

X. FINDINGS

A. PRELIMINARY ISSUES

10.1 As a preliminary matter, Japan requests the Panel to exclude from consideration eight¹¹⁷⁶ separate "measures"¹¹⁷⁷ which Japan believes are outside the terms of reference of the Panel as not having been identified specifically in the US request for the Panel's establishment. The eight "measures" are the following:

- (1) 1968 Sixth Interim Report of Industrial Structure Council, "Distribution Modernization Outlook and Issues";
- (2) 1976 JDB financing to Konica for joint distribution facilities;
- (3) 1967/1977 SMEA financing to photofinishing laboratories (to enable them to buy new equipment for colour photofinishing);
- (4) 1971 JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement);
- (5) 1967 JFTC Notification No. 17 on premiums to businesses;
- (6) 1967 JFTC Notification No. 34 on open lotteries;
- (7) 1977 JFTC Notification No. 5 on premiums to customers; and
- (8) 1983 JFTC guidance on the establishment of rules on loss-leader advertising and dumping.

10.2 Japan claims that these "measures" were mentioned for the first time by the United States in its initial submission to the Panel and were neither raised by the United States during consultations under Article 4.4 of the DSU nor identified specifically in the US request for the establishment of the panel under Article 6.2 of the DSU. We note in this regard that although Japan makes arguments about the alleged US failure to consult on the eight "measures" that Japan wishes to exclude from consideration in this proceeding, the ruling requested by Japan relates solely to the alleged US failure to identify specifically these same eight "measures" in the US request for the establishment of this Panel. Accordingly, we shall forego examination of the conformity of US actions with the consultation requirements of Article 4.4 of the DSU, concentrating instead on Japan's claim pursuant to Article 6.2 of the DSU.

10.3 The United States counme

1. SPECIFICITY OF THE "MEASURES" IDENTIFIED IN THE PANEL REQUEST

(a) Article 6.2 and the request for establishment of the Panel

10.4 The starting point for our analysis is Article 6.2 of the DSU, which provides in relevant part as follows:

"The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, *identify the specific measures at issue* and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. ... " (emphasis added).

10.5 The relevant part of the US request for the establishment of this Panel reads as follows:

"The Government of Japan has implemented and maintains laws, regulations, requirements and measures (collectively "measures") affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, including: liberalization countermeasures; distribution measures, such as, but not limited to, the cabinet decision, administrative guidance, and other measures listed in Attachment A; the Law Pertaining to the Adjustment of Business Activities of the Retail Industry for Large Scale Retail Stores, No. 109 of 1973 (*Daiten Ho*); Special Measures for the Adjustment of Retail Business; No. 1

tariff concessions that the Government of Japan made on black and white and colour consumer photographic film and paper in the Kennedy Round, Tokyo Round, and Uruguay Round multilateral tariff negotiations.

[Description of consultations omitted]

Accordingly, pursuant to Articles 4 and 6 of the DSU, the United States respectfully requests the establishment of a panel with standard terms of reference as set out in Article 7 of the DSU.

[Request for special meeting of DSB omitted]

ATTACHMENT A

- MITI, "Administrative Guidance to Promote Rationalization of Distribution System", 1966
- Cabinet Decision, "Liberalization of Foreign Investment", 6 June 1967.
- MITI Industrial Structure Council Distribution Subcommittee, "Distribution Systemization", 1969. (*Tsusansho Koho*, 13 and 14 August 1969).
- MITI Preparatory Survey, "The Actual State of Trade Practices in Photo Film", 1969.
- MITI, "Film Trade Normalization Guidelines", 1970.
- MITI, "Business Bureau Report on Film Prices", 1970.
- MITI, "Basic Plan for Distribution Systemization", 1971.
- MITI, "Manual for Systemization of Distribution", 1975.
- MITI, "Guidelines for Improving Business Practices", 1990.
- MITI and the Small and Medium Enterprises Agency, "Distribution Vision for the 21st Century", 1995 (and earlier versions for the 1970s, 1980s, and 1990s).
- Photo Industry Distribution Information Systemization Council [Kyogikai], "Comprehensive Manual for Photo Distribution Industry Distribution Information Systemization", 1996 (and 1989, 1990, 1991, and 1992 versions).
- Other related measures, including guidelines."¹¹⁷⁸

(b) Analysis of Article 6.2

10.6 We shall proceed with our analysis of the Japanese procedural objection in light of the interpretative rules of the Vienna Convention¹¹⁷⁹ and Article XVI of the WTO Agreement.¹¹⁸⁰ In this connection, we examine, as appropriate, (i) the ordinary meaning of the terms of Article 6.2; (ii) the context and the object and purpose of Article 6.2; and (iii)

¹¹⁷⁸WT/DS44/2.

¹¹⁷⁹The Appellate Body made clear in its first two decisions that under Article 3.2 of the DSU the starting point for the interpretation of WTO provisions is the Vienna Convention on the Law of Treaties. Article 31 of the Vienna Convention provides in relevant part as follows: "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 light of its object and purpose". See Appellate Body Report on *Japan - Taxes on Alcoholic Beverages* ("Japan - Alcoholic Beverages"), adopted on 1 November 1996, WT/DS8, 10 and 11/AB/R, pp. 10-12; Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline* ("US - Gasoline"), adopted on 20 May 1996, WT/DS2/AB/R, pp. 16-17.

¹¹⁸⁰

past practice under Article 6.2 and its predecessor provision.¹¹⁸¹

10.7 The portion of Article 6.2 relevant to the Japanese objection provides that "[t]he request for the establishment of a panel shall ... identify the specific measures at issue ...". Both parties agree, and our reading of the US panel request confirms, that this panel request does not explicitly identify the eight "measures" which are the subject of Japan's objection.

10.8 The question thus becomes whether the ordinary meaning of the terms of Article 6.2, i.e., that "the specific measures at issue" be identified in the panel request, can be met if a "measure" is not explicitly described in the request. To fall within the terms of Article 6.2, it seems clear that a "measure" not explicitly described in a panel request must have a clear relationship to a "measure" that is specifically described therein, so that it can be said to be "included" in the specified "measure". In our view, the requirements of Article 6.2 would be met in the case of a "measure" that is subsidiary or so closely related to a "measure" specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements -- close relationship and notice -- are inter-related: only if a "measure" is subsidiary or closely related to a specifically identified "measure" will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing "measures" is specified in a panel request, implementing "measures" might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing "measures". As explained below, this interpretation of Article 6.2 is consistent with the context and the object and purpose of Article 6.2, as well as past panel practice.

10.9 The *Bananas III* panel found that the object and purpose of Article 6.2's specificity requirement is to ensure clarity of panels' terms of reference, which pursuant to Article 7 of the DSU are typically determined by the panel request, and to inform the respondent and potential third parties of the scope of the complaining party's claims (i.e., the "measures" challenged and the WTO provisions invoked by the complaining party).¹¹⁸² So long as Article 6.2 is interpreted to require any "measure" challenged to be specified in the panel request or to be subsidiary or closely related to the specified "measures", the object and purpose of Article 6.2 are satisfied.

10.

implement, supplement and amend [the EC banana] regime". The *Bananas III* panel found that this reference was sufficient for the specificity requirement of Article 6.2 because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.¹¹⁸³ The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".¹¹⁸⁴ In our view, "measures" that are subsidiary or closely related to specified "measures" can be found to be "adequately identified" as that concept was applied in the *Bananas III* case.

10.11 The proposed interpretation is also consistent with other WTO/GATT cases dealing with terms-of-reference issues. In one such WTO case, a measure was found to be outside the terms of reference when it had not been mentioned at all in the panel request.¹¹⁸⁵ In a 1984 GATT case, a panel declined to examine any measures related to "manufacture" of goods in view of its terms of reference which "only refer to the purchase of goods in Canada and/or the export of goods from Canada".¹¹⁸⁶ Similarly, claims based on provisions of GATT or other agreements not mentioned in the panel request have also been found to be outside the terms of reference of the panel concerned.¹¹⁸⁷

(c) The eight "measures" in light of Article 6.2

10.12 We will now analyze the eight "measures" which are the subject of Japan's objection under Article 6.2 of the DSU. Bearing in mind our analysis of the text of Article 6.2 in accordance with the rules of treaty interpretation of the Vienna Convention, we believe that the eight "measures" at issue may be usefully divided into four categories.

10.13 In the first category we would include two measures which, although not specifically identified in the request for the establishment of the panel can, in our view, be viewed as subsidiary or closely related to the Premiums Law, which is specifically identified in the US panel request. These two measures are JFTC Notification No. 17 on premiums to business and JFTC Notification No. 5 on premiums to customers, both of which were issued pursuant to the Premiums Law and implement its general provisions. The content of these notifications is generally predetermined by the Premiums Law, which is itself a relatively focused statute, dealing in detail with one rather narrow subject matter. Article 1 of the Premiums Law specifies its purpose:

"This Law, in order to prevent inducement of customers by means of unjustifiable premiums and misleading representations in connection with transactions of a commodity or service ... aims to secure fair competition and thereby to protect the interests of consumers in general".¹¹⁸⁸

Article 3 of the Law authorizes the JFTC:

¹¹⁸³ *Bananas III*, WT/DS27/R, para. 7.27.

¹¹⁸⁴ *Bananas III*, WT/DS27/AB/R, para. 140.

¹¹⁸⁵ *Japan - Alcoholic Beverages*, para. 6.5. The panel request mentioned the Japan Liquor Tax Law; the additional measure was the Taxation Special Measures Law.

¹¹⁸⁶ Panel Report on *Canada - Administration of the Foreign Investment Review Act ("Canada - FIRA")*, adopted on 7 February 1984, BISD 30S/140, 158, para. 5.3. See also Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages ("US - Malt Beverages")*, adopted on 19 June 1992, BISD 39S/206, 226-228, paras. 3.1-3.5 (The panel did not consider unspecified "new measures which may come into effect during the Panel's deliberation").

¹¹⁸⁷ See, e.g., *Bananas III*, WT/DS27/R, para. 7.30; *Desiccated Coconut*, WT/DS22/R, para. 290; Panel Report on *United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128, 147-148, paras. 6.1-6.2.

¹¹⁸⁸ Law Against Unjustifiable Premiums and Misleading Representations, Law No. 134 of 15 May 1962, Japan, Ex. D-1.

reference would not normally be sufficient to put Japan on notice that these measures were a concern of the United States. In addition, we see no reason why, as suggested by the United States, the nature of these measures precluded their specification by the United States in the panel request. In our view, the International Contract Notification Requirement and JFTC Notification No. 34 on open lotteries (1971) are not subsidiary or closely related to a "measure" specified as being at issue in the panel request. Therefore, we find that these measures are not properly before this Panel.

10.17 In the fourth category we would place the three remaining "measures" which are the subject of Japan's procedural objection under Article 6.2 of the DSU. These three "measures" are clearly not related to any "measure" specifically identified in the panel request. This is the case for: JDB financing to Konica for joint distribution facilities; SMEA financing to photofinishing laboratories to enable them to buy new equipment for colour photofinishing; and the JFTC guidance on loss-leader advertising and dumping (1983).

10.18 In the case of the JDB and SMEA subsidies, the US position is that Japan had adequate notice of US claims relating to them because MITI's 1971 Basic Plan for the Systemization of Distribution, which was raised during consultations with Japan and figures in the "measures" listed in the panel request, makes reference to "positive support and guidance from the government" being necessary in relation to carrying out systemization. In our view, the relationship between these two "measures" and the 1971 Basic Plan is too tenuous to find that they are covered by the panel request. The timing of the "measures", which range from 1967 to 1976¹¹⁹⁰, does not seem connected to a 1971 plan. In addition, we agree with Japan that the phrase "positive support" in the Basic Plan does not necessarily refer to financial contributions and is too vague to constitute any meaningful notice to Japan that JDB and SMEA financing were covered by the panel request. Moreover, we see no reason why, as suggested by the United States, the nature of these "measures" precluded their specification by the United States. Therefore, we find that these "measures" are not properly before this Panel.

10.19 In respect of JFTC guidance on the establishment of rules on loss-leader advertising and dumping, we note that the procedural objection to this "measure" came in Japan's second submission, as a consequence of its inclusion in the US list of "measures" subject to claims, which was submitted by the United States following the first meeting in response to a panel question. It was therefore not the subject of detailed arguments by the parties, as were the other "measures". For our purposes, it is sufficient to note that this guidance, which is difficult to comprehend in any event and in part subject to a translation dispute, probably is not a measure for purposes of Article XXIII:1(b) and does not seem to be related at all to any "measure" listed in the panel request. Therefore, we find that this JFTC guidance is not properly before this Panel.

2. SUMMARY

10.20

10.21 We further find that the following "measures" fall outside our terms of reference and are not properly before this Panel:

1976 JDB financing to Konica for joint distribution facilities;
1967/1977 SMEA financing to photofinishing laboratories (to enable them to buy new equipment for colour photofinishing);
1971 JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement);
1971 JFTC Notification No. 34 on open lotteries; and
1983 JFTC guidance on the establishment of rules on loss-leader advertising and dumping.

B. CLAIMS OF THE PARTIES

10.22 The United States claims that through the application of three broad categories of liberalization "countermeasures"¹¹⁹¹ the Japanese Government for more than 30 years has inhibited the distribution and sale of imported consumer photographic film and paper¹¹⁹² in Japan. These three categories of "measures" cover: (1) distribution "measures", which allegedly encourage and facilitate the creation of a market structure for photographic film and paper in which imports are excluded from traditional distribution channels; (2) restrictions on large retail stores, which allegedly restrict the growth of an alternative distribution channel for imported film; and (3) promotion "measures", which allegedly disadvantage imports by restricting the use of sales promotion techniques.

10.23 In light of the foregoing ruling on Japan's procedural objection, the specific "measures" which are the subject of the US claims are set out below. Detailed descriptions of these "measures" are found in Part II.

Distribution "countermeasures"

- 1967 JFTC Notification 17 on Premiums to Businesses;
- 1967 Cabinet Decision on Liberalization of of Inward Direct Investment;
- 1968 Sixth Interim Report on "Distribution Modernization Outlook and Issues";
-

Restrictions on large retail stores

- 1974 Large Stores Law;
- 1979 Amendment to the Large Stores Law;

Promotion "countermeasures"

follow the sequence chosen by the parties in addressing the US claims. We shall therefore first address the US claims dealing with non-violation nullification or impairment under Article XXIII:1(b) and thereafter consider the US violation claims under Articles III:4 and X:1.

D. BURDEN OF PROOF

10.28 Given the nature of this factually complex dispute and particularly its claims of non-violation nullification or impairment in respect of 16 separate "measures", we consider that the resolution of issues relating to the proper allocation of the burden of proof is of particular importance.

10.29 We note that as in all cases under the WTO/GATT dispute settlement system - and, indeed, as the Appellate Body recently stated¹¹⁹⁵, under most systems of jurisprudence - it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence then shifts to the other party to rebut the presumption. The Appellate Body stated the principle succinctly as follows:

"In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.

In the context of the GATT 1994 and the WTO Agreement precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision and case to case".¹¹⁹⁶

Thus, in this case, it will be for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it will be for Japan to adduce sufficient evidence to rebut any such presumption.

10.30 In a case of non-violation nullification or impairment pursuant to Article XXIII:1(b), Article 26.1(a) of the DSU and GATT jurisprudence confirm that this is an exceptional remedy for which the complaining party bears the burden of providing a *detailed justification* to back up its allegations. Specifically, Article 26.1 of the DSU provides in relevant part:

"Where and to the extent that such party considers and a panel or the

¹¹⁹⁵See Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* ("US - Wool Shirts and Blouses"), adopted on 23 May 1997, WT/DS33/AB/R, p. 14.

¹¹⁹⁶Idem (footnotes omitted).

Appellate Body determines that a case concerns a measure that does not conflict with the provisions of a covered agreement to which the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable, the procedures in this Understanding shall apply, subject to the following:

- (a) *the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement ...* (emphasis added).

10.31 This DSU requirement had previously been codified in the *Annex to the 1979 Understanding on Dispute Settlement* in a virtually identical form.¹¹⁹⁷ This requirement has been recognized and applied by a number of GATT panels. For example, the panel on *Uruguayan Recourse to Article XXIII* noted that in cases

"where there is no infringement of GATT provisions, it would be ... incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article".¹¹⁹⁸

And the panel on *US - Agricultural Waiver* noted, in applying the 1979 codification of this rule:

"The party bringing a complaint under [Article XXIII:1(b)] would normally be expected to explain in detail that benefits accruing to it under a tariff concession have been nullified or impaired".¹¹⁹⁹

10.32 Consistent with the explicit terms of the DSU and established WTO/GATT jurisprudence, and recalling the Appellate Body ruling that "precisely how much and precisely what kind of evidence will be required to establish ... a presumption [that what is claimed is true] will necessarily vary from ... provision to provision", we thus consider that the United States, with respect to its claim of non-violation nullification or impairment under Article XXIII:1(b), bears the burden of providing a detailed justification for its claim in order to establish a presumption that what is claimed is true. It will be for Japan to rebut any such presumption.

¹¹⁹⁷See *Annex to the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance* ("*Annex to the 1979 Understanding on Dispute Settlement*"), adopted on 28 November 1979, BISD 26S/210, 216.

¹¹⁹⁸Panel Report on *Uruguayan Recourse to Article XXIII* ("*Uruguayan Recourse*"), adopted on 16 November 1962, BISD 11S/95, 100, para. 15.

¹¹⁹⁹Panel Report on *United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions* ("*US - Agricultural Waiver*"), adopted on 7 November 1990, 37S/228, 261-262, paras. 5.20-5.23, quoting para. 5.21. See also *Japan - Trade in Semi-conductors* ("*Japan - Semi-conductors*"), adopted on 4 May 1988, BISD 35S/116, 161, para. 131.

E. ARTICLE XXIII:1(B) - NON-VIOLATION NULLIFICATION OR IMPAIRMENT

10.33 We recall the US claim under Article XXIII:1(b) that specific "measures" of the Government of Japan -- eight distribution "countermeasures", two restrictions on large retail stores, and eight promotion "countermeasures" -- individually and in combination nullify or impair benefits accruing to the United States stemming from tariff concessions made by Japan on black and white and colour photographic film and paper at the end of three successive multilateral rounds of trade negotiations -- the Kennedy Round, the Tokyo Round and the Uruguay Round.¹²⁰⁰

10.34 We shall proceed with our analysis of this US claim, examining as appropriate the ordinary meaning of the terms of Article XXIII:1(b), their context and the object and purpose of Article XXIII:1(b), and past GATT practice under Article XXIII:1(b).¹²⁰¹

1. OVERVIEW OF THE NON-VIOLATION REMEDY

10.35 The underlying purpose of Article XXIII:1(b) was cogently explained by the panel on *EEC - Oilseeds*:

"The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement".¹²⁰²

...

"The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations".

parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.¹²⁰⁵ The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.

10.37 While we consider that the non-violation remedy should be approached with caution and should remain an exceptional remedy, each case should be examined on its own merits, bearing in mind the above-mentioned need to safeguard the process of negotiating reciprocal tariff concessions. Our role as a panel charged with examining claims under Article XXIII:1(b) is, therefore, to make an objective assessment of whether, in light of all the relevant facts and circumstances in the matter before us, particular measures taken by Japan have nullified or impaired benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.38 In GATT jurisprudence, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for the producer of a product has been introduced or modified following the grant of a tariff concession on that product.¹²⁰⁶ The instant case presents a different sort of non-violation claim. At the outset, however, we wish to make clear that we do not *a priori* consider it inappropriate to apply the Article XXIII:1(b) remedy to other governmental actions, such as those designed to strengthen the competitiveness of certain distribution or industrial sectors through non-financial assistance. Whether assistance is financial or non-financial, direct or indirect, does not determine whether its effect may offset the expected result of tariff negotiations. Thus, a Member's industrial policy, pursuing the goal of increasing efficiency in a sector, could in some circumstances upset the competitive relationship in the market place between domestic and imported products in a way that could give rise to a cause of action under Article XXIII:1(b). In the context of a Member's distribution system, for example, it is conceivable that measures that do not infringe GATT rules could be implemented in a manner that effectively results in a disproportionate impact on market conditions for imported products. In this regard, however, we must also bear in mind that tariff concessions have never been viewed as creating a guarantee of trade volumes, but rather, as explained below, as creating expectations as to competitive relationships.

BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines* ("*Germany - Sardines*"), G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC - Citrus Products*"), GATT Doc. L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC - Canned Fruit*"), GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

¹²⁰⁵In *EEC - Oilseeds*, the United States stated that it "concurred in the proposition that non-violation nullification or impairment should remain an exceptional concept. Although this concept had been in the text of Article XXIII of the General Agreement from the outset, a cautious approach should continue to be taken in applying the concept". *EEC - Oilseeds*, BISD 37S/86, 118, para. 114. The EEC in that case stated that "recourse to the 'non-violation' concept under Article XXIII:1(b) should remain exceptional, since otherwise the trading world would be plunged into a state of precariousness and uncertainty". *Ibid*, para. 113.

