IX. INTERIM REVIEW

9.1 On 19 December 1997, the United States and Japan requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 5 December 1997. Neither the United States nor Japan requested that a further meeting of the Panel with the parties be held. In a letter dated 12 January 1998, the United States submitted a response to certain of Japan's comments on the interim report. In a letter dated 21 January 1998, Japan responded to some of the US comments on its comments.

9.2 Following comments by Japan on the descriptive part, we modified paras. 2.5, 2.9, 2.14, 2.226, 5.412, 6.309, 6.334, 6.441 and 6.466.

9.3 The United States expresses its strong disagreement with the Panel's legal findings and conclusions. The United States reiterates that the Japanese Government undermined the benefits the United States legitimately expected would flow from a series of tariff concessions it bargained for in good faith over a period of more than 30 years. Japan is further charged with having frustrated the intent of the GATT negotiation process by enacting a series of measures that allegedly have created an interlocking web of protection that has been difficult to detect and understand even after three years of intensive investigation and research. In light of the comprehensive nature of its objections, the United States deems it impossible to comment on a paragraph-by-paragraph basis and rather elaborates on some of the major deficiencies that, in its view, pervade the interim report.

9.4 First, the United States criticizes that the Panel failed to acknowledge the combined operation and effects of the liberalization countermeasures which, in the US view, directly affected the findings on Article XXIII:1(b) and Article III. The United States alleges that as a result of the combination of measures, rather than of any single measure, Japan created a market structure and maintained it until today that keeps foreign photographic materials out of the Japanese market. In our view, this criticism is unfounded, as we considered the evidence and arguments of the parties on combined effects of the measures in paras. 10.350-10.367 of the findings.

9.5 Second, the United States argues that the interim report construes the "detailed justification" requirement as imposing a heightened evidentiary standard in non-violation cases, while for the United States it is rather a pleading requirement, i.e., a screen to dismiss inadequately articulated non-violation claims from a panel's consideration. The United States emphasizes that the fact that Article XXIII:1(b) provides for an exceptional remedy does not justify requiring a quantum of proof that is higher than the one applied under other GATT articles. We recall that in para. 10.84 we stated that "at this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment." In our view, we did not apply the "detailed justification" requirement as a heightened evidentiary standard. In response to the US comments we modified, *inter alia*, the language of paras. 10.50, 10.60, 10.61, 10.80, 10.111, 10.126, 10.140, 10.153, 10.166, 10.184, 10.198, 10.219, 10.232, 10.258, 10.271, 10.286, 10.303, 10.308, 10.309, 10.317, 10.319, 10.331, 10.338, 10.346, 10.357 and 10.363 in order to make this clearer.

9.6 Third, in the US view, many of the Panel's factual findings ignore evidence that the United States deems substantial. In particular, the United States denies that Japan's interference in the distribution system was for the purpose of modernization. The United States claims to have provided the Panel with a substantial quantity of evidence concerning protectionist intent, the effects of the unique circumstances of the government-industry concerted adjustment system, and the peculiarities of the Japanese distribution system in the film sector. We reject the US characterization of our findings on this issue as ignoring substantial evidence.

9.7 Fourth, the United States submits that, while it was aware of the Large Stores Law, Premiums Law and Antimonopoly Law at the time of the Tokyo and Uruguay Rounds, it could not and did not know the extent to which Japan's closed distribution system for photographic materials was the result of the combined effect of the distribution measures, or that the distribution countermeasures, the Large Stores Law, and the promotion countermeasures worked together to impede market access, and to prevent price and other types of competition in the market. The United States emphasizes that notice of the existence of these laws and their essential provisions was not tantamount to notice of the actual operation of the measures. While we explicitly accepted that a Member might not appreciate the effect of the application of a measure at the time of its publication, in our view, the United States in general failed to demonstrate that it should not be charged with such knowledge in this case.

9.8 Fifth, the United States argues that the Panel's ruling that a complaining party is charged with knowledge of the responding government's measures as of the date of their publication suggests a rule of *caveat emptor* which would operate as a deterrent to concluding tariff negotiations in the future. In the US view, this would imply for countries' negotiators the need to undertake a sector-by-sector investigation of great magnitude before accepting any concession, lest they be charged with "anticipation" of non-transparent administrative measures that could potentially impair the benefits of that concession. The United States believes that no country is capable of such a massive effort in the course of comprehensive multilateral negotiations because countries would face serious difficulties detecting the many measures that may nullify or impair tariff concessions for the hundreds of products under consideration. We reject the US characterization of the test we developed in this area. It is accurate that we operated on the presumption that in general a Member's knowledge of a measure shall be assumed as of the date of its publication. Additionally, however, we also explicitly accepted that this presumption could be overcome if a Member demonstrates that for specific reasons it could not have reasonably anticipated a measure. In contrast, the latitude to show otherwise in the approach suggested by the United States could, in our view, lead to conclusions that might undermine the security and predictability of the multilateral trading system.

