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UNITED STATES - MEASURES TREATING EXPORTS RESTRAINTS AS SUBSIDIES

Report of the Panel

The report of the Panel on United States - Measures Treating Exports Restraints as Subsidies is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 29 June 2001 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that, in accordance with the DSU, only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

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I. INTRODUCTION

A. COMPLAINT OF CANADA

1.1 On 19 May 2000, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 and Article 30 of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"), concerning US measures that treat a restraint on exports of a product as a subsidy to other products made using or incorporating the restricted product if the domestic price of the restricted product is affected by the restraint[1].

1.2 On 15 June 2000, Canada and the United States held the requested consultations with a view to reaching a mutually satisfactory resolution of the matter, but the consultations failed to settle the dispute.

1.3 On 24 July 2000, Canada requested the establishment of a panel to examine the matter[2].

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 11 September 2000, the Dispute Settlement Body ("the DSB") established a Panel pursuant to the request made by Canada in document WT/DS194/2.[3]

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference as follows:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS194/2, the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 23 October 2000, the parties agreed to the following composition of the Panel:

1.7 Chairman: Mr. Michael Cartland

Members: Mr. Scott Gallacher
Mr. Richard Plender

1.8 Australia, the European Communities, and India have reserved their rights to participate in the panel proceedings as third parties[4].

C. PANEL PROCEEDINGS

1.9 The Panel met with the parties on 18 January 2001 and on 21 February 2001. The Panel met with third parties on 18 January 2001.

1.10 On 27 April 2001, the Panel provided its interim report to the parties. See Section VII, *infra*.

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[1] WT/DS194/1.
[2] WT/DS194/2.
[3] *See*, WT/DSB/M/88 at paragraph 12.
[4] WT/DS194/3.

II. FACTUAL ASPECTS

2.1 This dispute concerns the treatment of export restraints under US countervailing duty ("CVD") law. In its request for establishment of a Panel, Canada alleges that the measures at issue include Section 771(5) of the *Tariff Act of 1930* (19 U.S.C. § 1677(5)), as amended by the *Uruguay Round Agreements Act* ("*URAA*"), as interpreted by the Statement of Administrative Action ("SAA") accompanying the *URAA* (H.R. 5110, H.R. Doc. 316, Vol. 1, 103d Congress, 2nd Session, 656, at 925-926 (1994)) and the Explanation of the Final Rules ("the Preamble"), US Department of Commerce, Countervailing Duties, Final Rule (63 Federal Register 65,348 at 65,349-51 (25 Nov. 1998)), and US practice thereunder.

A. SECTION 771(5) OF THE TARIFF ACT OF 1930 AS AMENDED BY THE URUGUAY ROUND AGREEMENTS ACT

2.2 Section 251 of the *URAA* amends Section 771(5) of the *Tariff Act of 1930* so as to implement the definition of "subsidy" in Article 1.1 of the SCM Agreement. There is no disagreement between the parties that the definition of "subsidy" in Section 771(5) as amended essentially reproduces the definition in Article 1.1 of the SCM Agreement. The parties also agree that Section 771(5) does not specifically address export restraints.

B. THE STATEMENT OF ADMINISTRATIVE ACTION

2.3 When the *URAA* was submitted to the US Congress for passage, it was accompanied by the SAA. Congress approved the SAA at the same time that it passed the *URAA*. According to the *URAA*, the SAA constitutes "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the *URAA*] in any judicial proceeding in which a question arises concerning such interpretation or application".[5]

2.4 The SAA by its own terms:

> "represents an authoritative expression by the Administration regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement".[6]

2.5 The portion of the SAA that Canada challenges as relevant to the treatment of export restraints under the statute is its discussion of Section 771(5)(B)(iii). This section addresses the situation where a government "entrusts or directs a private entity to make a financial contribution". In this context the SAA states, *inter alia*:

> "One of the definitional elements of a subsidy under the Subsidies Agreement is the provision by a government or any public body of a "financial contribution" as defined by the Agreement, including the provision of goods or services. Moreover, the Subsidies Agreement specifically states that the term "financial contribution" includes situations where the government entrusts or directs a private body to provide a subsidy. (It is the Administrations view that the term "private body" is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided "directly or indirectly" by a government. Accordingly, the Administration intends

[5] Exhibit CAN-7 (19 U.S.C.§ 3512(d) (1994)).
[6] Exhibit CAN-2 (SAA at 656).

> that the "entrusts or directs" standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry.
>
> "In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g.*, Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea). The specific manner in which the government acted through the private party to provide the benefit varied widely in the above cases. Commerce has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.
>
> "In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met**.**"[7]

2.6 Canada contends, and the United States disagrees, that the SAA requires the US Department of Commerce ("the DOC") to treat export restraints as financial contributions.

C. THE "PREAMBLE" TO THE US COUNTERVAILING DUTY REGULATIONS

2.7 In 1998, the DOC issued Regulations implementing the *URAA*'s amendments to the US countervailing duty law.[8] The Regulations were accompanied by an "Explanation of the Final Rules", otherwise known as the "Preamble". In part, the Preamble contains the responses of the Department of Commerce to comments submitted on the proposed regulations during the public comment process. The parties agree that there is no specific Regulation addressing export restraints. They also agree that the portions of the Preamble that are relevant to the question of export restraints are found in the explanations of Sections 351.102 and 351.501 of the Regulations.

2.8 The Preamble, in respect of Section 351.102 states, *inter alia*:

> "As the extensive comments on this issue indicate, the phrase 'entrusts or directs' could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations. Rather, we believe that we should follow the guidance provided in the SAA to examine indirect subsidies on a case-by-case basis. We will, however, enforce this provision vigorously.

[7] Exhibit CAN-2 (SAA at 926).
[8] Exhibit CAN-3 (19 CFR Part 351, Countervailing Duties, Final Rule, 63 Fed. Reg. 65,348-65,418).

> "We agree with those commenters who urged the Department to confirm that the current standard is no narrower than the prior U.S. standard for finding an indirect subsidy as described in *Certain Steel Products from Korea* … and *Certain Softwood Lumber Products from Canada* … . Also, we believe that the phrase 'entrusts or directs' subsumes many elements of the definitions proposed by commenters. With respect to the suggestion that we include an illustrative list of situations that would fall under the 'entrusts or directs' standard, we do not believe this is necessary. The SAA at 926 lists a number of cases where the Department has found indirect subsidies in the past, and these cases serve to provide examples of situations where we believe the statute would permit the Department to reach the same result. Similarly, regarding the request that we define the phrase 'private entity' to include groups of entities or persons, the SAA is clear that groups are included (*see* SAA at 926). Therefore, we have not promulgated a regulation with this definition".[9]

2.9 The Preamble, in respect of Section 351.501 states, *inter alia*:

> "Regarding the issue of whether indirect subsidies can arise through the provision of goods and services, we believe this is clearly answered by the Act. Section 771(5)(D)(iii) states that financial contributions include the provision of goods or services. Hence, if a private entity is entrusted or directed to provide a good or service to producers of the merchandise under investigation, a financial contribution exists. With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration. This was recognized by Commerce in *Certain Softwood Lumber Products from Canada* …("*Lumber*") and *Leather from Argentina* … ("*Leather*"). Further, as indicated by the SAA (at 926), and as we confirm in these Final Regulations, if the Department were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the Department to reach the same result".[10]

2.10 Canada contends, and the United States disagrees, that the Preamble requires the DOC to treat export restraints as financial contributions.

D. "PRACTICE" OF THE US DEPARTMENT OF COMMERCE

2.11 According to Canada, as a matter of law, US "practice" under the statute, the SAA and the Preamble treats export restraints as meeting the standard of Section 771(5)(B)(iii) of the statute. Canada cites three post-WTO cases (*Live Cattle from Canada* ("*Cattle*"), *Stainless Steel Sheet and Strip in Coils from the Republic of Korea* ("*Stainless Steel Sheet and Strip*") and *Stainless Steel Plate in Coils from the Republic of Korea* ("*Stainless Steel Plate*") in support of this argument. Canada further argues that "practice" is not an individual determination in a countervailing duty case (although a determination normally will reflect "practice") but rather is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations. As such, Canada argues, "practice" is related to precedent, in that an interpretation or methodology will often be developed in a single case or group of cases, and becomes the "practice" followed in subsequent cases. Canada maintains that, as a matter of US law, the DOC is bound by prior precedents absent a reasoned explanation justifying the departure therefrom.

[9] Id. at 65,349-65,350.
[10] Id. at 65,351.

2.12 The United States disagrees that any post-WTO US "practice" exists in respect of the treatment of export restraints in countervailing duty investigations. The United States states, and Canada does not dispute, that there has been no post-WTO case in which the DOC has found an export restraint to be a subsidy. The United States argues that as a matter of US law, case precedent is not binding on Commerce. Concerning Canada's argument that "practice" is an institutional commitment to follow declared interpretations and methodologies, the United States denies that such a purported commitment exists, and further states that even if such a commitment existed, it would not be binding on Commerce as a matter of US law.

2.13 Thus, the parties disagree over both the existence and the legal significance of what Canada refers to as US "practice".

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

3.1 Canada submits that the US "measures" at issue are inconsistent with the SCM Agreement and the WTO Agreement. According to Canada, these "measures" commit the United States to treat an export restraint as meeting the definition of "financial contribution" under Article 1.1 of the SCM Agreement if, in the view of the US investigating authorities, the export restraint has the effect of increasing the supply of the restricted good. Therefore, if the downstream product incorporating the restrained input product is subject to a US countervailing duty investigation, according to Canada the United States would consider that the definitional requirement of financial contribution is satisfied (and, if the export restraint lowers the price of the restrained good, that the definitional requirement of "benefit" is satisfied). Canada argues that such treatment of export restraints as financial contributions violates the SCM Agreement and, for the same reasons, Canada alleges, the US law also violates the WTO Agreement and the SCM Agreement.

3.2 As discussed in the preceding section, the US "measures" that Canada challenges, because it considers that they require this treatment of export restraints, are:

(i) Section 771(5) of the *Tariff Act of 1930*[11] ("*Tariff Act*"), as amended by the *Uruguay Round Agreements Act*, which is the provision of US countervailing duty law that defines the term "countervailable subsidy";

(ii) portions of the Statement of Administrative Action[12] accompanying the *URAA* interpreting Section 771(5) with respect to export restraints;

(iii) portions of the US Department of Commerce Regulations[13] (in particular the "Preamble" thereto) interpreting and implementing Section 771(5) and the SAA with respect to export restraints; and

(iv) the ongoing practice of the DOC of treating an export restraint as a "financial contribution" within the meaning of Article 1.1 of the SCM Agreement.

3.3 Canada indicates that the definition of "subsidy" in Article 1.1 of the SCM Agreement requires that there be a "financial contribution" (or income or price support) that confers a "benefit". In the view of Canada, the measures at issue, taken together:

[11] Annex A to First Written Submission of Canada – Exhibit CAN-1.
[12] Annex B to First Written Submission of Canada – Exhibit CAN-2.
[13] Annex C to First Written Submission of Canada – Exhibit CAN-3.

(i) are inconsistent with Article 1.1 of the SCM Agreement and, because they require the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1, are inconsistent with Article 10 (as well as Articles 11, 17, and 19, as they relate to the requirements of Article 10) and 32.1 of the SCM Agreement; and

(ii) for the same reasons, also violate obligations of the United States under both Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement to ensure conformity of its laws, regulations, and administrative procedures with its obligations under the WTO agreements.

3.4 Canada therefore requests that the Panel make the following recommendation to the DSB:

- That the United States bring its "measures" into conformity with the SCM Agreement and the WTO Agreement, including by ceasing to treat export restraints as "financial contributions".

B. UNITED STATES

3.5 The United States requests that the Panel find:

(i) that none of the measures identified by Canada (either in its request for a panel or in its First Written Submission) are inconsistent with Articles 1.1, 10, 11, 17, 19, or 32.1 of the SCM Agreement; and

(ii) that the United States has not failed to ensure that its laws, regulations, and administrative procedures are in conformity with its obligations under Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement.

IV. REQUEST OF THE UNITED STATES FOR PRELIMINARY RULINGS[14]

A. REQUEST OF THE UNITED STATES

4.1 The United States, in a Request for Preliminary Rulings submitted after Canada's first written submission and before the US first written submission, requests the Panel to dismiss Canada's complaint by making preliminary rulings as follows:

(a) That, as neither Section 771(5), the SAA, the Preamble, nor any DOC "practice" requires US authorities to treat export restraints as subsidies, these alleged measures, as such, do not violate US obligations under any of the provisions cited by Canada in its request for a panel;

(b) That US "practice" – whether past, present, or future – does not constitute a measure properly before this Panel;

(c) That, because Canada did not include US "practice" under Section 771(5) in its request for consultations, the parties did not actually consult on US "practice", and Canada's panel request fails to adequately identify the US "practice" in question, Canada's claims regarding US "practice" fail to conform to Articles 4.7 and 6.2 of the DSU, and are not properly before this Panel; and

[14] The Panel notes that the summaries of the parties' arguments set forth in Sections IV, V, and VI are based on executive summaries of the parties' submissions, provided by the parties pursuant to the working procedures established by the Panel.

(d) That, because Canada's panel request did not identify the SAA or the Preamble as measures, and because, in any event, neither the SAA nor the Preamble is a measure, Canada's inclusion of the SAA and the Preamble as separate measures in its First Written Submission fails to conform to Article 6.2 of the DSU, and Canada's claims regarding the SAA and the Preamble are not within the Panel's terms of reference.

4.2 In support of this request, the United States makes the following arguments.

1. Introduction

4.3 In the view of the United States, Canada is asking the Panel to rule in the abstract that never, under any set of circumstances present or future, can an export restraint be regarded as a subsidy program – or even a part of a subsidy program – for purposes of the SCM Agreement. Such a ruling would step beyond the bounds of any existing dispute, and thereby usurp the "exclusive authority" of the Ministerial Conference or the General Council to authoritatively interpret Article 1.

4.4 The United States raises what it views as four different, threshold issues related to its request for preliminary rulings. First, none of the "measures" Canada has identified mandate that US authorities treat export restraints as "subsidies", as Canada alleged in its request for a panel, or as "financial contributions." Thus, under the mandatory/discretionary doctrine, none of these "measures" violates US WTO obligations.

4.5 Second, there simply is no DOC "practice" of treating export restraints as subsidies under current US law. Even if such a "practice" existed, it could not be regarded as a measure.

4.6 Third, because Canada's request for a panel did not identify the SAA or the Preamble as distinct measures subject to dispute, they are not within the Panel's terms of reference. Moreover, because neither the SAA nor the Preamble has any legal effect independent of the statute or regulations, neither document constitutes a measure susceptible to dispute resolution.

4.7 Fourth, "practice" was not included in Canada's consultation request, and the United States and Canada did not actually consult on any alleged "practice". Moreover, at least until its First Written Submission, Canada failed to identify any particular "practice" about which it complained, and the "practice" it has now identified is not the sort of measure it originally described. Thus, Canada's claims regarding "practice" are not properly before the Panel.

4.8 The United States argues that Canada's request that this Panel rule on discretionary measures, and its insistence that the Panel force the United States to comply with a ruling regarding *future* United States actions or "practice" – actions that may never occur – raise serious institutional concerns regarding the fundamental structure of the WTO, as well as proper judicial method. If the Panel were to rule that future measures, *if* they should ever be adopted, also violate US WTO obligations, the Panel would be adopting a binding prospective interpretation of the SCM Agreement and stepping well beyond the boundaries of any existing dispute.

4.9 For the United States, the procedural defects in Canada's request for a panel mean that Canada's claims of WTO violations must fail, even if one were to assume that its interpretation of the SCM Agreement were correct, which it clearly is not. At a minimum, the flaws in Canada's pleadings indicate that the Panel must examine its claims with unusual care, and avoid overstepping its authority.

2. Factual Background

4.10 The United States asserts that with respect to Section 771(5), Canada does not identify any way that Section 771(5) itself fails to conform to US WTO obligations or needs to be amended. Further, according to the United States, the SAA, which is a type of legislative history, does not *require* the DOC to treat such measures as countervailable subsidies. The SAA permits the DOC to treat an export restraint as a subsidy when justified by the terms of the statute (and the SCM Agreement), but *only if* the DOC determines that doing so would satisfy the requirements of the new subsidy definition. With respect to the Preamble, the United States argues that the passages that Canada cites indicate that the DOC simply was of the view that Section 771(5)(B)(iii) of the *Tariff Act did not preclude* the DOC from treating export restraints as subsidies in appropriate circumstances. The DOC never stated that Section 771(5)(B)(iii) *mandated* that the DOC treat export restraints as subsidies. Moreover, the DOC did *not* promulgate a regulation on "indirect subsidies" in general, or export restraints in particular, and the DOC's statements were made in the context of explaining why it was *not* promulgating a regulation regarding "indirect subsidies". With respect to practice, the United States argues that *Live Cattle* is the only US countervailing duty ("CVD") investigation since the implementation of the *URAA* even to consider whether something which arguably could be categorized as similar to an export restraint programme might constitute a countervailable subsidy, and the DOC found no subsidy. According to the United States, the other two cases cited by Canada involved both a different type of financial contribution than any export restraint case (loans vs. goods) and a different type of government action (government direction of credit vs. government restrictions on exports).

3. Legal Argument

(a) Assuming for Purposes of Argument that Canada's Interpretation of Article 1 of the SCM Agreement Is Correct, Section 771(5) Does Not Violate US WTO Obligations Because Section 771(5) Does Not Mandate that the DOC Treat Export Restraints as Subsidies

4.11 The United States notes that the Appellate Body has explained, "the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's GATT 1947 obligations".[15] This doctrine has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member's legislation is WTO-inconsistent. For example, in *Canada Aircraft*, the panel applied the mandatory/discretionary distinction in rejecting several Brazilian claims of prohibited subsidies under the SCM Agreement. Similarly, the panel in *US 301* applied the mandatory/discretionary distinction, stating that its decision "does not imply a reversal of the classical test in the pre-existing jurisprudence that only legislation mandating a WTO inconsistency or precluding WTO consistency, could, as such, violate WTO provisions. Indeed that is the very test we shall apply in our analysis." The United States notes that most recently, in the *1916 Act* case, the Appellate Body set forth the traditional formulation of the mandatory/discretionary doctrine. The Appellate Body engaged in a lengthy discussion of the doctrine and its correct application, ultimately finding that the panel had applied the doctrine correctly.

4.12 According to the United States, the text of Section 771(5) requires the DOC to treat export restraints as subsidies *only if* they might meet all of the statute's requirements, which are in effect the same as those of the SCM Agreement. Therefore, even assuming (wrongly) for purposes of argument that Article 1.1 of the SCM Agreement precludes ever treating an export restraint as a subsidy,

[15] *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 88 ("*U.S. 1916 Act AB Report*").

nothing in the text of Section 771(5) mandates that the DOC treat an export restraint as a subsidy. This conclusion does not change if one interprets Section 771(5)(B)(iii) in light of the SAA. Although the SAA is an authoritative expression by the United States concerning the interpretation of the *URAA*, pages 925-926 of the SAA state merely that the DOC *may* impose countervailing duties regarding export restraints *only if* such restraints meet all of the requirements for countervailability under the statute and the SCM Agreement.

4.13 Turning to the Preamble, the United States asserts that nothing in the Preamble requires the DOC to treat export restraints as subsidies. At most, the Preamble expresses the DOC's view that Section 771(5)(B)(iii) "would permit" it to treat export restraints as subsidies. Even if the Preamble stated that Section 771(5)(B)(iii) *required* the DOC to treat export restraints as subsidies, such a statement would not be binding upon the DOC as a matter of US law. Moreover, the DOC did *not* promulgate a regulation on the topic of indirect subsidies in general, or export restraints in particular. Thus, the Preamble cannot even be used as an interpretive tool, because there is no regulation to interpret. At most, that United States argues, the Preamble is a non-binding statement by the DOC regarding its views at the time concerning the scope of Section 771(5)(B)(iii).

4.14 With respect to Canada's claims concerning US "practice", the United States maintains that no DOC determination has ever found that any export restraint meets the standard of Section 771(5)(B)(iii); but even if one had, this would not mandate that the DOC interpret the statute in this fashion. It is a well-established principle of US administrative law that an administrative agency, such as the DOC, is not obliged to follow its own precedents, provided that it explains why it departs from them. Thus, even if the DOC had made a determination under Section 771(5) in a prior CVD proceeding that an export restraint constituted a subsidy (which it has not), the DOC would not be bound by that determination in a future CVD proceeding involving an export restraint. The key consideration under US law is that DOC determinations be consistent with the statute and the regulations.

4.15 Moreover, the United States asserts, written submissions made by Canada in the course of the DOC's rulemaking proceeding demonstrate that Canada has agreed with the above assessment. Canada has stated that Section 771(5) of the *Tariff Act* "adopts a definition of 'subsidy' that is *substantively the same as* that of the [SCM] Agreement", and that the DOC "can easily, and should, interpret the *URAA* consistent with US GATT obligations, which require that regulatory measures be excluded from the definition of subsidy." (emphasis added). Canada also has stated that it "appreciate[d] that the Department may wish to preserve its *flexibility* and *discretion* with respect to the application of the concepts of 'indirect subsidies' . . . and has decided therefore not to propose regulations addressing these issues at this time". (emphasis added).

4.16 In other words, according to the United States, until it decided to commence this dispute Canada was of the view that Section 771(5) did *not* require the DOC to treat export restraints as subsidies. Similarly, until it decided to commence this dispute, Canada was of the view that by declining to promulgate a regulation on the topic, the DOC had preserved "its flexibility and discretion" with respect to the treatment of export restraints. Now, the United States argues, Canada is suddenly claiming that in its rulemaking proceeding the DOC somehow bound itself to treat export restraints as subsidies. For the United States, not only do Canada's prior statements to the DOC constitute an admission against interest for purposes of this dispute, but Canada's drastic reversal of positions speaks volumes about the strength (and purposes) of its case.

(b) Canada's Claims Concerning "US Practice" Under Section 771(5) Should be Dismissed

4.17 The United States asserts that what Canada refers to as "practice" consists of nothing more than individual applications of the US CVD law. While these applications themselves might

individually constitute measures, they do not, through numbers, mutate into a separate and distinct "measure" that can be called "practice." Rather, Canada's alleged "practice" simply consists of specific determinations in specific CVD proceedings (or in some cases only "thoughts" expressed in specific CVD proceedings) that are not within the Panel's terms of reference and that Canada says it is not challenging. In the view of the United States, the sort of "practice" alleged by Canada does not constitute a measure within the meaning of the DSU.

4.18 However, even if "practice" could be considered as a measure, the United States argues that Canada's claims regarding US "practice" still would not be properly before this Panel. Because Canada did not identify US "practice" in its consultation request, the United States and Canada did not actually consult with respect to US "practice", and Canada's panel request did not adequately identify US "practice", Canada's claims fail to conform to Articles 4.7 and 6.2 of the DSU and must be rejected for that reason. Moreover, to the extent that Canada's First Written Submission finally identifies the three types of "practice" about which it is complaining, none of the three types can violate US WTO obligations: (1) pre-WTO CVD determinations cannot violate the WTO or SCM Agreements; (2) there is no existing US "practice" of treating export restraints as subsidies that violates the WTO or SCM Agreements; and (3) hypothetical future US practice under Section 771(5) is not properly before the Panel because it is not a measure, and because only the Ministerial Conference and the General Council have the power to issue authoritative interpretations of the SCM Agreement.

4.19 Nor, according to the United States, would rulings on possible future practice be wise. As previously noted by the panel in *European Communities – Audio Tapes*, para. 365, "[I]t would [not] be appropriate to reach findings on a 'practice' *in abstracto* when it had determined that the actions taken in a particular investigation were not inconsistent with the Agreement and that the 'practice' was not pursuant to mandatory legislation." More fundamentally, the "future practice" of a Member simply cannot be regarded as a "measure" subject to dispute settlement, because it is purely speculative. For that reason, the DSU applies only to measures "taken", not to measures "that may possibly be taken in the future".

4.20 For the United States, an additional reason why Canada's claims regarding DOC "practice" are not properly before the Panel is that those claims were not made in conformity with Articles 4.7 and 6.2 of the DSU. In its request for consultations, Canada identified the SAA and the Preamble as the challenged measures, effectively alleging that these measures, as such, violated various US WTO obligations. Canada did not allege that any actual application of these measures in a specific US CVD proceeding violated US WTO obligations. Likewise, at the consultations which took place on 15 June 2000, the parties did not discuss any actual application of the SAA, the Preamble, or Section 771(5) in a particular US CVD proceeding.

4.21 Nonetheless, the United States argues, in its panel request Canada for the first time in this dispute raised US practice under Section 771(5) as a challenged measure. In the view of the United States, Articles 4.7 and 6.2 of the DSU preclude Canada from challenging a measure which was neither identified in its consultation request nor the subject of consultations.

4.22 The United States recalls that in *Brazil - Aircraft*, the Appellate Body was faced with a situation where Brazil sought to dismiss Canada's complaint because the regulatory instruments identified in Canada's consultation request – and on which Canada and Brazil consulted – were no longer in effect by the time the panel was established. This was due to the fact that the regulatory instruments in question had a short lifespan, and were constantly expiring and being re-enacted under a new name.

4.23 According to the United States, the Appellate Body rejected Brazil's argument on the basis that the regulatory instruments that came into affect after consultations were held did not change the

essence of the export subsidies complained about by Canada. In so doing, however, the Appellate Body reaffirmed the important role that consultations play in the dispute settlement process. According to the Appellate Body, "Articles 4 and 6 of the DSU . . . set forth a process by which a complaining party *must* request consultations, and consultations *must* be held, before a matter may be referred to the DSB for the establishment of a panel." (emphasis added). The Appellate Body found that Articles 4 and 6 of the DSU do not "require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel." (emphasis in original). Implicit in this statement, however, is the notion that there must be *some* identity between the subject of the consultations and the specific measures identified in the panel request. If there is not, then the panel request is defective as a matter of law.

4.24 With respect to Section 771(5), the United States does not object to its inclusion in Canada's panel request, even though it was not identified in Canada's consultation request. In the consultation request and at the consultations, Canada made clear its intent to challenge US law, as such. The consultations clarified which measure Canada had to identify if it was to properly make such a challenge.

4.25 However, the United States indicates, at no time during the consultations phase did Canada indicate that it intended to challenge US law, as applied. In the view of the United States, there is no identity between a law, as such, and a law, as applied. For that reason, the Panel should find that Canada has failed to comply with Articles 4.7 and 6.2 of the DSU, and should dismiss Canada's claims with respect to US practice under Section 771(5).

4.26 For the United States, Canada's panel request also fails to meet the requirements of Article 6.2 of the DSU, because the request fails to "identify the specific measures at issue ... ." Specifically, by simply making a vague reference to "US practice thereunder" – "thereunder" being a reference to Section 771(5) – Canada has failed to adequately identify the particular applications of Section 771(5) about which it is complaining.

4.27 The United States argues that not until its First Written Submission did Canada describe any examples of US practice that it wished to make the subject of this action (although it could easily have done so in consultations), and even now it is by no means clear exactly what Canada considers to be "practice" or whether it has other as-yet-unmentioned "practice" in mind. The United States asserts that it has been prejudiced by these failures, and these failures make the requisite consultation process an empty one (thereby undermining the overall dispute settlement process).

4.28 Finally, the United States emphasizes that subsequent to the entry into force of the WTO Agreement, the DOC has never had any practice that "treats a restraint on exports of a product as a subsidy to producers of other products". *Live Cattle from Canada* cannot be a "measure[] that treat[s] a restraint on exports of a product as a subsidy" of the sort alleged in Canada's requests either for a consultation or for a panel, because in that case the DOC found that the Canadian measure at issue was *not* a subsidy because it did not provide a benefit. Nor did the DOC make a finding that any export restraint constituted a "financial contribution", the sort of measure addressed in Canada's First Written Submission.

4.29 Moreover, in the view of the United States, the two Korean steel cases cited by Canada involved measures (government direction of credit) that are completely different from an export restraint. Accordingly, none of the examples of "practice" Canada has identified even in its First Written Submission constitute the sort of measures it has said that it challenges.

4.30 For the United States, Canada's vague and amorphous request for a panel to address actions that have not yet been and may never be taken emphasizes the problems associated with trying to

address practice purely in the abstract. Canada's consistent failure to identify the precise "measures" and "practice" it wishes to place at issue highlights the fact that its real complaint involves a measure – US imposition of countervailing duties on Canadian lumber imports – that does not exist. The United States acknowledges that it is certainly possible that the DOC will one day find that some type of export restriction program in Canada or its provinces amounts to entrusting or directing, either alone or in combination with other restrictions, a private "body" to sell an input good to a particular producer or producers, and meets the other requirements for a countervailable subsidy, but states that it is also possible that the DOC will not make such a finding if and when it is faced with the issue. Yet for both practical and juridical reasons, in the opinion of the United States the Panel would be ill-advised to speculate on either what types of restrictions might exist *or* how the DOC would treat them. Accordingly, the Panel should decline to rule on Canada's complaint and dismiss it.

(c) The Panel Should Dismiss Canada's Claims Concerning the SAA and the Preamble Because Neither Document Was Identified as a Measure in Canada's Panel Request and Because Neither Document Constitutes a "Measure" Within the Meaning of Article 6.2 of the DSU

4.31 The United States notes that in its panel request, Canada identified the challenged measures as: (1) Section 771(5) (as interpreted by the SAA and the Preamble), and (2) US practice thereunder. If Canada had intended to challenge the SAA and the Preamble as separate measures, the "as interpreted by" phrase would have been unnecessary.

4.32 However, the United States continues, in its First Written Submission, Canada expanded its case to include the SAA and the Preamble as separate "measures". According to the United States, Canada cannot do so, because it is well-established that a Panel's terms of reference are fixed by the panel request, and a complainant cannot add new measures thereafter.

4.33 For the United States, Canada's behaviour is particularly egregious in light of the fact that at the first DSB meeting to consider Canada's panel request, the United States indicated that it interpreted the request as involving two measures – Section 771(5) and US practice thereunder. Canada never took issue with this interpretation. Indeed, at the second DSB meeting, the only point on which Canada took issue with the United States concerned the US objection to Canada's inclusion of "practice" in its panel request.

4.34 Finally, the United States argues, even if Canada's panel request could be construed as having separately identified the SAA and the Preamble as things it wished to challenge, those documents do not constitute measures within the meaning of Article 6.2 of the DSU. According to the United States, neither document, in itself, has any independent legal effect under US law, and neither document authorizes nor requires any action by the US Government. In the view of the United States, documents of this nature cannot constitute a measure within the meaning of Article 6.2.

B. RESPONSE OF CANADA

4.35 Canada considers that each of the US requests for preliminary rulings is unfounded and consequently requests that the Panel deny the preliminary rulings sought by the United States. Canada argues that, in an effort to substantiate its request, the United States mischaracterizes Canada's claim and the nature and effect of the measures under US law, as well as the relevance of the WTO case law cited by the United States in the context of a request for a preliminary ruling.

1. The Matter Raised By Canada's Panel Request Is Properly Before This Panel

4.36 Canada notes that in the US Request for Preliminary Rulings ("the US Request"), the United States has challenged in a variety of ways whether the matter raised by Canada's panel request is properly before this Panel and reflects an actual dispute. Canada submits that its Panel Request sets

out both specific measures and legal claims, well within the requirements established by the Appellate Body in *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*,[16] that reflect the real controversy that exists between Canada and the United States with respect to the treatment of export restraints under US countervailing duty law.

4.37 Canada recalls that in *Guatemala – Cement*, the Appellate Body concluded that the "matter" referred to the DSB consists of two elements: the specific measures at issue and the legal basis of the complaint (or the claims). According to Canada, its panel request sets out four measures as constituting the relevant aspects of US countervailing duty law that, when taken together, are inconsistent with the provisions of the SCM Agreement and the WTO Agreement identified by Canada. For Canada, these government actions all clearly satisfy the standard for a "measure" set out in *Guatemala – Cement*.

4.38 Canada asserts that its legal claims also are set out in its panel request and that these claims, which echo Canada's request for consultations, unquestionably put the United States on notice, and have done so since the very beginning of this dispute, that Canada is of the view that the treatment of export restraints under US countervailing duty law is inconsistent with the various identified provisions of the SCM Agreement and WTO Agreement.

4.39 Canada argues that the United States attempts to isolate the constituent parts of US countervailing duty law into separate pieces in order to claim that each, by itself, is meaningless. In particular, the United States, while not objecting to Section 771(5) of the *Tariff Act of 1930* as a "measure", claims that it is the *only* measure, and that whether the statutory language of Section 771(5) itself mandates the treatment of export restraints as subsidies is dispositive of this proceeding. It also claims that the SAA and Preamble have no "legal effect independent from the statute or regulations",[17] and that there is no US "practice" with respect to export restraints.

4.40 For Canada, the US characterization of the basis for Canada's complaint and its attempt at parsing the measures so as render each measure meaningless in its own right is not supported by WTO jurisprudence. As Canada discusses in its First Written Submission (see *infra*), the Panel in *United States – Sections 301 – 310 of the Trade Act of 1974* noted that a national law may be "multi-layered," including statutory and other institutional and administrative elements that are "often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."

4.41 Canada notes that the United States also argues that in WTO dispute settlement, the meaning of municipal law is a question of fact to be proven, and consists not only of the provisions themselves, but also the domestic legal principles governing their interpretation. The United States then suggests that a Member's views on the meaning of its own law is ordinarily worthy of some deference. Canada notes, however, that a Panel has an independent obligation to assess municipal law to determine whether the Member is in compliance with its WTO obligations. Canada notes that the law is well established in this regard, and points to the Appellate Body Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*.

4.42 Canada notes that according to the United States, Section 771(5) largely tracks the language of Article 1.1(a)(1)(iv) of the SCM Agreement, and thus is not a violation of that Article. Moreover, the United States suggests that under US principles of statutory construction, Section 771(5) cannot be interpreted in a fashion that would violate Article 1.1(a)(1)(iv) of the Agreement, because under "the

[16] *Guatemala – Anti-Dumping Investigation Regarding Portland Cement From Mexico*, Report of the Appellate Body, WT/DS60/AB/R, 2 November 1998 at para. 75 (hereinafter *Guatemala – Cement*).

[17] *Id.* at para. 8.

Charming Betsy doctrine", an ambiguous US statute is to be "construed, where possible, to be consistent with international obligations of the United States".

4.43 Canada agrees that the language of Section 771(5) *could* have been interpreted consistently with the definition of "subsidy" in Article 1.1 of the SCM Agreement, as Canada noted in its comments submitted to the DOC during its rulemaking proceeding in 1995. For Canada, however, this is not the question at issue. Rather, as the Appellate Body has noted (*United States – 1916 Act*), the issue is not how a statute theoretically might be interpreted, but how it is interpreted in light of both statutory and non-statutory elements.

4.44 As to its contention about the *Charming Betsy*, Canada argues, the United States omits to note other US judicial doctrines that render the *Charming Betsy* doctrine meaningless in this context. In this case, the United States has made plain in its submissions to the Panel that it interprets Article 1.1 of the SCM Agreement to permit it to countervail export restraints, and the *Charming Betsy* doctrine consequently will not lead it to adopt a different interpretation of its obligations.

4.45 In Canada's view, the United States also mischaracterizes the role and significance of the SAA. While conceding that by the terms of the statute the SAA is "an authoritative expression by the United States concerning the interpretation of the *URAA*", the US Request asserts that the SAA is merely "a type of legislative history". For Canada, this US argument is inherently contradictory and belied by both US court decisions and the treatment of the SAA by the United States itself.

4.46 First, Canada states, the SAA is not legislative history in any ordinary sense, for the reasons that it was required by statute, agreed between the US Administration and the US Congress in advance, submitted by the US President to the US Congress with the proposed *URAA* legislation, and approved by the Congress. The SAA has a function and significance in US law beyond that of ordinary legislative history.

4.47 Second, Canada argues, the very existence of the SAA and the declaration in the statute that it is an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements…" makes plain that the scope and meaning of the statute are to be determined by the SAA. This fact that has been repeatedly recognized by US courts.

4.48 Finally, Canada notes, the US attempt to downplay the significance of the SAA, treating it as merely "encouraging" certain interpretations is completely contradictory to its position and assurances set out in *United States – Section 301*. In that case, the United States declared that "[t]he SAA must, by law, be treated as the authoritative expression concerning the interpretation of the statute in any judicial proceeding." On this basis, Canada states, the Panel found in favour of the United States.

4.49 As regards the effect of the Preamble, Canada asserts that the US Request acknowledges that the DOC's statements concerning export restraints in its *Notice of Final Rule* "would have been binding" on the DOC if they had been made in a "regulation", but then claims that inclusion of those statements in the Preamble makes them "[a]t most … a non-binding statement by the DOC regarding its views at the time." The United States adds that it is not bound by the Preamble.

4.50 For Canada, the claim that a Preamble to Regulations has lesser legal status ignores the administrative framework under which US agencies promulgate regulations. The DOC regulations are issued in accordance with the *Administrative Procedure Act* (the *APA*), which requires that an agency incorporate a preamble in rules that they issue. Thus, the purported distinction between the Preamble and the remainder of the regulation that is urged by the United States is without basis. Moreover, Canada asserts, numerous US courts have recognized the Preamble as part and parcel of a regulation, and thus binding.

4.51 Canada finds equally invalid the US argument that the Preamble's provisions on export restraints are not binding because the Preamble is the only portion of the regulation that addresses the issue. First, this argument suggests that Commerce engaged in a meaningless exercise when it drafted its position on export restraints in the Preamble. Second, numerous US courts have treated a preamble as a binding agency pronouncement, even where the preamble is the only portion of the regulation that addresses the issue. In fact, according to Canada, the United States has done so in submissions to WTO panels. In *United States – Standards for Reformulated and Conventional Gasoline*, the United States justified certain EPA rules as being compatible with its WTO obligation by reference to the Preamble, including to provisions in the Preamble that contained obligations not found in other parts of the regulation.

4.52 Finally, Canada argues, there also is no validity to the assertion that Commerce itself has never recognized the binding nature of the Preamble. To the contrary, in its countervailing duty determinations, Commerce *uniformly* treats the Preamble to the countervailing duty regulations as an integral part of Commerce's regulations and equivalent in legal authority to other sections of the regulations. Indeed, Canada states, Commerce commonly refers to the regulatory language included in the Preamble as simply "the regulations" and relies on the Preamble as legal authority for its interpretations. This was made evident in the Korean Steel cases.

4.53 Canada notes the United States argument that its practice of treating export restraints as "financial contributions" is not appropriately a "measure". Canada asserts that the United States claims that because pre-WTO determinations cannot violate WTO obligations they are irrelevant to "practice" and "there is no existing US 'practice' of treating export restraints as subsidies that violates the WTO or SCM Agreements"; and that Canada is seeking a ruling on a "hypothetical future US practice". The United States is wrong on both counts.

4.54 For Canada it is clear that there is an existing US administrative practice of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement, which is defined, in large part, by the United States' statements in the SAA regarding its pre-WTO practice of countervailing export restraints. While Canada agrees that this pre-WTO practice should have become irrelevant after the SCM Agreement came into force, the SAA expressly provides that US practice in those cases is to continue under the SCM Agreement and the revised US countervailing duty law.

4.55 Canada asserts that this reliance on pre-WTO cases including *Leather* and *Lumber* to describe its continuing practice of treating export restraints as financial contributions is repeatedly confirmed in the Regulations. There can, therefore, be no doubt that Commerce's pre-WTO practice *is* its post-WTO practice.

4.56 In Canada's view, the US attempt to dismiss its post-WTO practice as irrelevant is equally invalid. The Korean *Stainless Steel* cases discussed by Canada confirm the Commerce Department's absolute adherence to the view that the "clear and unambiguous language of the SAA is that Congress intended the specific types of indirect subsidies found to be countervailable" in past cases, including *Softwood Lumber*, "to continue to be covered by the [*Tariff Act of 1930*], as amended by the *URAA*." For Canada, those cases also confirm the Commerce Department's view that its Regulations, like the SAA, foreclose any discretionary consideration of "financial contribution" in the case of "indirect subsidies".

4.57 Nor, argues Canada, can the United States escape an "existing practice" by claiming that its discussion of financial contribution in *Live Cattle* was "at most *dicta*". Canada acknowledges that in *Live Cattle*, Commerce did not find the Canadian Wheat Board's "control" of exports to be a countervailable subsidy because it found no *benefit*. But, Canada asserts, Commerce's initiation of the case, based only on allegations of an export restraint and a price effect, like its pronouncements on

"financial contribution" and "private body" in its final determination, are manifestations of its continuing practice of considering an export restraint to be a "financial contribution." In short, the determination made clear that Commerce did not countervail the alleged export restraint not because it did not view an export restraint as a financial contribution but rather *only* because it did not find a benefit.

4.58 More fundamentally for Canada, the "practice" at issue is not individual determinations in countervailing duty cases as the United States suggests. Canada contends that it does not seek a ruling overturning the determinations in particular past cases. Rather, as is recognised under WTO jurisprudence, references to specific cases is an acceptable means of establishing an interpretation under domestic law. Canada's challenge to US practice is particularly crucial to US compliance with a DSB ruling if Canada prevails in this dispute. Canada believes that there is ample evidence from other WTO proceedings that the United States may take the position that a change in administrative practice is not a necessary element of compliance, even where Panel and Appellate Body reports have plainly found the existing practice to be in violation of WTO agreements It is in this light that Canada challenges US practice with respect to export restraints, and seeks relief that expressly addresses US practice.

2. The Mandatory/Discretionary Distinction Is Not A "Procedural Matter" Going to The Jurisdiction Of This Panel

4.59 Canada states that the United States claims that neither Section 771(5), the SAA, the Preamble, nor any DOC "practice" requires US authorities to treat export restraints as subsidies, and on this basis, that the alleged measures, as such, do not violate US obligations under any of the provisions cited by Canada in its request for a panel. For Canada, however, this argument is based on a mischaracterization of Canada's complaint. Canada does not contend that the US measures require the United States to treat export restraints as subsidies. Rather, Canada's position is that the measures require the United States to determine that an export restraint satisfies the "financial contribution" element of the definition of 'subsidy" and therefore that an export restraint is countervailable if Commerce finds that it confers a "benefit". In Canada's view, this is inconsistent with the definition of Article 1.1 of the SCM Agreement because an export restraint does not come within any of the government actions set out in Article 1.1, including, in particular, the requirements of subparagraph 1.1(a)(1)(iv) of the Agreement.

4.60 Canada notes that in support of the US argument that the measures at issue are not properly before this Panel because they are not "mandatory", the United States cites various GATT and WTO jurisprudence. This review culminates in a US claim that Canada's complaint should be dismissed as a procedural matter on this basis. However, Canada argues, because this issue does not go to a procedural matter, it is not properly the subject of a preliminary ruling.

4.61 More importantly for Canada, these cases are not relevant to this Panel's jurisdiction to hear the "matter" brought before it by Canada. Under the GATT cases cited by the United States, the mandatory or discretionary nature of a measure is an issue that addresses whether a measure as such violates the GATT provisions invoked, not whether a panel has jurisdiction to hear a particular matter. In Canada's view, this was made clear by the Appellate Body in *United States – Anti-Dumping Act of 1916.*

4.62 Canada further states that in a variation on that US argument, the United States asserts that Canada is seeking an advisory opinion under the SCM Agreement and in doing so is asking the Panel to usurp the authority of the Ministerial Conference and General Council under Article IX:2 of the WTO Agreement. For Canada, in advancing these arguments the United States relies on dicta regarding "judicial economy". Canada points out that this dicta addresses whether a panel should

decline to address certain issues that are not necessary to resolve the issue before it, not whether the dispute should have been considered originally.

4.63 Canada asks the Panel to find that the measures at issue violate existing provisions in the SCM and WTO Agreements in that they require the United States to treat an export restraint as a "financial contribution". If export restraints do not come within the scope of the definition of "financial contribution" in the SCM Agreement, then the treatment of export restraints under US countervailing duty law is necessarily inconsistent with both the SCM Agreement and the WTO Agreement. Canada contends that it is entitled to a determination of this issue so that benefits accruing to it under these Agreements are not, and cannot, be impaired by the application of a WTO inconsistent approach. As such this dispute is properly before this Panel.

4.64 Canada recalls that at paragraphs 58-69 of the US Request, the United States refers to a number of GATT and WTO cases in which a panel declined to find a measure as such to be inconsistent with GATT or WTO rules because the country maintaining the measure was able to establish that, even though the measure could be applied inconsistently with international obligations, the measure did not mandate a violation.

4.65 Canada argues, however, that the United States neglects to mention that in all of these cases, either the panel first made a finding as to the obligations in question, or there was essentially no dispute about those obligations. Put differently, where there was a dispute as to the nature of the obligation at issue, panels first determined the meaning of the obligation before considering whether the measure violated that obligation. In Canada's view, none of these cases supports the US Request.[18]

4.66 Canada notes that in this dispute, the United States and Canada vigorously dispute the requirements of the WTO rules invoked by Canada. The United States openly acknowledges that it does not agree with Canada's interpretation, and the US measures and the US submissions make it quite clear that under US countervailing duty law, an export restraint is considered to be a "financial contribution." In Canada's view, these differences can be addressed only after a full hearing of the substance of Canada's case before this Panel.

4.67 For Canada, not only is the United States incorrect in its efforts to rely upon the mandatory/discretionary distinction in requesting a preliminary ruling, it also has mischaracterized the "mandatory" nature of the SAA and Preamble. In response to Canada's description of how the SAA requires the United States to treat export restraints as "financial contributions", the United States focuses on the proviso in the SAA that states that the types of indirect subsidies identified in the SAA will continue to be countervailable "provided that" Commerce is satisfied that the standard of Section 771(5)(B)(iii) has been met. Canada asserts that the proviso must, however, be read in context and that the context curtails any Commerce discretion.

4.68 Canada notes that the proviso is preceded by three paragraphs containing key directives on the interpretation of Section 771(5)(B)(iii). The first paragraph of the SAA passage on "indirect subsidies" declares that the "entrusts or directs" language of 771(5)(B)(iii) "shall be interpreted broadly" to "continue [the Administration's] policy of not permitting the indirect provision of a subsidy to become a loophole" in countervailing duty enforcement.[19] The second paragraph recites pre-WTO Commerce practice, specifically including the countervailing of export restraints in *Leather* and *Lumber*, and concludes that Commerce found a countervailable subsidy "where the government took or imposed (through statutory, regulatory, or administrative action) a *formal, enforceable measure* which directly *led to a discernible benefit* … .".

[18] See *Response of Canada to the United States' Request For Preliminary Rulings* at paras. 49-51.
[19] SAA at 925-926. (Annex B to Canada's First Written Submission – Exhibit CAN-2)

4.69 Canada continues that the third, and crucial, paragraph, by characterizing the export restraints of *Leather* and *Lumber* as "cases where the government acts through a private party", declares that those export restraints meet the entrusts or directs standard of 771(5)(B)(iii), and states that in such cases, the amended law is to be "administered on a case-by-case basis consistent with" the pre-WTO practice described in the preceding paragraph. In Canada's view removing any remaining doubt about the interpretation of Section 771(5)(B)(iii) is the statement in this paragraph of the SAA of the "Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) *encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable.*.. (emphasis added). Canada asserts that therefore the SAA gives Commerce explicit direction as to the determination it should make under the proviso with regard to export restraints.

4.70 In a similar vein, Canada argues, the US Request asserts that the Preamble does not require Commerce "to treat export restraints as subsidies"[20] (thus once again misstating the issue as "subsidy" rather than "financial contribution"), but essentially limits its argument to claiming that "at most, the Preamble expresses the DOC's view that Section 771(5)(B)(iii) 'would permit' it to treat export restraints as subsidies."[21] As in the case of the SAA, when viewed in context, the "would permit" language does not mean what the United States suggests, in Canada's view. The language comes at the end of a paragraph that confirms that "if the Department were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the Department to reach the same result."[22] Canada states that US countervailing duty law itself is mandatory in the sense that when Commerce finds a financial contribution, benefit, and specificity, it must find a countervailable subsidy. Because, according to Canada, the SAA and Preamble have already determined that an export restraint meets the financial contribution requirement, the scope of any discretion under the "would permit" language is limited to Commerce's analysis of benefit and specificity.

3. The Sufficiency Of The Consultations On US Practice

4.71 Canada recalls that the United States submits that Canada's "claims" regarding US practice are not properly before the Panel based on allegations that: (1) Canada did not include US practice as a "measure" in its request for consultations; (2) the parties did not actually consult on US practice; and (3) Canada's Panel Request fails to adequately identify the "US 'practice' in question."

4.72 Canada states that the United States attempts to support its position by quoting selectively from the Appellate Body report in *Brazil – Export Financing Programme for Aircraft* as standing for the principle that without identity between the subject of the consultations and the specific measures identified in the panel request, the panel request is defective as a matter of law".[23] Notwithstanding the erroneous assertion by the US as to absence of identity between the subject of the consultations and the specific measures identified in the panel request, Canada finds it instructive to set out more fully what the Appellate Body actually said in the report relied on by the United States:

> "We do not believe, however, that Articles 4 and 6 of the DSU … require a *precise and exact* identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel.…As stated by the Panel, "[o]ne purpose of consultations … is to 'clarify the facts of the situation', and it can be expected that information obtained during the

[20] US Request at paras. 48, 80.
[21] US Request at para. 80.
[22] See *Regulations* at 65,351 (Annex C to Canada's First Written Submission - Exhibit CAN-3), Canada's First Written Submission at para. 50.
[23] US Request at para. 110.

> course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel."

4.73 Canada states that apart from not requiring a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel, panels have also been directed to look to whether the "essence" of the matters consulted on are the same as the measures identified in a panel request. In Canada's view, there can be no doubt that this is the case in the present case.

4.74 Turning to what occurred during consultations, prior to the meeting on 15 June 2000, Canada indicates that it notified the United States that among other things to be dealt with at the meeting:

> "We also will wish to inquire as to the sources of United States … practice, if any, that are relevant to the Department of Commerce's treatment of an alleged export restraint under U.S. countervailing duty law in addition to the *Uruguay Round Agreements Act* (*URAA*), the Statement of Administrative Action accompanying the *URAA* and the Department of Commerce's (DOC) Explanation of its Final Rule."[24] (emphasis added)

4.75 According to Canada, this question was repeated at the consultations. Thus the United States was well aware that Canada was concerned about US practice regarding the treatment of export restraints. Moreover Canada states, the pre-WTO Commerce determinations identified by Canada at the DSB meeting of September 11, 2000 are, as discussed above, plainly relevant to post-WTO practice, given that the SAA and Preamble expressly give those cases continuing relevance.

4.76 Canada further submits that it is not challenging specific applications of Commerce's practice, but rather the practice itself. In Canada's view, the United States was in no way "prevented … from knowing the legal basis of the complaint,"[25] given that from the beginning of this dispute Canada has never deviated from taking issue with the treatment of export restraints under US countervailing duty law.

4. The Sufficiency Of Canada's Panel Request

4.77 Canada notes the US argument that with respect to the SAA and Preamble, Canada's Panel Request is deficient because (1) the SAA and Preamble are not identified as "measures" and (2) neither is a "measure." Canada asserts that it has already demonstrated above that the SAA and Preamble are "measures".

4.78 Canada states in addition that contrary to the position of the United States, the sentence in Canada's Panel Request identifying the measures at issue sets out four measures, not two. Canada states that this is clear in Canada's First Written Submission, when after repeating the relevant sentence from the Panel Request in paragraph 3, it breaks out the four measures in paragraph 13 as part of explaining how Canada's description of these measures will occur in the submission. The four measures are easily identified in this paragraph.

4.79 Canada maintains that the manner in which it has set out the measures in this case is almost identical to the manner in which the measures in *EC - Bananas* were set out. In that case, the Appellate Body considered it sufficient identification of the measures to reference the "regime for the

[24] Letter from S. Marchi, Canada's Ambassador and Permanent Representative to the Permanent Mission of Canada to the World Trade Organization, to R. Hayes, US Ambassador to the Permanent Mission of the United States to the World Trade Organization, dated 13 June 2000. (US Exhibit 6)

[25] US Request at para. 115.

importation, sale and distribution of bananas established by Regulation 404/93 (O.J. L 47 of 25 February 1993, p. 1), and subsequent EC legislation, regulations and administrative measures, including those reflecting the provisions of the Framework Agreement on bananas, which implement, supplement and amend that regime".[26]

4.80 Canada maintains that it has gone even further in this case in notifying, through its Panel Request, the specific measures with which it takes issue, which Request Canada has already shown to meet the requirements of Article 6.2 of the DSU. Further, it is clear to Canada from both the US Request and the US First Written Submission that the United States has not been prejudiced, because it has been able to respond fully to Canada's claims. In addition, Canada argues that its Panel Request clearly satisfies the standard set out in *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products.*[27]

5. Conclusion

4.81 For the foregoing reasons, Canada requests this Panel to reject the efforts of the United States in the US Request to distract this Panel from its true task: resolving the dispute between Canada and the United States regarding the treatment of export restraints under US countervailing duty law. Therefore, Canada requests that this Panel find that the claims made in the US Request are without foundation.

V. MAIN ARGUMENTS OF THE PARTIES

5.1 The main arguments, presented by the parties in their written submissions and oral statements, are summarized below. Summaries of the parties' written answers to written questions are attached at Annex A.

A. FIRST WRITTEN SUBMISSION OF CANADA

1. Introduction

5.2 Canada states that at issue in this dispute is the treatment of export restraints under US countervailing duty law, which, in Canada's view, places the United States in violation of its obligations under the *Agreement on Subsidies and Countervailing Measures* (the SCM Agreement) and *the Marrakesh Agreement Establishing the World Trade Organisation* (the WTO Agreement).

5.3 According to Canada, under US countervailing duty law, a government regulatory action that limits exports of a good (an export restraint) is considered to be a "financial contribution" within the meaning of Article 1.1 (a)(1) of the SCM Agreement. US law therefore treats an export restraint as a "subsidy" if, in the view of US investigating authorities, the export restraint has the effect of lowering the domestic price of the restricted good to downstream users of that good. If those downstream users of the restrained input product are subject to a US countervailing duty investigation, the alleged "subsidy" is countervailable.

5.4 For Canada, this is inconsistent with Article 1.1 of the SCM Agreement. The definition of "subsidy" in Article 1.1 requires that there be a "financial contribution" (or an income or price support) that confers a "benefit". The "financial contribution" element of the Agreement's definition of "subsidy" is exhaustively defined in Article 1.1(a)(1) to encompass only particular government

[26] See *European Communities -- Regime for the Importation, Sale, and Distribution of Bananas*, Request for Establishment of a Panel by Ecuador, Guatemala, Honduras, Mexico, and the United States, WT/DS27/6, 12 April 1996. (Exhibit CAN-94)

[27] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, 14 December 1999 at para. 123.

actions – the direct transfer of funds, the foregoing of government revenue, or the provision of goods or services or purchase of goods – that transfer financial resources from a government, or at the direction of a government, to a private producer. In Canada's view, an export restraint does not fall within any of these categories.

5.5 More specifically, and contrary to US law, Canada argues, an export restraint does not fall under Article 1.1(a)(1)(iv) of the Agreement. An export restraint does not "entrust or direct" a "private body" to "carry out the provision of goods" and does not meet the other requirements of Article 1.1(a)(1)(iv).

5.6 Canada asserts that the US measures that require this treatment of export restraints are Section 771(5) of the *Tariff Act of 1930*,[28] as amended by the *Uruguay Round Agreements Act*, portions of the Statement of Administrative Action[29] accompanying the *URAA* interpreting Section 771(5) with respect to export restraints, portions of the Preamble to the US Department of Commerce Final Countervailing Duty Regulations[30] interpreting and implementing Section 771(5) and the SAA with respect to export restraints, and Commerce's ongoing practice thereunder.

5.7 For Canada, in addition to being inconsistent with Article 1.1 of the SCM Agreement, these measures are inconsistent with Article 10 (as well as Articles 11, 17 and 19, as they relate to the requirements of Article 10) and 32.1 of the SCM Agreement, because they require the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1. For the same reason, the measures violate obligations of the United States under both Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement to ensure conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements.

2. Pre- And Post-WTO US Countervailing Duty Law And The US Measures

5.8 Canada notes that the imposition of countervailing duties by the United States is governed by the US countervailing duty statute, contained in Subtitle A of Title VII of the *Tariff Act of 1930*, ("the Act") as amended from time to time. Section 701 of the Act sets forth the basic requirement that if the administering authority determines that a countervailable subsidy is being provided to merchandise under investigation, and the US International Trade Commission finds that a domestic industry is materially injured by reason of imports of that merchandise, there "*shall be imposed upon such merchandise a countervailing duty … .*" Thus, Canada states, the imposition of a duty is mandatory if the subsidy and injury elements of the statute are satisfied.

5.9 Canada further notes that the definition of "countervailable subsidy" appears in Section 771(5) of the Act. Under pre-WTO US law, there was no definition of "subsidy" as such, but rather an illustrative list of subsidies. More generally, although some form of "government action" was usually the predicate, a subsidy was defined as a "countervailable benefit" that was specific to particular enterprises or industries.

5.10 Canada argues that until the 1990's, Commerce recognised that to countervail border measures would lead to absurd results by bringing many legitimate government practices within the ambit of the countervailing duty law, and consistently determined that border measures (including export restraints) were not countervailable subsidies under US law.[31] Canada states that Commerce

[28] *Codified at* 19 U.S.C. § 1677(5) (1994).

[29] "Statement of Administrative Action" in H.R. Doc. No. 103-316, Vol. 1, in particular at 925-926 (1994).

[30] *Countervailing Duties*, 63 Fed. Reg. 65,348 at 65,349-65,351 (Dep't Commerce 25 Nov. 1998) (final rule).

[31] See paragraphs 19 and 20 of Canada's First Written Submission dated 27 November 2000 (Canada's First Submission).

departed radically from this position in two countervailing duty cases in the early 1990's, *Leather from Argentina*[32] (*Leather*) and *Certain Softwood Lumber Products from Canada*[33] (*Lumber*). According to Canada, Commerce concluded that the hide embargo in *Leather* and log export restraints in *Lumber* were countervailable domestic subsidies because they had a "direct and discernible effect" on domestic prices that benefited downstream producers. Commerce expressly did not consider the restraint in either case to be a "provision of goods,"[34] and in *Lumber*, rejected respondents' argument that the export restraints were not countervailable because they involved no "financial contribution" on the ground that neither the pre-WTO Subsidies Code nor US law required a "financial contribution" for a subsidy to exist.

5.11 Accordingly, Canada states, the advent of the definition of subsidy in the SCM Agreement, requiring a "financial contribution" and the consequent conferral of a "benefit" necessarily required amendment of the US countervailing duty law. The United States undertook to implement the definition of subsidy in the *URAA* by amending Section 771(5) of the Act. For Canada, although that section, as amended, does not specifically address export restraints, it is the statutory underpinning for the other measures that taken together with the statute commit the United States to treat export restraints as "financial contributions".[35]

5.12 Canada states that the SAA accompanying the *URAA* sets forth the authoritative interpretation of the *URAA* and the US Administration's obligations in implementing it.[36] Nearly all of the SAA provisions on "financial contribution" focus on what the SAA refers to as "indirect subsidies" and the Administration's intention that Section 771(5)(B)(iii) – where a government "entrusts or directs a private entity to make a financial contribution" – be broadly interpreted to encompass practices like those Commerce countervailed under the pre-WTO countervailing duty law. In particular, according to Canada, the SAA directs Commerce to continue to find the circumstances of *Leather* and *Lumber* countervailable. It is therefore an express and controlling direction to Commerce to apply Section 771(5) to achieve the same result, with regard to export restraints, as under pre-WTO Commerce practice.[37]

5.13 Canada notes that Commerce issued the Regulations implementing the *URAA*'s amendments to US countervailing duty law in 1998, and argues that the Regulations elaborate on the SAA's interpretation that an export restraint satisfies the standards of the "entrusts or directs" provision in Article 1.1(a)(1)(iv) of the SCM Agreement and Section 771(5)(B)(iii) of the statute. First, they confirm that the post-*URAA* "standard for finding an indirect subsidy" is unchanged from pre-WTO practice. Second, they interpret the "entrusts or directs" standard as being met where a government "causes" a private person (or group of unaffiliated private persons) to provide a benefit. Finally, they declare export restraints to constitute a government's entrustment or direction to a private entity to provide goods – hence a "financial contribution" – that is countervailable if it "leads" to lower domestic prices for the restrained good. For Canada, the Regulations thus make clear that Commerce will find the entrusts or directs standard under Section 771(5)(B)(iii) to be met, and therefore will find an export restraint to be a countervailable subsidy, where Commerce concludes that the producers of

[32] *Leather from Argentina*, 55 Fed. Reg. 40,212 (Department of Commerce 2 Oct. 1990) (final determination).

[33] *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22,570, 22,610 (Department of Commerce 28 May 1992) (final determination) (hereinafter *Lumber*).

[34] See paragraph 24 of Canada's First Submission.

[35] Canada notes that the Panel Report in *United States – Sections 301-310 of the Trade Act of 1974* noted that a national law may be "multi-layered," including statutory and other institutional and administrative elements that are "often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations." WT/DS152/R, 22 December 1999 at paragraphs 7.26 and 7.27.

[36] See paragraphs 32-35 of Canada's First Submission.

[37] See paragraphs 36-41 of Canada's First Submission.

the restrained product are providing it to downstream users for what Commerce views as "less than adequate remuneration", i.e. whenever Commerce finds that a "benefit" has been conferred.[38]

5.14 Canada asserts that like the SAA and the Regulations, US practice pursuant to those measures treats an export restraint as meeting the standard of Section 771(5)(B)(iii) of the Act, as a matter of US law.[39]

3. Legal Argument

(a) To Be A Countervailable Subsidy, A Practice Must Satisfy The Definition Of "Financial Contribution"

5.15 Canada notes that under the SCM Agreement countervailing duties may only be imposed against "subsidies".[40] For Canada, the US measures are inconsistent with US obligations under the SCM Agreement because export restraints are not "subsidies" within the meaning of Article 1.1 of the Agreement.

5.16 Canada states that the definition of "subsidy" in Article 1.1 applies by its own terms for all purposes under the SCM Agreement. It thus applies in determining whether a countervailing duty may be imposed under Article 10 of the Agreement, whether the evidence is adequate for initiating a countervailing duty investigation under Article 11, and whether a provisional or final countervailing duty may be imposed under Articles 17 or 19. Further, Article 32.1 of the Agreement provides that "[n]o specific action against a *subsidy* of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement" (emphasis added). Hence to be countervailable a practice must satisfy the definition of "subsidy" in Article 1.1. No provision of the WTO Agreements permits imposition of countervailing duties in circumstances or against practices that do not meet the definition of "subsidy" in the SCM Agreement.

5.17 Canada asserts that the definition of subsidy in Article 1 of the SCM Agreement has two discrete elements: (1) that there be "a financial contribution by a government or any public body"; and (2) that "a benefit is thereby conferred". As the Appellate Body declared in *Brazil – Export Financing Programme for Aircraft*, "financial contribution" and its conferral of a benefit are "separate legal elements in Article 1.1 … which *together* determine whether a subsidy *exists*"[41] [emphasis in the original]. Moreover, for Canada, the terms of the Agreement make clear that the nature of the government action is conclusive as to whether there is a "financial contribution" under Article 1.1(a)(1). If a government has not acted in a manner enumerated in Article 1.1(a)(1), then a "financial contribution" does not exist and there can be no "subsidy".

5.18 That particular kinds of government actions are prerequisites to the existence of a "subsidy" is confirmed for Canada by the negotiating history of the SCM Agreement. According to Canada, the United States proposed defining the term "subsidy" as *any* government action that confers a benefit, thus avoiding the need to show a financial contribution.[42] That US proposal, however, which reflected pre-WTO US law by focusing solely on the existence of a "benefit" and placing no limitation on the nature of the government action required, was rejected, in favour of the language of Article 1.1(a)(1). Canada asserts that the US position that the SCM Agreement changed nothing from pre-WTO US law is therefore untenable.

[38] See paragraphs 42-51 of Canada's First Submission.

[39] See paragraphs 52-60 of Canada's First Submission.

[40] Canada notes that the specificity and injury requirements of the SCM Agreement must also be satisfied before countervailing duties may be imposed. However, for Canada, at issue in this case is the meaning of the definition of "subsidy".

[41] WT/DS46/AB/R, 2 August 1999 at paragraph 157.

[42] See paragraph 71 of Canada's First Submission.

5.19 Moreover, Canada argues, the definition of "financial contribution" in Article 1.1(a)(1) is exclusive and exhaustive as demonstrated by the ordinary meaning of the terms in their context and confirmed by the negotiating history. The list of types of "financial contributions" in subparagraphs (i) to (iv) of Article 1.1(a)(1) is introduced by "i.e. where," meaning "that is." This restricting term makes clear that the list is exhaustive**,** not illustrative. By contrast, Canada states, where the SCM Agreement negotiators intended a list to be illustrative, they used expressions such as "e.g." instead. Successive, drafts of the Agreement text confirm this, showing an early shift from illustrative ("such as where") language to the definitive "i.e. where" that appears in the final text.[43]

(b) The Treatment Of Export Restraints As An "Indirect Subsidy" Is Inconsistent With The Express Terms Of The SCM Agreement

5.20 Canada notes that Article 1.1(a)(1) of the SCM Agreement sets out four categories of government action that can constitute a "financial contribution." The first three are where a government or public body (i) makes a direct or potential direct transfer of funds, such as grants, loans, or loan guarantees; (ii) foregoes or does not collect government revenue otherwise due, such as tax credits; and (iii) provides goods or services (other than general infrastructure) or purchases goods. Notably, Canada states, each of these types of government action involves a transfer of economic (i.e. financial) resources from a government to producers of goods or services. Canada argues that an export restraint, by contrast, does not constitute such a transfer of financial resources by a government and does not fall within any of these three categories. It is not a direct transfer of funds, the foregoing of government revenue, or a provision of goods.

5.21 Canada states that the fourth category, in Article 1.1(a)(1)(iv), provides for an indirect financial contribution. In Canada's view, to meet the terms of that provision, five elements must be satisfied: (a) a government must entrust or direct; (b) a private body; (c) to carry out one or more of the types of functions listed in subparagraphs (i) through (iii); (d) which would normally be vested in a government; and (e) the practice must, in no real sense, differ from practices normally followed by governments. For a practice to qualify under Article 1.1(a)(iv), it must satisfy *each* of these elements. For Canada, however, an export restraint satisfies none of them. The United States' assertion that an export restraint falls within Article 1.1(a)(1)(iv) as a government entrustment or direction to a private body to provide goods to domestic users of the restrained product is therefore profoundly mistaken.

5.22 First, Canada argues, an export restraint does not "entrust or direct" anyone to do anything affirmative. In their plain meaning, the words "entrusts or directs" connote an affirmative action to order or commission someone to do something. The *New Shorter Oxford English Dictionary* defines the term "entrust" as meaning to "invest with a trust; give (a person, etc.) the responsibility for a task …".[44] "Entrust" thus carries a strong connotation of agency. The ordinary meaning of the term "direct" is "to give authoritative instructions to; to ordain, order or appoint (a person) to do (a thing) to be done; order the performance of".[45]

5.23 For Canada, these meanings are reinforced by the terms that immediately follow "entrusts or directs", namely "to carry out". The ordinary meaning of "to carry out" is to "conduct to completion, put into practice"[46] or "to put into execution".[47] When read together, "entrusts or directs … to carry out" suggests the communication of a duty or instruction that is to be discharged or executed.

