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UNITED STATES - MEASURES TREATING EXPORTS RESTRAINTS AS SUBSIDIES

Report of the Panel

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A. COMPLAINT OF CANADA

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that the "entrusts or directs" standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry.

"In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g.*, Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea). The specific manner in which

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

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

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

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

D. "PRACTICE" OF THE US DEPARTMENT OF COMMERCE

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

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

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

1. Introduction

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

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

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

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

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

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

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

2. Factual Background

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

3. Legal Argument

(a) Assuming for Purposes of Argument that Canada's Interpretation of Article 1 of the SCM Agreement Is Correct, Section 771(5) Does NaAu9tion since

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individually constitute measures, they do not, through numbers, mutate into a separate and distinct "measure" that can be called "practice." Rather, Canada's alleged "practice" simply consists of

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

4.43 Canada agrees that the language of Section 771(5) *could* have been interpreted consistently with the definition of "subsidy" in Article 1.1 of the SCM Agreement, as Canada noted in its comments submitted to the DOC during its rulemaking proceeding in 1995. For Canada, however,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.74 Turning to what occurred during consultations, prior to t June 2000, Canada indicates that it notified the United States that among other thi th at the meeting:

> "We also will wish to inquire as to the sources o . practice, if any, that are relevant to the Department of Comme f an alleged export restraint under U.S. countervailing duty law the *Uruguay Round Agreements Act* (*URAA*), the Statement of ction accompanying the *URAA* and the Department of Commerce ation of its Final Rule."[24] (emphasis added)

4.75 According to Canada, this question e consultations. Thus the United States was well aware that Canada was concer ractice regarding the treatment of export restraints. Moreover Canada states, the erce determinations identified by Canada at the DSB meeting of September 11, cussed above, plainly relevant to post-WTO practice, given that the SAA and Pre give those cases continuing relevance.

4.76 Canada further submits enging specific applications of Commerce's practice, but rather the practice itself. , the United States was in no way "hosa2dhas"r

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

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

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

5.7 For Canada, in addition to being inconsistent with Article 1.1 of the SCM Agreement, these measures are inconsistent with Article 10 (as well as Articles 11, 17 and 19, as they relate to the requirements of Article 10) and 32.1 of the SCM Agreement, because

departed radically from this position in two countervailing duty cases in the early 1990's, *Leather from Argentina*[32] (*Leather*) and *Certain Softwood Lumber Products from Canada*[33] (*Lumber*). According to Canada, Commerce concluded that the hide embargo in

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

5.19 Moreover, Canada argues, the definition of "financial contribution" in Article 1.1(a)(1) is

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

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

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

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

5.27 For Canada, under the United States' interpretation, a vast array of government regulatory measures that do not meet the requirements of Article 1 of the SCM Agreement and were never meant to be covered by it would become subject to the Agreement. If an export restraint is considered to be the provision of a good because it *might* result in greater [illegible]

Agreement did not encompass export restraints. This is evident from US

2. Legal Argument

(a) Canada Bears the Burden of Proof

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

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

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

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

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

5.37 The United States asserts that the elements of Article 31(1) of the *Vienna Convention on the Law of Treaties* constitute "one holistic rule of interpretation rather than a sequence of separate tests to 0 Tc -0pli2g(uyinterpa Tjrch0r3 (never) Twiesr."TD /F166."T1.25 Tf 0.0875 . Tf 3w ((a))3j 12.75 0 TD 5roustio

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

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

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

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

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

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

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

5.52 The United States notes that Canada argues that an export restraint does not constitute a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Conclusion

5.84 In the view of the United States, Canada fails to demonstrate that never, under any set of circumstances, can an export restraint constitute a subsidy under Article 1.1 of the SCM Agreement. The United States asserts that to the contrary, the United States has demonstrated that on the basis of standard principles of treaty interpretation, subparagraph (iv) of Article 1.1(a)(1) – the provis

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

5.89 Canada states that in keeping with the approach to treaty interpretation set forth in the Vienna Convention it believes that a government regulatory measure that restrains exports is not within the

drafters used the term "private body" if, as the US urges, they meant "private person or persons". Finally, according to Canada, the US approach does not articulate any principle that would distinguish between private actors in terms of which situations involve a "body" and which do not. Thus, taken together with the US interpretation of "direct" to mean "cause", the US view would in Canada's view

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

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

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

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

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

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

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

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

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

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

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

5.135 The United States argues that it demonstrated in its first submission that an export restraint is capable of satisfying all of the elements of subparagraph (iv)In [illegible]

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

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

E. SECOND WRITTEN SUBMISSION OF CANADA

1. Introduction

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

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

5.145 Canada argues that it has already demonstrated that whether or in what degree a challenged measure is discretionary with respect to an alleged violation of WTO rules is not properly characterized as a procedural or jurisdictional issue. Furthermore, Canada states, it has demonstrated