¹²⁰⁶See *Australian Subsidy on Ammonium Sulphate*, BISD II/188; Working Party Report on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, 224, para. 13; Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201, 209, para. 28; *EEC - Canned Fruit*, GATT Doc. L/5778 (unadopted); *EEC - Oilseeds*, BISD 37S/86.

10.39 The United States has presented much evidence on the structure of the Japanese market for film. In considering the US claims, we note that the issue is not whether or not the structure described by the United States in fact exists, but rather whether measures attributable to the Government of Japan have contributed to the creation or maintenance of that structure in a way that nullifies or impairs benefits accruing to the United States within the terms of Article XXIII:1(b).

10.40 While acknowledging the possible application of Article XXIII:1(b) in this context, we also note that there are some unusual features to the case before us. Many of the cited "measures" go back a long way in time and their current status is not always clear. Moreover, many of them are, on their face, neutral as to the origin of products. These features may make it more difficult to present a detailed justification in support of non-violation claims.

2. THREE REQUIRED ELEMENTS

10.41 We now return to our more detailed examination of the scope of Article XXIII:1(b). Article XXIII:1(b) provides in relevant part:

"If any Member should consider that any *benefit* accruing to it directly or indirectly under this Agreement is being *nullified or impaired* ... as the result of ... (b) the *application* by another Member of any

(i) General considerations

10.43 The ordinary meaning of *measure* as it is used in Article XXIII:1(b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments.¹²⁰⁸ At the same time, it is also true that not every utterance by a government official or study prepared by a non-governmental body at the request of the government or with some degree of government support can be viewed as a measure of a Member government.

10.44 In Japan, it is accepted that the government sometimes acts through what is referred to as administrative guidance. In such a case, the company receiving guidance from the Government of Japan may not be legally bound to act in accordance with it, but compliance may be expected in light of the power of the government and a system of government incentives and disincentives arising from the wide array of government activities and involvement in the Japanese economy. As noted by the parties, administrative guidance in Japan takes various forms. Japan, for example, refers to what it calls "regulatory administrative guidance", which it concedes effectively substitutes for formal government action.¹²⁰⁹ It also refers to promotional administrative guidance, where companies are urged to do things that are in their interest to do in any event. In Japan's view, this sort of guidance should not be assimilated to a measure in the sense of Article XXIII:1(b). For our purposes, these categories inform, but do not determine the issue before us. Thus, it is not useful for us to try to place specific instances of administrative guidance into one general category or another. It will be necessary for us, as it has been for GATT panels in the past, to examine each alleged "measure" to see whether it has the particular attributes required of a measure for Article XXIII:1(b) purposes.

10.45 Our review of GATT jurisprudence, particularly the panel report on *Japan - Semiconductors*, teaches that where administrative guidance creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner, it may be considered a governmental measure.¹²¹⁰ In that case, the panel found that although a measure was not mandatory, it could be considered a *restriction* subject to

method used to enforce certain measures, the panel found that:

"the practice of 'administrative guidance' played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the *effectiveness of the measures* in spite of the initial lack of transparency".¹²¹³

In line with this observation of the *Japan - Agricultural Products* panel, we consider that our analysis of the alleged "measures" in this case must proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.

10.47 In this case, Japan argues that measures for purposes of Article XXIII:1(b) must either provide benefits or impose obligations, and that to impose obligations the measure must be a government policy or action which imposes legally binding obligations or the substantive equivalent. The US position is that the term measure in Article XXIII:1(b) should not be limited to refer only to legally binding obligations or their substantive equivalent. It argues in favour of a more encompassing definition of the term.

10.48 Recalling the criteria applied in *Japan - Semi-conductors* for determining whether or not a formally non-binding measure should be assimilated to a governmental restriction under Article XI:1, i.e., that administrative guidance must create incentives or disincentives to act and compliance with the guidance must depend largely on governmental action, we consider that these criteria would certainly also lend themselves satisfactorily to the definition of the term *measure* under Article XXIII:1(b). However, we note that there is nothing in *Japan - Semi-conductors* suggesting that this incentives/disincentives test should be seen as the exclusive test for characterizing formally non-binding measures as governmental. We consider, therefore, that *Japan - Semi-conductors* should not be seen as setting forth the exclusive test or outer limit of what may be considered to constitute a measure under Article XXIII:1(b).

10.49 In particular, we are not persuaded that the definition proposed by Japan, i.e., that a measure must provide a benefit or impose a legally binding obligation or its substantive equivalent, should circumscribe what may constitute a measure within the meaning of Article XXIII:1(b). In our view, a government policy or action need not necessarily have a substantially binding or compulsory nature for it to entail a likelihood of compliance by private actors in a way so as to nullify or impair legitimately expected benefits within the purview of Article XXIII:1(b). Indeed, it is clear that non-binding actions, which include sufficient incentives or disincentives for private parties to act in a particular manner, can potentially have adverse effects on competitive conditions of market access. For example, a number of non-violation cases have involved subsidies, receipt of which requires only voluntary compliance with eligibility criteria. Moreover, we also consider it conceivable, in cases where there is a high degree of cooperation and collaboration between government and business, e.g., where there is substantial reliance on administrative guidance and other more informal forms of government-business cooperation, that even non-binding, hortatory wording in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance. Consequently, we believe we should be open to a broad definition of the term *measure* for purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one.

¹²¹³Ibid (emphasis added).

10.50 We reach this conclusion in considering the purpose of Article XXIII:1(b), which is to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member's legitimate expectations of benefits from tariff negotiations.¹²¹⁴ To achieve this purpose, in our view, it is important that the kinds of government actions considered to be measures covered by Article XXIII:1(b) should not be defined in an unduly restrictive manner. Otherwise, there is the risk of cases, in which governments have been involved one way or another in the nullification or impairment of benefits, that will not be redressable under Article XXIII:1(b), thereby preventing the achievement of its purpose. We would stress, however, that giving a broad definition to *measure* does not expand the scope of the Article XXIII:1(b) remedy because it remains incumbent on the complaining Member to clearly demonstrate how the measure at issue results in or causes nullification or impairment of benefits, and as explained below, in the final analysis the responding Member's government is only responsible for what it has itself caused.

10.51 Finally on the subject of what may constitute a governmental measure, we note the analysis of several GATT panels dealing with the related issue of what may constitute "all laws, regulations and requirements affecting ... internal sale, offering for sale, purchase, transportation, distribution or use" under GATT Article III:4. In these cases, the conclusion that there is a law, regulation or requirement that exists and violates GATT rules gives rise to a presumption of nullification or impairment. Even so, panels have taken a broad view of when a governmental action is a law, regulation or requirement. For example, in 1984 a panel examined written purchase and export undertakings under the Foreign Investment Review Act of Canada (FIRA), submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. These written undertakings were considered legally binding under FIRA. The panel determined that the undertakings were to be considered "laws, regulations or requirements" within the meaning of Article III:4, even though FIRA did not make their submission obligatory.¹²¹⁵ Similarly, the panel on *EEC -- Parts and Components* considered that the term "laws, regulations or requirements" included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government."¹²¹⁶ Given that the scope of the term *requirement*

(ii) Governmental versus private actions

10.52 As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But while this "truth" may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.

10.53 One GATT study in 1960, examining the question of whether subsidies financed by non-governmental levy were notifiable under Article XVI, expressed the view that "the question ... depends upon the source of the funds and the extent of government action, if any, in their collection".¹²¹⁷

10.54 In *Japan - Semi-conductors*

(iii) Measure versus continuing effect

10.57 The text of Article XXIII:1(b) is written in the present tense, viz. "If any Member should consider that any benefit *accruing* to it directly or indirectly under this Agreement is being nullified or impaired ... as the result of ... (b) the application by another Member of any measure, whether or not it *conflicts* with the provisions of this Agreement". It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, "whether or not it conflicts" (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.

10.58 Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on measures which have expired or which have been repealed or withdrawn.¹²²¹ In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.¹²²²

10.59 We note that the parties to the dispute do not disagree on the fundamental point that only a measure that continues to be applied, and not the market structure which may or may not result from the application of such measure, may be the basis for a cognizable claim under GATT Article XXIII:1(b). On the other hand, we note that the parties disagree as to whether or not certain of the "measures" at issue are still in effect. Whereas Japan argues that most of the "measures" ended years ago and thus are not currently actionable, the United States contends that at most two "measures" were formally repealed and that, in any case, all the policies underlying the "measures" continue today in the form of "continuing administrative guidance". Given the significance of the principle of continued application of measures to the interpretation of Article XXIII:1(b), we shall need to give particularly careful analysis -- in examining the individual "measures" -- to the evidence relating to such alleged continuing administrative guidance. At this stage, suffice it to say that we do not rule out the possibility that *old* "measures" that were never officially revoked may continue to be applied through continuing administrative guidance. Similarly, even if measures were officially revoked, the underlying policies may continue to be applied through continuing administrative guidance. However, the burden is on the United States to demonstrate clearly that such guidance does in fact exist and that it is currently nullifying or impairing benefits.

¹²²¹See *US - Gasoline* WT/DS2/R, para. 6.19, where the panel observed that "it had not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the panel's terms of reference were fixed, were not and would not become effective". See also Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, circulated on 25 November 1997, pp. 84-86.

¹²²²See, e.g., Panel Report on *US - Wool Shirts and Blouses*, WT/DS33/R, upheld by the Appellate Body, WT/DS33/AB/R, where the panel ruled on a measure that was revoked after the interim review but before issuance of the final report to the parties; Panel Report on *EEC - Measure on Animal Feed Proteins*, adopted on 14 March 1992, BISD 25S/49, where the panel ruled on a discontinued measure, but one that had terminated after the terms of reference of the panel had already been agreed; Panel Report on *United States - Prohibitions on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, 106, para. 4.3., where the panel ruled on the GATT consistency of a withdrawn measure but only in light of the two parties' agreement to this procedure; Panel Report on *EEC - Restrictions on Imports of Apples from Chile*, adopted on 10 November 1980, BISD 27S/98, where the panel ruled on a measure which had terminated before agreement on the panel's terms of reference but where the terms of reference specifically included the terminated measure and, given its seasonal nature, there remained the prospect of its reintroduction.

(iv) Summary

10.60 In examining the non-violation claims in this case, we consider it important to approach the issue of whether the "measures" in dispute are private or attributable to the Government of Japan with particular care, especially in light of the strong disagreement between the parties as to the nature of certain of these "measures". We are also sensitive to the possibility that at times it may not be possible to distinguish with great precision a bright-line test of a measure. Recalling the considerations outlined in paragraphs 10.48 to 10.50 above, we will take an expansive view of what constitutes a measure, bearing in mind that the United States must, in any event, demonstrate that the measure does in fact result in nullification or impairment of expected benefits.

(b) Benefit accruing under the GATT

10.61 The second required element which must be considered to establish a case of non-violation nullification or impairment under Article XXIII:1(b) is the existence of a benefit accruing to a WTO Member under the relevant agreement (in this case, GATT 1994). In all but one of the past GATT cases dealing with Article XXIII:1(b) claims, the claimed benefit has been that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions.¹²²³ This same set of GATT precedents suggests that for expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession.¹²²⁴

Of course, as with the first element (application of a measure), the complaining party has the burden of demonstrating the "benefit accruing".

10.62 In the particular case before us, the question of legitimate expectations of benefits accruing to the United States is complicated by the fact that the United States is claiming to have had expectations of improved market access benefits in respect of four different products (each under a different tariff line), granted during three successive rounds of multilateral trade negotiations. This claim raises two general issues. First, may the benefits legitimately expected by a Member derive from successive rounds of tariff negotiations? Second, what factors should be considered to determine if a Member should have reasonably anticipated measures that it claims nullified or impaired benefits?

¹²²³*Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; *Germany - Sardines*, adopted on 31 October 1952, BISD 1S/53; Panel Report on *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; *EC - Citrus Products*, GATT Doc. L/5776, dated 7 February 1985 (unadopted); *EEC - Canned Fruit*, GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *US - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228. Only in *EC - Citrus Products* did the complaining party claim that the benefit denied was not improved market access from tariff concessions granted under GATT Article II, but rather GATT Article I:1 ("most-favoured-nation") treatment with respect to unbound tariff preferences granted by the EC to certain Mediterranean countries.

¹²²⁴See, e.g., *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 193-194; *Germany - Sardines*, BISD 1S/53, 58-59; *EEC - Oilseeds*, BISD 37S/86, 126-129.

(i) Benefits under successive Rounds

10.63 The United States claims to have had reasonable expectations of benefits accruing to it under Article XXIII:1(b) as the result of tariff concessions granted by Japan on black and white film and paper during the Kennedy Round (1967), on colour and black and white film and paper during the Tokyo Round (1979) and on colour and black and white film and paper during the Uruguay Round (1994). Japan argues that the reasonable expectations of the United States must be limited to those existing in 1994 at the conclusion of the Uruguay Round in that these latter expectations reflected a new balance and global reassessment of the value of market access concessions, replacing any reasonable expectations that may have arisen under prior tariff negotiations.

10.64 Two provisions of GATT 1994 (sub-paragraphs (b)(i) and (d) of paragraph 1) appear to us to be relevant to the resolution of this matter. The text of GATT 1994 provides in relevant part:

"1. The General Agreement on Tariffs and Trade 1994 ('GATT 1994') shall consist of:

(a) the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947, ...

(b) the provisions of the legal instruments set forth below that have entered into force under the GATT 1947 before the date of entry into force of the WTO Agreement:

(i) protocols and certifications relating to tariff concessions;

...
(d) the Marrakesh Protocol to GATT 1994".

As referenced in the quoted text -- also known as the GATT 1994 incorporation clause -- GATT 1994 incorporates both "protocols and certifications relating to tariff concessions" under paragraph 1(b)(i) and "the Marrakesh Protocol to GATT 1994" under paragraph 1(d). The ordinary meaning of the text of paragraphs 1(b)(i) and 1(d) of GATT 1994, read together, clearly suggests that all protocols relating to tariff concessions, both those predating the Uruguay Round and the Marrakesh Protocol to GATT 1994, are incorporated into GATT 1994 and continue to have legal existence under the WTO Agreement.

10.65 Japan appears to argue that the Schedules annexed to the Marrakesh Protocol prevail as a later agreement over Schedules that entered into force under GATT 1947. In our view, such an interpretation would only make sense if the Marrakesh Protocol, referred to in paragraph 1(d) of GATT 1994, were viewed as later in time than the protocols referred to in paragraph 1(b)(i) thereof, and then, only to the extent of any conflict between tariff concessions annexed to the Marrakesh Protocol and the concessions in the other tariff protocols incorporated in GATT 1994. We consider that, as argued by the United States, Article 30 of the Vienna Convention¹²²⁵, which is designed to resolve conflicts between provisions of successive treaties on the same subject matter, is not applicable to the situation at hand because there is nothing inherently incompatible -- in conflict -- between

¹²²⁵Article 30 of the Vienna Convention, entitled "Application of successive treaties relating to the same subject-matter", provides in relevant part: "... 3. When all the parties to the earlier treaty are parties to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

the earlier and later agreed tariff concessions. Such a conflict would only seem to exist if the subsequent concessions were less favourable than prior concessions, which is not the situation in this case. Where tariff concessions have been progressively improved, the benefits -- expectations of improved market access -- accruing directly or indirectly under different tariff concession protocols incorporated in GATT 1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US - Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.¹²²⁶

10.66 The conclusion that benefits accruing from concessions granted during successive rounds of tariff negotiations may separately give rise to reasonable expectations of improved market access is consistent with past panel reports.¹²²⁷ The panel in *EEC - Canned Fruit* found that the United States had a reasonable expectation arising from the EEC's 1974 tariff concessions pursuant to Article XXIV:6 negotiations and 1979 Tokyo Round tariff concessions (even though the panel separately found that the United States could have anticipated certain subsidies in respect of the Tokyo Round tariff concessions).¹²²⁸ And the *EEC - Oilseeds* panel found that the United States had a reasonable expectation arising from the EEC's 1962 Dillon Round tariff concessions.¹²²⁹ As the United States points out, these findings would not have been possible if subsequent multilateral tariff agreements or enlargement agreements were deemed to extinguish wholesale the tariff concessions in prior tariff schedules.

10.67 The following quotation from the *EEC - Oilseeds* panel report appears to us to be particularly on point:

"In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the

10.68 The fact that the *EEC - Oilseeds* case (and the unadopted *EEC - Canned Fruit* case as well) dealt with renegotiation of tariff concessions under Article XXIV:6 as opposed to Article XXVIII or Article XXVIII*bis* does not, in our view, undermine the relevance of the above finding to the case at hand. This is because the Article XXIV:6 procedure is simply a means permitting a WTO Member, which has entered into a customs union and which proposes to increase a rate of duty above bound levels, to modify or withdraw that concession under the procedures of Article XXVIII.¹²³¹ The panel in *EEC - Oilseeds* found that there was, effectively, no modification or withdrawal of tariff concessions under Article XXIV:6 -- and no new balance of concessions achieved, i.e., "the balance of concessions negotiated in 1962 ... was not altered" -- even though the tariff bindings on oilseeds had been withdrawn and reinstated intact.

10.69 We note that Article XXVIII may be invoked under specifically defined circumstances to modify or withdraw concessions. And, as noted above, Article XXIV:6 permits Members which have entered into customs unions to modify or withdraw those concessions under the procedures of Article XXVIII. Article XXVIII*bis*, in contrast, which provides a legal basis for Members to reduce and bind tariffs on a mutually advantageous (i.e. multilateral) basis, as a general rule does not provide a means to modify or withdraw tariff concessions.¹²³²

10.70 We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIII*bis* negotiations. Nevertheless, the establishment of a case based on expectations from rounds concluded 18 or 30 years ago may be difficult. The

(ii) Legitimate expectations of a benefit

10.72 The text of Article XXIII:1(b) simply refers to "a benefit accruing, directly or indirectly, under this Agreement" and does not further define or explain what benefits are referred to. Past GATT panel reports have considered that such benefits include those that a Member reasonably expects to obtain from a tariff negotiation.

10.73 The first GATT report analysing Article XXIII:1(b) was the 1950 Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*. The Working Party found that the withdrawal by Australia of a wartime subsidy on sodium nitrate fertilizer while

or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned".¹²³⁶

A 1961 report, citing the foregoing paragraph, stated:

"In this connexion it was noted that the expression 'reasonable expectation' was qualified by the words 'failing evidence to the contrary'. By this the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then

impairment caused by these measures.

10.77 Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan. In the case before us, there is disagreement between the parties on this issue of reasonable anticipation with respect to each and every "measure" claimed by the United States to nullify and impair benefits accruing to it under GATT.

example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds)

complex areas of our examination. In this connection, we note that in the three prior non-violation cases in which panels found that the complaining parties had failed to provide a detailed justification to support their claims, the issue turned primarily on the lack of evidence of causality.¹²⁴² Four issues related to causation merit general discussion. First, the question of the degree of causation that must be shown -- "but for" or less. Second, the relevance of the origin-neutral nature of a measure to causation of nullification or impairment. Third, the relevance of intent to causality. And fourth, the extent to which measures may be considered collectively in an analysis of causation.

10.84 As to the first issue, the United States argues that it need not show that the measures in issue are a "*but for*" cause of impairment of market-access conditions for imported film and paper, but that it need only demonstrate that these measures are "*a*" cause of such distortion. Japan argues that a clear linkage between the measure at issue and the alleged nullification or impairment must be proved by the complaining party in order to establish the necessary causal connection. Specifically, Japan states that the issue is whether the complaining party has provided a "detailed justification" in support of its claim that a measure has caused nullification or impairment. In our view, Japan should be responsible for what is caused by measures attributable to the Japanese Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.

10.85 In respect of the second issue, Japan argues that all of the accused "measures" are neutral as to origin of the goods, none of them distinguishing between the imported and domestic products concerned, and that there is accordingly no causal connection between the alleged "measures", individually or collectively, and any unfavourable competitive conditions for imported film and paper. The United States responds that the "measures" at issue have had a disparate impact on imported products in their application, thereby upsetting competitive conditions of market access for imported film and paper. In our view, even in the absence of *de jure* discrimination (measures which on their face discriminate as to origin), it may be possible for the United States to show *de facto* discrimination (measures which have a disparate impact on imports). However, in such circumstances, the complaining party is called upon to make a detailed showing of any claimed disproportionate impact on imports resulting from the origin-neutral measure. And, the burden of demonstrating such impact may be significantly more difficult where the relationship between the measure and the product is questionable.

10.86 We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I¹²⁴³ and in regard to that of national treatment under GATT Article III.¹²⁴⁴ The consistent focus of GATT and WTO panels on ensuring effective equality of competitive opportunities between imported products from different countries and between imported and domestic products has been confirmed by the Appellate Body in

Uruguay Recourse, BISD 11S/95, 100, para. 15; *Japan - Semi-conductors*, BISD 35S/116, 161, para. 131; *US - Agricultural Waiver*, BISD 37S/228, 261-62, paras. 5.20-5.23.

¹²⁴³See, e.g., Panel Report on *European Economic Community - Imports of Beef from Canada*, adopted on 10 March 1981, BISD 28S/92, 98, paras. 4.2, 4.3.