9.9 Finally, the United States agrees with the Panel that a measure need not provide for benefits or impose legally binding obligations or the substantive equivalent for purposes of non-violation complaints, and that the "incentives/disincentives test" developed by the panel on *Japan - Semiconductors* is not the exclusive test or outer limit of what may constitute a measure under Article XXIII:1(b). The United States further requests the Panel to make clear that the binding nature of a measure is a relevant - albeit not dispositive - factor in an analysis of whether something is a measure. We agree with the United States that the test is not exclusive and where appropriate we have clarified our position in the general part of the findings and in our examination of specific "measures" at issue.

9.10 Japan emphasizes that its comments were in general designed to further improve the factual findings and the legal reasoning in support of the conclusions reached by the Panel in its interim report.

9.11 Most of Japan's specific comments concern the Panel's discussion of which items complained against are to be considered to be measures within the meaning of Article XXIII:1(b). In particular, Japan requests the Panel to explain what tests other than the "incentive/disincentive test" suggested by the panel on *Japan - Semiconductors* are relevant in this respect. In Japan's view, there is no substantial difference between the tests developed by the panel on *Japan - Semiconductors* and the panel on *Japan - Agricultural Products* because the former is the mere elaboration of the latter. Japan further proposes clarification that the Panel's test(s) focus on the alleged measures themselves and how these measures operate, not on the alleged consequences of the measures, i.e., actions taken by private parties or trade flows. Specifically, in Japan's view, the *Japan - Semiconductors* case did not deal with private actions that were deemed to be governmental, but with measures which were actually taken by the Japanese Government. We adjusted paras. 10.49 and 10.50 to make our reading of the panel reports on *Japan - Semiconductors* and *Japan - Agricultural Products* on the issue of what constitutes a governmental measure clearer.

9.12 Japan deems it inappropriate to characterize the government-business relationship in Japan as one of a high degree of cooperation and collaboration. In particular, it objects to the Panel using such a "simplification" in the context of a generally applicable test to determine what constitutes a measure. Rather, Japan proposes that the Panel discuss such specific circumstances only when the general test is applied to individual cases. We modified the reasoning in para. 10.49 without changing our basic approach of discussing the government-business relationship in both the general part of the findings as well as in the context of our examination of the specific "measures" in dispute.

9.13 Furthermore, Japan proposes clarification that it is "continuing administrative guidance" issued to perpetuate the underlying policies which is actionable as a measure, not a revoked government action *per se* which ceases to exist and thus cannot be in effect. We clarified para. 10.59 accordingly.

9.14 In principle, Japan favours the Panel's approach of making affirmative assumptions with respect to some elements and then proceeding to consider other elements in order to complete the examination of all the other elements that arise in the context of a non-violation claim. However, in Japan's view, this approach does not require the Panel to make any findings on those elements which involve insufficient or conflicting evidence. In such cases, Japan argues, the doubt should go against the party that bears the burden of proof. Consequently, the Panel is called on to limit itself to stating its assumption without making a finding on whether an item constitutes a measure within the ambit of Article XXIII:1(b). In response, we modified para. 10.60 to read "we will take an expansive view of what constitutes a measure …". However, where we considered the evidence to be sufficient, we have made findings as to which of the specific measures in dispute constitute measures within the meaning of Article XXIII:1(b), rather than limiting ourselves to stating assumptions as suggested by Japan.

9.15 Moreover, Japan requests the Panel to modify its finding that reasonable expectations may in principle continue to exist in respect of tariff concessions in successive rounds of Article XXVIIIbis negotiations. Japan reiterates its position that only benefits accruing from the Uruguay Round tariff concessions are relevant in this case because the latest tariff negotiation should be deemed to have created a new expectation concerning the balance of tariff concessions, and to have replaced any reasonable expectation that arose under a prior tariff negotiation. In Japan's view, the panel on *EEC - Oilseeds* focused on the issue of whether or not a new balance of concessions (i.e. a global reassessment of the value of all the EEC's concessions) was created, and not on the issue of the procedures and formalities under which the tariff negotiation was carried out. We added language to para. 10.68, reflecting the *EEC - Oilseeds* panel's finding that "the balance of concessions negotiated in 1962 … was not altered" in that case. However, this argument is not determinative for our finding in para. 10.70. Thus, we continue to consider that reasonable expectations may co-exist in respect of tariff concessions in successive rounds of Article XXVIIIbis negotiations.

