

## **X. FINDINGS**

### **A. PRELIMINARY ISSUES**

10.1 As a preliminary matter, Japan requests the Panel to exclude from consideration eight<sup>1176</sup> separate "measures"<sup>1177</sup> which Japan believes are outside the terms of reference of the Panel as not having been identified specifically in the US request for the Panel's establishment. The eight "measures" are the following:

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

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

10.3 The United States counters that it fulfilled the requirements of Article 6.2 and that these "measures" are therefore within the Panel's terms of reference. Specifically, the United States argues that: (1) Japan was on adequate notice of the "measures" implicated in the US request for the establishment of the panel; (2) Japan has not complained that any of the "measures" are not related to "measures" that were discussed in the consultations and identified in the panel request; and (3) the means selected by it to describe these "measures" are necessitated by the nature of the "measures" themselves. Japan contests each of these US arguments.

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<sup>1176</sup>In its request for a preliminary ruling, Japan objected to nine of the "measures" discussed in the first US written submission to the Panel. After the US response to a panel question, in which the United States specified the measures subject to its claims, Japan objected to one additional measure, but dropped its objections in respect of two measures not specified in the US response.

<sup>1177</sup>In our findings, one of the central issues is whether or not certain governmental actions or policies cited by the United States are measures within the meaning of GATT Article XXIII:1(b). Where dealing with the parties' allegations and arguments, we put the term "measure" within quotation marks. Only where we refer to the term more generally or where we have decided or assumed that such governmental actions or policies are measures within the meaning of Article XXIII:1(b) do we use the term without quotation marks.

**I. SPECIFICITY OF THE "MEASURES" IDENTIFIED IN THE PANEL REQUEST**

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

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

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

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

"The Government of Japan has implemented and maintains laws, regulations, requirements and measures (collectively "measures") affecting the distribution, offering for sale, and internal sale of imported consumer photographic film and paper, including: liberalization countermeasures; distribution measures, such as, but not limited to, the cabinet decision, administrative guidance, and other measures listed in Attachment A; the Law Pertaining to the Adjustment of Business Activities of the Retail Industry for Large Scale Retail Stores, No. 109 of 1973 (*Daiten Ho*); Special Measures for the Adjustment of Retail Business; No. 155 of 1959 (*Shocho Ho*); the Law Against Unjustifiable Premiums and Misleading Representations, No. 134 of 1962; measures regarding dispatched employees pursuant to the Law Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, No. 54 of 1947; the Law Concerning Enterprise Reform for Specified Industries, No. 61 of 1995; the Ministry of International Trade and Industry Establishment Law, No. 275 of 1952; and related measures.

The United States considers that such measures nullify or impair benefits accruing to it, within the meaning of Articles XXIII:1(a), as a result of the failure of the Government of Japan to carry out its obligations under Article III and X of the General Agreement on Tariffs and Trade 1994 (GATT). More specifically, the Japanese Government measures:

- were implemented and maintained so as to afford protection to domestic production of consumer photographic film and paper within the meaning of GATT Article III:1;
- conflict with GATT Article III:4 by affecting the conditions of competition for the distribution, offering for sale, and internal sale of consumer photographic film and paper in a manner that accords less favourable treatment to imported film and paper than to comparable products of national origin; and
- conflict with GATT Articles X:1 and X:3 because the measures lack transparency in that they were not promptly published and were not administered in a uniform, impartial and reasonable manner.

In addition, the application of these measures by the Government of Japan nullifies or impairs, within the meaning of GATT Article XXIII:1(b), the tariff concessions that the Government of Japan made on black and white and colour consumer photographic film and paper in the Kennedy Round, Tokyo Round, and Uruguay Round multilateral tariff negotiations.

[Description of consultations omitted]

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

[Request for special meeting of DSB omitted]

#### ATTACHMENT A

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

#### (b) Analysis of Article 6.2

10.6 We shall proceed with our analysis of the Japanese procedural objection in light of the interpretative rules of the Vienna Convention<sup>1179</sup> and Article XVI of the WTO Agreement.<sup>1180</sup> In this connection, we examine, as appropriate, (i) the ordinary meaning of the terms of Article 6.2; (ii) the context and the object and purpose of Article 6.2; and (iii) past practice under Article 6.2 and its predecessor provision.<sup>1181</sup>

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<sup>1178</sup>WT/DS44/2.

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

<sup>1180</sup>Article XVI provides: "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

<sup>1181</sup>In the case of adopted panel reports, the Appellate Body has stated: "Adopted panel reports are important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among WTO Members, and, therefore should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute". *Japan - Alcoholic Beverages*, WT/DS8/AB/R, p. 14.

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

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

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

10.10 The proposed interpretation is also consistent with past WTO and GATT panel practice. The *Bananas III* panel is the only WTO panel to have interpreted the aspect of Article 6.2 at issue in this case, i.e., the definition of the "measures" to be deemed covered by a panel request. In the *Bananas III* panel request, the "basic EC regulation at issue" had been identified by place and date of publication. In addition, the request referred in general terms to "subsequent EC legislation, regulations and administrative measures ... which implement, supplement and amend [the EC banana] regime". The *Bananas III* panel found that this reference was sufficient for the specificity requirement of Article 6.2 because the measures that the complainants were contesting were "adequately identified", even though they were not explicitly listed.<sup>1183</sup> The Appellate Body agreed that the panel request "contains sufficient identification of the measures at issue to fulfil the requirements of Article 6.2".<sup>1184</sup> In our view, "measures" that are subsidiary or closely related to specified "measures" can be found to be "adequately identified" as that concept was applied in the *Bananas III* case.

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<sup>1182</sup>Panel Report on *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("Bananas III")*, adopted on 25 September 1997, WT/DS27/R, para. 7.35, modified on other grounds by the Appellate Body in WT/DS27/AB/R, adopted on 25 September 1997. See also Appellate Body Report on *Bananas III*, WT/DS27/AB/R, para. 142; Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut ("Brazil - Desiccated Coconut")*, adopted on 20 March 1997, WT/DS22/AB/R, p. 22.

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

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

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

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

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

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

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

Article 3 of the Law authorizes the JFTC:

"when it finds it necessary to prevent unfair inducement of customers, [to] limit either the maximum value of a premium or the aggregate total amount of premiums, the kind of premiums or the method of offering of a premium or any other matter relating thereto, or [to] prohibit the offering of a premium".<sup>1189</sup>

The two notifications at issue establish limits on premiums in accordance with the Premiums Law. Given the close association of these JFTC notifications with the Premiums Law and in line with the reasoning in *Bananas III*, we consider that Japan had adequate notice that these notifications were within the scope of the US claims. Thus, we do not consider that Japan could be said to be prejudiced in any way by inclusion of these two measures in the matter before this Panel. We therefore find that

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

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

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

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

<sup>1189</sup>*Ibid.*

JFTC Notification No. 17 on premiums to business and JFTC Notification No. 5 on premiums to customers are within our terms of reference and properly before this Panel.

10.14 In the second category we would include a "measure", the Sixth Interim Report of the Industrial Structure Council's Distribution Committee, that is closely related, although not subsidiary, to a "measure" that is listed in the panel request. The Sixth Interim Report is not listed in the panel request, although it is part of a series of reports, another one of which (the Seventh Interim Report) is mentioned among the "measures" listed in the panel request. In that sense, one may view the Sixth Interim Report as being closely related to a "measure" that is listed in the panel request. We note in this regard that Japan was on notice that the US claims concerned the reports of the Industrial Structure Council's Distribution Committee. We see no reason to believe that our consideration of the report will cause prejudice to Japan or third parties in this case, given the similar nature and significant degree of overlap between the Sixth and Seventh Interim Reports. Accordingly, we find that there is a sufficiently close relationship between the Sixth Interim Report and the Seventh Interim Report, that the former is within our terms of reference and properly before this Panel.

10.15 In the third category we would include two measures which are only indirectly related to a measure mentioned in the panel request. These two measures are: JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (International Contract Notification Requirement) and JFTC Notification No. 34 on open lotteries (1971). JFTC Rule No. 1 and JFTC Notification No. 34 were issued pursuant to Articles 6 and 2(7), respectively, of the Antimonopoly Law, which is not listed separately as a measure challenged by the United States. However, the Antimonopoly Law is referred to in the panel request, in connection with the identification of a "measure" regarding dispatched employees.

10.16 In considering whether these two measures were adequately identified in the panel request, we note that in contrast to the Premiums Law, which has a relatively narrow focus (i.e., premiums), the Antimonopoly Law has a very broad scope and deals with a broad range of issues. As such, we would have some hesitation in saying that a reference to the Antimonopoly Law alone would be sufficient to bring all measures taken by Japan under that Law within the scope of the panel request. The text of Article 2(7), for example, does not clearly specify and predetermine the form, content and scope of subsidiary regulations. We need not decide that issue, however, because there was no such general reference made in this case. In this case, the reference in the panel request to the Antimonopoly Law was for the purpose of identifying a "measure" dealing with dispatched employees, an issue unrelated to the International Contract Notification Requirement or open lotteries. Such a reference would not normally be sufficient to put Japan on notice that these measures were a concern of the United States. In addition, we see no reason why, as suggested by the United States, the nature of these measures precluded their specification by the United States in the panel request. In our view, the International Contract Notification Requirement and JFTC Notification No. 34 on open lotteries (1971) are not subsidiary or closely related to a "measure" specified as being at issue in the panel request. Therefore, we find that these measures are not properly before this Panel.

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

10.18 In the case of the JDB and SMEA subsidies, the US position is that Japan had adequate notice of US claims relating to them because MITI's 1971 Basic Plan for the Systemization of Distribution, which was raised during consultations with Japan and figures in the "measures" listed in the panel request, makes reference to "positive support and guidance from the government" being necessary in relation to carrying out systemization. In our view, the relationship between these two "measures"

and the 1971 Basic Plan is too tenuous to find that they are covered by the panel request. The timing of the "measures", which range from 1967 to 1976<sup>1190</sup>, does not seem connected to a 1971 plan. In addition, we agree with Japan that the phrase "positive support" in the Basic Plan does not necessarily refer to financial contributions and is too vague to constitute any meaningful notice to Japan that JDB and SMEA financing were covered by the panel request. Moreover, we see no reason why, as suggested by the United States, the nature of these "measures" precluded their specification by the United States. Therefore, we find that these "measures" are not properly before this Panel.

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

## 2. *SUMMARY*

10.20 To sum up, on the basis of our examination of Japan's procedural objection to inclusion of eight specific "measures" in the Panel's terms of reference, we find that the following "measures" are within our terms of reference:

1968 Sixth Interim Report of Industrial Structure Council, "Distribution Modernization Outlook and Issues";  
1967 JFTC Notification No. 17 on premiums between businesses; and  
1977 JFTC Notification No. 5 on premiums to customers.

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

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

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<sup>1190</sup>The JDB loan is dated 1976; the SMEA subsidies were given starting in 1967.

## B. CLAIMS OF THE PARTIES

10.22 The United States claims that through the application of three broad categories of liberalization "countermeasures"<sup>1191</sup> the Japanese Government for more than 30 years has inhibited the distribution and sale of imported consumer photographic film and paper<sup>1192</sup> in Japan. These three categories of "measures" cover: (1) distribution "measures", which allegedly encourage and facilitate the creation of a market structure for photographic film and paper in which imports are excluded from traditional distribution channels; (2) restrictions on large retail stores, which allegedly restrict the growth of an alternative distribution channel for imported film; and (3) promotion "measures", which allegedly disadvantage imports by restricting the use of sales promotion techniques.

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

### Distribution "countermeasures"

- 1967 JFTC Notification 17 on Premiums to Businesses;
- 1967 Cabinet Decision on Liberalization of of Inward Direct Investment;
- 1968 Sixth Interim Report on "Distribution Modernization Outlook and Issues";
- 1969 Seventh Interim Report on "Systemization of Distribution Activities";
- 1969 Survey Report regarding Transaction Terms;
- 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
- 1971 Basic Plan for the Systemization of Distribution;
- 1975 Manual for Systemization of Distribution by Industry: Camera and Film;

### Restrictions on large retail stores

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

### Promotion "countermeasures"

- 1967 JFTC Notification 17 on Premiums to Businesses;
- 1967 Cabinet Decision on Liberalization of of Inward Direct Investment;
- 1977 JFTC Notification 5 on Premiums to Consumers;
- 1981 JFTC Guidance on Dispatched Employees;
- 1982 Self-regulating Rules Concerning Fairness in Trade with Business;
- 1982 Establishment of Fair Trade Promotion Council;

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<sup>1191</sup>We note that the parties disagree as to the correct translation of the Japanese word *taisaku*. The United States uses *countermeasure*, whereas Japan argues that *measure* or *policy in response to* are more appropriate translations. On this and other translation issues we refer, to the extent appropriate, to the opinions of two translation experts appointed by the Panel, Professor Zentaro Kitagawa and Professor Michael Young. See Part I and the "Annex on Translation Problems" in Part XI. The translation experts consider that *taisaku* can be translated as either *measure* or *countermeasure*, depending on the context. In our findings, we refer both to *measure* and "*countermeasure*", but in the latter case the term is always written within quotation marks.

