ANNEX B

Third Parties' Submissions

ANNEX B-1

EXECUTIVE SUMMARY OF THIRD PARTY WRITTEN SUBMISSION BY THE EUROPEAN COMMUNITIES

(9 January 2001)

I. INTRODUCTION

1. The European Communities (hereafter "the EC") makes this third party submission because of

regulatory means" is drawn by the *chapeau* of Article 1.1(a)(1) itself. It serves to delimit those government practices which shall be subject to the SCM Agreement from other practices subject to other parts of the WTO Agreement. The distinction is thus substantive, and not a pure matter of "form".

12. Also, this distinction does not have the effect of "making circumvention of obligations by Members too easy". If an export restraint is found to exist, no one prevents the afflicted Member from challenging this measure under the terms and conditions of Article XI of the GATT. The Appellate Body's finding in *Canada-Autos*[7] was made in a very different context than is at stake in the present case. The *chapeau* of Article 1.1(a)(1) explicitly refers to "financial contribution". In order not to nullify the very text (and meaning) of the SCM Agreement, this term must thus be interpreted in such a way as to preserve the *chapeau*'s *effet utile*.

C. ARTICLE 1.1(A)(1)(IV) AND THE CONCEPT OF "DIRECTION"

13. The EC agrees with the main gist of the arguments put forward by Canada in the context of its analysis of Article 1.1(a)(1)(iv), namely (a) that this subparagraph must be interpreted strictly in the sense of being limited to the types of practices contained in subparagraphs (i) – (iii), and (b) that an export restraint does not meet all the requirements of subparagraph (iv).

14. As regards (a) the strict interpretation to be given to subparagraph (iv), this is not invalidated by the fact that this subparagraph refers to "types of functions illustrated in (i) to (iii)". As evidenced e.g. by the term "loan agreement" (which is merely one of the examples cited in subparagraph (i)), a textual analysis of subparagraphs (i) to (iii) reveals that these provisions list "types" of functions which a government may perform in order to provide a "financial contribution".

15. The US assertion that subparagraph (iv) contains "expansive language" and should thus be interpreted "broadly"[8] is not borne out by its ordinary meaning. This provision, by its very wording, does not go beyond the types of practices listed in subparagraphs (i) to (iii). Therefore, a practice which, had it been performed directly by the government, would not fall into one of these categories and thus not constitute a "direct financial contribution", cannot become an "indirect financial contribution" simply because it was performed by a "private body". Subparagraph (iv) does not expand the types of functions listed in subparagraphs (i) to (iii); it only refers to the route via which they are delivered to the beneficiary.

16. As regards (b) the fact that an export restraint does not meet all the requirements laid down in subparagraph (iv), the two crucial factors to be taken into account are the notions of "government direction" and of a "private body carry[ing] out … the functions … which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments".

17. With respect to "government direction", while it is true that an export restraint limits domestic producers' export opportunities, it still does not 'force' them to sell their goods domestically to 'targetted customers' at lower prices. The producers remain free to adapt to the modified market conditions. As a result, while in the case of "direct provision of goods", the government is in a position to determine exactly the scope and extent of the benefit it wishes to confer and the class of beneficiaries it intends to reach, the same is not true for an export restraint. In the latter case, the producer's freedom of action is limited, but not curtailed. The producer can still make choices. An export restraint does thus not equate to "indirect provision of goods", and is therefore not covered by the SCM Agreement.

---

[7] *Canada-Autos*, paras. 135-142.
[8] Id., para. 26.

18. This fact is implicitly recognized by the "pineapple-growers' scenario".[9] The only alternative which would meet the standard of "government direction" is the case in which the government would direct the pineapple producers to provide their pineapples to the juice industry at fixed prices. Only such a regulatory measure would really correspond to the government directly buying pineapples and selling them to the juice industry at a determined price, since it would eliminate the discretion open to producers in the face of an export restraint.

19. The above analysis is corroborated by the second crucial element of subparagraph (iv), a "private body carry[ing] out … the functions… which would normally be vested in the government (etc.)". What matters in this respect, is that the private body be directed to perform materially the same function than would otherwise be carried out by the government itself. In other words, the "private body directed by the government" must become a "quasi-emanation of the government".