9.16 Further Japanese comments refer to the issue of the causation of nullification or impairment of benefits accruing from tariff concessions by a measure within the meaning of Article XXIII:1(b). Japan points out that it does not advocate and has not advocated a "but for" standard of causation. Rather, in Japan's view, a clear linkage between the measure at issue and the alleged nullification or impairment must be proven with a "detailed justification" in order to establish the necessary causal connection. In response to Japan's comment, we adjusted para. 10.84. Finally, Japan advocates a higher standard of causation than the Panel's standard of a "more than a *de minimis* contribution" which, in Japan's view, understates the requisite degree of causal connection under Article XXIII:1(b). We disagree with Japan's position and, accordingly, have not altered the text on this point.

9.17 As regards the distribution measures at issue, Japan urges the Panel to make clear that both the characterization of the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports and the 1969 Survey as measures within the meaning of Article XXIII:1(b), and its statement that the alleged measures are still in effect, are assumptions, not findings. We carefully reviewed our reasoning and

have made appropriate modifications to make clearer where we made findings and where we proceeded on assumptions.

9.18 Japan emphasizes that the 1967 Cabinet Decision was published in Kampo (i.e. the Japanese Government's Official Gazette) on 21 June 1967, prior to the conclusion of the Kennedy Round on 30 June 1967. Accordingly, in Japan's view, the United States should have reasonably anticipated the 1967 Cabinet Decision prior to the Kennedy Round. The United States responds that it did not have the opportunity or foresight to re-open the negotiations on individual products nine days prior to the conclusion of the Kennedy Round on the basis of the publication of this measure in Japanese. Accordingly, the United States requests the Panel to maintain its finding that the United States could not have reasonably anticipated the 1967 Cabinet Decision because of the proximity in time of that measure's publication to the conclusion of the round of multilateral tariff negotiations. In view of the parties' comments and in applying the test developed in paras. 10.79-10.81, we modified paras. 10.103, 10.106, 10.247 and 10.251.

9.19 Japan disagrees with the Panel's findings concerning the governmental attributability of the 1970 Guidelines and the 1971 Basic Plan. In the alternative, Japan contends that non-binding suggestions could have a *similar* effect at best - but not the *same* effect - as legally binding measures. We maintain our findings that the two above-mentioned items are to be considered measures within the meaning of Article XXIII:1(b). However, we accepted Japan's alternative proposal and clarified that non-binding suggestions could have a *similar* effect to legally binding measures. Consequently, we modified paras. 10.49, 10.161 and 10.180.

9.20 Further, Japan makes detailed proposals on how to make the Panel's reasoning with regard to the alleged "continuing effect" of certain "measures" (i.e., the 1967 Cabinet Decision, the Sixth and Seventh Interim Reports, the 1969 Survey, the 1970 Guidelines, the 1971 Basic Plan and the 1975 Manual) more uniform. We largely accepted these suggestions and harmonized the language of paras. 10.123, 10.137, 10.150, 10.163, 10.181 and 10.195.

9.21 As to the impact of the Large Stores Law on the competitive relationship between domestic and imported products, it is Japan's position that benefits of tariff concessions accruing under Article II consist of the legitimate expectation that market access opportunities, or improved competitive conditions, for imports created by the tariff concessions will not be frustrated as a result of any government measure. In Japan's view, however, the benefits under Article II do not include expectations concerning market evolution, because changes in the marketplace situation can result from various factors such as market forces and private practices, regardless of the existence of alleged governmental measures. We modified para. 10.232 in order to clarify our reasoning on this point.

9.22 With respect to the establishment of the Fair Trade *Promotion* Council in 1982, Japan continues to deny that the Promotion Council constitutes a fair trade council established under a fair competition code with the approval of the JFTC pursuant to Article 10 of the Premiums Law. According to Japan, the Fair Trade *Promotion* Council was established by private businesses having no connection with Japanese governmental entities. We emphasize that our finding was not based on whether the creation of the Promotion Council was approved by the JFTC, but on our assessment that in certain cases the relationship between the Promotion Council and the JFTC was sufficiently close for a finding that actions of the Promotion Council are to be deemed attributable to the Japanese Government.