<sup>1192</sup>We note that the term "consumer photographic film" as used by the United States includes both colour and black and white film for use in still photography by consumers. It includes both negative (print) and reversal (slide) film, and includes film incorporated in so-called "single-use cameras". It excludes various specialized films used by professional photographers and various other specialty films (x-ray film, microfilm). We further note that the term "consumer photographic paper" as used by the United States refers to photosensitive paper used to make still colour and black and white photographic prints from consumer photographic film. Hereafter we refer to consumer photographic film and consumer photographic paper as "film" and "paper".



- 1984 Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film;
- 1987 JFTC approval of the Retailers Fair Competition Code and its enforcement body, the Retailers Fair Trade Council.

10.24 The United States alleges that the above "measures", individually and collectively, nullify or impair benefits accruing to the United States within the meaning of GATT Article XXIII:1(b). In addition, it alleges that the above distribution "measures" are inconsistent with GATT Article III:4. It further alleges that (i) unpublished enforcement actions by the JFTC and fair trade councils under the Premiums Law and relevant fair competition codes that establish or modify criteria applicable in future cases, and (ii) unpublished guidance through which the Japanese authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, are inconsistent with GATT Article X:1.

10.25 Japan denies all the claims of the United States.

### **C. SEQUENCE OF CLAIMS TO BE ADDRESSED**

10.26 We note that traditionally in cases involving both violation and non-violation claims, panels first address claims of inconsistency with a covered agreement pursuant to Article XXIII:1(a), before moving on to consider claims of non-violation nullification or impairment under Article XXIII:1(b).<sup>1193</sup> We note, however, that whereas the US request for the establishment of this Panel<sup>1194</sup> first lists its violation claims, in the Panel proceedings the United States and Japan have first addressed the US claims of non-violation nullification or impairment under Article XXIII:1(b), followed by those dealing with inconsistency with Articles III:4 and X:1.

10.27 Even though there would appear to be merit in the traditional approach of first considering violation claims before moving to claims of non-violation, given that in the particular case before us the United States and Japan have begun with the non-violation claims in their written and oral presentations and have devoted the lion's share of their arguments to this portion of the case, we consider that it would be most efficient to also follow the sequence chosen by the parties in addressing the US claims. We shall therefore first address the US claims dealing with non-violation nullification or impairment under Article XXIII:1(b) and thereafter consider the US violation claims under Articles III:4 and X:1.

### **D. BURDEN OF PROOF**

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

10.29 We note that as in all cases under the WTO/GATT dispute settlement system - and, indeed, as the Appellate Body recently stated<sup>1195</sup>, under most systems of jurisprudence - it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party

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<sup>1193</sup>See, e.g., *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC - Oilseeds")*, adopted on 25 January 1990, BISD 37S/86, para.142. See also Working Party Report on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188, paras. 1, 12.

<sup>1194</sup>WT/DS44/2.

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

has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence then shifts to the other party to rebut the presumption. The Appellate Body stated the principle succinctly as follows:

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

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

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

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

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

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

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

"where there is no infringement of GATT provisions, it would be ... incumbent on the country invoking Article XXIII to demonstrate the grounds and reasons for its

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<sup>1196</sup>Idem (footnotes omitted).

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

invocation. Detailed submissions on the part of that contracting party on these points were therefore essential for a judgement to be made under this Article".<sup>1198</sup>

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

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

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

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

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

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

##### **1. OVERVIEW OF THE NON-VIOLATION REMEDY**

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

"The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a

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

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

<sup>1200</sup>There are only 16 distinct "measures" in total within the Panel's terms of reference, as two of the distribution "countermeasures" are also cited as promotion "countermeasures" (i.e., the 1967 Cabinet Decision and the 1967 JFTC Notification 17.

<sup>1201</sup>See Article 31 of the Vienna Convention.

reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement".<sup>1202</sup>

"The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. If no right of redress were given to them in such a case they would be reluctant to make tariff concessions and the General Agreement would no longer be useful as a legal framework for incorporating the results of trade negotiations".<sup>1203</sup>

Clearly, the safeguarding of the process and the results of negotiating reciprocal tariff concessions under Article II is fundamental to the balance of rights and obligations to which all WTO Members subscribe.

10.36 Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims.<sup>1204</sup> This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept.<sup>1205</sup> The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.

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

10.38 In GATT jurisprudence, most of the cases of non-violation nullification or impairment have dealt with situations where a GATT-consistent domestic subsidy for the producer of a product has been

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<sup>1202</sup>*EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86, 128-129, para.144.

<sup>1203</sup>*Ibid*, para.148.

<sup>1204</sup>Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*, adopted on 3 April 1950, BISD II/188; Panel Report on *Treatment by Germany of Imports of Sardines* ("*Germany - Sardines*"), G/26, adopted on 31 October 1952, BISD 1S/53; *Uruguayan Recourse*, adopted on 16 November 1962, BISD 11S/95; Panel Report on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region* ("*EC - Citrus Products*"), GATT Doc. L/5576, dated 7 February 1985 (unadopted); Panel Report on *EEC - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes* ("*EEC - Canned Fruit*"), GATT Doc. L/5778, dated 20 February 1985 (unadopted); *Japan - Semi-conductors*, adopted on 4 May 1988, BISD 35S/116; *EEC - Oilseeds*, adopted on 25 January 1990, BISD 37S/86; *United States - Agricultural Waiver*, adopted on 7 November 1990, BISD 37S/228.

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

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

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

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

## 2. **THREE REQUIRED ELEMENTS**

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

"If any Member should consider that any *benefit* accruing to it directly or indirectly under this Agreement is being *nullified or impaired* ... as the result of ... (b) the *application* by another Member of any *measure*, whether or not it conflicts with the provisions of this Agreement ... " (emphasis added).

The text of Article XXIII:1(b) establishes three elements that a complaining party must demonstrate in order to make out a cognizable claim under Article XXIII:1(b): (1) application of a measure by a WTO Member; (2) a benefit accruing under the relevant agreement; and (3) nullification or impairment of the benefit as the result of the application of the measure.<sup>1207</sup> We shall proceed with our analysis by considering in turn each of these three elements.

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

<sup>1207</sup>See, e.g., *EEC - Oilseeds*, BISD 37S/86, paras. 142-152; *Australian Subsidy on Ammonium Sulphate*, BISD II/188, 192-193.

**(a) Application of a measure**

10.42 In analysing the elements of a non-violation claim, a logical starting point is the requirement that there be application of a measure by a WTO Member. In the first instance, it is necessary to define what is meant by the term *measure*. In this case, some of the items included by the United States in its list of "measures" at issue are laws or regulations. Others are less formal or less concrete forms of governmental action, such as general policy statements by government agencies and officials of various ranks. Yet others are governmental actions generally authorizing certain private activities, where the question is the extent to which such activities are attributable to the government. These last two kinds of alleged "measures" raise a number of general issues of a conceptual nature and specific issues in respect of the individual "measures". We explore in this section general issues related to the definition of *measure*.

**(i) General considerations**

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

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

10.45 Our review of GATT jurisprudence, particularly the panel report on *Japan - Semi-conductors*, teaches that where administrative guidance creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner, it may be considered a governmental measure.<sup>1210</sup> In that case, the panel found that although a measure was not mandatory, it could be considered a *restriction* subject to Article XI:1 because

"sufficient incentives or disincentives existed for non-mandatory measures to take effect ... [and] the operation of the measures ... was essentially dependent on Government action or intervention [because in such a case] the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the

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<sup>1208</sup>The two definitions of *measure* relevant to our consideration in the *Concise Oxford Dictionary (Ninth Edition 1995)* are "legislative enactment" and "suitable action to achieve some end".

<sup>1209</sup>See para. 6.94.

<sup>1210</sup>*Japan - Semi-conductors*, BISD 35S/116, 154-55.

measures and mandatory requirements was only one of form and not of substance ...".<sup>1211</sup>

10.46 Another panel, that on *Japan - Restrictions on Imports of Certain Agricultural Products*, found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of GATT Article XI:2 because it emanated from the government and was effective in the Japanese context.<sup>1212</sup> Specifically as regards the method used to enforce certain measures, the panel found that:

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

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

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

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

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

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<sup>1211</sup>Ibid, p. 155.

<sup>1212</sup>Panel Report on *Japan - Restrictions on Imports of Certain Agricultural Products* ("*Japan - Agricultural Products*"), adopted on 22 March 1988, BISD 35S/163, 242.

<sup>1213</sup>Ibid (emphasis added).

that even non-binding, hortatory wording in a government statement of policy could have a similar effect on private actors to a legally binding measure or what Japan refers to as regulatory administrative guidance. Consequently, we believe we should be open to a broad definition of the term *measure* for purposes of Article XXIII:1(b), which considers whether or not a non-binding government action has an effect similar to a binding one.

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

10.51 Finally on the subject of what may constitute a governmental measure, we note the analysis of several GATT panels dealing with the related issue of what may constitute "all laws, regulations and requirements affecting ... internal sale, offering for sale, purchase, transportation, distribution or use" under GATT Article III:4. In these cases, the conclusion that there is a law, regulation or requirement that exists and violates GATT rules gives rise to a presumption of nullification or impairment. Even so, panels have taken a broad view of when a governmental action is a law, regulation or requirement. For example, in 1984 a panel examined written purchase and export undertakings under the Foreign Investment Review Act of Canada (FIRA), submitted by investors regarding the conduct of the business they were proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. These written undertakings were considered legally binding under FIRA. The panel determined that the undertakings were to be considered "laws, regulations or requirements" within the meaning of Article III:4, even though FIRA did not make their submission obligatory.<sup>1215</sup> Similarly, the panel on *EEC -- Parts and Components* considered that the term "laws, regulations or requirements" included requirements "which an enterprise voluntarily accepts in order to obtain an advantage from the government."<sup>1216</sup> Given that the scope of the term *requirement* would seem to be narrower than that of *measure*, the broad reading given to the word *requirement* by the *Canada - FIRA* and *EEC - Parts and Components* panels supports an even broader reading of the word *measure* in Article XXIII:1(b).

**(ii) Governmental versus private actions**

10.52 As the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to obligations, it follows by implication that the term *measure* in Article XXIII:1(b) and Article 26.1 of the DSU, as elsewhere in the WTO Agreement, refers only to policies or actions of governments, not those of private parties. But

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<sup>1214</sup>*EEC - Oilseeds*, BISD 37S/86, para. 144.

<sup>1215</sup>*Canada -- FIRA*, BISD 30S/140, 158, para. 5.4.

<sup>1216</sup>Panel Report on *EEC -- Regulation on Imports of Parts and Components* ("*EEC -- Parts and Components*"), adopted on 16 May 1990, BISD 37S/132, 197, para. 5.21. See also Panel Report on *Bananas III*, WT/DS27/R, paras. 7.179-7.180. The Illustrative List of Trade-Related Investment Measures (TRIMs) contained in the Annex to the Agreement on TRIMs indicates that TRIMs inconsistent with Articles III:4 and XI:1 include those which are "mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage" (emphasis added).



while this "truth" may not be open to question, there have been a number of trade disputes in relation to which panels have been faced with making sometimes difficult judgments as to the extent to which what appear on their face to be private actions may nonetheless be attributable to a government because of some governmental connection to or endorsement of those actions.

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

10.54 In *Japan - Semi-conductors*, "Japan contended that there were no governmental measures limiting the right of Japanese producers and exporters to export semi-conductors at any price they wished. ... Exports were limited by private enterprises in their own self-interest and such private action was outside the scope of Article XI:1".<sup>1218</sup> However, the panel found that

"... an administrative structure had been created by the Government of Japan which operated to exert maximum possible pressure on the private sector to cease exporting at prices below company-specific costs ... the Panel considered that the complex of measures exhibited the rationale as well as the essential elements of a formal system of export control".<sup>1219</sup>

10.55 And a 1989 panel on *EEC - Restrictions on Imports of Dessert Apples* noted that "the EEC internal regime for apples was a hybrid one, which combined elements of public and private responsibility. Legally there were two possible systems, direct buying-in of apples by Member State authorities and withdrawals by producer groups". That panel found that both the buying-in and withdrawal systems established for apples under the EEC regulation could be considered to be governmental measures for the purposes of Article XI:2(c)(i).<sup>1220</sup>

10.56 These past GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed to be governmental if there is sufficient government involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.

