BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2004-3)

APPELLANT'S SUBMISSION OF THE UNITED STATES

June 11, 2004

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SERVICE LIST

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Australia - Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted Nov. 6, 1998
EC - Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Sept. 25, 1997
EC - Hormones	Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R, adopted Feb. 13, 1998
EC - Poultry	Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted July 23, 1998
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Korea - Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted Jan. 10, 2001
Korea - Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000
Mexico - HFSC (Article 21.5)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS132/AB/RW, adopted Nov. 21, 2001
Thailand - H-Beams	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/AB/R, adopted April 5, 2001
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United States - FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations*," WT/DS108/AB/R, adopted March 20, 2000

United States - Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted May 20, 1996
United States - Wheat Gluten	Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS116/AB/R, adopted Jan 19, 2001

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States seeks reversal by the Appellate Body of a number of findings made by the March and July Panels[1/] in this dispute. These findings and conclusions relate to Article XVII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. First, the Panel erroneously concluded that the CWB Export Regime, in its entirety, is consistent with Canada's obligations under Article XVII of the GATT 1994. This error stemmed, in part, from the Panel's failure to interpret Article XVII:1(b) in light of international customary rules of treaty interpretation. Specifically, the Panel's interpretation of "enterprises" in Article XVII:1(b) was overly narrow, depriving the term of its ordinary meaning in its context and in light of the object and purpose of the GATT 1994. The Panel inappropriately determined that "enterprises" refers not to all companies, but only to those who are buyers in the marketplace.

3. The Panel also erred in finding that the phrase "solely in accordance with commercial considerations" in Article XVII:1(b) is "simply intended to prevent STEs from behaving like 'political' actors." Again, the Panel ignored the ordinary meaning of the phrase "commercial considerations" in light of the context of Article XVII and the object and purpose of the GATT 1994. The Panel rejected an interpretation, well-grounded in the text and context of Article XVII and the object and purpose of the GATT 1994, that "commercial considerations" are those

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[1/] As explained in the Panel Report, two panels were established in this dispute. *See* Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, circulated April 6, 2003 ("Panel Report"), paras. 1.4 and 1.10. Proceedings of the March Panel and the July Panel were then harmonized pursuant to Article 9.3 of the DSU. *See id.*, para. 1.11. For purposes of this submission and for ease of reference, the March Panel and the July Panel will be referred to individually and collectively as "the Panel."

experienced by commercial actors. Instead, the Panel eschewed a textual analysis and concluded that "commercial considerations" simply means "non-political" considerations. The Panel's further conclusion that acting "solely in accordance with commercial considerations" under Article XVII allows enterprises to make purchases or sales on terms which are "economically advantageous for themselves" undermines Article XVII and provides no discipline at all for STEs.

4. The Panel's findings with respect to the challenged measure – the CWB Export Regime – also are erroneous because the Panel failed to examine the challenged measure in its entirety. Indeed, only a subset of the elements of the challenged measure were ever reviewed by the Panel. The CWB Export Regime consisted of four distinct elements, as set forth by the Panel in its findings. Yet, despite outlining the scope of the challenged measure in detail, the Panel ignored a critical element of the CWB Export Regime, that is, the special and exclusive privileges granted to the CWB by the Government of Canada.

5. The Panel also deliberately disregarded evidence presented and argued by the United States with respect to the CWB's legal framework, including numerous provisions of the *Canadian Wheat Board Act* ("*CWB Act*") and the CWB's special and exclusive privileges codified therein. This failure to objectively assess the facts presented constituted a breach of the Panel's responsibilities under Article 11 of the DSU.

6. In ignoring the evidence presented, the Panel incorrectly narrowed the scope of the CWB's legal structure, resulting in erroneous conclusions that the CWB is "controlled by" wheat farmers and that the CWB's sales are not constrained by the legal framework of the CWB. If the Panel had properly considered all of the factual evidence presented and argued by the United

States, it would have defined the CWB Export Regime correctly and, in turn, concluded that the CWB does not engage in sales that are solely in accordance with commercial considerations, a violation of Article XVII:1(b). The Panel's refusal to consider the evidence submitted by the United States was incompatible with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU.

7. Finally, the Panel erred when it concluded that Canada's request for a preliminary ruling under Article 6.2 of the DSU was filed in a timely manner. Canada failed to raise its procedural objections at the earliest opportunity. In addition, the Panel's implication that a United States' response to Canada's letter of April 7, 2003, complaining about alleged deficiencies in the United States' panel request could have cured a breach of Article 6.2, was in error.

8. The United States respectfully requests that the Appellate Body reverse the Panel's findings on all of these issues.

II. ARGUMENT

A. The Panel Erred In Concluding That The CWB Export Regime Is Consistent With Canada's Obligations Under Article XVII Of The GATT 1994

9. The Panel made several errors in its determination that the CWB Export Regime does not breach Canada's obligations under Article XVII of the GATT 1994. First, the Panel's interpretation of the terms of Article XVII:1(b) was flawed. Second, the Panel failed to examine the challenged measure in its entirety, resulting in erroneous findings. Third, the Panel failed to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU. The

United States respectfully requests that the Appellate Body reverse the Panel's erroneous findings on these issues, for the reasons set forth below.

