

**UNITED STATES - MEASURES TREATING
EXPORTS RESTRAINTS AS SUBSIDIES**

Report of the Panel

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

I. INTRODUCTION

A. COMPLAINT OF CANADA

1.1 On 19 May 2000, Canada requested consultations with the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 and Article 30 of the Agreement on Subsidies and Countervailing Measures ("the SCM Agreement"), concerning US measures that treat a restraint on exports of a product as a subsidy to other products made using or incorporating the restricted product if the domestic price of the restricted product is affected by the restraint¹.

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

1.3 On 24 July 2000, Canada requested the establishment of a panel to examine the matter².

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.4 At its meeting of 11 September 2000, the Dispute Settlement Body ("the DSB") established a Panel pursuant to the request made by Canada in document WT/DS194/2.³

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

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

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

1.7 Chairman: Mr. Michael Cartland

Members: Mr. Scott Gallacher
Mr. Richard Plender

1.8 Australia, the European Communities, and India have reserved their rights to participate in the panel proceedings as third parties⁴.

C. PANEL PROCEEDINGS

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

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

¹ WT/DS194/1.

² WT/DS194/2.

³ See, WT/DSB/M/88 at paragraph 12.

⁴ WT/DS194/3.

II. FACTUAL ASPECTS

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

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

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

B. THE STATEMENT OF ADMINISTRATIVE ACTION

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

2.4 The SAA by its own terms:

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

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

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

⁵ Exhibit CAN-7 (19 U.S.C. § 3512(d) (1994)).

⁶ Exhibit CAN-2 (SAA at 656).

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

"In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g.,* Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea). The specific manner in which the government acted through the private party to provide the benefit varied widely in the above cases. Commerce has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.

"In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under Section 771(5)(B)(iii) has been met."⁷

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

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

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

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

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

⁷ Exhibit CAN-2 (SAA at 926).

⁸ Exhibit CAN-3 (19 CFR Part 351, Countervailing Duties, Final Rule, 63 Fed. Reg. 65,348-65,418).

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

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

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

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

D. "PRACTICE" OF THE US DEPARTMENT OF COMMERCE

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

⁹ Id. at 65,349-65,350.

¹⁰ Id. at 65,351.

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

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. CANADA

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

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

- (i) Section 771(5) of the *Tariff Act of 1930*¹¹ ("*Tariff Act*"), as amended by the *Uruguay Round Agreements Act*, which is the provision of US countervailing duty law that defines the term "countervailable subsidy";
- (ii) portions of the Statement of Administrative Action¹² accompanying the *URAA* interpreting Section 771(5) with respect to export restraints;
- (iii) portions of the US Department of Commerce Regulations¹³ (in particular the "Preamble" thereto) interpreting and implementing Section 771(5) and the SAA with respect to export restraints; and
- (iv) the ongoing practice of the DOC of treating an export restraint as a "financial contribution" within the meaning of Article 1.1 of the SCM Agreement.

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

¹¹ Annex A to First Written Submission of Canada – Exhibit CAN-1.

¹² Annex B to First Written Submission of Canada – Exhibit CAN-2.

¹³ Annex C to First Written Submission of Canada – Exhibit CAN-3.

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

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

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

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

B. UNITED STATES

3.5 The United States requests that the Panel find:

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

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

[Parties' arguments in Sections IV, V and VI deleted from this version]

VII. INTERIM REVIEW

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

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

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

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

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

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

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

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

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

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

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

VIII. FINDINGS

A. REQUEST FOR PRELIMINARY RULINGS

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

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

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

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

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

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

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

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

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

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

"[T]he concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party's *GATT 1947* obligations."¹⁰⁷

. . .

"[P]anels developed the concept that mandatory and discretionary legislation should be distinguished from each other, reasoning that only legislation that mandates a violation of GATT obligations can be found as such to be inconsistent with those obligations."¹⁰⁸

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

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

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

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

¹⁰⁸ *Id.*, para. 60.

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

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

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

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

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

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

2. Order in which the issues will be addressed

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

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

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

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

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

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

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

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

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

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

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

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

(a) Scope of rulings

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

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

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

(b) Rules of treaty interpretation

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

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

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

¹¹⁷ *Id.*

authoritative and succinct expression in the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*')¹¹⁸, and cites Article 31.1 thereof¹¹⁹, which reads as follows:

ARTICLE 31

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

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

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

8.20 SCM Article 1.1 provides as follows:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits [footnote omitted]);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

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

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

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

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

or

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

and

(b) a benefit is thereby conferred.