### (iii) Measure versus continuing effect

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

10.58 Moreover, GATT/WTO precedent in other areas, including in respect of virtually all panel cases under Article XXIII:1(a), confirms that it is not the practice of GATT/WTO panels to rule on

<sup>1217</sup>Report on *Review Pursuant to Article XVI:5*, adopted on 24 May 1960, BISD 9S/188, 192.

<sup>1218</sup>*Japan - Semi-conductors*, BISD 35S/116, para. 102.

<sup>1219</sup>*Ibid*, para. 117.

<sup>1220</sup>Panel Report on *EEC - Restrictions on Imports of Dessert Apples (Complaint by Chile)*, adopted on 22 June 1989, BISD 36S/93, 126.

measures which have expired or which have been repealed or withdrawn.<sup>1221</sup> In only a very small number of cases, involving very particular situations, have panels proceeded to adjudicate claims involving measures which no longer exist or which are no longer being applied. In those cases, the measures typically had been applied in the very recent past.<sup>1222</sup>

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

**(iv) Summary**

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

**(b) Benefit accruing under the GATT**

10.61 The second required element which must be considered to establish a case of non-violation nullification or impairment under Article XXIII:1(b) is the existence of a benefit accruing to a WTO Member under the relevant agreement (in this case, GATT 1994). In all but one of the past GATT cases dealing with Article XXIII:1(b) claims, the claimed benefit has been that of legitimate expectations

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

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

of improved market-access opportunities arising out of relevant tariff concessions.<sup>1223</sup> This same set of GATT precedents suggests that for expectations to be legitimate, they must take into account all measures of the party making the concession that could have been reasonably anticipated at the time of the concession.<sup>1224</sup> Of course, as with the first element (application of a measure), the complaining party has the burden of demonstrating the "benefit accruing".

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

**(i) Benefits under successive Rounds**

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

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

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

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

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

(i) protocols and certifications relating to tariff concessions;

...

(d) the Marrakesh Protocol to GATT 1994".

As referenced in the quoted text -- also known as the GATT 1994 incorporation clause -- GATT 1994 incorporates both "protocols and certifications relating to tariff concessions" under paragraph 1(b)(i)

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

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

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

10.65 Japan appears to argue that the Schedules annexed to the Marrakesh Protocol prevail as a later agreement over Schedules that entered into force under GATT 1947. In our view, such an interpretation would only make sense if the Marrakesh Protocol, referred to in paragraph 1(d) of GATT 1994, were viewed as later in time than the protocols referred to in paragraph 1(b)(i) thereof, and then, only to the extent of any conflict between tariff concessions annexed to the Marrakesh Protocol and the concessions in the other tariff protocols incorporated in GATT 1994. We consider that, as argued by the United States, Article 30 of the Vienna Convention<sup>1225</sup>, which is designed to resolve conflicts between provisions of successive treaties on the same subject matter, is not applicable to the situation at hand because there is nothing inherently incompatible -- in conflict -- between the earlier and later agreed tariff concessions. Such a conflict would only seem to exist if the subsequent concessions were less favourable than prior concessions, which is not the situation in this case. Where tariff concessions have been progressively improved, the benefits -- expectations of improved market access -- accruing directly or indirectly under different tariff concession protocols incorporated in GATT 1994 can be read in harmony. This approach is in accordance with general principles of legal interpretation which, as the Appellate Body reiterated in *US - Gasoline*, teach that one should endeavour to give legal effect to all elements of a treaty and not reduce them to redundancy or inutility.<sup>1226</sup>

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

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

"In these circumstances, the partners of the Community in the successive renegotiations under Article XXIV:6 could legitimately assume, in the absence of any indications to the contrary, that the offer to continue a tariff commitment by the Community was an offer not to change the balance of concessions previously attained. The Panel noted that nothing in the material submitted to it indicated that the Community had made it clear to its negotiating partners that the withdrawal and reinstatement of the tariff concessions for oilseeds as part of the withdrawal of the whole of the

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

<sup>1226</sup>WT/DS2/AB/R, p. 23.

<sup>1227</sup>See *EEC - Canned Fruit*, L/5778 (unadopted); *EEC - Oilseeds*, BISD 37S/86.

<sup>1228</sup>*EEC - Canned Fruit*, L/5778 (unadopted), para. 54.

<sup>1229</sup>*EEC - Oilseeds*, BISD 37S/86, 126-127, paras. 144-146.

Community Schedule meant that the Community was seeking a new balance of concessions with respect to these items. There is in particular no evidence that the Community, in the context of these negotiations, offered to compensate its negotiating partners for any impairment of the tariff concessions through production subsidies or that it accepted compensatory tariff withdrawals by its negotiating partners to take into account any such impairment. The balance of concessions negotiated in 1962 in respect of oilseeds was thus not altered in the successive Article XXIV:6 negotiations. The Panel therefore found that the benefits accruing to the United States under the oilseed tariff concessions resulting from the Article XXIV:6 negotiations of 1986/87 include the protection of reasonable expectations the United States had when these concessions were initially negotiated in 1962".<sup>1230</sup>

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

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

10.70 We consider, therefore, that reasonable expectations may in principle be said to continue to exist with respect to tariff concessions given by Japan on film and paper in successive rounds of Article XXVIII*bis* negotiations. Nevertheless, the establishment of a case based on expectations from rounds concluded 18 or 30 years ago may be difficult. The United States must show that those expectations, as well as its more recent ones, are currently nullified or impaired.

10.71 Turning to the four products at issue in this dispute and their relevance to reasonable expectations claimed by the United States, we note that the first tariff concessions by Japan on photographic film and paper were in the Kennedy Round and that these related only to *black and white* film and paper; the subsequent concessions granted during the Tokyo and Uruguay Rounds related to *both colour and black and white* film and paper. In light of these facts, two general points can be made as to how we shall proceed with our Article XXIII:1(b) analysis. First, it is clear that the United States cannot claim any reasonable expectations on colour film or paper emanating from the Kennedy Round. Second,

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<sup>1230</sup>Ibid, 127-28, para. 146.

<sup>1231</sup>We note in this regard that Article XXIV:6 does not establish a separate procedure, but explicitly cross-references the procedures of Article XXVIII.

<sup>1232</sup>In respect of GATT 1947 negotiating rounds under Article XXVIII*bis*, it should be noted that there is a provision in the Dillon Round "Protocol Embodying the Results of the 1960-61 Tariff Conference" providing for the substitution of new concessions for old concessions where Dillon Round schedules provided for treatment for a product less favourable than that provided in a pre-existing schedule. BISD 8S/8, 9, para. 4. While there is no such provision in the Kennedy Round or Tokyo Round protocols, a similar provision applicable only to Egypt, Peru, South Africa and Uruguay is found in paragraph 7 of the Marrakesh Protocol. These provisions would not be relevant to Japan's progressive tariff reductions for film and paper in its Kennedy, Tokyo and Uruguay Round schedules.

because the US arguments and Japanese rebuttals focus mainly on the film market, and particularly on that for colour film, we consider it appropriate to also focus on the *film market* in our analysis and, as of 1979, on the *colour film market* in particular, supplementing this analysis as necessary with reference to the market for black and white film and both black and white and colour paper.

**(ii) Legitimate expectations of a benefit**

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

10.73 The first GATT report analysing Article XXIII: 1(b) was the 1950 Report of the Working Party on *Australian Subsidy on Ammonium Sulphate*. The Working Party found that the withdrawal by Australia of a wartime subsidy on sodium nitrate fertilizer while maintaining a subsidy on ammonium sulphate fertilizer, although not inconsistent with Australia's GATT obligations, nullified or impaired benefits accruing to Chile under the General Agreement. The Working Party agreed that impairment would exist if the Australian action

"which resulted in *upsetting the competitive relationship* between sodium nitrate and ammonium sulphate could not *reasonably have been anticipated* by the Chilean Government, taking into consideration all pertinent circumstances and the provisions of the General Agreement, at the time it negotiated for the duty-free binding on sodium nitrate. The working party concluded that the Government of Chile had reason to assume, during these negotiations, that the war-time fertilizer subsidy would not be removed from sodium nitrate before it was removed from ammonium sulphate. [Reasons omitted.] For these reasons, the working party also concluded that the Australian action should be considered as relating to a benefit accruing to Chile under the Agreement, and that it was therefore subject to the provisions of Article XXIII. ... The inequality created and the treatment Chile could have expected at the time of the negotiation, after taking into consideration all pertinent circumstances, including the circumstances mentioned above, and the provisions of the General Agreement, were important elements in the working party's conclusions".<sup>1233</sup>

The 1952 Panel Report on *Germany - Sardines* also based a non-violation finding on an "action of the German Government, which resulted in *upsetting the competitive relationship* between [different members of the same fish family that] could not *reasonably have been anticipated* by the Norwegian Government at the time it negotiated for tariff reductions on [fish]".<sup>1234</sup> In so finding, the panel noted that Norway "had reason to assume" that the fish they were interested in would not be treated less favourably.<sup>1235</sup>

10.74 Two GATT study groups elaborated these concepts in the context of subsidies, in each case focusing on whether a party had reasonable expectations that certain treatment would continue. In 1955, a working party wrote:

"So far as domestic subsidies are concerned, it was agreed that a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a *reasonable expectation*, failing evidence to the contrary,

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<sup>1233</sup>*Australian Subsidy on Ammonium Sulphate*, BISD II/188, para. 12 (emphasis added).

<sup>1234</sup>BISD 1S/53, 58, para. 16 (emphasis added).

<sup>1235</sup>*Ibid.* The panel found that the fish at issue, although of the same family, were not "like products" and thus the differential tariff treatment did not violate Article I.

that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned".<sup>1236</sup>

A 1961 report, citing the foregoing paragraph, stated:

"In this connexion it was noted that the expression 'reasonable expectation' was qualified by the words 'failing evidence to the contrary'. By this the Panel understands that the presumption is that unless such pertinent facts were available at the time the tariff concession was negotiated, it was then reasonably to be expected that the concession would not be nullified or impaired by the introduction or increase of a domestic subsidy."<sup>1237</sup>

10.75 The 1990 Panel Report on *EEC - Oilseeds* approached a non-violation complaint as follows:

"The Panel examined whether it was *reasonable* for the United States to *expect* that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions.

. . .

The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. The contracting parties have decided that a finding of impairment does not authorize them to request the impairing contracting party to remove a measure not inconsistent with the General Agreement; such a finding merely allows the contracting party frustrated in its expectation to request, in accordance with Article XXIII:2, an authorization to suspend the application of concessions or other obligations under the General Agreement. The recognition of the legitimacy of an expectation thus essentially means the recognition of the legitimacy of such a request. The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers of oilseeds completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports".<sup>1238</sup>

10.76 As suggested by the 1961 report, in order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.

10.77 Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent

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<sup>1236</sup>Working Party Report on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, 224, para. 13 (emphasis added).

<sup>1237</sup>Panel Report on *Operation of the Provisions of Article XVI*, adopted on 21 November 1961, BISD 10S/201, 209, para. 28.

<sup>1238</sup>*EEC - Oilseeds*, BISD 37S/86, 128-129, paras. 147-148.

that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan. In the case before us, there is disagreement between the parties on this issue of reasonable anticipation with respect to each and every "measure" claimed by the United States to nullify and impair benefits accruing to it under GATT.

10.78 An obvious starting point for determining whether a measure was reasonably anticipated is to consider whether the measure was adopted before or after the conclusion of the relevant round of tariff negotiations, which is the approach taken in the 1961 report quoted above. The parties argue, however, that the matter is much more complicated than that. According to the United States, it was simply unaware of some "measures" that predated the conclusion of the relevant round of tariff negotiations due to their nontransparent nature. In other instances, the United States indicates that although it was aware of the existence of the "measures" prior to such conclusion, it did not know and could not have known of their significance in relation to access of imported film and paper to the Japanese market at the time of the relevant tariff negotiations. Japan, in contrast, maintains that the United States did anticipate or should have anticipated all of the alleged "measures". In this regard, it argues that exporting Members should reasonably anticipate GATT-consistent measures taken by an importing Member to improve the efficiency of a particular sector of its economy, such as the distribution sector.