[43] See paragraph 75 of Canada's First Submission.
[44] *The New Shorter Oxford English Dictionary*, vol. 1 (Oxford: Clarendon Press, 1993), p. 831.
[45] *The New Shorter Oxford English Dictionary*, vol. 1 (Oxford: Clarendon Press, 1993), p. 679.
[46] *The New Shorter Oxford English Dictionary*, vol. 1, (Oxford: Clarendon Press, 1993), p. 343.
[47] *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, Mass.: Merriam-Webster, 1993), p. 176.

According to Canada, an export restraint does not commission or charge or authoritatively instruct producers of the restrained good to do anything; rather it limits their ability to export.

5.24 Second, Canada asserts, an export restraint does not entrust or direct a "private body" (or, as used in US law but with the same meaning, a "private entity") because the universe of private producers of a good are not a "private body".

5.25 Rather, the ordinary meaning of "body' is "a group of persons or things: … a group of individuals organised for some purpose … ."[48] The term "private body" thus connotes for Canada an organised private group or collective entity that has a separate and independent existence." Put differently, the fact that individuals may be described by a common characteristic – e.g. gold miners, persons under 21, farmers or doctors – does not transform the universe of such individuals into a "private body". Consequently, under the plain language of Article 1.1(a)(1)(iv), as unorganised individual producers, the hide producers and loggers of *Leather* and *Lumber* were not "private bodies" in Canada's view.

5.26 Third, Canada argues, an export restraint does not entrust or direct a private body to "carry out the provision of goods", but rather by definition limits the ability to export. It involves no transfer of financial resources by a government to producers of goods. Indeed, as noted above, Commerce itself expressly did not consider the export restraints in *Leather* or *Lumber* to constitute the provision of goods.[49] Producers of a good supply that good in the domestic market to the extent they wish to do so, and whether or not there is an export restraint.

5.27 For Canada, under the United States' interpretation, a vast array of government regulatory measures that do not meet the requirements of Article 1 of the SCM Agreement and were never meant to be covered by it would become subject to the Agreement. If an export restraint is considered to be the provision of a good because it *might* result in greater domestic availability of a product, then *any* measure that might induce or encourage domestic producers to increase the supply of a product would have to be considered to be the provision of a good, and hence a financial contribution. In Canada's view, this reflects an unthinkable expansion of the definition of "subsidy" in the SCM Agreement that would undermine the bargain reached by the negotiators during the Uruguay Round and eliminate the security and predictability that was achieved with the successful negotiation of the Agreement.

5.28 Canada states that the fourth and fifth elements of Article 1.1(a)(1)(iv) require that the "function" in subparagraphs (i) through (iii) that a government "entrusts or directs a private body to carry out" be one that "would normally be vested in the government", and that "the practice, in no real sense, differs from practices normally followed by governments". Canada argues that these elements are legal prerequisites to a financial contribution within Article 1.1(a)(1)(iv) that are, by definition, not met if, as in the case of export restraints, no function enumerated in subparagraphs (i) through (iii) is involved. But as significantly for Canada, these elements add important context demonstrating that Article 1.1(a)(1)(iv) is not a catch-all for governmental regulatory actions that in some sense may result in economic benefits. Rather, it is intended to ensure that a government cannot avoid otherwise applicable subsidies disciplines by entrusting or directing a private surrogate to make one of the types of financial contribution delineated in Article 1.1(a)(i), (ii) or (iii) that the government normally would have made directly. In Canada's view, an export restraint is plainly not a measure of that kind.

5.29 Finally, Canada maintains, the negotiating history confirms that export restraints are not within the definition of subsidy in the SCM Agreement. During the Uruguay Round negotiations, the United States itself recognised that the definition of "subsidy" that became Article 1.1(a) of the SCM

[48] *Merriam-Webster's Collegiate Dictionary*, 10th ed. (Springfield, Mass.: Merriam-Webster, 1993) at 128.

[49] See *Lumber*, 57 Fed. Reg. at 22,592, 22,609.

Agreement did not encompass export restraints. This is evident from US proposals tabled in the Subsidies Negotiating Group, in which the United States sought disciplines on so-called "industrial targeting" practices, including export restraints, *in addition to subsidies defined in Article 1.1*.

5.30 Canada further states that in its proposals, the United States considered an export restraint to be a targeting "policy tool", and considered such "policy tools" to be separate and distinct from a "subsidy". Thus, in Canada's view, the United States plainly understood that an export restraint fell outside the ambit of the definition of subsidy, and effectively acknowledged this in the Negotiating Group.[50] Moreover, these US efforts to bring export restraints within the coverage of the SCM Agreement failed, as was widely recognised by private US interests in their assessments of the Uruguay Round negotiations.[51]

5.31 Canada argues that although the United States clearly failed in its attempt to have the language of the SCM Agreement accommodate previous US law, the United States nevertheless declined to alter the treatment accorded to export restraints under US law when purporting to implement the new obligations of the Uruguay Round. While the United States amended the statutory language of its countervailing duty law, it used the device of the SAA and the Regulations to assure that the statutory language would be interpreted and implemented according to pre-WTO US law, and contrary to the requirements of the SCM Agreement.

(c) The US Measures Also Violate The United States' Obligation To Bring Its Law Into Conformity With The WTO Agreements

5.32 Canada argues that for the same reasons as discussed above, the treatment of export restraints under US law is also inconsistent with the United States' obligations under Article XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement.

5.33 By their terms, Canada states, the obligations set out in these Articles are unqualified. They reflect the fact that a law, regulation or administrative procedure that violates a WTO obligation creates uncertainty and adversely effects the competitive opportunities for goods or services of other Members. The fact that US law provides for the application of countervailing duties to practices that are not subsidies within the meaning of Article 1.1 of the SCM Agreement means that the United States has failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the SCM Agreement. Thus the United States should also be found in violation of its obligations under Articles XVI:4 of the WTO Agreement and Article 32.5 of the SCM Agreement.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

5.34 In the view of the United States, for the Panel to find in Canada's favor, the Panel must conclude that there is no imaginable set of circumstances in which an export restraint could operate as a subsidy. The United States considers that Canada presents little, if any, description of particular export restraints that exist in the real world. It is possible, in the US view, for an export restraint to meet all of the definitional elements of an indirect subsidy set forth in Article 1.1(a)(1)(iv). Therefore, Canada's extraordinary request for an authoritative interpretation by the Panel of the SCM Agreement must fail as a matter of substance.

[50] See paragraphs 96-104 of Canada's First Submission.
[51] See paragraphs 105-107 of Canada's First Submission.

2. Legal Argument

(a) Canada Bears the Burden of Proof

5.35 The United States argues that in this case, the burden of proof faced by Canada is formidable. Canada has taken upon itself the burden of proving the negative; that there is not and never will be an export restraint that could be regarded as a subsidy under Article 1.1. Canada has attempted to surmount this difficult burden of proof by virtually avoiding discussion of any actual export restraint measures that may exist in the world today, effectively asking the Panel to make an authoritative interpretation in the absence of any facts.

(b) The SCM Agreement Does Not Preclude Treating an Export Restraint as a Subsidy

(i) As an Economic Matter, Export Restraints Are Recognized as Subsidies

5.36 The United States maintains that there is no question that economically, and in the vernacular, export restraints are regarded as subsidies. In discussing an export restraint imposed by Indonesia, the WTO Secretariat explained: "Restricting exports of the primary resource encourages downstream processing by providing, in effect, *an input subsidy to processors*." This view is widely shared among other international institutions. Numerous academic and policy studies also agree with this view. The United States notes that Canada argues that notwithstanding this general view, export restraints can never *technically* qualify as subsidies under Article 1.1 of the SCM Agreement.

(ii) Ruling Out the Possibility that Export Restraints Could Constitute Subsidies Would Be Inconsistent with the Object and Purpose of the SCM Agreement

5.37 The United States asserts that the elements of Article 31(1) of the *Vienna Convention on the Law of Treaties* constitute "one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order."[52] A recent panel described the object and purpose of the SCM Agreement as follows: "In our view, the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade." For the United States, this view is consistent with the generally held view of subsidies as distortions of international trade.

5.38 The United States asserts that this purpose is borne out by the text of the SCM Agreement itself. Indirect subsidies are encompassed by Article 1.1(a)(1)(iv). While these measures do not necessarily entail a cost to government, they are certainly "forms of government intervention [that] distort international trade." If cost to government were a required element, the United States argues, subparagraph (iv) would be meaningless.[53]

5.39 For the United States, the ordinary meaning of subparagraph (iv) indicates that indirect subsidies are potentially actionable. There is no rational way for Canada to argue that indirect subsidies are actionable in appropriate circumstances, but that a particular type of indirect subsidy – export restraints – never can be. If the Panel were to declare that, regardless of the facts, this particular category of indirect subsidies is beyond the purview of the SCM Agreement, in the view of the United States the object and purpose of the SCM Agreement would be undermined by making

[52] *United States 301*, para. 7.22.

[53] For the United States, "cost to government" is incompatible with the term "benefit" because it would exclude from the scope of that term the very situations described by Article 1.1(a)(1)(iv). *Canada Aircraft (AB)*, para. 160.

circumvention of obligations by Members too easy. The Appellate Body previously has warned that this is an outcome to be avoided.[54]

(iii) The Text and Context of Article 1.1 Indicate that an Export Restraint Can Constitute an Indirect Subsidy Within the Meaning of Subparagraph (iv)

Canada's Narrow Approach to the Interpretation of Article 1.1 Is Wrong

5.40 According to the United States, neither the text of Article 1.1 in general nor subparagraph (iv) in particular expressly excludes export restraints from the definition of "subsidy,"[55] and Article 1.1 and subparagraph (iv) should be given an expansive reading.[56] Canada, however, argues for a narrow interpretation of Article 1.1. Canada relies primarily upon the use of the phrase "i.e., where" to introduce the list of types of financial contributions in Article 1.1(a)(1).

5.41 The United States agrees that "i.e." is generally a limiting term. However, the phrase "i.e., where" is found in the chapeau of Article 1.1(a)(1). To the extent that the phrase is limiting, in the view of the United States it merely limits the categories of "financial contributions" to four. The phrase is not found within subparagraph (iv) itself. For the United States, while the phrase "i.e., where" establishes that the universe of subsidies is finite, it does not establish whether that finite universe is large or small.

5.42 According to the United States, the text of subparagraph (iv) suggests a universe that is not as confined as the one hypothesized by Canada. Subparagraph (iv) states that a financial contribution exists where: "a government . . . entrusts or directs a private body to carry out one or more of the *type* of functions illustrated in (i) to (iii) above" (emphasis added). In the US view, the word "type" means "the general form, structure or character distinguishing a particular group or class of things." Thus, the inclusion of the word "type" suggests that functions of the same general form, structure, or character as those illustrated in subparagraphs (i) through (iii) would likewise constitute the indirect provision of a financial contribution. Thus, the United States argues, the definition of an indirect financial contribution in subparagraph (iv) is not as limited as Canada would have the Panel believe.

5.43 In the US view, one of Canada's own arguments supports this conclusion. Canada contends that where the drafters intended a list to be illustrative, they used other terms - "e.g." or "such as". Canada refers to other subparagraphs of Article 1.1(a)(1). To the United States, this indicates that Canada recognizes that the phrase "i.e., where" in the introductory part of Article 1.1(a)(1) does not limit the subparagraphs of Article 1.1(a)(1) to only the items listed in those subparagraphs where the subparagraphs themselves contain language that is expansive rather than exhaustive. Because subparagraph (iv) likewise contains language that is expansive rather than limiting, the United States argues that subparagraph (iv) must be interpreted broadly.[57]

[54] *Canada Autos (AB)*, para. 142, in which the Appellate Body found the panel's interpretation of Article 3.1(b) of the SCM Agreement to "be contrary to the object and purpose of the *SCM Agreement*, because it would make circumvention of obligations by Members too easy."

[55] The United States does not rule out the possibility that, depending on the facts, other provisions of Article 1.1 might be relevant.

[56] The United States notes that the Appellate Body has cautioned against interpretations that "elevate form over substance and that permit Members to circumvent . . . subsidy disciplines ... ." *Canada Dairy (AB)*, para. 110.

[57] According to the United States, in light of this discussion, Canada's statements regarding the evolution of the phrase "i.e., where" have limited, if any, relevance.

The Text of Subparagraph (iv) Supports the Proposition That an Export Restraint Could Constitute a Subsidy

5.44 The United States notes that under Article 1.1(a)(1)(iv), five elements are required for an indirect subsidy. An export restraint is capable of satisfying each of these elements.

5.45 The United States argues that with respect to "entrusts or directs", "entrust" is defined in relevant part as "invest with a trust; give (a person, etc.) responsibility for a task." Thus, if a government gives a "private body" responsibility to carry out what might otherwise be a governmental subsidy function of the type listed in subparagraphs (i)-(iii) of Article 1.1(a)(1), there would be a financial contribution within the meaning of Article 1.1(a)(1).

5.46 In the view of the United States, definitions of the word "directs" include "cause to move in or take a specified direction; turn towards a specified destination or target" or "to give authoritative instructions to; to ordain, order (a person) *to do* (a thing) *to be done*; order the performance of." Additional definitions of "directs" include "to regulate the course of", and "to cause (something or someone) to move on a particular course; to guide (something or someone); to govern; to instruct (something or someone) with authority".

5.47 The United States asserts that it cannot be said that no export restraint is capable of satisfying any of these definitions. At a minimum, an export restraint easily can be said to "regulate the activities of" or "cause" a private body to carry out one of the enumerated functions of subparagraph (iv), and thus provide a financial contribution.

5.48 For example, the United States argues, assume that in order to promote the production and export of more value-added products, the government of Shangri-La decides to support its pineapple juice industry. It begins to purchase all the pineapples from its growers and to re-sell those pineapples to its pineapple juice industry at less than the government's purchase price. For the United States, it is clear that a subsidy exists in such a case because the government has provided a financial contribution to the pineapple juice industry by providing it with a good (pineapples) for less than adequate remuneration.

5.49 Now further assume, argues the United States, that instead of purchasing the pineapples itself, the government has sufficient control over the pineapple growers so that it can direct them to sell their pineapples to the domestic pineapple juice industry. Here, it is the pineapple growers, and not the government, that provides the good within the meaning of subparagraph (iii). Such a situation is , in the US view, exactly the type of situation to which Article 1.1(a)(1)(iv) is addressed. If the goods are provided for less than adequate remuneration, a subsidy exists.

5.50 However, the United States asserts, the direction by the government of Shangri-La to the pineapple growers to sell their pineapples to the domestic pineapple juice industry could be effectuated through a variety of means. The government of Shangri-La could decree that growers sell only to the domestic juice industry. According to the United States, the exact same result could be achieved if, in the normal course, there were large volumes of pineapple exports and the government of Shangri-La put a stop to such activity by prohibiting the export of pineapples. According to the United States, the government, by directing the growers not to export, would be forcing them to sell the pineapples they otherwise would have exported to the domestic users of pineapples.

5.51 According to the United States, if an increased supply of the product in the domestic market causes the price for that product to be lowered, that is the same result as if the government had ordered the growers to sell for less than market price. Thus, ordering the hypothetical pineapple growers not to export can be the functional equivalent of ordering the growers to sell their products to

the juice industry for less than adequate remuneration. In the US view, both types of functions fall squarely within subparagraph (iv).[58]

5.52 The United States notes that Canada argues that an export restraint does not constitute a direction to provide goods because an "export restraint does not commission or charge or authoritatively instruct producers of the restrained good to do anything; rather, it limits their ability to export." The United States further notes that the Panel is not restricted to the definitions chosen by Canada.[59]

5.53 For the United States, Canada's distinction between a prohibitive restriction and an affirmative obligation is simply an elevation of form over substance. The two are functionally equivalent – where a producer is faced with two options, a prohibition on one option is an affirmative direction to perform the other. The United States maintains that an export ban clearly directs producers not to export, thereby directing them to seek the only other purchasers available to them for the sale of their goods.

5.54 The United States continues that with respect to "private body", neither the word nor the concept of an "organized" body is contained in the SCM Agreement (regardless of what language version is reviewed), nor should that term be read into the Agreement.[60]

5.55 For the United States, the word "body" has multiple meanings. For example, "body" may refer to the singular, *e.g.*, "an individual, a person," or the plural, *e.g.*, "an aggregate of individuals." The United States notes that even Canada offers the alternate definition of "a group of persons or things." Thus, in the case of an export restraint, a government may be viewed as directing each individual producer or producers as a group not to export, or to export only under certain limited conditions.

5.56 For the United States, Canada's argument that "a common characteristic, – e.g., gold miners, persons under 21, farmers or doctors – does not transform the universe of such individuals into a 'private body'" is obviously mistaken. The very dictionary upon which Canada itself relies states that a "body" is defined to include: "an assemblage of units characterized by some common attribute and thus regarded as a whole; a collective mass (of persons or of things)."

5.57 The United States argues that under Canada's view, an association of steel producers would constitute a private body (presumably, because it is "organized"), but the individual steel producers belonging to the association would not, despite the fact that each individual steel producer is itself a corporate body. Consistent with the text and object and purpose of the SCM Agreement, the United States maintains, no rational distinction can be drawn between the association and its corporate members. Nor is there a difference between banks and credit unions (which Canada concedes are private bodies) and any other supplier of a good or service.

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[58] For the United States, in either case, there is a transfer of resources from the growers to the juice industry, and "a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration." *Canada Dairy (AB)*, para. 87.

[59] According to the United States, Canada's *Special Import Measures Act*, S.C. 1984, c. 25, s.2, finds an indirect subsidy to exist where: "The government *permits or directs* a non-governmental body to do any thing referred to in any of paragraphs (a) to (c) ... ." Thus, Canada is urging on the Panel a standard that it does not apply for purposes of its own CVD law.

[60] The United States states that the Spanish version of the SCM Agreement refers to an "entitad privada", which translated into English is a "private entity." Canada relies on the French version of the SCM Agreement which uses the phrase "organisme privé" and argues that that term means "an organised group." However, the term "organisme" translated into English is defined as an "organisation" or a "body."

5.58 According to the United States, as long as there is some entity that could constitute a private body even under Canada's narrow definition (*e.g.*, an organized association of producers) that could be entrusted or directed by virtue of an export restraint to provide a good or service, the "private body" element of subparagraph (iv) must be regarded as capable of being satisfied by an export restraint.

5.59 The United States notes that the third element of subparagraph (iv) refers back to the previous three subparagraphs, by stating that the private body must be entrusted or directed "to carry out one or more of the type of functions illustrated in (i) to (iii) above." The United States states that the ordinary meaning of "carry out" is to "perform, conduct to completion, put into practice." Thus, in the case of an export restraint, if a "private body" performs the function entrusted or directed to it by the government, this element is satisfied.

5.60 For the United States, conceptually, an export restraint qualifies under subparagraph (iii) of Article 1.1(a)(1) regarding the provision of goods or services. In the case of an export restraint, the United States argues, the government would be directing a private body (producers of a good) to provide the restricted good to the domestic industry that uses the good by restricting the producers' ability to sell elsewhere.

5.61 The United States notes that Canada argues that each type of government action in subparagraphs (i)-(iii) "involves a transfer of economic (i.e., financial) resources from a government to producers of goods or services" and that an export restraint is not such a transfer of financial resources. For the United States, this argument is simply another iteration of Canada's long-held (and rejected) position that a subsidy (whether direct or indirect) can exist only where there is some net cost to the government.

5.62 The United States further notes that Canada also argues that the "producers of a good supply that good in the domestic market to the extent they wish to do so, and whether or not there is an export restraint." For the United States, this is simply not true. While producers of a good will certainly continue to supply goods to the domestic market where an export restraint is in place (because they have no other choice), they are not supplying the domestic market "to the extent they wish to do so."

5.63 The United States recalls that the final element of subparagraph (iv) requires that the function at issue "would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments." In the US view, Canada offers no explanation at all as to why an export restraint never could be capable of satisfying this element. Instead, Canada merely falls back on its erroneous arguments relating to the first three elements, and asserts (incorrectly) that because an export restraint never could satisfy all of the first three elements, the last element necessarily is not satisfied.

5.64 The United States maintains that putting aside Canada's failure to argue the point, the text does not elaborate on this element. However, for the United States, a report of a GATT panel is instructive as to the likely intended meaning of these phrases, referring specifically to the government "functions of taxation and subsidization." The United States argues that Canada acknowledges that whether a practice differs, in any real sense, from practices normally followed by governments depends on the circumstances relating to the government and the financial contribution in question.

5.65 For the United States, the important point is that where a government is involved in the provision of a good or service and, instead of providing that good or service directly, it entrusts or directs a private body to provide the good or service to domestic purchasers, by way of an export restraint or otherwise, there could be a financial contribution within the meaning of subparagraph (iv). More importantly, the United States argues, it is clear that subparagraph (iv) refers to functions

"normally" performed by governments in the context of providing a subsidy; any other meaning would leave subparagraph (iv) utterly empty.

5.66 Finally, in the view of the United States, an export restraint is capable of providing a benefit. The United States asserts that whether a particular export restraint confers a benefit is a factual question that can only be determined on a case-by-case basis, applying the standard set forth in Article 14(d) of the SCM Agreement regarding the provision of goods or services. Although, the United States argues, Canada appears to concede the possibility that an export restraint can confer a benefit, it nonetheless argues that "if an export restraint is considered to be the provision of a good because it *might* result in greater domestic availability of a product, then *any* measure that might induce or encourage domestic producers to increase the supply of a product would have to be considered the provision of a good, and hence a financial contribution." With respect to this "slippery slope" argument, the United States indicates, the simple answer is that as a factual matter, it is unlikely that all such measures could be found to confer a financial contribution, within the meaning of subparagraph (iv), that results in a benefit, within the meaning of Article 1.1(b). Indeed, the United States notes, in *Live Cattle from Canada*, the DOC determined that the measure in question did *not* confer a benefit, and, thus, did not constitute a subsidy.

5.67 In addition, the United States recalls, only those government measures that are specific within the meaning of Article 1.2 of the SCM Agreement are actionable. Thus, for the United States, it is clear that not all government measures that increase the supply of a product would constitute countervailable subsidies. Indeed, history has shown that there have been very few CVD investigations, if any, that have involved general government "regulatory" regimes. In the US view, the absence of such cases undermines Canada's plea for a narrow definition of subparagraph (iv) based on an alleged flood of litigation.

The Context of Subparagraph (iv) Supports the Proposition that an Export Restraint Can Constitute a Subsidy

5.68 The United States argues that indirect subsidies also are covered by item (d) of the Illustrative List of Export Subsidies, and that item (d) is highly pertinent to the interpretation of Article 1.1, because each type of subsidy described in the Illustrative List must satisfy the requirements of Article 1.1. Thus, for the United States, the language of subparagraph (iv) must be sufficiently broad so as to encompass "government-mandated schemes" under item (d). At a minimum, the United States argues, it is not hard to think of export restraints as a "government-mandated scheme" designed to benefit users of the restricted product.

5.69 In *Canada - Dairy*, the United States asserts, the panel considered item (d) for purposes of deciding whether Canada's dual-pricing scheme could constitute an export subsidy not listed in Article 9.1 of the Agreement on Agriculture. The panel concluded that the scheme was a "government-mandated scheme" of the type described in item (d). According to the panel:

> [I]n the event milk were not directly provided by Canada's governments or their agencies under Classes 5(d) and (e), in our view, it is at least indirectly provided through government-mandated schemes. *For there to be such schemes we do not consider it necessary, as argued by Canada, that the federal or provincial governments specifically direct a certain outcome or course of action to be achieved or taken* by the CDC, the provincial marketing boards or the CMSMC. (emphasis added).

5.70 For the United States, this finding by the panel is highly relevant to this case, because Canada has argued that an export restraint can never constitute a subsidy because "[a]n export restraint does not commission or charge or authoritatively instruct producers of the restrained good to do

anything ... ." However, in the US view, the *Canada - Dairy* panel flatly rejected such a standard, finding instead that in order for an indirect subsidy to exist, it is not necessary that "governments specifically direct a certain outcome or course of action to be achieved or taken ... ."

(iv) Nothing in the Negotiating History of the SCM Agreement Precludes the Possibility that an Export Restraint Could Constitute a Subsidy

5.71 The United States maintains that Canada has brought up the negotiating history of the SCM Agreement in a vain attempt to overcome the conclusion to which the text, context, and object and purpose inexorably lead. For the United States, nothing in the negotiating history establishes that export restraints can never constitute subsidies.

5.72 The United States recalls that Canada asserts that during the Uruguay Round negotiations, "the United States itself recognised that the SCM Agreement definition of subsidy . . . did not encompass export restraints." According to Canada, this is evident from US proposals relating to industrial targeting practices.[61]

5.73 According to the United States, the negotiating history reveals that, while the United States would have preferred that the SCM Agreement explicitly address "industrial targeting," the United States did not ever take the position that the term "subsidy" could never encompass export restraints. More importantly for the United States, the results of the negotiations reveal no explicit "carve out" or exception for export restraints.

5.74 The United States recalls that in order to facilitate work, the Secretariat prepared a list of problems that had arisen in the operation of the relevant GATT 1947 agreements. The Secretariat noted that the Group of Experts on the Calculation of the Amount of a Subsidy had been discussing criteria to determine when certain practices might constitute countervailable subsidies and how the amount of the subsidy should be measured. The Secretariat listed four types of subsidies discussed by the Group – one of which was "export restrictions." Clearly, the United States argues, someone in the Group of Experts thought that export restrictions were capable of constituting subsidies.

5.75 The United States recalls that in March 1987, it tabled its first proposal on Subsidies and Countervailing Measures, the relevant portion consisting of two paragraphs, the first of which reads:

> Industry targeting consists of a government plan or scheme of coordinated measures to assist specific export-oriented industries. *While some targeting measures are clearly covered by subsidies disciplines, the application of the Code to other measures is unclear.* As a result, *there has been extensive debate in the Subsidies Code Committee over whether government "targeting" practices fall within the internationally-accepted definition of a subsidy.* To date, however, there has been no agreement as to whether industrial policy-type measures that result in the indirect channelling of resources to a specific industry or sector constitute countervailable subsidies or should be addressed under some other provision of GATT. (emphasis added).

According to the United States, this paragraph sets out the common understanding that there was no agreement as to whether government targeting practices constituted countervailable subsidies, as well

[61] The United States notes in this regard that the term "industrial targeting" referred to a government plan or scheme of coordinated measures to assist specific export-oriented industries.

as the US position that certain components of "targeting" were already covered by subsidies disciplines.

5.76 The United States recalls that the second paragraph of its March 1987 proposal reads as follows:

> The United States believes that the Uruguay Round negotiations should clarify what remedies are available for the trade distortions and economic damage associated with targeting and other industrial policy measures that affect trade. The United States is concerned that the international trade rules do not adequately address the trade damage that can result from industrial targeting programs.

5.77 In the view of the United States, Canada is asking the Panel to selectively read this paragraph to mean that the United States conceded that export restraints are not encompassed under the definition of subsidy. However, in the view of the United States, the full text of the US statement does not support Canada's interpretation. Rather, the United States' desire to *clarify* that targeting and certain other industrial policy measures are subject to international trading rules and disciplines simply reflects the fact that there was no agreement on this issue. Other documents quoted by Canada prove this point, according to the United States.

5.78 The United States asserts that Canada reproduces three quotations from the Secretariat's Notes on the June 1990 meeting as alleged proof that the United States "plainly understood that an export restraint fell outside the ambit of the definition of subsidy." The United States argues that the most relevant quotation, however, states as follows:

> [The United States] found that among the policies most frequently used were the following: protection of the home market, promotion or toleration of cartels, discriminatory or preferential government procurement practices, direction of capital (government to private) to certain enterprises, export restrictions, and manipulation of the user market to reduce the risk associated with product development and commercialization.

5.79 The United States notes that Canada argues that the inclusion of "export restrictions" in this discussion of "industrial targeting" makes it "plain" that export restraints were not regarded as subsidies. In fact, the United States asserts, it made clear that some of the actions encompassed by industrial targeting were, standing alone, subsidies. Indeed, the United States argues, the document Canada quotes includes in the list of possible elements of "industrial targeting" "discriminatory or preferential government procurement practices" (e.g., the purchase of goods by a government for more than adequate remuneration) and the "direction of capital (government or private) to certain enterprises." Clearly for the United States, like export restraints, these can be actionable subsidies under Article 1.1, even though the United States categorized them as possible elements of "industrial targeting."

5.80 In the US view, Canada also misrepresents positions taken in litigation during the pendency of the Uruguay Round. Using partial quotations from DOC CVD determinations made at the time, according to the United States, Canada asserts that the United States conceded that export restraints cannot constitute a financial contribution. In the view of the United States, these determinations obviously do not constitute part of the negotiating history of the SCM Agreement, and are therefore irrelevant. However, the United States asserts, Canada's misrepresentations are so blatant that they require clarification.

5.81 The United States asserts that in the *Softwood Lumber* case, Canada argued that an export restraint did not constitute a subsidy because an export restraint did not constitute a financial contribution, in the sense of a transfer of resources from the government to the recipient. According to the United States, it was clear that the dicta Canada has cited was based on Canada's characterization of the meaning of "financial contribution." Consistent with its Uruguay Round negotiating position at the time, Canada equated a "financial contribution" with a cost to the government. This becomes clear, the United States argues, when one considers the full quotation from the DOC determination, which Canada quotes only partially.

5.82 In a final attempt to bolster its argument, the United States asserts, Canada cites statements by US industries concerning the results of the Uruguay Round negotiations. Notwithstanding the fact that many of these parties expressed concern only that export restraints "might" cease to be countervailable, in the view of the United States, US industries' assessments cannot be considered part of the *negotiating* history. Moreover, even if certain US industries (erroneously) thought that the Article 1.1 definition might preclude treating export restraints as subsidies, other US industries clearly did not take that view.

5.83 Thus, for the United States the only thing the negotiating history demonstrates is that the United States unsuccessfully sought to include language on targeting practices in the SCM Agreement. However, at no time did the United States concede that export restraints could never constitute subsidies standing alone, and the SCM Agreement contains no explicit exception for export restraints; *i.e.*, no indication that export restraints can never, under any circumstances, constitute a subsidy. Yet, the United States argues, that is what Canada would have the Panel conclude, and the Panel should decline to do so.

3. Conclusion

5.84 In the view of the United States, Canada fails to demonstrate that never, under any set of circumstances, can an export restraint constitute a subsidy under Article 1.1 of the SCM Agreement. The United States asserts that to the contrary, the United States has demonstrated that on the basis of standard principles of treaty interpretation, subparagraph (iv) of Article 1.1(a)(1) – the provision cited by Canada – can accommodate export restraints. As a result, the United States argues, Canada has failed to satisfy its burden of proof.

C. FIRST ORAL STATEMENT OF CANADA

1. The US Request For Preliminary Rulings

5.85 Canada refers to its Response to the US Request (*See* Section IV.B, *infra)*.

2. The Definition Of "Subsidy" In The SCM Agreement

5.86 Canada argues that in its first written submission, the United States misinterprets the SCM Agreement definition of "subsidy" in several respects, beginning with assertions about economics and a flawed version of the object and purpose of the SCM Agreement. According to Canada, while the United States purports to apply the requirements of the Vienna Convention, its approach seeks to bend the ordinary meaning of the words in order to enable the United States to continue to act against practices that might confer a benefit.

5.87 Canada states that as the Appellate Body made clear in *Canada – Aircraft*, however, the interpretative task begins with "examining the ordinary meaning of the text". Canada agrees, and begins with the text of Article 1.1(a)(1).

5.88 Canada asserts that the United States agrees with it that Article 1.1 of the SCM Agreement defines the universe of what constitutes a "subsidy." Thus, Canada states, both countries concur that the existence of a "subsidy" within the meaning of Article 1.1 of the SCM Agreement is a prerequisite to the imposition of countervailing measures. Where Canada and the United States differ, according to Canada, is the extent of the "universe" of government actions encompassed within the definition of "financial contribution" in Article 1.1(a)(1) of the Agreement.

5.89 Canada states that in keeping with the approach to treaty interpretation set forth in the Vienna Convention it believes that a government regulatory measure that restrains exports is not within the ordinary meaning of the terms of Article 1.1 (a)(1)(iv). In restraining exports, Canada states, a government does not "entrust or direct" a "private body" to make a financial contribution enumerated in subparagraphs (i) through (iii), or meet the other requirements of subparagraph (iv). Each of these failings is sufficient to render the US measures inconsistent with the SCM and WTO Agreements.

5.90 Regarding the "entrusts or directs" element, Canada notes that the United States concentrates its arguments on the concept of "directs" rather than "entrusts", thus apparently recognizing that a restraint on a producer's ability to export cannot be seen as investing a producer with a trust or responsibility to carry out a governmental function.

5.91 Remarkably to Canada, however, the United States claims that the term "directs" means "causes". Not only do these words commonly mean very different things, Canada counters, but "causes" is taken completely out of context from dictionary definitions offered by the United States and an export restraint plainly does not meet those definitions. For example, if "direct" is defined to mean "cause to take a specified direction", an export restraint would not qualify as a "direction" under Article 1.1(a)(1)(iv), because the "specified direction" would need to be "to carry out one or more of the type of functions illustrated in [subparagraphs] (i) to (iii)." Yet Canada maintains, the "specified direction" in the case of an export restraint is *not* to provide goods, but rather is "to not export." The same is true if "directs" is defined as "to cause (something or someone) to move on a particular course". In the case of an export restraint, the "particular course" is " to not export", Canada states; it is *not* to make a financial contribution by providing goods.

5.92 In short, Canada argues, the ordinary meaning of "directs" is to "give authoritative instructions to" or "order a person to do a thing", and even the dictionary definitions supplied by the United States cannot be stretched to transform the plain meaning of "directs" into "causes". Canada argues that the drafters were obviously familiar with the concept of causation, and that it must be assumed that if they had contemplated using that concept in subparagraph (iv) of the definition of "financial contribution", they would have used that word.

5.93 For Canada, the US approach would lead to absurd and unpredictable results, and would expand the SCM Agreement definition of "subsidy" beyond recognition by subjecting the exercise of regulatory authority by governments to countervailing measures. For example, considering the situation where a government restricts imports of steel, or increases its steel tariffs within its WTO tariff bindings, under the US approach if this led to an increase in domestic steel prices, the government would have "caused" private parties (steel purchasers) to provide funds to steel producers that otherwise would not have been provided, and therefore would have provided a financial contribution. But according to Canada this was clearly not intended.

5.94 In Canada's view, the US approach to the term "private body" is similarly aimed at diminishing, rather than giving effect to, the ordinary meaning of the terms of the treaty, and for that reason is equally flawed. The United States insists that "private body" can mean, among other things, a vast number of unassociated individual persons, in effect asserting, for example, that "all persons under 21" can be a "private body", but doing so by reference to dictionary definitions that refer to "an assemblage" or a "collective". Canada argues that the United States offers no suggestion why the

drafters used the term "private body" if, as the US urges, they meant "private person or persons". Finally, according to Canada, the US approach does not articulate any principle that would distinguish between private actors in terms of which situations involve a "body" and which do not. Thus, taken together with the US interpretation of "direct" to mean "cause", the US view would in Canada's view mean that any government action that affects the marketplace (that is, individual buyers and sellers) would "entrust or direct a private body." Had that been the drafters' intent, Canada maintains, they could surely have so stated.

5.95 Canada notes that the third element of Article 1.1(a)(1)(iv) is that what a private body must be directed or entrusted to do is to carry out a financial contribution within subparagraphs (i) through (iii). Canada states that an export restraint limits a producer's ability to export, and does not "entrust or direct" a producer to "provide goods" as the United States contends. Indeed, the US argument to the contrary is not based on the treaty terms at all in Canada's view, but rather is simply an assertion that an export restraint is "conceptually" the same thing as a provision of goods. For Canada, even if this were true, Article 1.1(a)(1)(iii) does not say "…the provision of goods *or anything conceptually similar*." Rather the text identifies the provision of goods as the relevant function in subparagraph (iii).

5.96 For Canada, the US argument that government actions are countervailable where they are the so-called "functional equivalent" of financial contributions listed in (i) through (iii) is similarly flawed. "Functional equivalence" and "conceptual similarity" are unbounded concepts that eliminate the textual limitations imposed in Article 1.1(a)(1) and introduce a level of subjectivity and hence uncertainty into the definition of financial contribution that the drafters could not possibly have intended.

5.97 Finally, Canada states, the fourth and fifth elements of Article 1.1(a)(1)(iv) confirm that the expansive interpretation that the United States urges for that provision is not warranted by the text. In Canada's view, those elements make clear that subparagraph (iv) does not open the definition of subsidy to encompass government regulatory actions that are not financial contributions within subparagraphs (i) through (iii), but rather is designed to ensure that a government cannot escape subsidy disciplines by entrusting or directing a private body to make a financial contribution that the government normally would have made directly.

5.98 For Canada, the US hypothetical example of pineapples in Shangri-La is a telling illustration of why an export restraint does not come within the text of Article 1.1(a)(1)(iv). Under the ordinary meaning of the words "entrust or direct", the hypothetical export restraint does not in Canada's view "entrust or direct" a private body to provide pineapples to the juice industry, it simply prevents the exportation of those pineapples. Moreover, Canada maintains, the producers, who already "provide pineapples" without government direction, may choose to continue to do so to the same extent, or make other economic choices. Similarly, in the example, pineapple producers do not act as a collective, but make individual and probably varying decisions. Finally, Canada argues, the US claim that an export restraint on pineapples is the "functional equivalent" of ordering the growers to sell to the juice industry at "less than adequate remuneration" is nothing less than a claim that if there is a price effect, an export restraint may be presumed to be a financial contribution.

5.99 Put differently, Canada states, this is an assertion that a benefit can "confer" a financial contribution. However, as the Appellate Body explained in *Canada – Aircraft*, a financial contribution must cause or lead to the benefit that is conferred, and not the reverse. A benefit cannot cause or lead to a financial contribution.

5.100 For Canada, its view of the text of the subsidy definition is borne out by the object and purpose of the SCM Agreement. Canada notes the Appellate Body statement in *United States – Import Prohibition of Certain Shrimp and Shrimp Products*: "It is in the words constituting [a]

provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought." As such, Canada argues, the United States has not only mischaracterized the object and purpose of the SCM Agreement, it has also deprived the text of Article 1.1 of its true meaning by beginning and basing its entire analysis on such a view.

5.101 In Canada's view, while one of the purposes of the SCM Agreement is to discipline certain forms of government action that may distort international trade, this is not the only object and purpose of the Agreement. Another purpose of the Agreement is to discipline the use of countervailing duty measures, hence its title "Agreement on Subsidies *and Countervailing Measures*". While discipline in regard to both of these "purposes" has now been achieved through the Agreement, Canada maintains, the fundamental question under the Agreement remains: "What forms of government action are subject to these disciplines?"

5.102 Canada notes that the United States' first written submission begins with an excerpt from the "*Statement Made by the Delegation of Canada at the Meeting Held on 28-29 June 1988*." Canada asserts that the United States has, however, quoted only selectively from Canada's statement, and that when considered in the context of the full statement, which is found in a section entitled "Parameters for the scope and application of countervail"[62], it is clear that Canada is speaking to the question of why, in Canada's view, disciplines on countervail were needed in the SCM Agreement.

5.103 With this in mind, Canada agrees that the SCM Agreement disciplines the use of trade-distorting subsidies. However, Canada maintains, the Agreement does so by defining the concept of a subsidy, by specifying what kinds of subsidies are prohibited, actionable, or non-actionable and by setting out the rules on how countervailing measures are to be applied against actionable subsidies. Accordingly, it is clear that the Agreement not only creates disciplines on the use of subsidies, but also creates disciplines on when countervailing measures may be imposed. This balance was an integral part of arriving at the negotiated result.

5.104 Finally, Canada argues, the United States claims that the Canadian interpretation of Article 1.1 of the SCM Agreement would "make circumvention of obligations by Members too easy." Yet for Canada, whether an export restraint constitutes circumvention of the SCM Agreement turns on whether export restraints are covered by the SCM Agreement. If they are not covered, then maintaining an export restraint would not constitute circumvention. Therefore in Canada's view, the US argument is circular because it assumes the conclusion it desires to prove.

3. The United States' Arguments Regarding the "Economics" of Export Restraints are Misplaced

5.105 Canada notes that the United States first asserts that there is "no question that economically, and in the vernacular, export restraints are regarded as subsidies" because they can have price effects. Such an assertion in Canada's view assumes that a potential economic effect determines whether there is a financial contribution under Article 1.1(a)(1). For Canada, whatever the United States may think a subsidy is in the "vernacular" is not relevant to the meaning of the definition of subsidy in the SCM Agreement, and none of the sources relied on by the United States addresses whether an export restraint comes within the meaning of the text of Article 1.1 of the SCM Agreement.

5.106 More specifically, Canada argues, the United States alleges that when faced with an export restraint, a domestic producer has only one economic choice and that is to sell the restrained good to domestic purchasers of that good. From an economic perspective, in Canada's view, this is simply incorrect. It does not inevitably follow that an export restraint will force a domestic producer of the restrained good to sell into the domestic market. Furthermore, as Commerce itself recognized in

[62] The entire statement was attached to Canada's Oral Statement as Exhibit CAN–106.

Anhydrous and Aqua Ammonia from Mexico, it does not necessarily follow that a reduction in the price of the restrained good, if any, in the domestic market for that good after the imposition of an export restraint, will be caused by that export restraint[63].

5.107 In the view of Canada this same mistaken approach to economics underlies the points that the United States tries to make through its hypothetical discussion of the pineapple industry in Shangri-La that is prohibited from exporting. As presented by the United States, a pineapple grower in Shangri-La would have no choice but to sell pineapples to the domestic pineapple juice industry, which for Canada is simply not true. Pineapple growers could make a number of different choices in response to a restraint on the export of pineapples. Growers might switch to growing another fruit or other crop that the land is suited to. They could choose to become integrated producers and produce pineapple juice products with their own and/or others' production or they could supply pineapples to other end users or make other choices. While Canada acknowledges that an export restraint limits a domestic producer's ability to export the restrained good, it maintains that it is not true that an export restraint "requires" or "forces" a producer of the restrained good to sell it to particular users of that good at lower prices. As such it does not "entrust or direct" these producers.

5.108 Thus, in Canada's view, the United States is wrong in asserting that an export restraint is the "functional equivalent" of ordering producers of a restrained good to sell the restrained good to domestic users of that good. For Canada, this does not necessarily follow either economically, or from a textual analysis of the wording of Article 1.1(a)(1)(iv) of the SCM Agreement. As such, the efforts of the United States to broaden the plain meaning of Article 1.1(a)(1)(iv) of the Agreement beyond any reasonable interpretation of those words must in Canada's opinion fail.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

5.109 The United States argues that the WTO does not regulate opinions and WTO dispute settlement does not deal with "thought crimes." Instead, the WTO regulates – and WTO dispute settlement deals with – measures taken. With respect to the subject matter of this dispute, the United States maintains, relevant measures would be either (1) the imposition of countervailing duties in a manner inconsistent with the SCM Agreement, or (2) the enactment of a law, regulation or procedure that mandates domestic authorities to impose countervailing duties in a manner inconsistent with the SCM Agreement. The United States notes that Canada does not allege the former, and asserts that the United States has not done the latter.

5.110 The United States argues that it is bad enough that Canada seeks to enjoin the DOC from expressing tentative opinions, but to make matters worse, Canada seeks to obtain its injunction by asking the Panel to rule entirely in the abstract that never, under any set of circumstances present or future, can an export restraint constitute a subsidy under Article 1.1 of the SCM Agreement.

5.111 In the view of the United States, Canada's extraordinary request for an advisory opinion has dangerous implications for the WTO dispute settlement system. The United States indicates that it has no hesitation in addressing the substantive issues raised by Canada, but feels compelled to address the broader systemic issues first.

5.112 The United States maintains that it is not seeking to deny Canada any of its rights, but that it is simply faced with a situation where the United States has not taken any measures that impair Canada's WTO rights. The United States argues that should it ever take such measures, Canada's right to challenge such actions is fully preserved.

[63] See Canada's First Written Submission at para. 19, footnote 8.

5.113 In the view of the United States, there is a well-established method by which the Panel can dismiss Canada's attempt to have panels get into the business of regulating Members' opinions and issuing authoritative interpretations. That method is to apply the mandatory/discretionary doctrine.

5.114 The United States notes that Canada does not dispute the continuing validity of the mandatory/discretionary doctrine or the US interpretation of that doctrine. Instead, the United States argues, Canada advances the factually inaccurate argument that the various documents it has cited *require* the DOC to treat export restraints as subsidies (or financial contributions). Alternatively, Canada makes the novel argument that even if these documents do not require that the DOC treat export restraints as subsidies (or financial contributions), the Panel cannot make that finding until it first makes a ruling, in the abstract, that an export restraint can never, under any set of circumstances present or future, constitute a subsidy under Article 1.1 of the SCM Agreement. For the United States, Canada is wrong on both counts.

5.115 With respect to Section 771(5), the United States maintains, Canada has consistently acknowledged that Section 771(5), on its face, does not require the DOC to treat export restraints as subsidies (or financial contributions). Thus, there appears to be agreement that Section 771(5) does not mandate WTO-inconsistent action.

5.116 Turning to the SAA, the United States argues that Canada alleges that the United States has attempted to misportray that document's status. In the view of the United States this is not the case, as set forth in paragraph 75 of the US Request.

5.117 The United States asserts that its disagreement with Canada is not with the SAA's status (although the United States does disagree that it is a "measure" in its own right), but rather with what the SAA means. In the view of the United States, the only way one can read the SAA is as a decision by Congress and the Administration to refrain from deciding exactly what types of measures previously falling under the rubric of "indirect subsidies" could be considered as subsidies under the new definition set forth in Section 771(5)(B)(iii) of the *Tariff Act* and Article 1.1(a)(1)(iv) of the SCM Agreement.

5.118 As a matter of US law, the United States asserts, the Preamble is at most a non-binding statement by the DOC regarding its views at the time concerning the scope of Section 771(5)(B)(iii). The United States recalls that the DOC did *not* promulgate a regulation dealing with indirect subsidies in general, or export restraints in particular. While the DOC expressed the view in the Preamble that export restraints might qualify as subsidies in appropriate circumstances, it did not definitively say that they do or otherwise bind itself to that view.

5.119 The United States notes that Canada cites a handful of cases – none of which involve the DOC's regulations or even the US countervailing duty law – for the proposition that agency statements in preambles to notices of final rules are always binding on the agency. However, for the United States each of these cases is either distinguishable or does not support the proposition for which it is submitted, as demonstrated by US Exhibits 26-29. Of particular significance to the United States is the fact that the Preamble was not included in the *Code of Federal Regulations*. This is because, the United States maintains, pursuant to the regulations governing the *Code of Federal Regulations*, the DOC did not intend the Preamble to have legal effect.

5.120 The United States argues with respect to the DOC Preamble that it was perfectly consistent with notions of transparency and good government for the DOC to express its tentative thinking on the issue of indirect subsidies, and that it would be a perverse result if the Panel were to penalize a Member for demonstrating greater transparency with respect to its thinking.

5.121 Like tribunals around the world, the United States notes, the DOC in a given case may cite a variety of materials to justify its determination, including such things as prior DOC determinations and law review articles, none of which are binding on the DOC. Thus, the DOC's citation to the Preamble does not, in the view of the United States, confer binding status on the Preamble.

5.122 In the US view, Canada's definition of "practice" constantly shifts, with Canada now saying that by "practice" it means "an administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology." Under any of the definitions used by Canada, the United States maintains, "practice" does not bind the DOC so as to require it to treat export restraints as subsidies (or financial contributions).

5.123 In the view of the United States, Canada seems to argue that even if the measures it has identified do not individually give rise to a WTO violation, they do when considered together. However, the United States argues, Canada does not explain how this conclusion is justified on the basis of any provision in the DSU or any other WTO agreement.

5.124 The United States argues that Canada amazingly argues that the Panel should make an authoritative interpretation of Article 1.1 first before dealing with the mandatory/discretionary doctrine. However, in the view of the United States, Canada's discussion of GATT and WTO panel reports on this point does not support its position. In none of the cases discussed does it appear that the respondent requested a preliminary ruling. The United States asserts that there is nothing in the DSU or this Panel's Working Procedures that limits preliminary rulings in the manner suggested by Canada, and that in addition, none of the cited cases expressly holds that a Panel must decide substantive issues first before invoking the mandatory/discretionary doctrine.

5.125 The United States maintains that there is a fundamental difference between the cases invoked by Canada and this case. In the cases cited by Canada, the panels were asked to opine on discrete measures maintained by the respondent, which is not the case here. In this dispute, according to the United States, the measures really at issue include not only the documents challenged by Canada, but an unidentified number of current and future export restraints. In the US view, the Panel cannot do what Canada asks it to do without opining in the abstract, and without any facts before it, that there never has been and never will be an export restraint capable of satisfying the definition of a subsidy in Article 1.1 of the SCM Agreement.

5.126 If the Panel finds – as the United States thinks it must – that the measures in question do not require what Canada says they do, for the United States that should be the end of the matter; anything else the Panel might say would be *dicta*.

5.127 The United States argues that Canada currently says that "practice" does not consist of individual determinations in particular countervailing duty cases, but instead consists of the DOC's institutional state of mind, which Canada describes as an "administrative commitment or policy." The DOC's state of mind does not constitute a measure "taken" within the meaning of the DSU according to the United States. In addition, the DOC's state of mind could not violate any of the provisions invoked by Canada.

5.128 For the United States, Article 1.1 is a definitional provision. Thus, strictly speaking, US "practice" – whatever that is defined to be – cannot violate Article 1.1. The United States maintains that Article 10 does not apply here, because Canada says it is not challenging the actual imposition by the United States of countervailing duties under Section 771(5) as the result of a finding that an export restraint is a subsidy, and that Articles 11, 17 and 19 of the SCM Agreement are inapplicable here for the same reason as is Article 10. The United States notes that Canada has not challenged – and the United States has not even taken – "specific action" under Section 771(5) with respect to an export

restraint, and the DOC's state of mind cannot constitute "specific action." Therefore, according to the United States, Article 32.5 of the SCM Agreement also is inapplicable.

5.129 The United States maintains that with respect to Article 32.5, the US statute, regulations, and procedures are fully in conformity with the SCM Agreement. An "administrative commitment or policy" is not within the scope of Article 32.5. In the US view, the same conclusion holds for Article XVI:4 of the WTO Agreement. There can be no breach of Article 32.5 or Article XVI:4 absent a law, regulation or procedure that mandates a violation of some other provision of the SCM Agreement.

5.130 The United States strongly objects to paragraph 40 of Canada's Response in which, the United States maintains, Canada attempts to portray the United States as having failed to comply with DSB rulings. The United States asserts that in no case has a WTO panel determined that the United States has failed to implement a DSB ruling, and under Article 23 of the DSU, Canada cannot make such a determination unilaterally.

5.131 According to the United States, Canada essentially asserts that "practice" – however it is defined – should be regarded as a measure taken because one should presume that WTO Members will act in bad faith. The United States notes that the Appellate Body has explained that such a presumption is not allowed.

5.132 In the view of the United States, for the reasons set forth in the US Request, Canada's claims regarding "practice" should also be dismissed due to Canada's failure to comply with Articles 4.7 and 6.2 of the DSU. Accepting for purposes of argument the equitable doctrine of "prejudice" that the Appellate Body and panels have grafted on to the requirements of the DSU, the United States submits that it has been prejudiced. Moreover, the United States maintains that there is prejudice to it and the WTO dispute settlement system when the notification and consultation requirements are treated in a pro forma way that precludes a thorough and accurate description of what the complainant is challenging.

5.133 The United States notes, in regard to why the SAA and the Preamble are not measures, that neither document has any independent legal effect under US law.

5.134 With respect to the question of whether either document is within the Panel's terms of reference, the United States notes that in its Response, Canada does not even attempt to explain how one could possibly read its panel request as encompassing the SAA and the Preamble as independent measures. Moreover, at two DSB meetings, the United States recalls that it expressed its belief that Canada had substituted Section 771(5) for the SAA and the Preamble as the challenged measure, and Canada did not challenge the accuracy of the US assessment.

5.135 The United States argues that it demonstrated in its first submission that an export restraint is capable of satisfying all of the elements of subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement. Whether a particular export restraint practice fulfilled all of the elements for a subsidy is something that could only be determined on the basis of a case-specific analysis of actual evidence. Here, in the US view, it is enough to say that Canada has failed to demonstrate that never, under any set of circumstances, could an export restraint practice satisfy all of the elements.

5.136 The United States maintains that a reading of its first submission demonstrates that the United States has engaged in a thorough textual analysis of subparagraph (iv). However, the object and purpose of the SCM Agreement *is* relevant to the interpretation of subparagraph (iv), and it *is* relevant that Canada's interpretation is inconsistent with that object and purpose, as well as with the common understanding of what is and is not a subsidy.

5.137 The United States argues that it has not said that *all* government interventions that distort international trade qualify as subsidies. Rather, it has emphasized that any government intervention would have to meet all of the definitional elements of an actionable subsidy.

5.138 According to the United States, the European Communities' "slippery slope" argument is without merit, because in the examples given, it is difficult to see where there would be a financial contribution. Moreover, in the 10 years since the DOC's determination in *Leather from Argentina*, the United States argues, the "parade of horribles" has not taken place.

5.139 At paragraph 90 of Canada's first submission, the United States recalls, Canada states that an export restraint does not qualify as a subsidy because "[i]t involves no transfer of financial resources by a government to producers of goods." Thus, the United States does not agree that it has mischaracterized Canada's position. Rather, Canada is advancing the same net cost to government position that has been repeatedly rejected.

5.140 Finally, the United States asserts, it has been suggested that export restraints can never constitute subsidies because, even though they may limit a producer's opportunities and can reduce the price the producer charges for an input (as Canada has conceded in this case), they do not force producers to sell their goods domestically to targeted customers at pre-determined prices or in pre-determined quantities. According to this line of argument, the United States notes, there is no government "direction" because the producer's freedom of action is limited, but a pre-determined sale or price is not mandated.

5.141 For the United States, this argument is fatally flawed for several reasons. First, there is no requirement in the text of subparagraphs (iii) or (iv) of Article 1.1(a)(1) that the price or quantities at which goods are provided to the subsidized party be specified. Second, there is no requirement that the beneficiaries of the subsidy practice at issue must be "targeted customers", although it may well be that a particular export restraint practice could satisfy such a requirement. Third, there is no support for the proposition that in order for a subsidy to exist, the government must determine exactly the scope and extent of the benefit it wishes to confer and the class of beneficiaries at the time of the government action; the Panel in *Canada - Dairy* rejected this argument. Fourth, it is irrelevant to say that producers who would otherwise export may be able to adapt to modified market conditions, such as by doing something else. With respect to the US hypothetical regarding pineapple growers, the United States believes that it has been conceded that if the government directed pineapple growers to sell at a fixed price or in pre-determined quantities to juice processors, an indirect subsidy would exist. However, in this scenario, the United States maintains, pineapple growers also would be free to leave the pineapple growing business, enter the juice processing business, or engage in a totally different business (for example, growing bananas). The United States fails to see how the theoretical ability to adapt in this scenario would *not* preclude a finding of an indirect subsidy, but it would preclude such a finding in the scenario where the government direction does not specify precise prices or quantities.

5.142 Moreover, the United States asserts, there may be circumstances where a producer, faced with an export restraint, has no other option but to sell to the domestic processor, such as where the export restraint applies to a raw material. In other words, there may be situations where engaging in another business is not an option. In the US view, this is a factual question that has to be decided case-by-case on the basis of evidence, rather than speculation.

5.143 In summary, the United States argues, Canada has failed to carry its burden of proof; Canada has failed to demonstrate that an export restraint can never constitute a subsidy. However, the Panel does not even need to get this far in its analysis according to the United States, because the focus of Canada's challenge is on opinions, not measures. The United States maintains that while it might be tempting to address the substantive, abstract issue posed by Canada, to do so would distort the

purpose and role of WTO dispute settlement. Thus, the United States submits that the proper outcome in this case is for the Panel to simply find that none of the measures cited by Canada require the DOC to treat an export restraint as a subsidy (or a financial contribution).

E. SECOND WRITTEN SUBMISSION OF CANADA

1. Introduction

5.144 Canada notes that its second written submission responds to the first oral statement of the United States. As a preliminary matter, Canada notes that the United States continues to claim that what Canada seeks in this dispute is an "advisory opinion" under the SCM Agreement. Canada disagrees, arguing that what Canada is seeking a ruling against the US measures at issue that treat an export restraint as a "financial contribution." Ultimately, in Canada's view, such a ruling will require resolution of the differences between the United States and Canada as to whether the US measures at issue are inconsistent with the provisions of the SCM and WTO Agreements invoked by Canada. Canada states that the resolution of these differences is of particular concern to it because of the direct impact that the treatment of export restraints under US CVD law has had and continues to have on Canada and Canadian industry. This impact is exemplified, for example, by Canada's request for WTO consultations in *Live Cattle* and, as was evident from the discussion at the first substantive meeting, by the immediate threat posed to Canadian lumber exports to the United States by threats of a countervailing duty investigation being commenced after the imminent expiry of the Softwood Lumber Agreement.

2. The Role Of The Mandatory/Discretionary Distinction As A Defence In WTO Jurisprudence

5.145 Canada argues that it has already demonstrated that whether or in what degree a challenged measure is discretionary with respect to an alleged violation of WTO rules is not properly characterized as a procedural or jurisdictional issue. Furthermore, Canada states, it has demonstrated in its Response that the GATT and WTO cases relied on by the United States turn out, on examination, not to depend on whether a measure was wholly or partly mandatory or discretionary in the abstract. Rather, the Panels in those cases, after resolving any controversy as to the requirements of the GATT/WTO rules at issue, found that the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. Further, in all of these cases it was explicit or implicit that the defending party not only could, but would, use the discretion in question to conform with the proper interpretation of the relevant rules.

5.146 Canada submits that the United States has continued to claim that the mandatory/discretionary distinction means that the challenged US measures cannot be found inconsistent with the SCM and WTO Agreements, regardless of the proper interpretation of those agreements, based on an argument that errs both in its interpretation of GATT and WTO precedent and in its representation of the legal force of the US measures as a matter of US law. In Canada's view, the US argument concerning the "mandatory/discretionary doctrine" in this dispute can be summarized as follows: (i) the United States considers that the WTO does not permit dispute settlement rulings on the conformity of challenged measures with WTO rules if the measures, as a matter of domestic law, do not "require" or "mandate" the action that is alleged to be inconsistent with WTO rules; and (ii) the United States is of the view that under US law the measures challenged by Canada do not either separately, or as a whole, ever "require" treating an export restraint as a financial contribution. Canada disagrees with the US arguments both under WTO law and under US law.

(a) GATT/WTO Case Law

5.147 Canada asserts that it is well established that a WTO Member can challenge legislation of another Party, independent of any specific application of that legislation, on grounds that the legislation, as such, is inconsistent with rules of the WTO. The purpose of permitting such challenges is to ensure predictability of conditions for trade by allowing parties to challenge measures that necessarily will result in action inconsistent with GATT/WTO obligations. This is so in Canada's view since such measures can themselves "chill" trade by compelling Members to modify their behaviour in order to comply with a measure which they reasonably anticipate will be applied to their exports. Canada recalls that in *United States – Anti-Dumping Act of 1916*, the Appellate Body cited with approval statements by the Panel in *United States – Superfund* that indicated that GATT 1947 is not only directed at protecting current trade but also at creating the predictability needed to plan future trade and that contracting parties must therefore be able to challenge existing legislation mandating actions at variance with the General Agreement and not wait until such legislation has actually been applied to their trade.

5.148 Canada states that it has already demonstrated in its previous submissions why the measures challenged by Canada require that export restraints be treated as "financial contributions" under US countervailing duty law and why this treatment is inconsistent with the United States' obligations under the SCM and WTO Agreements. Canada notes that the United States argues that *United States – Anti-Dumping Act of 1916* and other cases considering the mandatory/discretionary distinction support the US contention that the Panel cannot find the US measures at issue to be inconsistent with the SCM and WTO Agreements because the measures do not require the treatment of which Canada has complained (and which the United States does not consider to be inconsistent with the obligations in question). In Canada's view, however, the cases cited by the United States do not support this argument.

5.149 According to Canada, the mandatory/discretionary distinction does not mean that discretion of any type or degree will allow a defending party to successfully avail itself of this defence. In *United States – Anti-Dumping Act of 1916*, Canada states, the Appellate Body stated that in light of the case law developing and applying the mandatory/discretionary distinction, the discretion enjoyed by the US Justice Department to initiate or not to initiate criminal proceedings "is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation … ."[64] Similarly, in *United States – Malt Beverages*, the Panel found the discretion not to enforce a law that was inconsistent with the GATT did not make the law as such consistent with the GATT.[65]

5.150 Regarding the measures at issue in this dispute, Canada notes that Section 771(5)(B)(iii) does not specifically address export restraints. Section 771(5)(B)(iii) can be considered "discretionary", in the limited sense that Commerce, as the investigating authority, has to determine whether an export restraint, or any other practice subject to a countervailing duty investigation, is a financial contribution. However, Canada states, Section 771(5)(B)(iii) does not exist in isolation. Consistent with the reasoning of the Panel in *United States – Section 301*, Section 771(5)(B)(iii) is "inseparable" from the SAA, Preamble and US practice and, therefore, cannot be considered in isolation.

5.151 In each of the cases cited by the United States where a measure was held to be "discretionary", Canada states, the Panel found not only that sufficient discretion existed for the executive to be able to apply the law consistently with its GATT obligations, but also that the defending party both could use that discretion to act in a manner consistent with the GATT rule at issue and either had done so or was in some sense committed to do so.[66] Canada asserts that in each

[64] *Id*. at para. 91.
[65] *United States – Malt Beverages* at para. 5.60.
[66] See Canada's Second Written Submission at paras. 12-14.

of these cases, the Panel satisfied itself, often on the basis of assurances from the defending party as to how it would interpret its legislation, that the executive authority had sufficient discretion under the challenged legislation to avoid any violation of the GATT.

5.152 Further, Canada argues, the Panel in *United States - Section 301* found that a Member could "curtail its discretion" to violate a WTO obligation, by its interpretation of such discretion in the SAA and subsequent actions. For Canada, the converse must follow. A complaining Member must similarly be allowed to challenge whether a Member has "curtailed its discretion" not to violate a WTO commitment. Thus, while Section 771(5)(B)(iii) itself does not mandate inconsistent action in the sense that it can (and properly should) be interpreted and applied consistently with WTO rules, the SAA and the Preamble in Canada's view "curtail the discretion" of executive authority in the context of this dispute such that the legislation will be interpreted and applied in a WTO-inconsistent manner.

(b) The US Measures At Issue

5.153 For Canada, the sharp contrast between the above cases and the circumstances of this dispute is clear. In this dispute, rather than providing assurance that the United States will not treat export restraints as a financial contribution, the US measures in Canada's view demonstrate that the US executive authority has committed itself to interpret its legislation in a WTO-inconsistent manner. Canada notes that the United States argues that it could interpret its legislation otherwise, but argues that the US measures and statements make clear that it will not, at least in the absence of a decision of the DSB confirming that this is required by US obligations.

5.154 For Canada, this is not to say that the United States is acting in bad faith. Rather, in this situation, unlike that of the cases on which the United States seeks to rely, it is apparent to Canada that United States believes, wrongly, but in good faith, that its interpretation is not inconsistent with its WTO obligations. The fact that the United States believes its interpretation to be WTO consistent is made clear in the SAA, Preamble and through US practice. In Canada's view, given the importance that GATT/WTO Panels have placed on statements by the United States regarding how it intended to interpret its legislation (especially *United States – Superfund, United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco* and *United States – Section 301*), the interpretation set out in the US measures in this dispute, requiring a WTO-inconsistent treatment of export restraints, should be given significant weight. To Canada it demonstrates that Commerce is committed to act in a manner that is inconsistent with the United States' WTO obligations. As a result, Canada argues, the US measures at issue nullify and impair benefits accruing to Canada under the SCM and WTO Agreements.

5.155 Canada states that in invoking the mandatory/discretionary distinction as a defence in this dispute, the United States claims that the measures at issue provide Commerce with sufficient discretion not to treat export restraints as financial contributions while at the same time asserting that to do so would not be inconsistent with the United States' WTO obligations. However, for Canada, this discretion which the United States argues is provided for in the SAA proviso and the "would permit" language of the Preamble is so curtailed that Commerce's ability to act in a WTO-consistent manner has been effectively foreclosed. In other words, to the extent that there is any element of discretion in these measures, in Canada's view it is not of a nature to allow the United States to invoke the mandatory/discretionary distinction as a defence in this dispute because the SAA has directed how that discretion is to be exercised and the Preamble and US practice reflect this direction.

5.156 Canada submits that it has demonstrated in its Response that the SAA gives Commerce explicit direction as to the determination it should make under the proviso with regard to export restraints. In Canada's view, if the proviso leaves any discretion to Commerce, it is limited to satisfying itself that an alleged indirect subsidy involves a "formal, enforceable measure." If it does, Canada argues, Commerce must conclude that the standard in Section 771(5)(B)(iii) has been met.

Since an export restraint by its nature involves a formal, enforceable measure, and the SAA has so declared, it is Canada's position the SAA mandates Commerce to conclude that in the case of an export restraint, the standard of Section 771(5)(B)(iii) of the statute and Article 1.1(a)(1)(iv) of the SCM Agreement have been satisfied, and to find a countervailable subsidy if Commerce makes a factual finding in an investigation of a "benefit" to the industry subject to investigation.

5.157 Likewise for Canada the language in the Preamble that the United States claims provides Commerce with sufficient discretion to not treat export restraints as financial contributions, the "would permit" language, fails to provide the United States sufficient discretion to successfully avail itself of the mandatory/discretionary distinction in this case. Because in Canada's view the SAA and Preamble have already determined that an export restraint meets the financial contribution requirement, the scope of any discretion under the "would permit" language is therefore limited to Commerce's analysis of benefit and specificity.

5.158 For Canada, the extent to which the United States has curtailed its discretion in the context of export restraints is most clearly demonstrated by the passage in which the SAA authoritatively directs Commerce to consider circumstances similar to *Leather* and *Lumber* to come within the meaning of Section 771(5)(B)(iii). By demonstrating that in those particular circumstances Commerce must treat an export restraint as a financial contribution, in Canada' view this passage conclusively refutes the US position that, in effect, the Panel must rule in favour of the United States if it concludes that there is any set of circumstances in which an export restraint could ever be a financial contribution. While Canada considers that an export restraint does not constitute a financial contribution, Canada argues that it is well established that a measure is inconsistent with a WTO rule if that measure mandates action inconsistent with the WTO in particular circumstances, even if in other circumstances the action might not be inconsistent with the WTO.[67]

3. US Contentions That The Preamble Has No Legal Effect Misstate US Administrative Law And The Role Of The Commerce Preamble

5.159 According to Canada, the various US contentions that the Preamble to the Commerce Department's final countervailing duty regulations reflects merely "tentative opinions" or "at most a non-binding statement by the DOC regarding its views at the time" are inconsistent with US administrative law and misstate the role of the Preamble. Canada notes that, under US law, Commerce must conform to its declared interpretation of the statute in the Preamble absent a "compelling reason for departure".[68]

5.160 Canada states that the United States relies in particular on an argument that only a regulation published in the Code of Federal Regulations (CFR) has general applicability and legal effect, and claims that the fact that Commerce's Preamble to its final regulations was not published in the CFR is "a strong indication" that it does not have legal effect. In Canada's view, this is not, however, a rule of US administrative law. Kenneth Culp Davis, a renowned authority on US administrative law, states in his treatise that "courts should not rely on publication, or lack of publication, in the Code of Federal Regulations as evidence that an agency statement is, or is not, a rule." Criticising the decision in *American Portland Cement Alliance v. EPA* for its reference to CFR publication, Professor Davis notes that the *American Portland Cement Alliance* court relied on an outdated case and "apparently overlooked" a subsequent opinion in which the court of appeals emphasised that "publication, or lack of publication, in the Code of Federal Regulations is not more than 'a snippet of evidence of agency

[67] See *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, 27 March 1998.