20. For example, a private electricity company will provide an "indirect financial contribution" to the domestic aluminium producers if it is specifically directed by the government to provide electricity to these producers at a fixed price. If, however, the government instead decides to prohibit (or restrict) electricity exports, no "indirect financial contribution" exists, since the electricity company remains free to modify its activities in light of the modified market conditions.75 .1636ve a9 would("564m5

23. Also, the US citation to the Panel's reasoning in *Canada-Dairy* is, at the very least, incomplete and misleading.[12] When establishing the conditions for applicability of item (d) of Annex I, the Panel did not consider that all government-mandated schemes were covered by item (d), but only those where goods were being "provided" in the sense of Article 1.1(a)(1)(iii) and (iv) of the SCM Agreement. The Panel thus did not "flatly reject" Canada's position.[13] In addition to being "moot and, thus, of no legal effect",[14] this Panel Report thus seems devoid of any pertinence for the purposes of the present dispute.

[12] United States' First Submission, paras. 64-65 (erroneously referring to para. 7.126 instead of 7.130 of the Panel Report).

[13] United States' First Submission, para. 66, and Canada's First Submission, para. 84.

[14] *Canada-Dairy*, Appellate Body Report, para. 124.

ANNEX B-2

THIRD PARTY ORAL PRESENTATION

6. In its First Written Submission, and in line with Canada's Request for the Establishment of a Panel, Canada identified the measures under dispute as "section 771(5) of the *Tariff Act* of 1930, as amended by the *Uruguay Round Agreements Act*, as interpreted by the Statement of Administrative Action […] and the Preamble to the US Department of Commerce […] Final Countervailing Duty Regulations […] and Commerce's practice thereunder."[1] While in the context of its detailed appreciation of the said measures, Canada analyzed each measure separately,[2] the fact nevertheless remains that Canada clearly considers that these measures, "taken together"[3], are inconsistent with Article 1.1 of the Subsidies Agreement.

7. Canada did not ask the Panel to rule, e.g., that the concrete (past and present) "US practice" in concrete cases should be overturned (with the consequence that these concrete determinations would have to be repealed). What Canada requested, is that the Panel recommend that the United States bring its pertinent legislative framework into conformity with its WTO obligations, with the effect that export restraints no longer be treated as "financial contributions".[4]

8.

12. Also, the US statement that neither document would have "independent legal effect" seems somewhat besides the point. Obviously, a legal or administrative act whose very purpose is to authoritatively interpret another (basic) act cannot be conceived in isolation from the basic act it seeks to interpret. Moreover, it was the United States – in *Section 301*, and not Canada in the context of the present dispute, who declared that the Statement of Administrative Action *"must, by law, be treated as the authoritative expression concerning the interpretation of the statute"*.[10]

13. Surely, the legal effect to be attributed to one and the same legal act – the Statement of Administrative Action - cannot depend on the consequences (positive or negative) stemming from such effect for Defendants in the context of a given dispute. Therefore, since the United States earlier recognized that this legal effect exists, they cannot now pretend the opposite.

14. Finally, and as convincingly demonstrated by Canada, the Preamble to the Regulations has force of law in the United States.[11] While the EC is not in a position to comment on this analysis in detail, the EC nevertheless considers that, according to a general principle of administrative law, an administration must at the very least be considered to be bound by its own officially adopted Regulations.

15. In any event, and as recognized by the Appellate Body in *Guatemala – Cement* on the basis of the practice established under the GATT 1947, a "measure" may be any act of a Member, whether or not it is legally binding, and it can include even simple administrative guidance by a government.[12] Therefore, even if Canada had challenged the Preamble to the Regulations as a "separate measure" (*quod non*, since Canada always insisted that the measures it challenged had to be "taken together" and since it specifically qualified the Preamble, as from its Request for Consultations, as "interpreting Section 771(5) of the Tariff Act")[13], this could not disqualify the act as a "measure" under Article 6.2 of the DSU as long as this act contained authoritative guidance for the competent administration.

16. Remains the question of "US practice". In this respect, the US Request for Preliminary Rulings rightly points out that "US practice", whether prior or subsequent to the entry into force of the WTO-Agreement, was not as such mentioned in Canada's Request for Consultations.[14] However, the EC is not convinced that, for this reason alone, "US practice [under the Statute, as interpreted by the SAA and the Preamble to the Regulations]" would not be properly before this Panel.

17. In the first place, and while in light of the confidentiality of consultations, the EC is of course not in a position to assess whether "US practice" was or was not discussed during the said consultations, the EC nevertheless notes that Canada's letter to the United States dated 13 June 2000 (Exhibit US-6) – which preceded the consultations held on 15 June 2000 – clarified that Canada also wished "*to inquire as to the sources of United States law and practice, if any, that are relevant […] in addition to [the Statute, the SAA and the Preamble to the Regulations]*."[15] The US was thus at the very least aware that "US practice" would play some part in the Consultations – as well as in eventual future Panel proceedings.[16]

---

[10] *United States – Section 301*, paras. 4.121, 7.109 and footnote 683.