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

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

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

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

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

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

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

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

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

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

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

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

(i) *A government "entrusts or directs"*

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

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

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

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

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

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

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

¹²⁵ Comment of the United States on question 9 from the Panel to Canada following the first meeting (italic emphasis in original, underline emphasis added).

¹²⁶ Comment of the United States on question 11 from the Panel to Canada following the first meeting.

¹²⁷ *The New Shorter Oxford English Dictionary*, Volume 1, 1993, Clarendon Press, Oxford.

¹²⁸ *Id.*

¹²⁹ *The Concise Oxford Dictionary*, Ninth Edition, 1995, Clarendon Press, Oxford.

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

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

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

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

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

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

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

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

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

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

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

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

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

8.38 In the above example of imposition of tariffs, there may well be a question as to consistency with Article II of the GATT 1994, which deals with Members' schedules of concessions. It is, however, doubtful that the concept of financial contribution contained in Article 1.1(a) of the SCM Agreement seeks to bring such government action within the ambit of the SCM Agreement. To the contrary, by introducing the notion of financial contribution, the drafters foreclosed the possibility of the treatment of *any* government action that resulted in a benefit as a subsidy¹³¹. Indeed, this is arguably the principal significance of the concept of financial contribution, which can be characterised as one of the "gateways" to the SCM Agreement, along with the concepts of benefit and specificity. To hold that the concept of financial contribution is about the effects, rather than the nature, of a government action would be effectively to write it out of the Agreement, leaving the concepts of benefit and specificity as the sole determinants of the scope of the Agreement.

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

"[U]nder the ordinary meaning of 'direct', there would have to be the requisite causal connection between the government measure and the behaviour of private actors in order for a financial contribution to exist . . .";¹³³

and that:

"The requirements of 'benefit' and 'specificity' are relevant [to the question of legal interpretation of the concept of 'financial contribution'] because Canada and the European Communities [] are attempting to induce the Panel to adopt an unwarrantedly narrow interpretation of subparagraph (iv) based on unsubstantiated allegations of a 'parade of horrors' that supposedly would occur if their narrow interpretation is not accepted. However, the fact is that the 'benefit' and 'specificity' elements will operate so as to render many alleged indirect subsidies non-actionable and, thus, non-countervailable."¹³⁴

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

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

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

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

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

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

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

8.42 The Appellate Body rejected this argument and essentially agreed with Brazil and the United States that the focus of the SCM Agreement's obligations is on the granting government¹³⁸. The Appellate Body stated that "[i]t does *not* suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result"¹³⁹, and elaborated that, while "[a] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result . . . that alone is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation"¹⁴⁰. In other words, the Appellate Body found that a *cause and effect relationship* between the subsidy and actual or anticipated trends in exports was *not* sufficient to satisfy the "tied to" standard of conditionality for export contingency to exist.¹⁴¹ Similarly, in the case before us, for the "entrusts or directs" standard to be met, i.e., for there to be a financial contribution in the sense of subparagraph (iv), the government's *action* must be the focus, rather than the possible *effects* of the action on, or the reactions to it by, those affected, even if those effects or reactions are expected.

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

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

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

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

¹³⁸ *Id.*, para. 170.

¹³⁹ *Id.*, para. 171.

¹⁴⁰ *Id.*, para. 172.

¹⁴¹ *Id.*, paras. 171-172.

respect of item (d) of the Illustrative List of Export Subsidies¹⁴² (which findings in any event were rendered moot by the Appellate Body), and the "entrusts or directs" standard of SCM Article 1.1(a)(1)(iv)¹⁴³. In particular, the panel statement cited by the United States is that it was not necessary "that the federal or provincial governments specifically direct a certain outcome or course of action to be achieved or taken" for the milk pooling system at issue to constitute provision of goods by a government "through government-mandated schemes" in the sense of item (d) of the Illustrative List. In fact, this statement by the *Canada – Dairy* Panel, when seen in its full context, leads to the opposite conclusion from that advanced by the United States. First, the general context for the statement was the Panel's finding that it was the government (and not marketing boards or other entities acting on their own) that decided which milk should be sold to which customers at which prices, and that enforced these decisions through a system of permits and other measures. Second, the immediate context for the cited statement of the Panel was that, even to the extent that the marketing boards and other entities had some discretion to make certain marketing decisions, that discretion had been *explicitly delegated* to them by the government and thus the exercise of that discretion (i. e., the situation where the government did not "specifically direct a certain outcome or course of action") did not alter the conclusion that milk was being provided through "government-mandated schemes". This is neither the same as nor analogous to the US approach and thus provides no support for the US argument that an increase in the domestic supply of a good which happens to result, as a matter of fact, from the application of some government intervention in the market for that good constitutes government-entrusted or government-directed provision of the good.¹⁴⁴ To the contrary, the Panel made this statement in reference to a market every aspect of the operation of which was explicitly and tightly controlled and managed by the government.