1. The Panel Misapplied International Customary Rules Of Treaty Interpretation And, As A Result, Misinterpreted The Obligations Set Forth In Article XVII:1(b) Of The GATT 1994

10. The Panel failed to adhere to international customary rules of treaty interpretation in its narrow, and incorrect, reading of the provisions of Article XVII:1(b). It is well-settled that the provisions of the GATT 1994, "shall 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."[2/]

11. In its consideration of Article XVII:1(b) of the GATT 1994, the Panel misinterpreted the term "enterprises" in the second clause of Article XVII:1(b), failing to give due consideration to the ordinary meaning of the term and ignoring the term in its context and in light of the object and purpose of the GATT 1994. The Panel also misconstrued the phrase "solely in accordance with commercial considerations" in the first clause of Article XVII:1(b).

[2/] *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted May 20, 1996 ("*United States – Gasoline*"), pp. 16-17; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996 ("*Japan – Alcoholic Beverages*"), pp. 10-12; Article 31(1), *Vienna Convention on the Law of Treaties* ("Vienna Convention"), done at Vienna, May 23, 1969, 1155 U.N.T.S. 331, 8 International Legal Materials 679.

(a) The Ordinary Meaning Of The Term "Enterprises" In The Second Clause Of Article XVII:1(b) Encompasses Enterprises That Buy Wheat From The CWB As Well As Enterprises That Sell Wheat In Competition With The CWB

12. The Panel misinterpreted the term "enterprises" in the second clause of Article XVII:1(b) and, in doing so, impermissibly diminished the obligation provided in that provision. The second clause of Article XVII:1(b) states that STEs "shall afford the **enterprises** of the other [Members] adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases or sales."[3/] The Panel concluded that this reference to "enterprises" is limited solely to those enterprises that wish to *buy* the wheat from the CWB, and that those enterprises that wish to *sell* wheat in competition with the CWB are not "enterprises" under the second clause of Article XVII:1(b). This conclusion by the Panel, however, is not supported by the ordinary meaning of the term, read in its context and in light of the object and purpose of the GATT 1994.

13. The Panel first and foremost failed to properly take into account the ordinary meaning of the term "enterprise." Indeed, as the Panel itself observed, "[a]s a textual matter, it would appear that the term 'enterprises of the other [Members]' is, in principle, open to the interpretation advanced by the United States,"[4/] that is, that the term "enterprises" covers all enterprises that participate in the wheat market, regardless of whether those enterprises buy wheat from the CWB or sell wheat in competition with the CWB. However, after offering this acknowledgment, the Panel proceeded to completely ignore the ordinary meaning of "enterprise" as it continued to

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[3/] Emphasis added.

[4/] Panel Report, para. 6.68.; *see also U.S. Answers to First Set of Panel Questions*, para. 21.

examine (partially) the context of this term within Article XVII, and when it drew its ultimate conclusion on the meaning of the term.

14. *The New Shorter Oxford English Dictionary* defines "enterprise" as a "business firm" or a "company."[5/] Contrary to the Panel's conclusion, this definition in no way limits "enterprises" to only those entities that are buyers in the marketplace; there is absolutely no basis in this definition to exclude sellers.

15. Furthermore, examining the term "enterprises" in its context only reinforces its ordinary meaning rather than narrowing it. In fact, nothing in Article XVII or in the GATT 1994 suggests any basis for limiting the ordinary meaning of "enterprises" to only buyers. "Enterprise" is used throughout the text of Article XVII. For example, in Article XVII:1(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.

16. Article XVII:1(c) also uses the term "enterprise," stating that "[n]o [Member] shall prevent any enterprise (whether or not an enterprise described in subparagraph (a) of this paragraph) under its jurisdiction from acting in accordance with the principles of subparagraphs (a) and (b) of this paragraph." Again, nothing here suggests that "enterprises" be limited only to those that act as buyers in the market. Instead, use of this term throughout Article XVII:1 only confirms the ordinary meaning of the term, referring to all businesses or companies, regardless of whether they are buyers or sellers in the marketplace.

5/ *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press (1993)), v.1, p. 828.

17. Other provisions in Article XVII also provide relevant context for interpreting the term "enterprise." Article XVII:3, for example, recognizes that state trading enterprises "might be operated so as to create serious obstacles to trade."[6/] "Obstacles to trade" may occur both with respect to buyers in the marketplace as well as sellers. Therefore, in characterizing the potential obstacles resulting from STE's as "serious," the context provided by Article XVII:3 argues against narrowing the ordinary meaning of "enterprises"; otherwise, many of these serious obstacles would escape the disciplines of Article XVII. Similarly, narrowing the ordinary meaning of the term "enterprises" narrows the obligation under Article XVII:1(b), creating a loophole that would encourage serious obstacles to trade from STE's acting as sellers.

18. In this light, it is evident that the object and purpose of the GATT 1994 supports according the term "enterprises" its ordinary meaning in the second clause of Article XVII:1(b), because a main object and purpose of the GATT 1994 is to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce.[7/]

19. By contrast, the Panel's examination of the context of the term "enterprises" focused solely on the second clause of Article XVII:1(b), without examining other contextual elements of Article XVII, or considering the object and purpose of the GATT 1994. In particular, the Panel focused on the phrase "participate in," concluding that only buyers "participate in" an export

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[6/] *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article XVII:3.

[7/] GATT 1994, Preamble ("[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").

STE's sales.[8/] However, as noted above, this narrowing of the ordinary meaning of the term "enterprises" is not supported *inter alia* by the context in which that word is used throughout Article XVII. The obligation at issue under Article XVII:1(b) is to prevent STEs from discriminating against the enterprises of other Members. The Panel had no basis to so casually narrowed this central obligation of Article XVII by departing from and narrowing the ordinary meaning of the term "enterprise."