[11] Canada's Response to the US Request, paras. 25-33.

[12] *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico ("Guatemala-Cement")*, WT/DS60/AB/R, Report of the Appellate Body dated 2 November 1998, para. 69, footnote 47.

[13] Canada's First Written Submission, para. 4; Request for Consultations, second paragraph, *in fine*.

[14] United States Request for Preliminary Rulings, paras. 102-119. Request for Consultations by Canada, second paragraph.

[15]

18. Moreover, and as already noted earlier, Canada does not challenge "US practice" as such (with the effect that certain US subsidy determinations would have to be reversed). What Canada challenges, is (pre-WTO) "US practice" as incorporated into the SAA and the Preamble to the Regulations,[17] as well as (post-WTO) "US practice" as a manifestation of an administrative commitment or policy to adhere to a particular legal view or to apply a particular interpretation or methodology in future cases.[18] As regards the former, "practice" has been transformed into law. As regards the latter, practice serves as evidence of the former's transformation into law. In the EC's view, at least pre-WTO US "practice" must thus in any event be properly before this Panel, insofar as this has effectively been integrated into US law.

19. Finally, while it corresponds to well-established jurisprudence – and to the EC's established position – that a measure which has not been the subject of consultations cannot be examined by the Panel,[19] this does not mean that there need be a *"precise and exact identity"* between the measures subject to the Consultations and the measures identified in the Request for Establishment of a Panel.[20]

20. As regards post-WTO US "practice", therefore, Canada should at the very least be able to rely thereon as evidence of the meaning and mandatory nature of the challenged (legislative) "measures". At least to this extent, therefore, (post-WTO) "US practice" should be examined by this Panel – as was done by the Panel in *United States – Section 301*.[21] Understood in this sense, post-WTO US "practice" should thus also be properly before this Panel.

V. SUBSTANTIVE ISSUES – THE MANDATORY NATURE OF THE "MEASURES"

21. In the second part of today's Presentation, the EC will now turn to the question of the mandatory – or discretionary – nature of the US "measure(s)". In this respect, the EC would first redress an apparently ongoing misperception, by the United States, of the scope of this very question.

22. Obviously, the question at stake is not "whether the measures mandate the US administration to treat export restraints as subsidies".[22] Indeed, since the determination of the existence of an actionable subsidy involves several factors ("financial contribution", "benefit", "specificity"), the answer to the question as formulated by the US would necessarily always be negative. After all, a positive answer to this question would also require the administration to assume (rather than establish in its analysis) the existence of a "benefit" and "specificity" alongside the "financial contribution".

23. However, Canada has never pretended that this is what the measures prescribe. What Canada has argued, as from its Request for the Establishment of a Panel,[23] throughout its First Written Submission[24] and in Response to the US Request for Preliminary Rulings,[25] is that the measures

---

[17] Canada's Response to the US Request for Preliminary Rulings, paras. 35-36; Canada's First Written Submission, paras. 38-41 (re the SAA) and paras. 48-51 (re the Preamble to the Regulations).

[18] Canada's Response to the US Request for Preliminary Rulings, paras. 37-40; Canada's First Written Submission, paras. 52-60 (cf. in this respect, e.g., para 60, where Canada stated: *"The treatment of so-called "indirect subsidies" in these post-WTO cases thus confirms that US law treats export restraints as meeting the standard of Section 771(5)(B)(iii), and reflects, in Canada's understanding, the ongoing misapplication of the SCM Agreement by the United States*." – emphasis added)

[19] Cf., e.g., the European Communities' Third Party Submission dated 27 January 2000 in WT/DS156, *Guatemala – Definitive Anti-Dumping Duties on Grey Portland Cement from Mexico*, para. 7 and footnote 3.

[20] *Brazil-Export Financing Programme for Aircraft ("Brazil-Aircraft")*, WT/DS46/AB/R, Report of the Appellate Body adopted 20 August 1999, para. 132.

[21]

require the administration to treat export restraints as "financial contributions". It is therefore only in this respect that the mandatory – or otherwise – nature of the US measure(s) need to be determined by this Panel.