[68] *NMB Singapore v. United States*, 780 F. Supp. 823, 827 (Ct. Int'l Trade 1991).

intent.'"[69] Moreover, Canada submits, the US assertion as to the significance of CFR publication is not even supported by the cases on which the United States relies, both of which involved the reviewability of *proposed*, as opposed to *final*, regulations. Commerce promulgated its countervailing duty regulations, including the Preamble, as final and effective upon the date of publication in the Federal Register. Although parts of the regulation were later codified and published in the CFR, for Canada that later CFR publication neither diminishes nor adds to the legal authority of the regulations, including the Preamble, as published in the Federal Register.

5.161 Canada argues that the United States' other primary basis for asking this Panel to dismiss the language of the Preamble is its assertion to this Panel that Commerce did not *intend* the Preamble to have legal effect. Canada asserts, however, that it has been unable to locate any such prior statement, and it does not comport with the record of Commerce determinations, US court decisions reviewing Commerce determinations, or the US reliance on the Preamble as having legal effect before WTO panels.

5.162 Canada argues that since 1 January 1995, the Commerce Department has relied on the Preamble to its proposed or final countervailing duty regulations in fully 103 anti-dumping and countervailing duty determinations. In none of these instances, according to Canada, did Commerce intimate that it did not consider the Preamble to have legal effect, or that it was relying on mere "tentative opinions" to determine duties in trade remedy cases. Rather, in all cases, it cited the Preamble as stating the applicable interpretation or rule, and simply proceeded to apply it to affect the legal rights of parties to the proceedings. In some of these cases, Canada states, the Preamble statement relied upon provided critical elaboration of, or described exceptions to the interpretation stated in, an accompanying regulation, while in many of the cases, the declaration on which Commerce relied occurred *only* in the Preamble. Canada notes that it has set out a number of examples in which, in Canada's view, Commerce has relied solely on the Preamble for its determinations on issues.[70]

5.163 For Canada, the most dramatic examples of Commerce application of the Preamble's interpretations and methodologies with conclusive legal effect are in the context of whether a benefit is passed through in an arm's-length privatisation, and in the *Live Cattle* and Korea *Stainless Steel* cases. In parallel to its lengthy statements on export restraints, Canada states, the Preamble extensively addresses whether an arm's-length privatization eliminates a benefit from pre-privatization subsidies.[71] In that discussion, Commerce declared that it was not promulgating a regulation and emphasized that the statute left it discretion to determine the impact of a change in ownership on a case-by-case basis. According to Canada, Commerce nonetheless declared that it would continue its pre-WTO practice of only examining benefit at the time of bestowal of subsidy, and that its pre-WTO "repayment/reallocation methodology", under which some portion of the benefit of past subsidies is passed through, "achieves th[e] objective" of retaining its discretion to make case-by-case determinations. In other words, Canada states, Commerce decided the key legal issue – that at least some "benefit" survives an arm's-length privatization – by declaring in the Preamble that its pre-WTO methodologies continued to apply, and limited its "discretion" to applying a formula to measure the amount of the benefit. Canada states that Commerce has subsequently applied its pre-WTO methodology in numerous post-WTO privatisation cases.

5.164 For Canada, the Korean *Stainless Steel* cases provide another stark example of Commerce application of the Preamble as conclusive of an issue, and in circumstances that make clear just how

[69] Kenneth Culp Davis and Richard J. Pierce Jr., *Administrative Law Treatise*, 3d ed. Supp. 2000 (Boston, Mass.: Little, Brown and Co., 2000) at 167-68.

[70] See Canada's Second Written Submission at para. 34.

[71] *Regulations*, 63 Fed. Reg. at 65,351-55 (Annex C to Canada's First Written Submission – Exhibit CAN-3).

controlling are the Preamble's references to *Argentine Leather* and *Softwood Lumber*. In a portion of the Preamble, Commerce interprets Section 771(5)(D)(iii) of the statute, which implements Article 1.1(a)(1)(iii) of the SCM Agreement and lists as a financial contribution "the provision of goods or services, other than general infrastructure." Canada states that in declaring that roads or bridges may benefit particular industries rather than society as a whole, Commerce cites the pre-WTO *Certain Steel Products from Korea* case – the same case that is referenced in the indirect subsidies discussion in the SAA and Preamble – in which Commerce had found port facilities at Kwangyang Bay not to constitute "general infrastructure" for purposes of its pre-WTO "specificity" test, and therefore to be countervailable.[72] When the issue arose again in the post-WTO *Stainless Steel* cases, Canada notes, Commerce stated:

> "The infrastructure provided at Kwangyang Bay was not provided for the good of the general public; . . .therefore, it is not "general infrastructure." . . . Therefore, the infrastructure at Kwangyang Bay is countervailable. Indeed, the "Explanation of the Final Rules" (the Preamble) to the new CVD regulations . . . specifically cites to the infrastructure provided at Kwangyang Bay in Steel Products From Korea as an example of industrial parks, roads, rail lines, and ports that do not constitute 'general infrastructure,' and which are countervailable. . . . See CVD Final Rules, 63 FR at 65378-79."[73]

5.165 Thus, according to Canada, Commerce, in deciding a significant issue in post-WTO cases, found that the Preamble's interpretation of "general infrastructure", and in particular its citation to a pre-WTO case finding Kwangyang Bay not to be "general infrastructure" was dispositive. In Canada's view, it is difficult to conceive, therefore, how Commerce would not find the Preamble's interpretation concerning export restraints and its citation of *Softwood Lumber from Canada* equally dispositive in a case posing the same issue.

5.166 Finally, for Canada, the US contention that the Preamble reflects mere "tentative opinions" is belied by US court cases and the United States' own use of a preamble in WTO dispute settlement proceedings. According to Canada, in US courts, Commerce relies on the Preamble as the legal basis for its determinations and the courts uphold Commerce on that basis.

4. "Practice" Is A Measure, And Fits Within The WTO Concept Of "Mandatory"

5.167 Canada asserts that as the United States well knows, agency "practice" is an extremely common concept in US law. Commerce routinely and expressly refers to its "practice" in anti-dumping and countervailing duty determinations, giving legal effect to that "practice" as determinative of the interpretations and methodologies it applies, as shown by cases cited by Canada.[74] Further, Canada argues, practice is related to precedent, in that an interpretation or methodology will often be developed in a single case or group of cases, and becomes the "practice" followed in subsequent cases. For Canada therefore, practice is not an individual determination in a countervailing duty case (although a determination normally will reflect "practice") but rather is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations.

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[72] *Id.*, at 65,378.

[73] *Stainless Steel Sheet and Strip in Coil from the Republic of Korea*, 64 Fed. Reg. 30,636, 30,659 (Department of Commerce 8 June 1999) (final determination) (Exhibit CAN-23); *Stainless Steel Plate in Coils from the Republic of Korea*, 64 Fed. Reg. 15,530, 15,548 (Department of Commerce 31 Mar. 1999) (final determination) (Exhibit CAN-24).

[74] See Canada's Second Written Submission at para. 40.

5.168 Canada states that when Commerce issues countervailing duty and anti-dumping regulations, it sets forth its practice in those regulations, including the Preamble. Commerce practice is often not, however, articulated in regulations. Indeed, until final substantive countervailing duty regulations were issued in 1998, Canada argues, Commerce had never issued final regulations setting forth its substantive interpretations of US law and the methodologies it would apply. Consequently, for much of the last twenty years, the interpretations and methodologies that dictated Commerce determinations in countervailing duty cases were simply a function of Commerce "practice". Thus, Canada submits, although "practice" is reflected in Commerce regulations when those are issued, "practice" is an independent basis for Commerce action that is given legal effect in addition to or in the absence of a statement of that practice in regulations.

5.169 That practice is independent of regulations is evident to Canada in Commerce's issuance of an *Amended Regulation Concerning the Revocation of Anti-dumping and Countervailing Duty Orders* in response to the WTO Panel determination on DRAMs from Korea.[75] In the preamble to that regulation, Canada notes, Commerce declared that while the WTO decision necessitated a change to a commerce standard, it did not invalidate several aspects of Commerce "practice", which would continue in effect.

5.170 Moreover, Canada asserts, it is a fundamental principle of US law that an agency may not depart from its practice and precedents except in narrow circumstances, where the change from prior policies and standards is express, deliberate, and adequately explained. In Canada's view those narrow circumstances cannot arise here, where the United States plainly has no intention of departing from a treatment of export restraints that it insists is correct.

5.171 Canada argues that the "practice" challenged here is the Commerce Department's commitment to adhere to a particular legal view and to apply a particular interpretation or methodology. With respect to the treatment of an export restraint as a financial contribution, in Canada's view it includes pre-WTO practice of Commerce in *Leather from Argentina* and *Softwood Lumber from Canada*, because that practice has expressly been incorporated in current US practice through the SAA and Preamble. It further includes post-WTO practice of the Commerce Department, as confirmed in *Live Cattle* and the Korea *Stainless Steel* cases, which are cumulative examples evidencing Commerce's commitment to apply the practice stated in the Preamble, notably, to apply "a standard no narrower than the prior US standard for finding an indirect subsidy".

5.172 In Canada's view, because Commerce has articulated its "practice" with respect to export restraints in the Preamble to final countervailing duty regulations that are in effect, there is currently no substantive distinction between Commerce's treatment of export restraints under the SAA and the Preamble and its treatment of export restraints under its "practice". Moreover, the SAA and Preamble are inconsistent with the United States' obligations under the SCM Agreement, independent of the "practice" Canada is challenging. In that sense, while Canada believes that "practice" is as much a measure susceptible to dispute settlement as any law, regulation or other act of a Member, Canada considers that a finding by this Panel with regard to "practice" is not essential to a finding that the other US measures are inconsistent with WTO obligations.

5.173 To Canada, however, "practice" is relevant to compliance by the United States with a WTO ruling in Canada's favour. That is, if this Panel finds that the US statute, as interpreted by the SAA, the Preamble, and in US practice, is inconsistent with the SCM Agreement in that it commits the United States to treat an export restraint as a financial contribution, Canada believes that the United States would need to, *inter alia*, alter its practice by ceasing to treat an export restraint as a financial contribution in initiating and making determinations in countervailing duty cases. Canada states that it has therefore included "practice" as a measure to underscore this point, and seeks a

[75] 64 Fed. Reg. 51,236 at 51,239 (Dep't Commerce 22 Sept. 1999) (final rule) (Exhibit CAN-109).

specific recommendation from the Panel that the United States bring its measures into conformity with the SCM Agreement and the WTO Agreement, including by ceasing to treat an export restraint as a financial contribution.

5. Comments On The US Submissions Regarding The SCM Agreement In The US Oral Statement

5.174 In Canada's view, the central issue in this dispute has been and remains whether the treatment of export restraints under the US measures is inconsistent with the definition of "financial contribution" in Article 1.1(a)(1) of the SCM Agreement, an issue that necessarily depends on interpreting that provision according to the ordinary meaning of its terms in their context and in light of the object and purpose of the Agreement. Canada argues that as it set forth in its first oral statement, the US effort to fit export restraints within the definition of financial contribution represents a deeply flawed attempt to apply these principles of treaty interpretation.

5.175 Canada asserts that the United States simply redefines the critical term "directs" to mean "causes" in the broadest of senses, a contention which relies on an extrapolation from dictionary meanings taken out of context. Canada states that the word "directs" in Article 1.1(a)(1)(iv) means that a government must give authoritative instructions to the "private body" to carry out a certain action, while the definition selected by the United States – "regulating the course of, or causing something or someone to move on a particular course" - has a quite different meaning. Further, Canada submits, as Canada pointed out in its first oral statement, an export restraint plainly does not meet even the US definition of "directs". More importantly, the word "causes" is simply not found in the text of subparagraph (iv).

5.176 In addition, Canada notes, the United States argues that whether a particular export restraint fulfilled all of the elements for a "subsidy under Article 1.1" could only be determined on the basis of a case-specific analysis of actual evidence. While to Canada it is true that whether "a benefit is thereby conferred" within Article 1.1(b) would require an evidentiary analysis, "benefit" is not at issue here. Canada submits that if the Panel agrees with it that an export restraint is not a "financial contribution" under Article 1.1(a)(1)(iv), the question of "benefit" would never arise, since no case alleging that an export restraint is a "subsidy" could ever properly be initiated.

5.177 Canada notes that the United States also claims that there is no "slippery slope" of finding a host of government regulatory measures encompassed under its interpretation of subparagraph (iv). In Canada's view, a simple example may demonstrate its error. In possible reaction to the reduction or elimination of a duty, importers might increase their imports of a product, potentially leading to increased domestic supply and, under certain economic conditions, to a reduced market price for the good to downstream users. Under the US interpretation of subparagraph (iv), as in its view of export restraints, Canada argues, the government, in reducing the duty, would have "entrusted or directed" the importers to "provide goods" to domestic users of the product. Under both Canadian and EC arguments, government actions such as a reduction in import duties are simply not within the forms of government actions that constitute a "financial contribution" under Article 1.1(a)(1).

5.178 Finally, Canada states, in response to both Canada's and the EC's arguments regarding the ability of producers subject to an export restraint to adapt to market conditions, the United States continues to argue that an export restraint is nonetheless a government "entrustment or direction" to "provide goods" that is countervailable if a benefit and specificity are found. Canada notes that the freedom of producers to adapt to the imposition of an export restraint highlights the lack of an entrustment or direction under Article 1.1(a)(1)(iv). In Canada's view, a direction by the government to not undertake one activity simply does not translate, under subparagraph (iv), into a direction to undertake another.

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

5.179 By way of an overview, the United States emphasizes that what is at issue is a category of measures – export restraints – that are regarded as "subsidies" in the normal, economic sense of the term. The United States submits that the WTO Secretariat and United Nations organizations, to name a few, have characterized export restraints as such. Notwithstanding this, Canada is seeking to prove that an export restraint can never, under any set of circumstances, constitute a subsidy under the SCM Agreement as a technical matter. In the US view, Canada advances this claim without offering any evidence regarding the nature and operation of actual export restraints as they exist in the real world. The United States asserts that Canada does so notwithstanding the fact that, as complainant, it bears the burden of proof, and, in this case, bears the burden of proving the negative.

5.180 Second, for the United States there is no real, tangible dispute here. Canada is not contesting the imposition of any countervailing duty. Indeed, in the post-WTO era, no countervailing duty has been imposed by the DOC in respect of an export restraint against Canada or any other Member. Nor is Canada arguing that there is a US law or regulation that, on its face, is inconsistent with any WTO agreement. Instead, the United States submits, what Canada is really arguing is that it believes that, if ever faced with the question, the DOC will interpret its WTO-consistent statute so as to encompass export restraints. However, such a challenge simply does not involve a challenge to a measure "taken" within the meaning of the DSU, according to the United States.

5.181 Third, the United States argues, notwithstanding the fact that this case should be dismissed on procedural grounds, and notwithstanding the abstract nature of Canada's challenge, Canada is wrong with respect to its substantive claims. The United States submits that it has demonstrated, based upon an analysis of the text, context, and object and purpose of the SCM Agreement, that Canada is wrong when it claims that an export restraint could never, under any set of circumstances, constitute a subsidy. Thus, while the United States believes the Panel need not and should not address Canada's substantive claims, should the Panel choose to do so, the United States believes that the Panel must reject them.

2. The Mandatory/Discretionary Doctrine

5.182 Significantly for the United States, neither Canada nor the EC challenges the continuing validity of the mandatory/discretionary doctrine. Thus, the only real question before the Panel is whether the so-called " measures" identified by Canada require the DOC to treat export restraints as subsidies.

(a) Section 771(5)

5.183 With respect to Section 771(5) of the *Tariff Act of 1930*, the United States notes that Canada concedes that the statute, on its face, "does not specifically address export restraints."[76] Canada has to concede this in the US view because, as it acknowledged in 1995 in its comments to the DOC, Section 771(5) "adopts a definition of 'subsidy' that is substantively the same as that of the Subsidies Agreement."[77] Thus, under the mandatory/discretionary doctrine, the United States asserts, Section 771(5) does not violate US WTO obligations.

[76] Canada's First Submission, para. 32.
[77] *Request by the United States for Preliminary Rulings* ("*US Request*"), para. 43, quoting from US-11.

(b) The SAA

5.184 The United States maintains that the parties also agree that the SAA is "authoritative" with respect to the interpretation of Section 771(5). However, the United States believes that it has demonstrated that all that the SAA "authoritatively" says is that the DOC must follow the standard set forth in Section 771(5), which Canada concedes is WTO-consistent.[78] Thus, under the mandatory/discretionary doctrine, even if the SAA were a separate measure, within the Panel's terms of reference, in the US view it would not violate US WTO obligations.

(c) The Preamble

5.185 The United States notes that the parties agree that a regulatory preamble can be used to interpret an agency regulation. More specifically, US case law shows that a regulatory preamble can be used as evidence of an agency's contemporaneous understanding of its proposed rules.[79] However, with respect to the preambular language at issue, the United States asserts, the DOC did not promulgate a regulation nor was the preambular language included in the *Code of Federal Regulations*. The United States states that it has demonstrated that, as a matter of US law, the Preamble at issue in this case is not binding on the DOC.[80]

5.186 Moreover, lost in the debate over an obscure principle of US administrative law, the United States argues, is the fact that even if the Preamble were binding on the DOC, the Preamble does not reflect an interpretation by the DOC that Section 771(5) *requires* the DOC to treat export restraints as subsidies (or financial contributions). Rather, the Preamble simply expresses the tentative opinion that the statute "would permit" the DOC to treat an export restraint as a subsidy; *i.e.*, that treating an export restraint as a subsidy would be one possible interpretation of the statute.[81]

5.187 Thus, under the mandatory/discretionary doctrine, the United States asserts, the Preamble does not violate US WTO obligations because (1) it is not binding on the DOC; and (2) even if it were binding, it does not require the DOC to treat export restraints as subsidies.

(d) US "Practice"

5.188 The United States notes that Canada does not dispute the fact that there is no post-WTO case in which the DOC has found an export restraint to be a subsidy. The United States further submits that Canada also does not dispute the fact that, even if there were such a case, as a matter of US law it would not be binding on the DOC.[82] Thus, under the mandatory/discretionary doctrine, the United States argues, US "practice" – understood in the conventional sense of agency case precedent – would not violate any US WTO obligation not to treat an export restraint as a subsidy.

5.189 However, the United States argues, in the course of this dispute Canada's definition of "practice" has constantly evolved. In its latest incarnation, according to the United States, "practice" is an alleged "administrative commitment" to treat export restraints as subsidies; in other words, the DOC's alleged institutional state of mind. However, nowhere in any of its submissions has Canada explained how an "administrative commitment" – whatever that may be – is binding on the DOC as a matter of US law. Thus, even if this "administrative commitment" could constitute a measure for

[78] *See, e.g., US Request*, paras. 35-39, 75-79; and US Answers to Question 1 (First Set) and Questions 15, 27 and 31-33 (Second Set).

[79] *US Request*, para. 81 and cases cited therein.

[80] *Id.*, paras. 80-83 and cases cited therein; *Oral Statement of the United States* ("*US Oral Statement*"), paras. 17-31 and cases cited therein.

[81] *US Request*, para. 80.

[82] The United States refers, for a discussion of the non-binding nature of administrative agency precedents, to *US Request*, paras. 84-85; and US Answer to Question 16(d) (Second Set).

purposes of the DSU, in the US view Canada has failed to demonstrate that this "thing" requires the DOC to treat export restraints as subsidies.[83] Thus, under the mandatory/discretionary doctrine, the United States asserts, any such alleged "administrative commitment" does not violate US WTO obligations.

(e) The Measures Taken Together

5.190 The United States believes that Canada has argued that even if the documents it has identified do not individually require the DOC to treat export restraints as subsidies, the measures do so require when "taken together."[84] However, the United States argues, nowhere in any of Canada's submissions is there any explanation – let alone a demonstration – as to how, under US law in general, individual measures that do not require an agency to act in a particular manner collectively can constitute such a requirement. Nor is there any demonstration as to how, under US law, the particular documents at issue collectively require the DOC to treat export restraints as subsidies. For the United States, the reasons for this void in Canada's argument is that Canada's fundamental assertion is simply wrong, as a matter of US law. Thus, under the mandatory/discretionary doctrine, the United States submits, the measures taken together do not violate US WTO obligations.

3. None Of The Measures Cited By Canada Violate Any Of The Provisions Of The WTO Agreements That Canada Has Invoked

5.191 The United States recalls its explanation in paragraphs 44-51 of the *US Oral Statement* and in the *US* answer to Question 17 (Second Set), that most of the "measures" identified by Canada are incapable of violating any of the provisions of the WTO agreements that Canada has invoked in this case.

5.192 In the US view, none of the measures can violate Article 1.1, because Article 1.1 is a definitional provision which does not impose obligations as such. Likewise, none of the measures can violate Article 10 (or Articles 11, 17 and 19 as they relate to the requirements of Article 10), because these provisions pertain to actions taken in the context of actual CVD proceedings, and Canada is not challenging any such action. Article 32.1 is also inapplicable because it pertains to "specific action against a subsidy of another Member", and Canada is not challenging any such action.

5.193 Thus, the United States asserts, the only provisions that could conceivably apply to a challenge to measures "as such" are Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement, both of which apply to "laws, regulations and administrative procedures." In general, to violate either of these provisions, a law, regulation or administrative procedure would have to violate some other provision of a WTO agreement. In the context of this case, the United States submits, a law, regulation, or administrative procedure would violate these provisions only if it mandated action inconsistent with Articles 1.1, 10 (or 11, 17 and 19), or 32.1 of the SCM Agreement.

5.194 In the US view, the only measure at issue in this case which potentially could fall under Article 32.5 or Article XVI:4 is Section 771(5), which is a "law". However, the United States argues, Canada concedes that Section 771(5) is, on its face, not inconsistent with any of the provisions it has cited, and the United States has demonstrated that this conclusion does not change if Section 771(5) is interpreted in conjunction with the SAA. Thus, the United States concludes, Section 771(5) does not violate either Article 32.5 or Article XVI:4.

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[83] The United States refers to US Answer to Question 16(d) (Second Set), explaining why an "administrative commitment" could not be binding as a matter of US law.

[84] *Canada's Oral Statement*, para. 8.

5.195 With respect to the other "measures", the United States argues that they simply are not subject to Article 32.5 or Article XVI:4. Neither the SAA, the Preamble, nor Canada's amorphously defined "practice" constitutes a "law", a "regulation", or an "administrative procedure" within the meaning of these provisions.

4. Canada Has Failed In Its Attempt To Demonstrate That An Export Restraint Can Never, Under Any Set Of Circumstances, Constitute A Subsidy

5.196 Concerning Canada's claim that an export restraint can never, under any set of circumstances, constitute a subsidy under subparagraph (iv) of Article 1.1(a)(1), the United States reiterates its position that the Panel need not and should not reach this issue.[85] Should the Panel nonetheless choose to do so, the United States asserts that it has demonstrated that an export restraint is potentially capable of satisfying the standards of subparagraph (iv).

(a) "Entrusts or Directs"

5.197 The United States notes that the main thrust of Canada's argument relates to the "entrusts or directs" requirement in subparagraph (iv). The United States asserts, however, that it has previously demonstrated that an export restraint could, in appropriate circumstances, satisfy this requirement based upon the ordinary meaning of the terms. "Directs" means "cause to take a specified direction"; "to cause (something or someone) to move on a particular course".[86] According to the United States, Canada can point to nothing in these definitions that excludes export restraints from coverage.

5.198 The United States notes that Canada's case with respect to "entrusts or directs" essentially is focused on three arguments. First, Canada takes issue with the dictionary definitions of "directs" that employ a causal element, and seeks to insert an additional requirement that "an authoritative instruction to do something" affirmative, as opposed to refrain from doing something, is required.[87] Second, Canada, along with the EC, argues that an export restraint can never satisfy the "entrusts or directs" standard because the producer of the restrained product has options available to it other than selling the product domestically, such as producing another product, processing a downstream product, or going out of business. Third, Canada argues that if its preferred approach is not accepted, there will be a "slippery slope" leading to the countervailing of all government regulatory actions.

(i) "Authoritative Instruction"

5.199 With respect to Canada's first argument, the United States recalls that Canada asserts that, in the case of an export restraint, there is no specified direction to provide goods domestically, but rather the specified direction is "to not export." Significantly, asserts the United States, Canada concedes that export restraints constitute "direction."[88] Canada argues, however, that there must be an

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[85] *See, e.g.*, US Answer to Question 39 (Second Set).

[86] *US First Submission*, para. 31. In this regard, the United States does not concede, as Canada suggests at paragraph 19 of *Canada's Oral Statement*, that the word "entrust" can be disregarded. There may well be situations in which an export restraint constitutes the mechanism by which a government "entrusts" a private body to provide a financial contribution within the meaning of subparagraph (iv). However, if, as the United States has demonstrated, an export restraint can satisfy the meaning of "directs", the word "entrusts" becomes a moot point insofar as Canada's claims in this dispute are concerned.

[87] The United States argues that, significantly, this approach is inconsistent with Canada's own contemporaneous interpretation of "entrusts or directs", because Canada's CVD statute does not require "an authoritative instruction". Instead, under the Canadian statute, a financial contribution exists if a government "permits or directs" a private body to do something. *See US First Submission*, para. 37, note 34.

[88] *Canada's Oral Statement*, para. 20 ("Yet, the 'specified direction' in the case of an export restraint is *not* to provide goods, but rather is 'to not export.'") (emphasis in original).

"authoritative instruction" or an "order . . . to do a thing" in order for "direction" to exist.[89] In the view of the United States, Canada cites no textual support for this proposition, but simply asserts that its preferred dictionary definitions should govern.[90]

5.200 Moreover, the United States submits, Canada fails to account for the varying forms in which an export restraint may manifest itself (a problem which would not arise if Canada had brought a case based on real facts). Presumably, even under Canada's reading the "entrusts or directs" standard would be satisfied if an export restraint operated in conjunction with a governmental requirement that the restrained product must be processed domestically. At best, the United States asserts, Canada seeks to put form over substance. When a domestic producer is in the business of selling a product, the US view is that a restriction against exporting *can be* a direction to sell (*i.e.*, provide goods) to domestic purchasers within any normal commercial setting.

5.201 Furthermore, according to the United States, the word "directs" as used in subparagraph (iv) does entail elements of causation, as recognized in Question 11(c) (Second Set). To the United States, whether or not an export restraint causes a producer to sell domestically is a factual question that can only be answered on a case-by-case basis. What is significant to the United States for purposes of this dispute is that both Canada and the United States appear to agree that an export restraint is capable of bringing about the requisite effect. Canada made the following assertion in its oral statement:

> "More specifically, the United States alleges that when faced with an export restraint, a domestic producer has only one economic choice and that is to sell the restrained good to domestic purchasers of that good. From an economic perspective, this is simply incorrect. *It does not inevitably follow* that an export restraint will force a domestic producer of the restrained good to sell into the domestic market."[91]

5.202 To the United States, implicit in the phrase "it does not inevitably follow" is an acknowledgement by Canada that it "could" follow that an export restraint would force a domestic producer of the restrained goods to sell into the domestic market. The United States asserts that Canada is trying to have it both ways. On the one hand, it acknowledges that in theory an export restraint could force a domestic producer of the restrained good to sell in the domestic market. On the other hand, it essentially asserts that this could never happen in the real world, but fails to submit a scintilla of evidence to support this factual assertion.

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[89] *Id*., para. 21.

[90] The United States asserts that Canada does try to argue that because the drafters also used the word "cause" elsewhere in the SCM Agreement, this means that they must have intended that "direct" have something other than its ordinary meaning. With respect to this argument, the United States has three observations. First, the Appellate Body has recognized that different words can have interchangeable or overlapping meanings. *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body adopted 25 September 1997, para. 203 (Appellate Body found that notwithstanding the use of different phrases in Article 1.3 of the *Licensing Agreement* and Article X:3(a) of GATT 1994, the two provisions had identical coverage). Second, to the extent that Canada is arguing that the word "directs" as used in subparagraph (iv) has a special meaning, under customary principles of public international law, the burden of proof is on Canada to prove that the drafters had such an intent. *Vienna Convention on the Law of Treaties*, Article 31(4). Third, the United States notes that footnote 1 of the SCM Agreement demonstrates that the drafters knew how to exclude certain practices from the scope of Article 1.1, but did not do so in the case of export restraints.

[91] *Canada's Oral Statement* (18 January 2001), para. 42 (emphasis added). The United States argues that of course, the United States has not asserted that an export restraint will always have the hypothesized effect. The US position simply is that it cannot be said that an export restraint could never have the hypothesized effect.

(ii) "Alternative Choices"

5.203 The United States argues that Canada's second attempt to argue around the ordinary meaning of "entrusts or directs" is its "alternative choices" argument. Canada and the EC argue that, faced with an export restraint, producers can choose to produce another product, not produce at all, or become processors of the downstream product.[92]

5.204 However, the United States submits, there may be situations in which, as a factual matter, the producer of the restrained product does not have such options. Indeed, as discussed in the preceding section, in the US view Canada implicitly acknowledges this possibility, and fails to provide evidence that there could never be a real life case where Canada's theoretical options do not exist.

5.205 In any event, according to the United States, with the exception perhaps of a command, nonmarket economy regime (something which need not be addressed in this case dealing with hypotheticals), a producer always has choices. If a government "orders" a bank to loan to a company, the bank always can refuse. The United States notes that there may be consequences to a refusal, but the bank still has a choice. For the United States, this commercial reality is no different in the case of an export restraint.

5.206 Indeed, the United States maintains, even applying the Canada/EC standard of an authoritative instruction to sell on pre-determined conditions, a producer would have the option of producing a different product, going out of business, or commencing production of the downstream product. However, if the presence of choices in this situation means that no subsidy can exist, then for the United States subparagraph (iv) truly would be a meaningless provision – there could be no such thing as a producer-financed subsidy.[93]

5.207 In the US view, the argument that a subsidy cannot exist because of the existence of a theoretical choice stands the SCM Agreement on its head. The United States notes that Canada has stated that subsidies distort comparative advantage,[94] and for the United States that is precisely what an export restraint is capable of doing. The United States notes that it can only speak in the abstract because there are no facts in this dispute, but as an example posits that in a market based on comparative advantage and free of any export restraint, an input would be exported to a different market for processing there because it is more financially advantageous to do so. Because of an export restraint, the producer of the input (which could not otherwise economically justify processing) begins to produce the downstream product, thereby artificially enhancing production domestically at the expense of foreign producers. The United States asserts that Canada claims that none of this is of any concern under the SCM Agreement because the producer has choices.

5.208 For the United States, the real point is that an export restraint can cause the producer to provide goods to domestic processors that it otherwise would not have provided absent the export restraint. Thus, in the US view, the key question as reflected in Question 11(c) (Second Set) is whether there is a significant enough causal connection between the government's action in introducing and enforcing an export restraint and the domestic producer's provision of the good in a manner that would not have occurred in the market.

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[92] *Id.*, para. 40. The United States notes that the EC adds the requirement that the good be provided on the basis of certain pre-determined conditions. *EC Submission*, paras. 25-27. The United States believes that it has adequately addressed this particular EC argument in its answers to the Panel's questions.

[93] The United States notes that Canada says that it has now abandoned its prior position that a cost-to-government is required in order for a subsidy to exist. *Id.*, para. 27.

[94] CAN-106.

(iii) The "Slippery Slope"

5.209 The United States asserts that Canada's final argument in support of its position that the ordinary meaning of "entrusts or directs" should be ignored is its "slippery slope" or "doomsday" argument.[95] In the US view, part of Canada's tactic is to focus on select words chosen from the *US* submissions, such as "functional equivalence" and "conceptual similarity", and characterize them as "unbounded concepts."[96] The United States submits that in so doing, however, Canada's arguments go way beyond export restraints to encompass all indirect subsidies.

5.210 In any event, for the United States there is absolutely no factual support for Canada's doomsday predictions. Most telling, in the ten years since *Leather from Argentina* and in the six years since the WTO Agreement entered into force, doomsday has not arrived. Indeed, the United States asserts, Canada cannot even find a real life case on which to base its claim. In fact, with respect to export restraints, the United States has not even had occasion under post-WTO law to evaluate whether any particular export restraint gave rise to a financial contribution. Indeed, the United States argues, if one goes even further back and looks at pre-WTO determinations, one finds that in *Lumber III*, the DOC found that the export restraints in three of the four provinces examined did not satisfy the standard that the DOC employed at the time; the standard that Canada and the EC falsely claim is the standard under current law.

5.211 For the United States, the most significant point about the "slippery slope" argument, however, is that the "entrusts or directs" standard – which is an element both of *US* law and subparagraph (iv) – requires a causal connection. The United States argues that some export restraints may satisfy this standard, others may not. Even for those export restraints that might satisfy this standard, the requirements of benefit and specificity will operate so as to weed out certain export restraints and other types of indirect government measures from the category of actionable subsidies.[97]

(b) "Private Body"

5.212 The United States asserts that it previously has demonstrated that dictionary definitions in multiple languages thoroughly undermine Canada's peculiar interpretation of "private body",[98] and further argues that even the EC does not support Canada's invented requirement for an "organized collectivity."[99]

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[95] *See, e.g., Canada's Oral Statement*, para. 25 ("The U.S. view would mean that any government action that affects the marketplace (that is, individual buyers and sellers) would 'entrust or direct a private body.'").

[96] *Id*., para. 27.

[97] According to the United States, the EC makes a sort of "reverse slippery slope" argument when it claims that export restraints can be addressed under Article XI of GATT 1994. As a legal matter, according to the United States, this argument is clearly wrong and inconsistent with prior EC positions. The United States notes that in *Indonesia - Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Report of the Panel adopted 23 July 1998, paras. 14.29-14.36, the panel agreed with the position of the United States, Japan *and the EC* that a measure could be actionable under both the SCM Agreement and Article III of GATT 1994. In particular, the panel noted the existence of footnote 56 to Article 32.1 of the SCM Agreement, which recognizes that actions against subsidies remain possible under other provisions of GATT 1994. *Id*., para. 14.36, note 659. For the United States, as a factual matter this argument is clearly wrong, because not all export restraints will violate Article XI, and even those that do may be subject to one or more exceptions under Article XX of GATT 1994.

[98] *US First Submission*, paras. 40-44.

[99] *EC Submission*, para. 28.

(c) To Carry Out One or More of the Type of Functions Illustrated in (i) to (iii) Which Would Normally Be Vested in the Government and that in No Real Sense Differs from Practices Normally Followed by Governments

5.213 With respect to the final elements of subparagraph (iv), the United States argues, Canada offers no explanation as to why an export restraint is incapable of satisfying these elements.[100] Instead, it simply asserts that these elements cannot be satisfied, and offers no explanation of what these elements mean.

5.214 The United States notes that these elements are discussed in greater detail in its answers to the Panel's questions. The United States recalls its position that "normally vested in" and "normally followed by governments" refer to the functions of taxation and subsidization, and asserts that support for this position is found in the only reference on point, the 1960 *Article XVI:5 Report*, which refers to the "functions of taxation and subsidization."

(d) Object and Purpose

5.215 The United States argues that Canada and the EC both object to the *US* reliance on the object and purpose of the SCM Agreement, falsely suggesting that the United States has relied on object and purpose to the exclusion of the text.[101] According to the United States, both are wrong.

5.216 In the view of the United States, the *US* submissions speak for themselves, and demonstrate that the United States has not ignored the text, but instead has demonstrated that the text supports the US position. However, the United States argues, consistent with customary principles of public international law, as reflected in Article 31 of the *Vienna Convention on the Law of Treaties*, object and purpose form part of a single rule of treaty interpretation. For the United States, in this case in particular, object and purpose are informative on how the text should be interpreted.

5.217 To the United States, what is particularly telling is its view that neither Canada nor the EC can plausibly dispute that the object and purpose of the SCM Agreement – regardless of what weight is attached to it – support the US position. The United States recalls its previous statement that the primary object and purpose of the SCM Agreement is to impose disciplines on certain government measures that distort international trade.[102]

5.218 The United States objects that Canada seeks to characterize the US position as "one-dimensional" by referring to a single paragraph from the *Statement Made by the Delegation of Canada at a Meeting Held on 28-29 June 1988*, CAN-106, in which Canada noted that there need to be limits on the use of countervailing measures.[103] While the United States acknowledges that the SCM Agreement also regulates the use of countervailing measures, it is clear that this is not its primary purpose. Indeed, the United States submits, virtually the entirety of CAN-106 speaks to the need to discipline the use of subsidies as trade-distorting measures. The United States urges the Panel to read CAN-106 in its entirety. The United States notes that even when speaking of disciplines on countervailing measures, Canada makes it clear that great care must be taken to avoid creating a loophole.

5.219 The United States also emphasizes that in its view neither Canada nor the EC disputes the object and purpose of subparagraph (iv), which is to prevent governments from doing indirectly what

[100] *See*, *Canada's First Submission*, para. 93; and *Canada's Oral Statement*, para. 28.

[101] The United States asserts that the EC's accusation is particularly troubling, given that in its submissions, the EC did not even conduct a textual analysis of Article 1.1 in general, or subparagraph (iv) in particular.

[102] *US First Submission*, paras. 13-20; US Answers to Questions 18-19 (Second Set).

[103] *Canada's Oral Statement*, para. 34.

they cannot do directly. For the United States, if the Panel, in the absence of any facts, were to categorically exclude export restraints from the definition of Article 1.1, the object and purpose of subparagraph (iv) would be undermined.

5.220 Finally, the United States argues, Canada claims that the SCM Agreement's method of designating practices as either prohibited, actionable, or non-actionable supports its view that export restraints should be excluded from the definition of Article 1.1.[104] According to the United States, if anything the opposite is true. If export restraints were categorically excluded from Article 1.1, they essentially would be rendered non-actionable, and the Panel effectively would be rewriting the SCM Agreement. In the US view, the drafters of the SCM Agreement presumably provided a definition of "subsidy" so that each particular government measure (not each category of measure) could be evaluated on the basis of its own facts and circumstances.

5. Conclusion

5.221 Based on the foregoing, the United States renews its request that the Panel dismiss Canada's complaint by making the preliminary rulings described in paragraph 125 of the *US Request*. Should the Panel decline to dismiss Canada's complaint, the United States renews its request that the Panel make the findings described in paragraph 87 of the *US First Submission*.

G. SECOND ORAL STATEMENT OF CANADA

1. Introduction And The United States' Continued Efforts To Define "Subsidy" As "Countervailable Benefit"

5.222 Canada asserts that it has demonstrated that the measures in question treat an export restraint as a financial contribution and that an export restraint is not a financial contribution under Article 1.1(a)(1) of the SCM Agreement. Canada submits that the US response has been that; first, the measures do not "require" the US to treat an export restraint as a financial contribution, but leave it to Commerce to determine on a case-by-case basis; and that second, export restraints can constitute a financial contribution if there is merely a "causal relationship" between an export restraint and a provision of the good to domestic users. These positions, according to Canada, rewrite both US law and the SCM Agreement.

5.223 With regard to its first argument, Canada states, the United States relies primarily on assertions that the measures leave Commerce sufficient flexibility in any case to decide that an export restraint is not a financial contribution. To Canada, this alleged flexibility is illusory as the measures have already determined that an export restraint will satisfy the financial contribution requirement.

5.224 Canada submits that while the United States argues that the measures are open to interpretation on a case by case basis the US repeatedly states that it cannot say how *any* export restraint would be treated under US countervailing duty law, and has failed to provide this Panel with a single example of an export restraint that it would not consider to be a financial contribution. In Canada's view, every instance of alleged flexibility turns out to be an example in which an export restraint was not considered to be a *subsidy* because there was no *benefit*, or there was no export restraint in the first place.

5.225 Canada notes that the second part of the US argument rests on a claim that subparagraph (iv) is satisfied if there is a causal relationship between a government action and the provision of a good. In Canada's view, the US analysis is not sustainable under the ordinary meaning of the language of subparagraph (iv) in its context and in light of the object and purpose of the Agreement. There is

[104] *Id*., para. 36.

simply no way to explain why subparagraph (iv) is written as it is if it were intended to mean what the US claims.

5.226 To the extent the measures contain any element of discretion, Canada asserts, it is not of a nature that enables the United States to invoke the mandatory/discretionary distinction as a defence. Such treatment of export restraints is inconsistent with subparagraph (iv), because an export restraint does not fall within the plain meaning of that provision. For Canada, the US claims to the contrary reflect the continuing effort by the United States to maintain the open-ended definition of "subsidy" that it tried, but failed, to obtain during the negotiation of the SCM Agreement.

5.227 In Canada's view, this dispute reveals a fundamental difference of opinion as to the government actions that fall under the definition of "financial contribution" in Article 1.1. On the one hand, Canada and the European Communities have advanced a position that relies on the ordinary meaning of the language in its context, and provides certainty and predictability to the operation of the SCM Agreement. The United States has advanced an interpretation of "financial contribution" that is so broad that any government action that causes a benefit will be considered a "financial contribution", thus, in effect, reading the "financial contribution" element out of the Agreement. For Canada, this expands its scope to such an extent that the certainty and predictability achieved by the negotiators is lost.

5.228 Canada submits that the fundamental approach of the United States is aptly summarized in paragraph 2 of its second written submission, where the United States asserts that export restraints "are regarded as 'subsidies' in the normal economic sense of the term," which means that export restraints *must* be capable of being subject to countervailing duties. According to Canada, this logic echoes the failed US effort in the Uruguay Round to define "subsidy" as any government action that led to a "benefit". In Canada's view, arriving at the definition of a subsidy was one of the most important achievements of the Round, an achievement that the position of the United States seeks to ignore. The United States begins with a subsidy in the so-called "vernacular" and works backwards to conclude that an export restraint must be a subsidy under the Agreement. Canada asserts that the United States, in the context of export restraints, in effect implemented the agreement it tried to negotiate instead of the one agreed to.

2. The Measures At Issue Require The United States To Treat An Export Restraint As A "Financial Contribution"

5.229 Canada notes that the United States argues that the SAA, the Preamble and Commerce practice are not measures at all and, even if they were**,** what they direct regarding export restraints is of no real effect as they do not require any particular action of Commerce. For Canada, these measures clearly *are* measures under GATT and WTO law. If they have no import, Canada submits, then the United States has made great efforts to creating meaningless interpretations of its statute. In Canada's view these are not empty measures. They authoritatively direct Commerce to treat an export restraint as a financial contribution.

5.230 Canada submits that the United States attempts to keep the measures in clinical isolation from each other, but nevertheless itself recommends that the panel look to how the measures "relate to each other, under [its] domestic law." For Canada, this approach is grounded both in common sense and in WTO case law. The Panel in *United States – Section 301* noted that statutory and non-statutory elements of a Member's domestic law are "often inseparable and should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."

5.231 Canada notes that the SAA is an "authoritative expression" of the US Administration's and Congress's views regarding the "interpretation and application" of the WTO Agreements and is to be regarded as such in US judicial proceedings. Canada submits that it gives Commerce explicit

direction as to how it is to treat export restraints. This is made abundantly clear by the statement in the SAA that "Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) *encompass* indirect subsidy practices like those which Commerce countervailed in the past" (i.e. the export restraints in *Leather* and in *Lumber*). Canada argues that this statement does not read "may encompass" or "could encompass". Despite this clarity, and the clear direction in the SAA that the "entrusts or directs" standard be interpreted broadly, Canada argues, the United States insists that the SAA does not provide direction to Commerce on how the statute is to be interpreted. In Canada's view, the United States downplays the significance of the SAA because of what it terms Commerce's "freedom" to make up its own mind.

5.232 Canada notes that the United States asserts that "all that the SAA 'authoritatively' says is that Commerce must follow the standard set forth in Section 771(5)", and that the SAA expresses no position on indirect subsidies. For Canada, the US view seems to be that the entire discussion in the SAA on what Article 1.1(a)(1)(iv) of the SCM Agreement and Section 771(5)(B)(iii) *encompass* should be read as Congress refraining from pre-judging the consideration of export restraints. Canada submits that this assertion is belied by the very purpose of the SAA as an affirmative, authoritative expression as to how the legislation is to be interpreted and applied.

5.233 Canada argues that the United States further downplays the text of the SAA by characterizing statements made in the Korea *Stainless Steel* cases as simply the expression of "[Commerce's] non-binding opinion that the results under the new standard in subparagraph (iv) may not differ significantly from the results that would have obtained under [Commerce's] pre-WTO standard." Canada submits that what Commerce actually said, however, was that "the clear and unambiguous language of the SAA is that Congress intended the specific types of indirect subsidies found to be countervailable" in the cited pre-WTO cases are to continue to be countervailable under the new law. For Canada, this is a clear and unambiguous statement of Commerce's position, made in direct response to the argument that loans by private foreign banks could not constitute financial contributions.

5.234 In Canada's view, to say that Congress simply left the issue to be decided by Commerce cannot be reconciled with the clear statements contained in the SAA and confirmed in other legislative history such as the Senate Joint Report on the *URAA*[105] and more recently in Congressional statements concerning Canadian softwood lumber only two weeks ago.[106]

5.235 Canada argues that the US description of the Preamble as reflecting Commerce's "tentative opinions" is at odds with what the Preamble says. For Canada, nothing in the Preamble suggests that the views expressed in it are in any way "tentative" or preliminary, and Commerce's past reliance on it in the Korea *Stainless Steel* cases makes clear that Commerce has not treated the Preamble as "tentative". In Canada's view, this US argument is also belied by US court cases and the United States' use of a preamble in WTO dispute settlement proceedings. There is nothing "tentative" in Commerce's conclusion that the standard under the *URAA* is no narrower than the standard under pre-WTO law and its reliance on the SAA discussion of pre-WTO case law regarding export restraints to make this statement. Canada argues that the Preamble cannot be considered "tentative" when it clearly states that Commerce will enforce the "entrust or directs" provision vigorously and that Commerce agrees with "those commenters who urged the Department to confirm that the current standard is no narrower than the prior U.S. standard for finding an indirect subsidy as described in…[*Lumber*]."

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[105] *Uruguay Round Agreements Act: Joint Report of the Comm.. on Finance,Comm. on Agriculture, Nutrition, and Forestry, Comm. on Governmental Affairs*, United States Senate, 103d Cong., S. Rep. 103-412 at 91 (1994). (Exhibit CAN-134)

[106] 147 Congressional Record S1158 (daily ed. 7 February 2001) (statement of Sen. Snowe). (Exhibit CAN-135)

5.236 Canada submits that in the light of the administrative framework under which US agencies promulgate regulations, the purported distinction between the Preamble and the remainder of the regulation is without basis. Likewise, in Canada's view, there is no basis to the claim that under US law, Commerce's Preamble to its final regulations must be published in the CFR in order to have legal effect.

5.237 Canada submits that the United States is incorrect in arguing that there is no US practice relevant to the treatment of export restraints. Relevant US practice includes pre-WTO practice which is expressly incorporated in US law through the SAA and Preamble and post-WTO practice of the Commerce (e.g., *Live Cattle* and the Korea *Stainless Steel* cases) which evidence its commitment to apply "a standard no narrower than the prior US standard for finding an indirect subsidy". The Korea *Stainless Steel* cases left no doubt, according to Canada, that Commerce practice with respect to indirect subsidies, including export restraints, follows the dictates of the SAA and Preamble, and claims no scope for departure from the standard set out in the SAA and Preamble.

5.238 Canada argues that the *Live Cattle* case is further evidence of Commerce's view that an export restraint satisfies the "financial contribution" requirement of Section 771(5)(B)(iii). Canada notes that in the Initiation Memorandum, Commerce specifically stated that the petitioner had provided "evidence that the CWB controls exports"; that the petitioner claimed the CWB was limiting the amount [of feed barley] exported to the United States"; and that the petitioner had offered "empirical evidence that the CWB restrains exports to the United States".[¯] In Canada's view, Commerce's decision to initiate an investigation of this allegation on the basis of this evidence means it necessarily concluded that CWB's "control" over barley exports, if proved to exist, would meet the standard for a financial contribution under Section 771(5)(B)(iii). Further, in its final determination, Canada notes, Commerce stated its view that in the context of export restraints "the provision of a good, whether provided directly or indirectly, for less than adequate remuneration constitutes a financial contribution."

5.239 For Canada, if there is any element of discretion in the measures, it is not of a nature that would allow the United States to invoke the mandatory/discretionary distinction as a defence. The discretion the United States claims to exist in the SAA and Preamble has been curtailed such that Commerce is committed to apply US law inconsistently with the SCM and WTO Agreements. To effectively invoke this defence, according to Canada, the United States would have to demonstrate that Commerce has the discretion to disregard the SAA and Preamble and determine that an export restraint is not a financial contribution. All of the evidence is, however, to the contrary in Canada's view.

3. Export Restraints Do Not Come Within Article 1.1 (A)(1)(Iv) Of The SCM Agreement Because They Do Not "Entrust" Or "Direct" A Private Body To Provide Goods

5.240 Canada notes that the definition of "subsidy" in Article 1.1 of the SCM Agreement is the fundamental basis upon which all actions under the SCM Agreement are premised. A measure that implements the definition inconsistent with the Agreement nullifies and impairs the rights of other WTO Members. In Canada's view, a proper interpretation of subparagraph (iv) of Article 1.1 results in a conclusion that its terms do not encompass export restraints. The need to show benefit and specificity cannot justify nullifying the financial contribution element.

5.241 According to Canada, the United States ignores the word "entrusts", thus ignoring that "entrusts" provides context for the meaning of the word "directs." While not synonymous with "entrust", Canada argues, the word "direct" shares the same essential quality of a governmental communication to a private body. The United States, however, effectively replaces the word "directs" with "causes" in subparagraph (iv). For Canada, "direct" does not mean "cause." The mere fact that something occurred does not mean that the government directed someone to do that thing.

5.242 Moreover, Canada states, the SCM Agreement drafters knew how to use "cause" or "causal relationships", as they did in Article 15.5, but chose for subparagraph (iv) the more limiting terms "entrusts or directs". Canada argues that the United States dismisses the multiple uses of the concept of "causes" in the Agreement, stating that words have interchangeable or overlapping meanings. It relies on *EC –Bananas*, but in that case, Canada argues, the comparison was of similar language in two related agreements, not of different terms within the same agreement. In Canada's view, while different agreements may use different formulations to express similar concepts, within an agreement it is reasonable to conclude that use of a different term evidences an intent to express a different concept.

5.243 According to Canada, the dictionary meanings relating to authoritative instructions are appropriate in this case as they correspond with the wording in subparagraph (iv). The *Concise Oxford Dictionary* is precise in this regard. For "direct" when followed by "*to* + infinitive", it gives as a meaning "give a formal order or command to". Canada notes that in subparagraph (iv), the word "directs" is followed by the infinitive "to carry out".

5.244 Canada states that an export restraint does not entrust or direct a private body to provide goods to anyone, and that the United States itself views an export restraint "…as *limiting* the opportunities available to the producer of the restrained good." According to Canada, an export restraint will limit the export of goods but this is not the same as directing someone to provide those goods. Canada asserts that the United States concedes that a producer always has choices but discounts such choices as a matter of commercial reality, which is Canada's own point. In particular, absent a measure that truly directs a producer to provide goods to someone, that producer will exercise the choice that is in its best interest.

5.245 According to Canada, if the position of the United States were correct, then any government action that in some way caused lower prices would become a financial contribution as there would be some causal relationship between it and the behaviour of private market operators. In Canada's view, had this been the intention of the drafters of the SCM Agreement, they could have accomplished it by simply defining a subsidy as any government action that causes a benefit and is specific. Canada states that the need to show benefit and specificity cannot justify nullifying the financial contribution element.

5.246 Canada states that the United States argues that the fact that producers have choices is consistent with the position that an export restraint is a direction to provide goods, and that the United States reaches this conclusion through a *reductio ad absurdum* proposition that even where a producer truly is ordered to provide goods, the producer would have the option of breaking the law. Canada notes that the United States argues (and Canada agrees) that this is not a real choice. The choices Canada described were economic and, moreover, *legal* choices available to the producer.

5.247 According to Canada, the United States misconstrues the portion of subparagraph (iv) referring to "… one or more of the type of functions illustrated in (i) to (iii) …", by saying that this phrase must be read to include functions of the same "general character" as those in those subparagraphs despite the fact that the provision directly links the functions in subparagraph (iv) with the functions set out in subparagraphs (i)-(iii). Canada states that the United States also reads "illustrated" as connoting undefined functions sharing general characteristics of the functions in those subparagraphs. That is, rather than "illustrated" meaning "making clear or evident by way of example", it is broadened to include functions outside of those subparagraphs. In Canada's view, the effect is to impose disciplines on a range of private actions that are not subject to discipline when performed by governments, an untenable result.

5.248 Canada asserts that contrary to US arguments, Canada has not said that the Illustrative List prohibits government measures that are not subsidies within Article 1.1. Rather, Canada submits,

items on the Illustrative List are to be interpreted consistent with the coverage of the definition of "subsidy." Also, in Canada's view, subparagraph (iv) will apply to the functions illustrated in subparagraph (iii) where there is an entrustment or direction to provide goods or services or to purchase goods, a test that export restraints do not meet.

H. SECOND ORAL STATEMENT OF THE UNITED STATES

5.249 The United States argues that if "bad facts make bad law", "no facts make worse law." The United States argues that Canada is asking the Panel to rule, in the absence of facts, that a particular category of measures can never, under any circumstances, constitute a financial contribution. For the United States this is a recipe for not only bad law, but "worse" law. In the US view, the Panel can avoid making "worse" law by finding that the so-called "measures" identified by Canada do not require the DOC to treat export restraints as subsidies. Such a finding is dispositive of this dispute, and is the only finding the Panel could make that would be supported by evidence.

5.250 For the United States, Canada's assertion that it is not asking for an "advisory opinion" is nonsense. The United States argues that according to Canada, even if the Panel finds that Canada is not entitled to any relief, the Panel nonetheless must make findings on the status of export restraints, notwithstanding that any such findings would be of no legal effect. In the view of the US, that is the essence of a request for an "advisory opinion."

5.251 The United States asserts that Canada tries to slip in the notion that the US bears the burden of proving that the "measures" at issue do not require WTO-inconsistent action, and argues that Canada is wrong for at least two reasons. First, Canada has made the factual allegation that the "measures" at issue *require* the DOC to treat export restraints as subsidies (or financial contributions). As the complainant, Canada bears the burden of substantiating this allegation, both in terms of the burden of coming forward and the ultimate burden of persuasion. Second, the Appellate Body did not find in the *1916 Act* case that the mandatory/discretionary doctrine is an "affirmative defense." Thus, the United States submits, nothing in the *1916 Act* case relieves Canada of its burden of proving its allegation that the "measures" at issue require the DOC to treat export restraints as subsidies.

5.252 Turning to the mandatory/discretionary doctrine itself, the United States notes that Canada asserts that in each of the cases cited by the United States, the panel ruled in favor of the defending party only because that party had either applied discretionary legislation in a GATT-consistent manner or was "in some sense committed to do so." In the US view, Canada has ignored the GATT and WTO cases cited by the United States that directly contradict Canada's assertion. In *EEC Parts*, the panel found that the EEC's application of its anti-circumvention legislation was inconsistent with Article III:2, but found that the legislation, as such, was not GATT-inconsistent because it did not require GATT-inconsistent action. In *Canada Aircraft*, the panel found that particular debt financing under the Canada Account constituted a prohibited subsidy, but found that the Canada Account, as such, was not WTO-inconsistent because it did not mandate the provision of export contingent subsidies. Notwithstanding that the panel found that Canada had applied the Canada Account in a WTO-inconsistent manner, the panel found that "[i]n light of the distinction that GATT/WTO panels have consistently drawn between discretionary legislation and mandatory legislation, we find that we may not make any findings on the Canada Account programme *per se*."

5.253 According to the United States, another erroneous Canadian proposition is that a Member must be allowed to challenge whether a Member has "curtailed its discretion" *not* to violate a WTO commitment. In the US view, there is no authority for this proposition, as previously recognized by Canada. In *Canada Aircraft*, Canada stated: "There is *no basis* in the findings of the Panel or the Appellate Body, the SCM Agreement, or international law for imputing to Canada an obligation to prove that discretionary laws could not possibly be used to grant export subsidies." (emphasis added). The United States notes that Appellate Body agreed with Canada.

5.254 Turning to the application of the mandatory/discretionary doctrine to the "measures" at issue, the United States asserts that Canada appears to be upset that the United States has not acknowledged in this dispute that if there is a *Lumber IV*, the DOC will find Canadian log export restraints to be subsidies. According to the United States, none of the members of the US delegation at the Panel meeting – indeed, no employee of USTR or the DOC – is in a position to state what might happen if there ever were to be a *Lumber IV*. Moreover, as a legal matter, what the DOC *might* do in a future case is irrelevant. What is relevant for the United States is what, if anything, US law *mandates* the DOC to do. In this regard, it is the opinion of the United States that if the Assistant Secretary for Import Administration should determine in an actual CVD proceeding that a provincial log export restraint does *not* constitute a financial contribution, no US court or NAFTA binational panel would overturn that determination on the grounds that the SAA, the Preamble, or some amorphous "administrative commitment" *require* a different result.

5.255 Turning to Canada's discussion of the SAA, the United States argues that no US court would read the proviso out of existence the way Canada does. Moreover, in its comments to the DOC in connection with the DOC's rulemaking proceeding, the United States recalls that Canada took the position that the statute and the SAA did not require the DOC to treat export restraints as subsidies, and that Canada also took this position in the 1999 *Live Cattle* case, as reflected by US-32. For the United States, Canada's brief in *Cattle* also calls attention to another important portion of the SAA not discussed so far in this case; namely, the paragraph at the top of page 925 of the SAA. According to the United States, this portion of the SAA sets forth the general intent of Congress and the Administration that prior DOC practice regarding the definition of "subsidy" continue only to the extent that it is consistent with the new, WTO-consistent definition of "subsidy" set forth in the statute.

5.256 With respect to the Preamble, in the view of the United States, Canada improperly equates the Preamble with a regulation. The United States argues that Canada has yet to cite any case that says the DOC is bound by anything other than a regulation. The United States notes that Canada asserts that "U.S. courts regularly find agency statements in preambles that interpret a statute to be controlling and reviewable like any regulation ...", and states that as authority, Canada simply refers to cases that the United States has previously explained are either distinguishable or do not support the proposition for which they are submitted.

5.257 The United States notes that Canada cites Professor Davis for the proposition that publication in the *CFR* should not constitute evidence that an agency statement is, or is not, a rule. According to the United States, Canada is inviting the Panel to undermine the credibility of its own report by taking the views of academics regarding how US law ought to be over the opinions of a federal appellate court regarding what US law is. Moreover, referring to US-33 and US-34, the United States argues that when one considers what else Professors Davis and Pierce have to say, it is apparent that they are not of the view that a legislative rule need not be published in the *CFR*. In addition, the United States maintains, if one were to apply the *American Mining Congress* test without the criterion of publication in the *CFR*, the Preamble would not qualify as a valid, binding legislative rule. Finally, the United States states, Canada's citation to the *Wiggins Brothers, Inc.* case (CAN-124) is not on point, because the court made clear that the preamble could not be disregarded because it constituted part of the "legislative history" of the regulation that was being construed. The court did *not* say that the preamble in question was itself a binding, legislative rule, which is the status that Canada attempts to accord the DOC Preamble at issue in this case. Also, continues the United States, Canada has not addressed the case of *Clean Air Implementation Project v. EPA* (US-26), which stands for the proposition that a preamble is not a "binding statement of agency policy" where the agency does not consider the preamble as such.

5.258 In the Preamble to the proposed rules, according to the United States, the DOC expressly stated that it was not promulgating a regulation on "indirect subsidies" in order to preserve its

"flexibility and discretion." In the Preamble to the final rules, the United States notes, the DOC expressly stated that "the phrase 'entrusts or directs' could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations." Thus, for the United States, the DOC's explanation in the portion of the Preamble at issue here makes it clear that the DOC did not intend to bind itself on the topic of indirect subsidies by promulgating a regulation. The United States argues that it is simply absurd to assert, as Canada does, that at the same time as the DOC was expressing an intent not to bind itself by means of a regulation, it simultaneously intended to bind itself by means of a preambular statement explaining why the DOC was not binding itself.

5.259 For the United States, the fact that the DOC may cite the Preamble in a particular determination does not transform the Preamble into a binding regulation any more than would a citation to a law review article transform the article into a binding regulation. The United States does not dispute the fact that courts and agencies rely on regulatory preambles for purposes of interpreting agency regulations. In this case, however, the United States argues, there is no regulation to interpret. Moreover, Canada *has not identified a single instance* in which the DOC stated that it was following a principle articulated in the Preamble because it was legally bound to do so. For the United States this is a critical point. There is a big difference between citing the Preamble as a shorthand explanation of the reasons why the DOC is making a particular determination, and citing the Preamble as binding authority. The United States argues that in the first situation, the DOC, as a matter of discretion, is citing reasoning set forth in the Preamble because it finds that reasoning to be persuasive. In the second situation, the DOC would be following the Preamble because it has no discretion to do otherwise. Likewise, the United States maintains, Canada has been unable to cite a single case where a court has said that a portion of a DOC regulatory preamble unrelated to a regulation has the force of law.

5.260 The United States argues that in respect of DOC "practice" – whatever that may be – Canada has not been able to cite a single US court decision standing for the proposition that agency practice in general, or DOC practice in particular, is binding. Moreover, according to the United States, Canada's assertion that an agency may depart from prior precedents only in "narrow circumstances" is contradicted by the very US administrative law experts on which Canada has relied in this case. The United States argues that as set forth in US-34, Professors Davis and Pierce are of the view that an agency may freely overrule its precedent.

5.261 For the United States, Canada's reference to the so-called *Subsidies Appendix* is worthy of a brief comment, because the history of the *Subsidies Appendix* totally contradicts Canada's arguments in this case. The *Subsidies Appendix* was attached to a 1984 final CVD determination which announced new DOC practice on a host of CVD methodological issues at a time when there were no regulations. Although the DOC had not generated the *Subsidies Appendix* through the type of notice-and-comment process required by the *Administrative Procedure Act* ("*APA*") for a valid, binding legislative rule, the DOC nonetheless began to treat the *Subsidies Appendix* as if it were a legislative rule. In 1988, the US Court of International Trade put a halt to this, as explained in the preamble to the DOC's 1989 proposed regulations (CAN-5). The DOC's reviewing court told it that it could not act as if its administrative practice was binding, because under established US principles of administrative law, it was not. The court told the DOC that if it wanted to make its practice binding, it would have to codify it in the form of regulations.

5.262 The United States notes that Canada claims that Article 10 of the SCM Agreement applies to this dispute because Article 10 imposes an obligation "to 'take all necessary steps to ensure . . .' that the imposition of countervailing duties is consistent with the SCM Agreement and Article VI of the GATT 1994." According to the United States, Canada claims that Article 10 (and the provisions related thereto) itself imposes an obligation on a Member to ensure the conformity of its countervailing duty law with the SCM Agreement and Article VI. When one considers Article 10 in

full, however, it is apparent to the United States that Article 10 was intended to apply to the actions of Members in individual countervailing duty proceedings. The reference in the first sentence to "imposition" is suggestive of a case-specific determination, as is the reference in the second sentence to "investigations initiated and conducted". Moreover, the United States argues, if Canada's interpretation were accepted, Article 10 would be redundant of Article 32.5, which expressly imposes an obligation to ensure the conformity of laws, regulations and administrative procedures. In the view of the United States, Canada has implicitly recognized this in all of its prior submissions in this dispute. Article 10 and Article 32.5 can each be given meaning by interpreting Article 10 as governing actual actions taken by a Member in an actual CVD proceeding, and Article 32.5 as governing the conformity as such of a Member's laws, regulations and administrative procedures.

5.263 According to the United States, putting aside the issue of whether the SAA, the Preamble, and the DOC's alleged "administrative commitment" constitute "measures", even if one assumes *arguendo* that these "measures" should be considered together, Canada has yet to cite *any* authority for the proposition that, under US law, "measures" that individually do not require an agency to do a particular thing do so require when considered together.

5.264 With respect to the phrase "entrusts or directs", the United States asserts that Canada simply asks the Panel to ignore the dictionary definitions of "direct" that undermine its case. Canada claims that the determination of whether an export restraint constitutes a "financial contribution" is a legal, rather than a factual, issue. However, the United States maintains, this is true only if one ignores the ordinary meaning of "direct." All of the dictionaries referred to in this dispute include definitions with a causal element. For the United States, it is significant that Canada has conceded that an export restraint constitutes government "direction", and simply argues that the "direction" is "to not export." In the view of the United States, this is nothing more than a semantic game.

5.265 Finally, the United States argues, Canada reiterates its tired argument that "the freedom of producers to adapt to the imposition of an export restraint" means that there is no entrustment or direction within the meaning of subparagraph (iv). The United States submits that Canada's alleged "freedom of producers" to adapt is unsupported by *any* factual evidence. In an effort to gloss over its evidentiary failings, asserts the United States, Canada misrepresents the position that the US has taken in this case, asserting that the US is arguing that an export restraint is subject to subparagraph (iv) "because it *might* result in greater domestic availability of a product ... ." The United States indicates that its prior submissions make clear that the US position is that an export restraint might be subject to subparagraph (iv) only if it *did* result in greater domestic availability. In the US view, it is Canada which bases its position on theoretical speculation as to what an export restraint *might* do, because it fears what the facts might reveal in actual cases.

5.266 Finally, what the United States sees as the emptiness of Canada's argument regarding the "freedom of producers" is revealed by the last sentence of its answer to Question 6 (Second Set), in which it states that a producer would have the freedom to "elect to reduce or terminate its production"; *i.e.*, go out of business. For the United States, if this is the type of "freedom" that removes a government measure from the scope of subparagraph (iv), then subparagraph (iv) is truly meaningless. In a scenario in which a government directs a producer to sell a product to identified domestic customers on pre-determined conditions (a scenario which both Canada and the EC concede ought to fall under subparagraph (iv)), the producer would have the same "freedom" to go out of business.

5.267 With respect to the phrase "private body", to the United States it is now entirely unclear what Canada's position is with respect to this phrase. In its answer, Canada says that "a law, regulation, or administrative directive requiring 'all bankers' to lend (in lieu of the government lending) X percent of their loanable funds to the widget industry might make bankers a 'private body' ... ." The United States fails to see any substantive difference between this scenario and a scenario in which a

government, by means of an export restraint, directs producers of an input to sell only to domestic customers.

5.268 With respect to the language in subparagraph (iv) that begins with the phrase "normally vested in", the United States argues, as indicated in its response to Question 26(a), that because the DOC has yet to address this language, the United States does not have a definitive position on the meaning of this language. However, it appears to the United States that this language was drawn from the 1960 *Article XVI:5 Report*, which referred to the functions of taxation and subsidization. Thus, to the United States this language suggests that the appropriate inquiry is whether the practice that a private body is directed to perform falls within the types of practices that a government normally engages in for purposes of delivering a subsidy.