20. The Panel's disregard for the ordinary meaning of the term "enterprise" and its failure to examine that term in the context of Article XVII and in light of the object and purpose of the GATT 1994 has led to an overly narrow, incorrect, interpretation of "enterprises" that impermissibly narrows the reach of Article XVII's disciplines. Contrary to the Panel's conclusion, Article XVII:1(b) is in no way limited to only "enterprises" that are buyers in the marketplace; there is absolutely no basis in this definition to exclude sellers. Article XVII protects all enterprises of other Members against serious obstacles to trade regardless of whether such enterprises buy wheat from the CWB or sell wheat in competition with the CWB in the world wheat market. The Appellate Body should therefore reverse this wrong interpretation and find instead that the term "enterprise" includes both buyers and sellers.

(b) The Panel Erred In Concluding That The Phrase "Solely In Accordance With Commercial Considerations" In Article XVII:1(b) Is A Narrow Requirement "Simply Intended To Prevent STEs From Behaving Like 'Political' Actors"

21. Article XVII:1(b) requires STEs to make their "purchases or sales solely in accordance with commercial considerations." The Panel interpreted "commercial considerations" in Article

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[8/] Panel Report, para. 6.69.

XVII:1(b) to mean "considerations pertaining to commerce and trade, or considerations which involve regarding purchases or sales 'as mere matters of business.'"[9/] The Panel went on to conclude that the phrase "solely in accordance with commercial considerations" "is simply intended to prevent STEs from behaving like 'political' actors."[10/] This final result, interpreting an obligation to make sales solely in accordance with commercial considerations as equivalent to making "non-political" decisions, does not represent the ordinary meaning of "commercial considerations" when considered in its context and in light of the object and purpose of the GATT 1994.

22. The Panel correctly began its analysis by examining the ordinary meaning of the term "commercial." The Panel noted that "commercial" means "engaged in commerce; of, pertaining to, or bearing on commerce," or "interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business."[11/] The Panel then analyzed "commercial considerations" in its context, and it is this analysis that resulted in the Panel's flawed conclusion regarding the meaning of "commercial considerations."

23. As noted above, the context of Article XVII establishes the importance of Article XVII's disciplines as a means of preventing STEs from being operated so as to create serious obstacles to trade. Article XVII thus implicitly recognizes that STEs with special privileges may be able to use those privileges to the disadvantage of commercial actors in a given market. It is in this context that STEs are constrained under Article XVII:1(b) to act "solely in accordance with

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[9/] Panel Report, para. 6.85.

[10/] *Id.*, para. 6.94.

[11/] *Id.*, para. 6.85.

commercial considerations." Commercial actors naturally operate based on commercial considerations; thus, Article XVII:1(b), through its obligation to act in accordance with commercial considerations, prevents an STE from using its privileges to operate so as to create serious obstacles to trade which disadvantage such commercial actors.

24. For example, an STE may be able to use its special privileges to gain market share to the detriment of commercial actors by engaging in long-run price under-cutting in a given market. In this situation, Article XVII's obligation that the STE must act in accordance with commercial considerations means that the STE must act as a commercial actor would; that is, it would have to sell at prices which, at a minimum, would equal the replacement value of the good.

25. The Panel concluded that it is not correct to consider the situation of commercial actors when interpreting the meaning of "commercial considerations because the term "commercial actors" does not appear in Article XVII:1(b).[12/] However, neither does the term "political actors." Nevertheless, the Panel correctly inferred from the context of Article XVII that behaving like a political character, and making purchases and sales based on political considerations, would breach the obligation to make purchases or sales solely in accordance with commercial considerations.[13/] Likewise, though the term "commercial actors" does not appear in Article XVII:1(b), it requires no great logical leap to conclude that commercial considerations are those which commercial actors consider. Indeed, this is the most obvious conclusion to be drawn. And commercial actors do not merely act based on "non-political" considerations; they cannot, for example, act beyond their cost constraints, which are established by the market.

[12/] Panel Report, para. 6.92

[13/] Panel Report, para. 6.94.

26. This is consistent with the ordinary meaning of "commercial considerations," i.e., "engaged in commerce; of, pertaining to, or bearing on commerce," or "interested in financial return rather than artistry; likely to make a profit; regarded as a mere matter of business."[14/] Commercial actors are those "engaged in commerce" and they "are interested in financial return." Moreover, they are "likely to make a profit," and certainly to seek one. These conclusions are also consistent with the object and purpose of the GATT 1994, which is to substantially reduce barriers to trade and eliminate discriminatory treatment in international commerce.

27. Notwithstanding all of this, however, the Panel decided to eschew a textual analysis of the term "commercial considerations" and instead – using its own cursory survey of STEs and how they work – came up with an interpretation of Article XVII:1(b) that is at odds with the text, in its context, and in light of the object and purpose of the GATT 1994. In effect, the Panel interpreted Article XVII:1(b) as doing nothing to constrain STEs from using their privileges to cause serious obstacles to trade and discrimination.

28. In support of its interpretation of "commercial considerations" as pertaining only to "non-political" considerations, the Panel began with the premise that not all STEs are used only for commercial purposes. Some STEs, for example, might have been created to carry out food security policies, reduce alcohol consumption or achieve price stabilization.[15/] Thus, the Panel appears to assume that because STEs have been created for numerous purposes, the obligation with respect to "commercial considerations" must be determined by reference to the least commercial among them. However, this conclusion does not follow. For one thing, the Panel's

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[14/] *Id.*, para. 6.85.