10.79 We consider that the issue of reasonable anticipation should be approached in respect of specific "measures" in light of the following guidelines. First, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States has raised a presumption that it should not be held to have anticipated these measures and it is then for Japan to rebut that presumption. Such a rebuttal might be made, for example, by establishing that the measure at issue is so clearly contemplated in an earlier measure that the United States should be held to have anticipated it. However, there must be a clear connection shown. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is consistent with or a continuation of a past *general* government policy. As in the *EEC - Oilseeds* case<sup>1239</sup>, we do not believe that it would be appropriate to charge the United States with having reasonably anticipated all GATT-consistent measures, such as "measures" to improve what Japan describes as the inefficient Japanese distribution sector. Indeed, if a Member were held to anticipate all GATT-consistent measures, a non-violation claim would not be possible. Nor do we consider that as a general rule the United States should have reasonably anticipated Japanese measures that are similar to measures in other Members' markets. In each such instance, the issue of reasonable anticipation needs to be addressed on a case-by-case basis.

10.80 Second, in the case of measures shown by Japan to have been introduced prior to the conclusion of the tariff negotiations at issue, it is our view that Japan has raised a presumption that the United States should be held to have anticipated those measures and it is for the United States to rebut that presumption. In this connection, it is our view that the United States is charged with knowledge of Japanese government measures as of the date of their publication. We realize that knowledge of a measure's existence is not equivalent to understanding the impact of the measure on a specific product market. For example, a vague measure could be given substance through enforcement policies that are initially unexpected or later changed significantly. However, where the United States claims that it did not know of a measure's relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States' legitimate expectations of benefits from these three Rounds. A simple statement that a Member's measures were

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<sup>1239</sup>*EEC - Oilseeds*, BISD 37S/86, paras. 147, 148.



so opaque and informal that their impact could not be assessed is not sufficient. While it is true that in most past non-violation cases, one could easily discern a clear link between a product-specific action and the effect on the tariff concession that it allegedly impaired, one can also discern a link between general measures affecting the internal sale and distribution of products, such as rules on advertising and premiums, and tariff concessions on products in general.

10.81 Third, for our purposes, we consider the conclusion of the tariff negotiations in the three Rounds to be as follows: In the case of the Kennedy Round, it appears that tariff negotiations continued until the very end of the Round and thus we will consider the date of the conclusion of the Round, i.e., 30 June 1967, as the relevant date. In the case of the Tokyo Round, the conclusion of the Round was 12 April 1979, although the relevant Protocol was formally dated 30 June 1979. We will address where appropriate the US argument that the negotiations on film tariff reductions ended earlier. In the case of the Uruguay Round, tariff negotiations were substantially completed as of 15 December 1993, although the formal end of the Round occurred on the signing of the WTO Agreement in Marrakesh on 15 April 1994. Accordingly, we will use the date of 15 December 1993 as the conclusion of the Uruguay Round tariff negotiations.

**(c) Nullification or impairment of benefit: causality**

10.82 The third required element of a non-violation claim under Article XXIII:1(b) is that the benefit accruing to the WTO Member (e.g., improved market access from tariff concessions) is *nullified or impaired as the result of* the application of a measure by another WTO Member. In other words, it must be demonstrated that the competitive position of the imported products subject to and benefitting from a relevant market access (tariff) concession is being *upset by* ("nullified or impaired ... as the result of") the application of a measure not reasonably anticipated. The equation of "nullification or impairment" with "upsetting the competitive relationship" established between domestic and imported products as a result of tariff concessions has been consistently used by GATT panels examining non-violation complaints. For example, the *EEC - Oilseeds* panel, in describing its findings, stated that it had "found ... that the subsidies concerned had impaired the tariff concession because they *upset the competitive relationship between domestic and imported oilseeds*, not because of any effect on trade flows".<sup>1240</sup> The same language was used in the *Australian Subsidy* and *Germany - Sardines* cases.<sup>1241</sup> Thus, in this case, it is up to the United States to prove that the governmental measures that it cites have upset the competitive relationship between domestic and imported photographic film and paper in Japan to the detriment of imports. In other words, the United States must show a clear correlation between the measures and the adverse effect on the relevant competitive relationships.

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

10.84 As to the first issue, the United States argues that it need not show that the measures in issue are a "*but for*" cause of impairment of market-access conditions for imported film and paper, but that it need only demonstrate that these measures are "*a*" cause of such distortion. Japan argues that a

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<sup>1240</sup>Follow-up on the Panel Report, *EEC - Oilseeds*, BISD 39S/91, 114-115, para. 77 (emphasis added).

<sup>1241</sup>See para. 10.73 above.

<sup>1242</sup>*Uruguayan Recourse*, BISD 11S/95, 100, para. 15; *Japan - Semi-conductors*, BISD 35S/116, 161, para. 131; *US - Agricultural Waiver*, BISD 37S/228, 261-62, paras. 5.20-5.23.

clear linkage between the measure at issue and the alleged nullification or impairment must be proved by the complaining party in order to establish the necessary causal connection. Specifically, Japan states that the issue is whether the complaining party has provided a "detailed justification" in support of its claim that a measure has caused nullification or impairment. In our view, Japan should be responsible for what is caused by measures attributable to the Japanese Government as opposed, for example, to what is caused by restrictive business conduct attributable to private economic actors. At this stage of the proceeding, the issue is whether such a measure has caused nullification or impairment, i.e., whether it has made more than a *de minimis* contribution to nullification or impairment.

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

10.86 We note that WTO/GATT case law on the issue of *de facto* discrimination is reasonably well-developed, both in regard to the principle of most-favoured-nation treatment under GATT Article I<sup>1243</sup> and in regard to that of national treatment under GATT Article III.<sup>1244</sup> The consistent focus of GATT and WTO panels on ensuring effective equality of competitive opportunities between imported products from different countries and between imported and domestic products has been confirmed by the Appellate Body in its reports on *Japan - Alcoholic Beverages*<sup>1245</sup> and most recently in *Bananas III*<sup>1246</sup>, with respect to both GATT and GATS non-discrimination rules. We consider that despite the fact that these past cases dealt with GATT provisions other than Article XXIII:1(b), the reasoning contained therein appears to be equally applicable in addressing the question of *de facto* discrimination with respect to claims of non-violation nullification or impairment, subject, of course, to the caveat, that in an Article XXIII:1(b) case the issue is not whether equality of competitive conditions exists but whether the relative conditions of competition which existed between domestic and foreign products as a consequence of the relevant tariff concessions have been upset.<sup>1247</sup>

10.87 The third issue is the relevance of intent to causality. The parties disagree in many cases whether the intent behind a specific measure is to limit imports or to promote an unrelated policy goal. From our reading of the measures and consideration of the parties' arguments, it is apparent that there may have been more than one reason motivating the adoption of measures. We note, however, that Article XXIII:1(b) does not require a proof of intent of nullification or impairment of benefits by a government adopting a measure. What matters for purposes of establishing causality is the impact of a measure, i.e. whether it upsets competitive relationships. Nonetheless, intent may not be irrelevant. In our

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

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

<sup>1245</sup>WT/DS8/AB/R, adopted on 1 November 1996, p. 16.

<sup>1246</sup>WT/DS27/AB/R, pp. 97-99.

<sup>1247</sup>See para. 10.82 above.

view, if a measure that appears on its face to be origin-neutral in its effect on domestic and imported products is nevertheless shown to have been intended to restrict imports, we may be more inclined to find a causal relationship in specific cases, bearing in mind that intent is not determinative where it in fact exists. It remains for the complaining party to show that the specific measure it challenges does in fact nullify or impair benefits within the meaning of Article XXIII:1(b).

10.88 Finally, as for the US position that the Panel should examine the impact of the measures *in combination* as well as individually (a position contested by Japan), we do not reject the possibility of such an impact. It is not without logic that a measure, when analyzed in isolation, may have only very limited impact on competitive conditions in a market, but may have a more significant impact on such conditions when seen in the context of -- in combination with -- a larger set of measures. Notwithstanding the logic of this theoretical argument, however, we are sensitive to the fact that the technique of engaging in a combined assessment of measures so as to determine causation is subject to potential abuse and therefore must be approached with caution and circumscribed as necessary.

10.89 For the sake of a complete analysis of the US claims, we will examine each alleged "measure" in light of each of the three elements of a non-violation claim. Thus, even if we find an alleged "measure" is not a measure for purposes of Article XXIII:1(b), we will continue with an analysis of the other two elements. Similarly, even if we find that a measure should have been reasonably anticipated, we will nevertheless carry through with the causality analysis.

### 3. ***DISTRIBUTION "MEASURES"***

#### (a) **General**

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

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

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

10.93 As noted above (para. 10.23), the United States claims that Japan's application of the following eight distribution "measures" encouraged and facilitated the creation of a market structure for

photographic film and paper in Japan in which imports are excluded from traditional distribution channels, thereby nullifying or impairing benefits accruing to the United States under Article XXIII:1(b).<sup>1248</sup>

- (1) 1967 Cabinet Decision;
- (2) 1967 JFTC Notification 17 on premiums to businesses;
- (3) 1968 Sixth Interim Report on Distribution Modernization Outlook and Issues;
- (4) 1969 Seventh Interim Report on Systemization of Distribution Activities;
- (5) 1969 Survey Report regarding Transaction Terms;
- (6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
- (7) 1971 Basic Plan for the Systemization of Distribution; and
- (8) 1975 Manual for Systemization of Distribution by Industry: Camera and Film.

We will examine each of these eight distribution "measures" in the order listed above.

10.94 In the following analysis, we will consider whether the US claim in respect of each "measure" has been justified in light of the three required elements of Article XXIII:1(b): (i) the application of a measure; (ii) the existence of a benefit accruing to the United States; and (iii) the nullification or impairment of that benefit by the measure (causality).

**(b) 1967 Cabinet Decision**

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

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

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

10.97 Japan responds that the 1967 Cabinet Decision, which implemented the first stage of capital liberalization, was concerned generally with modernization and improved efficiency in the Japanese

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<sup>1248</sup>We found in paragraph 10.21 above that three additional distribution "measures" cited by the United States -- specifically, application of the international contract notification provisions of JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (April 1971), JDB funding for Konica's wholesalers (1976) and SMEA funding for photoprocessing laboratories (July 1977) -- are not within the terms of reference of this Panel because they were not raised in the request for the establishment of the Panel in a manner consistent with Article 6.2 of the DSU. We have therefore excluded them from further consideration.

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

<sup>1250</sup>Ibid, p.4.

distribution sector so as to permit domestic industries to compete with foreign rivals in the new, less regulated business environment.

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

10.99 Reviewing the 1967 Cabinet Decision, we note that it addresses, in general terms, broad categories of measures which the Japanese Government considered as needing to be taken in conjunction with the liberalization of direct investment rules. The decision indicates that

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

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

"1. The Government will apply the Foreign Exchange and Foreign Trade Control Law in an appropriate manner for the management of foreign direct investment ...

2. Furthermore, the Government, for the time being, will deal carefully, as we have done so in the past with foreign direct investment in agriculture, forestry, mining, oil, and leather and leather product manufacturing ...".

In our view, the 1967 policies could have been carried forward, consistently with the 1980 Decision. To the extent the policies have not been abandoned, we consider that they continue to constitute a measure within the meaning of Article XXIII:1(b).

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<sup>1251</sup>Ibid, pp. 2, 4.

<sup>1252</sup>Concerning the Application of Inward Investments, Cabinet Decision, 26 December 1980, Japan Ex. B-55.

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

10.102 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have been aware. Japan argues that the measure should have been anticipated by the United States *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.103 We note that this Cabinet Decision of 6 June 1967 was published in Kampo (Japan's official gazette) on 21 June 1967<sup>1253</sup>, thus predating the formal conclusion of the Kennedy Round (30 June 1967) by nine days. We recall the test developed in our general discussion of reasonable anticipation to the effect that a Member is presumed to have knowledge of a measure as of the date of its publication, but that this presumption may be rebutted where the Member identifies exceptional circumstances. Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round. Accordingly, we consider that the United States, in relation to the 1967 Cabinet Decision, has legitimate expectations of improved market access emanating from the Kennedy Round. However, applying the test developed earlier, we find that the United States may not claim legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.104 *Impairment and causality.* The United States argues that improved market access to the Japanese distribution system for film and paper emanating from Japan's Kennedy Round concessions on black and white film and paper are nullified and impaired as the result of the 1967 Cabinet Decision and subsequent "liberalization countermeasures" of the Japanese Government. Japan contends that the 1967 Cabinet Decision contains only very general policy statements as to what sorts of actions the government considered to be desirable in order to modernize Japan's overall distribution sector following capital liberalization; it does not set in motion any specific measures which could be said to discriminate *de jure* or *de facto* against the access of imports to the Japanese market. Japan argues that the United States has not provided any evidence to the Panel demonstrating "impairment" resulting from the Cabinet Decision.