5.269 It appears to the United States that there are several possible interpretations of the "normally vested in" language. Based on the fact that the functions in subparagraphs (i) through (iii) are expressly recognized as mechanisms used by governments directly to provide financial contributions, one possible interpretation of the "normally vested in" language is that it recognizes that the functions listed in (i) through (iii) are normally vested in the government and places that same limitation on functions of the same "type". As a result, under this interpretation, subparagraph (iv) encompasses the functions in (i) through (iii), which are normally vested in the government, and functions of that "type", provided that they are also normally vested in the government.

5.270 Another possible interpretation, according to the United States, is that the "normally vested in" language serves to screen out government actions that, at first blush, might appear to be government direction to perform a function illustrated in subparagraphs (i)-(iii). For example, using Canada's example of a government action to break up a monopoly, looked at superficially, one might say that this could result in the type of government-directed provision of a good at reduced prices that qualifies as a subsidy. However, when considered from a different perspective, one could say that governments typically do not provide subsidies by breaking up cartels and restoring normal market conditions.

5.271 Finally, the United States notes, there is Canada's interpretation, which, as the United States understands it, is that the language requires that the government in question have ordinarily performed the function that the private body is directed to perform.

5.272 The United States argues that it is not uncommon for multilateral negotiations to produce legal documents that reflect less than ideal drafting. With all due respect to the drafters, the United States would admit that the "normally vested in" language is not a model of clarity, which makes recourse to its negotiating history all the more important.

5.273 However, in the US view, the Panel does not have to resolve the precise meaning of this language, because even under Canada's interpretation, Canada must still lose. Canada has not shown, as a factual matter, that there are not and never will be situations in which a government that has historically provided a good directly also restrains exports of that good in a manner that causes a private body to begin to provide the good.

VI. ARGUMENTS OF THE THIRD PARTIES

6.1 The arguments of the third parties the European Communities, and India are set out in their submissions and oral statements to the Panel, which are attached to this Report in Annex B. Australia did not make a written submission or an oral statement. (*See* List of Annexes, page v, *supra*).

VII. INTERIM REVIEW

7.1 The Panel issued its interim report to the parties on 27 April 2001. On 11 May 2001, both parties submitted written requests for review of specific aspects of the interim report. On 16 May 2001, the parties submitted comments on one another's interim review requests. Neither party requested an interim review meeting.

7.2 **Canada** argues that we have inaccurately reflected its position concerning the mandatory/discretionary distinction. We have expanded the quotation from Canada's response to a question in paragraph 8.6 as well as reflected its response to another question in paragraph 8.8 to provide a more complete context for our understanding of Canada's position.

7.3 Canada also suggests slight wording changes in paragraphs 8.23 and 8.50 to reflect more accurately its arguments. The United States proposes an alternative in respect of paragraph 8.50. We have adjusted the drafting in these paragraphs.

7.4 Canada also suggests deletion of a word in paragraph 8.75 as unnecessary, and makes a general comment in respect of our use of the phrase "independent operational status" in paragraphs 8.85, 8.99, 8.113, and 8.126. We disagree with the first comment, and have thus made no change to paragraph 8.75. We do not believe that Canada has asked for a particular change to the other cited paragraphs, nor do we feel that one is necessary. Thus, we have made no change to those paragraphs either.

7.5 The **United States** requests that we expunge Sections VIII.B.2 and VIII.B.3 of our findings, i. e., the part of the findings that address Canada's claims under SCM Article 1. In the view of the United States, similarly to what they had argued throughout the Panel proceedings, these sections are not necessary given our finding in Section VIII.B.4 that the US legislation does not require the DOC to treat export restraints as a subsidy. The United States further maintains that this aspect of the report, if followed by other panels, will have extremely serious and unfortunate consequences for the WTO dispute settlement system. Canada disagrees, and notes that we have considered whether the treatment complained of constitutes a violation of WTO obligations and then whether the measures at issue mandate such treatment. Moreover, Canada points out that the Appellate Body has criticised panels for failing to complete their analysis where panel findings on certain issues have been overturned. We have explained the reasons for the approach we have taken and the precedents for this approach. We have not made any change to these sections.

7.6 The United States makes further specific comments on Section VIII.B.3 in the event that we decide to maintain it. First, the United States indicates that we have misunderstood its position regarding the object and purpose of the SCM Agreement, and that we have not reconciled our interpretation of Article 1 with the object and purpose of the SCM Agreement. We have completed the quotation of Article 32 of the *Vienna Convention* in paragraph 8.64 following Canada's response to this US comment. We have also made some drafting changes to paragraphs 8.62 and 8.63 to clarify the US position, and to clarify our views on the relationship between our analysis of Article 1 and the object and purpose of the Agreement.

7.7 The United States indicates that we have misconstrued its arguments concerning dictionary definitions of the word "directs", and that we have only partially addressed in our findings dictionary definitions pertaining to the word "directs" in the particular grammatical construction that is used in Article 1.1(a)(1)(iv). We have redrafted paragraph 8.27 to reflect more fully the US argument, and have clarified our grammatical point in paragraph 8.28. We have also slightly redrafted paragraph 8.44 to clarify our response to the US argument.

7.8 The United States argues that we have incorrectly characterised its position as failing to recognise "financial contribution" as a separate and meaningful legal element of a subsidy. We have expanded the quotation from US responses to questions to clarify better its position on this point, and have clarified the drafting in paragraph 8.39 concerning our views as to the implications of the US position. The United States also questions the placement of footnote 135 of the report. We have made no change in response to this comment.

7.9 The United States also argues that we have mischaracterized its arguments concerning the phrase "type of functions" in paragraphs 8.51-8.52. We have redrafted our description of the US arguments in these paragraphs, as well as our concluding sentence on this issue in paragraph 8.55, to reflect more accurately the US argument, and have made consequential drafting changes in paragraph 8.53.

7.10 The United States also identifies clerical errors in footnotes 177, 186, and 187, which we have corrected.

7.11 We have also introduced clerical and technical corrections in Sections IV and V, and wording changes in paragraph 8.6 and the heading to Section VIII.B.4(a).

VIII. FINDINGS

A. REQUEST FOR PRELIMINARY RULINGS

8.1 We recall that the United States has requested the Panel to dismiss Canada's claims by making the following preliminary rulings (*See* Section IV.A, *supra*):

> (a) That, as neither Section 771(5), the SAA, the Preamble, nor any DOC "practice" requires US authorities to treat export restraints as subsidies, these alleged measures, as such, do not violate US obligations under any of the provisions cited by Canada in its request for a panel;
>
> (b) That US "practice" – whether past, present, or future – does not constitute a measure properly before this Panel;
>
> (c) That, because Canada did not include US "practice" under Section 771(5) in its request for consultations, the parties did not actually consult on US "practice", and Canada's panel request fails to adequately identify the US "practice" in question, Canada's claims regarding US "practice" fail to conform to Articles 4.7 and 6.2 of the DSU, and are not properly before this Panel; and
>
> (d) That, because Canada's panel request did not identify the SAA or the Preamble as measures, and because, in any event, neither the SAA nor the Preamble is a measure, Canada's inclusion of the SAA and the Preamble as separate measures in its First Written Submission fails to conform to Article 6.2 of the DSU, and Canada's claims regarding the SAA and the Preamble are not within the Panel's terms of reference.

8.2 We consider that the United States' preliminary objections, particularly as to what constitute the measures at issue and whether these measures are mandatory or discretionary in respect of the alleged treatment of export restraints, go to the substance of the matter before us. We therefore do not consider it appropriate to address the objections raised by the United States as threshold issues. Rather, we address these issues as part of our substantive analysis of the claims.

B. CLAIM UNDER ARTICLE 1 OF THE SCM AGREEMENT – WHETHER THE TREATMENT OF EXPORT RESTRAINTS AS FINANCIAL CONTRIBUTIONS IS INCONSISTENT WITH THE SCM AGREEMENT AND WHETHER US LAW REQUIRES SUCH TREATMENT

8.3 The measures at issue in this case are laws of the United States: its legislation, instruments by reference to which that legislation is to be construed, and practice pursuant to that legislation. Canada does not challenge a particular instance in which an export restraint was the subject of a CVD investigation. Canada maintains that the contested US measures operate separately and together to require a certain treatment of export restraints in CVD investigations, contrary to the United States' obligations under the WTO.

1. The type of legislation that can be found as such to be inconsistent with WTO obligations

8.4 There is a considerable body of dispute settlement practice under both GATT and WTO standing for the principle that only legislation that *mandates* a violation of GATT/WTO obligations can be found as such to be inconsistent with those obligations. This principle was recently noted and applied by the Appellate Body in *United States – Anti-Dumping Act of 1916* ("*1916 Act*"):

> "[T]he concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's *GATT 1947* obligations."[107]
>
> . . .
>
> "[P]anels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations."[108]

8.5 Prior to *1916 Act*, the Panel in *United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco* ("*United States Tobacco*") summed up the practice of GATT panels in the area as follows:

> "[P]anels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation could be subject to challenge."[109]

8.6 In its request for preliminary rulings, the United States argues that the mandatory/discretionary distinction – which we refer to hereafter as the "classical test" – should be applied in this dispute. Canada does not challenge the continuing validity of the classical test (nor does the European Communities as third party to the dispute). That is, Canada does not argue that

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[107] *1916 Act*, Appellate Body Report, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 88.

[108] *Id.*, para. 60.

[109] *United States Tobacco*, Panel Report, adopted 4 October 1994, BISD 41S/131, para. 118.

discretionary legislation can be found to be inconsistent with WTO obligations. To the contrary, Canada states explicitly that no violation could be found in such cases:

> "As Canada has set out in its submissions, Canada believes that the measures it has identified taken together *require* the United States to treat export restraints as financial contributions within the meaning of Article 1 of the SCM Agreement. If, however, the measures merely *authorised* the treatment of export restraints as financial contributions in the sense that the measures in no sense committed the United States to interpret Section 771(5)(B)(iii) in a manner that treated export restraints as 'financial contributions', then the measures at issue should not be found to be inconsistent with the United States' WTO obligations".[110]

8.7 Further, Canada's arguments are framed in accordance with the classical test. That is, Canada argues that the measures identified by Canada (i. e., the US legislation) *require* a certain treatment of export restraints in CVD investigations, which treatment in Canada's view violates the SCM Agreement, thereby rendering the legislation inconsistent with the SCM Agreement and the WTO Agreement.

8.8 Finally, Canada presents two arguments concerning the mandatory/discretionary distinction: (i) that the statute "as interpreted by" the SAA and the Preamble is *mandatory legislation that requires* the DOC to violate its obligations under the SCM Agreement; and (ii) that, although the statute on its own is discretionary, in the sense that it would be possible to interpret it in a WTO-consistent manner, the SAA and the Preamble "curtail the discretion" of the DOC to act WTO-consistently. In response to our question whether these arguments represented two formulations of a single argument, or two different or alternative arguments, Canada states: "There is no difference between these arguments in that the result under either argument is that the US measures are not 'discretionary' within the meaning of the mandatory/discretionary distinction in GATT/WTO jurisprudence, i. e., that the United States has not demonstrated that it has sufficient discretion to conform with its WTO obligations"[111].

8.9 As noted, the classical test has longstanding historical support, and has quite recently been employed by the Appellate Body, in *1916 Act*. More importantly, the distinction between mandatory and discretionary legislation has a rational objective in ensuring predictability of conditions for trade. It allows parties to challenge measures that will necessarily result in action inconsistent with GATT/WTO obligations, *before* such action is actually taken. Accordingly, we shall be applying the classical test in this dispute, in order to determine whether the US law is of the type that can be found as such to be inconsistent with WTO obligations, i. e., whether the law is mandatory in respect of the treatment of export restraints in CVD investigations.[112]

2. Order in which the issues will be addressed

8.10 While Canada does not challenge the classical test, it considers that whether or in what degree a challenged measure is discretionary with respect to an alleged violation of WTO rules is not

[110] Response of Canada to question 5 from the Panel at the first meeting (emphasis in original).

[111] Response of Canada to question 17 from the Panel following the second meeting.

[112] We note that the *Section 301* Panel found that even discretionary legislation may violate certain WTO obligations (*See United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, adopted 27 January 2000, para. 7.53). We recall that the Panel's analysis in that dispute focused on the nature of the obligations imposed by Article 23.2(a) of the DSU. Neither party has suggested that similar considerations apply in respect of the provisions of the SCM Agreement that Canada alleges were violated in this dispute.

properly characterised as a general procedural or jurisdictional issue. Canada's view is that, rather, the Appellate Body has confirmed, in *1916 Act*, that this is an issue that may arise as part of a panel's examination of the legal claims made in a particular case. The United States, on the other hand, argues that any substantive ruling on the meaning of WTO provisions, where legislation is eventually found to be discretionary, would constitute an inappropriate or impermissible "advisory opinion"[113]. It therefore contends that we must address whether the US law is mandatory or discretionary before considering the meaning of Article 1.

8.11 We are not aware of any GATT/WTO precedent that would require a panel to consider whether legislation is mandatory or discretionary *before* examining the substance of the provisions at issue. To the contrary, we note that a number of panels, in disputes concerning the consistency of legislation, have *not* considered the mandatory/discretionary question in the abstract and as a necessarily threshold issue. Rather, the panels in those cases first resolved any controversy as to the requirements of the GATT/WTO obligations at issue, and only then considered *in light of those findings* whether the defending party had demonstrated adequately that it had sufficient discretion to conform with those rules. That is, the mandatory/discretionary distinction was applied *in a given substantive context.*[114]

8.12 We consider such an approach to be appropriate in this case. In particular, identifying and addressing the relevant WTO obligations first will facilitate our assessment of the manner in which the legislation addresses those obligations, and whether any violation is involved. That is, it is after we have considered both the substance of the claims in respect of WTO provisions and the relevant provisions of the legislation at issue that we will be in the best position to determine whether the legislation requires a treatment of export restraints that violates those provisions.

8.13 Finally, we note that, whether or not a panel sees the mandatory/discretionary question as a necessarily threshold issue or, as suggested by Canada, as an issue that may arise as part of a panel's examination of the legal claims, it remains true – at least under the classical test which we shall be employing – that legislation as such cannot be found to be inconsistent with a Member's WTO obligations unless it is mandatory in nature. Thus, in any event, the order in which the two issues – the question of the type of legislation and the substance of the case – are addressed would not alter any eventual finding of consistency or lack thereof.

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[113] Request for Preliminary Rulings by the United States, para. 55.

[114] *See*, e. g., *United States – Superfund:* The scheme in question involved, *inter alia*, a discriminatory penalty tax that would be imposed if required information was not submitted by the importer. The Panel first found that such a penalty tax, if imposed, would violate Article III:2, then went on to find that the Superfund Act did not in fact require imposition of the tax, as the law foresaw the possibility for the United States to adopt regulations that would eliminate the need to impose it (*United States – Taxes on Petroleum and Certain Imported Substances* ("*Superfund*"), Report of the Panel, adopted 17 June 1987, BISD 34S/136, para. 5.2.9); *Thailand – Cigarettes*: After finding that the discriminatory tax rates provided for under the law would violate GATT rules, the Panel went on to find that the Thai authorities both had sufficient regulatory discretion to implement the law consistent with the GATT, and had actually exercised that discretion in that way (*Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, Report of the Panel, adopted 7 November 1990, BISD 37S/200, para. 84); *United States – Tobacco*: The US statute mandated that the US Department of Agriculture assess "comparable" inspection fees for imported and domestic tobacco, and the Panel first considered the meaning of the word "comparable" in light of the relevant GATT requirement that such fees be "commensurate" with the cost of services rendered to imported tobacco. The Panel then concluded that the United States had the discretion to interpret "comparable" as "commensurate" (and in practice had done so), i. e., that the legislation did not require a violation (*United States – Measures Affecting the Importation, Internal Sale, and Use of Tobacco*, Report of the Panel, adopted 4 October 1994, BISD 41S/131, para. 123).

8.14 For the foregoing reasons, we shall first consider whether the treatment of export restraints as financial contributions is inconsistent with the SCM Agreement and then determine whether US law requires such treatment.

3. Whether the treatment of export restraints as financial contributions is inconsistent with the SCM Agreement

(a) Scope of rulings

8.15 It is important, before we consider whether the treatment of export restraints as financial contributions is inconsistent with the SCM Agreement, to indicate what exactly we understand the term "export restraint" to mean in this dispute. In other words, we must first consider the essential defining characteristics of the measure described as an "export restraint", which is the subject of the claims before us, as this measure determines the scope of both the claims before us and our rulings thereon.

8.16 Canada states that "[a]n export restraint is a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted. Such measures could also take the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports".[115] The United States, for its part, indicates that "the ordinary meaning of 'restraint' is 'the action or an act of restraining something or someone'. 'Restrain', in turn, is defined as 'hold back or prevent *from* some course of action'. Thus, an 'export restraint' would be an action or an act that holds back or prevents exports".[116] We note that Canada and the United States do not have the same view as to the essential elements that make up an export restraint, although both seem to envisage the possibility that export restraints could take various forms (quantitative restrictions, taxes, etc.). In particular, the definition proposed by the United States' is broader, and arguably would encompass any action which results in the limiting of exports. The definition proposed by Canada, on the other hand, sets out additional elements and is therefore narrower in scope.

8.17 We agree entirely with the United States that "[i]t is neither practicable nor desirable for the Panel to attempt to define, in the abstract, a term that does not appear in the SCM Agreement"[117]. On the other hand, it is necessary to delineate clearly the scope of the issues before us. We note that, as in any dispute, the scope of the claims is determined by the complainant. We shall therefore apply the provisions of the SCM Agreement to the particular fact pattern cited by Canada, i. e., a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports. It is these essential characteristics – which we shall refer to hereafter for convenience as an "export restraint" – that delineate the scope of Canada's claims and of our rulings thereon.

(b) Rules of treaty interpretation

8.18 Article 3.2 of the *DSU* indicates that Members recognise that the dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". In this regard, the Appellate Body, in *United States – Gasoline*, refers to "a fundamental rule of treaty interpretation [which] has received its most

[115] Response of Canada to question 1 from the Panel to both parties at the first meeting.

[116] Response of the United States to question 1 from the Panel to both parties at the first meeting (footnotes omitted, emphasis in original).

[117] *Id.*

authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')"[118], and cites Article 31.1 thereof[119], which reads as follows:

> ARTICLE 31
>
> *General rule of interpretation*
>
> 1. A treaty 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 the light of its object and purpose.

The Appellate Body indicates that "[this] general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law'"[120]. We shall therefore begin our analysis of Canada's claim under SCM Article 1 on the basis of the text of that provision in its context and in light of the object and purpose of the SCM Agreement.

(c) Definition of "financial contribution" in the SCM Agreement

8.19 Canada's claim under SCM Article 1 centres on whether an export restraint can constitute a "financial contribution" in the sense of SCM Article 1.1(a)(1). Canada argues that under its CVD law, the United States treats export restraints as financial contributions in the form of government-entrusted or government-directed provision of goods by a private body as provided for in SCM Article 1.1(a)(1)(iii) and (iv), and that if export restraints confer benefits, the United States treats them as countervailable subsidies. In Canada's view, such an interpretation of these provisions of the SCM Agreement is not permissible. The United States argues that export restraints can (at least in some factual circumstances) constitute government-entrusted or government-directed provision of goods by a private body. Thus, at the heart of Canada's claim is the definition in Article 1.1(a)(1) of "financial contribution", and in particular, the provisions of Article 1.1(a)(1)(iii) and (iv).

8.20 SCM Article 1.1 provides as follows:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits [footnote omitted];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;

[118] *United States – Standards for Reformulated and Conventional Gasoline* ("*United States - Gasoline*"), Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, p. 16.

[119] (1969), 8 *International Legal Materials* 679.

[120] *United States – Gasoline*, Report of the Appellate Body, footnote 118, *supra*, p. 17 (footnote omitted).

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

Thus, Article 1.1 makes clear that the definition of a subsidy has two distinct elements (i) a financial contribution (or income or price support), (ii) which confers a benefit. The Appellate Body emphasised this point in *Brazil – Aircraft*, stating that financial contribution and benefit are "separate legal elements in Article 1.1 . . . which *together* determine whether a 'subsidy' exists"[121], which the panel in that case had erroneously blended together by importing the concept of benefit into the definition of financial contribution.

8.21 The issue under Article 1 as presented to us by the parties is limited to the definition of financial contribution. There is no issue in respect of benefit, *inter alia*, because the parties agree that an export restraint could confer a benefit.[122] Thus, our analysis under SCM Article 1.1(a)(1) is limited to the question of whether an export restraint could constitute a "financial contribution" in the sense of that provision.

8.22 On this point, the view of the United States is that an export restraint can constitute a financial contribution in the form of government-entrusted or government-directed provision of goods in the sense of Article 1.1(a)(1)(iii) and (iv), in that a limitation or outright prohibition of exports of the product in question is different only semantically from an affirmative direction to a private entity to provide goods (to a greater degree than before or exclusively) to domestic producers. In other words,

[121] *Brazil – Aircraft*, Report of the Appellate Body, WT/DS46/AB/R, adopted 20 August 1999, para. 157 (emphasis in original).

[122] The United States argues, "[D]omestic purchasers of a restrained product may be able to purchase that product at a lower price than would otherwise be the case if the market for that product was not artificially limited by the government. In such a case, domestic purchasers of the restrained product would receive a benefit in the form of lower costs for their inputs" (First Written Submission of the United States, para. 55). The United States further argues, referring to Canada's request for establishment, "Canada does not allege that an export restraint is incapable of providing a 'benefit' within the meaning of the SCM Agreement" (Response of the United States to question 1 from the Panel at the first meeting, citation omitted). Canada submits, in its request for the establishment of a panel, "[U]nder US [CVD] law, an export restraint is considered to satisfy the 'financial contribution' element of the definition of 'subsidy' in Article 1.1 of the SCM Agreement. This means that an export restraint that has *a price effect beneficial to users of the restricted product* in the restricted market will be subject to countervailing duties if the other requirements of US law are met (notably specificity and material injury)" (WT/DS194/2, emphasis added). Canada also argues, "[T]he US claim that an export restraint on pineapples is the 'functional equivalent' of ordering the growers to sell to the juice industry at 'less than adequate remuneration' is nothing less than a claim that if there is a price effect, an export restraint may be presumed to be a financial contribution. Put differently, this is an assertion that a *benefit* can 'confer' a financial contribution" (Oral Statement of Canada at the first meeting, para. 30, emphasis added).

the United States argues, an export restraint is "functionally equivalent" to an entrustment of or direction to a private body to provide goods domestically.[123]

8.23 In the view of Canada, by contrast, in light of the plain meaning of the words "entrust" and "direct", for government entrustment or direction of the provision of goods to exist, the government must explicitly and affirmatively instruct the private entity to provide the goods. For Canada, the US argument that the difference is only semantic is unpersuasive because, in the US scenario, the producers of the goods in question would, when faced with an export restraint, have only one option, namely to sell to domestic purchasers, while in Canada's view this would never be the case. Rather, a producer faced with an export restraint would have multiple options, which might include selling to domestic purchasers, but might also include, for example, vertically integrating or switching to another business altogether.

8.24 Thus, the specific issue before us is whether an export restraint could constitute a financial contribution in the form of government-entrusted or government-directed provision of goods in the sense of Article 1.1(a)(1)(iii) and (iv). It is to a detailed analysis of the text of these provisions that we now turn.

(d) Text and context of the elements of the definition of "financial contribution" in the SCM Agreement

8.25 The definition of financial contribution in Article 1.1(a)(1)(iv)contains five requirements:

> (i) a government "entrusts or directs"
>
> (ii) "a private body"
>
> (iii) "to carry out one or more of the type of functions illustrated in" subparagraphs (i)-(iii) of Article 1.1(a)(1) (in this case the provision of goods)
>
> (iv) "which would normally be vested in the government" and
>
> (v) "the practice, in no real sense, differs from practices normally followed by governments"

According to Canada, in the case of treating export restraints as financial contributions, these required conditions are not fulfilled. For the United States, it *is* possible for an export restraint to meet all of the definitional elements set forth in Article 1.1(a)(1)(iv), and therefore Canada's "extraordinary request for an authoritative interpretation by the Panel of the SCM Agreement must fail as a matter of substance."[124]

(i) A government "entrusts or directs"

8.26 The United States argues that export restraints can fall within the Article 1.1(a)(1) definition of "financial contribution" on the basis that export restraints constitute (or can constitute) government "entrustment" or "direction" to a private body in the sense of Article 1.1(a)(1)(iv) (to "provide goods"

[123] The United States argues, for example, that an export restraint and an affirmative direction to provide goods domestically "are functionally equivalent – where a producer is faced with two options, a prohibition on one option is an affirmative direction to perform the other. An export ban clearly directs producers not to export, thereby directing them to seek the only other purchasers available to them for the sale of their goods" (First Written Submission of the United States, para. 38).

[124] First Written Submission of the United States, para. 5.

in the sense of Article 1.1(a)(1)(iii)), because the United States sees no substantive difference, but only a semantic one, between a restriction on exporting a product and an instruction to sell that product domestically. For the United States, the two are "functionally equivalent". Canada takes issue with this interpretation of the concept of "entrusts or directs". According to Canada, the plain meaning of "entrusts or directs" is active, i.e., to order or commission someone to do something. For Canada, this ordinary meaning is reinforced by the terms that immediately follow the words "entrusts or directs" in Article 1.1(a)(1)(iv), namely "to carry out". In Canada's view, the term "entrusts or directs . . . to carry out" suggests the communication of a particular duty or instruction that is to be discharged or executed. Canada argues that an export restraint does not fit this definition, as it does not commission or charge or authoritatively instruct producers of the restrained good to do anything; to the contrary, it limits their ability to export.

8.27 The United States refers to a number of dictionary definitions of the words "entrust" and "direct" (some of which are broader than those used by Canada), including, "give responsibility to"; "cause to move in or take a specified direction"; "regulate the course of"; "guide (someone or something)"; "instruct (someone or something) with authority", "give authoritative instructions to; to ordain, order (a person) *to do* (a thing) *to be done*; order the performance of". For the United States, it cannot be said that *no* export restraint is capable of satisfying any of these definitions. At a minimum, according to the United States, an export restraint can "regulate the activities of" or "cause" a private body to carry out one of the enumerated functions of subparagraphs (i)-(iii) and thus provide a financial contribution. The United States submits that "[a]n export restraint *is* a direction to provide goods to domestic purchasers if it can be shown, as a factual matter, that there is a proximate causal relationship between the export restraint and the behaviour of the producers of the restrained product. Of course, whether such a causal relationship exists can only be assessed on a case-by-case basis".[125] In particular, the United States argues, if the restraint results in the producer having no practical or commercial choice but to sell (or to increase its sales) in the domestic market, the restraint is the same as a direction to sell in the domestic market. The United States further elaborates on this point, stating that "there would need to be a demonstrated causal relationship"[126] between an export restraint and a private body's action (e. g., the provision of a good) in order for there to be a financial contribution.

8.28 In our view, the requirement of "entrustment" or "direction" in subparagraph (iv) refers to the situation in which the government executes a particular policy by operating through a private body. The question in this dispute relates to the conditions under which the government can be considered to be operating through a private body as foreseen by subparagraph (iv). The dictionary meaning of the word "entrust" is, *inter alia*, to "give (a person, etc.) the responsibility for a task . . . Commit the . . . execution of (a task) *to* a person . . . ".[127] The word "direct" is defined, *inter alia*, as to "[g]ive authoritative instructions to; order (a person) *to do* . . . order the performance of".[128] In this regard, we consider significant the fact that, for "direct" when followed by "to" plus an infinitive (i. e., a verb), the dictionary gives as a meaning to "give a formal order or command to"[129], as this is precisely the construction used in subparagraph (iv) (". . . entrusts or directs a private body *to carry out* . . .").

8.29 It follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). To our minds, both the act of entrusting and that of directing therefore necessarily carry with them the following three elements: (i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or

[125] Comment of the United States on question 9 from the Panel to Canada following the first meeting (italic emphasis in original, underline emphasis added).
[126] Comment of the United States on question 11 from the Panel to Canada following the first meeting.
[127] *The New Shorter Oxford English Dictionary*, Volume 1, 1993, Clarendon Press, Oxford.
[128] *Id.*
[129] *The Concise Oxford Dictionary*, Ninth Edition, 1995, Clarendon Press, Oxford.

duty. In other words, the ordinary meanings of the verbs "entrust" and "direct" comprise these elements – *something* is necessarily delegated, and it is necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*. We therefore do not believe that either entrustment or direction could be said to have occurred until all of these three elements are present.

8.30 Having said that, it is clearly the first element – an explicit and affirmative action of delegation or command – that is determinative. The second and third elements – addressed to a particular party and of a particular task – are *aspects* of the first. Any assessment of whether delegation or command has occurred would necessarily be in reference to that which has been delegated or commanded and in reference to the one to whom it has been delegated or commanded. As aspects of and flowing from the first element of the definition, the second and third elements provide further support for our view that the action must be an explicit and affirmative act of delegation or command. We note, in this regard, that the "entrusts or directs" language in subparagraph (iv) is followed by the language "a private body to carry out . . . ", which is similar to that which we have used to describe the second and third elements of the definition of entrustment or direction. Thus, the subsequent language in subparagraph (iv) confirms our view of the requirement of an explicit and affirmative action.

8.31 Government entrustment or direction is thus very different from the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market. Indeed, governments intervene in markets in various ways, and with various policy or profit objectives, and these interventions might have various results, including results that are not intended by, or that are even undesirable for, the government. We do not see how a scenario of this type would comprise the three elements that we consider to be germane to the definition of entrustment or direction. That is, the fact that two different government actions might happen to have the same *result* in a given situation does not transform the *nature* of the actions, i. e., it does not mean that the two actions are effectively one and the same. Otherwise put, the distinction that we make between entrustment or direction and a government intervention which might or might not have a particular effect in a particular market at a particular time is not merely semantic.

8.32 The phrase "entrusts or directs" in Article 1.1(a)(1)(iv) is immediately preceded by the phrase "a government makes payments to a funding mechanism *or*". We consider that these two phrases are aimed at capturing *equivalent* government actions. Both are government actions that substitute an intermediary (whether a funding mechanism or a private body) to make a financial contribution that otherwise would be made directly by the government. In other words, the action of a government making payments to a funding mechanism and that of it entrusting or directing a private body to carry out the functions listed in subparagraphs (i)-(iii) are *equivalent* government actions. This is further contextual support for our view that entrustment or direction constitutes an explicit and affirmative action, comparable to the making of payments to a funding mechanism.

8.33 Our understanding of the United States' view is that, where the *effect* of an export restraint is to induce domestic producers to sell their product (in greater quantities or exclusively) to the domestic purchasers/users of that product, this is the same as if the government had explicitly and affirmatively ordered the domestic producers to do so, and that thus there is a financial contribution in the form of government-entrusted or government-directed provision of goods. In forwarding this argument of "functional equivalence" or "conceptual equivalence", the United States focuses primarily on the *effects* or the *results* of a government action, rather than on the *nature* of the action, in order to determine whether that action constitutes a financial contribution. Thus, according to the US approach, the existence of a financial contribution in the case of an export restraint depends entirely on the reaction thereto of the producers of the restrained good, and specifically on the extent to which they increase their domestic sales of the restrained product because of the restraint. Under

the US approach, the existence of a financial contribution in the case of an export restraint therefore actually *cannot* be determined from the nature of that action (the export restraint) as such.

8.34 We consider that it cannot be the case that the nature of a Member government's measure under the SCM Agreement is to be determined solely on the basis of the reaction to that measure by those it affects. Rather, the existence of a financial contribution by a *government* must be proven by reference to the action of the *government*. To determine whether a financial contribution exists under subparagraph (iv) solely by reference to the reaction of affected entities would mean in practice that a different standard would apply under that provision as compared to the standard under subparagraphs (i)-(iii), which involves consideration of the action of the government first. Similarly, we do not see how the reaction of private entities to a given governmental measure can be the basis on which the Member's compliance with its treaty obligations under the WTO is established.

8.35 Moreover, applying the "effects" approach to the question of whether a financial contribution exists would have far-reaching implications. In particular, it would seem to imply that any government measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a government-entrusted or government-directed provision of goods, and hence a financial contribution. While the United States does not appear to argue that this is the result it seeks, it points to no legal basis on which export restraints could be distinguished from other measures causing the same sorts of market effects. In response to a question as to what such a legal basis would be under the US approach, the United States submits:

> "First, under the ordinary meaning of 'direct', there would have to be the requisite causal connection between the government measure and the behaviour of private actors in order for a financial contribution to exist . . . Thus, the legal basis is found in subparagraph (iv) itself. Second . . . it would be short-sighted to focus solely on the financial contribution element of an actionable subsidy . . . One must take into account the fact that the application of the concepts of 'benefit' and 'specificity' will weed out government measures that might arguably satisfy the definition of 'financial contribution'."[130]

8.36 Thus, the only "legal basis" cited by the United States is the "causal connection between the government measure and the behaviour of private actors". Given that such a causal connection could exist in respect of a wide variety of government measures, by this argument the United States seems implicitly to acknowledge that, under its approach, any government measure that *caused* an increase in the domestic supply of a good would, for that reason alone, constitute government-entrusted or government-directed provision of goods and hence a financial contribution.

8.37 A hypothetical example better illustrates the difficulties of the US "effects" approach. Let us assume that a government imposes extremely high tariffs on imports of coal. It follows that the price of imported coal in the domestic market would increase and the supply thereof would perhaps decrease. Domestic downstream users of coal, such as steel producers, would probably find it more economical to purchase coal from domestic producers, who would thus see an increase in their sales volumes and would be likely to secure better terms of sale as well. A government action – the imposition of high tariffs on coal – would have benefited producers of coal by causing downstream users of coal to make a greater proportion of purchases from domestic producers vis-à-vis foreign producers as compared to the situation prior to the imposition of such tariffs. Surely this cannot be considered to be a situation where a government "entrusts or directs" a private body (users of coal) to purchase goods within the meaning of subparagraph (iii) – or "entrusts or directs" a private body (producers of coal) to provide goods within the meaning of subparagraph (iii) – and hence to

[130] Response of the United States to question 36(a) from the Panel following the first meeting.

constitute a financial contribution, although that is precisely the result that applying the US "effects" approach would yield. Were that to be the case, tariffs would constitute financial contributions and, given that they would necessarily confer a benefit on some actors in the market, tariffs would constitute subsidies within the meaning of Article 1 of the SCM Agreement.

8.38 In the above example of imposition of tariffs, there may well be a question as to consistency with Article II of the GATT 1994, which deals with Members' schedules of concessions. It is, however, doubtful that the concept of financial contribution contained in Article 1.1(a) of the SCM Agreement seeks to bring such government action within the ambit of the SCM Agreement. To the contrary, by introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy[131]. Indeed, this is arguably the principal significance of the concept of financial contribution, which can be characterised as one of the "gateways" to the SCM Agreement, along with the concepts of benefit and specificity. To hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the Agreement.

8.39 We note in this context that in the Uruguay Round the United States took the position that benefit was the key factor in the determination of the type of measure that constituted a subsidy.[132] Similarly, in this dispute, the United States submits, in response to questions from the Panel concerning the determination of "entrusts or directs", and the legal significance, if any, of the concepts of "benefit" and "specificity" for interpretation of the term "financial contribution", that:

> "[U]nder the ordinary meaning of 'direct', there would have to be the requisite causal connection between the government measure and the behaviour of private actors in order for a financial contribution to exist . . . ";[133]
>
> and that:
>
> "The requirements of 'benefit' and 'specificity' are relevant [to the question of legal interpretation of the concept of 'financial contribution'] because Canada and the European Communities [] are attempting to induce the Panel to adopt an unwarrantedly narrow interpretation of subparagraph (iv) based on unsubstantiated allegations of a 'parade of horribles' that supposedly would occur if their narrow interpretation is not accepted. However, the fact is that the 'benefit' and specificity' elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable."[134]

We understand the United States' response to our question of legal interpretation to be primarily that the practical consequences of a broad interpretation of the concept of financial contribution would be limited because in practice such an interpretation will not convert enormous numbers of government regulatory measures into subsidies, in view of the probable absence in many cases of benefit and specificity.

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[131] *See* paras. 8.66-8.69, *infra*, on negotiating history.

[132] Submission by the United States, MTN.GNG/NG10/W/29, 22 November 1989, para. II.1(a) (Exhibit CAN-34).

[133] Response of the United States to Question 36(a) from the Panel following the first meeting.

[134] Response of the United States to question 36(b) from the Panel following the first meeting.

8.40 But this response is not satisfactory; the requirements of "benefit" and "specificity" are separate legal questions from, and are *not* relevant to, the legal interpretation of the term "financial contribution"[135]. The US effects-based approach implies that the "financial contribution" element is not a meaningful legal requirement and thus not a limiting factor in itself in respect of the determination of the type of measure that falls within the scope of the SCM Agreement, and that the only limiting factors are "benefit" and "specificity". This of course cannot be correct. Indeed, as noted above, the Appellate Body stated in *Brazil – Aircraft* that "the issues – and the respective definitions – of a 'financial contribution' and a 'benefit' are two separate legal elements in Article 1.1 of the SCM Agreement, which *together* determine whether a 'subsidy' exists".[136] We believe therefore that the US approach would effectively, and impermissibly, eliminate financial contribution as a "separate legal element".

8.41 We find further support in the reasoning of the Appellate Body in the appeal of the original Panel ruling in *Canada – Aircraft* for our view that the United States' "effects" approach (i. e., increase as a matter of fact in the domestic supply of the restrained good as a result of an export restraint) is an impermissible basis for determining the existence of a financial contribution under subparagraph (iv). In the *Canada – Aircraft* appeal, the specific definitional question under the SCM Agreement was the meaning of *de facto* export contingency in the sense of SCM Article 3.1(a) and footnote 4. The underlying principle was, however, similar. In particular, Canada argued in that case that, for a subsidy to be *de facto* contingent on export performance, it "*must cause the recipient to prefer exports to domestic sales*".[137]

8.42 The Appellate Body rejected this argument and essentially agreed with Brazil and the United States that the focus of the SCM Agreement's obligations is on the granting government[138]. The Appellate Body stated that "[i]t does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result"[139], and elaborated that, while "[a] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result . . . that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation"[140]. In other words, the Appellate Body found that a *cause and effect relationship* between the subsidy and actual or anticipated trends in exports was *not* sufficient to satisfy the "tied to" standard of conditionality for export contingency to exist.[141] Similarly, in the case before us, for the "entrusts or directs" standard to be met, i.e., for there to be a financial contribution in the sense of subparagraph (iv), the government's *action* must be the focus, rather than the possible *effects* of the action on, or the reactions to it by, those affected, even if those effects or reactions are expected.

8.43 Nor are we persuaded by the parallel that the United States seeks to draw, in support of its cause-and-effect argument, between a certain statement in the *Canada – Dairy* Panel's findings in

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[135] We believe, in particular, that the appropriate way to conceive of "financial contribution" is purely as a transfer of economic resources by a government to private entities in the market, without regard to the *terms* of that transfer. Such a transfer can be effected either by a government directly (subparagraphs (i)-(iii)) or indirectly through private bodies (subparagraph (iv)). The question of the terms on which the transfer is made does not have to do with the existence of a financial contribution but rather goes to the separate issue of benefit, as Article 14 makes clear, by providing that to determine whether a benefit exists, the terms of the financial contribution need to be compared with the market terms.

[136] *Brazil – Export Financing Programme for Aircraft*, Appellate Body Report, WT/DS46/AB/R, adopted 20 August 1999, para. 157 (emphasis in original).

[137] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, para. 20.

[138] *Id*., para. 170.

[139] *Id*., para. 170.

[140] *Id.*, para. 171.

[141] *Id.*, paras. 171-172.

respect of item (d) of the Illustrative List of Export Subsidies[142] (which findings in any event were rendered moot by the Appellate Body), and the "entrusts or directs" standard of SCM Article 1.1(a)(1)(iv)[143]. In particular, the panel statement cited by the United States is that it was not necessary "that the federal or provincial governments specifically direct a certain outcome or course of action to be achieved or taken" for the milk pooling system at issue to constitute provision of goods by a government "through government-mandated schemes" in the sense of item (d) of the Illustrative List. In fact, this statement by the *Canada – Dairy* Panel, when seen in its full context, leads to the opposite conclusion from that advanced by the United States. First, the general context for the statement was the Panel's finding that it was the government (and not marketing boards or other entities acting on their own) that decided which milk should be sold to which customers at which prices, and that enforced these decisions through a system of permits and other measures. Second, the immediate context for the cited statement of the Panel was that, even to the extent that the marketing boards and other entities had some discretion to make certain marketing decisions, that discretion had been *explicitly delegated* to them by the government and thus the exercise of that discretion (i. e., the situation where the government did not "specifically direct a certain outcome or course of action") did not alter the conclusion that milk was being provided through "government-mandated schemes". This is neither the same as nor analogous to the US approach and thus provides no support for the US argument that an increase in the domestic supply of a good which happens to result, as a matter of fact, from the application of some government intervention in the market for that good constitutes government-entrusted or government-directed provision of the good.[144] To the contrary, the Panel made this statement in reference to a market every aspect of the operation of which was explicitly and tightly controlled and managed by the government.

8.44 In sum, we consider that the ordinary meanings of the words "entrusts" and "directs" require an explicit and affirmative action of delegation or command. Moreover, we find that the "effects" test (i. e., a proximate causal relationship)[145] advanced by the United States as the definition of "entrusts or directs" has implications which in our view would be contrary to the intended scope and coverage of the SCM Agreement, in that it would effectively read out of the text of Article 1 the financial contribution requirement. Thus, we find that an export restraint in the sense that the term is used in this dispute cannot satisfy the "entrusts or directs" standard of subparagraph (iv).

(ii) "Private body"

8.45 In its initial submissions in this dispute, Canada takes issue with the idea that the individual producers of a good subject to export restraints could be considered to be a "private body". The essence of Canada's argument on this point is that the term "private body" connotes a "collectivity" which a disparate group of producers does not have. For Canada, a "private body" is an organised private group or collective entity that has a separate and independent existence. The fact that a given group of individuals can be described by a common characteristic (e. g., gold miners), would not transform the universe of such individuals into a "private body".

8.46 However, in its later submissions in this dispute, Canada seems to indicate that an explicit government direction or entrustment to a given producer or group of producers, whether individually

[142] SCM Agreement, Annex I.

[143] First Written Submission of the United States, paras. 62, 65-66.

[144] We note that the United States premises this argument on its view that item (d) of the Illustrative List, and the *Canada – Dairy* Panel's reasoning in respect thereof, constitute relevant context for the concept of government-entrusted or government-directed provision of goods in the sense of SCM Article 1.1(a)(1)(iii) and (iv), on the grounds that "indirect subsidies falling under item (d) must involve financial contributions within the meaning of Article 1.1(a)(1)(iv)". Given that the passage from *Canada – Dairy* cited by the United States does not stand for the proposition asserted by the United States, we do not believe that it is necessary to consider, as such, the relationship between SCM Article 1 and the Illustrative List in SCM Annex I.

[145] *See* para. 8.26, *supra*.

or collectively, and no matter how identified or defined, would itself transform those producers into a "private body" in the sense of subparagraph (iv). According to Canada:

> "In order for a government to entrust or direct someone to do something, there must be some sort of government communication with the person or group so entrusted. This could occur in a variety of ways . . . Whatever device is available or chosen would identify the person(s) to whom the entrustment or direction was given and would impose the obligation on that person(s) to carry out a specific financial contribution . . . "[146]

According to Canada, the term "private body" is thus given meaning by the surrounding text in subparagraph (iv), which includes the function of government entrustment or direction.[147]

8.47 The United States essentially submits that Canada's (original) argument would suggest that, even if the government in question were to command each of the many private producers of a given product to act in a certain way, these producers nevertheless could not be deemed to be "private bodies" in the sense of Article 1.1(a)(1)(iv), because they were not organised into a collective entity of some sort. In other words, for the United States, Canada seems to indicate that only an organised body or collective entity with a separate existence can in Canada's view be a "private body". The United States argues that nothing in the text implies such a limitation of the term "private body". In the US view, any private entity is a private body, whether or not organised as a "collectivity". Rather, any common characteristic in respect of a given group of individuals *does* transform the universe of such individuals into a "private body". For instance, in the case of an export restraint, producers of the good subject to the export restraint would constitute a "private body". Moreover, for the United States, as long as there is *some* entity that could constitute a private body, Canada has not discharged its burden of proof in respect of this element.

8.48 We note that the original argument by Canada is essentially supplanted by its argument as to the nature (i. e., explicitness) of a government action that is necessary for that action to constitute government "entrustment or direction" of a private body to do something. Canada thus appears effectively to have dropped its "organised" entity approach. To our minds, the difference of opinion between the parties on the definition of "private body" therefore hinges on the difference of opinion between them on the definition of "entrusts or directs". In other words, under the approach advanced by both parties, it is the nature of entrustment or direction that would define the composition of the relevant "private body", and the latter could only be identified as a function of the former.

8.49 We believe that the term "private body" is used in Article 1.1(a)(1)(iv) as a counterpoint to "government" or "any public body" as the actor. That is, any entity that is neither a government nor a public body would be a private body. Under this reading of the term "private body", there is no room for circumvention in subparagraph (iv)[148]. As it is a government or a public body that would have to entrust or direct under subparagraph (iv), any entity other than a government or a public body could receive the entrustment or direction and could constitute a "private body". This is entirely logical. We do not consider that there is any need for a further definition of "private body", be it in reference to the nature of entrustment or direction or a common characteristic or some other factor. To the contrary, if there were such a further narrowing of the term "private body" in the Agreement, this would effectively exclude from any subsidy disciplines actions by some entities even if the entities in question had been explicitly and affirmatively ordered to take those actions by a government. For

[146] Response of Canada to question 26 from the Panel following the second meeting.
[147] *Id.*
[148] *See* paragraph 8.53 , *infra*.

these reasons, we conclude that the companies or other entities affected by or reacting to an export restraint would be "private bodies" in the sense of subparagraph (iv).

(iii) "To carry out one or more of the type of functions illustrated in (i) to (iii) above"

8.50 We note that, although there is disagreement between the parties as to the meaning of the phrase "one or more of the type of functions illustrated in (i)-(iii) above", this disagreement is not about whether the physical action at issue would or would not be provision of goods, a function explicitly identified in subparagraph (iii). Both parties recognise, as we also do, that an export restraint could result in a private body or bodies "provid[ing] goods". In this sense, an export restraint could satisfy this element of subparagraph (iv).

8.51 Instead, the parties' disagreement as to the meaning of this phrase has to do with whether the word "type" in this phrase means, as the United States argues, that subparagraph (iv) encompasses a "wide spectrum of potentially actionable government mechanisms", *inter alia*, export restraints. In particular, the United States argues that the word "type" means "the general form, structure, or character distinguishing a particular group or class of thing", and on this basis argues that the inclusion of this word suggests that functions of the same general form, structure, or character as those illustrated in subparagraphs (i)-(iii) would likewise constitute the indirect provision of a financial contribution. Canada considers that the phrase "one or more of the type of functions illustrated in (i) to (iii)" refers only to any *one* of the functions listed in subparagraphs (i)-(iii), and that an export restraint, a direction *not* to export, is not the same "type" of function as an affirmative direction to provide goods domestically.

8.52 The argument of the United States concerning the word "type" is unclear. As noted above, there is no disagreement between the parties, nor do we disagree, that the physical function at issue in the context of an export restraint would be provision of goods. The word "type" does not need to be interpreted broadly to arrive at this conclusion. On the other hand, if what the United States is arguing here is that an export restraint, itself a government function, can be seen pursuant to subparagraph (iv) as the same "type of function" as one of the government functions identified in subparagraphs (i)-(iii), we do not see how such an argument would fit within the framework of subparagraph (iv). That is, subparagraph (iv) has to do with the entrustment or direction by a government to a *private body* of one of the *government* "functions" identified in subparagraphs (i)-(iii). We do not see how the use of the word "type" before the word "function" in subparagraph (iv) would transform the meaning and operation of that subparagraph such that it would encompass functions performed by a *government* other than those identified in subparagraphs (i)-(iii).

8.53 Thus, we find no support in the text of the Agreement for the US reading of the word "type". Rather, in our view, the phrase "type of functions" refers to the physical functions identified in subparagraphs (i)-(iii). In this regard, we believe that the intention of subparagraph (iv) is to avoid circumvention of subparagraphs (i)-(iii) by a government simply by acting through a private body. Thus, ultimately, the scope of the actions (the physical functions) covered by subparagraph (iv) must be the same as those covered by subparagraphs (i)-(iii). That is, the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*. The phrase "type of functions" ensures that this is the case, that is, that Article 1 covers the types of functions identified in subparagraphs (i)-(iii) whether those functions are performed by the government itself or are delegated to a private body by the government.

8.54 As for the specific word "type", we see this as referring to the fact that *each* of subparagraphs (i)-(iii) constitutes by itself a general "type of functions" that encompasses one or more *categories* of behaviour. The subsequent phrase "illustrated in (i) to (iii) above" confirms this. In particular, subparagraphs (i)-(iii) each refer to *multiple* government actions and provide examples

thereof. Subparagraph (i), for instance, refers to three general categories (direct transfers of funds; potential direct transfers of funds; and potential direct transfers of liabilities) of the "type of function" of transfers of funds and liabilities.

8.55 We therefore find that the phrase "type of functions" refers to the physical functions encompassed by subparagraphs (i)-(iii), and does not expand the scope of subparagraph (iv) beyond these, to encompass other kinds of "government mechanisms".

(iv) "Which would normally be vested in the government" and "the practice, in no real sense, differs from practices normally followed by governments"

8.56 Canada argues that an export restraint, because it does not constitute government-entrusted or government-directed provision of goods, also would not fulfill the "normally vested" and "in no real sense differs" language in Article 1.1(a)(1)(iv). For Canada, this language also establishes legal requirements that must be met for there to be a financial contribution under this provision. That is, according to Canada, in the case where the government entrusts or directs a private body to carry out one of the functions listed in subparagraphs (i)-(iii), the function must be one that would normally be vested in the government, and must not differ in any real sense from practices normally followed by governments. In Canada's view, the drafting of this text indicates that these conditions are requirements, specifically of a *habitual practice* by a government of engaging in one of the functions enumerated. Canada observes that the limiting effect of these conditions is consistent with the purpose of subparagraph (iv) to ensure that a government cannot avoid otherwise applicable subsidy disciplines by using a private sector surrogate to make financial contributions that the government normally would have made directly. Thus, Canada's argument suggests that the scope of the actions covered by subparagraph (iv) is narrower than the scope of the actions covered by subparagraphs (i)-(iii).

8.57 We note that the United States, for its part, argues that the functions identified in subparagraphs (i)-(iii) are "normal" government functions in the context of government provision of subsidies.[149] The United States submits that the "normally vested" and "in no real sense differs" language originated in the 1960 report of the Panel on *Review Pursuant to Article XVI:5*, in which similar language was used in respect of producer-funded levies that were deemed not to differ, in any real sense, from government practices of taxation and subsidisation (That Panel referred to the government taking part "either by making payments into a common fund or entrusting to a private body the functions of taxation and subsidisation with the result that the practice would in no real sense differ from those normally followed by governments"[150]). Thus, for the United States, these last elements of Article 1.1(a)(1)(iv) mean that the functions in question are those where the government would be engaged in taxation and/or subsidisation, which in the US view could include the instituting of an export restraint.

8.58 We view the US argument as suggesting that the scope of the actions covered by subparagraph (iv) is broader than the scope of the actions covered by subparagraphs (i)-(iii). In particular, by arguing that for the "normally vested" and "in no real sense differs" language to be satisfied, the government must be engaging in "subsidisation", the United States' reasoning seems to be circular, in that it appears to import the concept of benefit into the concept of financial contribution.[151] We believe that, under such an approach, any government market intervention that

[149] Comment of the United States on question 12(a) from the Panel to Canada following the first meeting.

[150] *Review Pursuant to Article XVI:5*, Report of the Panel, L/1160, adopted 24 May 1960 (BISD 9S/188), para. 12.

[151] The United States indicates that "in stating that 'normal' government functions refer to government action in the context of providing subsidies, [it] was using the term 'subsidies' in the non-technical, vernacular

involved a reallocation of resources which created a benefit would be viewed as involving "subsidisation" in the broad sense used by the United States, and thus as satisfying the financial contribution requirement. In other words, under this approach, subparagraph (iv) would treat as financial contributions government actions that created "benefits" even when those actions were not among the functions encompassed by subparagraphs (i)-(iii).

8.59 While we have serious doubts regarding both of the parties' arguments as to the implications for the scope of subparagraph (iv) of the "normally vested" and "in no real sense differs", we do not consider that making a finding regarding the precise meaning of this language is necessary to resolve this dispute. In particular, these arguments do not directly address the basic question raised by Canada's argument that an export restraint, because it does not constitute government entrustment or direction of the provision of goods, for that reason would not satisfy the "normally vested" and "in no real sense differs" language. We note that for an export restraint *never* to be able to satisfy these textual elements, logically it would have to be the case that no government ever provided goods in the sense of subparagraph (iii) (something that Canada clearly does not argue), as only then could it be said that provision of goods would never be "normally vested" in a government. Thus, we do not see how Canada's argument, that the "normally vested" and "in no real sense differs" language *narrows* the circumstances in which there would be government entrustment or direction of the provision of goods, would rule out the possibility that an export restraint could potentially constitute such a provision of goods.

(e) Object and purpose

8.60 We recall that, under Article 31 of the *Vienna Convention*, the terms of a treaty must be read in light of the treaty's object and purpose.

8.61 The United States cites the statement of the panel in *Brazil – Aircraft* that "the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade". It further cites the statement of the panel in *Canada – Aircraft* that "the object and purpose of the SCM Agreement could more appropriately be summarised as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]'".[152] The United States argues that "[b]y emphasising the need to address government interventions that distort international trade – regardless of whether or not a government has incurred a cost – the panel [in *Canada – Aircraft*] confirmed that the curtailment of market-distorting government interventions is the central purpose of the SCM Agreement". The United States further submits that "the object and purpose of the SCM Agreement must inform the interpretation of the textual provisions at issue . . . [T]he meaning of these provisions should not be improperly narrowed to exclude measures commonly understood to be subsidies that distort trade, where the text would not exclude them and where doing so would frustrate the object and purpose of the Agreement".[153]

8.62 We agree with the statements both of the Panel in *Brazil – Aircraft* and of that in *Canada – Aircraft* as to the object and purpose of the SCM Agreement in disciplining certain forms of government action. It does not follow from those statements, however, that every government intervention that might in economic theory be deemed a subsidy with the potential to distort trade is a subsidy within the meaning of the SCM Agreement. Such an approach would mean that the "financial contribution" requirement would effectively be replaced by a requirement that the

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sense, similar to the manner in which it was used in *Review Pursuant to Article XVI:5*" (Response to question 25 from the Panel following the first meeting, citation omitted). We are not convinced, however, that this explanation eliminates the circularity of the US argument.

[152] First Written Submission of the United States, paras. 14, 16.

[153] Response of the United States to question 18 from the Panel following the first meeting.

government action in question be commonly understood to be a subsidy that distorts trade. The legal meaning of the term "subsidy" must, however, be derived from an analysis of the text and context of Article 1 of the SCM Agreement.

8.63 Moreover, we do not see any contradiction between the said object and purpose of the SCM Agreement and the fact that certain measures that might be commonly understood to be subsidies that distort trade might in fact be *excluded* from the scope of the Agreement. Indeed, while the object and purpose of the Agreement clearly is to discipline subsidies that distort trade, this object and purpose can only be in respect of "subsidies" *as defined* in the Agreement. This definition, which incorporates the notions of "financial contribution", "benefit", and "specificity", was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement (*See* Section VIII.B.3(f) on negotiating history, *infra*).

(f) Negotiating History

8.64 The Appellate Body states, in *Japan – Alcoholic Beverages*, that "[t]here can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status [as Article 31, of a rule of customary or general international law]"[154]. Article 32 of the *Vienna Convention* reads as follows:

> ARTICLE 32
>
> *Supplementary means of interpretation*
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

Pursuant to Article 32 of the *Vienna Convention*, negotiating history can thus be invoked as a supplementary means of interpretation, to confirm a conclusion reached on the basis of a textual and contextual analysis of a treaty. We therefore consider it useful to review the negotiating history of SCM Article 1 generally and its "financial contribution" requirement in particular.

(i) Negotiating history of the inclusion of the "financial contribution" requirement

8.65 The negotiating history of Article 1 confirms our interpretation of the term "financial contribution". This negotiating history demonstrates, in the first place, that the requirement of a financial contribution from the outset was intended by its proponents precisely to ensure that not all government measures that conferred benefits could be deemed to be subsidies. This point was extensively discussed during the negotiations, with many participants consistently maintaining that only government actions constituting financial contributions should be subject to the multilateral rules on subsidies and countervailing measures.[155]

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[154] *Japan – Taxes on Alcoholic* Beverages ("*Japan – Alcoholic Beverages*"), Report of the Appellate Body, WT/DS8/AB/R-WT/DS10/AB/R-WT/DS11/AB/R, adopted 1 November 1996, p. 10.

[155] *See*, e. g., Canada: "A basic condition for countervailability of a given measure should be the existence of a financial contribution by a government" (MTN.GNG/NG10/W/25); the European Communities:

8.66 Prior to the Uruguay Round, the multilateral subsidy and countervailing measures disciplines were contained in Article XVI and VI, respectively, of GATT 1947, and the Tokyo Round Subsidies Code. None of these provisions contained a definition of "subsidy". Rather, they simply referred to the term "subsidy". In spite of the existence of multilateral disciplines on the provision of subsidies, there was in practice very little GATT dispute settlement pursuant to these disciplines, and little attention in that context to the meaning of the term "subsidy". There was, by contrast, relatively frequent recourse to countervailing measures by a certain group of countries (including the United States), with each country that used such measures implementing its own definition of subsidy under its domestic procedures.

8.67 The United States in particular developed a definition which treated as countervailable subsidies "formal, enforceable" government measures "which directly led to a discernible benefit being provided"[156]. In other words, the United States' pre-WTO approach was to define as countervailable subsidies *benefits* arising from government action, regardless of the nature of that action.[157] This approach was controversial with other GATT contracting parties, who considered that not every sort of government measure that conferred a benefit could be considered to be a potential subsidy.[158] During the Uruguay Round, numerous participants in the Negotiating Group on Subsidies and Countervailing Measures ("the Negotiating Group") stressed the need to develop a definition of the term "subsidy", because of the problems caused by the lack of a uniform definition, particularly in the context of countervailing actions.[159] This point of view was expressed from the outset, as is evident from the first (September 1987) version of a checklist of issues for negotiations which was compiled by the Secretariat from submissions of the participants, an example of which was the following statement: "There is a need to review the Code with a view to adopting criteria for the determination of countervailable subsidies (government's expenses, grantee's benefits, or specificity). This revision would also aim at *defining the difference between subsidies and various trade distorting measures*."[160]

"Subsidies in international trade exist only when a financial charge has been incurred by a government or administrative authority on behalf of a beneficiary" (MTN.GNG/NG10/W/7); Egypt: "Only 'measures which constitute a charge on the public account or government budget such as grants, concessional loans, loan guarantees' constitute a subsidy" (MTN.GNG/NG10/W/14); India: "A financial contribution is a necessary prerequisite" (MTN.GNG/NG10/W/16); Japan: "A financial contribution by a government [should] be considered as an essential criterion for determining the existence of a subsidy" (GNG.NG10/W/8); the Nordic countries: "Countervailing action . . . [should] be made conditional upon a government practice which involves a net transfer of funds from public sources to the recipient" (GNG.NG10/W/30); Switzerland: "Actionable subsidies are all measures which result directly or indirectly in a net transfer of funds . . . from public sources to the recipient" (MTN.GNG/NG10/W/26).

[156] SAA, p. 926.

[157] *See*, e.g., the US DOC determination in the 1982 steel cases, set forth in SCM/36, 27 October 1982. There, it is noted that the DOC, to determine whether respondents had received subsidies within the meaning of the US CVD law, sought to determine "whether or not respondents have received directly or indirectly an economic benefit".

[158] For example, the European Communities, commenting on the quoted statement from the 1982 steel cases, stated in a paper to the Tokyo Round SCM Committee (G/SCM/35, item A.2), that "[w]hile [a] benefit is necessary for a determination of the existence of subsidy, it is not, however, the measure of the subsidy". Rather, in the view of the European Communities, for a subsidy to exist, there needed to be a charge on the public account, from which a benefit flowed to an industry.

[159] E. g., the European Communities: "The key issue upon which the resolution of all other open questions is predicated is the definition of a subsidy" (MTN.GNG/NG10/W/7); Canada: Unilateral interpretations due to lack of agreement on the concept of a subsidy "have caused uncertainty and trade conflicts" (MTN.GNG/NG10/W/22); Egypt: "Serious problems have arisen . . . as *inter alia* [] there is no clear definition of what constitutes subsidies" (MTN.GNG/NG10/W14).

[160] MTN.GNG/NG10/W/9, 7 September 1987, Section III.1 (emphasis added).

8.68 During the discussions in the Negotiating Group which led to the definition of "subsidy" that was eventually included in the text of Article 1, the basic difference between defining subsidy solely on the basis of the existence of a "benefit" conferred by any government action (the position taken by the United States[161]), on the one hand, and requiring a "government financial contribution" as a means of limiting the universe of government actions that could be considered a subsidy (the position taken by essentially all other participants), on the other, was articulated with some precision. Canada, for example, stated that "while virtually any government action could be construed as having possible effects on production and trade, *there need to be some outside limits on the scope of government activity that can be considered to be a subsidy* and subject to countervail"[162]. Canada further stated that:

> "GATT practice and disciplines on subsidies reflect a general view that subsidies exist where the price mechanism is affected by the exercise of government authority to impose tax and to expend revenue, whether directly or through delegation of authority. Current rules apply to practices which involve a direct transfer of funds, potential direct transfers or liabilities, and foregone revenue.
>
> . . .
>
> Accordingly, building upon current rules, a basic condition for countervailability of a given measure should be the existence of a financial contribution by government."[163]

8.69 Obviously, Article 1 as ultimately adopted incorporates the requirement of a financial contribution by a government or other public body as a necessary element of a subsidy. The submissions by participants to the negotiations suggest that the proponents' purpose behind including this element was to limit the *kinds* of government actions that could fall within the scope of the subsidy and countervailing measure rules. In other words, the definition ultimately agreed in the negotiations definitively rejected the approach espoused by the United States of defining subsidies as benefits resulting from any government action, by introducing the requirement that the government action in question constitute a "financial contribution" as set forth in an exhaustive list.[164]

(ii) Negotiating history of the definition of "financial contribution"

8.70 The negotiating history also confirms our understanding of the meaning of the term "financial contribution" as set forth in subparagraphs (i)-(iv). The participants advocating the introduction of a

[161] The United States proposed during the negotiations that "subsidy" be defined as "any government action or combination of actions which confers a benefit on the recipient firm(s)". MTN.GNG/NG10/W/29, "Elements of the Framework for Negotiations – Submission by the United States", 22 November 1989, Section II.2(a).

[162] MTN.GNG/NG10/W/22, Statement made by Canada at the Negotiating Group meeting of 28-29 June 1988 (emphasis added).

[163] MTN.GNG/NG10/W/25, Submission by Canada, 28 June 1989 (emphasis added).

[164] The United States itself, as evidenced by its various submissions on "targeting", seems to have recognised that the requirement of financial contribution would exclude some forms of government measures that might provide benefits. In particular, the United States, in a June 1988 submission stated that "most targeting practices fall outside even the most expansive international definitions of a 'subsidy' and, as a result, Article VI and XVI rights and remedies do not cover industrial targeting *per se*", and proposed that the Negotiating Group examine the targeting issue "with a view to determining whether some forms of government industrial policies aimed at promoting export-oriented industries *have effects analogous to those of a subsidy* and result in economic damage to the legitimate interests of other trading nations" (MTN.GNG/NG10/W20, emphasis added).

"financial contribution" requirement expressed a range of views during the negotiations concerning the precise meaning of the term "financial contribution", from limiting it to a "charge on the public account" or a "cost to government" to encompassing government transfers including those effected through non-governmental agents.[165]

8.71 The broader proposed definition closely reflects a view expressed, prior to the commencement of the Uruguay Round negotiations, by the Group of Experts on the Calculation of the Amount of a Subsidy (a body operating under the Tokyo Round Committee on Subsidies and Countervailing Measures). This view was quoted at length in one of the first papers prepared by the Secretariat at the request of the Negotiating Group – a summary of, *inter alia*, the existing status of the discussion of the GATT rules on countervailing measures and subsidies. The paper quotes the Group of Experts as follows:

> "It is suggested that there can be no subsidy in the absence of a financial contribution by government, or in other words that a subsidy presupposes such a contribution. Such an approach would seem to be useful to the extent that it underlines that there is a necessary link between a subsidy and the taxation function of government, exercised either directly or delegated to other, private bodies as suggested by a panel report based on a review of Article XVI, set out in BISD 9th Supplement. Paragraph 12 of the report examines the issue of subsidies by a non-government levy. While the panel felt that no hard and fast rule could be set down in view of the many forms action of this kind could take, it nonetheless clearly stated that 'there was no doubt that there was an obligation to notify all schemes of levy/subsidy affecting imports or exports in which the government took a part either by making payments into a common fund or by entrusting to a private body the functions of taxation and subsidisation with the result that the practice would be in no real sense different from those normally followed by governments'. There may be similar situations in which a government chooses to direct a private body to carry out certain functions related to the sovereign right of governments to collect revenues and expend them. An examination of the possible subsidy practices enumerated in Article 11.3 of the Code further illustrates the various forms government financial contributions can take. There are practices which involve a *direct transfer of funds (e. g., grants and loans); those involving potential direct transfers, or liabilities (e. g., loan guarantees); and those involving revenue foregone or not collected (fiscal incentives such as investment tax credits to specified industries). Such practices would seem to be simply specific examples of the general principle suggested by the Panel report in BISD, 9th Supplement, that subsidies exist where the government exercises its authority to impose tax and expend revenue, whether directly or through delegation of its taxing and [sic] authority*."[166]

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[165] These positions were summarised in a note by the Secretariat concerning the Negotiating Group's meeting of 26-27 September 1989:

> "Another important criterion [for the definition of an actionable subsidy] for [certain] participants was that of the charge on the public account in the sense of a financial contribution by a government (or revenue foregone). A view was expressed that this concept should cover not only direct but also *indirect transfers of funds (e. g. transfer from a government through non-governmental agents) in order to prevent any circumvention . . .*" (MTN.GNG/NG10/13, emphasis added).

[166] MTN.GNG/NG10/W/4, "Subsidies and Countervailing Measures – Note by the Secretariat", 28 April 1987, Section 4.1.A (footnote omitted, emphasis added).

8.72 We find particularly significant in the statement of the Group of Experts how nearly identical its characterisation of the "forms" of government financial contribution is to the text of SCM Article 1.1(a)(i)-(iii). We also find very significant the Group of Experts' interpretation that the 1960 Panel's reference to "practice . . . in no real sense different from those normally followed by governments" was a general reference to the *delegation* to private parties of the particular government functions of taxation and expenditure of revenue, and *not* a reference to government market interventions in the general sense, or the effects thereof. Our interpretation, discussed at length above, of the meaning of subparagraphs (i)-(iv) is fully consistent with, and thus is confirmed by, their negotiating history.