¹²⁴⁴See Panel reports on *United States - Section 337 of the Tariff Act of 1930* ("*US - Section 337*"), adopted on 7 November 1989, BISD 36S/345, para. 5.11; *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, para. 5.30; *US - Gasoline*, WT/DS2/R, para. 6.10; *Japan - Alcoholic Beverages*, WT/DS8/R, para. 6.33 and *Bananas III*, WT/DS27/R/ECU, paras. 7.179-7.180.

its reports on *Japan - Alcoholic Beverages*¹²⁴⁵ and most recently in *Bananas III*¹²⁴⁶, with respect to both GATT and GATS non-discrimination rules. We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.¹²⁴⁷

10.87 The third issue is the relevance of intent to causality. The parties disagree in many cases whether the intent behind a specific measure is to limit imports or to promote an unrelated policy goal. From our reading of the measures and consideration of the parties'

3. DISTRIBUTION "MEASURES"

(a) General

10.90 The US case against distribution "measures" may best be understood in the context of the general theme advanced by the United States to the effect that there exists in Japan a unique relationship between government and industry. The US argument is that for Japan to develop and implement its industrial policy, the government relies heavily on different types of quasi-governmental entities, including, *inter alia*, fair trade councils, advisory committees, study groups, research institutes, and chambers of commerce. The US position is that the participation of these entities in the "concerted adjustment" process increases the "peer pressure" on these entities to comply with the industrial policies adopted by the government.

10.91 In Japan's view, the United States relies on a distorted characterization of the Japanese system by attempting to lump all forms of government-industry cooperation, as well as administrative guidance, into one catch-all category of informal but binding regulations. Japan's position is that each "measure" should be examined on its own merit without any preconceived prejudice of a so-called "unique" Japanese system.

10.92 The United States argues that when the liberalization of international trading conditions became imminent, MITI and Japanese industry recognized the superiority of foreign firms which could create serious competition for Japanese manufacturers and their products. MITI and Japanese manufacturers, it is argued, consequently devised a plan to streamline Japan's distribution system in order to bring it under the control of domestic producers. The basic US position is that MITI sought to strengthen vertical distribution channels that would handle the products of a particular domestic manufacturer exclusively.

10.93 As noted above (para. 10.23), the United States claims that Japan's application of the following eight distribution "measures" encouraged and facilitated the creation of a market structure for photographic film and paper in Japan in which imports are excluded from traditional distribution channels, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b):¹²⁴⁸

the application of a measure; (ii) the existence of a benefit accruing to the United States; and (iii) the nullification or impairment of that benefit by the measure (causality).

(b) 1967 Cabinet Decision

10.95 The first distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Japanese Cabinet Decision on Liberalization of Inward Direct Investment of 6 June 1967 ("1967 Cabinet Decision")¹²⁴⁹. The Cabinet Decision gave three points as

"the basic direction of the countermeasures that the government should adopt ... : (1) prevent disorder that may arise from the advancement of foreign capital; (2) create the foundation to enable our enterprises to compete with foreign enterprises on equal terms; and (3) actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital".¹²⁵⁰

10.96 The United States asserts that this Cabinet Decision was a "watershed" in Japan's efforts to restructure Japanese industry to resist imminent foreign competition following capital liberalization in the 1960s, establishing a clear national priority to pursue distribution policies aimed at protecting domestic manufacturers from foreign competition. According to the United States, this decision formally endorsed the use of "countermeasures" to offset the effects of liberalization, making the protection of Japanese markets from foreign competition a high national priority. The decision further allegedly emphasized that the distribution sector was a key area for renovation and improvement so as to support the production sector, using a concerted industry-government approach.

10.97 Japan responds that the 1967 Cabinet Decision, which implemented the first stage of capital liberalization, was concerned generally with modernization and improved efficiency in the Japanese distribution sector so as to permit domestic industries to compete with foreign rivals in the new, less regulated business environment.

10.98 *Application of measure.* Although there can be little doubt that the 1967 Cabinet Decision as a whole constitutes a measure, within the meaning of Article XXIII:1(b), we note that the part of the decision addressing modernization of the Japanese distribution system is more in the nature of a general policy statement than either a decision on particular government actions or a mandate to private industry to follow governmental policy by taking specific actions. We further note that the parties differ on the issue of whether or not this measure is still in effect. While Japan submits and the United States concedes that the 1967 Cabinet Decision was repealed on 26 December 1980, the United States argues that the repeal affects only that portion of the 1967 Cabinet Decision relating to controls on international investment in Japan, not the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision. In reply, Japan indicates that it is impossible to respond adequately to this contention because the United States does not specify which measures it believes resulted from the 1967 Cabinet Decision, and that in any case any measures not specifically identified are not properly before this Panel.

10.99 Reviewing the 1967 Cabinet Decision, we note that it addresses, in general terms, broad categories of measures which the Japanese Government considered as needing to be

¹²⁴⁹US Ex. 67-6. It should be noted that the 1967 Cabinet Decision is also cited by the United States as a promotion "countermeasure".

¹²⁵⁰Ibid, p.4.

taken in conjunction with the liberalization of direct investment rules. The decision indicates that

"[a]s for our national economy as liberalization progresses, although foreign capital may advance into many of our industries, it is hoped that our firms will be able to compete fairly and effectively with them fairly and cooperate with them on equal terms, thereby promoting national economic interests. The largest future goal of the people, business circles and government must be the swift attainment of such a stage by our national economy. ... [I]t would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control. ... The establishment of these countermeasures for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits".¹²⁵¹

10.100 By its terms, the Cabinet Decision of 26 December 1980 abolishes the 1967 Cabinet Decision.¹²⁵² However, although there can be no doubt that the 1967 Cabinet Decision has been abolished, it is not clear to us that the broad policies on modernization of the manufacturing and distribution sectors outlined in the 1967 Cabinet Decision have been

expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have

later actions taken by the Government of Japan.

10.106 Thus, while the 1967 Cabinet Decision may still be viewed as a measure for purposes of Article XXIII:1(b) and the United States is not charged with having anticipated the measure prior to the conclusion of the Kennedy Round, the United States should have anticipated the Decision as of the conclusion of the Tokyo and Uruguay Rounds. Moreover, the United States has not shown that the measure nullifies or impairs benefits accruing to it from the Kennedy Round in respect of black and white film and paper, nor from the Tokyo or Uruguay Rounds in terms of black and white and colour film and paper.

(c) 1967 JFTC Notification 17 on premiums to businesses

10.107 The second distribution "measure" we shall examine is JFTC Notification 17 of 10

JFTC Notification 17 itself was also not specifically identified in the panel request, but that we decided to include it within our terms of reference given that it was a measure taken pursuant to the Premiums Law which was specifically identified in the request. JFTC Notification 15 of 1982, in contrast, is a measure taken pursuant to Article 2.9 of the Antimonopoly Law of 1947. While the Antimonopoly Law was cited in the panel request, it was cited only in respect of a "measure" relating to dispatched employees. Consequently, we found that "measures" unrelated to dispatched employees (i.e., measures relating to international contract notification and to guidance on loss-leader advertising and dumping) were not within our terms of reference. That finding suggests that we should also not consider Designation 9 of JFTC Notification 15 to be within our terms of reference.

were not able to invest in their own distribution networks until the 1970s when investment restrictions were progressively lifted. Thus, foreign enterprises had to compete with Japanese manufacturers for existing wholesalers and distributors to carry their products. JFTC Notification 17 limited the ability of foreign enterprises to outbid Japanese enterprises in the competition for Japanese distributors by setting an arbitrarily low ceiling on the amount of premiums that a manufacturer could give to a wholesaler or retailer in any one year. In addition, the United States argues that foreign manufacturers, which had no direct relationships with Japanese wholesalers because of Japan's requirement that they deal with a sole import agent, were prohibited from availing themselves of the exception under Item 2-4 of the JFTC Notification 17 which permitted the offering of unlimited premiums to the employees of enterprises that were in exclusive, vertically-integrated relationships with the manufacturer.

10.113 Japan responds that JFTC Notification 17 did not single out the photographic materials industry: more than 100 industries were covered. In any event, the regulation only restricted excessive premium offers to distributors, not other promotional activities. The rationale for the restriction was that excessive offers could impair fair and free price competition in the distribution sector and could increase the distribution cost to the detriment of consumer interests. Low price offers, rebates and offers of goods to assist the other parties' promotional activities were not regulated under this JFTC notification. Japan also argues that the United States misconstrues the nature of the exception found in Item 2-4. Premiums offered to employees of companies which were in a special relationship, through share holdings or interlocking directorates, with the manufacturer, did not fall under the regulation, because they were no different than premiums offered to one's own employees. The exception applied only to transactions which were virtually identical to operations within a single entity. Fuji and its primary wholesalers were not eligible because they were not in such a special relationship. Finally, as to the US arguments on investment restrictions, Japan responds that during the period before capital liberalization, if Kodak had wanted to use investments to establish and build relationships with any single-brand primary wholesalers it could have done so. According to Japan, Kodak's exclusive importer, Nagase, could and did invest in distribution by buying two primary wholesalers; it could have legally made equity investments in Fuji's primary wholesalers if it had wanted to. For Japan, US arguments about capital restrictions interfering with Kodak's business plans makes no sense because Kodak exercised virtually none of its legal options during the period of restrictions on investments or even after such restrictions were lifted.

10.114 Assessing the issue of impairment and causality, we note that JFTC Notification 17 appears to be directed at promotional activities with regard equally to domestic and foreign products. It is not specifically aimed at imports, nor does it specifically target film and paper, even though it lists "photographic materials" among the many consumer products to which it is directed. Although there is reference in a press summary to the need to counteract the influence of US capital¹²⁵⁶, the JFTC explanation cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.¹²⁵⁷

¹²⁵⁶Severe Restrictions on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyoshi Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, US Ex. 67-8, p. 1. In this press summary, JFTC explained that "[t]he primary objective of [Notification 17] is (a) rationalization of the distribution stage ... ; and (b) eliminat[ion] of the stronger prey upon the weaker sales competition based on the power of capital ... If US capital were to conduct [premium offers] directed at the Japanese distribution sector, this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization". Ibid.

¹²⁵⁷US Ex. 67-10, p. 2.

10.115 On balance, in our view, the evidence concerning its adoption suggests that this measure is directed against potential excesses of promotional activities in the distribution sector in general. It targets excessive premiums given by manufacturers to wholesalers and by wholesalers to retailers. It does not, however, attempt to regulate other forms of promotional activity, such as low price offers and rebates. Moreover, while we do not reject the notion that formally neutral measures may be shown to be applied to imported products in a manner that upsets the competitive relationship between domestic and imported products to the detriment of imports¹²⁵⁸, the United States has not been able to point to any single instance where implementation of JFTC Notification 17 has led to such a result in respect of US film or paper. For example, we note that at the time in question, Kodak had a relationship with a primary wholesaler -- Asanuma. That relationship later ended in 1975, apparently because of Kodak's refusal to deal directly with Asanuma.¹²⁵⁹ The United States has not shown that its inability to give premiums to Asanuma employees was relevant to the termination. In addition, the US contextual arguments about the impact of Japanese restrictions on investments, to the extent that they are true¹²⁶⁰, do not demonstrate anything in relation to the application of JFTC Notification 17. Finally, as to the exception provided in Item 2-4 of JFTC Notification 17, the evidence suggests that this provision, neither inherently nor in its application, discriminates against imported film or paper. Although it appears that Kodak was unable to avail itself of this exception, due to the structure of Kodak's distribution relationships, the same was true in the case of Fuji.

10.116 On the evidence before us, therefore, we are not persuaded that JFTC Notification 17, and its implementation in the Japanese photographic materials sector (to the extent this occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market by preventing Kodak from establishing distribution relationships in that market. Accordingly, we find that the United States has not demonstrated that JFTC Notification 17 nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.117 Thus, while the United States has shown that JFTC Notification 17 is a measure for purposes of Article XXIII:1(b), it is no longer in effect. Moreover, the United States has not demonstrated that it should not be held to have anticipated Notification 17 in relation to its

Japan. The United States argues that the report analyzes ways that foreign manufacturers might gain control of Japan's distribution system and highlights the government's concerns over such control, including:

- "1. There is a risk that growth sectors will fall under the monopolistic control of foreign capital, resulting from the difference in capital resources and the like.
2. There is a risk that the process of sales expansion by foreign capital affiliated distribution enterprises will aggravate excessive competition and hinder the smooth implementation of distribution modernization plans, and the [established] order of trade will be disrupted.
3. There is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".¹²⁶²

10.119 We note the US position that under Japan's systemization plan, the nature of the

argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report, Japan maintains, was never government action at all, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.122 In examining the nature of the Sixth Interim Report, we note that the Distribution Committee was a committee set up by MITI's Industrial Structure Council which itself was an advisory council composed of academics and industry representatives, not government officials. And, whereas the Industrial Structure Council was established pursuant to a Cabinet Order, the advisory nature of this Council and the Distribution Committee created under it does not seem to be in doubt. Applying the analysis we developed above in our general discussion of governmental measures, we note that the Sixth Interim Report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Essentially, the Sixth Interim Report is an analysis of the current and future status of the distribution sector that recommends certain general policies for the government to follow in the distribution sector. Those listed specifically are (i) the promotion of organized and cooperative business activity so as to realize economies of scale, (ii) the modernization of facilities and management systems, (iii) the securing of workforce and personnel training, and (iv) the rationalization of trade practices and transaction terms. Since it is a general report to the government, it cannot in itself be viewed as a government exhortation to the private sector to take specific actions in the distribution sector and it does not entail the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products* (see paras. 10.45-10.50 above). These recommendations are made in general terms; they are not specific enough to warrant concluding, even in the Japanese system, that they could have the same effect as formal government action. As such, the Sixth Interim Report appears to be a study report setting out possible options for governmental action, and we are not persuaded that it is in the nature of a measure attributable to the government. Accordingly, we find that the United States has not demonstrated that the Sixth Interim Report is a measure within the meaning of Article XXIII:1(b).

10.123 If despite our finding above, we assume that the Sixth Interim Report is a governmental measure, there is still the question of whether or not it is still in force. Since a report by a quasi-governmental entity is normally not formally adopted or promulgated by a government, it is not surprising that there is no evidence to suggest that it has been withdrawn or otherwise disavowed by the Government of Japan. Nonetheless, in light of this lack of disavowal, and even if there are more recent government policy statements on modernization of the Japanese distribution sector, if the Sixth Interim Report is a measure, it may still be in effect.

10.124 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen Japan's intention to issue the Sixth Interim Report (1968) before the conclusion of the Kennedy Round. Similarly, the United States argues that it could not have anticipated the impact of this measure on the Japanese film market as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the Sixth Interim Report as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's decision to help promote modernization of the Japanese distribution sector, following a high-profile, publicized debate on capital liberalization. Japan further argues that the United States should

reasonably have anticipated the measure *a fortiori* as of the Tokyo and Uruguay Rounds.

existing distribution channels while foreign producers, freed from investment restrictions, would be able to construct their own modern (and exclusive) distribution channels. However, Japan emphasizes, MITI policy on modernizing the distribution sector sought to promote efficiency and competitiveness of domestic industries following liberalization, not to block imports. Overall, Japan argues that the United States has not provided any

Report is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

(e) 1969 Seventh Interim Report

10.133 The fourth distribution "measure" is the Seventh Interim Report on "Systemization of Distribution Activities, prepared by MITI's Industrial Structure Council's Distribution Committee in July 1969.¹²⁷¹ Like the Sixth Interim Report of this committee, which has been addressed above under the heading "standardization of transaction terms", the Seventh Interim Report sets out a series of policy options for the consideration of MITI. We note that the Seventh Interim Report was issued as a "first step in meeting the challenges currently facing Japan's distribution sector".¹²⁷² In the Committee's perception, the aim of systemization was to improve functionality and productivity. The Committee stated that the best approach to systemization was to look at the distribution sector not as a cluster of separate entities but as a single whole and thereby apply a systems approach. Acknowledging that with respect to goods the most important factor is distribution, the Committee stated that systemization could only progress through centralized processing of physical control at distribution centres and stock points. The Committee identified three approaches (commodity, institutional and functional) to systemization and proposed the following policies to the government: (i) establishing a Distribution Systemization Council; (ii) presenting guide posts and promoting standardization; (iii) establishing a system for providing distribution-related information; and (iv) providing incentives in areas such as financing and taxation.

10.134 The United States presents the Seventh Interim Report as, in essence, one of the key foundation stones of Japan's alleged plan to systematize the distribution sector in Japan. In its view, the report suggests that to the extent that fostering efficiency becomes inconsistent with protection against foreign competition, the latter goal should prevail. The United States argues in particular that the premise of distribution systemization was to reorganize the Japanese distribution system along vertical and horizontal lines by (i) the formation and strengthening of product-specific vertical distribution ties between a Japanese manufacturer and various wholesalers, and between the wholesalers and retailers, and (ii) the creation of linkages -- commercial, physical and information ties -- among horizontal elements of the distribution system, which could be brought more easily into the systemized vertical arrangement (paras. 5.81-5.82). Japan counters that, in MITI's view, the backwardness of the distribution system would render domestic manufacturers unable to compete with foreign producers. Specifically, the concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from capital restrictions, would be able to construct their own modern (and exclusive) distribution channels (para. 5.83).

10.135 *Application of measure.* As in the case of the Sixth Interim Report, the United States contends that the Seventh Interim Report is a governmental measure and that it is effectively still in force. And Japan responds that the Seventh Interim Report is not a governmental measure, that it is nothing more than a report of an advisory council, setting out certain policy options for the government. Japan further argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to

¹²⁷¹Distribution Systemization - Industrial Structure Council Distribution Committee, 22 July 1969 (Seventh Interim Report 1969), US Ex. 69-4.

¹²⁷²Ibid, p.1.

industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report was never government action at all, Japan maintains, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

136 In examining the nature of the alleged "measure", we again note that the Distribution Committee was a committee set up by MITI's Industrial Structure Council which itself was an advisory council composed of academics and industry representatives, not government officials. And, whereas the Industrial Structure Council was established pursuant to a Cabinet Order, the advisory nature of this Council and of the Distribution Committee created under it does not seem to be in doubt. Applying the analysis we developed earlier, we note that the Seventh Interim Report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Since it is in itself a general report *to* the government, it cannot be viewed as a government exhortation to the private sector to take specific actions in the distribution sector and it does not entail the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products* (see paras. 10.45-10.50 above). As in the case of the Sixth Interim Report, we do not consider that the recommendations are specific enough to conclude, even in Japan, that they could have the same effect as formal government measures. As such, the Seventh Interim Report appears to be no more than a study report setting out possible options for governmental action, and we are not persuaded that it is in the nature of a governmental measure. Accordingly, we find that the United States has not demonstrated that the Seventh Interim Report is a measure within the meaning of Article XXIII:1(b).

10.137 If, despite our finding above, we assume that the Seventh Interim Report is a governmental measure, there is still the question of whether or not it is still in force. Since a report by a quasi-governmental entity is normally not formally adopted or promulgated by a government, it is not surprising that there is no evidence to suggest that it has been

negotiating round, absent some reason to reach a contrary result. In this regard, we are not persuaded by Japan's argument that the Seventh Interim Report is a logical outgrowth of Japan's pre-Kennedy Round policies on distribution and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet

United States has not provided any evidence to the Panel to show the causal connection between the measure and the alleged impairment.

10.142 In assessing the issue of whether or not US market-access expectations are impaired by the Seventh Interim Report, we note once again that: first, the report is an advisory report directed to the government, setting out non-binding policy options for the government without recommending specific actions to the government or private companies; second, these policy options are directed to modernizing and improving the overall efficiency of the distribution sector in Japan; third, they are not at all product-specific; and fourth, the United States has not been able to point to any specific government actions resulting from this policy options report. While it is true that the Seventh Interim Report supports cooperation among different levels of the distribution system, it does not endorse traditional forms of vertical integration as such. Indeed, it explicitly states in the introduction that "unlike Keiretsunization, cooperative business formations, etc., the concept of systemization as presented in no way refers to such preconceived notions of such institutions".¹²⁷⁷ The emphasis in the report is on the use of "systems" and the "systems approach" to modernize the Japanese distribution sector, including promotion of standardized forms and packaging. As noted below, foreign firms were expected to benefit from this as well as domestic ones, which suggests that vertical integration and single-brand distribution were not aims of the report. In any event, even if we assume that the Seventh Interim Report constitutes administrative guidance to the Japanese photographic film industry to integrate vertically and use single-brand primary wholesalers, there are timing problems with respect to causation since most of the wholesale distribution sector for film in Japan was already single-brand in 1968 (see para. 10.173 below).

10.143 In light of its emphasis on systems, we view the report as origin-neutral. Indeed, the report notes that "one effect of systematizing Japan's distribution system is the simplification of entry [into Japan's market] by foreign capital". While it is possible that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic or imported products to the detriment of imports, the United States has not been able to point to any single instance where application of the Seventh Interim Report does so in respect of US film or paper. In this context, it is difficult to conclude that this advisory report has contributed to the impairment of US market-access expectations emanating from the Kennedy Round.