(a) GATT/WTO Case Law

5.147 Canada asserts that it is well established that a WTO Member can challenge legislation of another Party, independent of any specific application of that legislation, on grounds that the legislation, as such, is inconsistent with rules of the WTO. The purpose of permitting such challenges is to ensure predictability of conditions for trade by allowing parties to challenge measures that necessarily will result in action inconsistent with GATT/WTO obligations. This is so in Canada's view since such measures can themselves "chill" trade by compelling Members to modify their behaviour in order to comply with a measure which they reasonably anticipate will be applied to their

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

controlling are the Preamble's references to *Argentine Leather* and *Softwood Lumber*. In a portion of the Preamble, Commerce interprets Section 771(5)(D)(iii) of the statute, which implements Article 1.1(a)(1)(iii) of the SCM Agreement and lists as a financial contribution "the provision of goods or services, other than general infrastructure." Canada states that in declaring that roads or bridges may benefit particular industries rather than society as a whole, Commerce cites the pre-WTO *ArgenCerta-0.ys*

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

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

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

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

5.172 In Canada's view, because Commerce has articulated its "practice" with respect to export restraints in the Preamble to final countervailing duty regulations that are in effect, there is currently no substantive distinction between Commerce's treatment of export restraints under the SAA and the Preamble and its treatment of export restraints under its "practice". Moreover, the SAA and Preamble are inconsistent with the United States' obligations under the SCM Agreement, independent of the "practice" Canada is challenging. In that sense, while Canada believes that "practice" is as much a s

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

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

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

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

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

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

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

F. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

1. Introduction

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

(e) The Measures Taken Together

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

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

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

(a) "Entrusts or Directs"

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

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

(i) "Authoritative Instruction"

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

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

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

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

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

(ii) "Alternative Choices"

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

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

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

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

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

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

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

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

[94] CAN-106.

(iii) The "Slippery Slope"

5.209

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

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

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

(d) Object and Purpose

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

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

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

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

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

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

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

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

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

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

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

5. Conclusion

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

G. SECOND ORAL STATEMENT OF CANADA

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

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

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

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

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

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

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

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

5.227 In Canada's view, this dispute reveals a fundamental difference of opinion as to the government actions that fall under the definition of "financial contribution" in Article 1.1. On the one hand, Canada and the European Communities have advanced a position that relies on the ordinary

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

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

5.233 Canada argues that the United States further downplays the text of the SAA by characterizing statements made in the Korea *Stainless Steel* cases as simply the expression of "[Commerce's] non-binding opinion that the results under the new standard in subparagraph (iv) may not differ significantly from the results that would have obtained under [Commerce's] pre-WTO standard." Canada submits that what Congress actually said, however, was that "the Executive branch [...] language of the SAA is that Congress intended the specific [...]

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

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

5.238 Canada argues that the *Live Cattle* case is further evidence of Commerce's view that an export restraint satisfies the "financial contribution" requirement of Section 771(5)(B)(iii). Canada notes that in the Initiation Memorandum, Commerce specifically stated that the petitioner had provided "evidence that the CWB controls exports"; that the petitioner claimed the CWB was limiting the amount [of feed barley] exported to the United States"; and that the petitioner had offered "empirical evidence that the CWB restrains exports to the United States". amo5-0.1275 Tw (ET 3 2.5014 32/F1 part B

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

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

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

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

5.246 Canada states that the United States argues that the fact that producers have choices is consistent with the position that an export restraint is a direction to provide goods, and that the United States reaches this conclusion through a *reductio ad absurdum* proposition that even where a producer

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

H. SECOND ORAL STATEMENT OF THE UNITED STATES

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

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

5.251

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

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

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

5.265 Finally, the United States argues, Canada reiterates its tired argument that "the freedom of producers to adapt to the imposition of an export restraint" means that there is no entrustment or direction within the meaning of subparagraph (iv). The United States submits that Canada's alleged "freedom of producers" to adapt is unsupported by *any* factual evidence. In an effort to gloss over its evidentiary failings, asserts the United States, Canada misrepresents the position that the US(any) a0.1, Canada misrep

5.265 iv). ates argrstinoreg Tf -0.1992tired argument tha9no entru389 Canada's alleged

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

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

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

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

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

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

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

VI. ARGUMENTS OF THE THIRD PARTIES

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

VII. INTERIM REVIEW

7.1

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

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

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

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

VIII. FINDINGS

A. REQUEST FOR PRELIMINARY RULINGS

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

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

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

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

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

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

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

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

2. Order in which the issues will be addressed

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

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

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

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

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

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

(a) Scope of rulings

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

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

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

(b) Rules of treaty interpretation

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

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

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

[117] *Id.*

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

> ARTICLE 31
>
> *General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

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

8.19 Canada's claim under SCM Article 1 centres on whether an export restraint can constitute a

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

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

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

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

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

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

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

(i) A government "entrusts or directs"