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

(ii) *"Private body"*

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

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

¹⁴² SCM Agreement, Annex I.

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

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

¹⁴⁵ See para. 8.26, *supra*.

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

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

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

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

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

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

¹⁴⁶ Response of Canada to question 26 from the Panel following the second meeting.

¹⁴⁷ *Id.*

¹⁴⁸ See paragraph 8.53, *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Object and purpose

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

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

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

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

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

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

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

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

(f) Negotiating History

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

ARTICLE 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

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

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

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

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

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

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

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

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

¹⁵⁶ SAA, p. 926.

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

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

¹⁵⁹ E. g., the European Communities: "The key issue upon which the resolution of all other open questions is predicated is the definition of a subsidy" (MTN.GNG/NG10/W/7); Canada: Unilateral interpretations due to lack of agreement on the concept of a subsidy "have caused uncertainty and trade conflicts" (MTN.GNG/NG10/W/22); Egypt: "Serious problems have arisen . . . as *inter alia* [] there is no clear definition of what constitutes subsidies" (MTN.GNG/NG10/W/14).

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

8.68 During the discussions in the Negotiating Group which led to the definition of "subsidy" that was eventually included in the text of Article 1, the basic difference between defining subsidy solely on the basis of the existence of a "benefit" conferred by any government action (the position taken by the United States¹⁶¹), on the one hand, and requiring a "government financial contribution" as a means of limiting the universe of government actions that could be considered a subsidy (the position taken by essentially all other participants), on the other, was articulated with some precision. Canada, for example, stated that "while virtually any government action could be construed as having possible effects on production and trade, *there need to be some outside limits on the scope of government activity that can be considered to be a subsidy* and subject to countervail"¹⁶². Canada further stated that:

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

...

Accordingly, building upon current rules, a basic condition for countervailability of a given measure should be the existence of a financial contribution by government."¹⁶³

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

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

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

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

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

¹⁶³ MTN.GNG/NG10/W/25, Submission by Canada, 28 June 1989.

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

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

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

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

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

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

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

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

(iii) *Summary*

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

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

(g) *Conclusion*

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

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

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

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

(a) Application of the mandatory vs. discretionary distinction

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

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

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

(b) The measures

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

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

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

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

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

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

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

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

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

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

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

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

¹⁷¹ *Id.*

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

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

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

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

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

(i) *The Statute*

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

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

"A subsidy is described in this paragraph in the case in which an authority –

(i) provides a financial contribution,

(ii) provides any form of income or price support, within the meaning of Article XVI of the *GATT 1994*, or

(iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,

¹⁷³ Second Written Submission of Canada, para. 10.

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

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

"(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods."¹⁷⁵

(a) Status in US domestic law

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

(b) Content in respect of export restraints

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

(ii) *The Statement of Administrative Action*

(a) Status in US domestic law

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

¹⁷⁴ *Tariff Act*, Section 771(5), codified at 19 *USC*, Section 1677(5) (1994) (Annex A to First Written Submission of Canada – Exhibit CAN-1).

¹⁷⁵ *Id.*

¹⁷⁶ Second Written Submission of Canada, para. 10.

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

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

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

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

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

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

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

¹⁷⁷ *URAA*, Section 102, codified at 19 *USC*, Section 3512(d) (1994) (Exhibit CAN-7).

¹⁷⁸ SAA, p. 656 (Annex B to First Written Submission of Canada – Exhibit CAN-2).

¹⁷⁹ Response of the United States to question 6(a) from the Panel at the first meeting.

¹⁸⁰ Request by the United States for Preliminary Rulings, para. 36.

¹⁸¹ Response of the United States to question 28 from the Panel following the first meeting.

¹⁸² Request by the United States for Preliminary Rulings, footnote 134.

