:1.

interpretation would render subparagraph (a) without effect, contrary to basic principles of treaty interpretation.[12/]

18. Furthermore, subparagraph (b) of Article XVII:1 "require[s] that such enterprises shall" make purchases or sales solely in accordance with commercial considerations and "shall" afford enterprises of other Members adequate opportunity to compete for participation in such purchases and sales. "Shall" is an unequivocal command; it is not qualified. Canada's reading of subparagraph (b) as an exception to subparagraph (a) is therefore untenable. (Moreover, Canada's reading then would render subparagraph (b) an affirmative defense to subparagraph (a); thus, Canada would bear the burden of proving that it is entitled to this "exception," which of course it has not.)

19. Subparagraph (b) does not say that *if* there is a breach of the principles of non-discriminatory treatment under subparagraph (a), an STE *may* make sales or purchases *as long as* they are based, at least in part, on commercial considerations. Rather, subparagraph (b) states that STEs "*shall*, having due regard to the other provisions of this Agreement, *make* any such purchases and sales *solely in accordance with commercial considerations*."[13/] Whether characterized as a separate obligation or as an additional requirement that flows from subparagraph (a), the commercial considerations requirement is a specific discipline on STE behavior that is mandated by subparagraph (b).

[12/] *See United States – Gasoline*, p. 23 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[13/] Article XVII:1(b), GATT 1994 (emphasis added).

20. The United States agrees that subparagraph (b) and subparagraph (a) are related. However, nothing in the text creates a hierarchy of obligations or leads to the conclusion that the requirements of subparagraph (b) "temper" the obligations of subparagraph (a), as Canada suggests.[14/] Subparagraphs (a) and (b) both establish constraints on STE behavior. Subparagraph (b) unequivocally states specific requirements, and Canada must ensure that the CWB meets these additional requirements.

21. The context of Article XVII supports the conclusion that, given the ordinary meaning of the terms "to require" and "shall," the CWB's failure to meet the requirements of subparagraph (b) would be sufficient to establish Canada's breach of Article XVII. Article XVII:3 recognizes that STEs "might be operated so as to create serious obstacles to trade . . ." This concern supports an interpretation of subparagraphs (a) and (b) of Article XVII:1 as a regime to prevent STEs from creating serious obstacles to trade by a variety of means. A reading of subparagraph (b) that fails to hold Members accountable for subparagraph (b)'s requirements contradicts the fundamental concern of the Members articulated in Article XVII:3. Subparagraph (a)'s general prohibition on discriminatory treatment addresses one obstacle to trade. However, Article XVII:3 speaks of "obstacles," and in this context the ordinary meaning of subparagraph (b) is properly understood as placing additional constraints on STE behavior to address the multiple obstacles to trade that STEs can create.

[14/] Implicit in Canada's arguments is the suggestion that subparagraph (a) is so vague as to need subparagraph (b) to give it meaning. Needless to say, this hardly recommends an interpretation under which a complainant has to prove a breach of subparagraph (a) before proceeding to an examination of subparagraph (b).

22. An additional contextual reference sheds light on the ordinary meaning of subparagraph (b) and its separate requirements. If the obligations under subparagraph (b) were completely subsumed in subparagraph (a) as Canada suggests, there would be no need to specify in Article XVII:1(c) that Members cannot prevent any enterprise "from acting in accordance with *the principles* of subparagraphs (a) *and* (b) of this paragraph."[15/] This reference to more than one principle emphasizes that both subparagraphs (a) and (b) contain important restrictions on STE behavior, and supports a reading of Article XVII that requires the CWB to observe all three requirements enshrined in subparagraphs (a) and (b) of Article XVII:1; if the CWB does not meet all three requirements, Canada has breached its obligations under Article XVII.

23. The object and purpose of the GATT 1994 also supports the interpretation of the text of Article XVII:1 as requiring the CWB to observe all three requirements of subparagraphs (a) and (b). The purpose of the GATT 1994, as stated in the Preamble, is to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce.[16/] If STEs could violate principles of non-discriminatory treatment as long as they comply only with the requirements of subparagraph (b) as Canada suggests,[17/] this would directly undermine a core object and purpose of the GATT 1994 by permitting discriminatory treatment in international

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[15/] Article XVII:1(c), GATT 1994 (emphasis added).

[16/] Preamble, GATT 1994 ("[b]eing desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce").