10.105 In our analysis of the claim that the 1967 Cabinet Decision impairs market-access benefits accruing to the United States, we note that one theme found in the 1967 Cabinet Decision is that the Japanese Government should find ways to help modernize the distribution sector so as to respond to the intensified competition that capital liberalization was expected to bring. However, the portions of the Cabinet Decision addressing the need to modernize the Japanese distribution system are in the nature of very general policy statements, which do not provide for clear mandates, orders or

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<sup>1253</sup>Table U of Japan's First Submission, p. 188.

recommendations to government entities or private companies to act in a specific way. In fact, the United States has not been able to point to any specific governmental actions or private sector activity in the distribution sector emanating from the 1967 Cabinet Decision in and of itself (although it does argue that in general terms most of the subsequent distribution "measures" it cites are grounded in the 1967 Cabinet Decision). Accordingly, we find that the United States has not demonstrated that the general policy statements contained in the 1967 Cabinet Decision, nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b). At most, in our view, the 1967 Cabinet Decision is part of the context for later actions taken by the Government of Japan.

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

**(c) 1967 JFTC Notification 17 on premiums to businesses**

10.107 The second distribution "measure" we shall examine is JFTC Notification 17 of 10 May 1967, which sets a ceiling of 100,000 yen per year on premiums between businesses (e.g., manufacturers and wholesalers) ("JFTC Notification 17").<sup>1254</sup> This notification is based on Article 3 of the Premiums Law. It limits to 100,000 yen annually the right of manufacturers of certain goods, including manufacturers of photosensitivity materials, to offer cash or other premiums to wholesalers or retailers as an inducement for the wholesaler or retailer to begin handling the manufacturer's products, or to meet other transaction conditions. An exception to this prohibition on premiums in excess of 100,000 yen (Item 2-4) allows a manufacturer to offer premiums to employees of distributors and retailers that are in a special relationship with the manufacturer (e.g. through capital investment, interlocking directorates, etc.). JFTC Notification 17 was repealed in April 1996 in the course of review of the Premiums Law.

10.108 *Application of measure.* The United States contends that JFTC Notification 17 is a governmental measure. While conceding that the measure was repealed in April 1996, the United States argues that other provisions of Japanese law make the repeal meaningless. Specifically, premiums from manufacturers to wholesalers are still subject to Designation 9 of JFTC Notification 15 of 1982<sup>1255</sup>, i.e., the provision governing the use of "unjust inducements" under the Antimonopoly Law. That designation prohibits premium offers in excess of "normal business practice". Thus, according to the United States, given that JFTC Notification 17 set industry practice for 19 years, it is uncertain at best as to whether present restrictions under Designation 9 will differ at all from the situation under JFTC Notification 17. Japan counters that, although JFTC Notification 17 was at one time a governmental measure, it was formally repealed in April 1996. Thus, for Japan, there is no governmental measure in issue. As for the alleged continuation of the policy underlying JFTC Notification 17 through Designation 9 of JFTC Notification 15 (1982), Japan responds that the United States is belatedly raising a "measure" or policy that was not specifically identified in its panel request and which is therefore outside the Panel's terms of reference. Japan further states that under Designation 9 of JFTC Notification 15, the automatic trigger level of 100,000 yen no longer exists and the burden of proof lies with the JFTC.

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<sup>1254</sup>US Ex. 67-4; Japan Ex. D-42. It should be noted that JFTC Notification 17 is also claimed by the United States to be a promotion "countermeasure".

<sup>1255</sup>US Ex. 82-6.

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

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

10.111 In our view, given that the publication of JFTC Notification 17 predated the conclusion of the Kennedy Round, it is difficult to conclude that the United States should not be held to have anticipated JFTC Notification 17 in advance of Japan's first tariff concessions on film and paper. As we noted earlier, the United States is charged with knowledge of Japanese regulations on publication. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. We are not persuaded that the United States has met its burden of establishing that in relation to JFTC Notification 17, it has legitimate expectations of improved market access emanating from the Kennedy Round. We consider that this reasoning applies *a fortiori* to claimed legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.112 *Impairment and causality.* The United States contends that even though JFTC Notification 17, which set a 100,000 yen (\$278 in 1967) maximum annual limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer) for all products traded between the two, applied to both domestic and foreign enterprises, it upset the competitive relationship between the two. In the US view, foreign enterprises entering the Japanese market or trying to expand their market share following tariff reductions and import liberalization, were not able to invest in their own distribution networks until the 1970s when investment restrictions



were progressively lifted. Thus, foreign enterprises had to compete with Japanese manufacturers for existing wholesalers and distributors to carry their products. JFTC Notification 17 limited the ability of foreign enterprises to outbid Japanese enterprises in the competition for Japanese distributors by setting an arbitrarily low ceiling on the amount of premiums that a manufacturer could give to a wholesaler or retailer in any one year. In addition, the United States argues that foreign manufacturers, which had no direct relationships with Japanese wholesalers because of Japan's requirement that they deal with a sole import agent, were prohibited from availing themselves of the exception under Item 2-4 of the JFTC Notification 17 which permitted the offering of unlimited premiums to the employees of enterprises that were in exclusive, vertically-integrated relationships with the manufacturer.

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

10.114 Assessing the issue of impairment and causality, we note that JFTC Notification 17 appears to be directed at promotional activities with regard equally to domestic and foreign products. It is not specifically aimed at imports, nor does it specifically target film and paper, even though it lists "photographic materials" among the many consumer products to which it is directed. Although there is reference in a press summary to the need to counteract the influence of US capital<sup>1256</sup>, the JFTC explanation cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.<sup>1257</sup>

10.115 On balance, in our view, the evidence concerning its adoption suggests that this measure is directed against potential excesses of promotional activities in the distribution sector in general. It targets excessive premiums given by manufacturers to wholesalers and by wholesalers to retailers. It does not, however, attempt to regulate other forms of promotional activity, such as low price offers and rebates. Moreover, while we do not reject the notion that formally neutral measures may be shown

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

<sup>1257</sup>US Ex. 67-10, p. 2.

to be applied to imported products in a manner that upsets the competitive relationship between domestic and imported products to the detriment of imports<sup>1258</sup>, the United States has not been able to point to any single instance where implementation of JFTC Notification 17 has led to such a result in respect of US film or paper. For example, we note that at the time in question, Kodak had a relationship with a primary wholesaler -- Asanuma. That relationship later ended in 1975, apparently because of Kodak's refusal to deal directly with Asanuma.<sup>1259</sup> The United States has not shown that its inability to give premiums to Asanuma employees was relevant to the termination. In addition, the US contextual arguments about the impact of Japanese restrictions on investments, to the extent that they are true<sup>1260</sup>, do not demonstrate anything in relation to the application of JFTC Notification 17. Finally, as to the exception provided in Item 2-4 of JFTC Notification 17, the evidence suggests that this provision, neither inherently nor in its application, discriminates against imported film or paper. Although it appears that Kodak was unable to avail itself of this exception, due to the structure of Kodak's distribution relationships, the same was true in the case of Fuji.

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

10.117 Thus, while the United States has shown that JFTC Notification 17 is a measure for purposes of Article XXIII:1(b), it is no longer in effect. Moreover, the United States has not demonstrated that it should not be held to have anticipated Notification 17 in relation to its Kennedy Round expectations in respect of black and white film and paper and it has not demonstrated that Notification 17 nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

**(d) 1968 Sixth Interim Report**

10.118 The third distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) is the Sixth Interim Report on "Distribution Modernization Outlook and Issues" (5 August 1968), prepared by MITI's Industrial Structure Council's Distribution Committee ("Sixth Interim Report").<sup>1261</sup> This Sixth Interim Report focuses on the need for broad-based efforts to modernize the distribution system in Japan. The United States argues that the report analyzes ways that foreign manufacturers might gain control of Japan's distribution system and highlights the government's concerns over such control, including:

1. There is a risk that growth sectors will fall under the monopolistic control of foreign capital, resulting from the difference in capital resources and the like.
2. There is a risk that the process of sales expansion by foreign capital affiliated distribution enterprises will aggravate excessive competition and hinder the smooth

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<sup>1258</sup>See discussion in paras. 10.85-10.86 above.

<sup>1259</sup>Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4.

<sup>1260</sup>We note in this regard Japan's reference to a statement by the President of Kodak Japan, Mr. Albert Sieg, in a 1988 interview: "The glaring mistake was waiting so long to take aggressive action in this market. We should have been here with this approach ten years ago. Clearly, the momentum of our local competitors got a strong forward thrust, and our task will be much, much more difficult". Japan Ex. B-45. Japan also indicates that Kodak could have established a 50-50 joint venture, such as Kodak Nagase (set up in 1986), as early as 1971, or a fully-owned subsidiary as of 1976..

<sup>1261</sup>US Ex. 68-8 and Japan Ex. B-7.

implementation of distribution modernization plans, and the [established] order of trade will be disrupted.

3. There is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".<sup>1262</sup>

10.119 We note the US position that under Japan's systemization plan, the nature of the links between companies in a "system" would include commercial transaction ties, physical ties, and information ties. Each of these ties would become essential to ensuring that the system operated as a single and exclusive whole. The United States argues that horizontal business cooperation would make the system more difficult for foreign firms to penetrate because many of the individual actors in the system would be bound together in a common distribution channel tied to and dominated by domestic manufacturers.

10.120 In response, Japan contends that the Sixth Interim Report is concerned with modernization of the distribution sector as a whole, to promote efficiency and competitiveness of domestic industries, not with impeding access of imported goods to distribution channels in Japan. Distribution modernization would also help the Japanese distribution sector compete with foreign capital. As cited by Japan, the preface to the Sixth Interim Report provides:

"Today, the delay in modernizing distribution activities is often seen to prevent the effectiveness of economy and improvement of people's living. The necessity of improving the structure of the distribution industry is gradually increasing. In addition, the modernization of distribution activities is pressed by the following two viewpoints. First, liberalization of direct investment by foreign capital is drawing near. It is necessary to quickly establish [market] conditions in which domestic capital could compete with foreign capital. Second, improving productivity of distribution activities is considered an effective way to solve the consumer price issue".<sup>1263</sup>

MITI's concern, according to Japan, was that domestic manufacturers would be stuck with existing distribution channels while foreign producers freed from capital restrictions would be able to construct their own modern (and possibly exclusive) distribution channels.

10.121 *Application of measure.* The United States contends that the Sixth Interim Report is a governmental measure and that it is effectively still in force. Japan responds that the Sixth Interim Report is not a governmental measure and is nothing more than a report of an advisory council, setting out certain policy options for the government. Japan further argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report, Japan maintains, was never government action at all, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.122 In examining the nature of the Sixth Interim Report, we note that the Distribution Committee was a committee set up by MITI's Industrial Structure Council which itself was an advisory council composed of academics and industry representatives, not government officials. And, whereas the Industrial Structure Council was established pursuant to a Cabinet Order, the advisory nature of this Council and the Distribution Committee created under it does not seem to be in doubt. Applying the analysis we developed above in our general discussion of governmental measures, we note that the Sixth Interim Report is clearly not in the nature of a binding law or regulation. It provides no incentives

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<sup>1262</sup>US Ex. 68-8, p. 8.

<sup>1263</sup>Preface to Sixth Interim Report, Japan Ex. B-7.

or disincentives to the private sector to take any particular action. Essentially, the Sixth Interim Report is an analysis of the current and future status of the distribution sector that recommends certain general policies for the government to follow in the distribution sector. Those listed specifically are (i) the promotion of organized and cooperative business activity so as to realize economies of scale, (ii) the modernization of facilities and management systems, (iii) the securing of workforce and personnel training, and (iv) the rationalization of trade practices and transaction terms. Since it is a general report to the government, it cannot in itself be viewed as a government exhortation to the private sector to take specific actions in the distribution sector and it does not entail the likelihood of compliance as exemplified by *Japan - Semi-conductors* and *Japan - Agricultural Products* (see paras. 10.45-10.50 above). These recommendations are made in general terms; they are not specific enough to warrant concluding, even in the Japanese system, that they could have the same effect as formal government action. As such, the Sixth Interim Report appears to be a study report setting out possible options for governmental action, and we are not persuaded that it is in the nature of a measure attributable to the government. Accordingly, we find that the United States has not demonstrated that the Sixth Interim Report is a measure within the meaning of Article XXIII:1(b).