(iii) Summary

8.73 In short, the negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of "financial contribution" and "benefit", was intended specifically to prevent the countervailing of *benefits* from any sort of (formal, enforceable) government measures, by restricting to a finite list the *kinds* of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)-(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under subparagraphs (i)-(iii), the government acting on its own behalf is effecting that transfer by directly providing something of value – either money, goods, or services – to a private entity.[167] Subparagraph (iv) ensures that the same kinds of *government* transfers of economic resources, when undertaken through explicit *delegation of those* functions to a private entity, do not thereby escape disciplines.

8.74 We recall our conclusion that subparagraph (iv), to fulfil this clearly-intended function as an anti-circumvention mechanism, cannot change (and in particular cannot expand beyond those actions identified in subparagraphs (i)-(iii)) the *nature* of the kinds of actions that can be considered financial contributions. If it did so, by allowing to be treated as financial contributions, on the basis of their *effects* on private entities, government measures such as export restraints that do *not* constitute government-entrusted or government-directed transfers of economic resources, the door would be reopened to the countervailing of *benefits* regardless of the nature of the government action that gave rise to them. This would effectively render the "financial contribution" requirement meaningless, a result that would be at odds not only with the principles of effective treaty interpretation as discussed at length in the preceding sections, but also with the negotiating history of this requirement.

(g) Conclusion

8.75 For the foregoing reasons, we conclude that an export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement. In other words, we reject the US approach that, because, or to the extent that, an export restraint causes an increased domestic supply of the restrained good, it is the same as if a government had expressly entrusted or directed a private body to provide the good domestically. The remaining textual elements of subparagraph (iv) support this conclusion. This conclusion is also confirmed by the negotiating history of the term "financial contribution". Accordingly, we find that the treatment of export restraints as financial contributions is inconsistent with Article 1.1(a) of the SCM Agreement.

[167] As we have emphasised elsewhere, the question of the terms on which this is done is irrelevant to the existence of a financial contribution, and constitutes instead the separate question of "benefit". Nor, of course, do we mean to imply that a government transfer of economic resources, to be a financial contribution, would have to involve a cost to the government or a charge on the public account. This is clear from the text of the SCM Agreement as well as the relevant negotiating history cited above, and has been confirmed as well in past disputes (notably *Canada – Aircraft*).

8.76 We reiterate that we have interpreted the provisions of the SCM Agreement as they relate to an export restraint as defined by Canada for the purposes of this dispute, i. e., a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports. It is these essential characteristics – which we refer to as an "export restraint" – that delineate the scope of our rulings on Canada's claims. We do not make any judgement as to the WTO-consistency of any other measures that Members might label export restraints or that fall outside the bounds of the definition put forward by Canada. (*See* Section VIII.B.3(a), *supra*.)

4. Whether US law requires the treatment of export restraints as financial contributions

(a) Application of the mandatory vs. discretionary distinction

8.77 We turn now to the question of the treatment under US CVD law of export restraints. In particular, we recall our statement that in considering this treatment, we will apply the classical test. That is, having found that the treatment of export restraints as financial contributions is inconsistent with Article 1 of the SCM Agreement, we now consider whether US law requires such treatment of export restraints. Should US law *require* the treatment of export restraints as financial contributions, whether in some or all cases, given our finding that such treatment would constitute a violation of the SCM Agreement, the United States would be in violation of its WTO obligations.

8.78 We note that the same principle was applied by the Appellate Body in *Argentina – Textiles and Apparel*. In that case, the Appellate Body agreed with the Panel (and the United States) that the imposition of a specific rate of duty violated an *ad valorem* duty binding even though in some circumstances the specific rate of duty would be at or below the level of *ad valorem* binding. In the view of the Appellate Body, where the specific rate of duty exceeded the *ad valorem* binding, the law was in violation of Article II.[168] In other words, it was found that a measure is inconsistent with WTO rules if that measure mandates action inconsistent with WTO rules in particular circumstances, even if in other circumstances the action might not be inconsistent with WTO rules. Therefore, given our finding that treating export restraints (as defined by Canada) as financial contributions would in all cases violate the SCM Agreement, we must examine what, if anything, the US legislation *requires* in respect of the treatment of export restraints in CVD investigations.

8.79 We recall that the Appellate Body confirmed in *1916 Act* that "the relevant discretion, for purposes of distinguishing between mandatory and discretionary legislation, is a discretion vested in the *executive branch* of government"[169]. We shall therefore examine whether the measures identified by Canada require the US DOC to treat export restraints as financial contributions in CVD investigations.

(b) The measures

8.80 We consider it unnecessary for the purposes of this case to accept the invitation of the United States, in its Request for Preliminary Rulings, to define what "measures" are susceptible to review under WTO dispute settlement. As the Appellate Body noted in *Guatemala – Cement*, in the practice established under the GATT 1947, a measure may be any act of a Member, or an omission or a failure

[168] *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items* ("*Argentina – Textiles and Apparel*"), Report of the Appellate Body, WT/DS56/AB/R, adopted 22 April 1998, paras. 62-63.

[169] *1916 Act*, Appellate Body Report, *supra*, footnote 107, para. 89 (emphasis in original).

to act on the part of a Member. [170] In this context, the Appellate Body recalled the finding of the Panel in *Japan – Semiconductors* that measures could consist of both binding and non-binding acts, including non-binding administrative guidance by a government.[171] We agree, and in particular find no reason or basis to rule in the abstract that a given type of instrument or action cannot be the subject of claims in WTO dispute settlement.

8.81 This of course does not mean, however, that all measures are capable by themselves of giving rise to violations of WTO obligations. It is this latter question, as it pertains to the measures at issue in this case, to which we now turn.

(c) The measures "separately" and "taken together"

8.82 Canada argues that each of the elements that it cites (the statute, the SAA, the Preamble, and US practice) individually constitutes a measure that is susceptible to dispute settlement, and that, "taken together" as well, these elements constitute a measure. Further, in the view of Canada, these measures individually *and* collectively require a particular treatment of export restraints. Canada's identification of the measures that it considers to be at issue therefore comprises two notions – that the cited elements are measures both individually and taken together, and that they operate both individually and taken together to require a particular treatment of export restraints.

8.83 The United States strongly disagrees. In addition to the preliminary objections it raises in respect of the status of the SAA, the Preamble, and US "practice" as "measures" (*See* Section IV.A, *supra*), the United States considers that "it is dangerous for the Panel to seek to analyse an ill-defined 'measure' as a 'package'". The United States argues:

> "It is not clear why, under the reasoning of either Canada or the *United States – Section 301* panel report, the documents in this dispute 'must' be analysed together. Canada contends that one or more of the documents in question, alone or together, somehow require the DOC to treat export restraints as subsidies. However, the proper analysis of such a claim cannot be undertaken based upon abstract notions of whether documents cited by a complaining party 'must be analysed together', but on the status of the cited documents, and how they relate to each other, under the responding Member's domestic law."[172]

8.84 In making our assessment of whether US law requires the DOC to treat export restraints as financial contributions in CVD investigations, we recall that Canada has alleged that each of the measures that it has identified (the statute, the SAA, the Preamble, and US practice) operates individually to require such treatment, as well as that these measures "taken together" require the same treatment. We will first analyse them separately, both in respect of the status and the effect of each under US domestic law, and in respect of whatever each says concerning export restraints.

8.85 In considering whether any or all of the measures individually can give rise to a violation of WTO obligations, the central question that must be answered is whether each measure operates in some concrete way in its own right. By this we mean that each measure would have to constitute an instrument with a functional life of its own, i. e., that it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of

[170] *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, Report of the Appellate Body, WT/DS60/AB/R, adopted 25 November 1998, footnote 47.

[171] *Id.*

[172] Comment of the United States on question 4 from the Panel to Canada at the first meeting.

WTO obligations. To determine whether each measure is operational on its own, we consider the status of each under US law.

8.86 We also examine how, if at all, the measures operate "taken together". Canada's argument on this point is that:

> "Section 771(5)(B)(iii) can be considered 'discretionary', in the limited sense that [the DOC], as the investigating authority, has to determine whether an export restraint, or any other practice subject to a [CVD] investigation, is a financial contribution. However, Section 771(5)(B)(iii) does not exist in isolation. Consistent with the reasoning of the Panel in *United States – Section 301*, Section 771(5)(B)(iii) is 'inseparable' from the SAA, Preamble, and US practice and, therefore, cannot be considered in isolation. Thus, the mandatory or discretionary nature of the measures at issue in this dispute must be considered in terms of all of the elements of US [CVD] law that bear on the treatment of export restraints."[173]

8.87 Given this statement, it appears to us that the primary focus of Canada's argument relates to considering the measures together, at least insofar as the allegedly mandatory nature of these measures is concerned. In particular, given Canada's statement that the statute itself can be considered "discretionary" at least in a limited sense, Canada appears to argue that it is only when the statute is looked at in conjunction with the other measures that are the subject of this dispute that the alleged mandatory treatment of export restraints is evident.

(i) The Statute

8.88 Under pre-WTO US law, as under the Tokyo Round Subsidies Code, there was no definition of "subsidy" as such; rather, US law contained an illustrative list of countervailable subsidies. The illustrative list made no reference to the concept of "financial contribution" (this concept did not exist under the Tokyo Round Subsidies Code), but rather described certain types of measures provided on advantageous terms. Under this legislation, the United States in several instances countervailed export restraints on the basis that they provided an advantage beyond what would be available in the market (i. e., a benefit).

8.89 Following the Uruguay Round, the United States undertook to implement the WTO Agreement in the *URAA* and, in particular, to implement the definition of "subsidy" in Article 1.1 of the SCM Agreement by amending Section 771(5) of the *Tariff Act*. The term "subsidy" is defined in Section 771(5)(B) as follows:

> "A subsidy is described in this paragraph in the case in which an authority –
>
> (i) provides a financial contribution,
>
> (ii) provides any form of income or price support, within the meaning of Article XVI of the *GATT 1994*, or
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,

[173] Second Written Submission of Canada, para. 10.

> to a person and a benefit is thereby conferred. For purposes of this paragraph and paragraphs (5A) and (5B), the term 'authority' means a government of a country or any public entity within the territory of a country."[174]

8.90 The term "financial contribution" in turn is defined in Section 771(5)(D) as:

> "(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
>
> (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
>
> (iii) providing goods or services, other than general infrastructure, or
>
> (iv) purchasing goods."[175]

(a) Status in US domestic law

8.91 Section 771(5) is the provision of the basic US CVD statute that contains the definition of "subsidy" for the purpose of US CVD actions, and there is no disagreement between the parties that it thus is the basis for the DOC's identification of countervailable subsidies in CVD investigations. In particular, it is to this part of the statute that the DOC must look in establishing the existence of the definitional elements of a "subsidy" in order to assess whether a particular programme is countervailable. The DOC is legally bound to ensure that the criteria set out in the statute are satisfied. Given this, it is clear that the statute has an operational life in its own right. It is the operational basis for the DOC's activities in respect of countervailing measures.

(b) Content in respect of export restraints

8.92 This being said, however, Sections 771(5)(B) and (D) of the *Tariff Act* essentially mirror the language of Article 1.1 of the SCM Agreement, and do not explicitly address export restraints, or how they would be treated if alleged in a CVD investigation. The statute read in isolation therefore reveals nothing about the treatment of export restraints under US CVD law, and could not be said to require any particular treatment of export restraints in a CVD investigation. Indeed, as noted above, Canada itself acknowledges that "Section 771(5)(B)(iii) can be considered 'discretionary', in the limited sense that [the DOC], as the investigating authority, has to determine whether an export restraint, or any other practice subject to a CVD investigation, is a financial contribution".[176] Noting, however, Canada's argument that the statute cannot be understood in isolation from the other measures at issue, we turn next to an examination of those measures.

(ii) The Statement of Administrative Action

(a) Status in US domestic law

8.93 We now consider the operational status of the SAA in US domestic law. As the United States explains, in general an SAA is typically required when the Executive Branch of the US Government submits legislation implementing a trade agreement to the US Congress that will be considered under so-called "fast-track" procedures. Because the *URAA* was submitted to Congress under "fast-track" procedures, an SAA was required. Specifically, the SAA was a requirement of the Omnibus Trade

[174] *Tariff Act*, Section 771(5), codified at 19 *USC*, Section 1677(5) (1994) (Annex A to First Written Submission of Canada – Exhibit CAN-1).
[175] *Id*.
[176] Second Written Submission of Canada, para. 10.

and Competitiveness Act of 1988, in which Congress granted Uruguay Round and other trade agreement negotiating authority to the President and provided for "fast-track" Congressional implementation of trade agreements. In accordance with that legislation, the SAA was agreed between the Administration and Congress in advance, and then submitted by the President to Congress for approval with the proposed *URAA* legislation.

8.94 Congress approved the SAA in the *URAA*, and provided, in the *URAA*, that:

> "The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."[177]

8.95 The SAA in turn refers to itself as an authoritative expression of the Administration's views regarding the interpretation of the Uruguay Round agreements and the United States' obligations in implementing them, including under domestic law, as agreed between the Administration and Congress:

> "[T]his Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of US international obligations and domestic law. Furthermore, the Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority."[178]

8.96 Canada asserts that the statements in both the SAA itself and in the *URAA* make it clear that the SAA has a controlling and determinative legal status in the interpretation of the *URAA* in the United States. Canada's view, further, is that the SAA requires that export restraints be treated as subsidies, and that this requirement is binding on the DOC due to the language of the SAA and the *URAA*.

8.97 The United States acknowledges "the status of the SAA as an authoritative interpretive tool".[179] It refers to the SAA as "a type of legislative history . . . [which,] [i]n the United States, is often considered for purposes of ascertaining the meaning of a statute . . . ".[180] While the United States indicates that the SAA cannot change the meaning of, or override, the statute to which it relates, "[a]s a general proposition, [] in terms of legislative history, the SAA ranks supreme".[181] The United States indicates that "it is not objecting to a consideration of the SAA and the Preamble as interpretive sources for ascertaining the meaning of Section 771(5) as a matter of US law . . . ".[182]

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[177] *URAA*, Section 102, codified at 19 *USC*, Section 3512(d) (1994) (Exhibit CAN-7).
[178] SAA, p. 656 (Annex B to First Written Submission of Canada – Exhibit CAN-2).
[179] Response of the United States to question 6(a) from the Panel at the first meeting.
[180] Request by the United States for Preliminary Rulings, para. 36.
[181] Response of the United States to question 28 from the Panel following the first meeting.
[182] Request by the United States for Preliminary Rulings, footnote 134.

Rather, the United States argues, "in determining what US law means, it would be appropriate for the Panel to consider the SAA, just as a US court would"[183].

8.98 It is clear to us that the *URAA* grants to the SAA unique legal status as an authoritative interpretation of the *URAA*, which the US courts must take into account. The text of the SAA confirms this by characterising itself as "an authoritative interpretation . . . both for purposes of US international obligations and domestic law". The SAA went through an approval process in Congress, and was in fact approved by Congress at the same time as the *URAA*. The United States itself acknowledges that "there is no disagreement between the parties about the status of the SAA as an authoritative interpretive tool".[184] Finally, it is clear that no other form of legislative history has higher authority than the SAA with regard to the meaning of the statute. The United States indicates that "If, hypothetically, on a particular interpretive issue, the SAA said 'X' and some other document of legislative history (e. g., a committee report) said 'Y', the interpretation should be 'X'".[185]

8.99 The unique legal status granted to the SAA is, however, in respect of its *interpretive* authority *in respect of* the statute. The *URAA* indicates that "[t]he statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements *and this Act*"[186], which implements the Agreements. We find no evidence, in the *URAA*, in the SAA, or anywhere else, that the SAA has an operational life or status independent of the statute such that it could, on its own, give rise to a violation of WTO rules. Independent of the statute, the SAA does not *do* anything; rather, it interprets (i. e., informs the meaning of) the statute. In other words, a petitioner or an exporter could not argue before a US court that the DOC had acted inconsistently with the provisions of the SAA, but rather that it had acted inconsistently with the provisions of the statute read in light of the SAA.

8.100 Accordingly, we consider that the SAA constitutes authoritative interpretive guidance in respect of the statute. As such, given its unique authority as interpretive guidance, the SAA is of fundamental importance in this dispute, in the sense that the statute cannot be properly interpreted without reference to the SAA. In particular, to understand the treatment of export restraints under the US CVD statute, anything that the SAA says about export restraints must be taken into account. Nor, as indicated, do the parties suggest otherwise. Indeed, the United States itself emphasises that it does not argue that the statute could or should be examined without some regard to the interpretation reflected in the SAA[187]. For the foregoing reasons, we shall look to the SAA as primary interpretive guidance in respect of the statute.

(b) Content in respect of export restraints

8.101 The next question to which we turn is what, if anything, the SAA says concerning subsidies in general, and export restraints in particular, in the context of CVD investigations. The issue we must address is whether the SAA requires the DOC to interpret the statute such that export restraints are treated as financial contributions in CVD investigations. If so, given that the SAA is authoritative interpretation of the statute, and given our finding that the treatment of export restraints as financial contributions is inconsistent with the SCM Agreement (*See* Section VIII.B.3, *supra*), it would follow, pursuant to the classical test, that the legislation as such is inconsistent with the United States' obligations under the SCM Agreement.

[183] Response of the United States to question 1 from the Panel following the second meeting, citing as well the Request by the United States for Preliminary Rulings, para. 124, footnote 134.
[184] Response of the United States to question 6(a) from the Panel at the first meeting.
[185] Response of the United States to question 28 from the Panel following the first meeting.
[186] *URAA*, footnote 177, *supra* (emphasis added).
[187] Response of the United States to question 1 from the Panel following the second meeting.

8.102 Dealing with the definition of subsidy in the SCM Agreement, including as it pertains to export restraints, the SAA states:

> "In general, the Administration intends that the definition of 'subsidy' will have the same meaning that administrative practice and courts have ascribed to the term 'bounty or grant' and 'subsidy' under prior versions of the statute, unless that practice or interpretation is inconsistent with the definition contained in the bill. Absent such inconsistency, and subject to other relevant changes enacted in the implementing bill (e. g., rules regarding non-countervailable subsidies and *de minimis* countervailable subsidies), practices countervailable under the current law will be countervailable under the revised statute.
>
> **Basic Definition**
>
> . . .
>
> One of the definitional elements of a subsidy under the Subsidies Agreement is the provision by a government or any public body of a 'financial contribution' as defined by the Agreement, including the provision of goods or services. Moreover, the Subsidies Agreement specifically states that the term 'financial contribution' includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Administration's view that the term 'private body' is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided 'directly or indirectly' by a government. Accordingly, the Administration intends that the 'entrusts or directs' standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a US industry.
>
> In the past, the [DOC] [] has countervailed a variety of programs where the government has provided a benefit through private parties (*See*, e. g., Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea) . . . [The DOC] has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory, or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.
>
> In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) encompass indirect subsidy practices like those

> which [the DOC] has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that [the DOC] is satisfied that the standard under Section 771(5)(B)(iii) has been met."[188]

8.103 We recall that the text of the statute is silent on the question of export restraints as such. That is clearly not the case with the SAA, but the question is whether the comments regarding indirect subsidies and export restraints contained therein are mandatory in nature, i. e., whether they amount to a *requirement* that the DOC interpret the statute so as to treat export restraints as financial contributions. For that to be the case, the SAA would have to create a binding obligation on the DOC to interpret Section 771(5)(B)(iii) such that export restraints meet the standard thereunder (which standard essentially mirrors the requirements in Article 1.1(a)(1)(iv) of the SCM Agreement).

8.104 On this point, the SAA appears to disclose a certain tension between two propositions or themes. On the one hand, there are passages suggesting that the DOC's past practice of treating export restraints as countervailable subsidies if they confer a benefit and are specific will continue. In particular, the SAA expresses the Administration's view that Article 1.1(a)(1)(iv) of the SCM Agreement encompasses indirect subsidy practices like those which the DOC countervailed in the past, particularly in *Leather from Argentina* ("*Leather*")[189] and *Certain Softwood Lumber Products from Canada* ("*Lumber*")[190]. On the other hand, there are passages to the effect that this will be the case only where the new condition is satisfied. Past practice will not be followed where this would be "inconsistent with the definition contained in the bill". It will be followed only where the DOC is satisfied that the standard under Section 771(5)(B)(iii) has been met. Since Section 771(5)(B)(iii) prescribes a new condition, including entrustment or direction to a private entity to make a financial contribution, it is clear that the practice followed in the past cannot continue without modification. Post-WTO, the DOC must address a question that did not previously arise: Is Section 771(5)(B)(iii) satisfied? Only if that question is answered in the affirmative can a subsidy be found to exist.

8.105 We conclude that, on careful reading, the SAA correctly indicates that the Administration's past practice will be pursued in future only *to the extent that there is no inconsistency with the definition of subsidy under the URAA*. The phrase "absent such inconsistency" makes the continuation of pre-WTO CVD practice expressly contingent on the consistency of such practice with the new statute, and specifically with the definition of subsidy set out therein. The SAA indicates, in respect of *Leather* and *Lumber*, that "these types of indirect subsidies will continue to be countervailable, *provided that [the DOC] is satisfied that the standard under Section 771(5)(B)(iii) has been met*". The language of this proviso further confirms that the DOC must apply the statute's definition of subsidy.

8.106 For these reasons, we conclude that the SAA does not require the DOC to interpret the statute such that export restraints are treated as financial contributions.

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[188] SAA, pp. 925-926 (Annex B to First Written Submission of Canada – Exhibit CAN-2).

[189] *Leather* involved, *inter alia*, a government embargo on exports of cattle hides, which was found to be a countervailable subsidy to leather producers on the basis that the embargo had a "direct and discernible effect" on hide prices and thereby benefited leather producers (55 Federal Register No. 191, p. 40213 – Exhibit CAN-13).

[190] *Lumber* involved, *inter alia*, certain export restraints on logs, which were found to be countervailable subsidies to lumber producers on the basis that the restraints had a "direct and discernible effect" on log prices and thereby benefited lumber producers (57 Federal Register No. 103, pp. 22609-22610 – Exhibit CAN-14).

(iii) The Preamble to the US Countervailing Duty Regulations

(a) Status in US domestic law

8.107 We next consider the operational status in US domestic law of the Preamble to the US CVD Regulations. In particular, we consider whether the Preamble has an independent operational life of its own and could independently give rise to the violations alleged by Canada.

8.108 The United States explains that, in 1995, following the enactment of the *URAA*, the DOC commenced a rulemaking process with the objective of revising its anti-dumping and CVD regulations so as to bring them into conformity with the *URAA* and, in some cases, to flesh out the provisions of the statute. The DOC published its final CVD regulations some years later, in 1998, following the receipt and analysis of comments submitted on the proposed regulations that had been published in 1997. The Preamble to the Regulations sets out, *inter alia*, the DOC's response to those comments, including on the subject of indirect subsidies in general and export restraints in particular. Canada notes that the Regulations were issued in accordance with the *Administrative Procedure Act* ("*APA*"), which governs US federal agency rulemaking and requires a notice and comment rulemaking process, and which therefore requires that the final regulations include a preamble setting forth the basis and purpose of the regulations and the agency's reasoned consideration of comments received in response to its proposed regulations.

8.109 Canada submits that the Preamble "is an integral part of the Regulations and is recognised and relied on as such by US courts"[191], citing to various US court decisions in this regard. In Canada's view, the Preamble is binding, and it disagrees with the United States that a preamble to regulations has lesser legal status than the regulations. According to Canada, this US argument ignores the administrative framework under which US agencies promulgate regulations. Canada submits that the *APA* specifically provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose", which is commonly called the Preamble.[192] Canada cites in particular to a US Court of Appeals statement as follows:

> "These regulations were expressly authorised by Congress, and, in view of Congress' delegation, the [Department of Justice's] regulations should be accorded 'controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute". The same is true of the preamble or commentary accompanying the regulations since both are part of the [Department of Justice's] official interpretation of the legislation."[193]

8.110 Finally, Canada considers that the DOC, in its CVD determinations, uniformly treats the Preamble as an integral part of the Regulations and equivalent in legal authority to other sections of the Regulations. Canada indicates that, when an issue is addressed by the Preamble, the DOC routinely applies the Preamble provisions to resolve issues in CVD investigations or administrative reviews.

8.111 The United States argues that only the Regulations themselves, and not the Preamble thereto, have the force of law, meaning that even if the Preamble stated that the DOC was required to treat export restraints as subsidies, any such statement would not be binding on the DOC as a matter of US law. The United States characterises the Preamble as "evidence of an agency's contemporaneous understanding of its proposed rules" which "may be consulted to determine the proper interpretation

[191] First Written Submission of Canada, para. 43.
[192] Response of Canada to Request by the United States for Preliminary Rulings, para. 26.
[193] *Id.*, para. 27.

of an agency's regulation", also citing to various US court decisions in this regard.[194] The United States submits that a US court has found that "language in the preamble of a regulation is not controlling over the language of a regulation itself" and, in the US view, "certainly is not controlling over a statute".[195] Further, the United States is of the view that, as the DOC did not promulgate a regulation on the topic of indirect subsidies in general, or export restraints in particular, the Preamble cannot even be used as an interpretive tool in the instant case, because there is no regulation to interpret. According to the United States, the Preamble is "at most . . . a non-binding statement by the DOC regarding its views at the time concerning the scope of Section 771(5)(B(iii)"[196] and "expressions of [the DOC's] tentative thoughts"[197]. As to the DOC's references to the Preamble in its determinations, the United States argues that "[t]here is a big difference between citing the Preamble as a shorthand explanation of the reasons why the DOC is making a particular determination, and citing the Preamble as binding authority"[198].

8.112 We recall, as indicated by Canada itself, that the *APA* specifically provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose", which is commonly called a Preamble.[199] We can certainly conceive of such a general statement as an indication of the context in which particular regulations were prepared, as a reflection of the issuing agency's views on the interpretations and methodologies set out in the regulations, and even as an interpretive guide to the regulations. To the extent that a Preamble refers to an underlying statute in addition to the regulations to which it is attached, we also can envision that it could provide interpretive guidance in respect of the statute.

8.113 We fail to see, however, that a "general statement of the[] basis and purpose" of regulations could have the same operational status as the regulations themselves, i. e., that the Preamble could constitute rules that were *separate* from the regulations and that would have *independent* operational effect on the agency in question. Only if that were the case could the general statement (the Preamble) be able to give rise independently to WTO violations. Further, while we note the *APA's* use of the words "incorporate in the rules", we consider that a "general statement of the[] basis and purpose" of the rules, even when "incorporate[d]" therein, could by its very nature only inform the reader of the rationale generally for the regulations, and for the interpretations and methodologies contained therein. That is, we are not persuaded that the fact that a general statement of basis and purpose is described as being "incorporate[d] in the rules" automatically confers on that statement the same operational status and effect as the rules themselves. Nor was the Preamble subject to any approval process comparable to that to which the SAA was subject, or to the notice and comment process to which the Regulations themselves were subject. Indeed, the Preamble to a large extent appears simply to be a written record of that latter process.

8.114 As for its description of that process, the Preamble states: (i) that the DOC has decided *not* to issue a regulation in respect of "entrusts or directs"; and (ii) that instead the DOC believes that it should follow the guidance provided in the SAA to examine indirect subsidies (under which rubric the DOC would place export restraints) on a case-by-case basis[200] (*See* paragraph 8.115, *infra*). Thus, the Preamble makes clear that no specific regulation has been adopted, and then incorporates by reference, and defers to, the interpretive guidance contained in the SAA, in respect of export restraints. We thus conclude that the Preamble has no operational life of its own – it does not *do*

[194] Request by the United States for Preliminary Rulings, para. 81.
[195] *Id.*
[196] *Id.*, para. 82.
[197] Oral Statement of the United States at the first meeting of the Panel, para. 28.
[198] Oral Statement of the United States at the second meeting of the Panel, para. 49.
[199] Response of Canada to Request by the United States for Preliminary Rulings, para. 26.
[200] *Regulations*, 63 Federal Register, p. 65349 (Annex C to First Written Submission of Canada – Exhibit CAN-3).

anything. We however have no reason to, and do not, exclude the Preamble from consideration as possible interpretive guidance regarding the treatment of export restraints in US CVD investigations pursuant to Section 771(5)(B)(iii).

(b) Content in respect of export restraints

8.115 We thus now turn to the language in the Preamble that is relevant to the treatment of export restraints. We note, first, that the DOC indicates in the Preamble that it decided against adopting a regulation concerning export restraints, or concerning "indirect subsidies" or the "entrusts or directs" language more generally. The Preamble explains that this was in part because the DOC considered this to be unnecessary, in that the SAA already contained examples of the kinds of "indirect subsidies" that could be encompassed by the statutory language, and also that the SAA "directs" the DOC to proceed on a case-by-case basis:

> "In our 1997 Proposed Regulations, we did not address indirect subsidies in detail. Instead, we note that the SAA directs the [DOC] to proceed on a case-by-case basis . . .
>
> . . .
>
> [T]he phrase 'entrusts or directs' could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations. Rather, we believe that we should follow the guidance provided in the SAA to examine indirect subsidies on a case-by-case basis.
>
> . . .
>
> The SAA . . . lists a number of cases where the [DOC] has found indirect subsidies in the past, and these cases serve to provide examples of situations where we believe the statute would permit the [DOC] to reach the same result." [201]

Thus, in this sense, as we noted above, the Preamble simply incorporates by reference and defers to the SAA in respect of the interpretation of the definitional elements of a "subsidy", in particular the meaning of "entrusts or directs".

8.116 Concerning export restraints specifically, the Preamble states in relevant part:

> "With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration . . . [I]f the [DOC] were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the [DOC] to reach the same result."[202]

The language "would permit" clearly does not connote a *requirement*. We thus see this statement as reflecting the DOC's view or belief that it *could*, under the new statute, continue to treat export

[201] *Regulations*, 63 Federal Register, pp. 65349-65350 (Annex C – Exhibit CAN-3).
[202] *Id.*, p. 65351.

restraints as countervailable subsidies, rather than reflecting the view or belief that it is *required* to do so.

8.117 Certainly, the Preamble expresses the view that there are circumstances similar to those in *Leather* and *Lumber* in which the DOC might find that an export restraint constitutes a financial contribution. The rationale in *Leather*, which was also adopted in *Lumber*, was, however, that two conditions had to be fulfilled for a subsidy to exist: specificity and benefit.[203] It was not necessary in either of those cases, as it is necessary today, to consider separately whether there is a financial contribution, this now being an essential element of a "subsidy" under Article 1.1 of the SCM Agreement.

8.118 We attach importance, however, to the fact that the Preamble refers to the interpretive guidance in the SAA concerning indirect subsidies and export restraints. For the reasons given in paragraph 8.105, we have concluded that the SAA correctly indicates that primacy is to be given to Section 771(5)(B)(iii), which contains the test of financial contribution. Accordingly, the Preamble, like the SAA, ensures that the DOC is to apply the test of financial contribution.

8.119 Thus, far from casting doubt on our conclusion as to the interpretation of the statute, the language in the Preamble is fully consistent with that conclusion, namely, that the DOC is not required under US law to treat export restraints as financial contributions.

(iv) US "Practice"

8.120 Canada defines US "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations"[204]. Canada considers that there is an existing US administrative "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement, which "practice", according to Canada, is defined in large part by the pre-WTO US practice of countervailing export restraints where they "directly led to a discernible benefit". In this regard, Canada cites *Leather* and *Lumber*. Canada submits that, while the practice in those cases should have become irrelevant after the SCM Agreement came into force, the SAA expressly provides that it is to continue under the SCM Agreement and the revised US CVD law.

8.121 Canada further considers that the DOC's determinations in the Korean *Stainless Steel* cases and *Live Cattle from Canada* confirm the DOC's view that its Regulations, like the SAA, foreclose any discretionary consideration of "financial contribution" in the case of "indirect subsidies". Canada makes it clear, however, that while practice is related to precedent, the US "practice" of which it complains is not individual determinations in CVD cases. Canada's arguments in respect of US "practice" therefore seem to comprise essentially two elements – references to certain pre-WTO US CVD cases in the SAA and the Preamble, and certain post-WTO US CVD cases – both of which effectively make up the "institutional commitment" alleged by Canada.

8.122 While Canada acknowledges that "[a] 'practice' identified in a [DOC] determination differs from 'legislation', because it is not statutory and has not been validly promulgated as a legislative rule"[205], Canada seeks to persuade the Panel that US "practice" has an operational existence in and of

[203] As the DOC observed in *Lumber*: "The rationale underlying that determination [*Leather*] was that (1) the embargo on raw hides 'applie[d] only to [raw] cattle hides, which are sold primarily, if not exclusively, to leather tanners [and, therefore,] [was] limited to a specific industry', and (2) the export embargo 'caused hide prices to be lower than they would have been absent the embargo' and, thereby, enabled the leather tanners to sell the finished product, leather, at a lower price" (57 Federal Register No. 103, p. 22606 – Exhibit CAN-14).

[204] Response of Canada to question 16(c) from the Panel following the first meeting.

[205] *Id.*

itself by arguing that "[a]gencies, including [the DOC] normally follow the precedents of prior determinations, and are required by US courts to do so absent a reasoned explanation"[206].

8.123 We find Canada's notion of US "practice", however expressed, to be imprecise. Given that Canada has not clearly identified what it refers to when it uses the term "practice" [207], we have great difficulty in conceiving of "practice" as a measure in this dispute, in whichever formulation proffered by Canada.

8.124 In respect of the references in the SAA and the Preamble to pre-WTO US CVD cases, we note that Canada argues that "pre-WTO practice was brought forward into post-WTO law and practice by virtue of the SAA and the Preamble"[208]. We consider, however, that such references would not constitute US "practice", but would simply be part of the SAA and the Preamble. That is, we do not see how any past practice *as incorporated in* the SAA or the Preamble could constitute a separate measure with an existence independent of that of the SAA and Preamble.

8.125 In respect of "practice" as embodied in post-WTO CVD cases, while Canada may well be correct in principle that "an interpretation or methodology will often be developed in a single case or group of cases, and becomes the 'practice' followed in subsequent cases"[209], this principle is not directly relevant to the present dispute, as there has been no post-WTO case where the United States has countervailed an export restraint. Further, even if there had been such cases, and even if the DOC had set out the methodologies it "normally" applied in such cases, Canada itself admits that under US law, the DOC could depart from those methodologies as long as it explained its reasons for doing so.[210]

8.126 Thus, while Canada may be right that under US law, "practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be"[211], past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC "normally" follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives "legal effect to that 'practice' as determinative of the interpretations and methodologies it applies"[212]. US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.

8.127 Moreover, although there has been no post-WTO case in which the United States has countervailed an export restraint, Canada further submits that there is nevertheless relevant post-WTO practice in several concrete cases. Canada argues in particular that the initiation of the *Live Cattle* case expressly relied on the pre-WTO decisions in *Leather* and *Lumber*, and that in the Korean *Stainless Steel* cases, the DOC made it clear that it would apply the same standard to "indirect subsidies" as was applied pre-WTO. In Canada's view, "[t]he decision to initiate the *Live Cattle* case is of precedential value, because it reflects [the DOC's] decision that the standard that there be 'sufficient evidence' of all the elements of a countervailable subsidy, including financial contribution, had been met. Thus, while a decision to initiate an investigation may not have the same precedential

[206] Response of Canada to question 15 from the Panel following the second meeting.
[207] We note here, as one example, Canada's statement that practice is "simply what the agency systematically does" (Response of Canada to question 14 from the Panel following the second meeting).
[208] *Id.*
[209] Response of Canada to question 16(c) from the Panel following the first meeting.
[210] Response of Canada to question 15 from the Panel following the second meeting.
[211] Response of Canada to question 14 from the Panel following the second meeting.
[212] Second Written Submission of Canada, para. 40.

value as a final determination because it applies a different standard, under both standards the same legal elements are required to be present".[213] We note, however, that, in *Live Cattle*, the DOC did not even address the question of whether the export restraint at issue constituted a financial contribution, as it found that there was no benefit. In the *Stainless Steel* cases, because the practice at issue was not export restraints, but the direction of credit, we see little if any relevance in *Stainless Steel* for the treatment of export restraints. These cases therefore cannot be considered as reflecting a post-WTO US "practice" of treating export restraints as financial contributions.

8.128 Finally, we note that Canada submits that "practice" in the form of an "institutional commitment" is "normally reflected in writing"[214]. It does not, however, explain how that is the case in the present dispute, except for the vague statement that "practice" is "reflected in DOC regulations when those are issued". We therefore do not see what form of expression this "institutional commitment" might take or where such an expression might be made.

8.129 For the foregoing reasons, we consider that there is before us *no* measure in the form of US "practice" in the sense used by Canada that requires the treatment of export restraints as financial contributions. Nor, given that Canada has not identified concretely what US "practice" is, can any US "practice" provide interpretive guidance in this dispute. Therefore, practice in the sense used by Canada cannot require any particular treatment of export restraints in US CVD investigations.

(v) Summary

8.130 We have found that, of the measures that are the subject of Canada's claims, only the statute has an independent operational life of its own. We have nevertheless found that the statute must be read in light of the SAA, and we have therefore looked to the SAA as the principal interpretive guide thereto. We have concluded that the statute read in light of the SAA does not require the treatment of export restraints as financial contributions in CVD investigations. We also recall that we have found that the Preamble, while it could provide interpretive guidance to the statute, in fact contributes little or no substance in this regard. Nevertheless, what it says in respect of the treatment of export restraints is consistent with our conclusion in respect of the statute read in light of the SAA. Finally, we recall that Canada has not concretely or clearly identified what it means by US "practice", nor in what way any such practice either has an independent operational status, or can provide interpretive guidance (binding or otherwise) concerning the treatment of export restraints in CVD investigations. Thus, given that we are not persuaded that there is any "practice" in the sense used by Canada, such practice cannot require any particular treatment of export restraints in US CVD investigations.[215]

(d) Conclusion

8.131 In sum, therefore, we find that the statute – including as read in light of the SAA and the Preamble – does not mandate the treatment of export restraints as financial contributions (which treatment we have found, however, would violate the SCM Agreement). Accordingly, we find that

[213] Response of Canada to question 15 from the Panel following the second meeting.

[214] Response of Canada to question 14 from the Panel following the second meeting.

[215] In light of our findings in this section, we need not, and thus do not, address the request by the United States for preliminary rulings as follows: (i) that the SAA and the Preamble are not identified as "measures" in the request for establishment, that in any event neither one is a measure, and that therefore the claims concerning them are not within the Panel's terms of reference; (ii) that US "practice" (past, present, or future) is not a measure properly before the Panel, and that any "practice" that might exist does not constitute binding precedent; and (iii) that "practice" was neither identified in Canada's request for consultations, nor was it the subject of consultations; nor did the request for establishment sufficiently identify the US "practice" in question, in violation of Articles 4.7 and 6.2 of the *DSU*, which therefore means that "practice" is not properly before the Panel.

Section 771(5)(B)(iii) of the *Tariff Act* as such does not violate the SCM Agreement, and we reject the claims of Canada under SCM Article 1.

C. CLAIMS UNDER OTHER PROVISIONS

8.132 The claims of Canada under SCM Articles 10 (and SCM Articles 11, 17, and 19, as they relate to SCM Article 10) and 32.1, on the one hand, and SCM Article 32.5 and WTO Article XVI:4, on the other, are entirely dependent on the claim that the treatment of export restraints as financial contributions is WTO-inconsistent and that US law requires such treatment contrary to SCM Article 1. In light of our finding that, while such treatment of export restraints *is* WTO-inconsistent, US law does not *require* such treatment and therefore is *not* WTO-inconsistent, we need not, and thus do not, consider Canada's claims under these provisions.

IX. CONCLUSIONS AND RECOMMENDATIONS

9.1 In light of the above findings, we conclude that:

- An export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement.

- Section 771(5)(B)(iii) read in light of the SAA and the Preamble to the US CVD Regulations is not inconsistent with Article 1.1 of the SCM Agreement by "requir[ing] the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1".

9.2 With respect to those of Canada's claims not addressed above, we have concluded that:

In light of considerations of judicial economy, it is neither necessary nor appropriate to make findings thereon.

9.3 We therefore make no recommendations with respect to the United States' obligations under the SCM and WTO Agreements.

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ANNEX A

Parties' Answers to Written Questions

ANNEX A-1

EXECUTIVE SUMMARY OF ANSWERS OF CANADA TO QUESTIONS POSED BY THE PANEL AT THE FIRST SUBSTANTIVE MEETING

(28 February 2001)

FIRST MEETING OF THE PANEL WITH THE PARTIES - QUESTIONS DATED 18 JANUARY 2001

I. QUESTIONS TO BOTH PARTIES

Q1. What, in your view, is an "export restraint"? That is, what are the essential, defining characteristics of an export restraint that would be universal to all "export restraints", no matter what the specific form of the export restraint in a given situation, and no matter what other elements might be present in a given measure that included an export restraint? Can you describe how an export restraint operates? Can you give any example of an export restraint which might, arguably, amount to a subsidy within the meaning of SCM Article 1.1?

Reply

An export restraint is a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or conditions the circumstances under which exports are permitted. Such measures could also take the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports.

Canada cannot conceive of an export restraint that could, even arguably, meet the definition of "financial contribution" in Article 1.1(a) of the SCM Agreement.

Q2. Do you agree that the conferral of a benefit under Article 1.1(b) of the *SCM Agreement* is immaterial to the question of the existence of a financial contribution under Article 1.1(a) of the Agreement?

Reply

Yes, "benefit" and "financial contribution" are discrete legal elements under the definition of a subsidy. Canada has pointed out the Appellate Body's statements in the Canada and Brazil *Aircraft* cases to this effect.

II. QUESTIONS TO CANADA

Q3. Do you agree with the US characterisation that you are asking the Panel to rule that an export restraint could never, under any circumstances, constitute a subsidy?

Reply

Canada cannot envisage any circumstances in which an export restraint could meet the definition of "financial contribution" in Article 1.1(a)(1) of the SCM Agreement. It bears emphasis that what Canada is asking this Panel to determine is whether the treatment of export restraints under

US law is inconsistent with the definition of "financial contribution" in Article 1.1(a) of the SCM Agreement.

Q4. You state, in paragraph 4 of your first written submission:

> **"These measures, *taken together*, are inconsistent with Article 1.1 of the *SCM Agreement* and, because they require the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1, are inconsistent with Article 10 (as well as Articles 11, 17, and 19, as they relate to the requirements of Article 10) and 32.1 of the *SCM Agreement*." (emphasis added)**

You further state, in paragraph 15 of your response to the US Request for Preliminary Rulings:

> **" . . . [I]n accordance with the *United States – Section 301* Panel's observation, the elements of US law at issue in this dispute must be *analysed together*". (emphasis added)**

Are Section 771(5) of the *Tariff Act*, the SAA, the Preamble, and US "practice" "measures" that are *individually* susceptible to dispute settlement? Do you claim that any of the four identified measures is by itself inconsistent with the *SCM Agreement*? Or, should the Panel simply be looking at the four identified measures as a package? In other words, should the Panel only look to these four measures when "taken together"?

Reply

Canada challenges the treatment of export restraints under US countervailing duty (CVD) law which is a result of the measures identified by Canada taken together. This treatment is inconsistent with the United States' obligations under the SCM and WTO Agreements. Thus, these measures should be analysed together to determine the treatment of export restraints under US countervailing duty law. This does not mean that the individual measures are not susceptible to dispute settlement. Should the Panel determine that one of the measures identified by Canada is not a "measure", this does not mean that the remaining measures are not susceptible to dispute settlement when considered together.

The SAA specifically requires that the United States continue its pre-WTO practice with respect to export restraints and clearly states that in the United States' view, such practice is consistent with both Article 1.1(a)(1)(iv) of the SCM Agreement and Section 771(5)(B)(iii) of the *Tariff Act of 1930*. The Preamble does so as well. In Canada's view any measure that is inconsistent with a relevant obligation is susceptible to dispute settlement. Under Article 32.5 of the SCM Agreement, a Member must ensure the conformity of its laws, regulations and administrative procedures with the provisions of the SCM Agreement.

Q5. Assume for the sake of argument that the measures challenged by you do not *require* – but *authorise* – the treatment of export restraints as financial contributions within the meaning of Article 1 of the *SCM Agreement*. In that case, could the measures be found as such to be inconsistent with the United States' WTO obligations? If so, on what basis? If not, please explain why.

Reply

The measures taken together *require* the United States to treat export restraints as financial contributions within the meaning of Article 1 of the SCM Agreement. If the measures merely

authorised the treatment of export restraints as financial contributions in the sense that the measures did not commit the United States to interpret Section 771(5)(B)(iii) to treat export restraints as "financial contributions", then the measures should not be found inconsistent with the United States' WTO obligations. It would be implicit in such a finding that the United States would not have substantially undermined the predictability of trading conditions as discussed in *United States – Anti-Dumping Act of 1916* and *United States – Superfund*.

However, such a finding would not be warranted as the SAA and Preamble make clear that the United States is committed to interpret the statute to treat export restraints as financial contributions. The initiation of the *Live Cattle* case and the language in the *Live Cattle* and Korean *Stainless Steel* cases reflect an administrative practice of adhering to the commitment set forth in the SAA and Preamble. The United States has made clear in its submissions that it considers export restraints can satisfy the "financial contribution" element of the definition of "subsidy". Canada further develops these comments in Part II of its Second Submission.

FIRST MEETING OF THE PANEL WITH THE PARTIES - QUESTIONS DATED 19 JANUARY 2001

I. QUESTIONS TO BOTH PARTIES

Q1. You argue that the subject of Article 1.1(a)(1)(iv) is "indirect subsidies" (in Canada's case that that article addresses this concept comprehensively). To what extent do your arguments under Article 1.1 depend on the equation of Article 1.1(a)(1)(iv)-type subsidies with "indirect subsidies" either as a whole or in part. In other words, does the extent to which export restraints fit or do not fit within the scope of Article 1.1(a)(1)(iv) depend on whether that provision is concerned with indirect, as opposed to direct, subsidies? What light is shed on the issues in dispute by your arguments that the subject matter of Article 1.1(a)(1)(iv) is "indirect", as opposed to "direct", subsidies?

Reply

Canada's position does not depend on equating government actions that may satisfy Article 1.1(a)(1)(iv) with "indirect subsidies," a term which is not used in the SCM Agreement or in the GATT. Article 1.1 specifies precisely what government actions, in what circumstances, can constitute the indirect bestowal of a financial contribution which, if it confers a benefit, will constitute a subsidy. Article1.1(a)(1)(iv) is the specific part of the definition that addresses this issue of indirect bestowal.

The United States essentially argues that because Article 1.1(a)(1)(iv) involves what the United States terms "indirect subsidies", the provision should be interpreted broadly. The US effort, articulated in the SAA and Preamble, to fit export restraints somewhere within the definition of "subsidy" in Article 1.1 relies on subparagraph (iv) as the place where export restraints can allegedly "fit" within the definition of financial contribution.

The fact that the subject matter of subparagraph (iv) is "indirect" as opposed to "direct", has at least three implications. First, an indirect bestowal of a financial contribution is not a "financial contribution" if it fails to satisfy any one of the five requirements contained the subparagraph. Export restraints fail to satisfy those requirements.

Second, the US attempt to fit export restraints into subparagraph (iv) does damage not only to the text of subparagraph (iv) but also to its object and purpose. If an export restraint is considered to be the provision of a good because it *might* result in greater domestic availability of a product, then *any* measure that might induce or encourage domestic producers to increase the supply of a product

would have to be considered to be the provision of a good, and hence a financial contribution. This is an unthinkable expansion of the definition of "subsidy" in the Agreement, undermines the Uruguay Round bargain and eliminates the security and predictability that was achieved. Article 1.1(a)(1)(iv) is not a catch-all for the myriad government regulatory actions that are not "financial contributions" under paragraphs (i) through (iii), even though such actions may have some beneficial effect on private actors. Rather, it was intended to ensure that a government could not avoid otherwise applicable subsidies disciplines by entrusting or directing a private body to make a "financial contribution" that the government normally would have made directly.

Third, subparagraph (iv) provides for "indirect" financial contributions only to the extent that a government action fits within the plain meaning of its terms. The United States attempts to avoid this result by redefining the word "direct" to mean "cause" and by introducing the concepts of "functional equivalence" and "conceptual" similarity into the provision, thus introducing a second, unbounded level of indirectness which does not exist in the provision.

Q2. What is the ordinary meaning, in accordance with Article 31 of the *Vienna Convention of the Law of Treaties*, of the word "type" as it appears in Article 1.1(a)(1)(iv)?

Reply

The dictionary meaning of "type" is "a class of things or persons having common characteristics". In its context in Article 1.1(a)(1)(iv), the relevant things having common characteristics are the functions, or forms of government action, enumerated in subparagraphs (i) through (iii). The common characteristic that defines them as a "type" is that, by the ordinary meaning of the Article 1.1(a)(1) chapeau, each is a financial contribution for purposes of the Agreement. The functions, however, are expressly worded as functions carried out by governments. Consequently, had the drafters simply said "one or more of the functions illustrated in (i) through (iii)", the text would not have made sense. To incorporate the same practices *when carried out by a private body*, the drafters could not simply refer to the "functions" in (i) through (iii), but needed the term "type of functions." "Type" was essential to incorporate the essence of each function in (i) through (iii), without incorporating the government element that is explicit in the wording. The function carried out by a private body is inherently (although only technically) different from that carried out by a government.

The US argument is based only on a definition of "type" and not on a textual analysis of the term in its context. It also is fundamentally illogical, and at odds with the object and purpose of subparagraph (iv), the definition of "subsidy", and the SCM Agreement more generally. The US argument implies that a far broader, and *undefined*, universe of actions may be read into subparagraph (iv), even though, under the US argument, the same broad and undefined reading of subparagraphs (i) through (iii) would not be possible. In other words, a wide variety of actions would constitute financial contributions when carried out by a private body at government direction within the terms of (iv), but those same actions would not be subject to SCM disciplines when carried out by governments themselves.

The terms of subparagraph (iv), make clear that it is aimed precisely at financial contributions that, as a rule, are made by governments. The definition of "subsidy" was the critical building block of the Agreement precisely because it *defines* what government actions (whether performed by governments or accomplished by an entrustment or direction to a private body) are subject to Agreement disciplines. The object and purpose of the Agreement includes disciplining certain government actions and disciplining the application of countervailing measures to those actions. The suggestion that subparagraph (iv) transforms the primary focus of the Agreement into disciplining a wide range of private actions that are not subject to discipline when performed by governments finds no support in the Uruguay Round negotiating history.

The phrase "type of functions illustrated in (i) to (iii) above" does not broaden the scope of subparagraph (iv) beyond the scope of subparagraphs (i) to (iii). It simply links the government action in subparagraph (iv) to the defined and circumscribed functions in subparagraphs (i) to (iii). Subparagraph (iv) broadens the scope of "financial contribution" only to the extent that it brings into the definition actions where a government, instead of undertaking the financial contributions itself, "entrusts or directs a private body" to do so.

II. QUESTIONS TO CANADA

Q3. We note that, in paragraph 29 of the written version of your oral statement at the first meeting of the Panel, you use the word "may", but that in delivering the statement orally, you substituted the word "must". In response to our oral question on this point, you stated that the written version ("may") is correct. Please confirm this.

Reply

Canada confirms that the written version of its oral statement ("may") is correct.

Q4. In paragraph 18 of its oral statement at the first meeting of the Panel, the European Communities presents a summary of its view of Canada's claims and arguments in this dispute. Do you agree with this summary? If not, please explain in detail in what respects you disagree.

Reply

Canada agrees that pre-WTO practice has been brought forward into post-WTO US CVD law through its incorporation into the SAA and Preamble. Canada agrees that post-WTO US practice serves as evidence of this incorporation. Canada is of the view that this post-WTO practice is also a manifestation of an administrative commitment or policy to adhere to a particular legal view or to apply a particular interpretation or methodology in future cases. The EC summary is not complete in so far as it does not include reference to Canada's concerns with respect to US practice as it relates to the relief Canada has requested.

Q5. Assume that a government directs certain privately owned banks to ensure that 10 per cent of the funds they lend are to be set aside for a given group of borrowers, in the sense that the banks, while not required to lend to these borrowers, cannot lend the set-aside funds to any other borrowers. In your view, would such a situation constitute a financial contribution in the form of a government-directed direct transfer of funds or potential direct transfer of funds, in the sense of Article 1.1(a)(1)(i) and (iv)? If not, why not? If so, what distinction can be drawn in respect of the question of "financial contribution" between this situation and the imposition of an export restraint? Please explain.

Reply

It is Canada's view that the described situation would not constitute a "financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement. The set aside can properly be viewed as having occurred as a result of a government direction since the banks are (presumably) required by law to do so. However, it cannot be said that the banks are also "directed" to make a "direct transfer of funds" to the designated group of borrowers since the banks are not compelled to lend the funds to them. Indeed, the banks may, on the basis of generally accepted financial risk and related prudential considerations, prefer to let the funds sit idle rather than lend to the designated group of borrowers. (Canada gives examples of reasons for this in its complete answer.) Each bank will make its own assessment of the merits of lending the funds based on prudential considerations.

The possibility that the banks might opt to lend the set aside funds to the designated group of borrowers does not constitute a government direction to make "potential direct transfers of the funds". The "potential" direct transfer of funds envisaged by Article 1.1(a)(1)(i) is made "actual", not at the option of the potential transferor, but by the existence of a legal relationship under which a contingent liability is created and the occurrence of a specified event that results in a direct transfer of funds. The word "potential" in Article 1.1(a)(1)(i) is a reference to the specified event occurring that triggers the commitment to make a direct transfer of funds.

Q6. Pursuant to your arguments in paragraphs 39-40 of your oral statement at the first meeting of the Panel, is it your assertion that there could be no circumstances in which a producer would have no choice but to sell its goods to the domestic users of its product pursuant to the imposition of an export restraint?

Reply

Canada cannot conceive of a situation in which an export restraint will result in a producer having no choice but to sell its goods to the domestic users of those goods. Certain choices are always available to a producer. For example, a producer could vertically integrate and, depending on the circumstances, sell either an upstream or downstream product not subject to the restraint to either the export or domestic market. It could also choose to produce and sell an entirely different product or use its capital for an entirely different economic activity. Further, a producer could always elect to reduce or terminate its production.

Q7. Please comment on the US argument that the proposition that an export restraint could never, under any circumstances, constitute a financial contribution is simply too abstract for the Panel to be able to rule on it, *i.e.*, that the range of possible export restraints is too broad for the Panel to be able to imagine all of them, and to rule that none could ever qualify as a financial contribution.

Reply

This is not the ruling Canada has requested, although Canada agrees that an export restraint can never be a financial contribution. The issue is not abstract. An export restraint is a border measure that takes the form of a government law or regulation that expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted. It could also take the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports. For the purpose of assessing the consistency of the US measures with the SCM Agreement, this Panel has to determine whether such government actions are included in the range of government actions that are defined as a "financial contribution" in Article 1.1(a)(1) of the Agreement.

The level of restraint can vary, but this does not change the basic nature of an export restraint. These variations do not make the issue abstract nor do they change the character of the measures that is relevant to ascertaining whether they are a financial contribution—they are government actions that restrict exports.

In assessing the relevance of variations in export restrictions, a distinction must be drawn between "action" and "effect". Article 1.1(a)(1) circumscribes a class of government *actions* defined to be financial contributions, the first element in the definition of a subsidy. Article 1.1(b) sets out the second element - "a benefit is thereby conferred" - which goes to the *effect* of the government actions defined in the first element. The US focus is on the effect.

Q8. Please comment on the EC statement in footnote 21 to its written submission that an export restraint may form part of a package of measures which, taken together, amount to

government "direction" under subparagraph (iv). The example given by the European Communities is a government prohibition of exports of a product and a requirement that the producer maintain output levels and sell the product at a certain price to downstream users. How should such a measure (or package of measures) be approached should it arise in a countervail investigation? Would there be a financial contribution, and would that contribution emanate from the measure as a whole or only from some part/s of the measure?

Reply

Canada is asking this Panel to determine whether an export restraint as such satisfies the definition of financial contribution in Article1.1 of the SCM Agreement. Canada is not asking the Panel to decide the WTO consistency of some other measure that involves an export restraint and one or more other government actions, where those other government actions in themselves may constitute a financial contribution within the meaning of subparagraph (iv). In the example given by the EC it is not an export restraint that affects whether a financial contribution exists. Rather the elements that would go to determining this are the specific requirements that the producers in question maintain output levels of the product and sell the product to certain specified downstream users.

To initiate a countervailing duty investigation in respect to such a package of measures, an investigating authority must be satisfied, and articulate its reasons for being satisfied, as to how the specific requirement that the producers in question maintain output levels of the product and provide it at certain prices to certain specified downstream users meets the standard set out in Article 11.2 of the SCM Agreement, and more specifically, how that requirement represents sufficient evidence of the existence of a "subsidy", i.e. how it represents sufficient evidence of "financial contribution", "benefit" and specificity".

Q9. The Panel notes your response in paragraphs 26-27 of your oral statement at the first meeting of the Panel to the apparent US argument that an export restraint can be the "functional equivalent" of an affirmative obligation to provide a good to domestic purchasers, to the extent that, by directing producers not to export, it directs them instead to seek the only other purchasers available to them for the sale of their goods. Assuming a situation in which the producers have no choice but to sell to domestic purchasers (*i.e.*, they cannot exercise any of the theoretical options identified by the European Communities as open to them), on what substantive basis could an export restriction be distinguished from an affirmative obligation to provide the restrained good to domestic purchasers?

Reply

Canada has indicated in its submissions that it cannot conceive of a situation in which an export restraint as such will result in a producer having no economic choice but to sell its goods to the same domestic users of the good in question that it sold to before the export restraint was imposed. For producers to truly have "no choice" but to sell to domestic purchasers implies that some government action other than an export restraint is present. It is that other government action that may constitute a financial contribution and not the export restraint. It is that other government action that creates an affirmative obligation to provide the restrained good. An export restraint, because it is simply a prohibition against doing something, cannot, by itself, be transformed into an affirmative obligation. The United States disregards the text of the SCM Agreement in favour of economic determinations of what government actions may have effects similar to actions defined as financial contributions in the SCM Agreement.

Q10. You seem to argue that a "private body" in the sense of Article 1.1(a)(1)(iv) must be an organised "collectivity", and that therefore the mere sharing of a common characteristic (e.g., gold miners) is not sufficient to transform a group of individual entities into a "private body". Is it your argument that an individual producer of a good could not be a "private body"

because it was not part of an organised "collectivity"? If not, are you arguing that each individual producer of a product could be a "private body", but that looked at as a whole (*i.e.*, from the perspective of their common characteristic), such producers could not be a "private body"? Please explain.

Reply

Canada's interpretation is grounded in both the plain meaning of the term "private body" and its context, i.e., the phrase "a government . . . entrusts or directs a private body to carry out" a financial contribution that is normally vested in the government in question and practised by governments generally. The "private body" is the recipient of the government entrustment or direction, and it is the surrogate of the government in making the financial contribution. In context, the mere fact that individuals share a common characteristic (e.g., bankers) that is unrelated to an entrustment or direction to carry out a financial contribution does not transform them into a private body within the meaning of subparagraph (iv).

Canada considers the apt meaning of "private body" to be "a group of individuals *organised for some purpose*". In the context of subparagraph (iv), the event that makes individual entities "organised for some purpose" is the government entrustment or direction to make a financial contribution, which would necessarily both designate those being entrusted or directed and define the financial contribution purpose. Although the individuals may be bankers, it is not that fact that makes them a "private body" in the sense of subparagraph (iv). Thus a law, regulation, or administrative directive requiring "all bankers" to lend (in lieu of the government's lending) to the widget industry might make bankers a "private body", but they would not be a "private body" simply because they were in the banking business.

Similarly, a law requiring individual producers of a good (e.g., barley farmers) to provide that good, or a government direction expressly charging those individual producers with responsibility for providing that good, might make those individual producers a "private body", but they are not a "private body" simply by reason of the fact that they are producers of a good. Absent the government entrustment or direction to provide the good, they would not become a "private body" by reason of some *other* government action (a change in the tax regime, an export restraint, a duty or duty reduction) that may have some economic effect in the market in which they participate.

A government might entrust or direct a single individual or entity to make a financial contribution within the terms of subparagraph (iv), and in that instance, the individual or entity would be a "private body." That does not, however, mean that "private body" can be isolated from its context and translated as "any private person(s)". Canada notes that if the drafters had meant "any private person(s)", presumably they would not have adopted the term "private body".

Q11. You argue that the United States interprets in an overly-broad manner Article 1.1(a)(1)(iv) in respect of government-entrusted or -directed provision by a private body of a good. In your view, the US interpretation would potentially open the door to defining any government regulatory measure that increases the domestic supply of a good as a government-directed provision of a good:

(a) In your view, how narrowly should this provision be construed? Would you consider that if a government ordered a producer to sell its product to a certain customer (or customers), without specifying a price, quantity or other terms, that this would constitute government-directed provision of a good? If not, why not?

Reply

The issue before this panel is not a matter of interpreting subparagraph (iv) "narrowly" or "broadly", but rather is a matter of construing the provision in a manner that gives effect to the plain meaning of its terms. In the example given, Canada considers that a government ordering a producer to sell its product to a certain customer(s) would constitute a government-directed provision of a good. Whether it would be a financial contribution would depend upon whether the other elements of subparagraph (iv) was met.

(b) Are there any circumstances other than an *explicit* requirement by a government to make available a given product to given purchasers that in your view would constitute government-entrusted or -directed provision of goods?

Reply

Based on the plain meaning of the words "entrust" and "direct", it is Canada's position that only an explicit requirement by a government to provide a given product to given purchasers could constitute a government-entrusted or -directed provision of goods. In their plain meaning, the words "entrusts or directs" connote an affirmative action to order or commission someone to do something. The *New Shorter Oxford English Dictionary* defines "entrust" as meaning to "invest with a trust; give (a person, etc.) the responsibility for a task …". "Entrust" thus carries a strong connotation of agency. This understanding of "entrust" is further reflected in the *Concise Oxford Dictionary* which defines "entrust" as meaning to "give responsibility for (a person or a thing) to a person in whom one has confidence … assign responsibility for a thing to (a person) … . The ordinary meaning of the term "direct" is "to give authoritative instructions to; to ordain, order or appoint (a person) to do (a thing) to be done; order the performance of".

The "explicit" nature of these actions is reinforced by the terms that immediately follow "entrusts or directs", namely "to carry out". The ordinary meaning of "to carry out" is to "conduct to completion, put into practice" or "to put into execution". When read together, "entrusts or directs … to carry out" suggests the communication of a duty or instruction that is to be discharged or executed, i.e. an action that is explicit (not implied).

(c) Taking into account your responses to questions (a) and (b) above, how proximate a relationship of cause and effect must there be between a government's action and a private body's action for the "entrusts or directs" standard in Article 1.1(a)(1)(iv) to be satisfied?

Reply

There is no issue of cause and effect. There must be a government action that entrusts or directs a private body to, for example, provide goods. It is that government action that potentially gives rise to a financial contribution provided that all other elements are also satisfied.

Q12. You argue that, where the government entrusts or directs a private body to carry out one of the types of functions in subparagraphs (i)-(iii) of Article 1.1(a)(1), subparagraph (iv) requires that such a function must be one that would normally be vested in the government and must not differ in any real sense from practices normally followed by governments:

(a) Please expand on how, in your view, these concepts or requirements fit in the context of the functions listed in subparagraphs (i)-(iii). Could it not be argued that many of these functions are "normally" undertaken by the private sector (e.g., investment of equity capital, lending of money, provision or purchase of

goods, etc.) Under what conditions or circumstances could it be said that such functions are "normally" undertaken by a government?

Reply

It is necessary to first clarify the meaning of "normally vested in the government" and "the practice in no real sense differs from practices normally followed by governments". In the phrase "a government . . . entrusts or directs", "a government" refers to the government being scrutinized under subparagraph (iv). The phrase "which would normally be vested in the government" refers to that same government and, "followed by governments" refers to governments in the generic sense. Subparagraph (iv) therefore does not encompass all instances of the types of functions defined in subparagraphs (i) to (iii), because the phrase "…normally be vested in the government" imposes a fundamental limitation on the scope of subparagraph (iv). Any other interpretation would deprive the phrase "which would normally be vested in the government" of any meaning or effect.

In the phrase "the practice in no real sense differs from practices normally followed by governments", the "practice" is the "carry[ing] out [of] one or more of the type of functions illustrated in (i) to (iii)" by a private body, i.e., the making of the financial contribution by the private body. This practice must, in no real sense, differ from practices normally followed by governments. Thus, the financial contribution would have to be one that the government in question ordinarily performed, and one that, as a rule, governments engage in.

Canada believes that the "normally vested in" and "normally followed by" elements of subparagraph (iv) are express limiting elements that make clear that a function in (i) through (iii), when carried out by a private body at the direction of government, is a financial contribution only when the private body is performing a normal government function in place of the government in question.

While a number of the functions in (i) through (iii) will often "normally" be undertaken by the private sector, the language plainly contemplates that there will be circumstances in which it could be said that such functions are "normally" undertaken by a particular government and normally practiced by governments generally. Thus, while the requirements limit subparagraph (iv), they do not render it a nullity. Without prejudging what circumstances might be sufficient in a particular instance, Canada notes as one example that provision of waste management services may normally be performed by a specific government and commonly provided by governments generally. It cannot be the case, however, that a government's mere ability or power to entrust or direct a private body means that the function is "vested in the government" or "normally followed by governments." That interpretation would render the requirements redundant of the "entrusts or directs" requirement.

(b) The United States argues that such functions are "normal" government functions in the context of the provision of subsidies. Given that you emphasise in your arguments that the concepts of financial contribution and benefit are separate and must not be confused or blended, is it correct that you would not agree with this statement by the United States? If you do not agree with the United States on this point, on what other basis or under what other circumstances do you consider that these functions would fall within the government's "normal" activities and thus would satisfy the test in subparagraph (iv)?

Reply

The "functions" in subparagraph (iv) (i.e., those normally vested in the government and normally followed by governments) are the forms of government action that constitute a "financial contribution" under the remainder of Article 1.1(a)(1), without consideration of their "effects". Since

there can be no "subsidy" unless the financial contribution in question confers a benefit, the US argument would read into subparagraph (iv) words ("in the context of the provision of subsidies") that are not there. Moreover, the US argument is circular: one would first have to determine if there was a subsidy to determine if there was a "financial contribution" under subparagraph (iv), even though a financial contribution is a prerequisite to a subsidy. One would also have to determine if there was a "benefit" in order to determine whether there was a "financial contribution", even though, under the plain wording of Article 1.1, it is the financial contribution that must confer the benefit, and not the other way around.

In response to question (a), Canada has tried to describe the kinds of circumstances under which the functions in (i) through (iii) might satisfy the tests in subparagraph (iv).

(c) The Cartland I draft[1] combined in each subparagraph (i)-(iv) the concepts of financial contribution and benefit. In addition, subparagraph (iv) also contained the "normally vested" and "in no real sense differs" language. Subsequent drafts separated the concept of financial contribution from the concept of benefit, but subparagraph (iv) maintained its references to "normally vested" and "in no real sense differs". What, if anything, is the significance of this drafting history for understanding the "normally vested" and "in no real sense differs" language in subparagraph (iv)?