10.144 Also, there is no evidence that application of the report has resulted in impairment of legitimate expectations flowing from the Tokyo and Uruguay Rounds. At most, we consider that the report establishes part of the context of the 1970 Guidelines and the 1971 Basic Plan, which are discussed below. Accordingly, we find that the United States has not demonstrated that the Seventh Interim Report nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.145 Thus, while the United States has shown that it should not be held to have anticipated the Seventh Interim Report in relation to its Kennedy Round expectations in

(f) 1969 Survey Report on Transaction Terms

10.146 The fifth distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is MITI's Survey Report regarding Transaction Terms including recommendations on transaction terms (from March 1969)¹²⁷⁸, and published drafts and republications (e.g., 1971) ("1969 Survey Report").¹²⁷⁹ In 1968, the Institute for Distribution Research, an apparently private organization, was requested by MITI to conduct a survey of transaction terms in several industries. In March 1969, it submitted its survey on transaction terms in the film industry. The survey examined business practices relating to: sales contracts, including discounts and rebate policies; deliveries and returns; settlement of accounts; and promotional practices, including dispatched employees and rebates.¹²⁸⁰

10.147 *Application of measure.* The United States argues that the 1969 Survey Report is a governmental measure and that it is still in effect. Japan responds that this survey report is that of a private institute, undertaking research and analysis and providing information to the government as appropriate. Accordingly, Japan argues that this survey is not a governmental measure and cannot even be described as administrative guidance. In any case, Japan argues, this 1969 survey is not currently in effect (para. 6.119). MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. Japan maintains that these recommendations were made, and private businesses followed them or ignored them at their own choosing. Any substantive relevance of the survey ended decades ago when it was either acted upon or ignored.

10.148 In order to consider whether the 1969 Survey Report is a measure for purposes of Article XXIII:1(b), we recall the analytical framework we developed above. Applying this analytical framework, we note that the report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Rather, it is in the nature of a factual survey conducted by an apparently

more specifically.

10.150 If despite our finding above, we assume that the 1969 Survey Report is a measure, there is still the question of whether or not it is still in force. On this issue, there is no evidence to suggest that this measure has been withdrawn or otherwise disavowed by the Government of Japan. However, recalling that the report is essentially a description of practices prevailing in the 1960s, it is not clear what it would mean to describe it as still in force. It simply remains a description of past practices. Nevertheless, to the extent that the report contains a small amount of normative content on the rationality of transaction terms, it has not been disavowed and even if, clearly, there are more recent government policy

implemented. Moreover, single-brand wholesale distribution of film is a common business practice which prevails in every major market in the world. Japan notes that its efforts towards distribution rationalization did not end in the 1970s: in 1990 MITI issued the "Guidelines for Improving Trade Practices".

10.159 *Application of measure.* The United States argues that the 1970 Guidelines represent a classic form of Japanese administrative guidance and, in line with established case precedent, they constitute a measure within the meaning of Article XXIII:1(b). Japan's position is that although the 1970 Guidelines constitute a form of administrative guidance (the only cited distribution "measure" which Japan considers can be so characterized), this particular administrative guidance is not a governmental measure because MITI merely issued guidance with no government-provided benefit attached to compliance and no government sanction attached to non-compliance. Japan's position is that the 1970 Guidelines were simply general suggestions and lacked any legal force. Thus, according to Japan, the administrative guidance reflected in the 1970 Guidelines does not meet the two criteria outlined in *Japan - Semiconductors*.

10.160 Our analysis of the 1970 Guidelines and subsequent actions taken by MITI and various industry groups leads us to conclude that the 1970 Guidelines are more than a mere set of suggestions. When publishing the 1970 Guidelines in the MITI gazette, MITI explained that it

"intends to see to it that improvement of terms of trade will be implemented in accordance with this guideline. As terms of trade deal with actual commercial transactions, it is not appropriate to immediately rely on legislative measures. Accordingly we expect that the parties involved in transactions understand the need for trade rationalization, and will make voluntary efforts to achieve this purpose".¹²⁸²

MITI went on to request industry associations to formulate and implement more specific transaction terms based on the 1970 Guidelines and to report back to MITI by November 1970.¹²⁸³ As the United States notes, shortly after publication of MITI's 1970 Guidelines, the photosensitivity wholesalers association published a "Transaction Outline" to implement the association's own transaction terms based on the 1970 Guidelines and reported it to MITI.¹²⁸⁴ Later, in 1971, MITI commissioned the Chamber of Commerce, along with the MITI-established Transaction Terms Standardization Committee and domestic photographic materials trade associations, to draft a "Model Contract" based upon the transaction terms outlined in the 1970 Guidelines for the photographic film sector.¹²⁸⁵ When publishing the standard transaction contract for photographic film in the spring of 1972, the Chamber stated that its actions were pursuant to the MITI request.¹²⁸⁶ Japan questions the scope of these implementation activities and responds that most elements of transactions were not regulated by the Transaction Outline or the Standard Contract and that it was left open to competitors to offer more favourable non-standardized transaction terms.

¹²⁸²Japan Ex. B-24, p. 1.

¹²⁸³US Ex. 70-3; Japan Ex. B-24.

¹²⁸⁴A Policy Outline, dated November 28, 1970, on Commercial Transactions was submitted by the Shashoren to replace MITI's Recommended Guidelines for More Appropriate Transactions, Nihon Shashin Kogyo Tsushin, 10 December 1970, Japan Ex. B-31.

¹²⁸⁵Draft a Standard Contract for Film with Criteria for Standardization of Transaction Terms, Zenren Tsuho, August 1971, US Ex. 71-11.

¹²⁸⁶Standard Contract Drafted for Photo Film Based on the Transaction Standardization Guideline Assigned to the Japan Chamber of Commerce by MITI, US Ex. 24.

10.161 In light of these statements and actions by MITI and industry associations, we consider that there is sufficient likelihood that the administrative guidance given by MITI in the 1970 Guidelines provides sufficient incentives for private parties to act in a particular manner such that it would have a similar effect on business activity in Japan to a legally binding measure. In our view, this conclusion is in accord with past GATT practice.¹²⁸⁷ While we note Japan's argument that the type of administrative guidance given in the 1970 Guidelines does not meet the test set out in *Japan - Semi-conductors*, we recall our explanation that the test set out in *Japan - Semi-conductors* is not an exhaustive test for the types of administrative guidance that may be assimilated to governmental measures. Accordingly, we find that the 1970 Guidelines are measures within the meaning of Article XXIII:1(b).

10.162 As for the question of the continued application of this measure, the United States argues that the 1970 Guidelines, and in particular the policies underlying them, have never been revoked and are still in effect. Japan responds that the 1970 Guidelines never had any binding effect, and thus never were measures "in effect" even from the beginning. In the alternative, Japan argues that the guidelines are clearly no longer in effect given that after almost 30 years, the business environment has changed so much that neither MITI nor private industry considers the 1970 Guidelines as having any current relevance or effect. Japan further indicates that the 1970 Guidelines have been superseded by MITI's very similar 1990 Guidelines, the latter receiving the support of the US Government.

10.163 Although one may have doubts as to the continued relevance today of guidelines

result. In this regard, we note the degree to which this measure is more specific in its analysis and recommendations as compared to the previous three "measures". Even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including rationalization of transaction terms, we do not believe that the United States should have been aware at that time that MITI would be enunciating a detailed set of product-specific recommendations covering the rationalization or standardization of transaction terms in the photographic film sector. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1970 Guidelines prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.166 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1970 measure and its application as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here, where the measure is specific to the film sector. Accordingly, we find that the United States has not demonstrated that in relation to 1970 Guidelines that it has legitimate expectations of improved market access with respect to film and paper emanating from the Tokyo or Uruguay Rounds.

10.167 *Impairment and causality.* The United States contends that application of the 1970 Guidelines, establishing industry standards for discounts, rebates, terms of payment, and dispatched employees, upset the competitive relationship between imported and domestic photographic materials in several ways. The standardization of transaction terms chilled the ability of foreign manufacturers to offer competitive terms to Japanese wholesalers: first, by setting uniform transaction terms, limiting the ability of foreign enterprises to outbid their Japanese competitors; second, by establishing shortened payment terms that enhanced the financial strength of Japanese manufacturers at the expense of wholesalers, and positioned domestic manufacturers to better withstand foreign penetration; and third, by establishing standardized terms, in particular volume rebates, that were by their very nature more beneficial to Japanese manufacturers with large market share.

10.168 Japan responds that the starting point for the analysis should be the wording of the 1970 Guidelines which did not either mandate uniform transaction terms or provide specific transaction terms to be followed by manufacturers, primary wholesalers, secondary wholesalers or retailers. The 1970 Guidelines only made general suggestions related to payment terms, volume discounts, and rebates, including that: (i) interest should be charged for an unusually long payment period (neither the reasonable payment period, the amount of interest to be charged, nor other terms were specified); (ii) volume discounts should have clear transparent terms (whether and under what circumstances such discounts should be granted and the amount of the discounts were not specified); and (iii) rebates should be minimized (with no details at all about the specific terms of rebates). The 1970 Guidelines urged the adoption of economically rational transaction terms, and then left it to individual manufacturers, wholesalers and retailers to establish their own specific terms.

10.169 Japan points out that, in fact, the transaction terms of individual manufacturers may and do vary, e.g., Fuji had and continues to have different transaction terms with each of its four independent primary wholesalers. Japan further states that MITI believed that

rationalizing transaction terms would help to ensure fair competition in the market, that there was neither ongoing monitoring nor ongoing enforcement of compliance with the 1970 Guidelines (only one of three industry associations even responded to a request for a report of actions taken, and no enforcement efforts were directed at specific companies), and that the United States has not shown how anything in the distribution policies or their application discriminates against imports. Most importantly, according to Japan, the United States has not been able to show any nexus between the 1970 Guidelines and single-brand distribution: private companies had taken actions regarding payment terms and rebates well before any actions by the Japanese Government regarding "standardized" transaction terms; and private companies had adopted single-brand distribution prior to any government action -- single-brand distribution had emerged by the mid-1960s, and was essentially complete by 1968. Japan also points out that the alleged objective behind adoption of the rationalized transaction terms, i.e., single-brand distribution, is the common form of distribution in the film industry in every market in the world.

10.170

10.172 Nonetheless, we do not rule out the possibility that measures which appear to be formally neutral as to the origin of products may in their application turn out to have a disproportionate impact on imports, in that they could upset the competitive relationship between domestic and imported products to the detriment of imports. The United States has not been able to point to any specific governmental or private actions with such impact in the distribution sector emanating from the 1970 Guidelines.

10.173 More significantly, when we examine what is the fundamental assertion of the United States, i.e., that the "measures" cited in connection with the standardization of transaction terms, and, in particular, the 1970 Guidelines, were designed to and did promote single-brand distribution at the wholesale level, there are serious difficulties of timing in the US argument on causation. Given the evidence that (i) most of the wholesale

(h) 1971 Basic Plan for the Systemization of Distribution

10.176 The seventh distribution "measure" to be examined is the "Basic Plan for the Systemization of Distribution" (28 July

the plan the chief of MITI's Business Bureau stated that "modernization of distribution is urgent from the standpoint of achieving balanced development of the Japanese economy, as well as from the standpoint of consumer price countermeasures and capital liberalization countermeasures"¹³⁰¹, and that "[w]ith this plan, the Ministry of International Trade and Industry has decided to make every effort toward the fulfilment of distribution systemization policies."¹³⁰² As such, the United States considers that this plan represents official policy of MITI. Japan's position is that the 1971 Basic Plan is simply a report of an advisory body to the government and can therefore not be characterized as a governmental

even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution of film and paper as a means to exclude foreign brands from traditional distribution channels, these trends began well in advance of the conclusion of the Kennedy Round. Japan maintains that the United States should have reasonably anticipated the Basic Plan *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.183 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1971 Basic Plan, even if we are not convinced by the US characterization of the plan as an "opaque, informal measure", neither are we convinced by Japan's argument that this plan and the relatively detailed recommendations contained therein should have been anticipated as part of a "logical outgrowth of MITI's ongoing distribution modernization policies". We recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a tariff negotiating round. Thus, even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including systemization of distribution practices, we do not believe that the United States necessarily should have been aware at that time that MITI would be enunciating a detailed set of recommendations covering systemization of distribution practices in the Japanese economy. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1971 Basic Plan prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, these relate only to black and white film and paper.

10.184 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1971 measure and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to 1971 Basic Plan that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.185 *Impairment and causality.* The United States argues that the 1971 Basic Plan announced that "modernization" of the Japanese distribution sector was urgent from the standpoint of capital liberalization "countermeasures"¹³⁰⁴ and that for individual industrial sectors "the decisive approach here is to regard the entire distribution process from production to consumption as a single system".¹³⁰⁵ According to the United States, the plan was thus a prime example, along with the Seventh Interim Report, of Japan's intent to promote vertical *keiretsu* in its systemization policy.¹³⁰⁶ The United States argues that these facts are clear examples of the manner in which MITI sought to upset the competitive relationship between domestic and imported film and paper in Japan. Japan argues that the 1971 Basic Plan recommended systemization in the distribution sector of the Japanese economy and in doing so, did not discriminate in favour of domestic industries. According to Japan, systemization and the resulting improved efficiencies and modernization in the distribution sector were and are to the benefit of all manufacturers, domestic and foreign alike.

¹³⁰⁴US Ex. 71-10, p. 2.

¹³⁰⁵Ibid, p. 4.

¹³⁰⁶Ibid, p. 6.

10.186 Our assessment of the impact of this 1971 Basic Plan is that the policy recommendations for systemization and modernization in the Japanese distribution sector are addressed to distribution of products in the national economy at large, without regard to the source of the products involved. Also, even if one of the concerns expressed by MITI and the Distribution Systemization Promotion Council in advancing the plan was to address "capital liberalization countermeasures", this concern does not appear to be reflected in the actual recommendations advanced in the plan. Rather, the recommendations appear to be neutral as to source of the products, whether domestic or foreign, promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where the 1971 Basic Plan has done so in respect of US film or paper. Nor, for that matter, has it shown that this measure would be likely to lead to such a result.

10.187 Even if we assume that the 1971 Basic Plan constitutes administrative guidance to the Japanese film industry to integrate vertically and use single-brand primary wholesalers, the US complaint has a significant timing problem in that the two dominant film manufacturers in Japan (Fuji and Konica) had virtually completed single-brand vertical integration of their wholesale distributors well in advance of the 1971 Basic Plan.

10.188 On the evidence before us, we are not persuaded that recommendations of the 1971 Basic Plan, and their implementation in the Japanese economy (to the extent this occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that the 1971 Basic Plan nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.189 Thus, while the United States has shown that the 1971 Basic Plan is a measure for purposes of Article XXIII:1(b) and that it should not be held to have anticipated the plan in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the plan nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(i) 1975 Manual for Systemization of Distribution by Industry: Camera and Film

10.190 The eighth and final distribution "measure" is a "Manual for Systemization of Distribution by Industry: Camera and Film", prepared and published by the Distribution Systemization Development Centre in March 1975 ("1975 Manual")¹³⁰⁷, together with actions taken to implement its recommendations. The Distribution Systemization Development Centre was established with MITI support in 1972, pursuant to the 1971 Basic Plan, in order to facilitate the work of the Distribution Systemization Promotion Council, and was delegated the task of working with industry to produce various "Systemization Manuals" for specific industries. The 1975 Manual was prepared by the centre in collaboration with a "Working Group" comprised of industry groups, camera manufacturers, film manufacturers, camera and film wholesalers, camera and film retailers, and camera and film industry publishers, and with a MITI official observing the proceedings.

10.191 In a foreword to the 1975 Manual, the centre acknowledges that "[a]s the economic environment grows worse, the systemization of distribution activities has become an issue of critical importance".¹³⁰⁸ The centre also indicates that the development of the 1975 Manual was one part of MITI's policy to actively develop effective policies related to the systemization of distribution activities.¹³⁰⁹ The 1975 Manual states that "it is an urgent need to improve the structure of manufacturers to a capacity that will resist foreign capital affiliated firms".¹³¹⁰ With regard to promoting systemization of distribution in the camera and film industry, the 1975 Manual makes specific recommendations on: (i) standardization of transaction terms; (ii) integration of codes and forms; (iii) increasing efficiency of physical distribution; and (iv) enhancement of information processing, including computer ties between manufacturers, distributors and retailers.¹³¹¹

10.192 The 1975 Manual also calls for the establishment of an association for the promotion of distribution systemization in the camera and film industry, to provide a forum for industry and government to discuss and study proposed solutions.¹³¹² Thereafter, a Photosensitive Materials Committee was established for the systemization of distribution

the advice was either acted upon or ignored.

10.194 Applying the analysis developed above, we note that the 1975 Manual is not a law or regulation nor does it provide incentives or disincentives to the private sector to take particular action. However, in further addressing the issue of whether or not the 1975 Manual is a governmental measure, we find that the evidence is somewhat conflicting. Whereas the Distribution System Development Centre was established and initially funded by MITI, there is nothing in the record to suggest that the centre's staff were governmental employees. Also, the membership of the working group which collaborated in the preparation of the manual appears to have come from private industry. On the other hand, the content of the 1975 Manual and the mandate for its preparation suggest a linkage to governmental policy on distribution systemization. And, as noted above, the foreword to the manual states that the development of the manual "is one part of MITI's policy ..."¹³¹³; it concludes by expressing the centre's hope "for the widespread adoption of this manual ...".¹³¹⁴ This, of course, is not a statement by the Government of Japan, but by the centre itself. There is no evidence that the 1975 Manual was endorsed by MITI, as was the case for the 1970 Guidelines and the 1971 Basic Plan. On balance, in contrast to our conclusions on this issue in respect of the 1970 Guidelines and the 1971 Basic Plan, we consider that the evidence on this issue suggests that the 1975 Manual does not have sufficient government imprimatur to be considered a governmental measure in this case. There is not the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products*, discussed earlier. Accordingly, we find that the United States has failed to demonstrate that the 1975 Manual is a measure within the meaning of Article XXIII:1(b).

10.195 If, however, we assume that the 1975 Manual is a governmental measure, we still have to consider whether it is currently in effect. Although one may question whether the particular recommendations contained therein still have relevance in the Japanese market some 22 years after their publication, there is no evidence to suggest that the plan has ever been revoked. Assuming that the 1975 Manual is a measure, it may still be in effect.

10.196 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1975 Manual -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States also argues that it could not reasonably foresee the impact of the 1975 Manual on the Japanese film and paper market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, the Japanese Government responds that the United States should have reasonably anticipated the 1975 Manual as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Japan further argues that even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution of film and paper as a means to exclude foreign brands from traditional distribution channels, these trends began well in advance of the conclusion of the Kennedy Round. Japan maintains that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the two later Rounds.

10.197 Assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1975 Manual, even if we are not convinced by the US characterization of the manual as an "opaque, informal measure",

¹³¹³Ibid, foreword.

¹³¹⁴Ibid.

neither are we convinced by Japan's argument that it and the relatively detailed recommendations contained therein should have been anticipated as part of a "logical outgrowth of MITI's ongoing distribution modernization policies". We recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a tariff negotiating round. Thus, even if the United States should have been aware in 1967 that there was a trend towards vertical integration in the film and paper industry, and that MITI was seeking to promote modernization of the distribution sector, including systemization of distribution practices, we do not believe that the United States should have been aware at that time that MITI or a body such as the centre would be enunciating a detailed set of recommendations covering systemization of distribution practices in the Japanese economy. Accordingly, we find that the United States should not be charged with having reasonably anticipated the existence of the 1975 Manual prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we again find that these relate only to black and white film and paper.

10.198 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay

this concern does not appear to be reflected in the actual analysis or recommendations advanced in the manual. For example, the manual explains that systemization of distribution has been emphasized in recent years for the following five reasons: (i) balancing supply and demand; (ii) controlling price increases; (iii) coping with labour shortages and wage increases; (iv) timely handling of increasing flows of distributed goods; (v) creating a management system for the information age.¹³¹⁷ In addition, the recommendations appear to be directed at promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where such systemization of the distribution sector in the Japanese film industry has undermined market-access conditions for US film or paper.

10.201 Even if we assume that the 1971 Basic Plan constitutes administrative guidance to the Japanese film industry to integrate vertically and use single-brand primary wholesalers, the US complaint has a significant timing problem in that the two dominant film manufacturers in Japan (Fuji and Konica) had virtually completed single-brand vertical integration of their wholesale distributors well in advance of the 1975 Manual.

10.202 On the evidence before us, therefore, we are not persuaded that the 1975 Manual and its implementation in the Japanese economy (to the extent this has occurred), have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that the 1975 Manual impairs nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.203 Thus, while the United States has shown that it should not be held to have anticipated the 1975 Manual in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the 1975 Manual is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

¹³¹⁷Ibid, pp.117-118.