24. In the EC's view, Canada has convincingly demonstrated that the US measures, taken together, are mandatory, since they allow no discretion as to the administration's appreciation of an "export restraint" under the "financial contribution"-element of Article 1.1 of the Subsidies Agreement (or Section 771(5)(B)(iii) and (D) of the Tariff Act of 1930, as amended by the URAA and as interpreted by the SAA and Preamble to the Regulations). Indeed, as the Community already advocated above (Part II, paras. 8-9 of this Presentation), the various "layers" of the applicable US law must be read and analyzed together – and for the Community, even a very succinct reading through these layers clearly reveals that the US administration has no discretion as regards the treatment of export restraints.

25. While it is of course true that Section 771(5) itself is silent in this respect, already the SAA – which is not mere "legislative history", as the US would now have the Panel believe, but an authoritative statement of the US legislator's interpretation of the future application of the Statute and an instruction to future administrations to follow the same interpretation[26] - contains very explicit language on export restraints. Not only does it integrate the relevant pre-WTO US "practice" into the body of the Statute, but it also clearly states that Commerce's previous practice of finding a countervailable subsidy *'where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit"*[27] should continue under the new Statute.

26. However, as the EC has already amply demonstrated in its Written Submission, and as Canada rightly argues, this is precisely not the meaning to be attributed to Article 1.1 of the Subsidies Agreement. Article 1.1 requires the existence of a "financial contribution". This requirement has, in the case of indirect subsidies (and export restraints in particular), thus effectively been "read out" of the Statute by the SAA and authoritatively replaced by a different standard – the "formal, enforceable measure"-standard. This new standard (which is, in fact, the old pre-WTO US standard), combined with the existence of a "benefit", will thus hencetoforth determine whether a "subsidy" exists under the Statute.

27. The above conclusion is not invalidated by the US' reliance on certain (supposed) SAA "provisos", namely that the standard would be administered on a "case-by-case basis" or that it would only lead to subsidies being found countervailable if the administration was satisfied that the standard under Section 771(5)(B)(iii) had been met.[28] In fact, what these "provisos" mean, is that the Department of Commerce is – obviously – still required to apply this standard to concrete cases, with the possible effect that, in a particular case, certain government measures may not be found "formal" or "enforceable".

28. However, if export restraint there is, and since export restraints are obviously "formal, enforceable government measures", these measures will be subsidies if a "benefit" is conferred by them. Moreover, in the very passage cited by the US in support of the SAA's allegedly discretionary nature,[29] the SAA itself equals pre-WTO US "practice" on export restraints (*Lumber* and *Leather*) with "indirect subsidies". Again, this equation is only possible if, by virtue of the Statute, export restraints, as "formal enforceable measures", *per se* amount to "financial contributions".

---

[25] Canada's Response to the US Request, para. 41.
[26] Cf. the portion of the SAA quoted in Canada's First Written Submission, para. 34 (emphasis added).
[27] SAA at 925-926 (Annex B – Exhibit CDA-2).
[28] US Request for Preliminary Rulings, paras. 78-79.
[29] Id.

29. The above "provisos" thus simply confirm that the administration must still ascertain the existence of an export restraint before proceeding with its remaining (benefit) investigation. This, however, is not "discretion". It simply reflects the (obvious) overall requirement of correct and complete application of any given law by the competent administration.

30. In the EC's view, the analysis could in principle stop here – since regardless of whether this is considered "legally binding" or "non-binding", the Preamble to the Regulations, as an act of the competent administration, cannot interpret the law *contra legem.* Suffice it to state, therefore, that far from invalidating the above conclusion, the Preamble in fact serves confirm it.

31. In this respect, the EC would recall that in the Preamble, the Department of Commerce confirms that, as regards indirect subsidies, the (post-WTO) standard is no narrower than the previous

Article 1.1 of the Subsidies Agreement – since, as the EC firmly believes, and as it has advocated in its Written Submission, the broader standard laid down in the Statute does not comply with the Subsidies Agreement.[36]

[36] Cf. in this respect the Panel's reasoning in *United States – Section 301*, paras. 7.54-56, which concluded in the sense of a *prima facie* violation.

regulatory framework affecting production standards), export restraints are classical examples of "government measures modifying market conditions by regulatory means". Therefore – and unless one were also to accept that customs (import) duties, by providing a "benefit" to the ("specific") domestic producers of the targeted product, amounted to "subsidies" in the sense of Article 1.1 of the SCM Agreement – the EC cannot provide an example of an export restraint which would "amount to" a subsidy.