Reply

This drafting history confirms that the "normally vested" and "in no real sense differs" language are requirements that limit the "financial contributions" (or functions) encompassed in subparagraph (iv) and that those requirements do not relate to "benefit" or "subsidy". Because the Cartland I draft combined the concepts of financial contribution and benefit in each subparagraph, it could have been argued that the "normally vested" and "in no real sense differs" language was relevant to "benefit" as well as "financial contribution". The separation of "benefit" in subsequent drafts, and the retention of the references to "normally vested" and "in no real sense differs" in subparagraph (iv), make plain that the drafters' intent was for that language to apply only to the "financial contribution" element.

(d) Considering the specific case of provision of goods, what constitutes the "normal" provision of goods by a government? In what circumstances could it be said that a provision of goods by a private body at the direction of a government would satisfy the criteria of "normally vested in the government" and "in no real sense differs from practices normally followed by governments" set forth in subparagraph (iv)?

Reply

It may be relatively uncommon for the provision of goods by a government to be "normal". There would, however, be such instances, where a government produces or markets a good. In Canada's view, the provision of a good by a government would be "normal" when the government had engaged in that activity.

"Normally vested in" means that the provision of goods by the private body at the direction of a government must be carried out in materially the same way as it had been carried out by the government in question. If the private body, in providing goods, is simply reacting to market forces as a private market participant, it is performing a purely *private* market function. (Although governments may at times act like private market participants, the question here is whether the private

[1] Exhibit CAN-36.

body, at the direction of government, is acting like the government, i.e., as its surrogate.) "Normally followed by" simply means that provision of goods by the private body at the direction of government must be materially the same as the provision of goods normally performed by governments. For example, if a government were to direct a private body to provide water to individuals and businesses rather than providing it through a public utility, the issue would be whether that provision was materially the same as the provision accomplished through the public utility.

Q13. Do you agree with the European Communities' argument that, in the case of government-entrusted or -directed provision of goods, for the condition of the "carrying out of functions that would normally be vested in the government" to be fulfilled, not only would there have to be specific direction to the producers to provide the goods, but also that this provision would have to be on "certain pre-determined conditions"? If you agree, why would "pre-determined conditions" have to exist in order for a private body to be carrying out a function normally vested in a government (*i.e.*, for a *financial contribution* to exist)? That is, are not the "conditions" on which a good is provided the determinant of whether there is a benefit? If so, in what way would "conditions", pre-determined or otherwise, be relevant to the question of financial contribution?

Reply

Canada agrees generally with the European Communities' position. Where there is a government entrusted or directed provision of goods, the remaining elements of subparagraph (iv) must still be met. For the function to be one "normally vested" in the government and "normally followed by governments', the private body, in carrying out the function at government direction, must be acting in the place of the government rather than behaving as a participant in the private market. Some pre-determined conditions would therefore be a necessary element of a financial contribution, to ensure that the government function was mirrored when performed by the private body. While Canada agrees that some conditions relevant to a financial contribution might also be relevant to benefit, the inquiries into the two elements of a subsidy are distinct.

Q14. Please comment on paragraphs 17-31 of the United States' oral statement at the first meeting of the Panel with the parties.

Reply

Canada's comments can be found in Part III of Canada's Second Submission.

Q15. Please explain why (in paragraph 45 of your first written submission and paragraph 56 of your response to the US request for preliminary rulings, which view also is expressed by the European Communities in paragraph 27 of its oral statement at the first meeting of the Panel) you consider that the proviso in the SAA limits any discretion that Commerce may enjoy to "satisfying itself that an alleged subsidy involves a formal enforceable measure". The proviso states, in particular, that the type of indirect subsidies which Commerce has countervailed in the past will continue to be countervailable "provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met". Do these words not require Commerce to be satisfied that all of the elements in Section 771(5)(B)(iii) have been met?

Reply

The proviso must be read in the context of the three paragraphs that precede it. Although the proviso states that Commerce must be satisfied that all the elements of section 771(5)(B)(iii) are met, the preceding paragraphs have already authoritatively instructed Commerce as to when those conditions should be considered to be met and, at a minimum, authoritatively instruct Commerce that they will be met in circumstances similar to *Leather* and *Lumber*.

The first paragraph states unequivocally that the "entrusts or directs standard" of 771(5)(B)(iii) "shall be interpreted broadly" to "continue [the Administration's] policy of not permitting the indirect provision of a subsidy to become a loophole" in countervailing duty enforcement. The second paragraphs, discussion of *Leather* and *Lumber* makes clear that a "formal, enforceable measure" is the only requirement relevant to the determination of whether an export restraint is a "financial contribution". The third and crucial paragraph then declares that those export restraints meet the entrusts or directs standard of 771(5)(B)(iii), and that in such cases, the amended law is to be "administered on a case-by-case basis consistent with" the pre-WTO practice. Any remaining doubt about the SAA's authoritative instructions with respect to the interpretation of section 771(5)(B)(iii) is removed by the very words that precede the proviso, when the SAA declares the

> Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under section 771(5)(B)(iii) has been met. (emphasis added)

As Canada has previously pointed out, this statement does not say "may encompass" or "could encompass". It simply and clearly says "encompass". Thus the SAA gives Commerce explicit direction as to the determination it should make under the proviso with regard to export restraints.

Q16. You state, in paragraph 39 of your response to the US Request for Preliminary Rulings:

> **" . . . [T]he 'practice' at issue is not individual determinations in countervailing duty cases as the United States suggests. As Canada has made clear, it does not seek a ruling overturning the determinations in particular past cases. Practice is, rather, an administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology – here, to treat an export restraint as meeting the financial contribution requirement of the *SCM Agreement* when US authorities find a benefit." (footnotes omitted)**

(a) How, in your opinion, is such an "administrative commitment or policy" susceptible of dispute settlement *per se*? How is such an "administrative commitment or policy" – something that might be otherwise described as US 'behaviour' – to be conceived of as a measure?

Reply

An administrative commitment or policy is susceptible of dispute resolution *per se* because it is a "measure", as that term is understood in the DSU and GATT 1994, that is inconsistent with US obligations under the SCM and WTO Agreements.

The ordinary meaning of the word "measure" is "a plan or course of action to attain some object, a suitable action," or "a step planned or taken as a means to an end." A "measure" clearly encompasses an administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology. The Appellate Body in *Guatemala – Cement* confirmed that "a 'measure' may be *any* act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government…"

The context of the word "measure" supports the broad scope of the term. Article 3.3 of the DSU refers to the "prompt settlement of situations in which a Member considers that any benefits

accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". Restricting the scope of the term "measure" as suggested by the United States would limit the scope of dispute settlement and exclude certain government actions such as administrative policies and practice that could impair benefits accruing under covered agreements. Given the importance of administrative policy and practice in the legal regimes of many Members, such a limitation could have substantial adverse consequences. The Panel in *United States - Section 301* recognized the importance of capturing all elements of Members' laws in interpreting the disciplines in the WTO Agreements.

Furthermore, Article 3.2 of the DSU states in unequivocal terms that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." To remove the measures at issue here from the scope of dispute settlement would frustrate the attainment of security and predictability.

The importance of including administrative practices in the definition of measure is underscored at paragraph 8.2 of the Panel Report in *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, where the Panel recommended that the United States revise its continuing and WTO-inconsistent, administrative practice. The administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology at issue in this dispute is an administrative practice akin to that referred to by that Panel.

(b) In what way is US "practice", in the sense described in the above quote, different from the references to export restraints in the SAA and the Preamble as you characterise them? That is, if the Panel were to rule on the SAA and the Preamble, as requested by you, as policy statements binding on the DOC in respect of the treatment of export restraints, what would an additional ruling in respect of US "practice" add?

Reply

US practice is part of the treatment of export restraints as financial contributions under US countervailing duty law. Compliance by the United States with its WTO obligations would require it, *inter alia*, to cease applying the WTO-inconsistent treatment of export restraints in then-ongoing or subsequent countervailing duty investigations.

(c) If practice is "not individual determinations in countervailing duty cases", and also is something different from and beyond the statements in the SAA and the Preamble, then what is it precisely?

Reply

Practice is an administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology. Practice is related to precedent and becomes the "practice" followed in subsequent cases. Practice is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations. This commitment causes uncertainty and unpredictability for exports of Canadian goods into the US market, contrary to the object and purpose of the SCM and WTO Agreements. Canada agrees that this commitment is also expressed in the SAA and the Preamble, which Canada has also identified as measures with which it takes issue in this dispute.

(d) Do you believe that US "practice" as an "administrative commitment or policy" is mandatory legislation in the sense that the term is used in the mandatory/discretionary distinction? And if US "practice" does not constitute

mandatory legislation – which *requires* the United States to do something – then on what basis could it be found as such to be inconsistent with the United States' WTO obligations?

Reply

Yes. See Part IV of Canada's Second Submission.

Q17. Please respond in detail to the US arguments in paragraphs 43-55 of its oral statement at the first meeting of the Panel, concerning the applicability of the *WTO* and *SCM Agreements'* provisions cited by Canada to the measures identified by Canada. (In this regard, please note that, in response to an oral question from the Panel at its first meeting, the United States indicated that these arguments are applicable to the SAA and the Preamble, in addition to practice, under which heading they appear in the US oral statement delivered at that meeting.)

Reply

Canada's challenge is grounded in the definition of "subsidy" in Article 1.1 of the SCM Agreement. The measures at issue treat an export restraint as a financial contribution. As an export restraint is not a financial contribution under Article 1.1(a)(1), the treatment is inconsistent with that Article.

Article 10 imposes an affirmative obligation on Members to "take all necessary steps to ensure…" that the imposition of countervailing duties is consistent with the SCM Agreement and Article VI of the GATT 1994. This includes ensuring that the foundation of US CVD law—the definition of a subsidy—is in accordance the Agreement. If this were not the case, investigations could be initiated against measures that are clearly not the proper subject of countervailing duties.

The violations of Articles 11, 17, 19 and 32.1 flow from the violation of Article 10. Article 32.5 of the SCM Agreement requires the United States to take all necessary steps to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Agreement. Accordingly, the inconsistency of US countervailing duty law with the above-noted provisions also results in a violation of the positive obligation in Article 32.5. The same comments apply to the US arguments regarding Canada's challenge under Article XVI:4 of the WTO Agreement.

ANNEX A-2

EXECUTIVE SUMMARY OF ANSWERS OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AT THE FIRST SUBSTANTIVE MEETING

(28 February 2001)

FIRST MEETING OF THE PANEL WITH THE PARTIES - QUESTIONS DATED 18 JANUARY 2001

The DOC has not taken a definitive position on the status of export restraints, other than to express the opinion that, in the appropriate circumstances, an export restraint might satisfy the definition of a subsidy set forth in the US statute and the SCM Agreement. Thus, with respect to many of the questions posed by the Panel, there is no DOC or US position, nor could there be in the absence of an actual case. Therefore, the answers set forth herein do not necessarily reflect what the DOC would do if confronted with actual facts in an actual case.

I. QUESTIONS TO BOTH PARTIES

Q1. What, in your view, is an "export restraint"? That is, what are the essential, defining characteristics of an export restraint that would be universal to all "export restraints", no matter what the specific form of the export restraint in a given situation, and no matter what other elements might be present in a given measure that included an export restraint? Can you describe how an export restraint operates? Can you give any example of an export restraint which might, arguably, amount to a subsidy within the meaning of SCM Article 1.1?

Reply

This question highlights the problematic nature of this dispute. It is neither practicable nor desirable for the Panel to attempt to define, in the abstract, a term that does not appear in the SCM Agreement, but the ordinary meaning of "export restraint" would be an action or an act that holds back or prevents exports. Canada concedes that an export restraint can result in "a price effect beneficial to users of the restricted product", and Canada does not allege that an export restraint is incapable of providing a "benefit." As examples of export restraints, the US refers the Panel to WT/TPR/S/51, page 105; CDA-12 and CDA-13; CDA-14; CDA-22; US-30; and WT/TPR/S/81, pages 65-67. The US declines to speculate on whether any of these export restraints would constitute a subsidy under the new definition of "subsidy" in Article 1.1. The US notes that under its pre-WTO CVD law, the DOC found that the export restraints existing at the time in Alberta, Ontario and Quebec did not constitute subsidies.

Q2. Do you agree that the conferral of a benefit under Article 1.1(b) of the *SCM Agreement* is immaterial to the question of the existence of a financial contribution under Article 1.1(a) of the Agreement?

Reply

The US agrees that "financial contribution" under Article 1.1(a) and "benefit" under Article 1.1(b) are separate and distinct requirements that must be satisfied for a finding of a "subsidy" under the SCM Agreement. In the case of an export restraint, the same body of evidence might be

relevant for purposes of determining whether both requirements are satisfied, and the requirements may not be totally unrelated.

II. QUESTIONS TO THE UNITED STATES

Q6. You indicate, in paragraph 36 of your request for preliminary rulings:

> **"In other words, the SAA is a type of legislative history. In the United States, legislative history is often considered for purposes of ascertaining the meaning of a statute, but cannot change the meaning of, or override, the statute to which it relates."**

However, in the *Section 301* case, you stated, in response to a question from the Panel:

> **"The SAA must, by law, be treated as the authoritative expression concerning the interpretation of the statute in any judicial proceedings".**[1]

(a) Please reconcile these two statements.

Reply

The US does not consider the two statements to be in conflict. If the meaning of a statutory provision were clear, a contrary meaning expressed in the SAA could not override the statute.

(b) Please provide clarification as to whether the SAA is binding in respect of the statute it accompanies. In particular, please elaborate on the words "the authoritative expression" in the quote above.

Reply

Under US legal principles the goal of statutory interpretation is to accurately discern the intent of the legislature. In cases where a statute is ambiguous or where confirmation of a clear statutory meaning is sought, interpreters may resort to legislative history to help discern the legislature's intent. An interpreter could properly resort to the SAA to identify the intent of the US Congress. As an "authoritative expression" of Congress' intent, the SAA would prevail over other legislative documents that also might shed light on that intent.

Q7. The SAA accompanying the *URAA* indicates, on page 926:

> **"In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met."**

[1] *Section 301*, Panel Report, WT/DS152/R, adopted 27 January 2000, footnote 683.

(a) What, in your view, does it mean for the law to be administered "on a case-by-case basis"? In particular, under what circumstances would the DOC find that export restraints do not meet the standard under Section 771(5)(B)(iii)?

Reply

With respect to the first question, Congress was confronted with a situation in which the DOC had countervailed a variety of government programs – including export restraints – that fell under the rubric of what were termed "indirect subsidies." The standard that the DOC had applied in these situations was different from the standard called for by the SCM Agreement. Congress chose to leave it to the DOC to decide, based on the facts of a case and the application of those facts to the new subsidy definition, whether a particular government program in a specific case constitutes an indirect subsidy. Insofar as export restraints are concerned, Congress refrained from pre-judging the matter one way or the other. The US is not in a position to speculate as to the precise circumstances under which the DOC might find that an export restraint does not meet the standards of section 771(5)(B)(iii). The DOC would apply the standards of that provision to the evidence before it.

(b) What, in your view, does it mean for "these types of indirect subsidies [to] *continue to be* countervailable" in the light of the entry into force of the *SCM Agreement*? In particular, how has the way in which you approach export restraints in the context of countervail investigations changed with the introduction of the new concepts of "financial contribution" and "benefit" contained in the Agreement and incorporated into US law?

Reply

The quoted language cannot be read in isolation from the proviso that immediately follows. When read together, the language constitutes a statement by Congress that congressional enactment of the URAA should not be construed as signifying that the types of government programs described in the SAA necessarily ceased to be countervailable. Instead, Congress refrained from pre-judging the issue. "Benefit" was not a new concept. With respect to "financial contribution," it is not an entirely new concept in the sense that the US CVD law always has required some form of government action in order for a subsidy to be found to exist. With respect to the concept of "financial contribution" as articulated in subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement, the US is not in a position to elaborate on how this may have changed the DOC's approach to export restraints.

Q8. Where terms such as "financial contribution" and "entrusts or directs" are adopted in the US statute from the *SCM Agreement*, is the SAA authoritative on the meaning of those terms? In other words, can the SAA affect the meaning to be given to terms in a treaty that are incorporated in US legislation?

Reply

To the extent that the terms of a treaty are subject to interpretation, the SAA, as a general proposition, expresses the authoritative view of Congress and the Administration as to what those terms should mean for purposes of domestic law. With respect to the phrase "entrusts or directs", the SAA does not express a view on precisely what that phrase means, but instead merely expresses the general desire of Congress and the Administration that the phrase be interpreted as broadly as the statutory requirements permit.

FIRST MEETING OF THE PANEL WITH THE PARTIES - QUESTIONS DATED 19 JANUARY 2001

I. QUESTIONS TO BOTH PARTIES

Q1. You argue that the subject of Article 1.1(a)(1)(iv) is "indirect subsidies" (in Canada's case that that article addresses this concept comprehensively). To what extent do your arguments under Article 1.1 depend on the equation of Article 1.1(a)(1)(iv)-type subsidies with "indirect subsidies" either as a whole or in part. In other words, does the extent to which export restraints fit or do not fit within the scope of Article 1.1(a)(1)(iv) depend on whether that provision is concerned with indirect, as opposed to direct, subsidies? What light is shed on the issues in dispute by your arguments that the subject matter of Article 1.1(a)(1)(iv) is "indirect", as opposed to "direct", subsidies?

Reply

The phrase "indirect subsidies" is merely a shorthand expression that the parties have used to describe the types of practices that potentially fall under subparagraph (iv). The important point is that subparagraph (iv) exists in order to prevent governments from avoiding subsidies disciplines by using private actors as the vehicle for transmitting a subsidy.

Q2. What is the ordinary meaning, in accordance with Article 31 of the *Vienna Convention of the Law of Treaties*, of the word "type" as it appears in Article 1.1(a)(1)(iv)?

Reply

See paragraph 25 of the *US First Submission*. An export restraint could constitute the government entrustment or direction of the provision of a good, a function which is expressly listed in subparagraph (iii).

II. QUESTIONS TO THE UNITED STATES

Q18. You argue that, insofar as the object and purpose of the *SCM Agreement* is "to impose multilateral disciplines on subsidies which distort international trade", it would be inconsistent with this object and purpose to rule out the possibility that export restraints could constitute subsidies. Assuming that this is a correct statement of the object and purpose of the *SCM Agreement*, how does this statement, which incorporates the word "subsidies", inform the question as to what constitute "subsidies" subject to the Agreement?

Reply

The quoted phrase uses the term "subsidies" in the non-technical, commonly understood sense of the word. The US has not argued that the object and purpose of the SCM Agreement alone is controlling, nor has it argued that all government measures that distort trade are subsidies. What the US has argued is that the meaning of these provisions should not be improperly narrowed to exclude measures commonly understood to be subsidies that distort trade, where the text would not exclude them and where doing so would frustrate the object and purpose of the Agreement.

Q19. Do you accept Canada's argument, in paragraph 33 of its oral statement at the first meeting of the Panel, that the imposition of multilateral disciplines on subsidies which distort international trade is only one of the objects of the *SCM Agreement*?

Reply

That is the primary objective of the SCM Agreement, as acknowledged by prior WTO panels. As the Appellate Body has noted, interpretations that make obligations under the SCM Agreement easy to circumvent are contrary to the object and purpose of that Agreement. Regulating countervailing measures is also a purpose of the SCM Agreement, but, as Canada has noted, should not be done in a manner which allows governments to engage in complex schemes that evade subsidy disciplines while artificially promoting domestic production.

Q20. You cite item (d) of the Illustrative List of Export Subsidies ("the provision by governments, either directly or through government-mandated schemes, of imported or domestic products or services") as contextual support for your argument that Article 1.1(a)(1)(iv) can encompass export restraints. Thus, in your view, "indirect" subsidies under item (d) (*i.e.*, provision of goods or services through government-mandated schemes) by definition must satisfy the requirements of *SCM* Article 1.1, including that they must involve a financial contribution:

(a) Assuming that this is a correct reading of the Illustrative List, what light does item (d) thereof shed on the central question of whether an export restraint constitutes a financial contribution in the form of government-directed provision of goods? In particular, is it not clear from Article 1.1 itself, without referring to the Illustrative List, that government-directed provision of goods and services is a financial contribution?

Reply

The US agrees that it is clear that the government-directed provision of goods and services is a financial contribution and that it is not necessary to refer to item (d). However, item (d) provides useful contextual support for the conclusion drawn from the ordinary meaning of the text. Item (d) confirms that a financial contribution exists where private parties provide goods as the result of a "government-mandated scheme."

(b) Canada and the European Communities argue that, in any case, you misconstrue the *Canada-Dairy* panel's findings in respect of item (d) (which, as pointed out by the European Communities, were mooted by the Appellate Body). In particular, they argue that the panel established as the conditions for the applicability of item (d), first that goods be provided on terms favouring exports, second that such provision be by a government, either directly or indirectly through a government-mandated scheme, and third that a benefit be conferred. In other words, according to the Canada and the European Communities, the panel did not consider that all government-mandated schemes favouring exports and conferring benefits were covered by item (d), but rather only those where goods were being "provided". Please comment on Canada's and the European Communities' characterisation of your argument and of the *Canada-Dairy* panel's findings.

Reply

The US does not dispute the fact that the Appellate Body characterized the panel's findings as moot. However, the characterization of the panel's findings as moot does not necessarily mean that this Panel may not rely on those findings for useful guidance. The US does not disagree with the proposition that not all "government-mandated schemes" necessarily will violate item (d). However, there are two key points which distinguish the US reading of *Canada - Dairy*. First, Article 1.1 and item (d) do not limit the concept of "subsidy" to instances where the government itself is providing a

good. Second, the panel found that the goods were "provided", whether directly or indirectly, in a situation where prices were negotiated; *i.e.*, not pre-determined, as Canada and the EC argue is required.

(c) Please comment on Canada's characterisation, in paragraph 31 of its oral statement at the first meeting of the Panel, of the Appellate Body ruling in *United States – Tax Treatment for "Foreign Sales Corporations"*.

Reply

Nothing in paragraph 93 of the Appellate Body report in the *FSC* case is inconsistent with the US position. The Appellate Body simply rejected the US argument that footnote 59 of the Illustrative List constituted an exception to the general definition of "subsidy" found in Article 1.

Q21. The European Communities argues that, contrary to the US position, an export restraint on a particular good is not substantively the same as a government direction requiring producers of that good to provide it to certain purchasers. In particular, the European Communities states that, when faced with an export restraint, producers of the restrained goods have a range of options other than simply continuing to sell the product to the domestic purchasers: reducing output, diversifying production, or becoming involved in downstream operations where exports were not restricted:

(a) Do you agree or disagree with the European Communities that the imposition of an export restraint opens a range of possible reactions by domestic producers to an export restraint? Please explain.

Reply

The US disagrees that an export restraint would open a range of possibilities to a producer of the restrained good. Instead, the US would characterize an export restraint as *limiting* the opportunities available to the producer of the restrained good. The US also disputes the EC's position that the presence of options in response to an export restraint somehow would undermine the basis for ever finding that an export restraint constitutes "direction." To argue that an export restraint does not constitute direction because a producer of the restrained product is free to make choices it otherwise would not make absent the restraint does not answer the question of whether the export restraint constitutes a financial contribution in a situation where the producer chooses to provide the goods to the domestic industry as a result of the export restraint.

Assume that in a market free of a government-imposed export restraint, the producer of the input would choose to export the input to a different market for processing into a downstream product because it is more financially advantageous for it to do so. However, because of the export restraint, the producer of the input – which could not otherwise economically justify processing – begins to produce the downstream product, thereby artificially enhancing domestic production at the expense of foreign producers of the downstream product. None of this squares with Canada's statement that "[s]ubsidies . . . can deny countries the benefits they can otherwise expect to derive from comparative advantage and thereby inhibit efficient resource allocation."

(b) If you agree, would you consider that an export restraint constituted government-entrusted or -directed provision of goods in all circumstances in which the producers of the restrained product continued to sell any of that product to domestic purchasers, or would there be some circumstances in which the continued sale of the restrained product to domestic purchasers would not constitute government-entrusted or -directed provision of goods? Please explain, and describe any such circumstances.

Reply

The US agrees that there could be circumstances in which the continued sale of the restrained product would not constitute the government entrustment or direction of a good.

(c) Or, are you saying, as appears to be implied in paragraph 81 of your oral statement at the first meeting of the Panel, that only if there are no other options but to sell to domestic purchasers would there be entrustment or direction?

Reply

No, paragraph 81 does not make this implication. The causal relationship is something that must be examined on a case-by-case basis. Paragraph 81 (the fifth in a series of rebuttal arguments) simply stated that there may be situations in which Canada's and the EC's *theoretical* options are not available, in which case their arguments would be irrelevant.

Q22. In paragraph 78 of your oral statement at the first meeting of the Panel, you argue as follows:

> **"[T]here is no requirement (in the text or otherwise) that the beneficiaries of the subsidy practice at issue must be "targeted customers", although it may well be that a particular export restraint practice could satisfy such a requirement. To the extent that one must identify a class of beneficiaries, this relates to the requirement of specificity in Article 1.2."**

How does this argument relate to and reconcile with what seems to be the core of your argument as to the reason that an export restraint at least *can* constitute a financial contribution, namely that it is the government's foreclosing of sales to a given group of customers (*i.e.*, those in export markets), that *directs* (or can direct) the producers of the restrained good to "provide" it exclusively or largely to a different, and particular, group of customers (*i.e.*, those in the domestic market)? That is, if you assume that the phrase "targeted customers", in the arguments which you dispute in the above quote, refers simply to domestic purchasers of the good as a whole, and is not as you suggest related to the question of specificity, is it not correct that your argument is that "targeting" to this extent is a necessary condition for a financial contribution to exist in the case of an export restraint? Please explain.

Reply

The Panel's essential description of the US position is correct. As used by the Panel, "targeting" is a very broad concept. However, the US believes that the EC used the term in a much narrower sense, suggesting a requirement that the intended beneficiaries of a subparagraph (iv) subsidy somehow be *de jure* specified in advance. There is no textual requirement in subparagraph (iv) of "targeting."

Q23. Could you confirm that paragraph 69 of your oral statement at the first meeting of the Panel is in reference to *SCM* Article 1.1(b), rather than to Article 1.1(a)(1).

Reply

Yes.

Q24. You argue, in paragraph 36 of your first written submission, that if an increased supply of a product in the domestic market causes the price for that product to be lowered, that is the

same result as if the government had ordered the growers to sell *for less than market price*, and that therefore, applying an export restraint *can* be the functional equivalent of ordering producers to sell their product domestically *for less than adequate remuneration*. Both types of functions, you argue, "fall squarely within Article 1.1(a)(1)(iv)". Is it your argument that the element of less than adequate remuneration, or less than market price, is what makes these functions (performed at the direction of a government) fall within Article 1.1(a)(1)(iv)? In other words, is it your position that less than adequate remuneration or a below-market price is a necessary condition for a government-directed provision of a good to fall within Article 1.1(a)(1)(iv)? Please explain how the adequacy of remuneration has any relevance to whether a financial contribution exists.

Reply

No, the US position is that inadequacy of remuneration or below-market price are not necessary conditions for a finding of a financial contribution in the form of the government-directed provision of a good within the meaning of subparagraph (iv). However, the evidence of a financial contribution and benefit could well overlap. In paragraph 36, the US merely was pointing out that the same desired price effect could be achieved by governments: (a) ordering producers to sell at fixed (lower) prices (which Canada appears to concede would be a subparagraph (iv) subsidy); or (b) taking actions that cause producers to sell domestically goods that they otherwise would have exported, thereby increasing supply and reducing price.

Q25. You argue, in paragraph 77 of your oral statement at the first meeting of the Panel, that, insofar as the element of financial contribution is concerned, there is no requirement in the text of subparagraphs (iii) or (iv) of Article 1.1(a)(1) that the price or quantities at which goods are provided to the subsidised party be specified. Rather, you argue that the question of whether the price and quantity are sufficiently affected by government action that the provision of a good is for less than adequate remuneration is relevant to the measure of *benefit*, not to the existence of a financial contribution. Yet, you also argue, in paragraph 54 of your first written submission, that the functions identified in subparagraphs (i)-(iii) are "normal" government functions in the sense of subparagraph (iv) in the context of government provision of *subsidies* – a concept that includes both financial contribution and benefit. Please reconcile these two arguments. That is, if price and quantity are related to benefit, and thus not to financial contribution in the case of provision of goods, then why would the reference to functions "normally" vested in a government, which occurs in the exclusive context of financial contribution in the text of *SCM* Article 1.1, be to the provision of "subsidies", which implicitly refers to both financial contribution and benefit?

Reply

As noted above, evidence of benefit and financial contribution could well overlap, because subparagraph (iv) requires that there be a causal connection between the government action and the behaviour of the private actor(s) and that the activity undertaken by the private actor be one that governments normally engage in when providing a financial contribution. In stating that "normal" government functions refer to government action in the context of providing subsidies, the US was using the term "subsidies" in the non-technical, vernacular sense, similar to the manner in which it was used in the *Article XVI:5 Report*

Q26. Concerning the references in Article 1.1(a)(1)(iv) to functions "normally vested in the government" which "in no real sense differ[] from practices normally followed by governments", you argue that there are at least *some* instances in which governments "normally" do provide certain goods and services (e.g., access to limited natural resources). You further argue that the important point is that, where a government is involved in the

provision of a good or service, and instead of doing so itself it delegates that function to a private body, there "could" be a financial contribution:

(a) Are you arguing that a government would first have to be in the business of providing a good and then delegate it to a private body for this condition to be met? That is, are you arguing that the United States would not consider a government-directed provision of goods or services to be a financial contribution unless the government in question "normally" provided those goods and services on the basis of some prior action? What criteria would determine whether a government was "involved" in the provision of a good or service, or "normally" provided such a good or service?

Reply

The US reiterates that it is not arguing anything about what the DOC would consider, because the DOC has yet to take a position on the issue. All the US is doing in this case is responding to Canada's claim that an export restraint can never, under any set of circumstances, constitute a subsidy. The US is not arguing that the text of subparagraph (iv) requires that a government previously has been in the business of providing the good or service in question. Instead, an appropriate line of inquiry would be whether the private party action is of the type that a government typically would take, or could take, in an effort to allocate resources through taxation or subsidization.

(b) Or, are you arguing that by virtue of intervening at any time in a product market through a private intermediary, a government would become "involved" in the provision of a good or service, thereby satisfying the "normally vested" and "in no real sense differs" criteria? If this is your argument, would these criteria not be rendered meaningless?

Reply

No, this is not what the US is arguing. The US is simply arguing that when the extent and effectiveness of government involvement is such as to cause private actors to provide goods to domestic purchasers when they otherwise would have sold the same goods for export, the behaviour of the private actors in no real sense differs from the behaviour of a government if it had provided the goods directly.

(c) Please explain your use of the word "could" in the argument summarised above (which appears in paragraph 53 of your first submission). That is, you state that if a government is "involved" in providing a good or service and instead of doing so itself it delegates this function to a private body, there "could" be a financial contribution. This suggests that, in your view, even under this set of facts, there are circumstances in which there would *not* be a financial contribution. Article 1.1(a)(1)(iii) and (iv), read together, however, seem to say that the provision of goods or services at the direction of a government *is* a financial contribution. Please explain your position and provide examples illustrating the circumstances in which a government-directed provision of goods or services would and would not constitute a financial contribution in the sense of Article 1.1 (a)(1).

Reply

The use of the word "could" was not intended to have any special meaning. As a general proposition, the US agrees with the Panel that if the degree of government activity is insufficient to satisfy the standard of subparagraph (iv), a subsidy would not exist.

(d) In paragraph 54 of your first submission, you argue that subparagraph (iv) refers to functions normally performed by governments "*in the context of providing a subsidy*", and that any other meaning would leave subparagraph (iv) utterly empty. If the reference to "normally" in subparagraph (iv) refers to functions in the context of providing a subsidy, however, does this not implicitly import the concept of "benefit", which is treated separately in Article 1.1(b), into the concept of "financial contribution", which is the sole subject of Article 1.1(a)(1)? Please explain.

Reply

While separate requirements, the concepts of financial contribution and benefit are not totally unrelated.

(e) The Cartland I draft[2] combined in each subparagraph (i)-(iv) the concepts of financial contribution and benefit. In addition, subparagraph (iv) also contained the "normally vested" and "in no real sense differs" language. Subsequent drafts separated the concept of financial contribution from the concept of benefit, but subparagraph (iv) maintained its references to "normally vested" and "in no real sense differs". What, if anything, is the significance of this drafting history for understanding the "normally vested" and "in no real sense differs" language in subparagraph (iv)?

Reply

In the view of the US, the phrases "normally vested" and "in no real sense differs" refer to the government functions of taxation and subsidization. *See US First Submission*, paras. 51-54. The only prior negotiating history – the *Article XVI:5 Report* – supports this interpretation.

Q27. In your oral statement at the first meeting of the Panel, in paragraphs 3 and 5, you assert that what Canada seeks to challenge and enjoin in this case are mere "tentative opinions". You characterise the Preamble as "tentative thinking" or "tentative thoughts" (paragraph 27 of your oral statement at that meeting). Is it also your argument that the SAA, insofar as relevant, expresses only "tentative opinions", and that the US "practice" on which Canada relies is in some sense also "tentative"?

Reply

With respect to the SAA, it is not "tentative", but it expresses no position on indirect subsidies other than that they may be treated as subsidies if they satisfy the standard of section 771(5)(B)(iii). There simply is no post-WTO practice to speak of.

Q28. In paragraph 35 of your request for preliminary rulings, you state that the SAA is "an" authoritative expression of the meaning of the statute while, in the *Section 301* dispute, you stated that the SAA is "the" authoritative expression of that meaning. Does your use of the word "an" imply that the SAA is one of several authoritative expressions of the meaning of the statute, *i.e.*, that a court might not be bound by it if there were other relevant authoritative documents?

[2] Exhibit CAN-36.

Reply

As a general proposition, in terms of legislative history the SAA ranks supreme.

Q29. Canada cites the following statement by the DOC in two 1999 cases involving stainless steel products from Korea which refers to the SAA and the Preamble:

> **" . . . [T]he clear and unambiguous language of the SAA is that Congress intended the specific types of indirect subsidies found to be countervailable in *Steel Products from Korea* to continue to be covered by the Act, as amended by the URAA. The Department's final countervailing duty regulations are equally clear on this issue: the Preamble confirms that the standard for finding indirect subsidies countervailable under the URAA-amended law 'is no narrower than the prior US standard for finding an indirect subsidy as described in Steel Products from Korea.'"**

How do you explain these characterisations by the DOC of the SAA and the Preamble and their legal effects in the light of your arguments that these instruments do not require the DOC to do anything, but instead simply permit the DOC to countervail certain measures provided it determines on a case-by-case basis that such measures meet the new legal standard(s) set forth in the statute?

Reply

The DOC determinations in these cases were based on multiple volumes of factual analysis, including lengthy memoranda that detailed how the requirements for countervailability had been met. Nothing in the passage suggests a belief on the part of the DOC that it is free to ignore the new standard contained in section 771(5)(B)(iii) or subparagraph (iv).

Q30. The Preamble states in respect of export restraints:

> **"With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration . . . [I]f the Department were to investigate situations and facts similar to those examined in Lumber and Leather in the future, the new statute would permit the Department to reach the same result."[3]**

We note the above statement that, if Commerce "were to investigate situations and facts similar to those examined" in *Certain Softwood Lumber Products from Canada* and *Leather from Argentina* in the future, the new statute would permit the Department to reach the same result" as it had in those investigations. Using each of these two previous cases as a separate factual situation, and assuming exactly the same facts as were present in the *Lumber* and *Leather* investigations, could the United States please indicate how, today, it would apply each of the requirements of *SCM* Article 1.1(a)(1) to determine whether or not a financial contribution existed. That is, would there be a financial contribution, and what would be the analysis of the facts in each case that would lead to the conclusion that there was or was not a financial contribution in the sense of *SCM* Article 1.1(a)(1)? Please note that this does not require any reference to the concept of "benefit" as found in Article 1.1(b).

[3] *Regulations*, 63 Federal Register, pp. 65 and 351 (Annex C – Exhibit CAN-3).

Reply

The US is not in a position to answer this question, because it would be inappropriate, impractical, and possibly unlawful for the US to do so. In addition, a statement by the DOC as to what it might do – as opposed to what it is required under US law to do – is irrelevant to the issues in this case.

Q31. The SAA states:

> **"One of the definitional elements of a subsidy under the Subsidies Agreement is the provision by a government or any public body of a 'financial contribution' as defined by the Agreement, including the provision of goods or services. Moreover, the Subsidies Agreement specifically states that the term 'financial contribution' includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Administration's view that the term 'private body' is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided 'directly or indirectly' by a government. Accordingly, *the Administration intends that the 'entrusts or directs' standard shall be interpreted broadly*. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a US industry."**

The SAA seems to indicate that, under Section 771(5)(B)(iii) (which sets forth the "entrusts or directs" standard), export restraints that have the effect of lowering input costs will be countervailable as government "entrustment or direction" of the provision of goods, provided that Commerce is satisfied that the "entrusts or directs" standard is met. Please clarify if this is a correct reading of this section of the SAA.

Reply

This is not a correct reading. The quoted paragraph does not even address export restraints; it merely describes certain aspects of the new subsidy definition and GATT Article VI. The third paragraph makes clear that an indirect subsidy may be countervailed only if the DOC is satisfied that all of the requirements of section 771(5)(B)(iii) are satisfied.

Q32. Please comment on the argument in paragraph 27 of the European Communities' oral statement at the first meeting of the Panel concerning the interpretation of the "provisos" in the SAA in respect of the statute as it pertains to "indirect subsidies".

Reply

The standard which the EC claims the SAA incorporated in the new statute is discussed in the second of the three SAA paragraphs at issue in this case, which merely describes, as a factual matter, what the DOC did under pre-WTO law. The third paragraph makes clear that programs found to be subsidies by the DOC under its pre-WTO standard would remain countervailable only if the DOC determined, on a case-by-case basis, that the new WTO-consistent standard is satisfied.

Q33. Does the SAA authorise or require the Administration to construe Section 771(5)(B)(iii) as encompassing indirect subsidy practices other than where an authority makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private party to make a financial contribution?

Reply

The SAA does not authorize or direct the DOC to construe section 771(5)(B)(iii) in the manner described. It would be inaccurate to say that the SAA "authorizes" any action by the DOC. It has no legal effect independent of the statute (and, thus, is not a measure), but rather provides an authoritative expression regarding the proper interpretation of the statute. With regard to the interpretation of section 771(5)(B)(iii), the SAA expressed the view that the DOC countervail only government practices that satisfy all of the elements of the statute.

Q34. You argue that the import of the SAA and the Preamble is to indicate that the DOC is to proceed on a case-by-case basis in determining whether a given export restraint fulfils the "entrusts or directs" standard of the US statute. What legal standard and criteria are employed by the DOC in making such a determination?

Reply

For purposes of a final DOC determination, the domestic legal standard is found in section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516A(b)(1)(B)(i), which sets forth the standard of review applicable to DOC determinations. Because the DOC has not yet had to apply the "entrusts or directs" standard to an export restraint, it has not developed any criteria for making such a determination.

Q35. In the *Live Cattle* case, the DOC found that there was no subsidy because there was no benefit from the measure at issue. In your response to an oral question from the Panel at its first meeting, you stated that, because there was no benefit, the DOC "exercised judicial economy" and made no determination in respect of financial contribution. Does this mean that this question was not considered at all by the DOC? Please identify the relevant portion(s) of the DOC's determination in that investigation.

Reply

In *Live Cattle* (CDA-22), the DOC's main discussion of the Canadian Wheat Board ("CWB") runs from pages 57,047 to 57,052. In this discussion, the DOC simply found that there was no "benefit" (*see, e.g.*, page 57,048 (left column, second full paragraph) and page 57,052 (middle column, second full paragraph). The DOC never determined, because it did not have to, that the actions of the CWB constituted a "financial contribution."

Q36. Please expand on your response, in paragraph 57 of your first submission, to what you refer to there as Canada's "slippery slope" argument, namely that if an export restraint is considered to be the provision of a good because it might result in greater domestic availability of a product, then any measure that might induce or encourage domestic producers to increase the supply of a product would have to be considered the *provision of a good*, and hence *a financial contribution*. Your response is that, as a factual matter, it is unlikely that *all* such measures could be found to confer a financial contribution that results in a benefit.

(a) While your response refers to both financial contribution and benefit, Canada's argument does not mention benefit, but refers only to financial contribution. Focusing only on the question of financial contribution, do you agree that any measure that might induce or encourage domestic producers to increase the supply of a product would have to be considered – as a legal matter – the government-entrusted or –directed provision of a good, and hence a financial contribution? If not, on what legal basis under your interpretation could certain such measures be deemed *not* to be provision of a good, and thus *not* a financial contribution? In other words, what are the legal limits to the sorts of measures

that encourage domestic producers to increase the domestic supply of a product that can be considered government-entrusted or -directed provision of a good and hence *financial contributions*?

Reply

The ordinary meaning of "direct" requires a causal connection between the government measure and the behaviour of private actors in order for a financial contribution to exist. Thus, the legal basis is found in subparagraph (iv) itself. It would be short-sighted to focus solely on the financial contribution element of an actionable subsidy in analysing the "slippery slope" argument. One must take into account the fact that the application of the concepts of "benefit" and "specificity" will weed out government measures that might arguably satisfy the definition of "financial contribution." Finally, the theoretical possibility that some Member might apply subparagraph (iv) in an overly broad manner does not justify imposing in the abstract Canada's narrow interpretation, which would render subparagraph (iv) a nullity and leave a gaping loophole subject to abuse.

(b) Why do you consider it relevant to this question of legal interpretation of the concept of "financial contribution" that as a factual matter "not all" such measures eventually would be deemed to be subsidies, due to the absence of a benefit.

Reply

The requirements of "benefit" and "specificity" are relevant because Canada and the EC are attempting to induce the Panel to adopt an unwarrantedly narrow interpretation of subparagraph (iv). The "benefit" and "specificity" elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable.

Q37. Assume for the sake of argument that the measures challenged by Canada do not *require* – but *authorise* – the treatment of export restraints as financial contributions within the meaning of Article 1 of the *SCM Agreement.* In that case, could the measures be found as such to be inconsistent with the United States' WTO obligations? If so, on what basis? If not, please explain why.

Reply

This dispute involves a measure (the statute) that does not expressly preclude treating export restraints as financial contributions. The measure cannot be found as such to be inconsistent with US WTO obligations because of the mandatory/discretionary doctrine. None of the other "measures" at issue "authorize" action by the US government. The doctrine has been applied even where (unlike here) there has been explicit authorization to undertake a WTO-inconsistent act. The obligations of Article 32.5 and Article XVI:4 are to ensure that laws, regulations and administrative procedures are such so as to permit domestic authorities to act in a WTO-consistent manner. As the Appellate Body has observed, ensuring conformity cannot mean a strict guarantee or absolute assurance as to the *future* application of a measure, because such a standard would "be very difficult, if not impossible, to satisfy since no one can predict how unknown administrators would apply, in the unknowable future, even the most conscientiously crafted compliance measure."

Q38. You cite the report of the Panel in *EC – Audio Tapes*, in paragraph 100 of your request for preliminary rulings, as indicating that "[I]t would [not] be appropriate to reach findings on a 'practice' *in abstracto* when it had determined that the actions taken in a particular investigation were not inconsistent with the Agreement and that the 'practice' was not pursuant to mandatory legislation". Is it your position that, where legislation authorises action contrary

to the *WTO Agreement,* but does not mandate it, it is not open to the Panel to hold that such legislation is inconsistent with the *WTO Agreement*?

Reply

Yes, that is the US position, and neither Canada nor the EC disputes this position. One of the WTO panel reports in which the mandatory/discretionary doctrine has been applied is *Canada - Aircraft*. It would be a peculiar result if, under the same agreement, a measure that merely authorized the provision of prohibited subsidies was deemed WTO-consistent, while a measure that merely did not expressly preclude the treatment of export restraints as subsidies was deemed WTO-*in*consistent.

Q39. You argue that Canada is seeking an authoritative interpretation by the Panel of certain aspects of *SCM* Article 1.1, a function which in your view is reserved for the Ministerial Conference and the General Council, and that the Panel should dismiss the dispute on the grounds that, whatever the substantive obligations under the *SCM and WTO Agreements* involved, the US legislation is discretionary. Canada, by contrast, argues that the Panel must first evaluate the substantive obligation under Article 1.1, before it can determine whether the US legislation requires that obligation to be violated. Is it your argument that, in every case in which a piece of legislation as such is at issue, a Panel *cannot* consider the substantive WTO obligations involved unless and until it has determined that the legislation is mandatory? Please explain.

Reply

In the scenario hypothesized by the question, there would be no principled rationale for deciding to address an issue the resolution of which is unnecessary for purposes of resolving the dispute. The Appellate Body already has stated that it is not the proper role of panels under the DSU to pursue dispute prevention by making abstract rulings. Canada cites to no authority for the proposition that a moot question of WTO-consistency must be addressed in a situation where the case must be dismissed for other reasons. In addition, in the cases Canada does cite, the nature of the GATT or WTO obligations in question appear to have been more complicated than the obligations at issue in this case. In those cases, the panels may have found it necessary to define the obligation precisely before turning to the question of whether the responding party's measure mandated a violation of that obligation. Canada appears to suggest that because the US does not agree with Canada's interpretation of the SCM Agreement, the fact of this disagreement justifies having the Panel decide the substantive issue. However, the drafters of the DSU could not possibly have intended that the existence of an abstract disagreement was something that called for a resolution by a WTO dispute settlement panel in the form of an advisory opinion. If this Panel were to issue the type of advisory opinion sought by Canada, there would be no limits on the dispute settlement case load involving requests from complainants for similar advisory opinions. The possibilities for abuse are endless, and are much more real than Canada's "slippery slope" scenarios. Articles 24.3 and 24.4 of the SCM Agreement establish a mechanism for delivering advisory opinions. This suggests that the drafters were aware of the concept of an advisory opinion and knew how to establish a mechanism for generating such opinions. Second, the existence of the PGE advisory opinion mechanism means that Canada has other options available to it if it needs assistance in making its choices. In addition to relying on the expert advice of its private counsel, Canada can ask the PGE – or it can ask the Committee to ask the PGE – for an advisory opinion. There is no need to waste the time and resources of the WTO dispute settlement system.

Q40. In paragraph 15 of its oral statement at the first meeting of the Panel, the European Communities argues on the basis of the Appellate Body ruling in *Guatemala – Cement* that a "measure" may be *any* act of a Member, whether or not it is legally binding, and that it can include even simple administrative guidance by a government. Please comment on this

argument of the European Communities, including its characterisation of the Appellate Body ruling in *Guatemala – Cement.*

Reply

The EC mischaracterizes the Appellate Body's rulings. The EC's arguments do not establish that the SAA and the Preamble are measures. The Appellate Body did not decide what constitutes a "measure" for purposes of WTO dispute settlement. Instead, the Appellate Body merely found that a "measure" and a "claim" are two different things. In footnote 47 of the report (which is clearly dicta) the Appellate Body did not say that "all" acts "are" measures. The brief reference to *Japan - Semiconductors* fails to disclose the particular circumstances of that case. When the relevant portions of that report are considered, it becomes apparent that the ruling of the panel in that case was far less sweeping than the EC makes it out to be. Furthermore, with respect to the other cases cited in footnote 47 of the *Guatemala - Cement* report, those cases involved situations where the relevant WTO agreement established an affirmative obligation to act, which is not the case here. Even the EC concedes that the Preamble could constitute a measure under Article 6.2 of the DSU only "as long as this act [the Preamble] contained authoritative guidance for the competent administration." The EC does not explain what "authoritative guidance" means, but simply relies on Canada's erroneous characterization of the status of regulatory preambles. However, the Preamble is not binding on the DOC and does not mandate or require the DOC to do anything. Moreover, in terms of its content, the Preamble does not express the view that the statute requires the DOC to treat export restraints as subsidies, but instead expresses the tentative opinion that the statute "would permit" the DOC to treat export restraints as subsidies.

UNITED STATES' RESPONSES TO CERTAIN QUESTIONS POSED TO CANADA (QUESTIONS DATED 18 JANUARY 2001)

Q3. Do you agree with the US characterisation that you are asking the Panel to rule that an export restraint could never, under any circumstances, constitute a subsidy?

Reply

This is precisely what Canada is asking the Panel to decide.

Q4. You state, in paragraph 4 of your first written submission:

> **"These measures, *taken together*, are inconsistent with Article 1.1 of the *SCM Agreement* and, because they require the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1, are inconsistent with Article 10 (as well as Articles 11, 17, and 19, as they relate to the requirements of Article 10) and 32.1 of the *SCM Agreement*." (emphasis added)**

You further state, in paragraph 15 of your response to the US Request for Preliminary Rulings:

> **" . . . [I]n accordance with the *United States – Section 301* Panel's observation, the elements of US law at issue in this dispute must be *analysed together*". (emphasis added)**

Are Section 771(5) of the *Tariff Act*, the SAA, the Preamble, and US "practice" "measures" that are *individually* susceptible to dispute settlement? Do you claim that any of the four identified measures is by itself inconsistent with the *SCM Agreement*? Or, should the Panel simply be

looking at the four identified measures as a package? In other words, should the Panel only look to these four measures when "taken together"?

Reply

It is dangerous for the Panel to seek to analyze an ill-defined "measure" identified as a "package". The proper analysis of such a claim cannot be undertaken based upon abstract notions of whether documents cited by a complaining party "must be analyzed together," but on the status of the cited documents under the responding Member's domestic law. Neither the SAA nor the Preamble mandates that the DOC treat export restraints as subsidies. Moreover, there is no "practice" of doing so, and even if there were, that practice could not mandate the treatment of an export restraint as a subsidy under basic (and uncontested) principles of US administrative law. Given the absence of a DOC regulation on this issue, the sole binding authority for addressing the status of export restraints is the statute, which incorporates the standards of the SCM Agreement.

UNITED STATES RESPONSES TO CERTAIN QUESTIONS POSED TO CANADA (QUESTIONS DATED 19 JANUARY 2001)

Q5. Assume that a government directs certain privately owned banks to ensure that 10 per cent of the funds they lend are to be set aside for a given group of borrowers, in the sense that the banks, while not required to lend to these borrowers, cannot lend the set-aside funds to any other borrowers. In your view, would such a situation constitute a financial contribution in the form of a government-directed direct transfer of funds or potential direct transfer of funds, in the sense of Article 1.1(a)(1)(i) and (iv)? If not, why not? If so, what distinction can be drawn in respect of the question of "financial contribution" between this situation and the imposition of an export restraint? Please explain.

Reply

Obviously, each situation would have to be assessed on its own facts, and a causal relationship or nexus would have to exist between the government action and the direct transfer of funds in order to find government entrustment or direction. Presumably, Canada (and the EC) would argue that a financial contribution would not exist because the bank "need not" lend the funds. However, to say this is to engage in a semantic game.

Q6. Pursuant to your arguments in paragraphs 39-40 of your oral statement at the first meeting of the Panel, is it your assertion that there could be no circumstances in which a producer would have no choice but to sell its goods to the domestic users of its product pursuant to the imposition of an export restraint?

Reply

If Canada is making the assertion described by the Panel's question, Canada has not provided any evidence to support this assertion. Moreover, "choice" must be understood to mean a real, commercial choice.

Q8. Please comment on the EC statement in footnote 21 to its written submission that an export restraint may form part of a package of measures which, taken together, amount to government "direction" under subparagraph (iv). The example given by the European Communities is a government prohibition of exports of a product and a requirement that the producer maintain output levels and sell the product at a certain price to downstream users. How should such a measure (or package of measures) be approached should it arise in a

countervail investigation? Would there be a financial contribution, and would that contribution emanate from the measure as a whole or only from some part/s of the measure?

Reply

The US does not disagree with the EC's assertion that an export restraint could form part of a package of measures that could amount to a subsidy under subparagraph (iv). However, the US does not rule out the possibility that an export restraint could constitute a subsidy standing alone, depending upon the facts. The EC's point demonstrates why the Panel should refrain from making findings in the abstract. What precisely would the "package of measures" have to consist of in order for government entrustment or direction to exist? Even the EC offers no facts.

Q9. The Panel notes your response in paragraphs 26-27 of your oral statement at the first meeting of the Panel to the apparent US argument that an export restraint can be the "functional equivalent" of an affirmative obligation to provide a good to domestic purchasers, to the extent that, by directing producers not to export, it directs them instead to seek the only other purchasers available to them for the sale of their goods. Assuming a situation in which the producers have no choice but to sell to domestic purchasers (*i.e.*, they cannot exercise any of the theoretical options identified by the European Communities as open to them), on what substantive basis could an export restriction be distinguished from an affirmative obligation to provide the restrained good to domestic purchasers?

Reply

There is no substantive basis for making such a distinction. In the hypothetical posed, ordering producers not to export is substantively no different from ordering them to sell only to domestic purchasers. An export restraint *is* a direction to provide goods to domestic purchasers if it can be shown, as a factual matter, that there is a proximate causal relationship between the export restraint and the behaviour of the producers of the restrained product. Of course, whether such a causal relationship exists is something that can only be assessed on a case-by-case basis. Canada has failed to demonstrate that there is not, and can never be, an export restraint that has the type of posited effect. Furthermore, if the restraint results in the producer having no practical or commercial choice but to sell in the domestic market, the restraint is the same as a direction to sell in the domestic market. Canada's efforts to avoid discussing the object and purpose of the SCM Agreement, which it very nicely summarized in CDA-106, is telling.

Q10. You seem to argue that a "private body" in the sense of Article 1.1(a)(1)(iv) must be an organised "collectivity", and that therefore the mere sharing of a common characteristic (e.g., gold miners) is not sufficient to transform a group of individual entities into a "private body". Is it your argument that an individual producer of a good could not be a "private body" because it was not part of an organised "collectivity"? If not, are you arguing that each individual producer of a product could be a "private body", but that looked at as a whole (*i.e.*, from the perspective of their common characteristic), such producers could not be a "private body"? Please explain.

Reply

See *US First Submission*, paras. 40-44. Even the EC does not agree with Canada's interpretation of the phrase.

Q11. You argue that the United States interprets in an overly-broad manner Article 1.1(a)(1)(iv) in respect of government-entrusted or -directed provision by a private body of a good. In your view, the US interpretation would potentially open the door to defining any

government regulatory measure that increases the domestic supply of a good as a government-directed provision of a good:

Reply

The interpretations referred to are interpretations offered for purposes of this dispute in order to rebut Canada's claim that an export restraint can never, under any set of circumstances, constitute a subsidy. The DOC has yet to apply the standard set forth in section 771(5)(B)(iii) and subparagraph (iv) in an actual CVD proceeding to anything other than government-directed provisions of credit. However, based only on the text of subparagraph (iv), the US seriously doubts that all regulatory measures, as claimed by Canada, would satisfy the standard for a subsidy under subparagraph (iv). Among other things, there would need to be a demonstrated causal relationship that results in a private body taking an action of the type listed in subparagraphs (i) through (iii).

(a) In your view, how narrowly should this provision be construed? Would you consider that if a government ordered a producer to sell its product to a certain customer (or customers), without specifying a price, quantity or other terms, that this would constitute government-directed provision of a good? If not, why not?

Reply

Absent other facts that might call for a different conclusion, the US fails to see how this could not constitute the government-directed provision of a good based on the ordinary meaning of "direct." There is no textual support for the proposition that price or quantity (or any other terms) need be specified. As to how narrowly should this provision be construed, "entrusts or directs" language combined with the requirements of "benefit" and "specificity", are sufficient to address Canada's "slippery slope" argument.

(b) Are there any circumstances other than an *explicit* requirement by a government to make available a given product to given purchasers that in your view would constitute government-entrusted or -directed provision of goods?

Reply

Based on the ordinary meaning of the text, such an "explicit requirement" need not be present. Moreover, such an interpretation would elevate form over substance.

(c) Taking into account your responses to questions (a) and (b) above, how proximate a relationship of cause and effect must there be between a government's action and a private body's action for the "entrusts or directs" standard in Article 1.1(a)(1)(iv) to be satisfied?

Reply

To the extent the Panel chooses to consider the status of export restraints in the abstract, this is the crucial question. The US agrees with the underlying premise of the question that, based on the ordinary meaning of the term "direct", there would have to be a demonstrated causal relationship between an export restraint and a private body's action (*e.g.*, the provision of a good) in order for the standard in subparagraph (iv) to be satisfied. Because the DOC has not had to address this question under post-WTO law, the US is not in a position to opine further on how strong this causal relationship must be. Under pre-WTO law, the DOC applied a "direct and discernible effect" standard to assess the causal relationship between an export restraint and the domestic prices of the restrained product. The US is not suggesting that this would be the standard applied by the DOC

under post-WTO law in the context of an actual CVD case. Nevertheless, the DOC found that sometimes an export restraint had an appreciable effect on prices, and that other times it did not. The DOC did not simply assume that a causal link existed.

Q12. You argue that, where the government entrusts or directs a private body to carry out one of the types of functions in subparagraphs (i)-(iii) of Article 1.1(a)(1), subparagraph (iv) requires that such a function must be one that would normally be vested in the government and must not differ in any real sense from practices normally followed by governments:

(a) Please expand on how, in your view, these concepts or requirements fit in the context of the functions listed in subparagraphs (i)-(iii). Could it not be argued that many of these functions are "normally" undertaken by the private sector (e.g., investment of equity capital, lending of money, provision or purchase of goods, etc.) Under what conditions or circumstances could it be said that such functions are "normally" undertaken by a government?

Reply

Canada's interpretation is too restrictive and would render subparagraph (iv) a nullity. The only negotiating history on subparagraph (iv) makes it clear that the government functions referred to in subparagraph (iv) relate to government actions in the context of providing a subsidy. This is another effective limitation on Canada's "slippery slope" argument. The induced private action must entail a reallocation of resources by way of taxation or subsidization or it would not be the type of government action that normally falls under subparagraphs (i)-(iii).

(b) The United States argues that such functions are "normal" government functions in the context of the provision of subsidies. Given that you emphasise in your arguments that the concepts of financial contribution and benefit are separate and must not be confused or blended, is it correct that you would not agree with this statement by the United States? If you do not agree with the United States on this point, on what other basis or under what other circumstances do you consider that these functions would fall within the government's "normal" activities and thus would satisfy the test in subparagraph (iv)?

Reply

There is a difference between benefit and financial contribution for purposes of subparagraph (iv). Financial contribution would appear to be a matter of: (1) a proximate causal relationship between the government action and the private action; and (2) the private action being a form of taxation or subsidization (*i.e.*, the type of action that a government "normally" would do). While the evidence for this second aspect and "benefit" may overlap, they are not the same thing. Insofar as Canada's "slippery slope" argument is concerned, it is not particularly important whether innocuous government regulations are excluded from the scope of an actionable subsidy because they are not financial contributions, do not confer a benefit, or are not specific.

(d) Considering the specific case of provision of goods, what constitutes the "normal" provision of goods by a government? In what circumstances could it be said that a provision of goods by a private body at the direction of a government would satisfy the criteria of "normally vested in the government" and "in no real sense differs from practices normally followed by governments" set forth in subparagraph (iv)?

Reply

The provision of a good by a private body at the direction of a government could satisfy the criteria of "normally vested in the government" and "in no real sense differs from practices normally followed by governments" where a subsidy results.

Q13. Do you agree with the European Communities' argument that, in the case of government-entrusted or -directed provision of goods, for the condition of the "carrying out of functions that would normally be vested in the government" to be fulfilled, not only would there have to be specific direction to the producers to provide the goods, but also that this provision would have to be on "certain pre-determined conditions"? If you agree, why would "pre-determined conditions" have to exist in order for a private body to be carrying out a function normally vested in a government (*i.e.*, for a *financial contribution* to exist)? That is, are not the "conditions" on which a good is provided the determinant of whether there is a benefit? If so, in what way would "conditions", pre-determined or otherwise, be relevant to the question of financial contribution?

Reply

There is no requirement in any of the subparagraphs of Article 1.1(a)(1) that there be "certain pre-determined conditions". While the EC erroneously accuses the US of focusing solely on the object and purpose of the SCM Agreement (which object and purpose certainly support the US position), the *EC Submission* contains no analysis of the ordinary meaning of the words used in subparagraph (iv). If the Panel examines the *EC Submission* carefully, it will see that there is *not a single* reference to a definition of any of the terms at issue.

Q14. Please comment on paragraphs 17-31 of the United States' oral statement at the first meeting of the Panel with the parties.

Reply

At this point, the US merely would recall the principle set forth in paragraph 7.19 of the *US 301* panel report. Under this principle, which is referred to in paragraph 71 of the *US Request*, while the Panel is not bound to accept the interpretation presented by the US, the US can reasonably expect that the Panel will give considerable deference to the US' views on the meaning of its own law. Contrary to the picture Canada attempts to paint in paragraph 16 of *Canada's Response to US Request for Preliminary Rulings* ("*Canada's Response*"), this principle is not of the US' creation, but rather was articulated by the panel in the *US 301* case.

Q15. Please explain why (in paragraph 45 of your first written submission and paragraph 56 of your response to the US request for preliminary rulings, which view also is expressed by the European Communities in paragraph 27 of its oral statement at the first meeting of the Panel) you consider that the proviso in the SAA limits any discretion that Commerce may enjoy to "satisfying itself that an alleged subsidy involves a formal enforceable measure". The proviso states, in particular, that the type of indirect subsidies which Commerce has countervailed in the past will continue to be countervailable "provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met". Do these words not require Commerce to be satisfied that all of the elements in Section 771(5)(B)(iii) have been met?

Reply

The interpretation of the SAA proposed by Canada and the EC would read the proviso out of the SAA. A US court or agency would not render the proviso ineffective by ignoring it.

Q16. You state, in paragraph 39 of your response to the US Request for Preliminary Rulings:

> **" . . . [T]he 'practice' at issue is not individual determinations in countervailing duty cases as the United States suggests. As Canada has made clear, it does not seek a ruling overturning the determinations in particular past cases. Practice is, rather, an administrative commitment or policy to adhere to a particular legal view and to apply a particular interpretation or methodology – here, to treat an export restraint as meeting the financial contribution requirement of the *SCM Agreement* when US authorities find a benefit." (footnotes omitted)**

(a) How, in your opinion, is such an "administrative commitment or policy" susceptible of dispute settlement *per se*? How is such an "administrative commitment or policy" – something that might be otherwise described as US 'behaviour' – to be conceived of as a measure?

Reply

The very question demonstrates the absurdity of Canada's claims. If the type of "administrative commitment" alleged by Canada in this case is considered to be a "measure", the consequences for the WTO dispute settlement system would be much more dire and real than the imagined "slippery slope" arguments Canada has advanced.

(b) In what way is US "practice", in the sense described in the above quote, different from the references to export restraints in the SAA and the Preamble as you characterise them? That is, if the Panel were to rule on the SAA and the Preamble, as requested by you, as policy statements binding on the DOC in respect of the treatment of export restraints, what would an additional ruling in respect of US "practice" add?

Reply

Because the SAA does not require the DOC to treat export restraints as subsidies and because the Preamble is at most a non-binding, tentative opinion by the DOC to the effect that an export restraint might constitute a subsidy under the new definition of that term, Canada needs something called "practice" to make its claims succeed. However, there simply is no practice for Canada to challenge in the sense of actual, post-WTO determinations by the DOC that an export restraint constitutes a subsidy (or even a financial contribution).

(c) If practice is "not individual determinations in countervailing duty cases", and also is something different from and beyond the statements in the SAA and the Preamble, then what is it precisely?

Reply

This question demonstrates the validity of the US position that Canada's claims regarding "US practice" are not properly before the Panel. Even after one full round of briefing and a meeting of the parties with the Panel, it is difficult to discern exactly what Canada means by "practice." If this does not constitute prejudice to the US (assuming *arguendo* that a showing of prejudice is required), then the pleading requirements of the DSU are meaningless.

(d) Do you believe that US "practice" as an "administrative commitment or policy" is mandatory legislation in the sense that the term is used in the mandatory/discretionary distinction? And if US "practice" does not constitute mandatory legislation – which *requires* the United States to do something – then

on what basis could it be found as such to be inconsistent with the United States' WTO obligations?

Reply

Canada has not disputed the principle that the DOC is not bound by its prior determinations. Although the phrase "administrative commitment or policy" appears to be of Canadian derivation, it stands to reason that if the DOC is not bound by its determinations in actual cases, it is not bound by an "administrative commitment or policy" articulated in the abstract and outside the context of actual cases. Canada has not disputed the continuing validity of the mandatory/discretionary doctrine. Therefore, Canada's alleged "administrative commitment or policy" cannot be found as such to be inconsistent with US WTO obligations. If the DOC should ever find a Canadian export restraint to be a subsidy in an actual case, or if the DOC should ever promulgate a binding regulation that mandated WTO-inconsistent action, Canada would be entitled to bring a dispute to the WTO. Until that time, however, Canada's rights under the WTO agreements have not been affected.

Q17. Please respond in detail to the US arguments in paragraphs 43-55 of its oral statement at the first meeting of the Panel, concerning the applicability of the *WTO* and *SCM Agreements*' provisions cited by Canada to the measures identified by Canada. (In this regard, please note that, in response to an oral question from the Panel at its first meeting, the United States indicated that these arguments are applicable to the SAA and the Preamble, in addition to practice, under which heading they appear in the US oral statement delivered at that meeting.)

Reply

The US confirms the referenced statement at the first meeting of the Panel. Although the US disputes that the SAA and the Preamble are measures, assuming for purposes of argument that they are, the arguments set forth in paragraphs 43-55 of the *US Oral Statement* apply equally to them.

UNITED STATES' RESPONSE TO A QUESTION POSED TO THE EUROPEAN COMMUNITIES

2. (c) Turning this argument around, is it your position that there would be no "financial contribution" in the sense of Article 1.1(a)(1)(iii) if a government-owned company established its production quantities and terms and conditions of sale as it saw fit, rather than the government establishing "pre-determined conditions" therefor?

Reply

This would appear to be the upshot of the EC's argument. At this point, the US simply would note that Article 1.1(a)(1) of the SCM Agreement refers to a financial contribution "by a government *or any public body*". (Emphasis added). The parties to this case appear to agree that a corporation would constitute a "body". Therefore, it is difficult to see how a "government-owned company" could be incapable of providing a financial contribution in the form of a provision of goods.

ANNEX A-3

EXECUTIVE SUMMARY OF ANSWERS OF CANADA TO QUESTIONS POSED BY THE PANEL AT THE SECOND SUBSTANTIVE MEETING

(8 March 2001)

QUESTIONS TO CANADA

Q13. Have there been any cases where the Preamble has been used as a "legislative rule" in the sense described by the United States at paragraphs 30-43 of its second oral statement? If so, please provide details.

Reply

US courts have frequently been called on to determine whether a particular agency statement is a legislative rule, and have developed a variety of tests adapted to varied factual situations. The United States has put forward one such test, namely, the test applied by the Court of Appeals for the District of Colombia in its 1994 *American Mining Congress* decision. Three years later, the same court, in *Troy Corporation v. Browner*,[1] applied a simpler test, first developed by it in *National Family Planning and Reproductive Health Ass'n v. Sullivan*,[2] to determine whether the preamble to a final agency regulation was legislative.

Under both tests, the Preamble is a legislative rule with respect to export restraints. Applying the test in *Troy*, the Preamble 1) "supplements" a statute by announcing interpretation with regard to export restraints, which the statute does not address, 2) "effects a change in existing law or policy" by establishing Commerce's legal interpretation of the newly amended statute with regard to export restraints, and 3) produces "significant legal effects on private interests" in that Commerce applied the Preamble as conclusive in its countervailing duty determinations, as described in Canada's Second Written Submission at paras. 33-39. Under *Troy*, any one of these factors establishes the Preamble as a legislative rule.