(j) Concluding observations on distribution "measures"

10.204 The essence of the US claim in respect of distribution "countermeasures" is that Japan created vertical integration and single-brand distribution in the Japanese film and paper market. In the US view, this was done through standardization of transaction terms, systemization and limitations on premiums to businesses. As we have found above, the United States has not been able to show that the various "measures" it cites have upset competitive relationships between domestic and US film and paper in Japan, principally because single-brand distribution appears to have occurred before and independently of those "measures", but also because the United States has not demonstrated that these "measures" are directed at promoting vertical integration or single-brand distribution. In answering the timing problem, the United States has provided no convincing evidence or arguments that the cited "measures" in fact had the effect of reinforcing single-brand distribution. Equally, the United States has not explained why the vertically integrated, single-brand distribution structure of the film sector in Japan -- a state of affairs that the evidence suggests is similar to that occurring elsewhere in the world (including in the United States) -- would have broken down in the absence of continuing government intervention.

10.205 In respect of a number of distribution "measures", the United States argues that they have continued in effect even though they may be dated or have been formally revoked. In our view, the United States has not shown that the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports, the 1969 Survey Report, the 1970 Guidelines, the 1971 Basic Plan and the 1975 Manual are today upsetting competitive relationships between domestic and US film and paper in Japan.

10.206 We note that the Sixth and Seventh Interim Reports, the 1969 Survey Report, the 1971 Basic Plan and the 1975 Manual refer to "foreign capital" and the need to prepare for its imminent appearance in Japan. In each case, however, the focus of these "measures" is not on foreign capital, but on general reform of the Japanese distribution sector for reasons unrelated to foreign capital (e.g. labour shortages). We do not suggest that proof of intent to nullify or impair benefits is required under Article XXIII:1(b). We merely note that in our review of these "measures", we were not convinced that foreign capital was a major factor in their adoption or implementation.

10.207 To the extent that the alleged "measures" exist and should not have been reasonably anticipated by the United States, legitimate expectations in relation to these "measures" only exist for black and white film and paper. We note in this connection that today the black and white film market in Japan is insignificant as compared to colour film. The parties agree that it is on the order of three per cent.¹³¹⁸ Moreover, proof of causation with regard to black and white film is undermined by an apparent increase, according to Japan, in market share from around 6.6 per cent in 1965 to a peak of around 41.4 per cent in 1985, despite the alleged impact of the "measures" in the 1965-1975 timeframe.¹³¹⁹ The United States has submitted alternative statistics concerning the market shares in the photographic materials market that do not separately break out black and white film from colour film.¹³²⁰

10.208 Finally, we would note that there is little argument from the United States in respect of the impact of these "measures" on imported paper. As argued by Japan, the only evidence cited by the United States on imported paper relates to a measure (SMEA

¹³¹⁸See paras. 2.2, 5.26, 6.279 and 6.339 above.

¹³¹⁹See para. 2.4 above.

¹³²⁰131gi14141Z TD 0.0ics rather focus on the issue of which percentage of the primary or secondary wholesalers used to or currently do carry foreign film.

financing to photofinishing laboratories) which we found not to be within our terms of reference.

4. RESTRICTIONS ON LARGE RETAIL STORES

10.209 The United States claims that Japan's application of (1) the Large Scale Retail Stores Law of 1 March 1974 (the "Large Stores Law")¹³²¹ and related regulations and administrative

10.211 Article 3 of the law requires that a party intending to build or open a large-scale retail store must submit, to MITI or the appropriate prefecture, an initial notification including the proposed floor area and planned opening date at least 12 months before the planned opening date. If the store is deemed to be subject to the law's procedures, the plans for the store must be explained to the appropriate authority, local retailers and consumers. Following this, the authority may recommend a reduction in the size of the store and/or a delay in the opening date and/or a change in its opening hours and store holidays. In 1982, MITI instituted, through Directive No. 36, a "prior explanation" requirement to precede the initial notification required by Article 3.¹³²³ This directive was revoked in 1992. Also in 1992, the minimum floor space requirements for Class I stores was raised from 1500 square metres to 3000 square metres (and to 6000 square metres in cities designated by ordinance).

10.212 The United States claims that large retail stores remain one potentially significant alternative distribution channel in Japan for foreign film manufacturers despite the Japanese Government's alleged reorganization of wholesale operations in the photographic materials sector. According to the United States, large retailers offered foreign manufacturers, foreclosed from the primary distribution network, a partial alternative to wholesalers. The United States also argues that large stores have carried imported products, including film, more frequently than small stores and have been less susceptible to pressure by domestic manufacturers. If such stores were permitted to proliferate across Japan, the United States argues, wholesalers would become less significant and foreign manufacturers could circumvent the bottle-necked distribution system. It was in response to this threat, the United States submits, that in 1967 and 1968 Japan began to impose controls on the expansion of large stores and finally enacted the Large Stores Law in 1973. According to the United States, this law imposes a burdensome process on the opening and expansion of large retail stores.

10.213 Japan responds that the Large Stores Law reflects long-standing Japanese policy, dating back to the enactment of the Department Store Law in 1956¹³²⁴, of regulating large stores to preserve a diversity of small, medium and large retailing competitors, a policy found in other countries as well. Japan contends that the law does not concern products generally, or film in particular. The law does not regulate which products large retailers can carry, nor does it take into account which products a retailer sells when determining whether and what adjustments are necessary. Accordingly, in Japan's view, the Large Stores Law is incapable of adversely modifying competitive conditions for any imported products, including film. Japan maintains that there is no correlation between store size and the likelihood of carrying foreign film brands. Japan also argues that the law has been significantly liberalized in recent years and is more favourable to imports now than at the time of any of the relevant tariff concessions.

10.214 *Application of measures.* Both parties agree -- and we have no reason to doubt -- that the Large Stores Law of 1974 and the 1979 amendment are governmental measures within the meaning of Article XXIII:1(b). The parties also agree -- and again we have no reason to doubt -- that the Large Stores Law, as amended, is currently in effect.

10.215 *Benefits accruing.* The United States claims that the benefits accruing to it are its

its 1979 amendment during the Kennedy Round negotiations because at that time (1967) neither of these measures had been proposed, and because MITI's two key directives, which in the US view, laid the foundation for the law by expanding the scope of the Department Store Law, were not issued until June 1968 and September 1970, respectively.

10.216 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the enactment of the Large Stores Law in 1973 and amendments in 1978 and thereafter, while subsequent to the Kennedy Round, have represented the continuation of a long-standing policy of preserving retailing diversity through regulation of large stores. The Department Store Law, which was enacted in 1956, required new department stores to obtain permits before opening. According to Japan, the Large Stores Law merely represented an extension of this preexisting regulatory policy to new types of stores that were starting to appear, such as supermarkets and large-surface discount stores, and was enacted in an effort to block the deliberate circumvention of the earlier law. Moreover, in Japan's view, even the various versions of the Large Stores

States emphasizes that during the Tokyo Round, no contracting party other than Japan could have anticipated the actions Japan would take to dramatically expand the scope and invasiveness of the Large Stores Law following conclusion of the Round. In particular, the United States argues, the addition in 1982 of the "prior explanation" requirement, by which builders were required to meet with and try to obtain consent of local retailers before submitting the Article 3 Notification, significantly increased the burdensome nature of the law. Japan responds that the United States should have reasonably anticipated the measures in effect at the time of the tariff concession, including the Large Stores Law and its

stores under the Large Stores Law affects the distribution of foreign film in Japan in two respects. First, restricting large stores indirectly supports manufacturer domination of oligopolistic distribution structures. This structure depends on manufacturer dominance of wholesalers, and wholesaler dominance over retailers. Retailers with greater purchasing power and business sophistication could effectively play the various wholesalers and manufacturers off of each other to gain more favourable terms, and to resist attempts to hold the retailers under the control of a single manufacturer-wholesaler chain. Second, large stores provide an alternative channel to market film for foreign manufacturers excluded from the wholesale distribution system. With a sufficiently developed network of large stores, a manufacturer could reach a large portion of the Japanese market with a limited number of accounts. Consequently, the United States claims that Japan upset the competitive relationship between imported and domestic photographic film and paper by inhibiting the development of a viable alternative channel for the distribution and sale of imported film and paper.

10.223 Japan argues in reply that in the present case the United States bears the burden to show specifically how the application of the Large Stores Law to the specific products at issue, i.e., black and white film and paper, and colour film and paper, nullifies or impairs some benefit. Japan maintains that the law and its implementing regulations neither apply directly to film or paper, nor to any product generally. The law does not distinguish between domestic and imported film and thus there is no explicit disadvantage imposed on imports. Furthermore, the regulation of large stores under this law also does not impose any inherent disadvantage on imports and there is nothing intrinsic in the nature of imports that renders them less capable of competing in a marketplace where a diversity of retailing types is promoted. Moreover, Japan points out, the Large Stores Law does not vest the government with the authority to recommend or order any store to carry certain products or products of a certain origin. Indeed, the only distinction the law draws with respect to products is to apply more liberal rules with respect to retail stores that carry imported products. In addition, the regulations imposed by the law on large stores do not differ depending on the origin of products carried by large stores or small retailers within their vicinity. Thus, the law does not create any artificial incentive for retailers to buy domestic film, nor does it discourage retailers from buying imported film. For Japan, there is thus no reason to believe that larger retail space inherently works to the advantage of imported film products, because retailers choose products to maximize profit, and the size of retail space does not change the profitability of film products to the advantage of domestic brands. The law is thus incapable of altering even indirectly the competitive conditions between domestic and imported products. Japan concludes that it is not possible for this law to frustrate any reasonable US anticipation concerning specific products at the time of any of the relevant tariff concessions. According to Japan, under the overly broad US theory of Article XXIII:1(b), virtually every form of government policy would become actionable as measures potentially relating to specific products. Japan believes, however, that a clear nexus must exist between specific products and the challenged government measure, and that the US allegations concerning the Large Stores Law do not meet this test.

10.224 In evaluating the US claim that the Large Stores Law upsets the competitive relationship between domestic and imported film and paper, we will consider (i) the relationship of large stores to imported film and paper, and (ii) the evolution of Japanese regulation of large stores.

10.225

the motivating force behind opposition to the expansion of large stores in Japan, and in many other countries as well, is from small- and medium-sized stores concerned with the impact that such stores may have on them, and not because of a desire to hinder imports of

however, it is necessary to consider the detail of the regulation under the two laws, as of 1967 and today. Japan notes that the Large Store Law only requires notifications as opposed to applications for permits (as required under the Department Store Law), but since notified stores may in fact be regulated as to various elements (size, opening hours), this aspect of the Department Store Law does not seem significantly more burdensome than the provisions of the Large Stores Law, which covers smaller stores, as well. The United States cites statistics on denials and required size reductions under the Large Stores Law, but it does not show how the situation differs from that prevailing under the Department Store Law as it applied at the conclusion of the Kennedy Round in 1967. Some firm conclusions may be drawn, however. In terms of what is normally permitted, policies on opening hours and store holidays are now more liberal than they were in 1967. The "normal" closing time has been extended from 6 p.m. to 8 p.m. and the required number of store holidays has been reduced from 48 to 24 days. These changes are significant because they affect the actual day-to-day operations of large stores. On the relative market position of large stores in the Japanese economy, we note initially that neither party has submitted evidence for the years between 1967 and 1982. However, since 1982, both parties agree that the market share of large stores in retail sales has increased, albeit modestly. We note that this increase occurred despite the existence from 1982 to 1992 of the "prior explanation" requirement.

10.230 Comparing the present situation in respect of the application of the Large Stores Law to those existing at the conclusions of the Tokyo Round in 1979 and of the Uruguay

these circumstances, the argument would seem to be that the situation would be even better if Japan had not interfered with this favourable market evolution by slowing it. This raises the question of whether the United States can claim legitimate expectations related to expected market evolution, as opposed to expectations that the market situation at the time of a tariff concession will not be upset, e.g., by a grant of subsidies or implementation of measures that change existing competitive relationships or by restricting the use of previously permitted sales techniques. Normally, for competitive relationships to be upset, we would expect an adverse change in the situation existing at the time of the tariff concessions. In the case of subsidies, for example, a Member reasonably expects that subsidies will not be increased, not that they will be decreased. To the extent that the United States claim is viewed as being based on expectations about market evolution, the question becomes to what extent it must establish it had reasons to expect in 1967 (or 1979 or 1993) that there would be a relative expansion of the large-store segment of Japan's economy, taking into account the existing regulation under the Department Stores Law or Large Stores Law. Even assuming that such expectations would be protected by Article XXIII:1(b), the United States has not established that it had any such expectation in 1967, 1979 or 1993.

10.233 On the record before us, therefore, we find that the United States has not demonstrated that the Large Stores Law of 1974, its amendment in 1979, or any implementing regulations or administrative measures, nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

5. PROMOTION "MEASURES"

10.234 The United States claims that Japan's application of the following eight promotion "countermeasures" allegedly disadvantage imports by restricting sales promotions, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b):

- (1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
- (2) 1967 JFTC Notification 17 on premiums to businesses;
- (3) 1977 JFTC Notification 5 on premium offers to consumers;
- (4)

producers, the United States contends that Japan has imposed them with the intention of striking against international competition by foreign imports following trade liberalization, i.e., the ability of foreign manufacturers to convert their strong capitalization and cost

(a) 1967 Cabinet Decision

10.239 The first promotion "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Japanese Cabinet Decision on Liberalization of Inward Direct Investment of 6 June 1967 ("1967 Cabinet Decision")¹³²⁹, considered previously in our examination of distribution "measures". We recall the US assertion that this 1967 Cabinet Decision was a "watershed" in Japan's efforts to restructure Japanese industry to resist imminent foreign competition following capital liberalization in the 1960s. We further recall Japan's response that the 1967 Cabinet Decision, which implemented the first stage of capital liberalization, was concerned generally with modernization and improved efficiency in the Japanese distribution sector so as to permit domestic industries to compete with foreign rivals in the new, less regulated business environment.

10.240 We note that in June 1967, following a request of the government for a study concerning inward direct investment, the Foreign Investment Council ("FIC") Expert Committee, an advisory committee of the Ministry of Finance, submitted a report stating, *inter alia*, that

"[f]or the provision of large-scale premiums, it is believed that establishing fair competition codes pursuant to the [Premiums Law] with assistance from the industry that might be affected, would be an effective countermeasure".¹³³⁰

On the regulation of unfair trade practices, the FIC Expert Committee Report also stated:

"(1) When foreign capital is brought into Japan, it is possible for a parent company to use vast amounts of capital to engage in dumping, offer premiums, and conduct large-scale publicity and advertising, etc. In the future, as liberalization of direct investment in the domestic market progresses, such risk may conceivably be reinforced. Therefore, in such a situation, it is necessary to fully study whether these actions qualify as unfair trade practices as defined in Article 2 of the Antimonopoly Law and can be regulated pursuant to provisions under Article 19 of the said Antimonopoly Law or the Law Against Unjustifiable Premiums and Misleading Representations.

(2) For the application of the Antimonopoly Law, while one may not specifically select foreign capital affiliated firms for differential treatment, foreign capital affiliated firms nevertheless have the strong capital and technological background of the parent company and are usually in an economically strong position. Consequently, it is believed that they will often become the object of regulation of the Antimonopoly Law. On this point, we must be able to apply standards to deal with any disorderly activities by foreign capital because existing standards of regulation of unfair

"countermeasures" to be taken in carrying out liberalization:

"If, therefore, our enterprises are to compete against foreign capital on equal terms, the following would be necessary: companies must improve their own quality and pursue the organization of the industrial system, intensively strengthen the capacity for technological development, organize the financial system in parallel with the organization of the industrial system, and lower of long-term interest rates.

On the other hand, it would be necessary to restrain foreign enterprises coming into Japan after liberalization from disturbing order in domestic industries, by resorting to the strength of their superior power, and from advancing into the non-liberalized sectors by evading control.

The establishment of these countermeasures for strengthening the capacity of our enterprises for international competition and for preventing foreign enterprises from disturbing order in our industries and market would be a basic necessity if the liberalization is to be promoted and if our people are to enjoy its economic benefits.

...

The basic direction of the countermeasures that the government should adopt are the following three points:

- 1) Prevent disorder that may arise from the advancement of foreign capital;
- 2) Create the foundation to enable our enterprises to compete with foreign enterprises on equal terms;
- 3) Actively strengthen the quality of [domestic] enterprises and reorganize the industrial system so that they can fully compete with foreign capital".¹³³²

10.242 We recall the US claim that in July 1967, the Cabinet adopted the recommendations of the FIC and its Expert Committee that the Premiums Law should be used as a liberalization "countermeasure" by establishing fair competition codes. According to the United States, the government directed that the codes were to be established by industry representatives and trade associations, as provided under Article 10 of the Premiums Law, and the government would exercise "active guidance".¹³³³ Japan responds that it does not believe it is necessary to address fair competition codes or fair trade councils as none of them cover photographic film or paper. Nevertheless, Japan argues that it was considered desirable for effective enforcement of the Premiums Law to have business entities agree on self-restraint of excessive premiums and misleading representations, and to prevent actual violations of the Premiums Law. According to Japan, it is against this background that the Premiums Law allows business entities to adopt, subject to the JFTC's approval, fair competition codes on premiums and representations. Japan also argues that, contrary to the US allegation, the Cabinet did not adopt the FIC Expert Committee Report. Therefore, Japan submits, the Japanese Government did not exercise "active guidance".

10.243 *Application of measure.* Although there can be little doubt that the 1967 Cabinet Decision as a whole constitutes a governmental measure, within the meaning of Article XXIII:1(b), the parties differ on the issue of whether or not this measure is still in

¹³³² MITI History Vol. 17, pp. 379-388, (provisional translation) US Ex. 67-6, p. 4.

¹³³³ US Ex. 67-5, A and B.

effect. While Japan submits and the United States concedes that the 1967 Cabinet Decision was repealed on 26 December 1980, the United States argues that the repeal affects only that portion of the 1967 Cabinet Decision relating to controls on international investment in Japan, not the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision. In reply, Japan indicates that it is impossible to adequately respond to this contention because the United States does not specify which measures it believes resulted from the 1967 Cabinet Decision, but that in any case any "measures" not specifically identified are not properly before this Panel.

10.244 Although the United States puts the emphasis here on another part of the 1967 Cabinet Decision than it did in its arguments on distribution "measures", the same analysis that we applied in the distribution section in respect of the effectiveness of the 1967 Cabinet Decision applies here as well. On the basis of that analysis, we find that the 1967 policies could have been carried forward, consistently with the 1980 Decision. To the extent that these policies have not been abandoned, we consider that they continue to constitute a measure within the meaning of Article XXIII:1(b).

10.245 *Benefit accruing.* We recall the US claim that the benefits accruing to it are its legitimate expectations of improved market access resulting from Japanese tariff concessions on film and paper at the conclusion of the Kennedy, Tokyo and Uruguay Rounds. The United States maintains it could not have reasonably anticipated the impact of the 1967 Cabinet Decision during the Kennedy Round negotiations. Specifically, according to the United States, at the time of the Kennedy Round negotiations there were no pertinent facts available concerning the actions Japan was preparing to take to implement its "liberalization countermeasures programme" and that as of 30 June 1967, the Cabinet Decision had yet to be promulgated and implemented. Similarly, the United States argues that it was unaware of the impact of this Cabinet Decision on the film industry in Japan even as of the conclusion of the Tokyo and Uruguay Rounds.

10.246 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have been aware. Japan also argues that the Premiums Law was enacted in 1962 and that this law targeted conduct that had been identified by the JFTC as unfair trade practices as early as 1953. Accordingly, Japan claims, the United States had no legitimate basis for expecting

anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round. Accordingly, we consider that the

(b) 1967 JFTC Notification 17 on premiums to business

10.252 The second promotion "measure" cited by the United States is JFTC Notification 17 on premiums to business, of 10 May 1967 ("JFTC Notification 17")¹³³⁶, previously discussed under the section on distribution "measures". This notification was made pursuant to Article 3 of the Premiums Law (authorization to the JFTC to restrict premiums), and provides *inter alia*

10.256 We note that both parties agree that between 1967 and 1996, JFTC Notification 17 was a governmental measure. We also note that they both agree that the measure was repealed in April 1996. The issue before us, therefore, is whether or not we should take cognizance of what the United States describes as a continuation of the policy of JFTC Notification 17 by means of Designation 9 of JFTC Notification 15 (1982), the latter not having been specifically identified in the US panel request. On this issue, we recall that JFTC Notification 17 itself was also not specifically identified in the panel request, but that we decided to permit its inclusion within our terms of reference given that it was a measure taken pursuant to the Premiums Law which was specifically identified in the request. JFTC Notification 15 of 1982, in contrast, is a "measure" taken pursuant to Article 2.9 of the Antimonopoly Law of 1947. While the Antimonopoly Law was cited in the panel request, it was cited only in respect of a "measure" relating to dispatched employees. Consequently, we found that "measures" unrelated to dispatched employees (i.e., a "measure" relating to international contract notification and to guidance on loss-leader advertising and dumping) were not within our terms of reference. Consistent with that finding we also do not consider Designation 9 of JFTC Notification 15 to be within our terms of reference. Moreover, even if we were to consider that it is appropriate to take into account the US argument that the policy underlying JFTC Notification 17 (1967) has continued to be applied under Designation 9 of JFTC Notification 15 (1982), we note that the United States has not demonstrated that the policy underlying JFTC Notification 17 has been continued through ongoing administrative guidance under the Designation.