[17/] *See Other Appellant's Submission of Canada*, para. 27 ("where a state trading enterprise makes distinctions in its purchasing or sales decisions that are caught by Article XVII:1(a), those distinctions would not be in violation of Article XVII:1 if they are based on commercial considerations. . . .")

commerce. In addition, Canada's interpretation does not reduce barriers to trade, it endorses barriers to trade in certain circumstances. When viewed in light of the object and purpose of the GATT 1994, Canada's novel interpretation of Article XVII:1 cannot stand.[18/]

24. In its other appellant's submission, Canada relies on the 1984 GATT panel report in *Canada – FIRA*. That panel, however, was charged with examining subparagraph (c) of Article XVII:1, not the relationship between subparagraphs (a) and (b). Furthermore, the Appellate Body has observed that relying on past GATT panel reports is not a substitute for a textual analysis of the GATT 1994 according to customary rules of interpretation of public international law.[19/] The *Canada – FIRA* panel did not examine the ordinary meaning of Article XVII:1(c), which, as noted above, refers to "the principles of subparagraphs (a) and (b)." Instead, the *Canada – FIRA* panel improperly created a hierarchy between subparagraphs (a) and (b) that was not supported by the ordinary meaning of the text or necessary to its analysis of subparagraph (c). Furthermore, the *Canada – FIRA* panel was not examining the behavior of STEs, but was

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[18/] It is interesting to note that Canada does not rely on the object and purpose of the GATT 1994, but instead on the so-called "object and purpose" of Art. XVII. See *Other Appellant's Submission of Canada*, paras. 24, 28, and 35. There is, however, no reference to the consideration of the "object and purpose" for particular provisions within a treaty in the customary rules of treaty interpretation, nor is there any basis for Canada's supposed "object and purpose" for Article XVII:1.

[19/] *See Argentina – Textiles and Apparel*, paras. 42 - 47 (criticizing the panel for relying on past GATT practice without undertaking analysis of the ordinary meaning of the terms of the provision at issue (GATT Article II) in their context and in light of the object and purpose of the GATT 1994).

examining a government measure to determine whether that measure prevented any enterprise "from acting in accordance with the principles of subparagraphs (a) and (b)."[20/]

25. Even looking to the *Canada – FIRA* panel's analysis of the relationship of subparagraphs (a) and (b), it becomes evident that the panel failed to examine the ordinary meaning of the term "to require." Instead, the *Canada – FIRA* panel seems to contradict itself, on the one hand stating that the obligation to act in a manner consistent with general principles of non-discriminatory treatment "is defined in subparagraph (b)," yet at the same time jumping to the conclusion that while subparagraph (b) "defines the obligations" of Members, the provisions of subparagraph (b) do not constitute separate obligations. This twisted logic is not supported by the ordinary meaning of subparagraph (b) of Article XVII:1 in the context of Article XVII and when viewed in light of the object and purpose of the GATT 1994.

26. In sum, a breach of any of the requirements set forth in Article XVII:1 constitutes a breach by Canada of its obligations under Article XVII of the GATT 1994. The Panel was therefore correct in first examining whether the CWB had failed to act in accordance with commercial considerations. If affirmed, such a determination would have been sufficient to establish Canada's breach of Article XVII. There is no hierarchy of obligations under Article XVII. To the contrary, the relatedness of subparagraphs (a) and (b), and the notion that subparagraph (a) is "understood to require" adherence to the requirements set forth in subparagraph (b), is consistent with the design of a regime to prevent STEs from creating serious

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[20/] Article XVII:1(c), GATT 1994 ("No [Member] shall prevent any enterprise . . . under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph.")

obstacles to trade and to promote the elimination of discriminatory treatment in international commerce. A breach of any of the three obligations set forth in subparagraphs (a) and (b) would undermine the object and purpose of the GATT 1994.

B. Canada's Interpretation of Article XVII:1, Which Suggests An Inherent Conflict Between Subparagraphs (a) And (b), Is Not Supported By Customary Rules Of Treaty Interpretation

27. Article XVII:1 is not "at war with itself" as Canada suggests.[21/] To the contrary, subparagraphs (a) and (b) of Article XVII:1 establish a coherent regime designed to discipline STEs that might otherwise engage in trade-distorting practices. Canada's assertion that if subparagraphs (a) and (b) are found to require separate obligations those two paragraphs would be in conflict, has no merit. There is a presumption against conflict in treaty interpretation.[22/] As discussed above, proper analysis according to customary rules of treaty interpretation leads to a harmonious reading of subparagraphs (a) and (b) of Article XVII:1. These two paragraphs contain complementary obligations that constrain STE behavior in a manner consistent with the ordinary meaning of the text, their context, and the object and purpose of the GATT 1994.