[15/] Panel Report, para. 6.96.

logic seems to be based on the (unspoken) premise that a description of how some STEs are operating can trump the meaning of the GATT text. For another, unless the Panel is assuming that all such STEs are in fact operating in accordance with GATT Article XVII (i.e., unless the Panel assumes away the very question at issue in this dispute) how can the Panel draw any conclusions from this observation? The fact that the Panel effectively assumed away the very question it was tasked to examine is clear from the language it uses in that discussion: "Such STEs must and, *hence*, do purchase or sell on the basis of commercial considerations . . . " (emphasis added). The source of the word "hence", and of the Panel's confidence in its conclusion, is nowhere explained.

29. Also, relying once again on its own understanding of STEs rather than on the text and context of Article XVII:1, in light of the object and purpose of the GATT 1994, the Panel found that "the requirement that STEs make purchases or sales solely in accordance with commercial considerations must imply that they should seek to purchase or sell on terms which are economically advantageous for themselves and/or their owners, members, beneficiaries, etc."[16/] In other words, rather than seeking to discipline STE behavior consistent with the context of Article XVII, the Panel's interpretation permits STEs to use their special privileges to the full extent possible, even if this causes discrimination or other serious obstacles to trade. This is no discipline at all, and thus is not supported by the text and context of Article XVII. "Commercial considerations" necessarily must go beyond self interest; it assumes a norm, one which is

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[16/] Panel Report, para. 6.87.

reflected in the behavior of commercial actors who have no choice but to act in accordance with such considerations.

30. In short, because the Panel's interpretation of "solely in accordance with commercial considerations" as "simply intended to prevent STEs from behaving like 'political' actors" is an erroneous conclusion that is not grounded in the ordinary meaning of the terms in their context and in light of the object and purpose of the GATT 1994. The Appellate Body should reverse this finding, and conclude that commercial considerations are those under which commercial actors must operate.

2. The Panel Findings Are Erroneous Because They Are Based Only On A Subset Of The Elements of Challenged Measure, Not The Challenged Measure In Its Entirety

31. The measure being challenged in this dispute is the CWB Export Regime as a whole. While the Panel correctly defined this measure at the outset of its report, it went on to offer a series of findings not based on the measure in its entirety. The Panel's findings regarding whether the CWB Export Regime necessarily results in a breach of Canada's obligations under Article XVII are therefore flawed, because the Panel only considered certain selected aspects of the challenged measure, and did not consider the measure as a whole.

32. Before turning to the gaps in the Panel's analysis, it is important to first establish the measure at issue. As set forth at paragraph 6.12 of the Panel's report and as agreed by the parties, the CWB Export Regime is comprised of three main elements: "(i) the legal framework of the CWB; (ii) Canada's provision to the CWB of exclusive and special privileges; and (iii) the

actions of Canada and the CWB with respect to the CWB's purchases and sales involving wheat exports."[17/]

33. Each of these three elements include numerous sub-elements. The first element includes the provisions of the *CWB Act*.[18/] The second element includes the exclusive right of the CWB to purchase and sell Western Canadian wheat for export and domestic human consumption; the CWB's right to set, subject to government approval, the initial price payable to Canadian farmers for Western Canadian wheat destined for export or domestic human consumption; the Government of Canada's guarantee of the initial payment to producers of Western Canadian wheat; the Government of Canada's financial guarantee of the CWB borrowing activities; and the Government of Canada's guarantee of certain CWB credit sales to foreign buyers.[19/] Finally, the third element includes the CWB's sales and the Government of Canada's actions, particularly its actions to approve the CWB borrowing plan, guarantee CWB borrowing and credit sales, and approve and guarantee the initial payment to Western Canadian wheat producers.[20/]

34. After correctly defining the measure at issue, the Panel then began its analysis of whether or not this measure as a whole – collectively known as the CWB Export Regime[21/] – necessarily results in the CWB making export sales that are not in accordance with Article XVII:1 standards. Specifically, the Panel noted at the outset that the United States is challenging "the combination

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17/ Panel Report, para. 6.12.

18/ Panel Report, para. 6.14.

19/ *Id.*, para. 6.15.

20/ *Id.*, para. 6.16.

21/ *Id.*, paras. 6.12 and 6.17.

of the various elements of the CWB Export Regime, not any one element taken in isolation, that necessarily results in the CWB making non-conforming export sales."[22/]

35. Yet despite correctly articulating the measure at issue, the Panel proceeded to ignore the CWB Export Regime as a whole in its analysis. By not considering the whole measure at issue, the Panel's analysis is necessarily flawed, because this led to findings that were based on only a subset of the challenged measure. It is instructive to walk through the Panel's analysis step-by-step to understand how the Panel made its flawed findings based on only a partial examination of the challenged measure.

36. In beginning its analysis on whether the CWB Export Regime is inconsistent with Article XVII:1 of the GATT 1994, the Panel stated that the United States had to "establish" "four assertions" in order demonstrate that the CWB Export Regime breaches Canada's obligations under Article XVII:1.[23/] After stating that it would assume that the United States had established the first two "assertions" relating to privileges granted to the CWB,[24/] the Panel only analyzed the third "assertion," "that the CWB's legal structure and mandate, together with the privileges granted to it, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations."[25/]

[22/] *Id.*, para. 6.25.

[23/] Panel Report, para. 6.120.

[24/] *Id.*, para. 6.121 (assuming first and second assertions by the Panel have been established.) These assertions are that: (1) the privileges enjoyed by the CWB give it more flexibility with respect to pricing and other sales terms than a commercial actor; *see id.*, para. 6.110, and (2) the alleged pricing flexibility resulting from the CWB's privileges enables the CWB to offer non-commercial sales terms and thus to deny commercial enterprises of other Members an adequate opportunity to compete.