5. It is of course possible that the conditions attached to subsidies can be formulated in such a way that they may have the same effect as export restraints. For instance, a government could give an income tax reduction for firms which sell steel scrap to domestic steel producers, but not accord the same incentive to firms which export such scrap. This will in practice contribute to restrain exports, but is clearly a subsidy as defined by Article 1. Many similar examples of subsidies (as defined by Article 1) which operate as de-facto export restraints could be given. However, it does not follow that measures which are not subsidies should somehow fall within the scope of Article 1 just because they operate to restrict exports.

2. You seem to argue that, in the case of government-entrusted or -directed provision of goods, for the condition of the "carrying out of functions that would normally be vested in the government" to be fulfilled, not only would there have to be specific direction to the producers to provide the goods, but also that this provision would have to be on "certain pre-determined conditions".

(a) Is this a correct reading of your argument?

6. This reading is in principle correct. However, in para. 28 of its Written Submission, the EC referred to "functions normally vested in a government (etc.)" as a shorthand-version for the full text of the relevant part of Article 1.1(a)(1)(iv). This is clearly evidenced by the language used by the EC in para. 24 of its Written Submission, the introductory paragraph to its analysis of the related question (where the EC cited the pertinent text in its entirety).

7. Therefore, in order to be fully accurate, the relevant condition should be described and understood as comprising both the fact that the function be normally vested in a government and that the practice, in no real sense, differ from those normally followed by governments.

(b) Why would the "pre-determined conditions" have to exist in order for a private body to be carrying out a function normally vested in a government?

8. As already explained by the EC in its Written Submission,[2] the actions contemplated by Article 1.1(a)(1)(iv) of the SCM Agreement are not "expansive", but limited to those enshrined, for governments or public bodies, in subparagraphs (i) to (iii) of the same Article.

9. Therefore, the determining factor for a private body carrying out the functions normally vested in the government

must apply in the case of an 'indirect subsidy' – with the government predetermining, through regulatory means, essentially the same conduct for the private body, and the same result for the beneficiary industry, than the government would otherwise "directly" have implemented itself.

11. Only if such pre-determination exists, will the private body become a "quasi-emanation of the government".[3] Only then will it carry out a subsidizing function "normally vested in the government", and only then will the practice "in no real sense differ from practices normally followed by governments". In the EC's view, therefore, the existence of (government) "pre-determined conditions" is a *sine qua non* for the existence of an indirect financial contribution in the sense of Article 1.1.(a)(1)(iv).

(c) Turning this argument around, is it your position that there would be no "financial contribution" in the sense of Article 1.1(a)(1)(iii) if a government-owned company established its production quantities and terms and conditions of sale as it saw fit, rather than the government establishing "pre-determined conditions" therefor?

12. As a preliminary point, the EC would first note that the Panel's formulation of this question apparently presupposes that "government ownership" of a company means that it is automatically part of the "government" or a "public body" in the sense of the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, since otherwise, the question would have to be answered by reference to Article 1.1(a)(1)(iv) of the SCM Agreement, and not Article 1.1(a)(1)(iii). In the EC's view, however, this is not the correct reading of the SCM Agreement's concepts of "government" or "public body".

13. "Government ownership" of a company is *per se* insufficient to 'transform' such company into part of the "government" or into a "public body". Governments can "own" (or hold a controlling share in) companies for all kinds of reasons, including purely historical ones. In fact, on the European continent, "government ownership" of companies for historical reasons is relatively frequent, although less common than it was, following a number of privatization programmes. However, for a company to be part of the "government" or a "public body", additional factors must be present: "Public bodies" are types of emanations of the government, without necessarily equalling the "government" proper. Their specific characteristic is the (at least occasional) exercise of public authority (*imperium).*

14. For this reason, government-owned companies which operate at the behest of government and in the absence of competition, e.g. monopoly suppliers of electricity, gas, coal etc, may be considered to be part of the "government" or "public bodies" for the purposes of Article 1. Similarly, state-owned banks intervening in the capital market through lending operations guided by macro-economic policy objectives could be regarded as the "government" providing a financial contribution. However, not all but only substantial government ownership or control confers this status on companies. Companies which operate in the marketplace and set their own objectives independently of the government will not be part of the "government" or "public bodies", even if the government is a shareholder. In the EC's view, therefore, to the extent that government-owned companies are not part of the "government" nor "public bodies", the Panel's question should be answered by reference to Article 1.1(a)(1)(iv) of the SCM Agreement.