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

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

10.125 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the Sixth Interim Report, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result (para. 10.79). In this regard, we are not persuaded by Japan's argument that the Sixth Interim Report is a logical outgrowth of Japan's pre-Kennedy Round policies on distribution and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for any specific actions to be taken by the Government of Japan or private companies. Moreover, the First through the Fifth Interim Reports contain in part different recommendations from those of the Sixth Interim Report. Thus, it cannot be said that the specific conclusions of the Sixth Interim Report were clearly contemplated in the 1967 Cabinet Decision and these earlier reports. Additionally, the nature of the report -- it emanates from an advisory group composed of academics and industry representatives, is non-binding, is not product-specific in its recommendations, and is more in the nature of a policy option paper submitted to the government than what could properly be said to be a governmental measure -- is such that we find that the United States should not be charged with having anticipated its appearance prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.126 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult not to conclude that the United States should be held to have anticipated this 1968 report and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Sixth Interim Report it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Rounds.

10.127 *Impairment and causality.* The United States contends that the Sixth Interim Report recommended that MITI take steps to systematize distribution by: adjustment of market conditions; rationalizing physical distribution techniques (packaging, storage, transportation, cargo handling)<sup>1264</sup>; and making improvements in the distribution environment (location of distributors, information links between manufactures, wholesalers, and retailers, and financing).<sup>1265</sup> The overall goal, the United States maintains, was to improve the efficiency of distribution channels and, more importantly, give control of these channels to domestic manufacturers in Japan by "striving for cooperation and systemization of enterprises through producers, intermediate processors, and wholesalers".<sup>1266</sup> The United States notes that the report also states that "[t]here is a risk that the manufacturing sector will be dominated by controlling the sales routes, bringing about the international subcontracting of Japanese industry".<sup>1267</sup>

10.128 Japan responds that MITI saw the backwardness of the distribution sector as an "Achilles' heel" that would render domestic manufacturers unable to compete with foreign products. Specifically, the concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from investment restrictions, would be able to construct their own modern (and exclusive) distribution channels. However, Japan emphasizes, MITI policy on modernizing the distribution sector sought to promote efficiency and competitiveness of domestic industries following liberalization, not to block imports. Overall, Japan argues that the United States has not provided any evidence to the Panel to show the causal connection between the measure and the alleged impairment.

10.129 In assessing the issue of whether or not US market-access expectations are impaired by the application of the Sixth Interim Report, we note that: first, the report is an advisory report directed to the government, setting out non-binding policy options for the government; second, these policy options are directed to modernizing and improving the overall efficiency of the distribution sector in Japan; third, they are not at all product-specific; and fourth, the United States has not been able to point to any specific government actions resulting from this policy options report, except perhaps for the 1970 Guidelines discussed below. We note that while it is true that the report supports cooperation among different levels of the distribution system, it also discusses the need to offset the possible adverse effects of such cooperation.<sup>1268</sup> In any event, even if we assume that the Sixth Interim Report constitutes administrative guidance to the Japanese photographic film industry to integrate vertically and use single-brand primary wholesalers, there are timing problems with respect to causation since most of the wholesale distribution sector for film in Japan was already single-brand in 1968 (see para. 10.173 below).

10.130 In addition, we note that the report appears to be origin-neutral. While the report refers to the need to prepare for the arrival of foreign capital, in our view, the clear emphasis of the report is on the need to improve the competitiveness of the Japanese distribution sector so that it can compete effectively. The report is not directed at preventing the arrival of foreign capital, although it suggests

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<sup>1264</sup>Sixth Interim Report, US Ex. 68-8, p. 9.

<sup>1265</sup>Ibid.

<sup>1266</sup>Ibid, p. 14.

<sup>1267</sup>Ibid, p. 8.

<sup>1268</sup>Ibid, e.g., pp. 15, 18.

a need to improve the competitive position of Japanese firms. It in fact lists advantages that will flow from liberalization in respect of increased efficiency in the Japanese distribution sector.<sup>1269</sup> While it is possible that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports<sup>1270</sup>, the United States has not been able to point to any single instance where application of the Sixth Interim Report has done so in respect of US film or paper.

10.131 In this context, it is difficult to conclude that this advisory report has contributed in any meaningful manner to the impairment of US market-access expectations emanating from the Kennedy Round. Also, there is no evidence that application of the report has resulted in impairment of legitimate expectations flowing from the Tokyo and Uruguay Rounds. At most, we consider that the report establishes part of the context of later cited measures of the Japanese Government, such as the 1970 Guidelines and 1971 Basic Plan, which are discussed below. Accordingly, we find that the United States has not demonstrated that the Sixth Interim Report nullifies or impairs benefits accruing to the United States within the meaning of Article XXIII:1(b).

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

**(e) 1969 Seventh Interim Report**

10.133 The fourth distribution "measure" is the Seventh Interim Report on "Systemization of Distribution Activities, prepared by MITI's Industrial Structure Council's Distribution Committee in July 1969.<sup>1271</sup> Like the Sixth Interim Report of this committee, which has been addressed above under the heading "standardization of transaction terms", the Seventh Interim Report sets out a series of policy options for the consideration of MITI. We note that the Seventh Interim Report was issued as a "first step in meeting the challenges currently facing Japan's distribution sector".<sup>1272</sup> In the Committee's perception, the aim of systemization was to improve functionality and productivity. The Committee stated that the best approach to systemization was to look at the distribution sector not as a cluster of separate entities but as a single whole and thereby apply a systems approach. Acknowledging that with respect to goods the most important factor is distribution, the Committee stated that systemization could only progress through centralized processing of physical control at distribution centres and stock points. The Committee identified three approaches (commodity, institutional and functional) to systemization and proposed the following policies to the government: (i) establishing a Distribution Systemization Council; (ii) presenting guide posts and promoting standardization; (iii) establishing a system for providing distribution-related information; and (iv) providing incentives in areas such as financing and taxation.

10.134 The United States presents the Seventh Interim Report as, in essence, one of the key foundation stones of Japan's alleged plan to systematize the distribution sector in Japan. In its view, the report suggests that to the extent that fostering efficiency becomes inconsistent with protection against foreign competition, the latter goal should prevail. The United States argues in particular that the premise of distribution systemization was to reorganize the Japanese distribution system along vertical and

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<sup>1269</sup>Ibid, p. 7.

<sup>1270</sup>See discussion in paras. 10.85-10.86 above.

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

<sup>1272</sup>Ibid, p.1.

horizontal lines by (i) the formation and strengthening of product-specific vertical distribution ties between a Japanese manufacturer and various wholesalers, and between the wholesalers and retailers, and (ii) the creation of linkages -- commercial, physical and information ties -- among horizontal elements of the distribution system, which could be brought more easily into the systemized vertical arrangement (paras. 5.81-5.82). Japan counters that, in MITI's view, the backwardness of the distribution system would render domestic manufacturers unable to compete with foreign producers. Specifically, the concern was that domestic manufacturers would be stuck with existing distribution channels while foreign producers, freed from capital restrictions, would be able to construct their own modern (and exclusive) distribution channels (para. 5.83).

10.135 *Application of measure.* As in the case of the Sixth Interim Report, the United States contends that the Seventh Interim Report is a governmental measure and that it is effectively still in force. And Japan responds that the Seventh Interim Report is not a governmental measure, that it is nothing more than a report of an advisory council, setting out certain policy options for the government. Japan further argues that this report is not currently in effect. According to Japan, MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, and private businesses followed them or ignored them at their own choosing. This report was never government action at all, Japan maintains, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

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

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

10.138 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen Japan's intention to issue the Seventh Interim Report (1969) before conclusion of the Kennedy Round. Similarly, the United States argues that it still could not reasonably anticipate the significance of the measure for the Japanese film market as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the Seventh Interim Report as of June 1967 because

the policies discussed therein were the logical outgrowth of MITI's decision to help promote modernization of the Japanese distribution sector, following a high-profile, publicized debate on capital liberalization. Japan further argues that the United States should have reasonably anticipated the measure *a fortiori* as of the end of the Tokyo and Uruguay Rounds.

10.139 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the Seventh Interim Report, we recall, as we did in the case of the related Sixth Interim Report, our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. In this regard, we are not persuaded by Japan's argument that the Seventh Interim Report is a logical outgrowth of Japan's pre-Kennedy Round policies on distribution and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for any specific actions to be taken by the Government of Japan or private companies. Moreover, the First through the Sixth Interim Reports contain in part different recommendations from those of the Seventh Interim Report. Thus, it cannot be said that the conclusions of the Seventh Interim Report were clearly contemplated in the 1967 Cabinet Decision or other Japanese measures. Additionally, the nature of the report -- it emanates from an advisory group composed of academics and industry representatives, is non-binding, is not product-specific in its recommendations, and is more in the nature of a policy option paper submitted to the government than what could properly be said to be a governmental measure -- is such that we find that the United States should not be charged with having reasonably anticipated its existence prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.140 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult not to conclude that the United States should be held to have anticipated this 1969 report and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here. Accordingly, we find that the United States has not demonstrated that in relation to the Seventh Interim Report it has legitimate expectations of improved market access for photographic film and paper emanating from the Tokyo or Uruguay Rounds.

10.141 *Impairment and causality.* We recall the US argument that the Distribution Committee stated in its Seventh Interim Report that "the concerted efforts of government and the private sector must be directed at systemization from the point of view of a capital liberalization countermeasure"<sup>1273</sup>, and that the report recommended systemization policies to the Government, including: (1) establishing a "Distribution Systemization Promotion Council" comprised of scholars, manufacturers, wholesalers, retailers, and computer specialists, to establish consensus on the basic direction for systematizing distribution activities; (2) researching and promoting distribution systemization; and (3) providing financial incentives through loans or special tax treatment to support systemization.<sup>1274</sup> For the United States, Japanese Government documents leave no doubt of Japan's intent to create and support vertically-tied, domestic-manufacturer-dominated distribution channels. As noted by the United States, the Seventh Interim Report states that under systemization, "more systems will probably be formed in which keiretsu routes are covered under the guidance of the manufacturer"<sup>1275</sup> and " ... comprehensively and

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<sup>1273</sup>Ibid, p. 4.

<sup>1274</sup>Ibid, pp. 9-10. The Distribution Committee's Ninth Interim Report described the Seventh Interim Report as "a powerful political blueprint for reforming the distribution sector". Industrial Structure Deliberation Council - Distribution for the 1970s (Ninth Interim Report), 22 July 1971, Ex. US 71-9.

<sup>1275</sup>US Ex. 69-4, p. 7.



systematically integrate the various aspects of production, processing, and [distribution] services".<sup>1276</sup> Japan's response is that, in MITI's view, the backwardness of the distribution sector would render domestic manufacturers unable to compete with foreign products. However, Japan emphasizes, MITI policy on modernizing the distribution sector sought to promote efficiency and competitiveness of domestic industries, not to block imports. Overall, Japan argues, the United States has not provided any evidence to the Panel to show the causal connection between the measure and the alleged impairment.

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

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

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

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

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<sup>1276</sup>Ibid.

<sup>1277</sup>Ibid, p.1.

**(f) 1969 Survey Report on Transaction Terms**

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

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

10.148 In order to consider whether the 1969 Survey Report is a measure for purposes of Article XXIII:1(b), we recall the analytical framework we developed above. Applying this analytical framework, we note that the report is clearly not in the nature of a binding law or regulation. It provides no incentives or disincentives to the private sector to take any particular action. Rather, it is in the nature of a factual survey conducted by an apparently private organization at the request of the Government. Since it is a report *to* the government, it cannot be viewed as a government exhortation to the private sector to follow specific distribution policies. While it is true that the report contains a few introductory pages (and concluding paragraphs) on the subject of what are irrational contract terms, the vast bulk of the 1969 Survey Report simply provides a description of existing practices. As such, it is no more than a background report providing current factual information of the basis on which the government might later decide to act. In our view, the report is not in the nature of a governmental measure. Accordingly, we find that the United States has not demonstrated that the report is a measure within the meaning of Article XXIII:1(b). At most, this study may be viewed as part of the context of the 1970 Guidelines, which are discussed below.

10.149 We note that MITI published the 1969 Survey Report in 1971. We do not consider that this fact changes our analysis. Publication by MITI cannot be seen as administrative guidance or a governmental exhortation to follow specific practices, given (i) the fact that the report is essentially a non-normative survey of past practices, and (ii) the intervening publication of the 1970 Guidelines, a governmental action that deals with transactions terms more specifically.

10.150 If despite our finding above, we assume that the 1969 Survey Report is a measure, there is still the question of whether or not it is still in force. On this issue, there is no evidence to suggest

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<sup>1278</sup>Institute for Distribution Research, Fact-finding Survey Report Pertaining to Transaction Terms: Actual Conditions of Transaction Practices in the Wholesale Industry, March 1969, US Ex. 15.

<sup>1279</sup>MITI Business Bureau, Actual Conditions of Transaction Terms in the Wholesale Industry, 31 August 1971, US Ex. 20. Institute for Distribution Research, 1969 Survey of Trade Conditions in the Film and Other Industries, Japan Ex. B-1.