[25/] *Id.*, para. 6.148.

37. A critical element in the analysis of this third assertion involves an examination of *the privileges granted to* the CWB. The Panel, however, never undertook this analysis. It implied that it had done so in concluding in paragraph 6.148 of its report that the United States had failed to establish that, "the CWB legal structure and mandate, *together with the privileges granted to it*, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations."[26/] Yet, in paragraphs 6.122 through 6.134, where the Panel sets forth its reasoning, none of the privileges are discussed.

38. In stating that it would assume that the United States had established the effects of such privileges under the first two "assertions," the Panel in effect absolved itself from any responsibility to examine the effect of these privileges on the CWB's sales, and whether those sales were made "solely in accordance with commercial considerations." But the effect of those privileges cannot be ignored; they constitute an integral part of the measure at issue, the CWB Export Regime, as the Panel had already agreed. The Panel could not purport to analyze the CWB Export Regime without examining how the CWB's special privileges interact with other elements of the regime. Thus, even if the Panel had undertaken a correct analysis of the CWB's legal structure and mandate, which, for the reasons described in the following section, it did not, it could not legitimately have based its legal findings with respect to "commercial considerations" in paragraphs 6.146 and 6.148 on only a subset of the measure it was charged with examining.

[26/] Panel Report, para. 6.148 (emphasis added).

39. Because the Panel never actually analzyed the special and exclusive privileges granted to the CWB, there was no legal basis for the Panel to have made findings with respect to whether "the CWB legal structure and mandate, *together with the privileges granted to it*, create an incentive for the CWB to discriminate between markets by making some of its sales not solely in accordance with commercial considerations."[27/] Therefore, there was also no basis for the Panel's "further and consequential conclusion that the United States has not demonstrated that the CWB Export Regime necessarily results in CWB export sales which are not solely in accordance with commercial considerations . . . and which are inconsistent with the principles of non-discriminatory treatment prescribed in the GATT 1994 for governmental measures affecting exports by private traders[.]"[28/]

40. In sum, by disregarding important elements of the challenged measure in its analysis, the Panel's finding that Canada did not violate Article XVII:1 of the GATT 1994 is in error because this finding was not based on the measure before the Panel. The Appellate body should therefore reverse these findings.

3. With Respect To The CWB's Legal Framework, Including The *CWB Act* And The CWB's Special Privileges Codified Therein, The Panel Failed To Objectively Assess The Facts Presented By The United States In Accordance With Article 11 Of The DSU

41. Article 11 of the DSU states that "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements[.]" According to the Appellate Body,

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[27/] Panel Report, para. 6.148 (emphasis added).

[28/] Panel Report, para. 6.149.

under Article 11, "a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof."[29/] Moreover, as the Appellate Body noted in *EC – Hormones*,

> The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.[30/]

42. The 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.

43. As described in the previous section, the Panel focused its analysis of whether Canada is in violation of its GATT Article XVII:1(b) obligations on whether "the CWB's legal structure and mandate, together with the privileges enjoyed by the CWB, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations."[31/] The previous section has described one error that the Panel committed, namely that it based its findings on this issue on only a sub-set of the elements of the measure in question. This section describes how the Panel also erred by deliberately disregarding, or refusing to consider, evidence presented by the United States.

[29/] Appellate Body Report, *United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS116/AB/R, adopted Jan 19, 2001 ("*United States – Wheat Gluten*"), para. 150 (quoting Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 137 n.29.

[30/] *EC – Hormones*, para. 133; *see also* Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted Nov. 6, 1998 ("*Australia – Salmon*"), paras. 262 - 267; Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted July 23, 1998 ("*EC – Poultry*"), paras. 131 - 136.

[31/] Panel Report, para. 6.146.

44. Despite the fact that the Panel itself defined the "legal framework of the CWB" as "the governing statute of the CWB, the *Canadian Wheat Board Act*"[32/], the Panel ignored relevant provisions of the *CWB Act* that were presented as evidence by the United States.[33/] If the Panel had considered all of the evidence introduced and argued by the United States related to the legal framework of the CWB, including both the *CWB Act* and the special and exclusive privileges codified therein, the Panel, contrary to the findings in its report, would have concluded that "the CWB's legal structure and mandate, together with the privileges enjoyed by the CWB, create an incentive for the CWB to make sales which are not solely in accordance with commercial considerations."[34/]

45. There were numerous facts before the Panel that the Panel should have considered in its analysis, but did not. These facts would have led to particular conclusions about the CWB's legal framework, which would have led the Panel to find that the CWB Export Regime necessarily results in sales that violate Article XVII principles. The Panel's deliberate disregard for these facts amounts to an error of law under Article 11 of the DSU.[35/]

[32/] Panel Report, para. 6.14.

[33/] *See, e.g., U.S. First Written Submission*, paras. 16 n.19, 22 - 26, 28 - 32 and 33 - 36; *see also Canadian Wheat Board Act* ("*CWB Act*") (Exhibit US-2).

[34/] Panel Report, para. 6.146.

[35/] *See United States – Wheat Gluten*, para. 175 (outlining the information an appellant should provide to the Appellate Body when challenging a Panel's exercise of its discretion under Article 11 of the DSU).

(a) 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

46. The CWB's legal structure, including *all* of the provisions of the *CWB Act* and the special and exclusive privileges afforded to the CWB under the *CWB Act,* create incentives to engage in sales based on non-commercial considerations. The Panel's conclusion to the contrary was based in part on its failure to fully examine the CWB Export Regime – the measure at issue – in its entirety, and in part on its deliberate disregard of evidence regarding the CWB legal framework placed before it by the United States.