10.257 *Benefit accruing.* The United States argues that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that it could not have anticipated the impact of JFTC Notification 17 at the time of the Kennedy Round negotiations because there were no pertinent facts available at that time concerning the actions Japan was preparing to take to implement its liberalization "countermeasures" programme. Similarly, the United States argues that it could not have anticipated the impact of this measure as of the conclusion of the Tokyo and Uruguay Rounds. We also recall the Japanese position that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, more than a month and a half following issuance of JFTC Notification 17 on 10 May 1967. Japan further argues that the measure should have been anticipated *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.258 In our view, given that the publication of JFTC Notification 17 predated the conclusion of the Kennedy Round, it is difficult to conclude that the United States should not be held to have anticipated JFTC Notification 17 in advance of Japan's first tariff concessions on film and paper. As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. This is particularly true given that as of 1967 the current structure of the Japanese film market was largely in place, i.e., there were only a few primary film wholesalers and single-brand distribution of film was typical, it would seem that the United States should have been able to assess the impact of this measure, if any, on the Japanese market for film at the time it was introduced. Thus, we are not persuaded that the United States has met its burden of establishing that in relation to JFTC Notification 17, it has

legitimate expectations of improved market access emanating from the Kennedy Round. We consider that this reasoning *a fortiori* applies to claimed legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.259 *Impairment and causality.* The United States contends that even though JFTC Notification 17, which sets a 100,000 yen (\$278 in 1967) maximum annual limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer) for all products traded between the two, it upset the competitive relationship between the two. According to the United States, foreign enterprises entering the Japanese market or trying to expand their market share following

influence of US capital¹³³⁹, the JFTC drafting history cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.¹³⁴⁰

10.262 On balance, in our view, the evidence suggests that this measure is directed against

has not shown any of the required elements of an Article XXIII:1(b) claim - except that it is a measure under Article XXIII:1(b).

(c) 1977 JFTC Notification 5 on premium offers to consumers

10.265 The third promotion "measure" cited by the United States is JFTC Notification 5 on Restriction on Premium Offers to Consumers of 1 March 1977 ("JFTC Notification 5").

10.270 In assessing whether the United States should have reasonably anticipated this measure, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we are not persuaded that the existence of the Premiums Law meant that the United States should be held to anticipate the specific way and terms pursuant to which premiums are regulated in Notification 5. However, to the extent that any legitimate expectations exist, they are limited to black and white film and paper.

10.271 With respect to the Tokyo and Uruguay Round concessions, which were granted subsequent to the measure, it is difficult not to conclude that the United States should have anticipated this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to JFTC Notification 5, it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Round concessions.

10.272 *Impairment and Causality.* The United States claims that the JFTC's imposition of new restrictions on the use of premiums upset the conditions of competition between imported and domestic products after the Kennedy Round by severely limiting the inducements enterprises could use to attract wholesalers, retailers and consumers to their products.

any case, Japan submits that in the course of a review of its regulations under the Premiums Law in 1996, the JFTC streamlined its general rule on excessive premiums, abolished restrictions on premium offers to businesses, and raised the ceiling on prizes.

10.274 On price competition in particular, we recall Japan's claim that Kodak film (the leading foreign brand) is often sold at retail at substantial discounts off manufacturer's suggested retail price, and that although Kodak does not advertise as heavily as its domestic competitors, it does engage in focused campaigns of targeted heavy advertising, "with predictable results". Japan notes that Kodak's heavy advertising and promotion in Nagano, site of the 1998 Winter Olympics (of which Kodak is a corporate sponsor), has led to a doubling of its market share in that area. In response, the United States argues that the ability of foreign manufacturers to use price discounts to expand their presence in Japan has been rather limited in that price reductions by foreign photographic materials manufacturers, including Kodak and Agfa, have often not been passed on to consumers at the retail level. For instance, according to the United States, Kodak has reduced its prices by 56 per cent since 1986, substantially undercutting its Japanese competitors, yet these price discounts have had virtually no effect on consumer prices in the market. The United States further states that this lack of price competition is reflected in the fact that Japan's consumer price index for film showed almost no movement between 1989 and 1996, a period of seven years.

10.275 Assessing the issues of impairment and causality, we note that the text of JFTC Notification 5 appears to be equally directed at domestic and foreign practices of manufacturers, distributors and retailers, as well as at market incumbents and market entrants. It is not specifically aimed at imports, nor does it make any mention of or otherwise target film and paper. The evidence suggests that this measure limits one particular type of promotional activity, specifically, the value of premiums (as a percentage of the value of individual transactions) that may be given to general consumers by manufacturers, distributors and retailers. It does not, however, regulate other forms of promotional activity, such as low price offers, rebates or advertising generally. While we appreciate the need for competitors with a small market share in an oligopolistic market to be able to engage in promotional activities in general, we consider it significant that JFTC Notification 5 and the other specific "measures" cited by the United States do not limit general advertising expenditures or price competition in general.

10.276 Turning first to the issue of how important it is for a seller of imported film and paper in Japan to be able to offer premiums to retail customers, we note that the United States suggests that the ability to offer premiums to retail customers is essential because retailers and wholesalers will not pass on lower wholesale prices to consumers. However, while it is not clear that Kodak has generally advertised as heavily as the domestic companies, there is evidence that when Kodak did advertise heavily (in the Nagano region) its market share increased.¹³⁴⁶

10.277 As noted above, JFTC Notification 5 applies equally to domestic and imported products. Nonetheless, we do not rule out the possibility that a measure which appears to be formally neutral as to the origin of products may be shown to be applied a manner that upsets the competitive relationship between domestic and foreign products to the detriment of imports. In this connection, the United States cites two examples in its claims in respect of the Retailers Code that involve premium offers to retail customers. As explained in our later discussion of the Retailers Code, we do not consider that these examples establish that Japan's limitations on premium offers to retail customers have resulted in upsetting the competitive relationship between domestic and US film and paper in the Japanese market. Accordingly, we find that the United States has not demonstrated that JFTC Notification 5 nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

10.278 Thus, while JFTC Notification 5 may be viewed as a measure for purposes of Article XXIII:1(b), the United States has not shown that it should not be held to have anticipated the measure nor that the measure nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(d) 1981 JFTC Guidance on Dispatched Employees

10.279 The fourth promotion "measure" cited by the United States is JFTC guidance of December 1981 recommending the establishment of rules on the use of dispatched employees ("JFTC Guidance on Dispatched Employees").¹³⁴⁷ In October 1979, the JFTC proposed and the Cabinet approved the establishment of a Distribution Sector Office ("DSO") to "administer duties pertaining to unfair trade practice designations related to distribution".¹³⁴⁸ Following its establishment, the DSO studied 16 business sectors, issuing its findings on cameras and photographic materials in December 1981, in which it advised "camera, photographic materials, colour photo laboratories and related industries" to address "problems" created by manufacturers dispatching employees to large retail stores. The alleged administrative guidance takes the form of a statement by a DSO official of the JFTC, in an article entitled "The Status of Distribution of Cameras". The relevant part of this article states the following:

"The JFTC is issuing guidance to the camera, photographic accessories, colour photo lab and related industries to examine the use of self-regulating measures with respect to the permanent dispatch of sales people so as not to go too far as manufacturers' sales promotion methods or as acts based on the buying power of volume sales stores".¹³⁴⁹

10.280 The US view is that dispatched employees are a unique form of economic inducement between businesses: they reduce costs for wholesalers and retailers and thereby allow for increased sales based upon cost or price reductions passed down the line of distribution. We also recall the Japanese response that the photographic industry was working on standards for the dispatch of personnel even before the JFTC published the result of the "Survey of Distribution of the Camera Industry" in December 1981.

10.281 *Application of measure.* The United States claims that the JFTC Guidance on

¹³⁴⁷Kosugi Misao, Trade Practices Department, Distribution Sector Office JFTC, Status of Distribution of Cameras, Kosei Torihiki, No. 377, March 1982, pp. 45-49, US Ex. 82-3, p. 8.

¹³⁴⁸Cabinet Order No. 43 of 1979, US Ex. 79-1.

¹³⁴⁹US Ex. 82-3, p. 8.

Dispatched Employees is a measure in the traditional form of Japanese administrative guidance and that it is still in effect. Japan argues that while this statement by a JFTC official may have constituted a form of administrative guidance in the broadest sense, it does not represent the kind of administrative guidance that could be considered to be the substantive equivalent of a formally binding measure, in that it neither provides sufficient incentives or disincentives for private parties to act, nor does it depend on government action to ensure compliance with the guidance. Moreover, according to Japan, to the extent that this ever was a measure, it is no longer in effect.

issue in respect of the Tokyo Round.

10.286 With respect to Japan's Uruguay Round concessions, which were granted subsequent to the measure, it is difficult to conclude that the United States should not be held to have anticipated this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its possible differential impact on imported products until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to JFTC Guidance on Dispatched Employees, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.287 *Impairment and causality.* The United States argues that the JFTC's Guidance on Dispatched Employees results in the restriction of a unique form of economic inducement between businesses. According to the United States, the ability of manufacturers and wholesalers to dispatch employees to retailers reduces costs to such retailers and thereby allows for increased sales based upon cost or price reductions passed down the line of distribution. Japanese responds that the photographic industry was already working on standards for the dispatch of personnel before the JFTC published the result of the "Survey of Distribution of the Camera Industry" in December 1981 (para. 5.249). Moreover, according to Japan, the particular guidance in issue is not addressed to the film and paper sectors of the photographic materials industry.

10.288 The JFTC Guidance on Dispatched Employees arguably led to the Self-Regulating Measures, discussed in the next section. Those measures contain limitations on dispatched employees and therefore effectively fulfil the guidance. However, we will consider the effect of measures limiting dispatched employees in this section because the United States addresses the issue here and not in respect of the Self-Regulating Measures. At the outset, we note that there is disagreement between the parties as to whether or not this guidance applies to the film and paper sectors. The guidance applies to the "camera, photographic accessories, colour photo lab and related industries".¹³⁵⁰ The film and paper sectors are not explicitly mentioned in the guidance. While it is possible that these sectors felt bound by the guidance under the "related industries" language, we recall that the 1970 Guidelines stated: "Dispatched employees are rarely seen at general photography materials retailers". Thus, we have doubts as to whether this guidance was directed at the film and paper sectors.

10.289 To the extent that the guidance does apply to the film and paper sectors, we note that in calling for the use of self-regulating measures with respect to the permanent dispatch of sales people, the JFTC Guidance on Dispatched Employees potentially limits one form of promotional activity. However, the United States has not provided any evidence to the Panel of how this particular measure has had any adverse effect on the efforts of foreign film and paper manufacturers to market their products in Japan. As noted above, there is evidence that the use of dispatched employees in the film and paper sector is not significant.

10.290 Also as noted above, this measure on its face affects domestic and imported products equally. Nonetheless, we do not rule out the possibility that a measure which appears to be formally neutral as to the origin of products may be shown to be applied in a manner that could upset the competitive relationship between domestic and foreign

¹³⁵⁰US Ex. 82-3, p. 8.

products to the detriment of imports. There is no evidence in the record before us that this has occurred in respect of this measure.

10.291 The lack of evidence of impact, when combined with the Japanese statement -- unrebutted by the United States -- that the photographic industry was already working on standards in this area prior to the JFTC guidance, leads us to find that the United States has failed to demonstrate that the application of JFTC Guidance on Dispatched Employees has nullified or impaired benefits accruing to it in terms of Article XXIII:1(b).

10.292 Thus, JFTC Guidance on Dispatched Employees may be viewed as a measure for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated the measure in respect of its expectations on black and white film and paper from the Kennedy Round and on the full range of products at issue in respect of the Tokyo Round. It has not shown, however, that the measure nullifies or impairs its benefits in terms of Article XXIII:1(b). In respect of the Uruguay Round, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(e) 1982 Self-Regulating Measures on Fairness in Trade and Establishment of the Fair Trade Promotion Council

10.293 The fifth and sixth promotion "measures" cited by the United States are the Self-Regulating Measures concerning Fairness in Trade with Business, issued in June 1982 ("Self-Regulating Measures on Fairness in Trade")¹³⁵¹, and the Establishment of the Fair Trade Promotion Council on 23 December 1982.¹³⁵² Because of the close interrelatedness of these two "measures", we shall consider them together in this section.

10.294 The Self-Regulating Measures on Fairness in Trade, which are set out in Part II, concern (i) the dispatch of employees by manufacturers or wholesalers to retailers for the purpose of sales promotion or other sales activities, and (ii) standards on promotional money and contributions.

10.295 The Fair Trade Promotion Council was established by the domestic photographic industry on 23 December 1982. According to its Articles of Association, the council is to, *inter alia*, establish fair transaction order in the photographic industry and to promote and enforce the Self-Regulating Measures on Fairness in Trade.¹³⁵³ The council consists of six groups, including Zenren (retailers association), Shashoren (photosensitive materials distributors' association), Zenraboren, the Photo-Sensitive Materials Manufacturers' Association, the Camera Industry Association and the Supplies Industry Association. Article 17 provides that "[e]stablishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council, shall require prior approval from the Japan Fair Trade Commission".¹³⁵⁴

10.296 *Application of measures.* The issue here is whether the establishment of the Fair Trade Promotion Council and the issuance and application of the Self-Regulating Measures on Fairness in Trade can be ascribed to the Government of Japan (the JFTC). We recall the US

¹³⁵¹Camera Times, "Self-Regulating Measures Regarding Making Business Dealings with Trading Partners Fair" ("Self-Regulating Rules on Fairness in Trade"), 22 June 1982, US Ex. 82-8, pp. 1-3.

¹³⁵²The National Photography Industry Fair Trade Promotion Council Articles of Association, 23 December 1982, see: Fair Trade Promotion Council Established: "An Attempt to Improve the Structure of the Industry" Fujimori Masao (Misuzu) Appointed Chairman of the Council, in: Zenren Tsuho, January 1983, pp. 46-47, US Ex. 83-3, pp. 2 ff.

¹³⁵³The council also enacted the 1984 Self-Regulating Standards regarding Representation of Developing Fees for Colour Negative Film (15 May 1984), US Ex. 84-4 (see below).

¹³⁵⁴US Ex. 83-3.

claims that the JFTC provided administrative guidance to the national photographic industry calling for self-regulating measures on dispatched employees (the previous measure considered above), and that thereafter the JFTC created the Fair Trade Promotion Council by administrative guidance. In relation to this latter claim, a 1992 directive of the Fair Trade Promotion Council states that

"[t]his council was established under the guidance of the Japan Fair Trade Commission in December of 1982 for the purpose of securing a fair trade system in the photographic industry, deepening the exchange of ideas and understanding among businesses, and contributing to the development of the industry".¹³⁵⁵

The United States further argues that Article 17 of the Fair Trade Promotion Council's Articles of Association illustrates the fact that the JFTC oversees the council's activities. Article 17 provides: "Establishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission".¹³⁵⁶ Moreover, in the US view, the delegation of authority from the JFTC to the Fair Trade Promotion Council is made explicit in Article 4 of the Articles of Association which confers upon the council a number of enforcement powers:

"In order to achieve the objectives which were described in Article 3 above, the Council will create a committee which will be responsible for the following: ... secure fair transaction order between all elements of the distribution system, manufacturers, wholesalers, and retailers. ... Take the necessary actions against those who violate the Self-Regulating Measures. ... Liaise with the competent governmental authorities. ... All other responsibilities necessary to achieve the Council's objectives".¹³⁵⁷

The United States also claims that the Japanese Government should bear responsibility for the effects of fair competition codes and the activities of fair trade councils, including trade associations acting under the aegis of a code or council because the codes and councils are subject to approval by the JFTC. Specifically, Article 10(1) of the Premiums Law provides:

"Businesses or a trade association may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair

10.297 Japan responds that industry self-regulation is private-sector conduct, and not a government measure. According to Japan, the Fair Trade Promotion Council is a private-sector organization which was established by the camera industry to implement voluntary standards on dispatched employees, and has no governmental authority. Japan points out that membership in the council is non-discriminatory and open to domestic and foreign entities; Kodak is a member through its affiliation with the Camera Manufacturers' Association. Japan also argues that although the council's documents refer to "approval" and "guidance", and that the council is free to declare that it will seek the JFTC's approval or follow its guidance, such references do not delegate to the council any authority of the JFTC. Moreover, Japan argues that the JFTC has no statutory authority to approve agreements underlying the Fair Trade Promotion Council; the JFTC's action with regard to the council's enforcement of the Self-Regulating Measures on Fairness in Trade, particularly as it relates to dispatched employees, was a non-binding expression of the JFTC's view that

(emphasis added).¹³⁶² In addition, Article 4 of these same articles calls on the council, in carrying out its objectives (including the establishment of fair transaction order in the photography industry), to "*liaise with the competent governmental authorities*" (emphasis added).¹³⁶³ There is also the statement in the "addendum" to the Self-Regulating Measures on Fairness in Trade to the effect that

"Each member company of the Fair Trade Promotion Council shall exert self-regulation in accordance with these standards, and the Fair Trade Promotion Council shall, *under the guidance of the Japan Fair Trade Commission*, issue guidance to them as appropriate and necessary" (emphasis added).¹³⁶⁴

10.299 In light of the above statements by the JFTC and the Fair Trade Promotion Council, we consider that the Self-Regulating Measures have sufficient connection to administrative guidance of the Japanese Government to warrant a finding that they are attributable to the government within the meaning of Article XXIII:1(b). Regardless of whether the Promotion Council's Articles of Association or the 1982 Self-Regulating Measures were in fact formally approved by the JFTC, there is a sufficient likelihood that private parties will act in conformity with the Self-Regulating Measures to consider it administrative guidance within the ambit of Article XXIII:1(b).¹³⁶⁵ In our view, this finding is consistent with past GATT

action taken by a council. Thus, we find that the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Round in respect of these measures.

10.303 However, with respect to Japan's Uruguay Round concessions, which were granted subsequent to the measures, it is difficult to conclude that the United States could not reasonably anticipate these already existing measures. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. The lack of such evidence would seem to be especially telling in view of the fact that the code regulates and the council encompasses members from the photographic industry, i.e., it was product-specific. Accordingly, we find that the United States has not demonstrated that in relation to the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.304 *Impairment and causality.* The United States argues that by regulating the use of

the establishment of the Fair Trade Promotion Council and the issuance of Self-Regulating Measures on Fairness in Trade could be assimilated to governmental measures, there could be no basis for claiming impairment therefrom. Japan also argues that the only case of impairment cited by the United States in relation to these two measures is the alleged action to suppress Kodak's VR campaign in 1983, an action having nothing to do with the dispatch of sales personnel, that in any case the campaign was not "foiled" but went ahead essentially as planned, that the JFTC played a very minor role in discussions with Kodak's representatives concerning this campaign, and that there is simply no truth to the US allegation that Zenren, the Fair Trade Promotion Council and the JFTC acted in unison to prevent the VR campaign.

10.306 While we consider that the evidence presented strongly suggests that the self-regulating measures were initiated and the council was established through actions taken largely by the camera sector of the photographic materials industry in Japan, we also consider that this same evidence suggests that many different levels of the photographic materials industry participate in and are potentially affected by actions taken by the Fair Trade Promotion Council. Thus, it is not clear to us, despite Japan's arguments, that these measures are necessarily irrelevant to the film and paper sectors of the Japanese economy. At the same time, however, we agree with Japan that the only concrete example put forward by the United States of any claimed impairment resulting from these measures is the alleged foiling of Kodak's VR campaign in June 1983.

10.307 Concerning the VR campaign, we first note that this Kodak promotion scheme had nothing to do with the dispatching of employees or promotional money, the two general activities regulated by the Self-Regulating Measures. Indeed, the evidence of record suggests, as argued by Japan, that the issue of dispatching sales personnel was of little significance in the photographic film and paper market. Even before the adoption of the code, MITI's 1970 Guidelines themselves indicated that dispatching of employees was not a common occurrence in the Japanese film market¹³⁶⁹, and the 1990 MITI Guidelines basically recommend restricting the use of dispatched employees "to sales of new products where

by JFTC officials to adjust its second shipment and to announce at store counters when the products were sold out.¹³⁷¹ It is not clear to us that compliance with most of these terms would seriously hinder the VR campaign. In any event, Japan contests whether such guidance was given. In this regard, we note that other evidence submitted by the United States suggests that the VR campaign was limited by promises made to Zenren.¹³⁷² Considering all the evidence taken together, it appears that the pressure put on Kodak's subsidiary by Zenren was by far the major factor impacting the VR campaign. The pressure from Zenren has not been shown to have emanated in any way from the JFTC. Thus, we find that the United States has not come forward with a sufficient demonstration of how statements made to Kodak representatives by JFTC and council officials in relation to the VR campaign could be said to have impaired competitive market-access conditions accruing to the United States. According to the evidence of record, it appears that Kodak did carry out a successful if somewhat abbreviated VR campaign. Finally, we note that this 14 year-old incident is the only one cited by the United States.