15. Understood in this sense, however, the Panel's question well reflects the EC's position on this matter. Take, for example, a market on which a number of producers compete freely. For purely historical reasons, one of these producers happens to be a government-owned company. Will the simple fact of this company taking part in general competition (by providing goods or services or purchasing goods) amount to "providing goods" in the sense of Article 1.1(a)(1)(iv) of the SCM

[3] Cf. EC Written Submission, para. 29.

Agreement (because of this subparagraph's incorporation of the content of subparagraph (iii))? In the EC's view, the answer is in the negative – and not because such action (obviously) confers no specific benefit. The negative answer stems from the fact that such action does not amount to a "financial contribution".

16. In such a situation, no "government direction" is present, the function is not "one normally vested in a government" and the practice does differ from (subsidizing) "practices normally followed by governments". For these conditions to be fulfilled, additional factors thus need to be present – namely, the existence of specific (sales or marketing) conditions pre-determined by the government.

3. Based on your oral answer provided at the third party session to question 2, above, we understand you to argue that government ownership of a company that provides goods is not enough for there to be "government provision of goods", and thereby a financial contribution, in the sense of *SCM* Article 1.1(a)(1)(iii). By arguing that, in addition to the government ownership/involvement as such, there must be "predetermined conditions" are you not, however, importing the concept of benefit into the concept of financial contribution? In this regard, we note that in your oral response to question 2(b), you stated that "pre-determined conditions" would need to exist because, if the government provides goods or services, the government decides who will be the "beneficiary", and how much "benefit" will be provided. Please explain in what way "pre-determined conditions" are relevant to the existence of a financial contribution rather than, or in addition to, the existence of a benefit.

17. As explained in the EC's Written Submission (e.g. para. 29), pre-determined conditions are relevant for the existence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement, since they are one of the elements which determine whether a domestic company is effectively directed by the government to provide goods or services. Modifying the example in para. 29 slightly, suppose that there exist a number of government-owned electricity suppliers which compete in the marketplace. On the basis of our argument above, to the extent that these are not part of the government, they will not confer a financial contribution under Article 1.1(a)(1)(iii) simply by providing goods or services. However, if one of the companies were directed by the government to provide electricity to domestic aluminium producers under certain pre-determined conditions, a financial contribution would exist under Article 1.1(a)(1)(iv).

18. The existence of "pre-determined conditions" is central here. It creates an (indirect) financial contribution because it limits the freedom of action of the electricity company to the same extent than would be the case if the firm were part of the government. Thereby, it forces the company to act in a way which differs, "in no real sense" from the manner in which the government itself would have provided electricity.

19. However, the fact that electricity is provided at "pre-determined conditions" should not be confused with the existence of a benefit. Pre-determined conditions may very well be on market terms, and involve adequate remuneration according to Article 14(d) of the SCM Agreement – with the effect that, in such circumstances, there would be no benefit. To sum up the EC's reasoning on this point, one may thus say that it is the existence of pre-determined conditions which determines whether or not there is a financial contribution, while it is the terms of these conditions which determine whether or not there is a benefit.

4. Please explain why (in paragraph 27 of your oral statement, which view is also expressed at paragraph 45 of Canada's first written submission and paragraph 56 of Canada's response to the US request for preliminary rulings) you consider that the proviso in the SAA limits any discretion that Commerce may enjoy to "satisfying itself that an alleged subsidy involves a formal enforceable measure". The proviso states, in particular, that the type of indirect subsidies which Commerce has countervailed in the past will continue to be countervailable

"provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met". Do these words not require Commerce to be satisfied that all of the elements in Section 771(5)(B)(iii) have been met?

20. As the Panel rightly notes, the cited proviso – at first sight - seems to require Commerce to be satisfied that all elements of Section 771(5)(B)(iii) of the Statute have been met in each particular case. However, as the EC already explained in paras. 25-26 of its Oral Submission, the SAA, through its integration of the relevant pre-WTO US practice into the body of the Statute, effectively read the "financial contribution"-requirement of Article 1.1(a)(1) of the SCM Agreement "out" of the Statute and replaced it by a "formal, enforceable measures"-standard.

21. Once this transformation has been made, however, there are no significant further criteria in Section 771(5)(B)(iii) which Commerce might still investigate – other than the one highlighted by the EC and Canada. In fact, this Section would then read, in pertinent part,

> *"entrusts or directs a private entity, through a formal enforceable measure, to [make a direct transfer of funds etc.,, provide goods or services or purchase goods – cf. Section 771(5)(D) of the Statute], if [making such transfer, providing the goods etc.]*

definition of subsidy into an illustrative one. Similarly, the use of the expression "type" in subpara