47. Under the Panel's own analytical rubric, the legal framework of the CWB was an essential element of the CWB Export Regime under review. Yet even though the CWB's legal framework was central to the panel's analysis, the Panel ignored evidence presented by the United States and chose, instead, to rely on only two discrete facts: the composition of the CWB Board of Directors, and the fact that the Government of Canada does not exercise day-to-day control over CWB operations.[36/] This led the Panel to its erroneous conclusion that the CWB is "controlled by" wheat farmers – and thus ensures that CWB financial returns are maximized – and that the CWB's sales are not influenced by other aspects of the CWB legal framework codified in the *CWB Act.*[37/]

48. The Panel justified its failure to review all of the evidence before it by incorrectly asserting that the United States itself advocated this narrow approach, claiming that "the United

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[36/] *See id.*, paras. 6.121 - 6.123.

[37/] *See id.*

States has discussed essentially two elements" of the CWB legal framework.[38/] Nothing could be further from the truth.

49. The United States presented evidence on provisions of the *CWB Act* establishing the legal framework of the CWB, including its governing structure and mandate, and the special and exclusive privileges granted by the Canadian Government to the CWB, all of which are fundamental elements of the CWB Export Regime. The Panel inexplicably ignored many of these relevant facts in its analysis.

50. Indeed, a review of the *CWB Act* as presented by the United States reveals that the CWB's operations are subject to the legal requirements of the *CWB Act*, which greatly constrain the CWB Board of Directors and CWB operations. First, the United States placed evidence before the Panel showing that the Board of Directors is not truly independent, for example: the President of the Board of Directors is appointed by the Canadian Government and holds office for a term determined by the Canadian Government;[39/] the Board of Directors of the CWB reports directly to a Minister of the Canadian Government and provides detailed information concerning CWB activities, holdings, purchases, and sales on a monthly basis;[40/] the Board of Directors is required "to act as agent for or on behalf of any Minister or agent of Her Majesty in right of

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[38/] *Id.*, para. 6.122.

[39/] *CWB Act*, Sec. 3.09 (1) (Exhibit US-2). Section 3 of the *CWB Act* reads in relevant part:

> The president is appointed by the Governor in Council on the recommendation of the Minister and holds office during pleasure for the term that the Governor in Council may determine.

[40/] *Id.*, Sec. 9.

Canada in respect of any operations that it may be directed to carry out by the Governor in Council;"[41/] and CWB profits are to be paid into a revenue fund of the Canadian Government.[42/]

51. The Panel also ignored significant facts related to the financial operations of the CWB. For example, the CWB effectively has a monopoly right to purchase Western Canadian grain and to sell that grain for domestic human consumption and export;[43/] the Canadian Government both approves and guarantees the initial payment price to producers;[44/] and any losses sustained by the CWB are reimbursed to the CWB by the Canadian Parliament.[45/] All of these elements of the

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[41/] *Id.*, Sec. 6(1)(j).

[42/] *Id.*, Sec. 7(2).

[43/] *See U.S. Answers to First Set of Panel Questions*, paras. 12, 43; *U.S. Oral Statement at First Panel Hearing*, para. 12 (referring to CWB's guaranteed access of supply).

[44/] *See U.S. Second Written Submission*, para. 11; *U.S. Oral Statement at First Panel Hearing*, para. 11; *U.S. Answers to First Set of Panel Questions*, para. 43; *see also CWB Act,* Sec. 53 (Exhibit US-2). Section 53 of the *CWB Act* states in relevant part:

> Initial Payment Guarantee: 53. (1) In this section, "eligible plan" means a marketing plan that includes provision for a system of initial payments in which the initial payments are fixed by the administrator *with the approval of the Governor in Council* at or before the beginning of each pool period for the duration of that pool period and, except *with the approval of the Governor in Council or as directed by the Governor in Council* after consultation with the administrator, are not changed thereafter during that pool period. (Emphasis added.)

[45/] *See U.S. Oral Statement at First Panel Hearing*, para. 11; *see also CWB Act,* Sec. 7(3) (Exhibit US-2). Section 7(3) of the *CWB Act* states in relevant part:

> Losses sustained by the Corporation
> (a) from its operations under Part III in relation to any pool period fixed thereunder, during that pool period, or
> (b) from its other operations under this Act during any crop year, for which no provision is made in any other Part, *shall be paid out of moneys provided by Parliament*. (Emphasis added)

CWB's legal framework – presented by the United States as evidence and deliberately disregarded by the Panel – drive the CWB's sales and marketing activities.

52. As discussed in the United States' submissions, these elements of the CWB's legal structure provide the CWB with greater pricing flexibility and reduced risk compared to commercial actors. Due to its selective analysis of the evidence, the Panel failed to consider that this pricing and risk structure, as evidenced by numerous provisions in the *CWB Act*, plays a fundamental role in establishing incentives in the marketplace.

53. Another key element of the CWB's legal structure presented by the United States and deliberately disregarded by the Panel is the Canadian Government's guarantee of all CWB borrowings.[46/] As set forth in Section 19 of the *CWB Act*[47/] and discussed in the United States' submissions,[48/] as a result of the Government of Canada's borrowing guarantee, the CWB can

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[46/] *See U.S. Oral Statement at First Panel Hearing*, para. 13.

