

ANNEX A

Parties' Answers to Written Questions

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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. Article 1.1(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 Article 1.1 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 draft¹ 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 draft² 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 authorize – 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-inconsistent.

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 Columbia 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 its 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 Parties⁵. 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 Secretariat¹³ 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.

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 Parties⁷. 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.