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

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

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

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

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

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

8.29 It follows from the ordinary meanings of the two words "entrust" and "direct" that the action of the government must contain a notion of delegation (in the case of entrustment) or command (in the case of direction). To our minds, both the act of entrusting and that of directing therefore necessarily

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duty. In other words, the ordinary meanings of the verbs "entrust" and "direct" comprise these elements – *something* is necessarily delegated, and it is necessarily delegated *to someone*; and, by the same token, *someone* is necessarily commanded, and he is necessarily commanded *to do something*.

the US approach, the existence of a financial contribution in the case of an export restraint therefore

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

8.38 In the above example of imposition of tariffs, there may well be a question as to consistency with Article II of the GATT 1994, which deals with Members' schedules of concessions. It is, however, doubtful that the concept of financial contribution contained in Article 1.1(a) of the SCM Agreement seeks to bring such government actthe sithin the meaning oambitCM Agreement.

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

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

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

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

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

[136] *Brazil – Export Financing Programme for Aircraft*

respect of item (d) of the Illustrative List of Export Subsidies[142] (which findings in any event were

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

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

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

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

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

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

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

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

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

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

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

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

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

8.54 8.54

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

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

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

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

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

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

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

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

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

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

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

(e) Object and purpose

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

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

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

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

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

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

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

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

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

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

8.68 During the discussions in the Negotiating Group which led to the definition of "subsidy" that was eventually included in the text of Article 1, the basic difference between defining subsidy solely

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

[156] SAA, p. 926.

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

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

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

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

on the basis of the existence of a "benefit" conferred by any government action (the position taken by the United States[161]), on the one hand, and requiring a "government financial contribution" as a means of limiting the universe of government actions that could be considered a subsidy (the position taken by essentially all other participants), on the other, was articulated with some precision. Canada, for example, stated that "while virtually any government action could be construed as having possible effects on production and trade, *there need to be some outside limits on the scope of government activity that can be considered to be a subsidy* and subject to countervail"[162]. Canada further stated that:

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

1960 Panel's reference to "practice . . . in no real sense different from those normally followed by governments" was a general reference to the *delegation* to private parties of the particular government functions of taxation and expenditure of revenue, and *not* a reference to government market interventions in the general sense, or the effects thereof. Our interpretation, discussed at length above, of the meaning of subparagraphs (i)-(iv) is fully consistent with, and thus is confirmed by, their negotiating history.

(iii) Summary

8.73 In short, the negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of "financial contribution" and "benefit", was intended specifically to prevent the countervailing of *benefits* from any sort of (formal, enforceable) government measures, by restricting to a finite list the *kinds* of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)-(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under subparagraphs (i)-

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

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

(a) Application of the mandatory vs. discretionary distinction

8.77 We turn now to the question of the treatment under US CVD law of export restraints. In particular, we recall our statement that in considering this treatment, we will apply the classical test. That is, having found that the treatment of export restraints as financial contributions is inconsistent with Article 1 of the SCM Agreement, we now consider whether US law requires such treatment of export restraints. Should US law *require* the treatment of export restraints as financial contributions,

including non-binding administrative guidance by a government.[171] We agree, and in particular find

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

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

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

(i) The Statute

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

8.89 Following the Uruguay Round, the United States undertook to implement the WTO Agreement in the *Fmechpnwsmj o hat exr dat*

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

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

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

(a) Status in US domestic law

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

(b) Content in respect of export restraints

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

(ii) The Statement of Administrative Action

(a) Status in US domestic law

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

[174] *Tariff Act*, Section 771(5), codified at 19 *n8l174 0 Tw (8.93) Tj9rl"52t44B1b0 T 771997lF Tj 42.75 D ih*

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

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

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

8.95

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

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

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

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

(b) Content in respect of export restraints

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

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[183] Response of the United States to question 1 from the Panel following the second meeting, citing as well the Request by the United States for Preliminary Rulings, para. 124, footnote 134.

[184] Response of the United States to question 6(a) from the Panel at the first meeting.

[185] Response of the United States to question 28 from the Panel following the first meeting.

[186] *URAA*, footnote 177, *supra* (emphasis added).

[187] Response of the United States to question 1 from the Panel following the second meeting.