28. Reading subparagraphs (a) and (b) in a complementary fashion is not only the inescapable result of a proper textual analysis, but is also supported by a presumption that provisions within the same article are consistent with each other.[23/] Canada misapplies the principle of

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[21/] *See Other Appellant's Submission of Canada*, para. 34 (interpreting Article XVII:1(b) as creating independent obligations "would place Article XVII:1 at war with itself").

[22/] *See, e.g., Indonesia – Autos*, para. 14.28 (citing, among other sources, Wilfred Jenks, "The Conflict of Law-Making Treaties," 30 British Yearbook of International Law 401 (1953), at 425, *et seq.*).

[23/] As the panel observed in *Indonesia – Autos,* "[t]he presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties,

effectiveness in treaty interpretation. In *Canada – Patents,* the Appellate Body noted that a treaty interpreter must read the provisions of a treaty so that there is meaning given to all of the provisions in a harmonious manner.[24/] Canada ignores this fundamental principle and instead urges the Appellate Body to adopt a fundamentally flawed interpretation of Article XVII:1.

29. Not only is no conflict presumed, but no conflict exists in fact. A reading of subparagraphs (a) and (b) of Article XVII and the Note *Ad Article XVII* [25/] confirm that no conflict exists. Adherence to the requirements of subparagraph (b) does not lead to a breach of subparagraph (a). Subparagraph (a) requires Members to ensure that STEs act consistently with the general principles of non-discriminatory treatment. The *Ad Note* confirms that this requirement of non-discriminatory treatment does not prevent an STE from acting in accordance with commercial considerations by selling on different terms, when such terms are dictated by different market conditions.[26/] Such behavior – selling at different prices in different markets – is

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since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary." *Indonesia – Autos*, para. 14.28 n.649; *see also Turkey – Textiles*, para. 9.94 (same). Given the presumption against conflict in separate agreements concluded by the same parties, there is most certainly a presumption against conflict when two provisions of a single article of a single agreement are at issue.

[24/] *See, e.g., Canada – Patents*, para. 97; *see also Argentina – Footwear Safeguards*, para. 81.

[25/] Canada seems to imply that the Note *Ad Article XVII* is not an integral part of the GATT 1994, stating without citation that "Interpretive Notes do not add to or detract from the rights and obligations of the Members." *Other Appellant's Submission of Canada*, para. 31. However, the *Ad Note* is an integral part of Article XVII and should be considered as relevant context. *See* Article XXXIV, GATT 1994 ("The annexes to this Agreement are hereby made an integral part of this Agreement.") (The *Ad Notes* constitute Annex I of the GATT 1994).

[26/] *Ad Article XVII, Para. 1*, GATT 1994 (selling on different terms is permissible, "provided that such different prices are charged for commercial reasons, to meet conditions of supply and demand in export markets").

consistent with the general principles of non-discriminatory treatment in the GATT 1994 where those differences are to meet market conditions of supply and demand and are not based on the inappropriate provision of special advantages to goods destined for one market versus goods destined for another.[27/] Under these circumstances, the STE has acted solely in accordance with the same considerations constraining the behavior of commercial actors in the market.

30. In this way, Article XVII:1 creates a consistent, coherent regime that requires STEs to act in accordance with commercial considerations *and* in a manner consistent with principles of non-discriminatory treatment in the GATT 1994. Canada improperly equates "not discriminating between markets" with acting "consistent with the general principles of non-discriminatory treatment prescribed in [the GATT 1994]." As explained above, STEs are required to meet the obligations under both subparagraphs (a) and (b) of Article XVII:1, acting solely in accordance with commercial considerations and at the same time acting consistent with principles of non-discriminatory treatment.