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

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

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

8.100 Accordingly, we consider that the SAA constitutes authoritative interpretive guidance in respect of the statute. As such, given its unique authority as interpretive guidance, the SAA is of fundamental importance in this dispute, in the sense that the statute cannot be properly interpreted without reference to the SAA. In particular, to understand the treatment of export restraints under the US CVD statute, anything that the SAA says about export restraints must be taken into account. Nor, as indicated, do the parties suggest otherwise. Indeed, the United States itself emphasises that it does not argue that the statute could or should be examined without some regard to the interpretation reflected in the SAA¹⁸⁷. For the foregoing reasons, we shall look to the SAA as primary interpretive guidance in respect of the statute.

(b) Content in respect of export restraints

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

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

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

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

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

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

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

"In general, the Administration intends that the definition of 'subsidy' will have the same meaning that administrative practice and courts have ascribed to the term 'bounty or grant' and 'subsidy' under prior versions of the statute, unless that practice or interpretation is inconsistent with the definition contained in the bill. Absent such inconsistency, and subject to other relevant changes enacted in the implementing bill (e. g., rules regarding non-countervailable subsidies and *de minimis* countervailable subsidies), practices countervailable under the current law will be countervailable under the revised statute.

Basic Definition

...

One of the definitional elements of a subsidy under the Subsidies Agreement is the provision by a government or any public body of a 'financial contribution' as defined by the Agreement, including the provision of goods or services. Moreover, the Subsidies Agreement specifically states that the term 'financial contribution' includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Administration's view that the term 'private body' is not necessarily limited to a single entity, but can include a group of entities or persons.) Additionally, Article VI of the GATT 1994 continues to refer to subsidies provided 'directly or indirectly' by a government. Accordingly, the Administration intends that the 'entrusts or directs' standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a US industry.

In the past, the [DOC] [] has countervailed a variety of programs where the government has provided a benefit through private parties (*See, e. g.,* Certain Softwood Lumber Products from Canada, Leather from Argentina, Lamb from New Zealand, Oil Country Tubular Goods from Korea, Carbon Steel Wire Rod from Spain, and Certain Steel Products from Korea) . . . [The DOC] has found a countervailable subsidy to exist where the government took or imposed (through statutory, regulatory, or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.

In cases where the government acts through a private party, such as in Certain Softwood Lumber Products from Canada and Leather from Argentina (which involved export restraints that led directly to a discernible lowering of input costs), the Administration intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and Section 771(5)(B)(iii) encompass indirect subsidy practices like those

which [the DOC] has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that [the DOC] is satisfied that the standard under Section 771(5)(B)(iii) has been met."¹⁸⁸

8.103 We recall that the text of the statute is silent on the question of export restraints as such. That is clearly not the case with the SAA, but the question is whether the comments regarding indirect subsidies and export restraints contained therein are mandatory in nature, i. e., whether they amount to a *requirement* that the DOC interpret the statute so as to treat export restraints as financial contributions. For that to be the case, the SAA would have to create a binding obligation on the DOC to interpret Section 771(5)(B)(iii) such that export restraints meet the standard thereunder (which standard essentially mirrors the requirements in Article 1.1(a)(1)(iv) of the SCM Agreement).

8.104 On this point, the SAA appears to disclose a certain tension between two propositions or themes. On the one hand, there are passages suggesting that the DOC's past practice of treating export restraints as countervailable subsidies if they confer a benefit and are specific will continue. In particular, the SAA expresses the Administration's view that Article 1.1(a)(1)(iv) of the SCM Agreement encompasses indirect subsidy practices like those which the DOC countervailed in the past, particularly in *Leather from Argentina* ("Leather")¹⁸⁹ and *Certain Softwood Lumber Products from Canada* ("Lumber")¹⁹⁰. On the other hand, there are passages to the effect that this will be the case only where the new condition is satisfied. Past practice will not be followed where this would be "inconsistent with the definition contained in the bill". It will be followed only where the DOC is satisfied that the standard under Section 771(5)(B)(iii) has been met. Since Section 771(5)(B)(iii) prescribes a new condition, including entrustment or direction to a private entity to make a financial contribution, it is clear that the practice followed in the past cannot continue without modification. Post-WTO, the DOC must address a question that did not previously arise: Is Section 771(5)(B)(iii) satisfied? Only if that question is answered in the affirmative can a subsidy be found to exist.