Similarly, the Preamble meets the *American Mining Congress* test. First, the Preamble establishes a legislative basis for Commerce action as to "indirect subsidies" and the "entrusts or directs" standard that would otherwise not exist, by declaring the standard no narrower than the pre-WTO standard and establishing that Commerce applies its pre-WTO precedents on export restraints. Hence the basis for Commerce action on export restraints is the Preamble, which Commerce simply adheres to and applies as dispositive in its determinations. Second, Commerce published the Preamble with the rest of the regulations in the Federal Register, which, as previously demonstrated by Canada, gives it full legal effect. Third, Commerce explicitly invoked its legislative authority; the Preamble states that Commerce intended to "translate the principles of the implementing legislation in specific and predictable rules". Commerce then applied its legislative authority by explicitly ruling on export restraints. Fourth, although the Preamble did not specifically amend a pre-existing legislative

[1] *Troy Corp. v. Browner*, 120 F.3d 277, 287 (D.C. Cir. 1997) (finding an agency statement not to be a legislative rule where it merely restated existing policy). (Exhibit CDA-138)

[2] 979 F.2d 227, 236-40 (D.C. Cir. 1992) (holding agency directives to be legislative rules where they did not merely clarify a statutory term but supplemented the statute, changed law or policy, and had significant effect on private interests). (Exhibit CDA-137).

rule (because Commerce had never issued final substantive countervailing duty regulations), the Preamble established the legislative rule on export restraints. Any one of these factors establishes the Preamble as a legislative rule under the *American Mining Congress* test.

There are numerous examples of when the Preamble has been used as a legislative rule in the sense described by the United States at paragraphs 30-43 of its second oral statement. The Korea *Stainless Steel* cases as well as the *Live Cattle* case are but a few relevant examples that Canada has previously provided. A listing of numerous other examples can be found in paragraphs 14-20 of Canada's Responses to the Panel's February 21-22 Questions ("February Responses").

With regard to the US discussion of the Davis treatise at paragraphs 31-33 of it oral statement, the United States alleges that Canada has attempted to substitute the views of academics regarding publication in the CFR for the decisions of the US Court of Appeals for the District of Columbia. Of course, Canada has shown that it was this same court that held publication in the CFR to be of no significance. More importantly, the United States submitted only the "interpretative rule" portions of Professor Davis's exposition on distinctions between legislative and interpretative rules. Immediately following the pages submitted by the United States, however, Professor Davis provides a critical clarification: a rule that "announces the agency's construction of a statute it has responsibility to administer" is a "legislative rule", not an "interpretative rule" if the agency has and exercises the authority to promulgate a legislative rule.[3] This is precisely what Commerce accomplished through the Preamble with regard to export restraints, and such legislative rule is binding on courts, on citizens, and on the agency itself.[4]

Q14. Canada argues, in response to question 16(c) from the Panel, that "[p]ractice is [] not an individual determination in a countervailing duty case (although a determination normally will reflect 'practice'), but rather is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations". In Canada's view, how is the "institutional commitment" expressed? That is, for something to be identifiable as such a "commitment", would it need to be reflected in writing, *e.g.*, in a DOC determination, and identified in general terms as agency "practice" or "policy"? If not, how (that is, in what form) would such an expression be made? To the extent that there is an explicit identification of a "practice" in a DOC determination or other document, how, in Canada's view, is this different from "legislation"?

Reply

The "institutional commitment" is normally reflected in writing. A "practice" identified in a Commerce determination differs from "legislation" because it is not statutory and has not been validly promulgated as a legislative rule. It simply is what the agency systematically does. As a matter of US law, a practice also differs from legislation (in the sense of statute) in that a practice that was inconsistent with a statute would not be upheld in a US court. However, as noted in response to Question 15, practice must normally be followed, and those affected by the US countervailing duty law therefore have reason to expect that it will be.

Q15. Also in response to question 16(c) from the Panel, Canada indicates that "in the context of this dispute, practice is related to precedent, in that an interpretation or methodology will often be developed in a single case or group of cases, and becomes the 'practice' followed in subsequent cases". In Canada's view, why is this principle applicable in the present dispute, given the absence of any post-WTO cases where the United States has countervailed export restraints? Further, even if there were such cases, and the DOC had set out the methodologies it "normally" applied in such cases, do you disagree with the US statement that under US law

[3] Davis, Vol. I, § 6.3, at 234-235. (Exhibit CDA-140)
[4] *Id.*, § 6.5, at 250-251.

the DOC could depart from those methodologies as long as it explained the reasons therefor? How does this affect the identification, in concrete terms, of "practice" as this term is used by Canada, *i.e.*, as "related to precedent"? Regarding *Live Cattle*, is it Canada's argument that a decision to initiate an investigation is of equivalent precedential value to that of a final affirmative determination?

Reply

First, pre-WTO practice was brought forward into post-WTO law and practice by virtue of the SAA and the Preamble. Second, the initiation of the *Live Cattle* case expressly relied on the pre-WTO decisions in *Leather* and *Lumber* and, in the final determination, Commerce expressly rejected Canada's arguments as to why an export restraint could not satisfy the financial contribution requirement in section 771(5)(b)(iii). Third, in the Korea *Stainless Steel* cases, Commerce made clear that it is directed to and will apply the same standard to indirect subsidies that was applied prior to the WTO and, as is made clear in the measures at issue in this case, "indirect subsidies" includes export restraints.

Agencies, including Commerce, normally follow the precedents of prior determinations, and are required by US courts to do so absent a reasoned explanation as to why the particular facts or an intervening change in law justify the departure, and how the departure is consistent with the statute and supported by substantial evidence. Agencies may not treat like circumstances differently, or simply change their minds from case to case. While Commerce may therefore theoretically depart from its export restraint practice under these very limited circumstances, all the evidence with respect to export restraints is that it will not do so. That is, all the evidence in this case reflects Commerce's clear commitment to continue its practice.

The decision to initiate the *Live Cattle* case is of precedential value because it reflects Commerce's decision that the standard that there be "sufficient evidence" of all the elements of a countervailable subsidy, including financial contribution, had been met. Thus, while a decision to initiate an investigation may not have the same precedential value as a final determination because it applies a different standard, under both standards the same legal elements are required to be present. Moreover, the initiation in *Live Cattle* is precedent for initiating a subsequent case alleging an export restraint "subsidy". As Canada has pointed out, in initiating *Live Cattle*, Commerce necessarily had to conclude that the CWB's "control" over barley exports, if proved to exist, would meet the financial contribution standard under section 771(5)(B)(iii) and thus that export restraints are financial contributions.

Q16. Assume hypothetically that the Panel were to rule on, and find in favour of Canada's claims in respect of, all of the "measures" identified by Canada other than "practice". In Canada's view, what actions would the United States need to take in order to "bring its measures into conformity" pursuant to such a ruling? How would such actions differ from those that the United States would have to take if the Panel ruled in favour of Canada's claim in respect of "practice" as well? That is, what does Canada believe that the specific, practical implications would be for remedy of including or excluding "practice" from any hypothetical ruling by the Panel in favour of Canada's claims? In your response, please comment on the statement of the panel in *European Communities – Parts and Components*, after the finding that the legislative provisions in question were not mandatory, that while it would be desirable for the European Communities to withdraw the legislative provisions in question, the European Communities would meet its GATT obligations if it were to cease to apply those provisions in respect of Contracting Parties[5]. Would the same be true in this case, assuming the hypothetical ruling posited above? If not, why not? In your oral response to this question, you indicated

[5] *European Economic Community – Regulation on Imports of Parts and Components*, Report of the Panel, BISD 37S/132, adopted 16 May 1990, para. 5.26.

that, assuming the hypothetical ruling, it would not be necessary for the United States to revise the SAA. How does this statement relate to your previous assertion that the SAA mandates the DOC to treat export restraints as financial contributions?

Reply

As Canada suggested in answering follow-up questions from the panel, this is essentially a question for the United States to address in determining how it would implement the hypothetical decision and Canada cannot prejudge how the United States might choose to do this. Having said this, Canada will respond by making general comments about each measure in turn.

With respect to the statute, Canada believes that no amendment would be necessary. As Canada has pointed out, the statute itself does not specifically address export restraints. However, because section 771(5)(B)(iii) provides the statutory basis or authority for the application of the treatment of export restraints under US countervailing duty law at issue in this dispute, the statute must be included in, and is essential to, any consideration of that treatment.

With respect to the SAA, whatever action the United States did take would have to have sufficient legal authority to allow the United States to treat export restraints in a manner consistent with the DSB ruling so that the treatment of export restraints required by the SAA and the other measures at issue would no longer have any force or effect under US countervailing duty law.

Regarding the Preamble, implementation would have to include in some manner Commerce's disavowal of the language regarding export restraints in the Preamble, such as through a Federal Register notice stating a new interpretation of the statute that was consistent with the DSB ruling and made clear that Commerce would no longer follow its pre-WTO practice and precedents on this issue.

Finally, with respect to practice, in Canada's view, Commerce would have to bring its practice into conformity with the DSB ruling by ceasing to treat export restraints as a financial contribution. This would need to be evidenced in any initiations, preliminary and final determinations, and preliminary and final results of review (if any). Further, it is important to note that if the United States modified the Preamble such that it simply did not address export restraints, there would still be a US practice of treating export restraints as financial contributions that would not be in conformity with the DSB ruling, and this practice would have to cease.

The *EEC – Parts and Components* case should be distinguished from this case in that the legislation at issue in that case was unequivocally discretionary in that the operative word in the legislation was "may", while here Canada has demonstrated that US countervailing duty law requires the treatment that Canada has complained about.

Q17. We understand Canada to make the following two arguments concerning the legislation at issue: (i) that the statute "as interpreted by" the SAA and the Preamble is *mandatory legislation that requires* the DOC to violate its obligations under the SCM Agreement; and (ii) that, although the statute on its own is discretionary, in the sense that it would be possible to interpret it in a WTO-consistent manner, the SAA and the Preamble "curtail the discretion" of the DOC to act WTO-consistently. Is this a correct understanding of Canada's arguments? Are these two formulations simply two different ways of saying the same thing, or is the second formulation an alternative argument to the first, or a different argument in some other respect from the first? Please explain.

Reply

The Panel has the correct understanding of Canada's arguments. There is no difference between them in that the result under either argument is that the US measures are not "discretionary"

within the meaning of the mandatory/discretionary distinction in GATT/WTO jurisprudence, i.e. that the United States has not demonstrated that it has sufficient discretion to conform with its WTO obligations. As Canada has explained in conjunction with the second formulation, the mandatory/discretionary distinction does not mean that discretion of any type or degree will allow a defending party to successfully avail itself of this defence. Here, the SAA and the Preamble curtail the discretion of the executive authority in the context of this dispute such that the legislation will be interpreted and applied in a WTO-inconsistent manner. These measures therefore demonstrate that the US cannot successfully avail itself of the mandatory/discretionary defence, even assuming *arguendo* that the measures provide Commerce with some level of discretion. Further, the US claim that it could avoid interpreting its law so as to not treat an export restraint as a financial contribution, i.e. interpret its law differently than the interpretation to which it is committed, is also not discretion of a nature or breadth as to allow the United States to avail itself of the mandatory/discretionary distinction as a defence.

Q18. Could Canada please reconcile its statement that the statute does not require the treatment of export restraints as financial contributions with its statement that each of the measures individually requires such treatment.

Reply

As Canada has pointed out, the statute itself does not specifically address export restraints. However, because section 771(5)(B)(iii) provides the statutory basis or authority for the application of the treatment of export restraints under US countervailing duty law at issue in this dispute, the statute must be included in, and is essential to, any consideration of that treatment. Therefore it is fair to say that while the statute should be considered among the measures which, taken together, result in the WTO-inconsistent treatment of export restraints under US countervailing duty law, the statute does not require this treatment independent of one or more of the other measures.

Q19. Could Canada explain the apparent inconsistency between its characterisation of the proviso in the SAA in this dispute and its arguments concerning the same proviso in the *Live Cattle* investigation, referred to at paragraph 24 of the second oral statement of the United States.

Reply

With respect to the United States' reliance on Canadian submissions in the *Live Cattle* case, Canada pleads guilty to trying to persuade Commerce to interpret US countervailing duty law in a manner that would be WTO consistent. In *Live Cattle*, Canada still harboured the hope that the United States would and could do so. One of the reasons Canada is before this Panel is that Commerce made clear in *Live Cattle*, through both the basis upon which it initiated the case and its reasons for disagreeing with Canada's arguments regarding financial contribution in its final determination, that it considers itself required to treat export restraints in a manner that is WTO-inconsistent.

Q20. What is the significance of the following sentence of the paragraph from the Senate Joint Report on the URAA (Exhibit CAN-134), an excerpt of which you quote at paragraph 19 of Canada's second oral statement?:

"The Committee further expects that these types of indirect subsidies will continue to be countervailable where the standard under new section 771(5)(B)(iii) has been met."

Does this sentence in Canada's view have the same meaning as the proviso in the SAA?

Reply

No. The sentence does not have the same meaning as the proviso. In Canada's view, the statement reflects the committee's understanding that the standard has already been defined in the preceding statements that Canada has quoted. Those statements are consistent with Canada's understanding of the SAA. More specifically, the last sentence in the paragraph of the Report in question does not apply to the immediately preceding statement that Canada quoted. Unlike the SAA, this sentence does not apply to the committee's statement that Commerce should administer US countervailing duty law consistent with *Leather* and *Lumber*.

Q21. Could Canada clarify whether in its view the Senate Joint Report on the URAA should be considered by the Panel as further interpretative guidance, or as in some sense binding on the Department of Commerce? In other words, what is the status of this report in respect of Section 771(5)(B)(iii) and the SAA?

Reply

In terms of US legislative history, the Senate Joint Report ranks just below the SAA in that it has not been approved by the whole Congress. The Report was offered by Canada as further evidence of the United States' commitment to treat export restraints as financial contributions and to reinforce what the SAA says and means, i.e. to demonstrate that the SAA is not simply "empty" words.

Q22. Would Canada please respond to the United States' argument at paragraph 63 of the US second oral statement.

Reply

The premise of the US argument is wrong because subject to Canada's comments in Question 18, regarding the statute, the measures individually do require the treatment of export restraints as financial contributions. Canada's point is that to fully understand the treatment of export restraints under US countervailing duty law, one needs to consider together all the elements of US law that bear on that treatment.

Q23. Canada appears to argue, in its responses to questions 11 and 12(a) from the Panel, that the coverage of paragraphs (i)-(iii) of Article 1.1(a)(1) is broader than that of paragraph (iv). That is, Canada argues that any action by a government itself of the type described in paragraphs (i)-(iii) would, by definition, and without any additional conditions, be a "financial contribution". Canada also argues, however, that if a government undertook the same action but this time operated *through* a private body, this action would only be a "financial contribution" if that government "ordinarily" performed that function. The implication of this argument would appear to be that government intervention in the market through a private body (even if repeated over some period of time) would not satisfy the requirements of paragraph (iv), unless the government already had a past history (or prior "ordinary" practice) of doing so itself directly. For example, if a government had no past history of lending money to private companies itself out of its own funds, and then began to order private banks to make certain loans to certain companies, Canada's argument seems to imply that these loans, in spite of being made at the explicit direction of the government, would not constitute financial contributions by that government, *because of* the absence of a prior practice of direct government lending. Is this a correct understanding of Canada's argument? Please explain, and please discuss the rationale or purpose under Article 1 for what Canada sees as two different legal standards under different paragraphs of the same "financial contribution" provision, *i.e.*, one standard under paragraphs (i)-(iii), and a second, narrower standard under paragraph (iv)?

Reply

Canada believes that the "normally vested" and "normally followed" requirements are express limiting factors of subparagraph (iv). Canada recognizes that future panels may have to develop a more comprehensive interpretation of these requirements. Canada has advanced a good faith interpretation that relies upon the ordinary meaning of the words of the treaty in their context and in the light of its object and purpose. Having said this, Canada would advocate neither a "broad" reading of subparagraph (iv) nor a "narrow" reading of it. Canada would advocate a reading of the provision that is consistent with the Vienna Convention, and consistent with the object and purpose of the treaty, which sets out a particular set of government actions that are subject to discipline under the Agreement. These actions are limited to the terms used in the definition including the terms used in subparagraph (iv). Having reference to these provisions, Canada notes that subparagraph (iv) necessarily implies limitations.

Q24. Could Canada please respond to the US argument in the last sentence of paragraph 46 of its second oral statement.

Reply

The US argument at paragraphs 45 and 46 of its second oral statement that the Preamble itself demonstrates that Commerce did not intend the Preamble language to be binding is incorrect. What Commerce said in the Preamble was that it did not think it appropriate to develop a *precise definition of "entrusts or directs"*. Commerce did *not* say that it did not intend to be bound by the interpretations of "indirect subsidies" and "entrusts or directs" that it *did* state in the Preamble. As Canada pointed out in its Second Written Submission, under US law the burden is on the agency publishing a notice in the Federal Register to clearly communicate some other intent if the publication is not intended to have the binding effect of a duly promulgated regulation. Neither the Preamble itself nor any other contemporaneous communication by Commerce stated any intent not to be bound by its statements, and the United States' *post hoc* assertion in this proceeding about its intent in publishing the Preamble cannot, under US law, substitute for such a communication. Moreover, the very fact that Commerce expressly did not precisely define "entrusts or directs" is evidence that, had it intended not to issue any binding interpretations of that phrase or "indirect subsidies", it would have so stated.

Moreover, while Commerce did not precisely define "entrusts or directs", it did interpret that phrase and "indirect subsidies" in the Preamble in very important ways: (1) Commerce confirmed that the "current standard is no narrower than the prior US standard for finding an indirect subsidy as described in . . .*Lumber*"; (2) Commerce declared its position that "the phrase 'entrusts or directs' subsumes many elements of the definitions proposed by commenters", when all of the referenced comments had proposed defining "entrusts or directs" solely in terms of causation or effects, and none had addressed the nature of the government action required; and (3) Commerce found it unnecessary to provide an illustrative list of situations that would fall under the "entrusts or directs" standard, because the SAA already listed cases (including *Leather* and *Lumber*) in which Commerce had found indirect subsidies in the past, which provided "examples of situations where [Commerce] believe[d] the statute would permit the Department to reach the same result".

Thus what Commerce stated in the Preamble did in fact define "entrusts or directs" to some degree, by declaring the standard to be a causation standard at least as broad as in its pre-WTO practice, as illustrated in *Leather* and *Lumber*. Commerce has consistently applied those interpretations as conclusive of parties' rights under the countervailing duty law since the Preamble was published.

Q25. Could Canada please respond to the US argument in paragraph 56 of its second oral statement.

Reply

The US argument regarding the *Subsidies Appendix* is very illuminating, because it demonstrates that Commerce has been treating the Preamble as a legislative rule. The United States says in paragraph 55 that "DOC nonetheless began to treat the *Subsidies Appendix* as if it were a legislative rule," and explains that two Court of International Trade (CIT) decisions found this approach invalid. The significance of this statement is that Commerce now treats the Preamble in the same way that it treated the *Subsidies Appendix*, which the United States concedes was equivalent to a legislative rule.[6] In other words, in the cases criticized by the CIT, Commerce had not said expressly that "we are bound by the *Subsidies Appendix*." Rather, Commerce had simply cited the *Subsidies Appendix* as justification for its position.[7] Exactly the same is true regarding Commerce's practice with respect to the Preamble. Therefore, if Commerce's use of the *Subsidies Appendix* was as a legislative rule, the same is true of Commerce's use of the Preamble. As discussed in response to Question 13, above, the issue is not whether the Preamble can have legal effect under US law; it clearly can. Instead, the issue is whether the substantive statements made in the Preamble commit Commerce to treat export restraints as financial contributions (which Canada has demonstrated they do).

Contrary to the US claim, the CIT decisions criticizing Commerce's use of the *Subsidies Appendix* do not mean that Commerce's administrative practice is not binding. That practice is binding as and to the extent set out in paragraphs 40-43 of Canada's Second Written Submission and in response to Question 15 above. As Canada noted at the meeting with the Panel, the CIT decisions cited were, in part, a response to Commerce's failure to have ever promulgated substantive regulations that were subject to the notice and comment provisions of the *Administrative Procedure Act*. Moreover, despite those court decisions, Commerce subsequently issued and applied the *General Issues Appendix* as it had the *Subsidies Appendix*, and it commonly expressly relies on its "practice" as the basis for its determinations in countervailing duty cases.

Q26. Could Canada please respond to the apparent implication of the US argument in paragraph 72 of its second oral statement that, under Canada's most recent arguments, "private body" in the sense of subparagraph (iv) becomes entirely a function of government "entrustment or direction".

Reply

The term "private body" is not defined in the Agreement. Canada believes that the plain meaning of the term in the context of subparagraph (iv) is a group organized for some purpose. This gives rise to the question of how they are organized. The answer comes when the term is interpreted in the context of the larger phrase; i.e., "a government …entrusts or directs a private body to carry out one or more of the type of functions … normally vested in the government and the practice, in no real sense differs from practices normally followed by governments." In order for a government to entrust or direct someone to do something, there must be some sort of government communication with the person or group so entrusted or directed. Whatever device is available or chosen to so communicate, it would identify the person(s) to whom the entrustment or direction was given and would impose the obligation on that person(s) to carry out a specific financial contribution. In addition, the private body

[6] Of course, the Preamble, unlike the Subsidies Appendix, has been promulgated in accordance with notice-and-comment procedures, and therefore Commerce has authority to treat it as a legislative rule (which was not the case with the Subsidies Appendix).

[7] See *Ipsco*, 687 F. Supp. 614, 627 (1988). (Exhibit CDA-139).

must be capable of carrying out a practice that in no real sense differs from that normally followed by governments.

Q27. Does Canada agree with the statement in paragraph 67 of the US second oral statement that an export restraint would be the same as a direction to "sell *only* to domestic customers"? Could Canada also confirm that, in its view, there are no hypothetical circumstances in which a producer or a product subject to an export restraint would have no choice but to sell that product domestically.

Reply

Canada does not agree with the statement in paragraph 67 of the US second oral statement that an export restraint would be the same as a direction to "sell only to domestic customers." As Canada has previously stated, an export restraint does not leave the producer of the good with only one choice. Canada cannot conceive of a situation in which an export restraint will result in a producer having no choice but to sell its goods to domestic users of those goods, and has listed a number of other options available to the producer.

ADDITIONAL QUESTIONS TO CANADA FROM THE UNITED STATES

Q1. Referring to pages 233-234 of US-34, Professors Davis and Pierce state that "a legislative rule has the same binding effect as a statute. It binds members of the public, the agency, and even the courts, in the sense that courts must affirm a legislative rule as long as it represents a valid exercise of agency authority." Referring to pages 252 of US-34, Davis and Pierce state that "[o]rdinarily, interpretative rules do not bind an agency", and they add at page 253 that "[t]he occasional cases holding an agency bound by its own interpretative rules can be explained on constitutional grounds." Because Canada has alleged that the DOC is bound by the portions of the Preamble that Canada has challenged in this dispute (63 Fed. Reg. 65,348, 65,349-51 (25 Nov. 1998), Canada presumably is alleging that this portion of the Preamble constitutes a legislative, rather than an interpretative, rule.

(a) Although the United States does not concede that the challenged portions constitute a "rule" at all, would Canada please confirm that it is alleging that the challenged portions constitute a legislative rule? If so, would Canada please identify those decisions of the DOC's reviewing courts (*i.e.*, the US Court of International Trade, the US Court of Appeals for the Federal Circuit, and the US Supreme Court) in which a court has held that it is bound by a DOC regulatory preamble that, like the portions of the Preamble at issue here, is unrelated to any regulation. For any such decisions, please identify and provide a copy of the precise portion of the decision in which the court held that it is so bound.

Reply

Yes. See Canada's responses to Questions 13 and 25 from the Panel. As to the second part of the question, Canada is not aware of any court decisions to that effect with regard to any Commerce regulation (whether in the Preamble or not). This is not surprising, since Commerce regulations are rarely if ever challenged as such. Courts are normally asked to review whether a Commerce determination is supported by substantial evidence and is otherwise in accordance with law. In addition, of course, since the Commerce regulations have been in effect only since 1997 (anti-dumping) and 1998 (countervailing duties), there has been little time for there to be many court decisions reviewing Commerce's application of its regulations in cases filed after those dates.

(b) If Canada is not alleging that the challenged portions of the Preamble constitute a legislative rule, on what basis does Canada claim that, as a matter of US law, the DOC is bound by the challenged portions.

Reply

See answer to (a) above.

Q2. Please identify DOC determinations in which the DOC has expressly stated that it is following a regulatory preamble unconnected to any regulation because it is legally bound to do so. For any such determinations, please identify and provide a copy of the precise portion of the determination in which the DOC says that it is so bound. (In this regard, the United States understands that Canada has argued that in numerous determinations the DOC has followed reasoning set forth in the Preamble or otherwise cited to the Preamble. This question is not addressed at these determinations, but rather at determinations where the DOC expressly states that it has no legal option other than to follow the Preamble).

Reply

It would not be normal practice for Commerce or any other agency to "expressly state" that it is following a regulatory preamble unconnected to any regulation because it is legally bound to do so. As demonstrated by cases cited in Canada's prior submissions and in response to Questions 13 and 25 from the Panel, Commerce and other agencies normally simply apply the interpretations they announce in their regulations, including regulatory preambles, without express discussion of whether they are legally bound. That is, when an agency applies an interpretation as conclusive with respect to a legal issue, as Commerce did, for example, in *Live Cattle* and the Korea *Stainless Steel* cases, it is understood that the agency considers itself bound by its properly promulgated regulations.

Q3. Given that Canada has defined "practice" as an "administrative commitment" to treat export restraints as financial contributions, how many precedents does it take to give rise to this type of "practice." If, as indicated by Canada in its preliminary oral answer to a similar question, Canada is of the view that a single precedent can give rise to an agency "practice", is it Canada's view that a single case precedent is binding on the DOC?

Reply

Certainly, Commerce's legal interpretations of particular issues that are developed, stated and applied in individual determinations establish precedents that Commerce follows and applies in subsequent proceedings. In this regard, an individual Commerce determination, particularly if it addresses a particular legal issue for the first time, can give rise to the agency's practice on that issue. Once Commerce establishes its legal interpretation in an individual case, Commerce is obligated to follow that precedent in future cases, unless Commerce provides a well-reasoned and defensible basis for departure from its precedents. While Commerce's practice developed through its legal interpretations in individual cases is not "binding" as a legislative rule in the way the Preamble to the regulations is binding, the practice established through individual determinations puts a burden on Commerce to follow its practice, unless and until it articulates a well-reasoned and defensible basis for departure.

CANADA'S RESPONSES TO CERTAIN QUESTIONS POSED TO THE UNITED STATES

Q2. In respect of the criminal action provided for by the 1916 Act, the Appellate Body found that "the discretion enjoyed by the United States Department of Justice is not discretion of such

a nature or of such breadth as to transform the 1916 Act into discretionary legislation . . . "[8]. Please comment on the implications, if any, of this finding of the Appellate Body for the order in which a panel might address the two questions of whether a particular legislation is mandatory or discretionary and of whether that legislation violates a Member's WTO obligations.

Reply

Canada has two initial observations to make with regard to this statement. First, Canada notes that it is reflective of the Appellate Body's later conclusion in paragraph 97 of the same report that the mandatory/discretionary distinction is a defence, which the United States bore the burden of establishing. This is because underlying the discussion of the mandatory/discretionary defence are the affirmative findings of the panel, already made, regarding the applicability of Article VI of GATT 1947. Second, the statement also reflects the Appellate Body's approval of the common sense approach taken by the panel in assessing the consistency of the 1916 Act with the United States' obligations under the relevant provisions of GATT 1947. That is, the panel first interpreted Article VI in order to determine whether the 1916 Act fell within the scope of that provision. This involved determining precisely what that scope was. Having established the scope of Article VI, only then could the panel assess whether the United States would be able to avoid the inconsistent application of the 1916 Act through an interpretation that would make it fall outside the scope of Article VI. Put differently, only then could the panel move to assess whether the United States' domestic law was sufficiently discretionary to enable it to not take action that would be inconsistent. This approach applies with equal force in this dispute.

As Canada noted in comments made at the second hearing, the United States' reliance on the *EEC Parts* case in paragraph 12 of its Statement is consistent in this regard and the United States has failed to show that the discretion enjoyed by Commerce is discretion of such a nature or of such breadth as to transform the measures into discretionary legislation.

Q3. In *1916 Act*, the United States argued before the Appellate Body that the panel had incorrectly treated the mandatory/discretionary distinction as a defence by the United States, which the United States bore the burden of proving. The Appellate Body found no error by the panel in its articulation and application of the burden of proof.[9] Does the United States believe that the burden of proof questions are different in this case from those in *1916 Act*? In particular, does the fact that the United States has raised the mandatory/discretionary issue in the form of a request for preliminary ruling change the allocation of burden of proof in this case in any way? Please explain in detail, citing any relevant precedents.

Reply

In Canada's view, the Appellate Body found that the Panel in *1916 Act* had correctly articulated the burden of proof. In particular, the Appellate Body cited with approval the Panel's rationale, as set out in paragraph 6.38 of the EC Panel Report and paragraph 6.25 of the Japan Panel Report. The fact that the United States first raised the mandatory/discretionary distinction in the context of its Request for Preliminary Rulings changes nothing in this rationale.

Canada is of the view that, as stated by the Appellate Body in *United States – Anti-Dumping Act of 1916* (referring to the AB reports in *Wool Shirts* and *Hormones*), a complaining Member bears the burden of demonstrating on a *prima facie* basis that another Member's measure is inconsistent with that Member's obligations under the agreement in question. Once the complaining party has done so, the burden shifts to the defending party to rebut that *prima facie* case. As Canada has stated

[8] *1916 Act*, Report of the Appellate Body, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 91 (footnote omitted).

[9] *Id.*, paras. 93-97.

throughout this case, and most recently in paragraph 8 of its Second Written Submission, Canada believes it has established that the measures it has challenged require that export restraints be treated as "financial contribution" under US countervailing duty law and why this treatment is inconsistent with the United States' obligations under the SCM and WTO Agreements. In other words, Canada has established a *prima facie* case and thus has satisfied its burden.

Canada takes the opportunity to reiterate comments it made at the second hearing regarding the United States' reliance on *Canada – Aircraft*. In Canada's view, this reliance is misplaced. In addition to Canada's earlier comments in its Response to the United States' Request for Preliminary Rulings, Canada notes that the circumstances in *Aircraft* were different than this case because Brazil was not able to establish its *prima facie* case. That is, Brazil did not establish that Canada intended that the EDC mandate was to be interpreted in a WTO inconsistent manner. Rather, the WTO inconsistency resulted from the EDC's own interpretation of its mandate. It was not as a result of any authoritative direction to the EDC under Canadian law. In this case, the SAA authoritatively directs Commerce how to interpret and apply section 771(5)(B)(iii) in the context of export restraints. Thus in the present case the act of "requiring" is the result of the authoritative direction to Commerce contained in US law and not, in the first instance, from Commerce's interpretation of that law. In fact, Commerce's practice makes clear its understanding that it has been so directed.[10]

Q7. In respect of the circumstances in which a subsidy is, in the words of footnote 4 of the SCM Agreement, "tied to" actual or anticipated exportation, the Appellate Body, in *Canada – Aircraft*, found as follows:

"It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition . . . applies to subsidies that are *contingent* upon export performance . . . [A] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation".[11]

What implications, if any, would this Appellate Body statement have for the US argument that an export restraint can meet the SCM Agreement's definition of a financial contribution if it has the *effect* of increasing the domestic supply of the restrained good?

Reply

The use of the words "tied to" in footnote 4 of the SCM Agreement provide further support for Canada's interpretation of "directs" in subparagraph 1.1(a)(1)(iv). "Directs" means more than "causes". It connotes authoritative instructions from a government, an order from a government, or another form of affirmative control. The mere fact that a government action has an incidental effect does not mean that a government "directs" an action that has that effect.

Q8. Is it the US position that a trader is "entrusted or directed" to provide goods (because it is "caused" to do so) where it is faced by an export restraint to which it could respond by any of

[10] Likewise, the issue presented in *Canada – Aircraft* relating to the Technology Partnerships Canada (TPC) programme was whether Canada had to demonstrate that its revised TPC law could not be used to provide export contingent subsidies, even though there was no evidence presented that the law or any subsequent interpretations thereof committed Canada to provide such subsidies. This was the issue addressed by the Appellate Body, *not* whether Canadian legislation could be challenged if Canadian actions demonstrated that the law committed Canada to provide export contingent subsidies. The United States, in paragraph 17 of its Second Oral Statement, is therefore attempting to create an inconsistency where there is none.

[11] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, paras. 171-172.

several commercially viable options, one of which is to supply the domestic market, and it chooses that option? The Panel refers to paragraphs 47-48 on the one hand, and paragraph 125 on the other hand, of the US responses to questions dated 7 February 2001.

Reply

Canada has offered comments in respect of the elements of this question in its response to Panel Question 23. As Canada has stated, the producer will have a number of options. All of these options are real and the producer will make its choice based upon what it conceives to be in its best economic interest. Moreover, the decision to choose one option or another need not be a one-time, unalterable decision. Like any other businessman, a producer that produces a product subject to an export restraint will constantly be reviewing its business operations to determine what business plans and procedures the producer should follow to optimize returns. In other words, the effect of an export restraint as evidenced by the actions of private parties will be incidental and will be influenced by a multitude of factors that are independent of or external to the government action in question (i.e., the export restraint).

Under the US theory, under some set of economic circumstances particular to some producers there will be an entrustment or direction to provide goods. However, the United States also asserts that there is no entrustment or direction under those same circumstances where producers decide not to provide goods domestically. In fact, under the US theory, in any case where a producer decides not to provide goods domestically, there would be no entrustment or direction. It goes without saying that most of these economic circumstances would be beyond the control of the producer, and many of them would be beyond the control of the government as well. Thus, the US theory itself demonstrates that the effect of an export restraint on private parties is incidental. In no sense are the private parties "directed" to sell to domestic customers by an export restraint.

Q10. The United States indicates, in response to question 12(b) from the Panel:

"There is a difference between benefit and financial contribution for purposes of subparagraph (iv). Financial contribution would appear to be a matter of: (1) a proximate causal relationship between the government action and the private action; and (2) the private action being a form of taxation or subsidisation (*i. e.*, the type of action that a government 'normally' would do)."

In the view of the United States, how can it be determined in practical terms, and without considering the question of benefit, that a given government "entrustment" or "direction" in the sense of subparagraph (iv) does or does not constitute a "form of taxation or subsidisation"?

Reply

The genesis of the concept "taxation or subsidization" was in the Report by the Panel adopted on 24 May 1960 entitled "Review Pursuant to Article XVI:5.[12] The Report first noted that the GATT did not concern itself with actions by private parties acting independently of their governments except in so far as it allows importing countries to take action under other provisions of the Agreement. Thus, they concluded that there was no obligation to notify other Contracting Parties where a group of producers voluntarily taxed themselves in order to subsidize exports. However, the Panel believed there could be GATT implications in such circumstances depending upon the source of the funds and the extent of government involvement. Accordingly, they considered that governments did have an obligation to notify where the government took part either by making payments into the common fund or by entrusting to a private body the functions of taxation and subsidization with the result that the practice would in no real sense differ from those normally followed by governments.

[12] BISD 9S/188 (L/1160).

One then must follow the evolution of the language through the 1987 Note by the Secretariat[13] that formed part of the negotiating history of the SCM Agreement. The first portion of that Note recognized that part of the problem was the question of the definition of a subsidy and the definition of the amount of a subsidy for the purpose of the imposition of countervailing measures. On the question of so-called "indirect subsidies" the Note referred to a view expressed in the Group of Experts on the calculation of the Amount of a Subsidy. That view found the 1960 Panel Report to be generally useful and considered that the example of producer levies demonstrated the necessary link between a subsidy and the taxation function. It considered that there may be similar situations in which a government chooses to direct a private body to carry out certain functions relating to the sovereign right of governments to collect revenues and expend them. It then set out practices involving direct transfers or liabilities and those involving revenue foregone or not collected. The conclusion stated was that such practices are specific examples of the general principles of the Panel Report that subsidies exist where the government exercises its authority to impose tax and to expend revenue, whether directly or through delegation of its taxing and [expenditure of revenue][14] authority.

Thus the issue is not determining the existence of a financial contribution by determining whether the government is delegating its function of taxation and/or (circular) function of subsidization. The issue is whether the government has entrusted or directed a private body to carry out the functions of the type illustrated in subparagraphs (i) to (iii) that are normally vested in the government and whether the practice in no real sense differs from those normally followed by governments.

[13] See footnote 50 of the First Submission of the United States; Negotiating Group on Subsidies and Countervailing Measures; Subsidy and Countervailing Measures; Note by the Secretariat, MTN.GNG/NG10/W/4 (28 April 1987).

[14] Canada notes that the square bracketed language does not appear in the Note. Given the surrounding discussion and syntax, Canada concludes that its omission is inadvertent.

ANNEX A-4

EXECUTIVE SUMMARY OF ANSWERS OF THE UNITED STATES TO QUESTIONS POSED BY THE PANEL AT THE SECOND SUBSTANTIVE MEETING

(9 March 2001)

QUESTIONS TO THE UNITED STATES

Q1. In paragraph 63 of the second oral statement of the United States, the United States objects to an approach which would "take together" the "measures" identified by Canada. Is it the US argument that the statute could be examined by the Panel without some regard to its interpretation as reflected in the SAA? Is it an accurate characterisation of Canada's argument that "'measures' that individually *do not* require an agency to do a particular thing . . . *do* so require when considered together"? It would appear that Canada's argument is, rather, that the "measures" they have identified do require, individually and collectively, the treatment of export restraints as financial contributions.

Reply

It is not the US argument that the statute could or should be examined without some regard to the interpretation reflected in the SAA. *See, e.g.*, *US Request*, para. 124, note 134. In determining what US law means, it would be appropriate for the Panel to consider the SAA, just as a US court would, recognizing that the SAA can clarify, but not override, the statute. The statute at issue in this dispute, whether considered alone or in conjunction with the SAA, does not require action inconsistent with US WTO obligations.

Canada nominally has made arguments in the alternative; *i.e.*, it has nominally argued that the measures should be looked at individually and as a package. However, the United States believes that the real focus of Canada's argument relates to considering the so-called "measures" together. *See, e.g., Canada's First Submission*, para. 4; *Canada's Response*, para. 8; and *Canada's First Oral Statement*, para. 8. In *Canada's Responses to the Panel's January 18 Questions* (7 February 2001), Canada made the following statement in response to Question #4:

> Fundamentally, and from the outset of this dispute, Canada has challenged the treatment of export restraints under US countervailing duty law. *This "treatment" is a result of the measures identified by Canada taken together.* In Canada's view this treatment is inconsistent with the United States' obligations under the SCM and WTO Agreements. *Thus, in Canada's view, these measures should be analysed together to determine the treatment of export restraints under US countervailing duty law.* Canada has in its submissions described the role of each of these measures in setting out such treatment. Canada believes the measures should be analysed together. This does not mean that the measures taken separately are not susceptible to dispute settlement. In addition, should the Panel determine that one of the measures identified by Canada is not a "measure", this does not mean that the remaining

> measures are not susceptible to dispute settlement when considered together. (Emphasis added).

While Canada made a brief reference to the notion that "this does not mean that the measures taken separately are not susceptible to dispute settlement", the focus of Canada's arguments has not been on the "measures" taken individually. Indeed, it would be difficult for Canada to argue that the "measures" individually require action that would violate US WTO obligations, given that Canada has admitted on numerous occasions that the statute, considered alone, is WTO-consistent, and given that, until it filed this case, Canada took a similar view with respect to the SAA. Likewise, in its 1995 comments regarding the DOC's rulemaking proceeding, Canada acknowledged that the DOC has preserved its "flexibility and discretion" by refraining from promulgating a regulation on the topic of "indirect subsidies."

If, as Canada sometimes suggests, the "measures" individually require the DOC to treat export restraints as subsidies (or financial contributions), they do not need to be treated together, or as a "package", in order for Canada to obtain relief. However, knowing that it cannot demonstrate that any of the "measures" individually require the DOC to treat export restraints as subsidies (or financial contributions), Canada focuses on treating the "measures" together under the amorphous concept of something called an "administrative commitment." The problem with this argument, though, is that Canada has failed to cite any US legal authority in support of the proposition that "measures" which individually are not mandatory somehow become mandatory when the "measures" are considered together. The reason for this, as previously explained by the United States, is that there is no such authority.

Q2. In respect of the criminal action provided for by the 1916 Act, the Appellate Body found that "the discretion enjoyed by the United States Department of Justice is not discretion of such a nature or of such breadth as to transform the 1916 Act into discretionary legislation . . . "[1]. Please comment on the implications, if any, of this finding of the Appellate Body for the order in which a panel might address the two questions of whether a particular legislation is mandatory or discretionary and of whether that legislation violates a Member's WTO obligations.

Reply

In the *1916 Act* case, the panel found that the legislation in question was mandatory legislation in the sense that, when applied, it required action inconsistent with US WTO obligations. The panel also found, and the Appellate Body affirmed, that prosecutorial discretion to refrain from applying the statute was not enough to transform the 1916 Act into discretionary legislation. In the instant dispute, the issue is whether the so-called "measures" are mandatory legislation at all in the sense of requiring allegedly WTO-inconsistent action when applied. In the view of the United States, Canada has failed to establish that they are; *i.e.*, Canada has failed to establish that the "measures" require the DOC to treat export restraints as subsidies (or financial contributions).

With respect to the implications for this dispute, given that this dispute does not involve issues of prosecutorial or judicial discretion, and given that the applicability of the mandatory/discretionary doctrine is not in dispute, the only clear implication is that a statute must *require* a WTO breach in order to be found WTO-inconsistent as such. In this regard, the United States calls to the Panel's attention the recently circulated panel report in *United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, in which the panel stated, at para. 7.192, as follows:

[1] *1916 Act*, Report of the Appellate Body, WT/DS136/AB/R-WT/DS162/AB/R, adopted 26 September 2000, para. 91 (footnote omitted).

> It is established GATT/WTO practice that the consistency of a law on its face may be challenged independently from any application thereof *only in so far as the law is mandatory and not discretionary in nature*. In other words, *only if a law mandates WTO inconsistent action or prohibits WTO consistent action* can the legislation be challenged on its face in a dispute settlement proceeding. (Emphasis added).

Referring to the analysis required by the captive production provision at issue, the panel went on to add, at para. 7.197, that "[w]hile there is no guarantee that this analysis will result in a determination consistent with US obligations under the AD Agreement, it does not require any action inconsistent with those obligations."[2]

Q3. In *1916 Act*, the United States argued before the Appellate Body that the panel had incorrectly treated the mandatory/discretionary distinction as a defence by the United States, which the United States bore the burden of proving. The Appellate Body found no error by the panel in its articulation and application of the burden of proof.[3] Does the United States believe that the burden of proof questions are different in this case from those in *1916 Act*? In particular, does the fact that the United States has raised the mandatory/discretionary issue in the form of a request for preliminary ruling change the allocation of burden of proof in this case in any way? Please explain in detail, citing any relevant precedents.

Reply

The Appellate Body did not characterize the mandatory/discretionary doctrine as an "affirmative defence." Instead, the Appellate Body found that the panel had properly articulated and applied the rules on burden of proof as set forth in the *India Wool Shirts* and *EC Hormones* cases. The panel found that the EC and Japan had made a *prima facie* case that the 1916 Act was mandatory legislation that required WTO-inconsistent action when applied, and that the United States had failed to rebut their case. The United States does not believe that the burden of proof questions are different from those in the *1916 Act* case. Like the EC and Japan, Canada has the burden of proof, both in terms of making a *prima facie* case and bearing the ultimate burden of persuasion, that the "measures" constitute mandatory legislation that require the DOC to treat export restraints as subsidies when applied. The United States does not believe that Canada has made a *prima facie* case, but assuming *arguendo* that it has, the United States has successfully rebutted it.

With respect to the implications of the US request for preliminary rulings, the United States does not see how such a request would affect the allocation of the burden of proof. In that request, the United States merely asked the Panel to dismiss Canada's case sooner rather than later because Canada had failed to demonstrate that the "measures" in question constitute mandatory legislation. In this regard, the United States would note that the fact that the United States first raised the mandatory/discretionary doctrine in the context of its request for preliminary rulings does not limit the applicability of that doctrine. Under the mandatory/discretionary doctrine, in order to prevail, Canada must demonstrate that the "measures" require the DOC to treat export restraints as subsidies (or financial contributions). Canada would face this burden even if the United States had never requested preliminary rulings by the Panel.

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[2] The panel reached a similar conclusion with respect to Japan's challenge to the critical circumstances provisions of the US anti-dumping statute, citing the Appellate Body's decision in the *1916 Act* case for the continuing validity of the mandatory/discretionary doctrine. *Id*., para. 7.141.

The panel also found it "of great importance" that the portion of the SAA relating to the "captive production" provision made clear that that provision did not require the relevant US authority to ignore the requirements for a valid injury determination under the AD Agreement. *Id*., para. 7.198. In a similar vein, the proviso to the SAA that we have been discussing in this case makes clear that the DOC must apply the standards of subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement.

[3] *Id.*, paras. 93-97.

Q4. The United States indicates, in its response to question 34 from the Panel:

> **"Obviously, the ordinary meaning of the 'entrusts or directs' standard requires *some causal connection* between the government action and the behaviour of private actors . . . " (emphasis added).**

According to the US approach outlined above, the existence of a financial contribution in the case of an export restraint would depend entirely on the reaction thereto of the producers of the restrained good, specifically, the extent to which they increase their domestic sales of the restrained product, and cannot be determined from the nature of that action (the export restraint) as such. Does this argument by the United States imply that the legal standard under subparagraph (iv) is broader than that under subparagraphs (i)-(iii), in the sense that (i)-(iii) have to do with specified actions by a government, and not the results or effects thereof, while under subparagraph (iv) the US argument is that the results or effects are *determinative*? Or is the United States arguing that the effects would be relevant and determinative under all four paragraphs?

Reply

Whether it would be proper to characterize subparagraph (iv) as broader or narrower than the other subparagraphs is open to debate. It certainly can be said, however, that the standard under subparagraph (iv) is different from the standards under subparagraphs (i)-(iii). Under subparagraph (iv), for a financial contribution to exist there must be findings of: (a) government action that (b) entrusted or directed, (c) a private body, (d) to carry out a function of the type illustrated in subparagraphs (i) to (iii) that (e) is normally vested in the government and in no real sense differs from practices normally followed by governments.

The United States is not suggesting that an increase in the amount of goods provided domestically following the imposition of an export restraint, in and of itself, would be determinative of the issue of financial contribution. Rather, at a minimum, a sufficient causal connection between the government action and the behaviour of a private body would have to be shown.

Q5. If the *Lumber* and *Leather* cases were before the DOC today, would the DOC determine the existence of a financial contribution on the basis of factual evidence as to changes in the domestic supply of the restrained good? Would there (instead or also) be other analytical elements (beyond the existence of the export restraint as such), which the DOC would examine in making this determination? If so, please identify them.

Reply

Subject to the caveat that the United States is not in a position to state definitively what the DOC would do if the *Lumber* and *Leather* cases were before the DOC under the post-WTO CVD law, it is highly probable that the DOC would examine factual evidence relating to changes in domestic supply of the restrained good. Although this does not purport to be a definitive list, other types of evidence that the DOC might consider would be econometric analyses; the specific language of the export restraint measure in question; the existence and nature of any penalties for non-compliance; the purpose for which the export restraint was imposed; whether demand for the restrained product exists outside the jurisdiction in question; whether there are sufficient exports to meet that demand notwithstanding the existence of an export restraint; the extent of the price differential, if any, between the domestic and export markets; whether producers of the restrained product desired to

export their products. More generally, the DOC would require evidence establishing that each of the elements of subparagraph (iv) is satisfied.

Q6. The United States submits, in response to question 36(b) from the Panel, that "the 'benefit' and 'specificity' elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable". Please comment on the implications for this argument, if any, of the Appellate Body statement, in *Brazil – Aircraft*, that "the issues – and the respective definitions – of a 'financial contribution' and a 'benefit' are two separate legal elements in Article 1.1 of the SCM Agreement, which *together* determine whether a 'subsidy' exists"[4] for this US comment. In particular, is it correct that the US comment implies that the "financial contribution" element would not act as a limiting factor in itself in respect of the determination of the types of measures that fall within the scope of the SCM Agreement, and that the only limiting factors are "benefit" and "specificity"?

Reply

The United States does not dispute the notion that "financial contribution" and "benefit" are separate elements, and the implication read into the US response is incorrect. Not all government measures would satisfy the standard of subparagraph (iv), so that "financial contribution" would be a limiting factor. However, it would be short-sighted to focus solely on the financial contribution element in analyzing Canada's "slippery slope" argument, because it is a fact that the elements of "benefit" and "specificity" will also serve to weed out government measures that might arguably satisfy the definition of "financial contribution." The second half of the Appellate Body's statement quoted above in fact confirms the United States' point: "financial contribution" and "benefit" together determine whether a "subsidy" exists.

Moreover, because "benefit" is also a requirement for finding a "subsidy," in certain instances the DOC may be relieved of undertaking a "financial contribution" analysis in determining that a particular government measure does *not* constitute a subsidy within the meaning of Article 1.1. Contrary to Canada's mischaracterizations of the case, this situation arose in *Live Cattle* where the DOC found there was no benefit, and consequently did not need to make a final determination with respect to the US industry's claims concerning "financial contribution."

Q7. In respect of the circumstances in which a subsidy is, in the words of footnote 4 of the SCM Agreement, "tied to" actual or anticipated exportation, the Appellate Body, in *Canada – Aircraft*, found as follows:

> **"It does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result. The prohibition . . . applies to subsidies that are *contingent* upon export performance . . . [A] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result. Yet, that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation".[5]**

What implications, if any, would this Appellate Body statement have for the US argument that an export restraint can meet the SCM Agreement's definition of a financial contribution if it has the *effect* of increasing the domestic supply of the restrained good?

[4] *Brazil – Export Financing Programme for Aircraft*, Report of the Appellate Body, WT/DS46/AB/R, adopted 20 August 1999, para. 157 (emphasis in original).

[5] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, paras. 171-172.

Reply

In the view of the United States, the quoted statement has little relevance to the issues in this dispute, because the Appellate Body was addressing terms ("contingent" and "tied to") that have different meanings than the terms at issue in this case. To the extent that the Appellate Body's teachings were applied to this case by analogy, they support the US position. The United States does not contend that mere anticipation or expectation of a result is sufficient to find a financial contribution under subparagraph (iv). Instead, there would, at a minimum, have to be a finding that an export restraint caused the provision of a good.

Q8. Is it the US position that a trader is "entrusted or directed" to provide goods (because it is "caused" to do so) where it is faced by an export restraint to which it could respond by any of several commercially viable options, one of which is to supply the domestic market, and it chooses that option? The Panel refers to paragraphs 47-48 on the one hand, and paragraph 125 on the other hand, of the US responses to questions dated 7 February 2001.

Reply

With respect to whether "entrusts or directs" means "cause", it is not the position of the United States that the mere fact that a producer chooses to supply goods domestically in the face of an export restraint means that it has been "directed" to do so within the meaning of subparagraph (iv). There would have to be some type of demonstrated causal connection between the producer's behaviour and the government action, although the DOC has not yet had to address the question of how strong this causal connection would have to be. Also, while the standards may be different for "entrusts" and "directs", the United States reiterates that every dictionary cited in this dispute by either party contains a definition of "direct" with causal elements.

With respect to the issue of alleged "options", none of the options presented by Canada are "commercially viable" in this context. Canada posits a producer having essentially four options: export, sell to domestic processors, process itself, or go out of business. If it is proven, on the facts of the case, that export has been legally/commercially restricted and, in fact, selling to domestic processors is the only commercially viable option and such sales increase, this result would not seem to warrant a different characterization for purposes of the SCM Agreement than if the government had simply declared "you must sell only to domestic processors." In the view of the United States, where a government action leaves only one commercially viable option to private entities, to say that the government action does not "direct" a commercial actor to exercise that option would open an enormous loophole in the SCM Agreement, based merely on a semantic distinction.

Canada's efforts to explain its "options" only lead to further contradictions. Canada has argued that the producer of the input could become a downstream processor once export is prohibited. If this occurs, government regulation has created additional production of the downstream product in the country imposing the export restraint (which was uneconomic absent the restraint) at the expense of the industry in third countries, exactly the type of government subsidy that should be actionable according to Canadian documents prepared outside of this litigation. *See US Answers*, para. 44, *quoting* CDA-106.

Now, Canada argues that the input producer could choose to go out of business by selling to someone else. At most, this option is a chimera. After all, what does the new purchaser do? It faces the same export restraint that eliminates the economically viable option of exporting, thereby forcing increased domestic sales or production of the downstream product that would not have occurred but for the export restraint. Or would Canada argue that the new purchaser has options because it, in turn, can sell the business to someone else? And that new purchaser, in turn, can sell to someone else, *ad infinitum*?

Throughout this dispute, the United States has set forth several reasons, in addition to the explanation above, as to why Canada's interpretation of "entrusts or directs" is incorrect. Given Canada's misdirection, a brief summary at this juncture seems necessary. First, the United States has cited multiple texts that make clear that "entrusts or directs" includes circumstances in which one party (the government) engages in action which causes or results in the private body's action. *First US Submission*, paras. 30-31. Canada now provides another text which it claims supports its "mandate" interpretation of "entrusts or directs." Canada quotes that source very selectively, because that source actually provides that "direct" means: "control, guide; govern the movements of"; "give a formal order or command to"; "tell or show . . . the way to a destination"; "point, aim, or cause . . . to move in a certain direction"; "guide as an adviser, as a principle, etc."; "supervise the performing, staging, etc. of ... ."; "guide the performance of". *See* CDA-136.

Even if one accepts Canada's argument that "directs" can only mean "give a formal order or command to", an export restraint is capable of satisfying that definition. An export restraint can be considered a "formal order or command to" not export. While Canada takes issue with whether or not an instruction to not export equates to an instruction to provide goods, *i.e.*, the function enumerated in subparagraph (iii), it should be noted that according to subparagraph (iv) the issue is whether the government direction is *of the type* of function illustrated in subparagraphs (i)-(iii). Furthermore, based on its arguments in this case, the United States understands Canada to concede that, whether or not considered to be an export restraint, a "formal order or command" to use or sell a good domestically satisfies the standard of subparagraph (iv).

Second, the negotiating history strongly supports the US interpretation. Canada (and the EC) had argued throughout the Uruguay Round for a narrow definition of subsidy that would only include subsidies which involved a cost to government. Canada made it clear that it believed that export restraints and other indirect subsidies would not be countervailable because they did not involve a "cost to government." Only since having lost that misguided argument in *Canada Aircraft* has Canada shifted its focus to the "entrusts or directs" language.

Third, other cases – particularly *Canada Dairy* – and an analysis of the Illustrative List of Export Subsidies support the US position. *First US Submission*, paras. 61-66.

Finally, the object and purpose of the SCM Agreement clearly support the US view. Indeed, export restraints are widely understood as providing a subsidy. Frankly, the United States is puzzled by the extensive Canadian argument that the US reliance on the normal understanding of the term subsidy as used by WTO, UN, and Canadian officials and economists somehow weakens the US case.

Q9. How does the United States reconcile its argument that, so long as the *effect* of an export restraint is to increase the domestic supply of the restrained good, that export restraint constitutes a financial contribution in the form of a government-entrusted or -directed provision of goods within the meaning of paragraph (iv), with the "normally vested" and "in no real sense differs" language in that provision? In particular, could these conditions be seen as connoting, at a minimum (and whatever else they might mean), a *direct* and *explicit affirmative* control by the government of the particular action of the private body involved? If so, how could this be reflected in the effects-based approach that you advocate? If not, why not?

Reply

In addition to an examination of the causal relationship between the government action (*i.e.*, the export restraint) and the private action (*i.e.*, the domestic provision of a good), the other elements of subparagraph (iv) would still have to be satisfied – including the "normally vested in" and "in no real sense differs" elements – in order for a financial contribution to exist. However, "normally vested in" and "in no real sense differs" refer to the type of function carried out, and the manner in

which it is carried out by the private body, not to the causal relationship between the government action and the behaviour of the private body.

The United States continues to be of the view that the language in question was taken from the *Article XVI:5 Report*, which referred to the government functions of taxation and subsidization. That is, in order to satisfy the requirements of subparagraph (iv), the type of function which a private body is entrusted or directed to perform must be the type of action that a government would engage in when it subsidizes; *i.e.*, behaviour that reallocates resources.[6]

There could well be situations in which the "entrusts or directs" element is satisfied, but other elements are not. One such example was provided in paragraph 75 of the *Second US Oral Statement*.

Finally, the United States reiterates that nowhere in subparagraph (iv) is there any indication that "direct and explicit affirmative control" is required under either the "entrusts or directs" or the "normally vested in/no real sense differs" elements. Those terms were not used in the text, nor would their use make any sense. If "direct and affirmative control" by the government were the standard, then subparagraph (iv) could easily be evaded, and, as a result, would be rendered meaningless.

Q10. The United States indicates, in response to question 12(b) from the Panel:

> **"There is a difference between benefit and financial contribution for purposes of subparagraph (iv). Financial contribution would appear to be a matter of: (1) a proximate causal relationship between the government action and the private action; and (2) the private action being a form of taxation or subsidisation (*i. e.*, the type of action that a government 'normally' would do)."**

In the view of the United States, how can it be determined in practical terms, and without considering the question of benefit, that a given government "entrustment" or "direction" in the sense of subparagraph (iv) does or does not constitute a "form of taxation or subsidisation"?

Reply

Given that a subsidy involves a reallocation of resources, it could be determined, without getting into the question of benefit, whether a private body is being directed to provide resources (*e.g.*, a good) to another party in a transfer that would not otherwise occur. For example, in the context of an export restraint, the question would be whether private actors are directed to provide goods domestically when, in the absence of government direction, they would not otherwise do so. It would be a separate question whether this government-directed provision of goods actually resulted in the conferral of a benefit. In theory, the government direction could result in no changes in the prices that would obtain absent the government direction, in which case a benefit likely would not exist.

[6] As the United States has previously noted, *see First US Submission*, para. 36, note 32, the Appellate Body has stated that "a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration." *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, Report of the Appellate Body adopted 27 October 1999, para. 87. Canada previously has agreed that subparagraph (iv) addresses the government functions of taxation and subsidization. *See First US Submission*, para. 52, note 51, *quoting Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, Report of the Panel, as modified by the Appellate Body, adopted 27 October 1999, para. 4.342.

Q11. The United States further submits, also in response to question 12(b) from the Panel:

> **"While evidence for this second aspect [the private action being a form of taxation or subsidisation] and 'benefit' may overlap, *they are not the same thing*." (emphasis added)**

Please explain in concrete terms the nature of the evidence to which you refer, and how such evidence could "overlap" in respect of financial contribution and benefit, without "being the same thing". Does the United States mean by this that the evidence would not be the same thing in the two contexts, or that the two contexts are not the same thing?

Reply

The evidence for private action being functionally the same type of activity performed by a government when it engages in taxation or subsidization and the evidence of "benefit" overlap because they both arise out of the same transaction and may or may not demonstrate that the private action would not have occurred but for the government intervention. The evidence of financial contribution goes to the existence of a transaction that meets the requirements of subparagraph (iv), while the evidence of benefit goes to whether the circumstances of that transaction meet the requirements of Article 14 of the SCM Agreement.

For example, in the case of a government loan, one must look to the loan transaction itself to determine whether a financial contribution took place, and then look to the terms of that same transaction in order to determine the existence of a benefit. The same would be true in the case of a government-directed loan, although there would be an additional evidentiary question of whether the government, in fact, directed the loan.

Q12. Would functions "normally [] vested" in a government in the sense of subparagraph (iv) be limited to "taxation and subsidisation"? Would other government functions involving the execution of various government policies (e.g., social policies) necessarily consist of "taxation or subsidisation"? If not, would such functions, even if they corresponded to functions described in subparagraphs (i)-(iii), fall outside of the scope of subparagraph (iv)?

Reply

As indicated in the *Second US Oral Statement*, paras. 73-78, there are several possible interpretations that one could ascribe to the "normally vested" language, and the United States provided at least one example of a situation which probably would fall outside the scope of subparagraph (iv) even though the function arguably falls under subparagraphs (i)-(iii). The "normally vested in" language is an independent required element of subparagraph (iv), even if the function in question corresponds to subparagraphs (i)-(iii).

US RESPONSES TO CERTAIN QUESTIONS POSED TO CANADA

Q13. Have there been any cases where the Preamble has been used as a "legislative rule" in the sense described by the United States at paragraphs 30-43 of its second oral statement? If so, please provide details.

Reply

Canada's position appears to be that the DOC treats the portion of the Preamble at issue here as if it were a regulation, in disregard of various principles of US administrative law relating to legislative rules and the non-binding nature of administrative precedent. In the view of the United States, this assertion is not supported by the relevant portion of the Preamble itself or the manner in which it has subsequently been cited by the DOC. However, when the entire Preamble is examined – as opposed to the portions challenged by Canada – it becomes even more apparent that the DOC was well-aware of what it needed to do in order to bind itself, and that when it chose not to do so, it did so deliberately.

For example, at page 65,349 of the DOC's *Notice of Final Rule*, CDA-3, the DOC provided the following explanation of why it chose not to bind itself with respect to so-called "hybrid instruments":

> In this regard, the Department considered codifying its approach with respect to so-called "hybrid instruments," financial contributions that do not readily fall into the basic categories of grant, loan, or equity. In the 1993 steel determinations (*see Certain Steel products from Austria (General Issues Appendix)*, 58 FR 37062, 37254 (9 July 1993) ("GIA"), the Department developed a hierarchical approach for categorizing hybrid instruments, an approach that was sustained in *Geneva Steel v. United States*, 914 F. Supp. 563 (CIT 1996). However, notwithstanding this judicial imprimatur, the Department has relatively little experience with hybrid instruments. Therefore, although the Department has no present intention of deviating from the approach set forth in the GIA, the codification of this approach in the form of a regulation would be premature at this time.

At page 65,355 of CDA-3, the DOC provided the following explanation as to why it chose not to bind itself with respect to its so-called "privatization methodology":

> While we have developed some expertise on the issue of changes in ownership over the past five years, and the comments submitted in response to the 1997 Proposed Regulations have provided us with additional ideas to consider, we do not think it is appropriate to promulgate a regulation on this issue at this time. As noted above, many of the ideas presented by the commenters would move us in the direction of adopting extreme positions. Another factor weighing against codification of any privatization methodology at this time is that the Courts may, in the course of their review of the current methodology, adopt an interpretation of the law that would either validate or overturn some of the options that we have considered, including those proposed by the commenters. Finally, given the rapidly changing economic conditions around the world, particularly with respect to the issue of state ownership, we believe we should continue to develop our policy in this area through the resolution of individual cases. These changing economic conditions pose additional challenges in developing a unified framework in which to analyze change-in-ownership transactions. In the 1997 Proposed Regulations, we identified many of these additional issues and new challenges that may warrant consideration in this

> context and raised questions about them. However, it is our view that the comments we received did not sufficiently address many of these concerns.
> . . . .
>
> Our decision not to include a provision on changes in ownership to these Final Regulations does not preclude us from issuing such a regulation at a later date. We will continue to examine this issue and consider whether an alternative analytical framework can be developed that addresses the variety of change-in-ownership scenarios we have encountered and that, like the present methodology, satisfies Congressional intent that we examine changes in ownership on a case-by-case basis. In the interim, we will continue to apply our current methodology for ongoing CVD cases and carefully examine the facts of each case. However, we will consider whether modifications to the methodology may be appropriate.

Elsewhere in the Preamble, the DOC explained why it was not promulgating regulations with detailed criteria involving the concept of "general infrastructure" (CDA-3, page 65,378); regulations regarding the government purchase of goods (CDA-3, page 65,379); regulations codifying the DOC's then-existing practice regarding worker-related subsidies (CDA-3, page 65,380); and regulations on import substitution subsidies (CDA-3, page 65,385).

With respect to each of these topics, the discussion in the Preamble reveals that the DOC did not consider that it had sufficient experience to warrant the promulgation of a binding regulation, and that it preferred instead to retain its flexibility to develop its policy regarding these topics on a case-by-case basis. In light of these examples, it is simply implausible to argue, as Canada does, that the DOC considers itself bound by the portion of the Preamble challenged by Canada.

Canada's counter-argument is that if these types of preambular statements are not binding, then they are "meaningless." The United States cannot speak to the situation under Canadian law, but in the United States it is considered highly desirable for an administrative agency, operating within the framework of a democratic system of government, to keep the public informed of the agency's thinking via non-binding instruments such as general policy statements or interpretative rules. Thus, the portions from the Preamble quoted above were not "meaningless" statements, because they communicated to the public the DOC's thinking on the topics to which they related.

More generally, it is worth mentioning the trade-offs an agency faces when trying to decide between the use of a legislative rule or some non-binding instrument, such as an interpretative rule or a general policy statement. From the agency's perspective, a legislative rule offers significant advantages in terms of efficiency. If a legislative rule is validly promulgated, the legislative rule is law, and the agency need not thereafter repeatedly justify the rule. In the case of an interpretative rule, on the other hand, the agency must continually justify the rule on a case-by-case basis. In addition, a recent decision by the US Supreme Court suggests that a legislative rule may receive a greater degree of judicial deference than an interpretative rule. *See* US-33, page 171, discussing the decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000).

The downside of a legislative rule is that because it *is* binding on the agency, the agency must live with the consequences of the policy choices reflected in the rule. For example, if, in a CVD proceeding, the DOC considered that the application of a regulation to the facts of the case generated the wrong result, the DOC would have to live with those results pending the repeal or amendment of the regulation. On the other hand, in the case of an interpretative rule, if an agency decided that the rule generated the wrong result, the agency could freely overrule the rule.

The Preamble, when considered *in toto*, indicates that the DOC considered these types of trade-offs. With respect to those topics for which the DOC felt that it had sufficient experience, it promulgated regulations, thereby binding itself. With respect to those topics for which the DOC felt it

had insufficient experience – such as the new standards applicable to "indirect subsidies" under section 771(5)(B)(iii) of the Tariff Act – the DOC declined to promulgate regulations, thereby preserving its flexibility and discretion.

Q14. Canada argues, in response to question 16(c) from the Panel, that "[p]ractice is [] not an individual determination in a countervailing duty case (although a determination normally will reflect 'practice'), but rather is an institutional commitment to follow declared interpretations and methodologies that is reflected in cumulative determinations". In Canada's view, how is the "institutional commitment" expressed? That is, for something to be identifiable as such a "commitment", would it need to be reflected in writing, *e.g.*, in a DOC determination, and identified in general terms as agency "practice" or "policy"? If not, how (that is, in what form) would such an expression be made? To the extent that there is an explicit identification of a "practice" in a DOC determination or other document, how, in Canada's view, is this different from "legislation"?

Reply

For its part, the United States remains confused as to the precise nature of Canada's "institutional commitment" and how it fits within the legal framework in which the DOC operates. Putting aside the question of how this alleged "institutional commitment" is expressed, the key question is whether this "commitment" – whatever it may be – binds the DOC so as to require it to treat export restraints as financial contributions. In the view of the United States, there are only two such instruments that would be mandatory in this sense: a statute or a regulation. Canada has not disputed the fact that there is no DOC regulation regarding indirect subsidies in general, or export restraints in particular, and Canada has conceded that the statute does not mandate the DOC to treat export restraints as subsidies. Moreover, this conclusion regarding the statute does not change upon consideration of the SAA.