31. Canada's reliance on an article by Wilfred Jenks also is misplaced. The provisions at issue in this dispute are two paragraphs of the *same provision, of the same treaty*. The Jenks article discusses conflicts between *different provisions, of different treaties*. Indeed, as noted

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[27/] One principle of non-discriminatory treatment in the GATT 1994, the most-favored-nation ("MFN") principle, is an instructive example. GATT Article I:1 does not require enterprises to charge the same prices in every market. Rather, GATT Article I:1 requires that "any advantage, favour, privilege or immunity" granted to products of one Member be granted to like products of other Members. *See* Article I:1, GATT 1994. In this dispute, the text of Article XVII:1(a) and the Note *Ad Article XVII* confirm that STEs can act consistently with non-discriminatory principles by providing MFN treatment, while at the same time not ignoring different prevailing market conditions in different markets. *See* Panel Report, para. 6.49.

earlier, the panel in *Turkey – Textiles* quoted the same Jenks article in its analysis of provisions of the GATT 1994 and the *Agreement on Textiles and Clothing*, observing that:

> A conflict of law-making treaties arises *only where simultaneous compliance with the obligations of different instruments is impossible* . . . There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another.[28/]

32. The panel in *Turkey – Textiles* further noted, "WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal 'conflict' between them. This flows from the fact that the WTO Agreement is a 'Single Undertaking.'"[29/] The Jenks article sets forth the proposition that conflicts between different provisions in different treaties arise only where simultaneous compliance with obligations of different instruments is impossible. Here, there are not different instruments, but one instrument, namely the GATT 1994. Indeed, there are not even two separate articles of the GATT 1994 at issue, but a single article, indeed, a single paragraph of a single article – paragraph 1 of Article XVII. It is difficult to imagine that the Members, in drafting Article XVII:1, intentionally created a conflict just between subparagraphs (a) and (b).

33. Simultaneous compliance with both subparagraphs (a) and (b) of Article XVII:1 is not only possible, but, as discussed in section A above, is supported by the text of the Agreement. The ordinary meaning of the terms of subparagraph (b) in their context and in light of the object and purpose of the GATT 1994 leads to the inevitable conclusion that the Members intended

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[28/] *Turkey – Textiles*, para. 9.92 (emphasis added) (quoting Jenks, pp. 426 - 427).

[29/] *Turkey – Textiles*, para. 9.92 (citing *Brazil – Desiccated Coconut*, p. 12).

STEs to be subject to all of the disciplines set forth in subparagraphs (a) and (b) of Article XVII:1 simultaneously. Canada's novel reading of Article XVII:1 would permit Members to escape their obligations under the GATT 1994. The Appellate Body has found on numerous occasions that such a result is impermissible.[30/]

C. After Resolving The Threshold Question Of Whether The CWB Is An STE Subject To Article XVII, The Panel Properly Examined The Requirements Of Article XVII:1(b)

34. Canada argues that the Panel failed to follow "the proper analytical steps" supposedly set out in Article XVII:1, and characterizes this as a "threshold" issue.[31/] However, the only threshold issue before the Panel – whether or not the CWB is an STE covered by Article XVII:1's disciplines – was properly decided. Indeed, it was undisputed.[32/]

35. After resolving this threshold issue, the Panel did not err by focusing its analysis on Article XVII:1(b). For all of the reasons set forth above in sections A and B, the Panel properly assumed that "an inconsistency with Article XVII:1 can be established merely by demonstrating

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[30/] *See, e.g., Australia – Salmon*, para. 206 (noting it would be incorrect to interpret an agreement in a way that "would render nugatory entire articles or paragraphs of articles of this Agreement and allow Members to escape from their obligations under this Agreement").

[31/] *See Other Appellant's Submission of Canada*, para. 37 n.18, citing *Canada – Autos*. *Canada – Autos* does not, however, support Canada's argument. The Appellate Body in *Canada – Autos* found that, as a threshold matter, a panel must decide if a challenged measure falls within the scope of the provision at issue before engaging in a substantive analysis. *See Canada – Autos*, paras. 151-152 (panel should have decided whether challenged measure was covered by GATS before examining that measure for its consistency with the substantive GATS obligation at issue). In this dispute, the threshold question before the Panel was whether the CWB was an STE within the scope of Article XVII.

[32/] Panel Report, para. 6.108 ("As an initial matter, we note that both parties consider that the CWB is an STE within the meaning of Article XVII:1(a).").

that an STE is acting contrary to the principles of subparagraph (b)."[33/] Indeed, the United States focused its case on the requirement under Article XVII:1(b) that STEs must make sales solely in accordance with commercial considerations. It was proper, then, for the Panel to focus its own analysis on this requirement. The Panel did not need to reach Article XVII:1(a) at all in order to find a breach of Article XVII.

III. CONCLUSION

36. For the foregoing reasons, the United States requests that the Appellate Body reject the arguments of Canada in their entirety and affirm the Panel's determination that a violation of either of the requirements set forth in Article XVII:1(b) is sufficient to establish a breach of Article XVII.

[33/] Panel Report, para. 6.59.