8.105 We conclude that, on careful reading, the SAA correctly indicates that the Administration's past practice will be pursued in future only *to the extent that there is no inconsistency with the definition of subsidy under the URAA*. The phrase "absent such inconsistency" makes the continuation of pre-WTO CVD practice expressly contingent on the consistency of such practice with the new statute, and specifically with the definition of subsidy set out therein. The SAA indicates, in respect of *Leather* and *Lumber*, that "these types of indirect subsidies will continue to be countervailable, *provided that [the DOC] is satisfied that the standard under Section 771(5)(B)(iii) has been met*". The language of this proviso further confirms that the DOC must apply the statute's definition of subsidy.

8.106 For these reasons, we conclude that the SAA does not require the DOC to interpret the statute such that export restraints are treated as financial contributions.

¹⁸⁸ SAA, pp. 925-926 (Annex B to First Written Submission of Canada – Exhibit CAN-2).

¹⁸⁹ *Leather* involved, *inter alia*, a government embargo on exports of cattle hides, which was found to be a countervailable subsidy to leather producers on the basis that the embargo had a "direct and discernible effect" on hide prices and thereby benefited leather producers (55 Federal Register No. 191, p. 40213 – Exhibit CAN-13).

¹⁹⁰ *Lumber* involved, *inter alia*, certain export restraints on logs, which were found to be countervailable subsidies to lumber producers on the basis that the restraints had a "direct and discernible effect" on log prices and thereby benefited lumber producers (57 Federal Register No. 103, pp. 22609-22610 – Exhibit CAN-14).

(iii) *The Preamble to the US Countervailing Duty Regulations*

(a) Status in US domestic law

8.107 We next consider the operational status in US domestic law of the Preamble to the US CVD Regulations. In particular, we consider whether the Preamble has an independent operational life of its own and could independently give rise to the violations alleged by Canada.

8.108 The United States explains that, in 1995, following the enactment of the *URAA*, the DOC commenced a rulemaking process with the objective of revising its anti-dumping and CVD regulations so as to bring them into conformity with the *URAA* and, in some cases, to flesh out the provisions of the statute. The DOC published its final CVD regulations some years later, in 1998, following the receipt and analysis of comments submitted on the proposed regulations that had been published in 1997. The Preamble to the Regulations sets out, *inter alia*, the DOC's response to those comments, including on the subject of indirect subsidies in general and export restraints in particular. Canada notes that the Regulations were issued in accordance with the *Administrative Procedure Act* ("*APA*"), which governs US federal agency rulemaking and requires a notice and comment rulemaking process, and which therefore requires that the final regulations include a preamble setting forth the basis and purpose of the regulations and the agency's reasoned consideration of comments received in response to its proposed regulations.

8.109 Canada submits that the Preamble "is an integral part of the Regulations and is recognised and relied on as such by US courts"¹⁹¹, citing to various US court decisions in this regard. In Canada's view, the Preamble is binding, and it disagrees with the United States that a preamble to regulations has lesser legal status than the regulations. According to Canada, this US argument ignores the administrative framework under which US agencies promulgate regulations. Canada submits that the *APA* specifically provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose", which is commonly called the Preamble.¹⁹² Canada cites in particular to a US Court of Appeals statement as follows:

"These regulations were expressly authorised by Congress, and, in view of Congress' delegation, the [Department of Justice's] regulations should be accorded 'controlling weight unless [they are] 'arbitrary, capricious, or manifestly contrary to the statute'. The same is true of the preamble or commentary accompanying the regulations since both are part of the [Department of Justice's] official interpretation of the legislation."¹⁹³

8.110 Finally, Canada considers that the DOC, in its CVD determinations, uniformly treats the Preamble as an integral part of the Regulations and equivalent in legal authority to other sections of the Regulations. Canada indicates that, when an issue is addressed by the Preamble, the DOC routinely applies the Preamble provisions to resolve issues in CVD investigations or administrative reviews.

8.111 The United States argues that only the Regulations themselves, and not the Preamble thereto, have the force of law, meaning that even if the Preamble stated that the DOC was required to treat export restraints as subsidies, any such statement would not be binding on the DOC as a matter of US law. The United States characterises the Preamble as "evidence of an agency's contemporaneous understanding of its proposed rules" which "may be consulted to determine the proper interpretation

¹⁹¹ First Written Submission of Canada, para. 43.

¹⁹² Response of Canada to Request by the United States for Preliminary Rulings, para. 26.