[47/] *CWB Act*, Sec. 19 (Exhibit US-2). Section 19 of the *CWB Act* states in relevant part:

> (1) The Corporation shall submit annually a corporate plan to the Minister for the approval of the Minister in consultation with the Minister of Finance.
> (2) The corporate plan shall encompass all the business and activities of the Corporation and shall contain any information that the Minister considers appropriate.
> (3) The Corporation shall submit annually to the Minister of Finance for approval a plan indicating the amount of money that the Corporation intends to borrow in the coming crop year for the purposes of carrying out its corporate plan.
> (4) The Corporation shall not undertake any borrowings described in the borrowing plan approved under subsection (3) unless the Minister of Finance has approved the time, terms and conditions of the borrowings.
> (5) The repayment with interest, if any, of money borrowed by the Corporation in accordance with the terms and conditions approved under subsection (4) is guaranteed by the Minister of Finance on behalf of Her Majesty.

[48/] *See, e.g., U.S. First Written Submission*, paras. 28 - 32 and 70 -79; *U.S. Oral Statement at First Panel Meeting*, paras. 7 , 13; *U.S. Answers to Second Set of Panel Questions*, para. 15.

borrow at a more favorable rate than commercial firms and loan funds at a higher rate, thus generating interest income.[49/] As explained in the United States' submissions to the Panel, the CWB does not limit these borrowing activities, and has borrowed more than ten times the amount of funds actually needed to cover its loans, presumably to generate more interest revenue.[50/] This additional revenue is a key element in the CWB legal framework that gives the CWB increased pricing flexibility and, in turn, incentives to make sales in a non-commercial manner.

54. Finally, the Panel ignored facts presented relating to the CWB's credit sales, as set forth in Section 19(6) of the *CWB Act*.[51/] Again, as with all of the aspects of the *CWB Act* described above, the Panel failed to examine this provision even though the United States presented evidence and arguments relating to it.

(b) If The Panel Had Considered The Factual Evidence Presented By The United States, The Panel Would Have Properly Concluded That the CWB Engages In Sales That Are Not Solely In Accordance With Commercial Considerations

55. The facts described above were properly before the Panel. Instead of examining the evidence above, the only two facts actually reviewed by the Panel were those that were *not*

[49/] *See U.S. Answers to First Set of Panel Questions*, para. 47.

[50/] *U.S. First Written Submission*, paras. 28, 32.

[51/] *See CWB Act*, Sec. 19(6) (Exhibit US-2); *See also U.S. First Written Submission*, paras. 33 - 36. Section 19(6) of the *CWB Act* states in relevant part:

> The Minister of Finance, on behalf of Her Majesty, may, on any terms and conditions that the Governor in Council may approve,
> (a) make loans or advances to the Corporation; or
> (b) guarantee payment with interest of amounts owing to the Corporation in respect of the sale of grain on credit.

central to the question of how the CWB's legal framework affects the CWB's operations. This error led both to the Panel's erroneous finding that the CWB's sales are not dictated by the legal framework of the *CWB Act*, but are, instead, "controlled by" wheat farmers, and to the Panel's additional erroneous finding that the CWB legal framework does not provide an incentive for the CWB to make non-commercial sales.

56. If the Panel had considered the extensive evidence that it disregarded, it would have found that the CWB engages in sales that are not based solely on commercial considerations. The United States presented ample additional evidence that through the comprehensive provisions of the *CWB Act*, the Canadian Government sets the direction, management, budget, policies, and priorities of the CWB. The privileges granted to the CWB liberate it from the cost and risk constraints under which commercial actors must operate. As a result, the CWB is in a position to grant preferential terms to its purchasers that commercial actors cannot.[52/]

57. The failure of the Panel to acknowledge and examine the provisions of the *CWB Act* presented by the United States was inconsistent with the Panel's duty to objectively assess the matter before it, as required by Article 11 of the DSU.

58. The Panel did not reject the facts presented by the United States. Instead, it failed to examine them in the first place. This amounts to a failure to objectively assess the facts under Article 11 of the DSU. Had the Panel recognized that the CWB's operations are constrained by the *CWB Act* in the ways described above, the Panel would have concluded that the CWB has an

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[52/] This is described in greater detail in various U.S. submissions. *See, e.g., U.S. First Written Submission*, paras. 70-79; *U.S. First Oral Statement*, paras. 9-14; *U.S. Written Second Submission*, paras. 8-12.

incentive to make non-commercial sales and, in turn, that the CWB Export Regime violates Article XVII:1(b).[53/]

B. The Panel Erred in Finding That Canada's Request for a Preliminary Ruling Under Article 6.2 of the DSU Was Filed in a Timely Manner

59. The Panel's legal conclusion in its preliminary ruling of June 25, 2003, that Canada's request for a preliminary ruling on Article 6.2 of the DSU was filed in a timely manner was in error, as was the Panel's implication that a response to Canada's letter of April 7, 2003 could have cured what the Panel found was otherwise a breach of Article 6.2.[54/]

60. The Appellate Body has observed several times previously that a Party should raise procedural objections at the earliest possible opportunity.[55/] Indeed, as the Appellate Body specifically noted in *United States – FSC*, "the procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[56/] It is imperative, then, that "responding Members reasonably and promptly bring claimed procedural deficiencies to the attention of the

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[53/] *Id.*, para. 6.121.

[54/] *See* Preliminary Ruling, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12, circulated July 21, 2003 ("Preliminary Ruling"), paras. 60, 64.

[55/] Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, adopted Dec. 19, 2002 ("*United States – Carbon Steel*"), para. 123 ("we have consistently held that . . . parties should bring alleged procedural deficiencies to the attention of a panel at the earliest possible opportunity"); *see also* Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations*," WT/DS108/AB/R, adopted March 20, 2000 ("*United States – FSC*"), paras. 165 - 166.