Q16. Assume hypothetically that the Panel were to rule on, and find in favour of Canada's claims in respect of, all of the "measures" identified by Canada other than "practice". In Canada's view, what actions would the United States need to take in order to "bring its measures into conformity" pursuant to such a ruling? How would such actions differ from those that the United States would have to take if the Panel ruled in favour of Canada's claim in respect of "practice" as well? That is, what does Canada believe that the specific, practical implications would be for remedy of including or excluding "practice" from any hypothetical ruling by the Panel in favour of Canada's claims? In your response, please comment on the statement of the panel in *European Communities – Parts and Components*, after the finding that the legislative provisions in question were not mandatory, that while it would be desirable for the European Communities to withdraw the legislative provisions in question, the European Communities would meet its GATT obligations if it were to cease to apply those provisions in respect of Contracting Parties[7]. Would the same be true in this case, assuming the hypothetical ruling posited above? If not, why not? In your oral response to this question, you indicated that, assuming the hypothetical ruling, it would not be necessary for the United States to revise the SAA. How does this statement relate to your previous assertion that the SAA mandates the DOC to treat export restraints as financial contributions?

[7] *European Economic Community – Regulation on Imports of Parts and Components*, Report of the Panel, BISD 37S/132, adopted 16 May 1990, para. 5.26.

Reply

The United States submits that Canada's oral answer to this question wholly undermines the credibility of Canada's claims. Based on the US delegation's notes, Canada made the following significant statements:

(a) With respect to the statute, no amendment to the statute would be necessary because the statute is not, on its face, inconsistent with the SCM Agreement;

(b) With respect to the SAA, the United States could "exploit" the proviso in the SAA so as to adjust its interpretation of the statute; and

(c) With respect to the Preamble, the DOC either could (i) publish a notice in the *Federal Register* disavowing the portion of the Preamble at issue in this dispute; or (ii) by means of a determination in a particular case cease to treat export restraints as subsidies (*e.g.*, decline to initiate on an alleged export restraint in an actual case, or issue a negative determination in an actual case on the grounds that export restraints do not constitute subsidies).

These statements are fundamentally at odds with the position Canada has taken throughout this dispute. With respect to the SAA, Canada has insisted that the SAA requires the DOC to interpret the statute in such a way as to treat export restraints as subsidies (or financial contributions). More specifically, as the Panel well knows, Canada has argued throughout this dispute that the proviso in the SAA is meaningless. Indeed, in *Canada's Second Oral Statement*, paras. 15-17, Canada continued to insist that the SAA requires the DOC to treat export restraints as subsidies (or financial contributions). Yet, only a few hours later, Canada, in responding to this question, admitted that the SAA does not really require any such thing.

The fact that Canada has taken inconsistent positions in the course of this dispute is not surprising. As demonstrated by US-32, as recently as September 1999 in the *Live Cattle* case, Canada was of the view that the SAA did *not* require the DOC to treat export restraints as subsidies.

Turning to the Preamble, Canada has insisted throughout this case that the Preamble has the same status as a regulation; *i.e.*, that it is a legislative rule that is binding on the DOC. However, if that were the case, then the DOC could not simply disavow the Preamble by publishing a *Federal Register* notice or applying a new approach in an actual CVD case. As a legislative rule, the Preamble would be "law"; *i.e.*, it would be binding on the DOC until properly repealed or amended. The only proper way to repeal or amend a legislative rule is to engage in the same notice-and-comment rulemaking by which the legislative rule was promulgated in the first place. Thus, Canada's suggested methods of implementation are totally at odds with its characterization of the legal status of the Preamble.

Q17. We understand Canada to make the following two arguments concerning the legislation at issue: (i) that the statute "as interpreted by" the SAA and the Preamble is *mandatory legislation that requires* the DOC to violate its obligations under the SCM Agreement; and (ii) that, although the statute on its own is discretionary, in the sense that it would be possible to interpret it in a WTO-consistent manner, the SAA and the Preamble "curtail the discretion" of the DOC to act WTO-consistently. Is this a correct understanding of Canada's arguments? Are these two formulations simply two different ways of saying the same thing, or is the second formulation an alternative argument to the first, or a different argument in some other respect from the first? Please explain.

Reply

The United States notes that "curtailing discretion" is not the same as "mandatory legislation." Any authority – a law review article, a congressional committee report, a prior administrative precedent, a determination by authorities of another Member – can be said to "curtail discretion" in the sense that, to the extent the authority is persuasive, it makes one approach more likely than the alternative and, for a rational, defensible decision, a decision-maker may choose to follow, explain, or distinguish the authority. However, this is not the same thing as mandatory legislation.

Consider, for example, the treatment of the Canada Account in *Canada Aircraft*. The existence of the Canada Account made the provision of prohibited export subsidies more likely than would have been the case if the Canada Account had not existed. Nonetheless, the panel in that case found that the Canada Account, as such, was not WTO-inconsistent because it did not mandate the provision of export subsidies. The panel so ruled notwithstanding the fact that it simultaneously found that particular debt financing made under the Canada Account did constitute the provision of prohibited export subsidies.

Q19. Could Canada explain the apparent inconsistency between its characterisation of the proviso in the SAA in this dispute and its arguments concerning the same proviso in the *Live Cattle* investigation, referred to at paragraph 24 of the second oral statement of the United States.

Reply

In the view of the United States, the inconsistency and Canada's attempted rationalization speak for themselves. The United States notes that when Canada made the argument in *Live Cattle*, it presumably was convinced, and argued on the record, that the DOC was not required by the statute, the SAA, or any other "measure" to treat export restraints as subsidies (or financial contributions).

Q20. What is the significance of the following sentence of the paragraph from the Senate Joint Report on the URAA (Exhibit CAN-134), an excerpt of which you quote at paragraph 19 of Canada's second oral statement?:

> **"The Committee further expects that these types of indirect subsidies will continue to be countervailable where the standard under new section 771(5)(B)(iii) has been met."**
>
> **Does this sentence in Canada's view have the same meaning as the proviso in the SAA?**

Reply

Setting aside the obvious implication to be drawn from Canada's selective quotation of the Senate Joint Report in its *Second Oral Statement*, in the view of the United States, this sentence has the same meaning as the proviso in the SAA; namely, that "indirect subsidies" of the type countervailed in the past will continue to be countervailable only if the DOC determines that the standard of subparagraph (iv) has been met.

Canada purports to have identified all the "measures" that make up the "treatment of export restraints under US countervailing duty law, but until the last minute ignored the Senate Joint Report. This is yet another reason why panel rulings should be based on actual actions of Members or clear mandatory legislation, rather than speculation about how an administrative agency might rule in the face of a plethora of authority and possible fact patterns.

Q23. Canada appears to argue, in its responses to questions 11 and 12(a) from the Panel, that the coverage of paragraphs (i)-(iii) of Article 1.1(a)(1) is broader than that of paragraph (iv). That is, Canada argues that any action by a government itself of the type described in paragraphs (i)-(iii) would, by definition, and without any additional conditions, be a "financial contribution". Canada also argues, however, that if a government undertook the same action but this time operated *through* a private body, this action would only be a "financial contribution" if that government "ordinarily" performed that function. The implication of this argument would appear to be that government intervention in the market through a private body (even if repeated over some period of time) would not satisfy the requirements of paragraph (iv), unless the government already had a past history (or prior "ordinary" practice) of doing so itself directly. For example, if a government had no past history of lending money to private companies itself out of its own funds, and then began to order private banks to make certain loans to certain companies, Canada's argument seems to imply that these loans, in spite of being made at the explicit direction of the government, would not constitute financial contributions by that government, *because of* the absence of a prior practice of direct government lending. Is this a correct understanding of Canada's argument? Please explain, and please discuss the rationale or purpose under Article 1 for what Canada sees as two different legal standards under different paragraphs of the same "financial contribution" provision, *i.e.*, one standard under paragraphs (i)-(iii), and a second, narrower standard under paragraph (iv)?

Reply

For reasons previously expressed, the United States considers Canada's argument (which the Panel accurately reflects) to be without logical foundation. At the close of the second meeting with the Panel, even Canada appeared to acknowledge the perverse results which its interpretation would generate.

At this point, the United States simply would add that Canada's interpretation is inconsistent with the object and purpose of the WTO Agreement, which, as expressed in the preamble thereto, includes "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade ... ." Under Canada's interpretation, activity by Member A might constitute a financial contribution within the meaning of subparagraph (iv), while the same activity by Member B might not. Such an outcome is not only nonsensical, but hardly can be considered "reciprocal and mutually advantageous."

Q24. Could Canada please respond to the US argument in the last sentence of paragraph 46 of its second oral statement.

Reply

Please see the US answer to question 13 to Canada, above.

ANNEX A-5

LETTER FROM THE UNITED STATES COMMENTING ON CANADA'S ANSWERS TO QUESTIONS POSED AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

(7 March 2001)

My authorities have instructed me to submit the following comments regarding *Canada's Answers to the Questions Posed at the Second Substantive Meeting of the Panel* ("*Canada's Second Answers*"), dated 2 March 2001. For the reasons set forth below, the United States respectfully requests that the Panel take these comments into consideration.

While the United States, in general, disagrees with the legal arguments set forth in *Canada's Second Answers*, those arguments largely repeat prior arguments made by Canada, and it is not the wish of the United States to engage in yet another round of briefing by repeating the rebuttals it already has made. Instead, the comments set forth below relate largely to three new pieces of factual information that were attached to, and discussed in, *Canada's Second Answers*; specifically, CDA-137, 138, and 140 as they relate to the concept of a "legislative rule" under US administrative law. This is new factual information on which the United States has not had an opportunity to comment. The United States believes it is important that the following points be brought to the Panel's attention.

The other area on which the United States would like to briefly comment concerns Canada's answer to Question 1(a) posed to it by the United States. Although Canada does not submit new information in its answer to that question, it makes a factually erroneous assertion that, in the view of the United States, requires correction.

The Panel's Question 13 and Legislative Rules

In responding to Question 13 from the Panel, Canada submits as evidence two US court decisions, *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) (CDA-137), and *Troy Corporation v. Browner*, 120 F.3d 277 (D.C. Cir. 1997) (CDA-138). Canada appears to allege that these cases set out some new and different standard for identifying a legislative rule, but, in fact, these cases are not inconsistent with the cases previously cited by the United States. Having said that, however, there are certain important points concerning these cases that Canada omits from its discussion.

In *Troy*, the complainant, like Canada in the instant dispute, alleged that a regulatory preamble constituted a legislative rule. Canada accurately summarizes the court's discussion of the criteria for a legislative rule, but it omits the court's discussion of the criteria for a general policy statement. The court said that "first, a general statement is one that 'does not impose any rights and obligations' and, second, that a policy statement generally leaves the agency and its decisionmakers free to exercise discretion." 120 F.3d, at 287 (citations omitted). Canada also omitted the statement by the court that "[w]e will also consider an agency's characterization of its own actions, although that characterization is not dispositive." *Id* (citation omitted).

Finally, Canada omitted the court's discussion of why it did not find the preamble in question to constitute a legislative rule. The court stated as follows:

> Applying these principles, we conclude that the EPA's exposure policy was exempt from the notice and comment requirements of section 553. The EPA's exposure policy merely informed the public that the agency would exercise its discretion by considering exposure only for low toxicity chemicals. The EPA did not thereby curtail this discretion; it did nothing more than clarify its own position. The policy does not impose rights or obligations or bind the agency to a particular result. Chemicals of low toxicity may be added despite the policy, just as chemicals of moderate or high toxicity are not necessarily added because of it. *Id*.

This statement could easily apply to the portion of the DOC Preamble at issue in this dispute. The DOC Preamble, at most, merely informed the public of the DOC's tentative thinking regarding the interpretation of the new section 771(5)(B)(iii) of the Tariff Act. This clarification of the DOC's position did not impose rights or obligations or bind the DOC to a particular result. In this regard, in its answers to Questions 1 and 2 posed by the United States, Canada failed to cite a single case – judicial or administrative – where a court or the DOC has said that the DOC is legally bound by the type of preambular statement at issue in this dispute. Moreover, Canada effectively admits that the DOC is not so bound in its answer to Question 16 from the Panel. There, Canada asserts that the DOC could simply cease to apply the alleged "legislative rule" of the Preamble in future cases. However, if the Preamble is a "legislative rule", then it is binding, and the DOC cannot simply decide to ignore it.

This latter point was made clearly in *National Family Planning*. In that case, the agency in question issued "Directives" which the court found had the effect of amending a prior legislative rule promulgated in the form of a regulation. In striking down the Directives, the court stated that "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked." 979 F.2d, at 234 (citations omitted). The court added: "It is a maxim of administrative law that: 'If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.'" *Id*., *quoting* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L.J. 381, 396.

Thus, under US law, if the Preamble actually were a legislative rule, it could be amended or revoked only by going through notice-and-comment rulemaking. Canada's assertion that the DOC could disavow the Preamble simply by publishing a *Federal Register* notice to that effect or announcing some action in an actual CVD case is incompatible with Canada's claim that the Preamble is a binding, legislative rule.[1]

Finally, Canada cites to pages 234-235 of volume I of the Davis & Pierce administrative law treatise (CDA-140). The United States does not disagree with Davis & Pierce that many legislative rules perform an interpretative function. Indeed, while no precise taxonomy has ever been prepared, a fair number of the DOC's regulations could be described as performing an interpretative function.

However, Canada draws a false conclusion from the professors' otherwise unobjectionable statement. The professors say that some legislative rules perform an interpretative function. They do not say, as Canada claims, that any rule which performs an interpretative function thereby is a legislative rule. Otherwise, there would be no distinction between a legislative rule and an

[1] Another interesting aspect of *National Family Planning* can be found on page 239 of the decision. There, the court cites a prior decision called *Fertilizer Institute*, in which the US Environmental Protection Agency set out in a preamble to a rule a detailed interpretation of a statutory term. According to the *National Family Planning* court, in *Fertilizer Institute* it held that the preamble did not constitute a legislative rule, notwithstanding the apparent detail of the agency's interpretation.

interpretative rule. Instead, more is required for a legislative rule, particularly an intent on the part of the agency that it be bound.

Canada's Answer to Question 1(a) from the United States

In paragraph 52 of *Canada's Second Answers*, Canada is unable to come up with a single example in which a reviewing court of the DOC has held that the DOC is bound by a regulatory preamble that, like the portions of the Preamble at issue in this dispute, is unrelated to any regulation. This failure is telling, but Canada attempts to dismiss this failure by referring to the fact that the DOC regulations have been in effect only since 1997.

Of course, the question was not limited to the DOC regulations currently in force, and Canada attempts to create the misimpression that DOC regulations have existed only since 1997. In fact, the first comprehensive set of DOC regulations were published in 1980, when the DOC assumed the responsibility for administering the US AD/CVD laws. The DOC published notices of final rule at 45 Fed. Reg. 4,932 (22 January 1980) (CVD), and 45 Fed. Reg. 8,182 (6 February 1980) (AD). These regulations were thoroughly overhauled in 1988-89 with the publication of notices of final rule at 53 Fed. Reg. 52,306 (27 December 1988) (CVD), and 54 Fed. Reg. 12,742 (28 March 1989) (AD). During this period and after, there also were more modest rulemaking proceedings which amended the then-existing regulations. Each of these rulemaking proceedings – both the major and the minor ones – would have been accompanied by preambles explaining the regulations that were being promulgated. Thus, this is not a situation in which there has been insufficient time for there to be many court decisions, as claimed by Canada in paragraph 52. The United States does not know the precise number of court decisions that have been issued regarding DOC AD/CVD determinations, but would estimate that the number is at least over one thousand.

Similarly, Canada's assertion in paragraph 52 that "Commerce's regulations are rarely if ever challenged as such" is also misleading, because the status of Commerce's regulations certainly has been litigated. Canada itself has cited court decisions for the proposition that the DOC is bound by its *regulations*. *See* CDA-33 and CDA-122. One would think that if, as alleged by Canada, the DOC treated regulatory preambles of the type at issue in this dispute as binding, legislative rules, US courts would have opined on this behaviour at least once. However, despite the fact that DOC regulations have been in effect in one form or another for over twenty years, Canada has been unable to identify a single case – either judicial or administrative – supporting its assertion that the DOC is bound by the type of regulatory preamble at issue in this dispute.

This dearth of authority is not surprising because the simple fact is that the DOC is not so bound. As discussed above, even Canada admits as much in its answer to Question 16 from the Panel.

ANNEX A-6

LETTER FROM CANADA TO THE PANEL COMMENTING ON US LETTER OF 7 MARCH 2001

(9 March 2001)

Further to our receipt of the letter of the United States dated 7 March 2001, my authorities have instructed me to submit the following comments.

Notwithstanding the United States' assertion that its comments with respect to Question 1(a) posed by the United States are in the nature of a correction to a "factually erroneous assertion", in Canada's view, these comments are not "factual" but rather attempt to make substantive arguments. As such, these comments are improper and should be disregarded. Moreover, in Canada's view, it is evident that Canada's purpose was not to dispute whether there had ever been preambles other than the Preamble to the substantive countervailing duty regulations issued in 1998, or how many court decisions there have been over the years. It is instructive, however, that the United States has not referred to any case among the thousand it contends exist in which a Court has found that Commerce failed to follow a preamble.

Regarding Canada's answer to Question 13 from the Panel, Canada would like to point out that it filed these additional authorities, in full, in response to the Panel's specific request that Canada "provide details" in responding to this question. Canada's answer also conforms with the requirements of paragraph 14 of the Panel's Working Procedures. Although the United States' comments on Question 13 misstate both Canada's position with respect to the Preamble and Canada's analysis of the standards in *Troy* and *National Family Planning*, Canada will let its answer speak for itself. Regarding the United States' comments as to how the process by which compliance with the hypothetical ruling posed in the Panel's Question 16 could be achieved with respect to the Preamble, it is Canada's understanding that the steps outlined by the United States would end with the Federal Register notice that Canada suggested may be part of such a process.

ANNEX B

Third Parties' Submissions

ANNEX B-1

EXECUTIVE SUMMARY OF THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

(9 January 2001)

I. INTRODUCTION

1. The European Communities (hereafter "the EC") makes this third party submission because of its systemic interest in the correct interpretation of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement").

2. Many of the issues in dispute involve questions of fact on which the EC is not in a position to comment. Also, following the United States' Request for Preliminary Rulings dated 12 December 2000, Canada requested and was granted leave to submit its Response to the US Request by 11 January 2001. The EC therefore reserves its right to reply to the various issues raised in the US Request, in light of Canada's Response, at the Oral Hearing.

3. Accordingly, Section II of this submission will only address the main substantive issue raised before this Panel, namely the legal interpretation of the definition of "subsidy" contained in Article 1.1 of the SCM Agreement, and in particular, the question whether export restraints fall into the category of measures covered by Article 1.1(a)(1)(iv) of the SCM Agreement.

II. INTERPRETATION OF ARTICLE 1.1 OF THE SCM AGREEMENT

A. APPLICABLE RULE OF TREATY INTERPRETATION AND OBJECT AND PURPOSE OF THE SCM AGREEMENT

4. The applicable rule for interpreting Article 1.1 of the SCM Agreement is Article 31(1) of the *Vienna Convention on the Law of Treaties*. While this Article may be considered as "*one holistic rule of interpretation*",[1] this does not mean that the object and purpose of a treaty could alone govern the "ordinary meaning" of its terms – especially not if this 'object and purpose' is construed in abstract from the treaty's very wording.

5. In *United States – Section 301*,[2] the Panel confirmed the basic methodology of textual interpretation. Moreover, the object and purpose of the SCM Agreement is not to curtail all government interventions which distort international trade. The SCM Agreement simply establishes that certain forms of government intervention shall be considered as "subsidies". While it is therefore generally accepted that subsidies may give rise to distortions of international trade, not all distortions of international trade, even if government-induced (and providing a benefit), can be considered as being subsidies.

[1] Cf. *United States – Section 301-310 of the Trade Act of 1974 ("United States – Section 301")*, WT/DS 152/R, Report of the Panel adopted 20 January 2000, para. 7.22.

[2] *United States – Section 301*, para. 7.22 and footnote 639 (emphasis added).

6. *Canada –Aircraft*[3] confirms the same standard. The broad interpretation put forward by the US would extend the concept of "subsidy" to all kinds of government measures with a trade-distorting effect, thereby creating an overlap with multilateral disciplines enshrined in other parts of the WTO Agreement and diminishing (if not annihilating) their very object and purpose (*effet utile*). A customs duty cannot be considered a "subsidy", even though it is a "government measure" distorting international trade and conferring a "benefit" to domestic producers.

B. ARTICLE 1.1(A)(1) AND THE CONCEPT OF "FINANCIAL CONTRIBUTION"

7. The EC fully shares Canada's systematic analysis of the SCM Agreement's definition of a "subsidy", which presupposes the existence of two legally distinct elements, a "financial contribution" and conferral of a "benefit". As regards the former, only those practices exhaustively listed in subparagraphs (i) to (iv) of Article 1.1(a)(1) amount to "financial contributions" in the sense of the SCM Agreement.

8. This does not imply that a subsidy could only exist if there were a "(net) cost to the government". However, the *chapeau* of Article 1.1(a)(1) establishes without ambiguity that there must be a "financial contribution". Had the drafters of the SCM Agreement intended that all kinds of government measures, including purely regulatory ones, could amount to subsidies, they would certainly have used a different term in the *chapeau*, e.g. "action" or "measure". Therefore, if the *chapeau* of Article 1.1(a)(1) is not to be devoid of any real meaning (*effet utile*), the concept of "financial contribution" must serve to circumscribe a specific class of government actions – namely, "financial contributions" – as opposed to "other government actions modifying market conditions by regulatory means".

9. This point may be illustrated by referring to a country lowering certain production standards. The result of such a "measure" would most certainly be to lower the production costs of the domestic producers, thus conferring a discernible "benefit". Nevertheless, the measure would not amount to a "financial contribution" in the sense of the SCM Agreement, because it does nothing more than modify the production process, and thus, the market conditions, for the product concerned. This conclusion is valid regardless of the discernible "benefit" conferred on domestic producers, and even though other countries may consider the "measure" to be "trade-distorting".

10. This example highlights one of the main flaws of the US' "pineapple-growers' scenario"[4] If the government imposes an export restraint, no "financial contribution" has been made. The government simply modified the market conditions by regulatory means. Such a "measure" may have a "trade-distorting effect". However, "measure" plus "trade-distorting effect" plus "benefit" does not *per se* equal "subsidy" in the sense of Article 1.1 of the SCM Agreement – everything depends on the nature of the "measure", which must amount to a "financial contribution".

11. This conclusion cannot be invalidated by arguing that it might "elevate form over substance" (*Canada-Dairy*)[5] or that it would "make circumvention by Members too easy" (*Canada-Autos*)[6]. The distinction between "financial contributions" and "other measures affecting market conditions by

[3] *Canada – Measures affecting the Export of Civilian Aircraft ("Canada-Aircraft")*, WT/DS 70/R, Report of the Panel dated 14 April 1999, as modified by the Appellate Body, adopted 20 August 1999, para. 9.119.

[4] United States' First Submission, paras. 33-36.

[5] United States' First Submission, paras. 22 and 38; *Canada – Measures affecting the Importation of Milk and the Exportation of Dairy Products ("Canada-Dairy")*, WT/DS 103/AB/R, WT/DS 113/AB/R, Report of the Appellate Body adopted 27 October 1999, para. 110.

[6] United States' First Submission, paras. 19, 22 and 39; *Canada-Certain Measures affecting the Automotive Industry ("Canada-Autos")*, WT/DS139/AB/R, WT/DS142/AB/R, Report of the Appellate Body adopted 19 June 2000, para. 142.

regulatory means" is drawn by the *chapeau* of Article 1.1(a)(1) itself. It serves to delimit those government practices which shall be subject to the SCM Agreement from other practices subject to other parts of the WTO Agreement. The distinction is thus substantive, and not a pure matter of "form".

12. Also, this distinction does not have the effect of "making circumvention of obligations by Members too easy". If an export restraint is found to exist, no one prevents the afflicted Member from challenging this measure under the terms and conditions of Article XI of the GATT. The Appellate Body's finding in *Canada-Autos*[7] was made in a very different context than is at stake in the present case. The *chapeau* of Article 1.1(a)(1) explicitly refers to "financial contribution". In order not to nullify the very text (and meaning) of the SCM Agreement, this term must thus be interpreted in such a way as to preserve the *chapeau*'s *effet utile*.

C. ARTICLE 1.1(A)(1)(IV) AND THE CONCEPT OF "DIRECTION"

13. The EC agrees with the main gist of the arguments put forward by Canada in the context of its analysis of Article 1.1(a)(1)(iv), namely (a) that this subparagraph must be interpreted strictly in the sense of being limited to the types of practices contained in subparagraphs (i) – (iii), and (b) that an export restraint does not meet all the requirements of subparagraph (iv).

14. As regards (a) the strict interpretation to be given to subparagraph (iv), this is not invalidated by the fact that this subparagraph refers to "types of functions illustrated in (i) to (iii)". As evidenced e.g. by the term "loan agreement" (which is merely one of the examples cited in subparagraph (i)), a textual analysis of subparagraphs (i) to (iii) reveals that these provisions list "types" of functions which a government may perform in order to provide a "financial contribution".

15. The US assertion that subparagraph (iv) contains "expansive language" and should thus be interpreted "broadly"[8] is not borne out by its ordinary meaning. This provision, by its very wording, does not go beyond the types of practices listed in subparagraphs (i) to (iii). Therefore, a practice which, had it been performed directly by the government, would not fall into one of these categories and thus not constitute a "direct financial contribution", cannot become an "indirect financial contribution" simply because it was performed by a "private body". Subparagraph (iv) does not expand the types of functions listed in subparagraphs (i) to (iii); it only refers to the route via which they are delivered to the beneficiary.

16. As regards (b) the fact that an export restraint does not meet all the requirements laid down in subparagraph (iv), the two crucial factors to be taken into account are the notions of "government direction" and of a "private body carry[ing] out … the functions … which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments".

17. With respect to "government direction", while it is true that an export restraint limits domestic producers' export opportunities, it still does not 'force' them to sell their goods domestically to 'targetted customers' at lower prices. The producers remain free to adapt to the modified market conditions. As a result, while in the case of "direct provision of goods", the government is in a position to determine exactly the scope and extent of the benefit it wishes to confer and the class of beneficiaries it intends to reach, the same is not true for an export restraint. In the latter case, the producer's freedom of action is limited, but not curtailed. The producer can still make choices. An export restraint does thus not equate to "indirect provision of goods", and is therefore not covered by the SCM Agreement.

[7] *Canada-Autos*, paras. 135-142.
[8] Id., para. 26.

18. This fact is implicitly recognized by the "pineapple-growers' scenario".[9] The only alternative which would meet the standard of "government direction" is the case in which the government would direct the pineapple producers to provide their pineapples to the juice industry at fixed prices. Only such a regulatory measure would really correspond to the government directly buying pineapples and selling them to the juice industry at a determined price, since it would eliminate the discretion open to producers in the face of an export restraint.

19. The above analysis is corroborated by the second crucial element of subparagraph (iv), a "private body carry[ing] out … the functions… which would normally be vested in the government (etc.)". What matters in this respect, is that the private body be directed to perform materially the same function than would otherwise be carried out by the government itself. In other words, the "private body directed by the government" must become a "quasi-emanation of the government".

20. For example, a private electricity company will provide an "indirect financial contribution" to the domestic aluminium producers if it is specifically directed by the government to provide electricity to these producers at a fixed price. If, however, the government instead decides to prohibit (or restrict) electricity exports, no "indirect financial contribution" exists, since the electricity company remains free to modify its activities in light of the modified market conditions. It thus fails to perform essentially the same function as the government would normally have, had it decided to provide electricity at a certain fixed price to the aluminium producers.

21. This is also borne out by the 1961 Panel Report.[10] If the extent of "government direction" is such that the private body's practice in no real sense differs from a "financial contribution" normally made by a government, the practice will fall into the ambit of the SCM Agreement. If, however, government regulatory action is such that private parties' resulting behaviour differs from a normal "financial contribution" made by a government, this regulatory action lies outside the scope of the SCM Agreement.

22. Finally, the above interpretation is not invalidated by item (d) of the Illustrative List of Export Subsidies found in Annex I of the SCM Agreement, nor by the Panel's reasoning in *Canada-Dairy*.[11] A practice will only fall into the Illustrative List of Annex I if it is a "subsidy". Therefore, item (d) of Annex I does not declare all government-mandated schemes "export subsidies", but only those which also fulfil the standards laid down in subparagraphs (iii) and (iv) of Article 1.1(a)(1) and thus amount to "indirect financial contributions".

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[9] United States' First Submission, paras. 32-34 and in particular footnote 31.

[10] United States' First Submission, para. 51 and footnote 50; *Review Pursuant to Article XVI:5*, L/1160, Report by the Panel adopted 24 May 1960, BISD 9S/188, 192 (1961).

[11] United States' First Submission, paras. 61-66; *Canada-Measures Affecting the Importation of Milk and the Exportation of Dairy Products ("Canada-Dairy")*, WT/DS103/R, WT/DS113/R, Report of the Panel dated 17 May 1999, paras. 7.124-7.130.

23. Also, the US citation to the Panel's reasoning in *Canada-Dairy* is, at the very least, incomplete and misleading.[12] When establishing the conditions for applicability of item (d) of Annex I, the Panel did not consider that all government-mandated schemes were covered by item (d), but only those where goods were being "provided" in the sense of Article 1.1(a)(1)(iii) and (iv) of the SCM Agreement. The Panel thus did not "flatly reject" Canada's position.[13] In addition to being "moot and, thus, of no legal effect",[14] this Panel Report thus seems devoid of any pertinence for the purposes of the present dispute.

[12] United States' First Submission, paras. 64-65 (erroneously referring to para. 7.126 instead of 7.130 of the Panel Report).

[13] United States' First Submission, para. 66, and Canada's First Submission, para. 84.

[14] *Canada-Dairy*, Appellate Body Report, para. 124.

ANNEX B-2

THIRD PARTY ORAL PRESENTATION BY THE EUROPEAN COMMUNITIES

(18 January 2001)

Mr. Chairman, Members of the Panel,

III. INTRODUCTION

1. The European Communities is intervening as third party in this case because of its systemic interest in the correct interpretation of the Agreement on Subsidies and Countervailing Measures (the "Subsidies-Agreement") and in the correct application of the DSU.

2. Many of the issues in dispute involve questions of fact on which the EC is not in a position to comment. Also, in its Written Submission dated 9 January 2001, the EC reserved its right to reply at the Oral Hearing to some of the issues raised by the United States' Request for Preliminary Rulings dated 12 December 2000, in light of Canada's Response submitted on 11 January 2001.

3. Today's third party contribution will therefore not return to those matters already commented upon by the EC in its Written Submission of 9 January 2001 – the fundamental substantive question whether government regulatory measures, *in casu*, export restraints, can amount to "financial contributions" in the sense of Article 1.1 of the Subsidies Agreement. In this respect, the EC fully maintains its position as laid down in its Written Submission.

4. The following presentation will thus limit itself to commenting upon some of the issues raised by the United States in its Request for Preliminary Rulings, and in particular

- the procedural question whether the acts cited in Canada's First Written Submission amount to "measures" in the sense of Article 6.2 of the DSU and in particular, whether United States "practice", which was not specifically mentioned in Canada's request for Consultations dated 19 May 2000, is properly before this Panel in light of Articles 4.4 and 6.2 of the DSU, and

- the substantive question whether the said measures are "mandatory" in the sense of creating a binding obligation on the United States' administration to treat "export restraints" as "financial contributions".

IV. PROCEDURAL ISSUES – THE "MEASURES"

5. In the first part of its Oral Presentation, the EC will concentrate upon the question whether the acts listed in Canada's First Written Submission, as well as in its Request for the Establishment of a Panel, amount to "measures" in the sense of the DSU – and in particular whether in this respect, United States "practice", which was not specifically mentioned in Canada's Request for Consultations, is properly before this Panel.

6. In its First Written Submission, and in line with Canada's Request for the Establishment of a Panel, Canada identified the measures under dispute as "section 771(5) of the *Tariff Act* of 1930, as amended by the *Uruguay Round Agreements Act*, as interpreted by the Statement of Administrative Action […] and the Preamble to the US Department of Commerce […] Final Countervailing Duty Regulations […] and Commerce's practice thereunder."[1] While in the context of its detailed appreciation of the said measures, Canada analyzed each measure separately,[2] the fact nevertheless remains that Canada clearly considers that these measures, "taken together"[3], are inconsistent with Article 1.1 of the Subsidies Agreement.

7. Canada did not ask the Panel to rule, e.g., that the concrete (past and present) "US practice" in concrete cases should be overturned (with the consequence that these concrete determinations would have to be repealed). What Canada requested, is that the Panel recommend that the United States bring its pertinent legislative framework into conformity with its WTO obligations, with the effect that export restraints no longer be treated as "financial contributions".[4]

8. In the EC's view, for the purposes of the present dispute, it is therefore immaterial whether the cited acts are qualified as amounting to "two", supposedly distinct, measures, as alleged by the United States,[5] or as "four" measures which, taken together, are inconsistent with the Subsidies Agreement.[6] What is a stake in the present dispute, amounts in reality to one single measure (or 'set of measures') the effect of which is to mandate the Department of Commerce to treat export restraints as "financial contributions".

9. Sections 771(5) of the Tariff Act, the Statement of Administrative Action and the Preamble to the Department of Commerce Regulations form one legislative whole, one "*multi-layered*" national law. The meaning of this law, and its mandatory nature, become apparent in light of recent US administrative practice. Therefore, in accordance with *United States – Section 301*, the various layers of the US "measure" should not be read independently from each other, but the "measure" evaluated on the basis of all elements taken together.[7]

10. In light of the above, the EC fails to understand the United States' claim that the SAA and the Preamble to the Regulations are not properly before this Panel, because Canada allegedly failed to identify them as "separate measures" in its Request for the Establishment of a Panel and because, allegedly, these documents would not constitute "measures" in the sense of Article 6.2 of the DSU.[8]

11. In the first place, these acts were already identified by Canada as "measures" in the context of Canada's Request for Consultations.[9] There can thus be no doubt that the United States were fully aware that these acts, insofar as they interpreted Section 771(5) of the Tariff Act, belonged to the core subjects of the dispute.

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[1] Canada's First Written Submission dated 27 November 2000, para. 3 (footnotes and abbreviations omitted; italics in original); see also the Request for the Establishment of a Panel dated 24 July 2000, WT/DS194/2, fourth paragraph.

[2] Canada's Written Submission, Part III ("The Treatment of Export Subsidies under US Countervailing Duty Law").

[3] Canada's First Written Submission, para. 4; see also Canada's Response to the United States Request for Preliminary Rulings, para. 8.

[4] Cf. Canada's First Written Submission, paras. 9 and 60.

[5] United States Request for Preliminary Rulings, paras. 23 and 29.

[6] Canada's Response to the United States Request for Preliminary Rulings, para. 8.

[7] Cf. *United States – Sections 301-310 of the Trade Act of 1974 ("United States – Section 301")*, WT/DS152/R, Report of the Panel adopted 20 January 2000, paras. 7.26-7.28.

[8] United States Request for Preliminary Rulings, paras. 7-8 and 120-124.

[9] Request for Consultations by Canada dated 19 May 2000, WT/DS194/1, second paragraph.

12. Also, the US statement that neither document would have "independent legal effect" seems somewhat besides the point. Obviously, a legal or administrative act whose very purpose is to authoritatively interpret another (basic) act cannot be conceived in isolation from the basic act it seeks to interpret. Moreover, it was the United States – in *Section 301*, and not Canada in the context of the present dispute, who declared that the Statement of Administrative Action "*must, by law, be treated as the authoritative expression concerning the interpretation of the statute*".[10]

13. Surely, the legal effect to be attributed to one and the same legal act – the Statement of Administrative Action - cannot depend on the consequences (positive or negative) stemming from such effect for Defendants in the context of a given dispute. Therefore, since the United States earlier recognized that this legal effect exists, they cannot now pretend the opposite.

14. Finally, and as convincingly demonstrated by Canada, the Preamble to the Regulations has force of law in the United States.[11] While the EC is not in a position to comment on this analysis in detail, the EC nevertheless considers that, according to a general principle of administrative law, an administration must at the very least be considered to be bound by its own officially adopted Regulations.

15. In any event, and as recognized by the Appellate Body in *Guatemala – Cement* on the basis of the practice established under the GATT 1947, a "measure" may be any act of a Member, whether or not it is legally binding, and it can include even simple administrative guidance by a government.[12] Therefore, even if Canada had challenged the Preamble to the Regulations as a "separate measure" (*quod non*, since Canada always insisted that the measures it challenged had to be "taken together" and since it specifically qualified the Preamble, as from its Request for Consultations, as "interpreting Section 771(5) of the Tariff Act")[13], this could not disqualify the act as a "measure" under Article 6.2 of the DSU as long as this act contained authoritative guidance for the competent administration.

16. Remains the question of "US practice". In this respect, the US Request for Preliminary Rulings rightly points out that "US practice", whether prior or subsequent to the entry into force of the WTO-Agreement, was not as such mentioned in Canada's Request for Consultations.[14] However, the EC is not convinced that, for this reason alone, "US practice [under the Statute, as interpreted by the SAA and the Preamble to the Regulations]" would not be properly before this Panel.

17. In the first place, and while in light of the confidentiality of consultations, the EC is of course not in a position to assess whether "US practice" was or was not discussed during the said consultations, the EC nevertheless notes that Canada's letter to the United States dated 13 June 2000 (Exhibit US-6) – which preceded the consultations held on 15 June 2000 – clarified that Canada also wished "*to inquire as to the sources of United States law and practice, if any, that are relevant […] in addition to [the Statute, the SAA and the Preamble to the Regulations]*."[15] The US was thus at the very least aware that "US practice" would play some part in the Consultations – as well as in eventual future Panel proceedings.[16]

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[10] *United States – Section 301*, paras. 4.121, 7.109 and footnote 683.

[11] Canada's Response to the US Request, paras. 25-33.

[12] *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico ("Guatemala-Cement")*, WT/DS60/AB/R, Report of the Appellate Body dated 2 November 1998, para. 69, footnote 47.

[13] Canada's First Written Submission, para. 4; Request for Consultations, second paragraph, *in fine*.

[14] United States Request for Preliminary Rulings, paras. 102-119. Request for Consultations by Canada, second paragraph.

[15] Cf. United States Request for Preliminary Rulings, paras. 106-107; Exhibit US-6, third paragraph.

[16] Cf. in this respect also Canada's Response to the US Request, paras. 58-64.

18. Moreover, and as already noted earlier, Canada does not challenge "US practice" as such (with the effect that certain US subsidy determinations would have to be reversed). What Canada challenges, is (pre-WTO) "US practice" as incorporated into the SAA and the Preamble to the Regulations,[17] as well as (post-WTO) "US practice" as a manifestation of an administrative commitment or policy to adhere to a particular legal view or to apply a particular interpretation or methodology in future cases.[18] As regards the former, "practice" has been transformed into law. As regards the latter, practice serves as evidence of the former's transformation into law. In the EC's view, at least pre-WTO US "practice" must thus in any event be properly before this Panel, insofar as this has effectively been integrated into US law.

19. Finally, while it corresponds to well-established jurisprudence – and to the EC's established position – that a measure which has not been the subject of consultations cannot be examined by the Panel,[19] this does not mean that there need be a "*precise and exact identity*" between the measures subject to the Consultations and the measures identified in the Request for Establishment of a Panel.[20]

20. As regards post-WTO US "practice", therefore, Canada should at the very least be able to rely thereon as evidence of the meaning and mandatory nature of the challenged (legislative) "measures". At least to this extent, therefore, (post-WTO) "US practice" should be examined by this Panel – as was done by the Panel in *United States – Section 301*.[21] Understood in this sense, post-WTO US "practice" should thus also be properly before this Panel.

V. SUBSTANTIVE ISSUES – THE MANDATORY NATURE OF THE "MEASURES"

21. In the second part of today's Presentation, the EC will now turn to the question of the mandatory – or discretionary – nature of the US "measure(s)". In this respect, the EC would first redress an apparently ongoing misperception, by the United States, of the scope of this very question.

22. Obviously, the question at stake is not "whether the measures mandate the US administration to treat export restraints as subsidies".[22] Indeed, since the determination of the existence of an actionable subsidy involves several factors ("financial contribution", "benefit", "specificity"), the answer to the question as formulated by the US would necessarily always be negative. After all, a positive answer to this question would also require the administration to assume (rather than establish in its analysis) the existence of a "benefit" and "specificity" alongside the "financial contribution".

23. However, Canada has never pretended that this is what the measures prescribe. What Canada has argued, as from its Request for the Establishment of a Panel,[23] throughout its First Written Submission[24] and in Response to the US Request for Preliminary Rulings,[25] is that the measures

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[17] Canada's Response to the US Request for Preliminary Rulings, paras. 35-36; Canada's First Written Submission, paras. 38-41 (re the SAA) and paras. 48-51 (re the Preamble to the Regulations).

[18] Canada's Response to the US Request for Preliminary Rulings, paras. 37-40; Canada's First Written Submission, paras. 52-60 (cf. in this respect, e.g., para 60, where Canada stated: "*The treatment of so-called "indirect subsidies" in these post-WTO cases thus confirms that US law treats export restraints as meeting the standard of Section 771(5)(B)(iii), and reflects, in Canada's understanding, the ongoing misapplication of the SCM Agreement by the United States.*" – emphasis added)

[19] Cf., e.g., the European Communities' Third Party Submission dated 27 January 2000 in WT/DS156, *Guatemala – Definitive Anti-Dumping Duties on Grey Portland Cement from Mexico*, para. 7 and footnote 3.

[20] *Brazil-Export Financing Programme for Aircraft ("Brazil-Aircraft")*, WT/DS46/AB/R, Report of the Appellate Body adopted 20 August 1999, para. 132.

[21] *United States – Section 301*, para. 7.127.

[22] Cf., e.g. US Request for Preliminary Rulings, paras. 38, 48, 68, 73, 79, 80, 89.

[23] Cf. Request for the Establishment of a Panel by Canada, fifth paragraph, second sentence.

[24] Cf, e.g., Canada's First Written Submission, paras. 2-5 and the entire Part IV of this Submission ("Legal Analysis").

require the administration to treat export restraints as "financial contributions". It is therefore only in this respect that the mandatory – or otherwise – nature of the US measure(s) need to be determined by this Panel.

24. In the EC's view, Canada has convincingly demonstrated that the US measures, taken together, are mandatory, since they allow no discretion as to the administration's appreciation of an "export restraint" under the "financial contribution"-element of Article 1.1 of the Subsidies Agreement (or Section 771(5)(B)(iii) and (D) of the Tariff Act of 1930, as amended by the URAA and as interpreted by the SAA and Preamble to the Regulations). Indeed, as the Community already advocated above (Part II, paras. 8-9 of this Presentation), the various "layers" of the applicable US law must be read and analyzed together – and for the Community, even a very succinct reading through these layers clearly reveals that the US administration has no discretion as regards the treatment of export restraints.

25. While it is of course true that Section 771(5) itself is silent in this respect, already the SAA – which is not mere "legislative history", as the US would now have the Panel believe, but an authoritative statement of the US legislator's interpretation of the future application of the Statute and an instruction to future administrations to follow the same interpretation[26] - contains very explicit language on export restraints. Not only does it integrate the relevant pre-WTO US "practice" into the body of the Statute, but it also clearly states that Commerce's previous practice of finding a countervailable subsidy "*where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit*"[27] should continue under the new Statute.

26. However, as the EC has already amply demonstrated in its Written Submission, and as Canada rightly argues, this is precisely not the meaning to be attributed to Article 1.1 of the Subsidies Agreement. Article 1.1 requires the existence of a "financial contribution". This requirement has, in the case of indirect subsidies (and export restraints in particular), thus effectively been "read out" of the Statute by the SAA and authoritatively replaced by a different standard – the "formal, enforceable measure"-standard. This new standard (which is, in fact, the old pre-WTO US standard), combined with the existence of a "benefit", will thus hencetoforth determine whether a "subsidy" exists under the Statute.

27. The above conclusion is not invalidated by the US' reliance on certain (supposed) SAA "provisos", namely that the standard would be administered on a "case-by-case basis" or that it would only lead to subsidies being found countervailable if the administration was satisfied that the standard under Section 771(5)(B)(iii) had been met.[28] In fact, what these "provisos" mean, is that the Department of Commerce is – obviously – still required to apply this standard to concrete cases, with the possible effect that, in a particular case, certain government measures may not be found "formal" or "enforceable".

28. However, if export restraint there is, and since export restraints are obviously "formal, enforceable government measures", these measures will be subsidies if a "benefit" is conferred by them. Moreover, in the very passage cited by the US in support of the SAA's allegedly discretionary nature,[29] the SAA itself equals pre-WTO US "practice" on export restraints (*Lumber* and *Leather*) with "indirect subsidies". Again, this equation is only possible if, by virtue of the Statute, export restraints, as "formal enforceable measures", *per se* amount to "financial contributions".

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[25] Canada's Response to the US Request, para. 41.
[26] Cf. the portion of the SAA quoted in Canada's First Written Submission, para. 34 (emphasis added).
[27] SAA at 925-926 (Annex B – Exhibit CDA-2).
[28] US Request for Preliminary Rulings, paras. 78-79.
[29] Id.

29. The above "provisos" thus simply confirm that the administration must still ascertain the existence of an export restraint before proceeding with its remaining (benefit) investigation. This, however, is not "discretion". It simply reflects the (obvious) overall requirement of correct and complete application of any given law by the competent administration.

30. In the EC's view, the analysis could in principle stop here – since regardless of whether this is considered "legally binding" or "non-binding", the Preamble to the Regulations, as an act of the competent administration, cannot interpret the law *contra legem*. Suffice it to state, therefore, that far from invalidating the above conclusion, the Preamble in fact serves confirm it.

31. In this respect, the EC would recall that in the Preamble, the Department of Commerce confirms that, as regards indirect subsidies, the (post-WTO) standard is no narrower than the previous US standard as described, e.g., in *Lumber*.[30] It also confirms that, as indicated by the SAA, in factual situations similar to those present in *Lumber*, the Statute would "permit" the imposition of countervailing duties.[31] Contrary to the US' assertion that the cited "permission" amounts to "discretion",[32] however, the Statute can only "permit" the above result if it replaces "financial contribution" by "formal, enforceable measure". This is precisely what the SAA has done to the Statute. This is also what the Preamble confirms. However, this is not what the Subsidies Agreement requires.

32. At this stage of the analysis, it will come as no surprise that the same conclusion is borne out by post-WTO US practice. If, in *Live Cattle*, the Department of Commerce equals export restraints and "indirect subsidies" (since it talks about "*indirect subsidies, such as export restraints*"),[33] it can only lawfully do so if, by virtue of the Statute, "financial contribution" equals "formal, enforceable measure". As the United States acknowledges, "*the key consideration under US law is that DOC determinations be consistent with the statute and the regulations*".[34] Therefore, regardless of the concrete precedential value of Commerce determinations under US law, post-WTO US practice serves to confirm Canada's (and the EC's) interpretation of the Statute.

33. As the Appellate Body confirmed in *United States – Anti-Dumping Act of 1916*,

> *"[t]he concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of this legislation – was inconsistent with a Contracting Party's GATT 1947 obligations."*[35]

In the case at hand, it is the legislation as such – the Statute as authoritatively interpreted by the SAA – which has replaced the "financial contributions"-standard enshrined in the Subsidies Agreement by a "formal, enforceable measures"-standard, the pre-WTO US standard. This is confirmed by the Preamble to the Regulations. In applying the law, the administration must thus operate on the basis of this broader standard. Otherwise, its determinations would not be consistent with the Statute.

34. Finally, that the administration does apply this broader standard is confirmed by post-WTO US practice. In the EC's view, there can thus be no doubt that the Statute "mandates" a violation of

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[30] Cf. the portion of the Preamble cited in Canada's First Wirtten Submission, para. 48.
[31] Cf. the portion of the Preamble cited in Canada's First Written Submission, para. 50.
[32] Cf. US Request for Preliminary Rulings, paras. 80-83.
[33] Cf. the portion of the DOC's final determination in *Live Cattle* cited in Canada's First Written Submission, para. 54 (emphasis added).
[34] US Request for Preliminary Rulings, para. 85.
[35] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, Report of the Appellate Body adopted 26 September 2000, para. 88 (emphasis added).

Article 1.1 of the Subsidies Agreement – since, as the EC firmly believes, and as it has advocated in its Written Submission, the broader standard laid down in the Statute does not comply with the Subsidies Agreement.[36]

[36] Cf. in this respect the Panel's reasoning in *United States – Section 301*, paras. 7.54-56, which concluded in the sense of a *prima facie* violation.

ANNEX B-3

REPLIES OF THE EUROPEAN COMMUNITIES TO THE THIRD PARTY QUESTIONS FROM THE PANEL

(7 February 2001)

1. What in your view is an "export restraint"? That is, what are the essential, defining characteristics of an export restraint that would be universal to all "export restraints", no matter what the specific form of the export restraint in a given situation, and no matter what other elements might be present in a given measure that included an export restraint? Can you describe how an export restraint operates? Can you give any example of an export restraint which might, arguably, amount to a subsidy within the meaning of *SCM* Article 1.1?

1. The European Communities (hereinafter, the "EC") would first note that there is, to its knowledge, no standard legal definition of the concept of "export restraint". Nor does the term appear in the WTO-Agreement or its Annexes (Article XI of the GATT, e.g., refers to "export restrictions"). A similar term appears in Article 11.1.b) of the Agreement on Safeguards, but qualified as a "voluntary export restraint". The following attempt at defining "export restraints" can thus only reflect the EC's understanding of this concept.

2. In the EC's view, the essential characteristics of an "export restraint" may be summarized as follows: An export restraint is a government regulatory measure,[1] the effect of which is to affect international trade by restricting exports. The export restraint thus "operates" like any other government regulatory measure modifying market conditions – it forces or at the very least, strongly compels, economic operators (producers, traders) not to export, to export less or to export under different conditions (quantities, prices, administrative requirements etc.) than they would otherwise have done, had the regulatory measure not been in place.

3. The (economic) effect of such measures invariably amounts to modifying market conditions for the products concerned, both on the domestic and on the potential export markets (at least, if there are no readily available substitutes or other sources of supply on these markets). Thereby, export restraints certainly affect the traditional terms of trade and "displace" trade (by modifying hencetoforth existing trade-flows). However, the concrete effects of export restraints on any given market are more difficult to predict, since they depend on the elasticities of supply and demand, substitutability of the product concerned, other regulatory measures affecting the same product/market etc.

4. As the EC has amply demonstrated in its Third Party Written Submission dated 9 January 2001, in its view, export restraints can never amount to "subsidies" in the sense of Article 1.1 of the SCM Agreement, because – regardless of whether or not a "benefit" might thereby be conferred, and regardless of the degree of "targetting" (and thus, "specificity") involved in any given case - they fail to fulfil the "financial contribution"-element enshrined in that Article. Just like the other examples cited in the EC's Written Submission (customs duties, modifications to the

[1] At least, as "mandatory" as the measures which were considered mandatory by the 1988 Panel in *Japan – Trade in Semi-conductors*, L/6309, adopted on 4 May 1988, BISD 35S/116, 153-155, paras. 104-109; GATT Analytical Index, ad Article XI, p. 287-288.

regulatory framework affecting production standards), export restraints are classical examples of "government measures modifying market conditions by regulatory means". Therefore – and unless one were also to accept that customs (import) duties, by providing a "benefit" to the ("specific") domestic producers of the targeted product, amounted to "subsidies" in the sense of Article 1.1 of the SCM Agreement – the EC cannot provide an example of an export restraint which would "amount to" a subsidy.

5. It is of course possible that the conditions attached to subsidies can be formulated in such a way that they may have the same effect as export restraints. For instance, a government could give an income tax reduction for firms which sell steel scrap to domestic steel producers, but not accord the same incentive to firms which export such scrap. This will in practice contribute to restrain exports, but is clearly a subsidy as defined by Article 1. Many similar examples of subsidies (as defined by Article 1) which operate as de-facto export restraints could be given. However, it does not follow that measures which are not subsidies should somehow fall within the scope of Article 1 just because they operate to restrict exports.

2. You seem to argue that, in the case of government-entrusted or -directed provision of goods, for the condition of the "carrying out of functions that would normally be vested in the government" to be fulfilled, not only would there have to be specific direction to the producers to provide the goods, but also that this provision would have to be on "certain pre-determined conditions".

(a) Is this a correct reading of your argument?

6. This reading is in principle correct. However, in para. 28 of its Written Submission, the EC referred to "functions normally vested in a government (etc.)" as a shorthand-version for the full text of the relevant part of Article 1.1(a)(1)(iv). This is clearly evidenced by the language used by the EC in para. 24 of its Written Submission, the introductory paragraph to its analysis of the related question (where the EC cited the pertinent text in its entirety).

7. Therefore, in order to be fully accurate, the relevant condition should be described and understood as comprising both the fact that the function be normally vested in a government and that the practice, in no real sense, differ from those normally followed by governments.

(b) Why would the "pre-determined conditions" have to exist in order for a private body to be carrying out a function normally vested in a government?

8. As already explained by the EC in its Written Submission,[2] the actions contemplated by Article 1.1(a)(1)(iv) of the SCM Agreement are not "expansive", but limited to those enshrined, for governments or public bodies, in subparagraphs (i) to (iii) of the same Article.

9. Therefore, the determining factor for a private body carrying out the functions normally vested in the government and the practice differing, in no real sense, from practices normally followed by governments (which is the full text of the relevant part of Article 1.1(a)(1)(iv) of the SCM Agreement) is that the private body must, through government direction, perform materially the same function as would otherwise be carried out by the government itself – and caught by Article 1.1(a)(1)(i) – (iii) of the SCM Agreement.

10. Now, when a government decides to provide a subsidy to a certain industry or part of an industry, the government will decide in advance the kind of action it wishes to take, the class of beneficiaries it wishes to reach and the extent of the "benefit" it wishes to confer. The same standard

[2] Cf. in particular, Part II.C, paras. 21-23 of the EC's Written Submission.

must apply in the case of an 'indirect subsidy' – with the government predetermining, through regulatory means, essentially the same conduct for the private body, and the same result for the beneficiary industry, than the government would otherwise "directly" have implemented itself.

11. Only if such pre-determination exists, will the private body become a "quasi-emanation of the government".[3] Only then will it carry out a subsidizing function "normally vested in the government", and only then will the practice "in no real sense differ from practices normally followed by governments". In the EC's view, therefore, the existence of (government) "pre-determined conditions" is a *sine qua non* for the existence of an indirect financial contribution in the sense of Article 1.1.(a)(1)(iv).

(c) Turning this argument around, is it your position that there would be no "financial contribution" in the sense of Article 1.1(a)(1)(iii) if a government-owned company established its production quantities and terms and conditions of sale as it saw fit, rather than the government establishing "pre-determined conditions" therefor?

12. As a preliminary point, the EC would first note that the Panel's formulation of this question apparently presupposes that "government ownership" of a company means that it is automatically part of the "government" or a "public body" in the sense of the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, since otherwise, the question would have to be answered by reference to Article 1.1(a)(1)(iv) of the SCM Agreement, and not Article 1.1(a)(1)(iii). In the EC's view, however, this is not the correct reading of the SCM Agreement's concepts of "government" or "public body".

13. "Government ownership" of a company is *per se* insufficient to 'transform' such company into part of the "government" or into a "public body". Governments can "own" (or hold a controlling share in) companies for all kinds of reasons, including purely historical ones. In fact, on the European continent, "government ownership" of companies for historical reasons is relatively frequent, although less common than it was, following a number of privatization programmes. However, for a company to be part of the "government" or a "public body", additional factors must be present: "Public bodies" are types of emanations of the government, without necessarily equalling the "government" proper. Their specific characteristic is the (at least occasional) exercise of public authority (*imperium).*

14. For this reason, government-owned companies which operate at the behest of government and in the absence of competition, e.g. monopoly suppliers of electricity, gas, coal etc, may be considered to be part of the "government" or "public bodies" for the purposes of Article 1. Similarly, state-owned banks intervening in the capital market through lending operations guided by macro-economic policy objectives could be regarded as the "government" providing a financial contribution. However, not all but only substantial government ownership or control confers this status on companies. Companies which operate in the marketplace and set their own objectives independently of the government will not be part of the "government" or "public bodies", even if the government is a shareholder. In the EC's view, therefore, to the extent that government-owned companies are not part of the "government" nor "public bodies", the Panel's question should be answered by reference to Article 1.1(a)(1)(iv) of the SCM Agreement.

15. Understood in this sense, however, the Panel's question well reflects the EC's position on this matter. Take, for example, a market on which a number of producers compete freely. For purely historical reasons, one of these producers happens to be a government-owned company. Will the simple fact of this company taking part in general competition (by providing goods or services or purchasing goods) amount to "providing goods" in the sense of Article 1.1(a)(1)(iv) of the SCM

[3] Cf. EC Written Submission, para. 29.

Agreement (because of this subparagraph's incorporation of the content of subparagraph (iii))? In the EC's view, the answer is in the negative – and not because such action (obviously) confers no specific benefit. The negative answer stems from the fact that such action does not amount to a "financial contribution".

16. In such a situation, no "government direction" is present, the function is not "one normally vested in a government" and the practice does differ from (subsidizing) "practices normally followed by governments". For these conditions to be fulfilled, additional factors thus need to be present – namely, the existence of specific (sales or marketing) conditions pre-determined by the government.

3. Based on your oral answer provided at the third party session to question 2, above, we understand you to argue that government ownership of a company that provides goods is not enough for there to be "government provision of goods", and thereby a financial contribution, in the sense of *SCM* Article 1.1(a)(1)(iii). By arguing that, in addition to the government ownership/involvement as such, there must be "predetermined conditions" are you not, however, importing the concept of benefit into the concept of financial contribution? In this regard, we note that in your oral response to question 2(b), you stated that "pre-determined conditions" would need to exist because, if the government provides goods or services, the government decides who will be the "beneficiary", and how much "benefit" will be provided. Please explain in what way "pre-determined conditions" are relevant to the existence of a financial contribution rather than, or in addition to, the existence of a benefit.

17. As explained in the EC's Written Submission (e.g. para. 29), pre-determined conditions are relevant for the existence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement, since they are one of the elements which determine whether a domestic company is effectively directed by the government to provide goods or services. Modifying the example in para. 29 slightly, suppose that there exist a number of government-owned electricity suppliers which compete in the marketplace. On the basis of our argument above, to the extent that these are not part of the government, they will not confer a financial contribution under Article 1.1(a)(1)(iii) simply by providing goods or services. However, if one of the companies were directed by the government to provide electricity to domestic aluminium producers under certain pre-determined conditions, a financial contribution would exist under Article 1.1(a)(1)(iv).

18. The existence of "pre-determined conditions" is central here. It creates an (indirect) financial contribution because it limits the freedom of action of the electricity company to the same extent than would be the case if the firm were part of the government. Thereby, it forces the company to act in a way which differs, "in no real sense" from the manner in which the government itself would have provided electricity.

19. However, the fact that electricity is provided at "pre-determined conditions" should not be confused with the existence of a benefit. Pre-determined conditions may very well be on market terms, and involve adequate remuneration according to Article 14(d) of the SCM Agreement – with the effect that, in such circumstances, there would be no benefit. To sum up the EC's reasoning on this point, one may thus say that it is the existence of pre-determined conditions which determines whether or not there is a financial contribution, while it is the terms of these conditions which determine whether or not there is a benefit.

4. Please explain why (in paragraph 27 of your oral statement, which view is also expressed at paragraph 45 of Canada's first written submission and paragraph 56 of Canada's response to the US request for preliminary rulings) you consider that the proviso in the SAA limits any discretion that Commerce may enjoy to "satisfying itself that an alleged subsidy involves a formal enforceable measure". The proviso states, in particular, that the type of indirect subsidies which Commerce has countervailed in the past will continue to be countervailable

"provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met". Do these words not require Commerce to be satisfied that all of the elements in Section 771(5)(B)(iii) have been met?

20. As the Panel rightly notes, the cited proviso – at first sight - seems to require Commerce to be satisfied that all elements of Section 771(5)(B)(iii) of the Statute have been met in each particular case. However, as the EC already explained in paras. 25-26 of its Oral Submission, the SAA, through its integration of the relevant pre-WTO US practice into the body of the Statute, effectively read the "financial contribution"-requirement of Article 1.1(a)(1) of the SCM Agreement "out" of the Statute and replaced it by a "formal, enforceable measures"-standard.

21. Once this transformation has been made, however, there are no significant further criteria in Section 771(5)(B)(iii) which Commerce might still investigate – other than the one highlighted by the EC and Canada. In fact, this Section would then read, in pertinent part,

> *"entrusts or directs a private entity, through a formal enforceable measure, to [make a direct transfer of funds etc.,, provide goods or services or purchase goods – cf. Section 771(5)(D) of the Statute], if [making such transfer, providing the goods etc.] would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments"*.

22. Now, in the US' understanding, "private entity" is not a delimiting factor (since it can encompass economic operators acting alone and does not require any form of "organization").[4] Nor can the last two conditions of this Section (which resemble, but do not fully equal, the last two criteria of Article 1.1(a)(1)(iv) of the SCM Agreement) count as delimiting factors – since obviously, if the government imposes the provision of goods through a "formal enforceable measure", such practice does not differ in substance from practices normally followed by governments and it replaces the provision of goods which would otherwise have been carried out directly by the government.[5] Finally, as the US has argued, "entrusts or directs" can mean anything, including simple causation.[6]

23. This is why the EC concluded, in para. 27 of its Oral Submission, that the cited proviso amounts to nothing more than Commerce still being required to apply Section 771(5)(B)(iii) – as modified by the SAA – to concrete cases. In the case of export restraints (as "measures causing private entities to provide goods"), Commerce's "application" of this Section would thus effectively seem to be limited to ascertaining whether the "measure" is "formal and enforceable". However, even if this were not so and Commerce were still effectively required to "check" the other parameters as well, such action would in any event not amount to "discretion" – it simply amounts to (correct and complete) application of the law by the competent administration (cf. para. 29 of the EC's Oral Submission).

[4] Cf. US First Written Submission, paras. 40-44.
[5] Cf. in this respect also US First Written Submission, paras. 50-54 and in particular para. 53.
[6] Cf. US First Written Submission, paras. 29-39, and in particular paras. 31 and 32.

ANNEX B-4

THIRD PARTY ORAL PRESENTATION OF INDIA

(18 January 2001)

The key issue in this dispute is whether an export restraint which lowers the price of the restrained product to a domestic producer using that product, can be considered a subsidy within the meaning of Article 1.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

We note that the US denies having any 'practice' or instance of treating export restraint as a subsidy by its authorities in the post-WTO period. The US, however, has not stated categorically that its CVD law (i.e. Article 771(5) of the Tariff Act, 1930, as amended by the Uruguay Round Agreements Act (URAA), as interpreted by the Statement of Administrative Action (SAA) and Preamble to the US Department of Commerce (DOC) Final Countervailing Duty Regulations) excludes from its purview the export restraint as a form of subsidy. It says that DOC (Department of Commerce) may impose CVD on such restraints only if they meet all the requirements under its CVD law. US argues that the export restraints are 'indirect subsidies' covered under subpara (iv) of Article 1.1(a)(1) of the SCM Agreement.

Canada interprets Article 1.1 of the SCM Agreement as excluding any practice other than 'financial contribution' as defined in that Article; US, on the other hand, argues that this Article is amenable to broader interpretation, since it does not specifically exclude practices other than 'financial contribution'. Therefore, in the view of the US, export restraints should not be considered to be outside the purview of definition of 'subsidy' and countervailability.

In support of such a broad interpretation, the US argues that subpara (iv) of Article 1.1(a)(1) must be seen in the light of the object and purpose of the SCM Agreement, which, according to US, is to impose multilateral disciplines on subsidies which distort international trade (paras 13-20 of US submission).

However, it is the strong view of India that to ascertain the meaning of a particular provision through interpretation, reliance must be placed on the wording in the text itself. Though the elements of Article 31.(1) of the Vienna Convention on the Law of Treaties should be treated as "one holistic rule of interpretation", this cannot be taken to mean that the interpretation should commence with the object and purpose of the SCM Agreement. Any interpretation must, in our view, commence with the text of the provision itself, which is the primary source of interpretation. The Panel in the *US - Section 301* (DS152) quoting the Appellate Body (*Japan - Alcoholic Beverages*) said, "interpretation must be based above all upon the text of the treaty" (panel report para 7.22 & footnote 639). Therefore, we are of the view that the methodology of textual interpretation, as suggested by Canada, in analysing Article 1.1 of SCM Agreement is legally sound.

We agree with Canada's interpretation that, unlike the use of terms like, "e.g.", "such as" or "including, *inter alia*", the use of expression "i.e. where" in the chapeau of the para (a)(1) of Article 1.1 of SCM Agreement, makes the listing in Article 1.1 relating to the definition of financial contribution/subsidy exhaustive. Therefore, the cases referred to in subparas (i)-(iv) are definitive, and not illustrative. The use of the term "i.e. where" in the chapeau of Article 1.1 governs that entire para. Accordingly, the use of terms "e.g." in subparas (i) & (ii) does not convert the exhaustive

definition of subsidy into an illustrative one. Similarly, the use of the expression "type" in subpara (iv) does not justify a broader definition of indirect subsidy, because this must be read in conjunction with "i.e. where" at the beginning of that provision. Accordingly, the US argument (at paras 25-27) for a broad interpretation of the Article is legally untenable.

Therefore, India considers that the definition of subsidy under Article 1.1 does not admit of 'export restraint' as an indirect financial contribution amounting to a subsidy. Accordingly, we urge the Panel to find that 'export restraint' does not constitute an indirect financial contribution amounting to a subsidy within the meaning of Article 1.1 of SCM Agreement and that the US law, which permits DOC to impose CVD by treating export restraint as a subsidy is inconsistent with the SCM Agreement and the WTO Agreement. In view of the above, India urges the panel to make a recommendation to the DSB requesting the US to bring its measures into conformity with the SCM Agreement and the WTO Agreement, including by ceasing to treat export restraints as a subsidy.

In view of our position as explained above, we do not consider it necessary to react either to the question posed by the Panel to the third parties or to the sweet 'pineapple' examples given by the US (paras 33-36).

WORLD TRADE ORGANIZATION

WT/DS194/R/Corr.2[1]
2 August 2001

(01-3835)

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UNITED STATES - MEASURES TREATING EXPORTS RESTRAINTS AS SUBSIDIES

Report of the Panel

Corrigendum

The following corrections should be made to document WT/DS/194/R:

Page 83

Footnote 139 should read "*Id.*, para. 171"
Footnote 140 should read "*Id.*, para. 172"

Page 91

Footnote 163 - Please delete "(emphasis added)" at end of line.

Page 105

Footnote 205 should read as follows: "Response of Canada to question 14 from the Panel following the second meeting". Delete "*Id.*".

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Para. 8.126 third line after "as a reasoned explanation" add "is provided".

Footnote 208 should read as follows: "Response of Canada to question 15 from the panel following the second meeting". Delete "*Id.*".

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[1] In English only