¹⁹³ *Id.*, para. 27.

of an agency's regulation", also citing to various US court decisions in this regard.¹⁹⁴ The United States submits that a US court has found that "language in the preamble of a regulation is not controlling over the language of a regulation itself" and, in the US view, "certainly is not controlling over a statute".¹⁹⁵ Further, the United States is of the view that, as the DOC did not promulgate a regulation on the topic of indirect subsidies in general, or export restraints in particular, the Preamble cannot even be used as an interpretive tool in the instant case, because there is no regulation to interpret. According to the United States, the Preamble is "at most . . . a non-binding statement by the DOC regarding its views at the time concerning the scope of Section 771(5)(B)(iii)"¹⁹⁶ and "expressions of [the DOC's] tentative thoughts"¹⁹⁷. As to the DOC's references to the Preamble in its determinations, the United States argues that "[t]here is a big difference between citing the Preamble as a shorthand explanation of the reasons why the DOC is making a particular determination, and citing the Preamble as binding authority"¹⁹⁸.

8.112 We recall, as indicated by Canada itself, that the *APA* specifically provides that "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose", which is commonly called a Preamble.¹⁹⁹ We can certainly conceive of such a general statement as an indication of the context in which particular regulations were prepared, as a reflection of the issuing agency's views on the interpretations and methodologies set out in the regulations, and even as an interpretive guide to the regulations. To the extent that a Preamble refers to an underlying statute in addition to the regulations to which it is attached, we also can envision that it could provide interpretive guidance in respect of the statute.

8.113 We fail to see, however, that a "general statement of the[] basis and purpose" of regulations could have the same operational status as the regulations themselves, i. e., that the Preamble could constitute rules that were *separate* from the regulations and that would have *independent* operational effect on the agency in question. Only if that were the case could the general statement (the Preamble) be able to give rise independently to WTO violations. Further, while we note the *APA*'s use of the words "incorporate in the rules", we consider that a "general statement of the[] basis and purpose" of the rules, even when "incorporate[d]" therein, could by its very nature only inform the reader of the rationale generally for the regulations, and for the interpretations and methodologies contained therein. That is, we are not persuaded that the fact that a general statement of basis and purpose is described as being "incorporate[d] in the rules" automatically confers on that statement the same operational status and effect as the rules themselves. Nor was the Preamble subject to any approval process comparable to that to which the SAA was subject, or to the notice and comment process to which the Regulations themselves were subject. Indeed, the Preamble to a large extent appears simply to be a written record of that latter process.

8.114 As for its description of that process, the Preamble states: (i) that the DOC has decided *not* to issue a regulation in respect of "entrusts or directs"; and (ii) that instead the DOC believes that it should follow the guidance provided in the SAA to examine indirect subsidies (under which rubric the DOC would place export restraints) on a case-by-case basis²⁰⁰ (*See* paragraph 8.115, *infra*). Thus, the Preamble makes clear that no specific regulation has been adopted, and then incorporates by reference, and defers to, the interpretive guidance contained in the SAA, in respect of export restraints. We thus conclude that the Preamble has no operational life of its own – it does not *do*

¹⁹⁴ Request by the United States for Preliminary Rulings, para. 81.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*, para. 82.

¹⁹⁷ Oral Statement of the United States at the first meeting of the Panel, para. 28.

¹⁹⁸ Oral Statement of the United States at the second meeting of the Panel, para. 49.

¹⁹⁹ Response of Canada to Request by the United States for Preliminary Rulings, para. 26.

²⁰⁰ *Regulations*, 63 Federal Register, p. 65349 (Annex C to First Written Submission of Canada – Exhibit CAN-3).

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

(b) Content in respect of export restraints

8.115 We thus now turn to the language in the Preamble that is relevant to the treatment of export restraints. We note, first, that the DOC indicates in the Preamble that it decided against adopting a regulation concerning export restraints, or concerning "indirect subsidies" or the "entrusts or directs" language more generally. The Preamble explains that this was in part because the DOC considered this to be unnecessary, in that the SAA already contained examples of the kinds of "indirect subsidies" that could be encompassed by the statutory language, and also that the SAA "directs" the DOC to proceed on a case-by-case basis:

"In our 1997 Proposed Regulations, we did not address indirect subsidies in detail. Instead, we note that the SAA directs the [DOC] to proceed on a case-by-case basis . . .

...

[T]he phrase 'entrusts or directs' could encompass a broad range of meanings. As such, we do not believe it is appropriate to develop a precise definition of the phrase for purposes of these regulations. Rather, we believe that we should follow the guidance provided in the SAA to examine indirect subsidies on a case-by-case basis.