[56/] *United States – FSC*, para. 166.

complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made[.]"[57/]

61. Yet in reaching its flawed conclusion that Canada's objections were raised in a timely manner, the Panel concluded that the Appellate Body report in *United States – FSC* was unpersuasive simply because *United States – FSC* involved objections to the specificity of a consultations request rather than a panel request.[58/] In the United States' view, this distinction by the Panel is irrelevant in light of the Appellate Body's rationale in *United States – FSC* and in other disputes. According to the Appellate Body, parties to a dispute have an obligation to take steps "to promote . . . the fair, prompt and effective resolution of trade disputes."[59/] Whether procedural objections are raised regarding a consultation request or a panel request, a party should come forward at its earliest opportunity with such procedural objections.

62. In this dispute, it is clear that Canada did not raise its procedural objections in a timely manner. The United States made its panel request on March 6, 2003, yet Canada failed to raise any concerns about or object to the sufficiency of the request at both the March 18 and March 31, 2003 meetings of the Dispute Settlement Body ("DSB"), which were the earliest opportunities in which Canada could have raised its procedural objections.[60/] Instead, Canada waited until a

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[57/] *Id*.

[58/] *See* Preliminary Ruling, para. 61.

[59/] *See, e.g.,* Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/AB/R, adopted April 5, 2001 ("*Thailand – H-Beams*"), para. 97 (citing *United States – FSC* in discussing sufficiency of panel request).

[60/] The United States submitted numerous detailed questions to Canada prior to consultations on January 31, 2003. Thus, even though Canada declined to answer most of these questions during the consultations, Canada was well aware of the scope of the United States'

preliminary ruling request filed on May 13, 2003, more than two months after the United States' panel request, to raise its objections.[61/]

63. As mentioned before, the Appellate Body in *United States – FSC* observed that by failing to raise procedural objections at the earliest opportunity possible, *i.e.*, at the DSB meetings where the request for establishment for a panel was considered, "the United States acted as if it had accepted the establishment of the Panel in [that] dispute," and thus the United States failed to raise its procedural objections in a timely manner.[62/] Similarly, in this dispute, the DSB meetings in which the U.S. panel request was being considered were the earliest opportunities for Canada to raise its procedural objections. Yet instead Canada waited until after the Panel's establishment to raise any objections, as an apparent delaying tactic to force the United States to re-file its panel request and go through the time consuming hurdle of considering the new request at two additional DSB meetings.

64. As even this Panel observed, it would have been "preferable" if Canada had informed the United States of its procedural objections at an earlier time.[63/] Thus, by not raising a procedural objection regarding the sufficiency of the U.S. panel request at the earliest opportunity and remaining silent through the panel establishment process, Canada – like the United States in the *United States – FSC* dispute – should be found to have acquiesced to the terms of the panel

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claims prior to receiving the U.S. panel request on March 6, 2003. *See* Panel Report, para. 1.4.

[61/] *See Comments of the United States on the Preliminary Ruling Request of Canada Regarding Article 6.2 of the DSU*, May 27, 2003, paras. 4, 5, 8 - 10.

[62/] *United States – FSC*, para. 165.

[63/] Preliminary Ruling, para. 58.

request; Canada should not have been permitted by the Panel to raise its procedural objections after the Panel's composition.

65. The Appellate Body applied the same rationale in *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*. There, the Appellate Body noted that because Mexico "was aware of all the facts" at the time the United States submitted its communication seeking recourse to Article 21.5 of the DSU, yet Mexico waited four months to raise its Article 6.2 objections, Mexico's objections could have been viewed as untimely.[64/] The Appellate Body explicitly noted that during this four month period, the DSB met and Mexico did not state any objections at that time.[65/] Again, the situation in the current dispute is analogous. Canada failed to raise its objections under Article 6.2 of the DSU at the two DSB meetings held after Canada received the U.S. panel request. As such, the Panel should have determined that Canada's objection was untimely.

66. In addition to the general tenor of the Panel's erroneous finding, the Panel also wrongly suggests at paragraph 60 of its Preliminary Ruling that if the United States had responded to Canada's letter of April 7, 2003 seeking clarification of the United States' panel request, the United States could have cured the alleged procedural defect in that panel request.[66/] However, to

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[64/] Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States)*, WT/DS132/AB/RW, adopted Nov. 21, 2001 ("*Mexico - HFCS (Article 21.5)*"), paras. 49 - 50.

[65/] *See id.*

[66/] Preliminary Ruling, para. 60. Although the Panel explicitly notes in a footnote "that the United States could not have 'cured' any inconsistencies with Article 6.2 of its panel request subsequent to the establishment of this Panel[,]" *see* note lxviii, the Panel in its final analysis

the extent procedural objections are raised in a timely fashion and are found to exist, such procedural defects cannot be cured during the course of the panel proceedings,[67/] let alone by an informal exchange of letters between the complaining and defending parties. Thus, for the Panel to imply that the United States should have responded to Canada's letter in order to cure any possible DSU Article 6.2 procedural defects is also legal error.

IV. CONCLUSION

67. For the foregoing reasons, the United States requests that the Appellate Body conclude that the Panel's legal and factual findings challenged here were in error.

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nevertheless gave considerable weight to the fact that the United States failed to respond to this letter, which was sent after the Panel was established.

[67/] Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted Sept. 25, 1997 ("*EC – Bananas III*"), para. 143).