9.23 In regard of the 1982 Self-Regulating Measures on Fairness in Trade and the 1984 Self-Regulating Standards, Japan reiterates its argument that these "measures" have not been approved by the JFTC as fair competition codes. In Japan's view, especially the "measures" relating to dispatched employees lie outside the scope of regulations on premiums and misleading representations. Japan further argues that the interaction between the JFTC and the industry during the formation of the 1982 Self-Regulating Measures was not intensive. Consequently, Japan contends that these "measures" are too tangentially

connected to the JFTC to attribute them to the Japanese Government within the meaning of Article XXIII:1(b). Moreover, even assuming that a sufficient connection to the Japanese Government is proven, Japan points out that the 1982 Self-Regulating Measures are not viewed by private parties as legally binding. To the extent that private parties are not free to demand the dispatch of employees from suppliers, Japan submits that this is a direct result of the application of the Antimonopoly Law itself, and not because the 1982 Self-Regulating Measures could be assimilated to a government measure. In respect of the 1984 Self-Regulating Standards, the JFTC merely responded to the Fair Trade Promotion Council's inquiry as to the lawfulness of these Standards under the Antimonopoly and Premiums Laws. Thus, in Japan's view, the 1984 Self-Regulating Standards are not attributable to the Japanese Government because the JFTC's relation to these Standards is too remote. We carefully reviewed our findings on this issue in light of the arguments raised, but were not persuaded of a need to modify them in line with Japan's position.

9.24 Japan generally objects to the Panel's conclusion that fair competition codes and individual activities of fair trade councils constitute governmental measures within the ambit of Article XXIII:1(b). In particular, Japan points out that the approval of a fair competition code by the JFTC does not imply any delegation of quasi-governmental authority to a private body such as a fair trade council. Moreover, according to Japan, JFTC approval does not grant immunity from the substantive provisions of the Antimonopoly Law, and, if individual actions fall outside the code, they are fully actionable under that Law. Japan also reiterates its argument that a fair trade council does not have any authority over non-members who are not obligated to join the council. In Japan's view, a government should not be held responsible for any action of private associations merely because it gives approval in certain aspects. Having reviewed our analysis of this issue, we see no reason to modify our reasoning on these points.

9.25 In addition, Japan requests the Panel to make an explicit finding that the 1987 Retailers Fair Competition Code only covers cameras and related products but does not apply to photographic film and paper. Japan notes that - regardless of whether or not a fair competition code is to be assimilated to a government measure - the JFTC has the authority to interpret the scope of approval under the Premiums Law and has never allowed and has no intention to allow the application of the Retailers Code to film or paper. Moreover, Japan submits that an industry member's statement quoted in Zenren Tsuho ("… I will endeavour to make both photosensitive materials and development and printing fall under the code") proves that the Retailers Code did not apply to photographic film or paper. However, we considered that the evidence before us was not conclusive and decided to merely assume that the Retailers Code might also apply to photographic film and paper.

9.26 In our examination of the claims raised under Article III, we reasoned that the terms *laws, regulations and requirements* in that article should be interpreted as encompassing a similarly broad range of government action, and action by private parties that may be assimilated to government action, as those actions covered by the term *measure* in Article XXIII:1(b). In Japan's view, the term *requirement* must mean something different from *measure*, the former being probably narrower than the latter. The Panel is requested to explain the difference between these two terms in more detail, especially with respect to the 1967 Cabinet Decision, the 1971 Basic Plan and the 1970 Guidelines, and to limit itself to merely assuming that these items are *requirements* in the meaning of Article III. In response to Japan's comment, we modified paras. 10.376 and 10.377.

9.27 Finally, Japan suggests that the discussion of whether the "measures" in dispute accord less favourable treatment to imported products in contravention of Article III be elaborated. In Japan's view, this could be done by repeating, or referring to, the Panel's examination of whether vertical integration and single-brand distribution in general, and the 1970 Guidelines and the 1971 Basic Plan in particular, have caused an upsetting of the competitive relationship between domestic and foreign products in the meaning of Article XXIII:1(b). In line with Japan's comment, we decided to expand our reasoning in para. 10.381, in particular with respect to the two specific measures mentioned above.

9.28 In response to other comments by Japan, we corrected factual inadequacies, especially in paras. 10.103, 10.104, 10.106, 10.128, 10.146, 10.160, 10.207, 10.208, 10.211, 10.247, 10.249 and 10.296. In addition, where we found merit in specific suggestions made by Japan, we adjusted paras. 10.87, 10.148, 10.194, 10.205. 10.298, 10.299, 10.302, 10.316, 10.345, 10.353.