...

The SAA . . . lists a number of cases where the [DOC] has found indirect subsidies in the past, and these cases serve to provide examples of situations where we believe the statute would permit the [DOC] to reach the same result."²⁰¹

Thus, in this sense, as we noted above, the Preamble simply incorporates by reference and defers to the SAA in respect of the interpretation of the definitional elements of a "subsidy", in particular the meaning of "entrusts or directs".

8.116 Concerning export restraints specifically, the Preamble states in relevant part:

"With regard to export restraints, while they may be imposed to limit parties' ability to export, they can also, in certain circumstances, lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration . . . [I]f the [DOC] were to investigate situations and facts similar to those examined in *Lumber* and *Leather* in the future, the new statute would permit the [DOC] to reach the same result."²⁰²

The language "would permit" clearly does not connote a *requirement*. We thus see this statement as reflecting the DOC's view or belief that it *could*, under the new statute, continue to treat export

²⁰¹ *Regulations*, 63 Federal Register, pp. 65349-65350 (Annex C – Exhibit CAN-3).

²⁰² *Id.*, p. 65351.

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

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

8.118 We attach importance, however, to the fact that the Preamble refers to the interpretive guidance in the SAA concerning indirect subsidies and export restraints. For the reasons given in paragraph 8.105, we have concluded that the SAA correctly indicates that primacy is to be given to Section 771(5)(B)(iii), which contains the test of financial contribution. Accordingly, the Preamble, like the SAA, ensures that the DOC is to apply the test of financial contribution.

8.119 Thus, far from casting doubt on our conclusion as to the interpretation of the statute, the language in the Preamble is fully consistent with that conclusion, namely, that the DOC is not required under US law to treat export restraints as financial contributions.

(iv) *US "Practice"*

8.120 Canada defines US "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations"²⁰⁴. Canada considers that there is an existing US administrative "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement, which "practice", according to Canada, is defined in large part by the pre-WTO US practice of countervailing export restraints where they "directly led to a discernible benefit". In this regard, Canada cites *Leather* and *Lumber*. Canada submits that, while the practice in those cases should have become irrelevant after the SCM Agreement came into force, the SAA expressly provides that it is to continue under the SCM Agreement and the revised US CVD law.

8.121 Canada further considers that the DOC's determinations in the Korean *Stainless Steel* cases and *Live Cattle from Canada* confirm the DOC's view that its Regulations, like the SAA, foreclose any discretionary consideration of "financial contribution" in the case of "indirect subsidies". Canada makes it clear, however, that while practice is related to precedent, the US "practice" of which it complains is not individual determinations in CVD cases. Canada's arguments in respect of US "practice" therefore seem to comprise essentially two elements – references to certain pre-WTO US CVD cases in the SAA and the Preamble, and certain post-WTO US CVD cases – both of which effectively make up the "institutional commitment" alleged by Canada.

8.122 While Canada acknowledges that "[a] 'practice' identified in a [DOC] determination differs from 'legislation', because it is not statutory and has not been validly promulgated as a legislative rule"²⁰⁵, Canada seeks to persuade the Panel that US "practice" has an operational existence in and of

²⁰³ As the DOC observed in *Lumber*: "The rationale underlying that determination [*Leather*] was that (1) the embargo on raw hides 'applie[d] only to [raw] cattle hides, which are sold primarily, if not exclusively, to leather tanners [and, therefore,] [was] limited to a specific industry', and (2) the export embargo 'caused hide prices to be lower than they would have been absent the embargo' and, thereby, enabled the leather tanners to sell the finished product, leather, at a lower price" (57 Federal Register No. 103, p. 22606 – Exhibit CAN-14).

²⁰⁴ Response of Canada to question 16(c) from the Panel following the first meeting.

²⁰⁵ Response of Canada to question 14 from the Panel following the second meeting.

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

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

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

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

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

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

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

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

²⁰⁸ Response of Canada to question 15 from the panel following the second meeting.

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

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

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

²¹² Second Written Submission of Canada, para. 40.

value as a final determination because it applies a different standard, under both standards the same legal elements are required to be present".²¹³ We note, however, that, in *Live Cattle*, the DOC did not even address the question of whether the export restraint at issue constituted a financial contribution, as it found that there was no benefit. In the *Stainless Steel* cases, because the practice at issue was not export restraints, but the direction of credit, we see little if any relevance in *Stainless Steel* for the treatment of export restraints. These cases therefore cannot be considered as reflecting a post-WTO US "practice" of treating export restraints as financial contributions.