10.309 Accordingly, given this lack of evidence of how the Self-Regulating Measures on Fairness in Trade have nullified or impaired legitimate market-access expectations accruing to the United States, we do not find that the United States has met its burden in this regard.

10.310 Thus, the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council may be viewed as measures for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated them in respect of its expectations on black and white film and paper from the Kennedy Round and on the full range of products at issue in respect of the Tokyo Round. It has not shown, however, that they nullify or impair benefits within the meaning of Article XXIII:1(b). In respect of the Uruguay Round, it has only shown one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

(f) 1984 Self-Regulating Standards

10.311 The seventh promotion "measure" cited by the United States is the Promotion Council's issuance in May 1984 of "Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film" ("1984 Self-Regulating Standards").¹³⁷³ These standards prescribe the manner in which prices for film developing and printing may be represented. Specifically, they define the information that film processing businesses ("those who receive colour film directly from the general consumer for processing") should use in connection with representations of prices for colour film developing and printing, including the

¹³⁷¹ Affidavit of Ishikawa Sumio, Nagase official, US Ex. 97-10.

¹³⁷² "Trial Pack Acclaimed in America, but in Japan ...?". Shukan Shashin Sokuho, 29 July 1983, p. 2, quoting Nagase Kodak Deputy Yokoyama, US Ex. 83-19, p. 2.

¹³⁷³ National Photography Industry Fair Trade Promotion Council, 15 May 1984, "The Self-Regulating Standards Regarding Representation of Developing Fees for Colour Negative Film", US Ex. 84-4; Kosei Torihiki Joho, No. 993, 28 May 1984, "Photo Industry to Establish Self-Regulating Standards Regarding Representations of Development and Printing Price, etc.", US Ex. 84-3.

printing fee, developing fee, processing time, and paper manufacturer. The standards mandate "provisions in regard to the representation of photo processing fees for colour negative film ... and printing fee[s] for service-size prints for direct orders from general consumers until the Fair Competition Code is established".¹³⁷⁴ According to the standards,

"businesses should properly list fees such as the developing fee of colour film and should not make representations that might mislead the general consumer or possibly lead them to have excessive expectations. ... This standard should not be used to limit or restrain businesses freedom to set fees".¹³⁷⁵

The standards also provide that the "Fair Trade Promotion Council shall conduct investigations and provide guidance on the operation of these standards if necessary".¹³⁷⁶

10.312 The United States asserts that because the 1984 Self-Regulating Standards cover "representation[s] of the photo processing fee for colour negative film", there is a relationship between this "measure" and photographic materials. Japan argues that these standards were adopted to deal with the problem of when service providers who displayed inexpensive printing charges but charged customers a high developing fee. The intention of the guidelines was to give consumers adequate information about both developing and printing charges. As such, according to Japan, the guidelines were not related to sales of film, and the JFTC's role was limited.

10.313 *Application of measure.* The United States claims that the 1984 Self-Regulating Standards are, effectively, a governmental measure because the Fair Trade Promotion Council "is the creation of Japanese law", and because these standards were developed under the instruction of, and in close collaboration with the JFTC. The United States further argues that the "measure" is still in effect. Japan's response is that because (i) the Fair Trade Promotion Council, which issued the 1984 Self-Regulating Standards, is a private-sector organization, and (ii) the JFTC played only a limited role in the elaboration of these standards, the standards are not a governmental measure.

10.314 In analyzing whether or not the 1984 Self-Regulating Standards should be assimilated to governmental action, we recall that whereas the Fair Trade Promotion Council is clearly a grouping of private-sector trade associations, it nonetheless has elaborate links to the JFTC. We also note that an article appearing in a specialized industry publication just two weeks after the issuance of the 1984 Self-Regulating Measures states that "[t]he Council established 'Self-Regulating Standards Regarding Development and Printing Price Representations' on May 15, and reported them to the Japan Fair Trade Commission" (emphasis added).¹³⁷⁷

Self-Regulating Standards, as such, have sufficient connection to the Japanese Government to warrant a finding that they are a measure within the ambit of Article XXIII:1(b).¹³⁷⁹ This

and printing fees for colour film, and that the United States has not demonstrated how this alleged "measure" upsets competitive market-access conditions for imported colour film in the Japanese market. Japan further argues that the purpose of the Self-Regulating Standards is consumer protection, without regard to the origin of the product.

10.319 Addressing the issue of impairment and causality, we note that the 1984 Self-Regulating Standards regulate the type of information that photo processing firms are required to provide when advertising colour film processing and printing. In essence, this measure appears directed at consumer protection, in particular, preventing misleading

(g) 1987 The Retailers Fair Competition Code and the Retailers Council

10.321 The eighth and final promotion "measure" cited by the United States is the JFTC approval, in March 1987, of the Retailers Fair Competition Code ("Fair Competition Code") and its enforcement body, the Retailers Fair Trade Council ("Retailers Council").¹³⁸¹ On 31 March 1987, acting pursuant to Article 10(1) of the Premiums Law, the JFTC approved the Fair Competition Code and its enforcement body, the Retailers Council. The objectives of the Fair Competition Code are stated to be "to protect the general consumers' appropriate product selection, prevent the unfair inducement of customers, and thereby to secure fair competition".¹³⁸² By its terms, the code applies to "camera category" (as translated by Japan) or "cameras and related products" (as translated by the United States)¹³⁸³, not explicitly including film or paper, and sets out rules regarding representations made by retailers of these products, including in relation to storefront displays, fliers, price comparisons ("representation of dual prices"), instalment sales, the use of expressions such as "very best", "cheapest" and "new release", comparative representations of quality, performance and transaction terms, and prohibitions on misleading representations and loss-leader advertising. These objectives, definitions and standards are covered in Articles 1 through 12 of the code. Article 13 establishes the Retailers Council "to achieve the objectives of this code", and Article 14 lists the activities of the Retailers Council, including those pertaining to making adjustments to how the code is being observed, investigating suspected violations of the code, taking necessary steps against those who have violated the code, processing complaints received from general consumers, making the Premiums Law and "other laws and ordinances pertaining to fair trade widely understood and preventing violations thereto", and "liaison with the competent authorities". Articles 15 through 17 then deal with investigation and decisions on violations. Finally, Article 18 states that the Retailers Council may establish regulations to execute and operate the code, and that "[p]rior to establishing or making amendments to the regulations ... [the Retailers Council] shall obtain approval from the Japan Fair Trade Commission".¹³⁸⁴

10.322 The US view is that the Japanese Government, in approving the Fair Competition Code and the Retailers Council, has delegated authority to the Retailers Council to take enforcement actions under both the code and the Premiums Law. The United States also argues that the standards established by the Fair Competition Code apply to the activities of all businesses selling photographic items, and that although it does not explicitly include film within its scope, the code has been applied to promotions for film and paper products. According to the United States, this expansive application arises from Article 2.2 which provides: "To attain the objectives outlined in the above Article, businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products". The United States goes on to say that application of the code to film and developing and printing was fundamental to securing Zenren's (the retailers association) support for the code and the Retailers Council.

10.323 Japan responds that the Fair Competition Code by its terms does not apply, and never has been applied, to film or paper. Rather, according to Japan, the code (and the Retailers Council established therein) consists of 47 prefecture-wide retailers associations, representing 6600 individual business entities, and deals only with representations

¹³⁸¹Fair Competition Code Regarding Representations in the Camera and Related Products Retailers Industry, Kanpo, (Official Gazette), 11 April 1987, US Ex. 87-4; Fair Competition Code Regarding Representations in the Camera and Related Products Retailers Industry, Kampo, 11 April 1987, p. 1-3, Japan Ex. D-66.

¹³⁸²Ibid, p. 1.

¹³⁸³We note that the Panel's translation experts agree with Japan's translation of the Japanese term "kamera-ru" as "camera category". See Translation Issue 17 in Part XI.

¹³⁸⁴US Ex. 87-4; Japan Ex. D-66, p. 9.

pertaining to the retail sale of cameras and related products; premiums are completely outside its scope. Japan submits that the JFTC has never allowed and has no intention to allow application of the code to film or paper.

10.324 *Application of measure.* The issue here is not whether the JFTC's approval of the Retailers' Fair Competition Code and its enforcement body, the Retailers Council, in and of itself should be viewed as a governmental measure. Clear

council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law; in the same way that activities of other associations are subject to the Antimonopoly Law, anything a council does is actionable. The only legal consequence of JFTC approval, Japan argues, is that the JFTC must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

10.327 In analyzing the extent to which actions taken by the Retailers Council under the Fair Competition Code may be assimilated to governmental measures within the meaning of Article XXIII:1(b), we consider that it may be helpful to focus on the status these actions are given in the eyes of the Japanese Government and the photographic industry. On this issue, we note the references made by the United States to Article 10 of the Premiums Law, particularly Article 10(1) which states that trade associations may obtain JFTC approval to set up fair competition codes, Article 10(3) which states that the operation of codes and councils is subject to JFTC supervision, and Article 10(5) which states that Japan's Antimonopoly Law shall not apply to fair competition codes that have been authorized or to the actions of businesses or trade associations under the codes.¹³⁸⁷ Viewed in the context of the JFTC having approved the Fair Competition Code and the Retailers Council, and of Article 10(5) appearing to give a governmental exemption from certain provisions of the Antimonopoly Law to actions by the Retailers Council and code members under the code, it is difficult to conclude that investigation, enforcement and governmental liaison actions of the Retailers Council under the code are purely private actions of a private trade association. The likelihood that such actions have governmental or quasi-governmental character is reinforced by the reference in the Fair Competition Code, in Article 1 thereof, to the "objective" of "establishing rules regarding representations made in retail transactions for cameras and related products based on [Article 10(1) of the Premiums Law]", and the further reference in Article 18(2) to the requirement that "[p]rior to establishing or making amendments to the regulations in accordance with Clause 1 above, [the Retailers Council] shall obtain approval from the Japan Fair Trade Commission".¹³⁸⁸

10.328 Accordingly, we find that in light of the JFTC approval of the Fair Competition Code and the Retailers Council and the JFTC sanctioning of actions taken by the Retailers Council under the Fair Competition Code, those actions have sufficient connection to administrative guidance of and approval by the Japanese Government to warrant a finding that they are measures attributable to the government within the meaning of Article XXIII:1(b). In view of the above-described involvement of the JFTC, we consider that there is a sufficient likelihood that private parties will act in conformity with the Fair Competition Code as if it

XXIII:1(b) should be interpreted so as to prevent actions by entities with governmental-like powers from nullifying or impairing expected benefits.

10.329 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy and Tokyo Rounds, and that, in particular, it could not have anticipated that in March 1987, well after both the Kennedy and Tokyo Rounds, the JFTC would create the Fair Competition Code and the Retailers Council to set and enforce standards for misrepresentations in advertising related to price and promotional terms. Similarly, the United States maintains that it was still unaware of the breadth of impact of this measure on the Japanese film market as of the conclusion of the Uruguay Round. Japan responds that the 1987 JFTC approval of the Fair Competition Code and the Retailers Council is irrelevant to the reasonable expectations of the United States because this action relates only to cameras and related photographic hardware. Moreover, in Japan's view, the JFTC approval of the code in 1987 was an application of the pre-existing Premiums Law, and brought about no change to the implementation of policy under that law.

10.330 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we recall our conclusion that normally a Member should not be considered to have anticipated a measure taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we see no reason why the United States should have anticipated these particular measures. The fact that fair competition codes and fair trade councils existed in Japan prior to the Uruguay Round, and were authorized by Article 10 of the Premiums Law, does not imply that specific embodiments of codes and councils should be foreseeable. Thus, we find that in relation to the Fair Competition Code and the Retailers Council, the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Rounds

10.331 However, with respect to Japan's Uruguay Round concessions, which were granted subsequent to 1987, it is difficult to conclude that the United States could not reasonably anticipate this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Fair Competition Code and the Retailers Council, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.332 *Impairment and causality.* In considering the issue of causality, we will address three issues. First, whether the Fair Competition Code applies to film and paper products at all. Second, whether Articles 3 and 4 of the Code on origin nullify or impair benefits. Third, whether the application of the Code impairs benefits.

10.333 As to the first issue, the US position is that the code applies, both *de jure* and *de facto*, to film and paper. The United States points out that Article 2.2 of the code provides that "[t]o attain the objectives outlined in the above Article, businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products".¹³⁹¹ The United States goes on to say that an industry member

¹³⁹¹Cf. Japan's translation of "kamera rui" as "camera category", not "cameras and related products". Japan Ex. D-68. We note that the Panel's experts agree with Japan's translation. See Translation Issue 17, Part XI.

explained that it would "indeed have been impossible to persuade Zenren members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware".¹³⁹² In the US view, Japan has invited its photographic industry to devise and

understood and preventing violations thereto". In the US view, the Retailers Council acts as a substitute enforcement body for the JFTC. The United States goes on to argue that the Retailers Council applies the code to promotional activities of non-members, not just those businesses that have agreed to adhere to the code. This practice, according to the United States, comports with what the United States says is the position of the Japanese Government that competition codes must apply industry-wide in order to have their intended effect. The United States goes on to state that the JFTC has confirmed that it relies upon fair competition codes when applying the Premiums Law to "outsiders".¹³⁹³ In addition, the United States argues that the JFTC, through its approval of the code, confers not only broad authority on private parties to act as surrogate enforcers, but also exempts them from prosecution for their activities. On this point, the United States cites the JFTC Secretary General as stating that "even if the contents of the codes or the actions based on the codes violate the Antimonopoly Law, no proceedings to restrict them will be taken based on the Antimonopoly Law".¹³⁹⁴ The United States also cites the director of the JFTC's division on premiums and representations guidance as stating that "[t]he approval of the Code means that the role we play to take enforcement actions¹³⁹⁵ on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning".¹³⁹⁶

10.340 Japan responds that the Retailers Council may take self-regulation measures under the Fair Competition Code against insiders, but may not apply the code to non-members.

specific provisions of the code or which specific activities of the Retailers Council have upset the competitive conditions of imported photographic film and paper. For Japan, the reason for this US omission is that no "code" or "council" has ever affected the importation of film or paper.

10.343 On this basic issue of demonstrating impairment and causality, we recall the US statement that the effect of Japan's overlapping enforcement mechanisms -- the JFTC, the Promotion Council, the Retailers Council and other "fair trade councils" and trade associations -- coupled with the numerous legal provisions that could stymie a promotion, have had a significant "chilling effect" on importers like Kodak. The United States argues that Kodak has developed many ideas for premiums and prizes, but that, according to a general manager of Kodak, "they were removed from the plans if they potentially conflicted with government regulations or the industry's self-regulation ... we tried to regulate ourselves before receiving such measures [from the JFTC or the Fair Trade Council]".¹³⁹⁷

10.344 The United States also mentions several examples involving premiums in connection with film developing, prizes and other promotions which, it claims, Kodak attempted to launch but had to cancel. Specifically, according to the United States:

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the product had nothing to do with the JFTC's actions, and similar campaigns for domestic products would have been equally held unlawful. Also, according to Japan, premiums regulations have been further relaxed, in particular since 1994, and are subject to continuous JFTC review. The "new general premiums rule" has been applied to all industries as of April 1996, and that since that time the JFTC has been reviewing premiums regulations applicable to individual industries, including industry-specific JFTC notifications and private "fair competition codes", in order to ensure consistency with the new general

claim -- the existence of a measure.

(h) Concluding observations on promotion "measures"

10.349 We note that among the promotion "countermeasures" cited by the United States, the evidence points to only isolated instances of enforcement actions taken by the JFTC and the Retailers Council pursuant to JFTC Notifications and the Fair Competition Code. The evidence also confirms that neither the JFTC Notifications nor the Fair Competition Code meaningfully limits advertising or price competition. Accordingly, we have found that the United States has failed to demonstrate that any of the promotion measures upsets the competitive relationship between imported and domestic film and paper in the Japanese market.

6. COMBINED EFFECTS

10.350 We recall the US claim that the distribution "countermeasures", Large Stores Law and related "measures", and promotion "countermeasures" *in combination* nullify or impair benefits accruing to the United States, within the meaning of Article XXIII:1(b). More specifically, the United States claims that: the distribution "countermeasures", as a set, nullify or impair benefits within the meaning of Article XXIII:1(b); the Large Stores Law and related "measures" also nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan; and the promotion "countermeasures", as a set, nullify or impair benefits within the meaning of Article XXIII:1(b), in the context of the restrictive distribution structure in Japan.

10.351 The United States argues that the distribution "measures" work together as an "organic whole". In the US view, the individual studies, reports, surveys, guidelines or other distribution "measures" standing alone may not have been sufficient to accomplish Japan's goal of restructuring the distribution system. The United States claims that MITI expected government and industry to work together to set targets for industrial restructuring, and for businesses to make efforts to achieve these targets, supported by government fiscal and other incentives. According to the United States, leading scholars in Japan agree that one way that administrative guidance is made effective is by a continuing process of studying, surveying, cajoling, and targeting the use of fiscal incentives that keeps the private sector focused on the goals set by the government, assesses their achievement of those goals, and builds peer pressure on those who are falling behind in their achievement.

10.352 We recall the Japanese response that since none of the alleged distribution "measures" individually adversely affect imported products or alter the conditions of competition faced by importing products, considering them as a "set of measures" in no

over a period of several decades, and (ii) a number of these "measures" are no longer in effect. We also recall our discussion of the timing problems as between the issuance of the "measures" and the emergence of standard transaction terms and single-brand distribution in the Japanese market. Against this background, to the extent that the United States claims that various "measures" in the areas of distribution, promotion and large stores set in motion policies which are said to have a complementary and cumulative effect on imported film and paper, we consider that it is for the United States to provide this Panel with a detailed showing of how these alleged "measures" interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each "measure" acting individually.

10.354 We recall our findings in relation to the alleged distribution "measures", in particular our findings that the United States has not demonstrated that any of the alleged distribution "measures" -- individually -- has upset the competitive market-access conditions for imported film or paper. In particular, we recall that we found in respect of each of the individual distribution "measures" cited by the United States that there was a "timing" problem, i.e., the vertical integration and single-brand distribution complained of by the United States had largely occurred prior to the adoption of the various "measures". This timing problem obviously applies to the distribution "measures" as a set. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, we find that the United States has not demonstrated that the combined effects of the distribution "measures" impair competitive market-access expectations for imported US film or paper in the Japanese market.

10.355 The United States further argues that the Large Stores Law and related "measures", in the context of the restrictive distribution structure in Japan, nullify or impair competitive market-access conditions for imported film or paper. In particular, the United States alleges that the Large Stores Law and related "measures" have operated to support the vertically aligned distribution system fostered by the Government of Japan in the photographic film and paper sector. The United States points to a 1969 MITI survey regarding transaction terms which, the United States maintains, demonstrates that MITI viewed large stores as a threat to Fuji and Konica's oligopolistic distribution systems. According to the United States, this survey cites as two threats to this oligopolistic system, first, the "growth of retail routes (especially regular chains and supermarkets) other than the photo retail route and changes in transaction terms due to this leadership", and second, the "effects of full participation of Eastman Kodak". The guidance allegedly explained why large stores threatened oligopolistic distribution: "When this share [the share of film sales by supermarkets] becomes larger, influence over manufacturers will grow, and the market system controlled by manufacturers will be shaken". Without the measures to restrict the growth of large stores, the United States contends that large stores would have brought sufficient bargaining power and competition into the Japanese distribution system to erode the exclusive vertical control over distribution exercised by Japanese manufacturers. Therefore, the United States takes the position, the Large Stores Law and related "measures" should be considered as important "measures" in Japan's overall efforts to create and support manufacturer-dominated, vertically aligned distribution in Japan.

10.356 To this, Japan responds that the United States takes a statement out of context to construct its argument that the Large Stores Law has "operated to support" the distribution system allegedly fostered by the government in the photographic film and paper sector. Specifically, Japan notes that the United States selects a few sentences from the residual category "other" at the end of a several-hundred-page MITI survey report on transaction

terms.¹⁴⁰³ Japan argues that comments in the report about "future problems" are a discussion about the threat of the reintroduction of irrational business terms, not the possible threat of large stores to some supposed oligopolistic distribution system that the government was allegedly trying to protect. Japan points out that the MITI report spoke of "free competition" as a positive development. In this regard, Japan notes that the United States left out a key portion of the quote: "the market system controlled by manufacturers will be shaken, *this leading to an environment of free competition*" (emphasis added). Japan also claims to have inadvertently made a translation error in leaving out the phrase "and this effect is desirable" at the end of the above quote.¹⁴⁰⁴ Finally, Japan argues that the fear expressed regarding the increase in sales by supermarkets was not a fear over the threat to some established domestic oligopoly, but rather a fear that these new retail channels would introduce irrational business practices, such as abnormally long payment periods, product returns, and dispatched employee practices.¹⁴⁰⁵

10.357 Again, for the US theory of "measures" acting in combination to be shown to have factual relevance in the present case it must be based on a detailed justification and convincing evidence. On the basis of the evidence and arguments presented by the two parties, and taking into account the additional portion of the MITI Survey Report mentioned by Japan, we consider that the MITI survey report cited by the United States, when correctly translated and read in context, does not sufficiently support the US proposition in relation to the alleged role of the Large Stores Law (and related "measures") in supporting what the United States claims is an oligopolistic distribution system for film and paper in Japan. Rather, the evidence would seem to suggest that MITI was mostly concerned with avoiding the reintroduction of what MITI viewed as irrational business terms. To the extent that the US claim is that the Large Stores Law "created" manufacturer-dominated, vertically integrated distribution in Japan, it suffers from the timing problem referred to above, i.e., such a distribution structure existed prior to the adoption of the Large Stores Law in 1973. The United States offers insufficient evidence as to how the Large Stores Law played a role in keeping this already-existing vertically integrated structure in place. In the absence of other evidence and argument to support the US claim, and in light of our earlier findings that the United States has not demonstrated that the Large Stores Law and related "measures" have upset the competitive market-access conditions for imported film or paper, we find that the United States has not demonstrated that the Large Stores Law and related "measures" have operated to support a vertically aligned distribution system in Japan for film and paper.