<sup>1280</sup>The parties disagree as to whether the institute published the report in 1969. They agree that MITI (re)published it in 1971.

that this measure has been withdrawn or otherwise disavowed by the Government of Japan. However, recalling that the report is essentially a description of practices prevailing in the 1960s, it is not clear what it would mean to describe it as still in force. It simply remains a description of past practices. Nevertheless, to the extent that the report contains a small amount of normative content on the rationality of transaction terms, it has not been disavowed and even if, clearly, there are more recent government policy statements on modernization of the Japanese distribution sector, it could be viewed as being in force in that sense. Thus, if the 1969 Survey Report is to be considered a measure, then it may still be in effect.

10.151 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1969 Survey Report -- what the United States describes as part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States also argues that it could not reasonably anticipate the significance of the measure for the Japanese film market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the 1969 Survey Report as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. In addition, Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.152 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy Round in relation to the 1969 Survey Report, we recall our conclusion that normally a Member should not be considered to have anticipated a measure adopted after the conclusion of a negotiating round, absent some reason to reach a contrary result. In this regard, we are not persuaded by the Japanese argument that the report is a logical outgrowth of its pre-Kennedy Round distribution policies and therefore should have been anticipated by the United States. In the first place, we have found that the 1967 Cabinet Decision did not call for any specific actions to be taken by the Government of Japan or private companies. Additionally, the nature of the 1969 Survey Report -- it is in the nature of a study conducted by a quasi-governmental organization at the request of the Government, which may be seen as a background report setting out the current situation so as to provide factual information on the basis of which the government might later decide that certain governmental actions should be taken -- is such that we find that the United States should not be charged with having reasonably anticipated its existence prior to the conclusion of the Kennedy Round. However, to the extent that any legitimate expectations exist, we find that these relate only to black and white film and paper.

10.153 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate this 1969 Survey Report, its 1971 publication and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance here, where the report is specific to the film sector. Accordingly, we find that the United States has not demonstrated that in relation to 1969 Survey Report that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.154 *Impairment and causality.* Neither the United States nor Japan has submitted any evidence or argument regarding the impact of the 1969 Survey Report on US market-access expectations stemming from the Kennedy, Tokyo and Uruguay Rounds, beyond the type of arguments made in relation to the Sixth and Seventh Interim Reports. Accordingly, we find that the United States has not demonstrated the existence of any nullification or impairment resulting from this Survey Report.

10.155 Thus, while the United States has shown that it should not be held to have anticipated the 1969 Survey Report in relation to its Kennedy Round expectations in respect of black and white film and paper, it has not demonstrated that the Report is a measure for purposes of Article XXIII:1(b) or that it nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

**(g) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film**

10.156 The sixth distribution "measure" claimed by the United States to nullify or impair benefits accruing to it under Article XXIII:1(b) consists of the 1970 "Guidelines for Rationalizing Terms of Trade for Photographic Film" prepared by MITI's Transaction Terms Standardization Committee ("1970 Guidelines").<sup>1281</sup> According to the United States, this "measure" includes related actions to implement recommendations in the 1970 Guidelines.

10.157 The United States argues that the 1970 Guidelines are directed at promoting vertical integration in the film distribution sector through the use of transaction terms so as to tie wholesale distributors more closely to domestic manufacturers. According to the United States, MITI promoted this policy in the 1970 Guidelines by calling for volume discounts, rebates, and standardized and shortened payment terms: discounts and rebates encouraged wholesalers to purchase greater volume from fewer suppliers; and standardized and shortened payment terms limited the opportunities for wholesalers to seek better credit terms from other suppliers. This, the United States argues, left wholesalers more dependent on and vulnerable to the credit terms offered by the manufacturer with whom they primarily did business. We further note the US position that prior to standardization, wholesalers were able to "shop around" different manufacturers for the best transaction terms. The alleged MITI actions reduced such competition in the distribution sector. The result, according to the United States, was to create stable, long-term and exclusive relationships in the distribution chain.

10.158 Japan responds that over the 1970-1972 period, MITI issued rationalization guidelines to 15 different industries, including photographic film. The guidelines to each of the 15 industries addressed the same issues and made basically the same suggestions. We further recall Japan's position that MITI has been consistently concerned with rationalization of trading terms in the distribution sector since the 1960's. What had hitherto existed, Japan maintains, were irrational business practices that were economically inefficient. According to Japan, the 1970 Guidelines explicitly discouraged the use of rebates and did not call for shorter payment terms. Thus, in Japan's view, they were unrelated and inimical to the establishment of single-brand distribution. In any case, according to Japan, the US argument is subject to intractable timing problems since single-brand distribution occurred as an industry trend before the alleged "measure" was implemented. Moreover, single-brand wholesale distribution of film is a common business practice which prevails in every major market in the world. Japan notes that its efforts towards distribution rationalization did not end in the 1970s: in 1990 MITI issued the "Guidelines for Improving Trade Practices".

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

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<sup>1281</sup>US Ex. 70-3; US Ex. 70-4; Japan Ex. B-24.

guidance reflected in the 1970 Guidelines does not meet the two criteria outlined in *Japan - Semiconductors*.

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

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

MITI went on to request industry associations to formulate and implement more specific transaction terms based on the 1970 Guidelines and to report back to MITI by November 1970.<sup>1283</sup> As the United States notes, shortly after publication of MITI's 1970 Guidelines, the photosensitivity wholesalers association published a "Transaction Outline" to implement the association's own transaction terms based on the 1970 Guidelines and reported it to MITI.<sup>1284</sup> Later, in 1971, MITI commissioned the Chamber of Commerce, along with the MITI-established Transaction Terms Standardization Committee and domestic photographic materials trade associations, to draft a "Model Contract" based upon the transaction terms outlined in the 1970 Guidelines for the photographic film sector.<sup>1285</sup> When publishing the standard transaction contract for photographic film in the spring of 1972, the Chamber stated that its actions were pursuant to the MITI request.<sup>1286</sup> Japan questions the scope of these implementation activities and responds that most elements of transactions were not regulated by the Transaction Outline or the Standard Contract and that it was left open to competitors to offer more favourable non-standardized transaction terms.

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

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

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<sup>1282</sup>Japan Ex. B-24, p. 1.

<sup>1283</sup>US Ex. 70-3; Japan Ex. B-24.

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

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

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

<sup>1287</sup>*Japan - Agricultural Products*, BISD 35S/163, 242.

relevance or effect. Japan further indicates that the 1970 Guidelines have been superseded by MITI's very similar 1990 Guidelines, the latter receiving the support of the US Government.

10.163 Although one may have doubts as to the continued relevance today of guidelines developed by MITI in 1970, there is nothing in the record to suggest that MITI has revoked or disavowed the recommendations it made in 1970 concerning rationalization of transaction terms. Even if one might posit that these earlier guidelines, which were specific to the film sector, have to a certain extent been replaced by the generally applicable 1990 Guidelines, there is nothing in the text of the 1990 Guidelines suggesting the withdrawal of the 1970 Guidelines, although some parts might be deemed to have been superseded by the provisions of the 1990 Guidelines. Accordingly, we consider that the 1970 Guidelines may still be in effect.

10.164 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1970 Guidelines -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States further argues that it could not anticipate the significance of the guidelines for the Japanese film market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, Japan responds that the United States should have reasonably anticipated the 1970 Guidelines as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Moreover, according to Japan, the trend towards single-brand distribution was well-advanced as of the conclusion of the Kennedy Round. Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the Tokyo and Uruguay Rounds.

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

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

10.167 *Impairment and causality.* The United States contends that application of the 1970 Guidelines, establishing industry standards for discounts, rebates, terms of payment, and dispatched employees, upset the competitive relationship between imported and domestic photographic materials in several

ways. The standardization of transaction terms chilled the ability of foreign manufacturers to offer competitive terms to Japanese wholesalers: first, by setting uniform transaction terms, limiting the ability of foreign enterprises to outbid their Japanese competitors; second, by establishing shortened payment terms that enhanced the financial strength of Japanese manufacturers at the expense of wholesalers, and positioned domestic manufacturers to better withstand foreign penetration; and third, by establishing standardized terms, in particular volume rebates, that were by their very nature more beneficial to Japanese manufacturers with large market share.

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

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

10.170 Addressing the issues of impairment and causality in relation to the 1970 Guidelines, we agree with Japan that the starting point for our analysis should be the text of the guidelines. Examining the 1970 Guidelines, we note that they do not encourage the use of volume discounts without reservation but encourage transparency in their use, and that they discourage the use of rebates.<sup>1288</sup> They also do not appear to mandate uniform terms or shortened payment terms. Thus, it appears that the United States may have overstated the specificity of the guidelines.

10.171 In considering the purpose of the guidelines, we note that the introduction to the 1970 Guidelines states:

"It goes without saying that rationalization of terms of trade is essential to improving market conditions, assuring effective competition, creating efficient distribution activities, developing a large scale distribution system, systematizing distribution activities, and facilitating the response to foreign capital".

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<sup>1288</sup>1970 Guidelines, US Ex. 70-4; Japan Ex. B-24.

However, beyond this general introductory reference to facilitating the response to foreign capital, the recommendations set out in the 1970 Guidelines appear to be origin neutral, i.e., they do not formally differentiate as to the treatment of domestic and imported film and paper. We are not persuaded, therefore, that the 1970 Guidelines are directed at promoting vertical integration in the photographic materials distribution sector with a view to impeding market access for foreign products. Rather, as argued by Japan, they appear to be directed at generally improving transaction efficiency in this sector, a result that is not inherently unfavourable to imports. As noted above, the 1967 Cabinet Decision, the Sixth Interim Report, the Seventh Interim Report and the 1969 Survey Report provide context for the interpretation of the 1970 Guidelines. Our examination of those documents supports our view of the 1970 Guidelines. While the documents occasionally make reference to the imminent entry of foreign capital into Japan, in our reading of them, their main focus is clearly on improving the various inefficiencies and deficiencies in Japan's distribution system, as a means to address broader problems, such as the need to cope with inflationary pressures and labour shortages. The US support for the 1990 Guidelines lends support to the view that improving the efficiency of the Japanese distribution system, through such actions as standardization of basic contract terms, promotes rather than restricts the ability of imports to enter the Japanese market.

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

10.173 More significantly, when we examine what is the fundamental assertion of the United States, i.e., that the "measures" cited in connection with the standardization of transaction terms, and, in particular, the 1970 Guidelines, were designed to and did promote single-brand distribution at the wholesale level, there are serious difficulties of timing in the US argument on causation. Given the evidence that (i) most of the wholesale distribution sector for film in Japan was already single-brand before 1970, with Konica having all single-brand wholesaler distribution by 1955<sup>1289</sup>, and Fuji having three of its four wholesalers single-brand by 1968<sup>1290</sup>, with Fuji's fourth primary wholesaler -- Asanuma -- becoming a single-brand distributor in 1975, apparently because Kodak refused to deal with it directly<sup>1291</sup>, and (ii) Fuji started to tighten payment terms in 1966, well before the guidelines or other cited distribution "measures",<sup>1292</sup> we are not persuaded that there is a meaningful nexus between the 1970 Guidelines and this largely pre-existing market structure. We also note, as argued by Japan and not contested by the United States, that single-brand wholesale distribution is the common market structure<sup>1293</sup> -- indeed the norm -- in most major national film markets, including the US market. While the United States responds that the US market structure was the result of private and not governmental actions, it is unclear why the same economic forces acting in the United States would not also exist in Japan.

10.174 Accordingly, we find that the United States has not demonstrated that the 1970 Guidelines nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b).

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<sup>1289</sup>Paras. 5.116, 6.350-6.351.

<sup>1290</sup>Paras. 5.115-5.119, 6.350-6.351; Affidavit of Tomihiko Asada, Japan Ex. A-12; Affidavit of Yuki Yoshi Noro, Japan Ex. A-14; Affidavit of Kaoru Kono, Japan Ex. A-15.

<sup>1291</sup>Paras. 5.116-5.117, 6.352. See: F.M. Scherer, Retail Distribution Channel Barriers to International Trade, October 1995, Japan Ex. A-19; Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4;

<sup>1292</sup>Paras. 5.122-5.133, 6.346-6.349, 6.356ff; Fuji Film's Result of Stricter Policy on Receivables, Zenren Tsuho, March 1968, US Ex. 68-2; Affidavit Tanaka Takeshi, p.3, Japan Ex. A-10; Affidavit of Haruyoshi Okyama, p.3, Japan Ex. A-18.