8.128 Finally, we note that Canada submits that "practice" in the form of an "institutional commitment" is "normally reflected in writing"²¹⁴. It does not, however, explain how that is the case in the present dispute, except for the vague statement that "practice" is "reflected in DOC regulations when those are issued". We therefore do not see what form of expression this "institutional commitment" might take or where such an expression might be made.

8.129 For the foregoing reasons, we consider that there is before us *no* measure in the form of US "practice" in the sense used by Canada that requires the treatment of export restraints as financial contributions. Nor, given that Canada has not identified concretely what US "practice" is, can any US "practice" provide interpretive guidance in this dispute. Therefore, practice in the sense used by Canada cannot require any particular treatment of export restraints in US CVD investigations.

(v) *Summary*

8.130 We have found that, of the measures that are the subject of Canada's claims, only the statute has an independent operational life of its own. We have nevertheless found that the statute must be read in light of the SAA, and we have therefore looked to the SAA as the principal interpretive guide thereto. We have concluded that the statute read in light of the SAA does not require the treatment of export restraints as financial contributions in CVD investigations. We also recall that we have found that the Preamble, while it could provide interpretive guidance to the statute, in fact contributes little or no substance in this regard. Nevertheless, what it says in respect of the treatment of export restraints is consistent with our conclusion in respect of the statute read in light of the SAA. Finally, we recall that Canada has not concretely or clearly identified what it means by US "practice", nor in what way any such practice either has an independent operational status, or can provide interpretive guidance (binding or otherwise) concerning the treatment of export restraints in CVD investigations. Thus, given that we are not persuaded that there is any "practice" in the sense used by Canada, such practice cannot require any particular treatment of export restraints in US CVD investigations.²¹⁵

(d) *Conclusion*

8.131 In sum, therefore, we find that the statute – including as read in light of the SAA and the Preamble – does not mandate the treatment of export restraints as financial contributions (which treatment we have found, however, would violate the SCM Agreement). Accordingly, we find that

²¹³ Response of Canada to question 15 from the Panel following the second meeting.

²¹⁴ Response of Canada to question 14 from the Panel following the second meeting.

²¹⁵ In light of our findings in this section, we need not, and thus do not, address the request by the United States for preliminary rulings as follows: (i) that the SAA and the Preamble are not identified as "measures" in the request for establishment, that in any event neither one is a measure, and that therefore the claims concerning them are not within the Panel's terms of reference; (ii) that US "practice" (past, present, or future) is not a measure properly before the Panel, and that any "practice" that might exist does not constitute binding precedent; and (iii) that "practice" was neither identified in Canada's request for consultations, nor was it the subject of consultations; nor did the request for establishment sufficiently identify the US "practice" in question, in violation of Articles 4.7 and 6.2 of the *DSU*, which therefore means that "practice" is not properly before the Panel.

Section 771(5)(B)(iii) of the *Tariff Act* as such does not violate the SCM Agreement, and we reject the claims of Canada under SCM Article 1.

C. CLAIMS UNDER OTHER PROVISIONS

8.132 The claims of Canada under SCM Articles 10 (and SCM Articles 11, 17, and 19, as they relate to SCM Article 10) and 32.1, on the one hand, and SCM Article 32.5 and WTO Article XVI:4, on the other, are entirely dependent on the claim that the treatment of export restraints as financial contributions is WTO-inconsistent and that US law requires such treatment contrary to SCM Article 1. In light of our finding that, while such treatment of export restraints *is* WTO-inconsistent, US law does not *require* such treatment and therefore is *not* WTO-inconsistent, we need not, and thus do not, consider Canada's claims under these provisions.

IX. CONCLUSIONS AND RECOMMENDATIONS

9.1 In light of the above findings, we conclude that:

- An export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement.
- Section 771(5)(B)(iii) read in light of the SAA and the Preamble to the US CVD Regulations is not inconsistent with Article 1.1 of the SCM Agreement by "requir[ing] the imposition of countervailing duties against practices that are not subsidies within the meaning of Article 1.1".

9.2 With respect to those of Canada's claims not addressed above, we have concluded that:

In light of considerations of judicial economy, it is neither necessary nor appropriate to make findings thereon.

9.3 We therefore make no recommendations with respect to the United States' obligations under the SCM and WTO Agreements.