10.358 The United States also claims that independently of the role that the Large Stores Law plays in supporting the oligopolistic distribution system in the Japanese film and paper market, the restrictions on large stores have limited market access by curtailing an alternate channel to market foreign products. The United States argues that even if unrestricted growth in large stores would not alter the exclusive manufacturer domination over Japanese wholesalers, it still would allow expansion of a sales channel that, according to the United States, has been more friendly to imports in Japan. The United States offers the example of Agfa which allegedly makes at least half its film sales in Japan to the Daiei supermarket chain, Japan's largest retailer. If Daiei's growth had not been retarded for three decades by repressive Japanese government regulation, the United States maintains, it might be an even larger chain today and Agfa's sales to it would be greater. On the other hand, the United States argues, if Japan's primary wholesalers were not in exclusive relationships with Japanese manufacturers and were willing to carry foreign film, the need

to rely on large stores as an alternative would be much reduced. Thus, in addition to the alleged action of the Large Stores Law in combination with the distribution "measures", the United States claims that the Large Stores Law (and related "measures") *by itself*, in the context of a closed distribution system, nullifies or impairs benefits with the meaning of Article XXIII:1(b).

10.359 Japan refutes the US claims of impairment with respect to the effects of the Large Stores Law and related "measures" acting in combination in the context of the "closed" Japanese distribution system, restating its view that none of the alleged "measures" individually adversely affect imported products or alter the conditions of competition facing imported products. According to Japan, large stores are not more likely to carry imported products. What counts is sales volume, regardless of whether one is speaking of smaller or larger stores. Japan further argues that large stores have increased in number regardless of the existence of the Large Stores Law. Japan reiterates that there is no evidence of a combined effect of the Large Stores Law and related "measures", in the context of a closed distribution system, because combining nothing with nothing still produces nothing.

10.360 As noted earlier, for the notion of combined effects to be shown to have factual relevance in the present case the United States must clearly demonstrate how the evidence supports this claim. We recall in this regard our findings in relation to the Large Stores Law and related "measures", which we examined together, in particular our findings that the United States has not demonstrated that any of these alleged "measures" has upset the competitive market-access conditions for imported film or paper. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, other than an anecdotal reference to Agfa's use of the Daiei supermarket chain as a major means of film distribution in Japan (an argument which, if factually correct, could be seen as indicative of the availability of such alternative source of distribution in the Japanese context), we find that the United States has not demonstrated that the combined effects of the Large Stores Law and related "measures", in the context of an alleged closed distribution system, impair competitive market-access conditions for imported US film or paper in Japan.

10.361 We next recall the US claim that the promotion "countermeasures" also have supported the closed distribution system. According to the United States, JFTC Notification 17 under the Premiums Law took away an important means for foreign manufacturers to offer Japanese distributors a more attractive deal to handle foreign products. JFTC Notification 17, in the US view, essentially ruled out all manner of premiums from manufacturers to wholesalers, except those of token value that could be considered reasonable in light of normal business practice. The United States maintains that limiting the ability to offer premiums restricted the ability of foreign manufacturers to use their financial and marketing strengths to entice Japanese distributors from their exclusive relationships with Japanese manufacturers, or to solidify their relationships with Japanese distributors. And because, in the US view, Notification 17 directly supported the Japanese manufacturer dominated distribution system, it should be considered both as a distribution "countermeasure" and a promotion "countermeasure". Other promotion "countermeasures", the United States argues, also helped to restrict market access for foreign photographic film and paper in Japan. When a foreign manufacturer has limited access to the distribution system, it is especially important that it be able to reach Japanese consumers with attractive premiums and promotions. Taken individually, the United States believes, any one of the limits on premiums and promotions might not have substantially impaired the ability of foreign firms to compete in Japan. But taken as a

group, the United States argues, the promotion "countermeasures" did have a significant chilling effect, particularly in the context of the system of enforcement through the fair competition codes and councils and the actions of the Fair Trade Promotion Council.

10.362 Japan rebuts the US claim that the alleged promotion "measures", as a set, have impaired benefits accruing to the United States, since, in the Japanese view, none of the

10.367 In the final analysis, it is not incumbent upon this Panel to engage in its own extensive, unaided investigation into the potential applicability in this case of the US theory of combined effects. Rather, it is for the United States, as the complaining party, to make a detailed showing of the relevance of this theory to the matter at hand. We consider that the United States has failed to make such a showing here.

F. ARTICLE III:4 - NATIONAL TREATMENT IN RESPECT OF LAWS, REGULATIONS AND REQUIREMENTS

10.368 The United States claims that the same distribution "measures" it has cited as nullifying or impairing benefits under Article XXIII:1(b) also accord less favourable treatment to imported film and paper in violation of Article III:4. Specifically, the United States claims that Japan's application of the following eight distribution "measures" violate Article III:4:¹⁴⁰⁶

- (1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
- (2) 1967 JFTC Notification 17 on premiums to businesses;
- (3) 1968 Sixth Interim Report on Distribution Modernization Outlook and Issues;
- (4) 1969 Seventh Interim Report on Systemization of Distribution Activities;
- (5) 1969 Survey Report regarding Transaction Terms;
- (6)

favourable to the imported film or paper than to like products of national origin.¹⁴⁰⁸ We note that the parties do not disagree on this point.

10.370 In examining the relevance of Article III:4 in the present dispute, we consider that we also need to take into account the general principle enunciated in Article III:1, which reads:

"1. Members recognize that internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production".

As the Appellate Body stated in *Japan - Alcoholic Beverages*:

"Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs".¹⁴⁰⁹

Essentially, as reiterated by the Appellate Body in *Japan - Alcoholic Beverages*, "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products".¹⁴¹⁰

10.371 We note that the specific national treatment issue addressed by the Appellate Body in *Japan - Alcoholic Beverages* was that of internal tax differentials under Article III:2 and that although the Appellate Body clearly indicates that the general principle articulated in Article III:1 informs the rest of Article III and should be used as a guide to understanding and interpreting the other paragraphs of Article III, in *Bananas III* the Appellate Body stated that "a determination of whether there has been a violation of Article III:4 does *not* require a separate consideration of whether a measure 'afford[s] protection to domestic production'".¹⁴¹¹ Accordingly, and in line with the Appellate Body's most recent stipulation in *Bananas III*, we shall use the general principle articulated in Article III:1 as a guide to interpreting Article III:4 but shall not give separate consideration to whether the measures cited by the United States "afford protection to domestic production".

10.372 As for the burden of proof, as stated earlier (section D), we note that it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is

¹⁴⁰⁸See, e.g., *US - Gasoline*, WT/DS2/9, p. 33.

¹⁴⁰⁹WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 18.

¹⁴¹⁰*Ibid.*, p. 16, citing *US - Taxes on Petroleum Products and Certain Imported Substances*, BISD 34S/136, para. 5.1.9 and *Japan - Liquor Taxes*, BISD 34S/83, para. 5.5(b). See *US - Section 337*, discussed below, which was the first panel to state that "[t]he words 'treatment no less favourable' in paragraph 4 [of Article III] call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products" (emphasis added). Adopted on 7 November 1989, BISD 36S/345, 386-387, para. 5.11. See also *EEC - Parts and Components*, BISD 37S/132; *Canada - FIRA*, BISD 30S/140.

¹⁴¹¹WT/DS27/AB/R, p. 92 (emphasis in original).

true, the burden of producing evidence shifts to the other party to rebut the presumption.¹⁴¹² Thus, in this case, including the claims under Articles III and X, it is for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it is for Japan to adduce sufficient evidence to rebut any such presumption.

(a) Laws, regulations or requirements

10.373 Turning to the eight distribution "measures" cited by the United States, we must first determine whether these constitute "laws, regulations [or] requirements" within the meaning of Article III:4. On this issue, we first recall that in addressing the interpretation of the term *measure* in the context of Article XXIII:1(b), including in relation to the same eight distribution "measures" at issue here, we concluded that that term should be given a broad construction.¹⁴¹³

10.374 We further recall our reference in that same section to previous GATT cases dealing with what may constitute "all laws, regulations and requirements" under Article III:4. There we noted that, in these previous cases, the conclusion that there is a law, regulation or requirement that exists and violates GATT rules gives rise to a presumption of nullification or impairment. Even so, panels have taken a broad view of when a governmental action is a law, regulation or requirement. For example, in 1984 a panel examined written purchase and export undertakings under the Foreign Investment Review Act of Canada (FIRA), submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. These written undertakings were considered legally binding under FIRA. The panel determined that the undertakings were to be considered "laws, regulations or requirements" within the meaning of Article III:4, even though FIRA did not make their submission obligatory.¹⁴¹⁴ Similarly, the panel on *EEC -- Parts and Components* considered that the term "laws, regulations or requirements" included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government."¹⁴¹⁵

10.375 We note that the parties disagree as to the breadth of interpretation to be given to the phrase "all laws, regulations and requirements" in Article III:4. The United States argues that the phrase speaks to government actions, i.e. action taken in the name of a WTO Member, by government officials or parties authorized to act on the government's behalf, in pursuit of government policies. According to the United States, the very language of Article III:4 indicates that it was intended to cover "all" government action which would include the formulation of government policy and its implementation. The United States maintains that a Member should bear responsibility if its governmental action accords less favourable treatment to imported products than to domestic products, regardless of the method used by the Member to achieve this result. In the US view, no single or set of criteria should be dispositive, an approach which, the United States asserts, comports with the Appellate Body's admonition in *Japan - Alcoholic Beverages* to take a case-specific approach and to refrain from applying WTO rules in a way that ignores "real facts and real

¹⁴¹²See *US - Wool Shirts and Blouses*, WT/DS33/AB/R, p. 14.

¹⁴¹³See paras. 10.47-10.50.

¹⁴¹⁴*Canada -- FIRA*, BISD 30S/140, 158, para. 5.4.

¹⁴¹⁵*EEC -- Parts and Components*, BISD 37S/132, 197, para. 5.21. See also *Bananas III*, WT/DS27/R, paras. 7.179-7.180. We also note that the Illustrative List of Trade-Related Investment Measures (TRIMs) contained in the Annex to the Agreement on TRIMs indicates that TRIMs inconsistent with Articles III:4 and XI:1 include those which are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" (emphasis added).

cases in the real world".¹⁴¹⁶ Japan responds that for a party to be subject to a government requirement, it must either (i) be legally obligated to carry out the request, or (ii) receive some advantage from the government in exchange for compliance. In other words, there must be either a government sanction or the withholding of a government benefit that is attached, formally or substantively, to non-compliance.

10.376 A literal reading of the words *all laws, regulations and requirements* in Article III:4 could suggest that they may have a narrower scope than the word *measure* in

equality of competitive opportunities, first clearly enunciated by the panel on *US -Section 337*¹⁴¹⁹, has been followed consistently in subsequent GATT and WTO panel reports.¹⁴²⁰ The panel report on *US - Section 337* explains the test in very clear terms, noting that

"the 'no less favourable' treatment requirement set out in Article III:4, is unqualified. These words are to be found throughout the General Agreement and later Agreements negotiated in the GATT framework as *an expression of the underlying principle of equality of treatment* of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III. The words "treatment no less favourable" in paragraph 4 call for *effective equality of opportunities* for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase transportation, distribution or use of products. This clearly sets a minimum permissible standard as a basis" (emphasis added).¹⁴²¹

10.380 We recall our earlier findings that none of the eight distribution "measures" cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted). In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) -- that of "upsetting the competitive relationship" -- may be different from the standard of "upsetting effective equality of competitive opportunities" applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently.

10.381 Here, as in our examination of the same measures in light of the US claim of non-violation nullification or impairment, the evidence cited by the United States indicates that the measures neither (i) discriminate on their face against imported film or paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper. As previously noted in the non-violation analysis, we are not persuaded that the 1967 Cabinet Decision or the 1970 Guidelines are directed at promoting vertical integration in the photographic materials distribution sector with a view to impeding market access for foreign products. Further, there are serious difficulties of timing in the US arguments on causation such that we are not persuaded that there is a meaningful nexus between the 1967 Cabinet Decision or the 1970 Guidelines and the largely pre-existing market structure. Moreover, the recommendations of the 1971 Basic Plan

including the US market. It is unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan.

10.382 Accordingly, and essentially for the reasons already stated in our findings on non-violation nullification and impairment, we find that the United States has failed to demonstrate that any of the distribution "measures" in issue accords less favourable treatment to imported film and paper than to film and paper of Japanese origin. The US claim under Article III:4 must therefore be rejected.

G. ARTICLE X:1 - PUBLICATION OF ADMINISTRATIVE RULINGS OF GENERAL APPLICATION

10.383 The United States claims that the following two alleged actions by the Government of Japan are inconsistent with GATT Article X:1:¹⁴²²

(1) in the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases; and

(2) in the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance through which regional MITI offices, prefectural governmental and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement.

1. GENERAL CONSIDERATIONS ON THE LEGAL TEST UNDER ARTICLE X:1

10.384 Prior to examining each of these claims, we shall address some more general points in relation to the legal test under Article X:1. The text of Article X:1 provides in relevant part as follows:

"Laws, regulations, judicial decisions and *administrative rulings of general application*, made effective by any Member, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfers of payments therefore, or *affecting their sale, distribution*, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use *shall be published promptly in such a manner as to enable governments and traders to become acquainted with them*" (emphasis added).

We note that the US claims relate not to laws, regulations or judicial decisions, but to *administrative rulings* and that the main issue presented by the US claims in this area is whether the administrative rulings, which the United States maintains Japan has failed to publish, are administrative rulings *of general application*. In particular, the United States maintains that Japan enforces the Premiums Law and the Retailers Fair Competition Code as well as the Large Stores Law primarily through informal, *unpublished* enforcement

¹⁴²²We note that whereas the US request for the establishment of this Panel (WT/DS44/2) makes reference to violations

actions in a manner inconsistent with Article X:1.

10.385 The meaning of "general application" was addressed in the recent WTO panel report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear*.¹⁴²³ That panel considered that "[i]f, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application".¹⁴²⁴ We agree with this analysis and consider that, consistent with the plain meaning of Article X:1, the publication requirement of Article X:1 does not extend to administrative rulings addressed to specific individuals or entities.

10.386 There are, however, no other GATT or WTO precedents directly on point.¹⁴²⁵ In

2. "MEASURES" TAKEN IN THE CONTEXT OF THE PREMIUMS LAW

10.389 The United States claims that in the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases violates Article X:1. We shall first examine this claim in relation to the Premiums Law enforcement actions by the JFTC.

(a) Premiums Law enforcement actions

10.390 The United States argues that Japan's enforcement of its premium and representation provisions is "shrouded in secrecy" resulting from the use of informal, unpublished enforcement actions. According to the United States, the problem is exacerbated due to the multi-tiered nature of Japan's enforcement system, with the JFTC, the prefectural governments and deputized private sector councils all having authority to enforce the Premiums Law. The confusion for companies attempting to do business in Japan primarily arises from Japan's failure to publish a large percentage of administrative rulings and enforcement actions and the difficulty in obtaining what information may be available. The United States submits that since the Premiums Law was enacted in 1962, the JFTC has initiated relatively few formal enforcement actions but has issued many "administrative guidances" or warnings, the overwhelming majority of which are unpublished. The lack of transparency is compounded, the United States maintains, by the fact that Japan's 47 prefectural governments take thousands of informal actions.

10.391 Japan responds that the enforcement system of the Premiums Law is sufficiently transparent and consistent with Article X:1. According to Japan, the Premiums Law itself and enforcement regulations for the Premiums Law, as well as numerous general and specific notifications interpreting the Premiums Law have been published. Japan contends that there is an ample public record, readily available to governments and traders, from which one can discern how the Premiums Law will be applied. Japan points out that the United States itself specifically identifies and refers to numerous JFTC notifications which explain how the Premiums Law is applied. Moreover, Japan maintains, the JFTC has published detailed notifications whenever it has announced significant restrictions or modifications in its enforcement policy. For Japan, the relevant issue is not whether informal enforcement actions are taken but whether any new policy is being applied without adequate disclosure. Japan considers as significant that the United States does not make a single specific allegation of any JFTC enforcement action at odds with already published policies.

10.392 Addressing this claim, we note that the primary difference between the parties is on whether or not such enforcement actions -- i.e., unpublished enforcement actions that establish or modify criteria applicable in future cases -- exist. Whereas Japan argues that it has consistently published all administrative rulings of general application as well as numerous cease and desist orders, general and specific notifications interpreting the Premiums Law, and outlines of major cases where warnings were given, the United States argues that it is not credible that none of the unpublished enforcement actions -- more than 90 per cent of all enforcement actions, according to the United States -- involves the establishment or modification of criteria that may be applied in future cases.

10.393 We agree with the United States that the vast majority of individual enforcement actions are unpublished. However, we note that there is a pronounced lack of evidence as to the nature of any alleged unpublished enforcement actions effecting changes to JFTC enforcement criteria. We agree with Japan that the record is devoid of any specific

allegation by the United States as to any JFTC enforcement action that is at odds with already published policies. We acknowledge that the nature of the US claim makes it difficult to cite examples -- if a ruling is unpublished how can the United States know that it effects such changes? The United States maintains it has made repeated requests for information on enforcement activities from the Japanese Government, the respective enforcement councils and relevant photographic trade associations, but that, almost without exception, these requests have been denied. Nonetheless, it would seem that the United States should be able to cite examples of changed policies that it believes were in fact implemented first in unpublished decisions. Otherwise, we have no basis for finding that there are such decisions. Even if the rate of published-to-unpublished actions is low, we have nothing before us that suggests what it should be. We cannot find that Japan should publish "more" decisions in the absence of specific examples of the types of decisions that should be published, i.e., administrative rulings establishing or modifying criteria applicable in future cases. In these circumstances, we find that the United States has failed demonstrate the existence of any such administrative rulings establishing or modifying criteria applicable in future cases, the non-publication of which could be viewed as a violation of Article X:1.

(b) Actions under "Fair Competition Codes"

10.394 The United States also argues that none of the four private sector enforcement bodies to which the JFTC allegedly delegates authority, i.e., (1) the Retailers Fair Trade Council ("RFTC"), (2) the Promotion Council, (3) the Manufacturers Fair Trade Council, or (4) the Wholesalers Fair Trade Council, publishes its enforcement actions so that traders and governments may become familiar with them. The United States maintains that these "fair trade councils" and "fair competition codes" are creations of Japanese law, in particular Section 10 of the Premiums Law, and they remain under the supervision of the JFTC. As such, the United States urges that Japan should take responsibility for the enforcement actions of these councils under the codes, including those unpublished enforcement actions establishing or modifying criteria applicable in future cases.

10.395 Japan responds that no fair competition code covers photographic film or paper and that there have been no actions under these codes even addressed to the film or paper industry. Japan also argues that these private sector councils are engaged in industry self-regulation and have no power as enforcement bodies under the Premiums Law. Moreover, Japan states that although the fair competition codes are published in the Official Gazette once approved by the JFTC, as industry self-regulation codes they fall outside the scope of Article X:1. Finally, Japan argues that the United States has not even alleged that any action taken by any of the councils is at odds with the basic principles set forth in the codes.

10.396 We note that this US claim is not limited to film or paper. Assuming that the enforcement actions of the various "fair trade councils" under the various "fair competition codes" are to be assimilated to "administrative rulings" of the Japanese Government¹⁴²⁷ under Article X:1, we must still determine whether any of these administrative rulings are of the type requiring publication under Article X:1. On this issue, we are again confronted with a lack of evidence as to the nature of any alleged unpublished enforcement actions effecting changes to JFTC or code enforcement criteria. The record is devoid of any specific allegation by the United States as to any action taken by any of the councils that is at odds

not such administrative rulings are rulings of "general application". As we indicated in our analysis of the Article X:1 claims with respect to enforcement actions under the Premiums Law, we consider that the concept of administrative rulings of "general application" may in principle encompass administrative rulings in individual cases which establish or modify criteria applicable in future cases. The key issue here, therefore, in respect of alleged continuing unpublished guidance under the Large So s—

not demonstrated that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.