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

> "In general, the Administration intends that the definition of 'subsidy' will have the same meaning that administrative practice and courts have ascribed to the term 'bounty or grant' and 'subsidy' under prior versions of the statute, unless that practice or interpretation is inconsistent with the definition contained in the bill. Absent such inconsistency, and subject to other relevant changes enacted in the implementing bill (e. g., rules regarding non-countervailable subsidies and *de minimis* countervailable subsidies), practices countervailable under the current law will be countervailable under the revised statute.
>
> **Basic Definition**
>
> . . .
>
> One of the definitional elements of a subsidy under the Subsidies Agreement is the provision by a government or any public body of a 'financial contribution' as defined by the Agreement, including the provision of goods or services. Moreover, the Subsidies Agreement specifically states that the term 'financial contribution' includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Administration's view that the term 'private body' is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided 'directly or indirectly' by a government. Accordingly, the Administration intends that the 'entrusts or directs' standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a US industry.
>
> In the past, the [DOC] [] has countervailed a variety of programs where the government has provided a benefit through private parties (*See*

which [the DOC] has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that [the DOC] is satisfied that the standard under Section

of an agency's regulation", also citing to various US court decisionsni*"this regard.

anything. We however have no reason to, and do not, exclude the Preamble from consideration as possible interpretive guidance regarding the treatment of export restraints in US CVD investigations pursuant to Section 771(5)(B)(iii).

(b) Content in respect of export restraints

8.115

restraints as countervailable subsidies, rather than reflecting the view or belief that it is *required* to do so.

8.117 Certainly, the Preamble expresses the view that there are circumstances similar to those in *Leather* and *Lumber* in which the DOC might find that an export restraint constitutes a financial contribution. The rationale in *Leather*, which was also adopted in *Lumber*, was, however, that two conditions had to be fulfilled for a subsidy to exist: specificity and benefit.[203] It was not necessary in either of those cases, as it is necessary today, to consider separately whether there is a financial contribution, this now being an essential element of a "subsidy" under Article 1.1 of the SCM Agreement.

8.118 We attach importance, however, to the fact that the Preamble refers to the interpretive guidance in the SAA concerning indirect subsidies and export restraints. For the reasons given in paragraph 8.105, we have concluded that the SAA correctly indicates that primacy is to be given to

itself by arguing that "[a]gencies, including [the DOC] normally follow the precedents of prior determinations, and are required by US courts to do so absent a reasoned explanation"[206].

8.123 We find Canada's notion of US "practice", however expressed, to be imprecise. Given that Canada has not clearly identified what it refers to when it uses the term "practice" [207], we have great difficulty in conceiving of "practice" as a measure in this dispute, in whichever formulation proffered by Canada.

8.124 In respect of the references in the SAA and the Preamble to pre-WTO US CVD cases, we note that Canada argues that "pre-WTO practice was brought forward into post-WTO law and practice by virtue of the SAA and the Preamble"[208]. We consider, however, that such references would not constitute US "practice", but would simply be part of the SAA and the Preamble. That is, we do not see how any past practice *as incorporated in* the SAA or the Preamble could constitute a separate measure with an existence independent of that of the SAA and Preamble.

8.125 In respect of "practice" as embodied in post-WTO CVD cases, while Canada may well be correct in principle that "an interpretation or methodology will often be developed in a single case or group of cases, and becomes the 'practice' followed in subsequent cases"[209], this principle is not directly relevant to the present dispute, as there has been no post-WTO case where the United States has countervailed an export restraint. Further, even if there had been such cases, and even if the DOC had set out the methodologies it "normally" applied in such cases, Canada itself admits that under US law, the DOC could depart from those methodologies as long as it explained its reasons for doing so.[210]

8.126 Thus, while Canada may be right that under US law, "practice must normally be followed, and those affected by US [CVD] law . . . therefore have reason to expect that it will be"[211], past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC "normally" follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives "legal effect to that 'practice' as determinative of the interpretations and methodologies it applies"[212]. US "practice" therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada.

8.127 Moreover, although there has been no post-WTO case in which the United States has countervailed an export restraint, Canada further submits that there is nevertheless relevant post-WTO practice in several concrete cases. Canada argues in particular that the initiation of the *Live Cattle* case expressly relied on the pre-WTO decisions in *Leather* and *Lumber*, and that in the Korean *Stainless Steel* cases, the DOC made it clear that it would apply the same standard to "indirect subsidies" as was applied pre-WTO. In Canada's view, "[t]he decision to initiate the *Live Cattle* case is of precedential value, because it reflects [the DOC's] decision that the standard that there be 'sufficient evidence' of all the elements of a countervailable subsidy, including financial contribution, had been met. Thus, while a decision to initiate an investigation may not have the same precedential

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[206] Response of Canada to question 15 from the Panel following the second meeting.

[207] We note here, as one example, Canada's statement that practice is "simply what the agency systematically does" (Response of Canada to question 14 from the Panel following the second meeting).

[208] *Id.*

[209] Response of Canada to question 16(c) from the Panel following the first meeting.

[210] Response of Canada to question 15 from the Panel following the second meeting.

[211] Response of Canada to question 14 from the Panel following the second meeting.

[212] Second Written Submission of Canada, para. 40.