<sup>1293</sup>Paras. 5.111-5.112, 5.120



10.175 Thus, while the United States has shown that the 1970 Guidelines are a measure for purposes of Article XXIII:1(b) and that it should not be held to have anticipated them in relation to its Kennedy Round expectations in respect of black and white film and paper, the United States has not demonstrated that the Guidelines nullify or impair benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has shown only one of the required elements of an Article XXIII:1(b) claim -- that the 1970 Guidelines are a measure.

**(h) 1971 Basic Plan for the Systemization of Distribution**

10.176 The seventh distribution "measure" to be examined is the "Basic Plan for the Systemization of Distribution" (28 July 1971) ("1971 Basic Plan")<sup>1294</sup>, prepared by MITI's Distribution Systemization Promotion Council, together with actions to implement recommendations in the Plan. Following a recommendation contained in the Seventh Interim Report, MITI formed the Distribution Systemization Promotion Council in 1970. This council published the 1971 Basic Plan in July 1971.

10.177 The authors of the 1971 Basic Plan indicate that it "represents the result of government and the private sector joining forces to consider the basic direction and goals for the systemization of distribution in Japan, and the means of realizing these goals, with the year 1975 set as the tentative target date for completion".<sup>1295</sup> They also indicate that "[t]he decisive approach here is to regard the entire process of distribution from production to consumption as a single system, and to effect an overall, comprehensive increase in the efficiency of this system, i.e. the 'systemization of distribution activities'".<sup>1296</sup>

10.178 The 1971 Basic Plan calls for systemization of distribution to "be realized through various stages: vertically from the intra-firm level to the inter-firm level; horizontally on the inter-firm level to the national economic level. Furthermore, in seeking to implement this, sufficient attention must be paid to the introduction of computers as an effective means of achieving [such systemization] ... ".<sup>1297</sup> The plan suggests that

"[t]he systemization of distribution must be consistently planned within existing individual sectors, and also must transcend the boundaries of many existing industry sectors. In other words, there is a need to view individual industry sectors as 'closed systems', and to achieve a systematic coordination of production, distribution and consumption within such a framework; we must consider how this can be accomplished. At the same time, however, these 'closed systems' should be logically dismantled, and existing industry sectors reshuffled through the medium of distribution ... ".<sup>1298</sup>

The recommendations on distribution systemization contained in the 1971 Basic Plan do not make any distinction between domestic and imported products, and, in general, these recommendations are not product-specific. However, in a section dealing with "rational transaction terms", reference is made to the guidelines established with respect to various specific industries, including those for the photographic film industry.<sup>1299</sup> It is also stated in this section that "in order to promote the spread and adoption of these guidelines, [MITI] will seek to obtain the cooperation of relevant industry groups to draft standard agreements that incorporate the substance of these guidelines".<sup>1300</sup>

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<sup>1294</sup>US Ex. 71-10; Japan Ex. B-18.

<sup>1295</sup>US Ex. 71-10, p. 4.

<sup>1296</sup>Ibid.

<sup>1297</sup>Ibid.

<sup>1298</sup>Ibid, p. 6.

<sup>1299</sup>Ibid, p. 10.

<sup>1300</sup>Ibid.

10.179 *Application of measure.* The United States contends that the 1971 Basic Plan is a governmental measure and that it is effectively still in force. The United States points out that the Distribution Systemization Promotion Council, which authored and published the plan, was established by MITI "as a forum for promoting the systemization of distribution through the joint efforts of government and the private sector", and that upon publication of the plan the chief of MITI's Business Bureau stated that "modernization of distribution is urgent from the standpoint of achieving balanced development of the Japanese economy, as well as from the standpoint of consumer price countermeasures and capital liberalization countermeasures"<sup>1301</sup>, and that "[w]ith this plan, the Ministry of International Trade and Industry has decided to make every effort toward the fulfilment of distribution systemization policies."<sup>1302</sup> As such, the United States considers that this plan represents official policy of MITI. Japan's position is that the 1971 Basic Plan is simply a report of an advisory body to the government and can therefore not be characterized as a governmental measure. Japan further contends that the plan is no longer in effect. MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. According to Japan, these recommendations were made, and private businesses followed them or ignored them at their own choosing. This plan, Japan maintains, was never government action at all, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

10.180 Applying the analysis developed earlier in our general discussion of Article XXIII:1(b), we note that the 1971 Basic Plan is not a law or regulation nor does it provide incentives or disincentives to the private sector to take particular action. Although the 1971 Basic Plan was authored and published by a quasi-governmental advisory body composed of academics, industry representatives and government officials, it nonetheless bears some hallmarks of a governmental measure in that the Distribution Systemization Promotion Council was created by MITI and commissioned by MITI to prepare the plan. Moreover, as noted above, upon its publication senior MITI officials endorsed the plan and stated that MITI would work with the private sector to ensure implementation of the plan's recommendations. In light of these statements and actions by MITI, we consider that there is sufficient likelihood that the administrative guidance given by MITI in connection with the 1971 Basic Plan provides sufficient incentives for private parties to act in a particular manner such that it would have a similar effect on business activity in Japan to a legally binding measure. In our view, this conclusion is in accord with past GATT practice.<sup>1303</sup> Accordingly, we find that the 1971 Basic Plan is a measure within the meaning of Article XXIII:1(b).

10.181 As for the current effectiveness of the plan, although one may question whether the particular recommendations contained in the plan still have relevance in the Japanese market 26 years after the fact, there is no evidence to suggest that the plan has ever been abandoned. Accordingly, we consider that 1971 Basic Plan, as a measure within the meaning of Article XXIII:1(b), may still be in effect.

10.182 *Benefit accruing.* We recall the US argument that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from the Kennedy, Tokyo and Uruguay Rounds, and that it could not have foreseen the 1971 Basic Plan -- part of "the Japanese government's array of opaque, informal measures" -- before conclusion of the Kennedy Round. The United States further argues that it could not reasonably anticipate the significance of the measure for the Japanese film and paper market even as of the conclusion of the Tokyo and Uruguay Rounds. To this, the Japanese government responds that the United States should have reasonably anticipated the 1971 Basic Plan as of June 1967 because the policies discussed therein were the logical outgrowth of MITI's ongoing distribution modernization policies aimed at rationalization of transaction terms and systemization of distribution practices. Japan further argues that even assuming that MITI's distribution modernization policies during the 1960s and '70s encouraged single-brand distribution

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<sup>1301</sup>Ibid, p. 2.

<sup>1302</sup>Ibid.

<sup>1303</sup>Japan - Agricultural Products, BISD 35S/163, 242. See also Japan - Semi-conductors, BISD 35S/116, 155.

of film and paper as a means to exclude foreign brands from traditional distribution channels, these trends began well in advance of the conclusion of the Kennedy Round. Japan maintains that the United States should have reasonably anticipated the Basic Plan *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

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

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

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

10.186 Our assessment of the impact of this 1971 Basic Plan is that the policy recommendations for systemization and modernization in the Japanese distribution sector are addressed to distribution of products in the national economy at large, without regard to the source of the products involved. Also, even if one of the concerns expressed by MITI and the Distribution Systemization Promotion Council in advancing the plan was to address "capital liberalization countermeasures", this concern does not

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<sup>1304</sup>US Ex. 71-10, p. 2.

<sup>1305</sup>Ibid, p. 4.

<sup>1306</sup>Ibid, p. 6.

appear to be reflected in the actual recommendations advanced in the plan. Rather, the recommendations appear to be neutral as to source of the products, whether domestic or foreign, promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where the 1971 Basic Plan has done so in respect of US film or paper. Nor, for that matter, has it shown that this measure would be likely to lead to such a result.

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

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

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

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

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

10.191 In a foreword to the 1975 Manual, the centre acknowledges that "[a]s the economic environment grows worse, the systemization of distribution activities has become an issue of critical importance".<sup>1308</sup> The centre also indicates that the development of the 1975 Manual was one part of MITI's policy to actively develop effective policies related to the systemization of distribution activities.<sup>1309</sup> The 1975 Manual states that "it is an urgent need to improve the structure of manufacturers to a capacity that

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<sup>1307</sup>US Ex. 75-5.

<sup>1308</sup>Ibid.

<sup>1309</sup>Ibid.

will resist foreign capital affiliated firms".<sup>1310</sup> With regard to promoting systemization of distribution in the camera and film industry, the 1975 Manual makes specific recommendations on: (i) standardization of transaction terms; (ii) integration of codes and forms; (iii) increasing efficiency of physical distribution; and (iv) enhancement of information processing, including computer ties between manufacturers, distributors and retailers.<sup>1311</sup>

10.192 The 1975 Manual also calls for the establishment of an association for the promotion of distribution systemization in the camera and film industry, to provide a forum for industry and government to discuss and study proposed solutions.<sup>1312</sup> Thereafter, a Photosensitive Materials Committee was established for the systemization of distribution by industry. This committee was charged with promoting information ties and physical integration of distribution facilities.

10.193 *Application of measure.* The United States claims that the 1975 Manual is a governmental measure because the Distribution System Development Centre, which produced the manual, was a "MITI creation" and the manual makes clear that it was prepared as part of MITI's policy of systemization. The United States also claims that this measure is effectively still in force. Japan responds that the author of the 1975 Manual is an advisory body to MITI, and that the information and recommendations contained in the 1975 Manual were directed toward MITI, not private industry. As such, Japan claims, the 1975 Manual can in no manner be construed as a governmental measure. In any case, according to Japan, the "measure" is not currently in effect. MITI's policies resulted in recommendations to industry in the 1960s and '70s on how to modernize distribution policies. These recommendations were made, Japan argues, and private businesses followed them or ignored them at their own choosing. This plan was never government action at all, Japan maintains, and any substantive relevance of it ended decades ago when the advice was either acted upon or ignored.

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

10.195 If, however, we assume that the 1975 Manual is a governmental measure, we still have to consider whether it is currently in effect. Although one may question whether the particular

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<sup>1310</sup>Ibid, p. 122.

<sup>1311</sup>Ibid, pp. 122-124.

<sup>1312</sup>Ibid, p. 124.

<sup>1313</sup>Ibid, foreword.

<sup>1314</sup>Ibid.

recommendations contained therein still have relevance in the Japanese market some 22 years after their publication, there is no evidence to suggest that the plan has ever been revoked. Assuming that the 1975 Manual is a measure, it may still be in effect.

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

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

10.198 With respect to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds, it is difficult to conclude that the United States could not reasonably anticipate the 1975 Manual and its application (to the extent this occurred) as of 1979 and 1993. Although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure for or its potential disparate impact on imported products until some time after its publication, the United States has not demonstrated the existence of any such circumstance in respect of this manual, which we note applies to film by its terms. Accordingly, we find that the United States has not demonstrated that in relation to 1975 Manual that it has legitimate expectations of improved market access emanating from the Tokyo or Uruguay Rounds.

10.199 *Impairment and causality.* The United States argues that the 1975 Manual emphasized that the major issues facing the Japanese film industry included "the liberalization of capital and trade" and that there was an "urgent need to improve the structure of manufacturers to a capacity that will resist foreign capital affiliated firms", and recommended several actions towards systemization, including

standardization of transaction terms.<sup>1315</sup> The United States further argues that, using the vehicle of the 1975 Manual, MITI saw the development of information links as an integral part of its distribution systemization efforts and strongly advocated improving computer linkages to cement the closed vertical distribution system and ensure its perpetuation.<sup>1316</sup> Japan's view is that none of the policies discussed in the 1975 Manual were inherently disadvantageous to imports. Moreover, according to Japan, there is no basis for assuming that MITI's systemization policies, for example the creation of information ties, had any exclusionary impact. Japan notes in this connection that Nagase's subsidiary Kuwada, a single-brand primary wholesaler for Kodak, was a member of the wholesalers' trade association at the time the 1975 Manual was prepared. And as to the US argument that Japanese manufacturers established on-line computer links with their primary wholesalers based on guidance from the 1975 Manual, Japan responds that Fuji did not establish its first on-line connection with a primary wholesaler until 1989. Thus, Japan contends, the alleged systemization guidance that the United States claims was so effective in creating an exclusionary market structure was in reality ignored for at least 14 years.

10.200 Our assessment of the impact of this 1975 Manual is similar to that of the 1971 Basic Plan: the policy recommendations for systemization and modernization in the Japanese distribution sector are without regard to source of the products involved. Also, even if one of the concerns expressed in the manual was to address "foreign capital affiliated firms", this concern does not appear to be reflected in the actual analysis or recommendations advanced in the manual. For example, the manual explains that systemization of distribution has been emphasized in recent years for the following five reasons: (i) balancing supply and demand; (ii) controlling price increases; (iii) coping with labour shortages and wage increases; (iv) timely handling of increasing flows of distributed goods; (v) creating a management system for the information age.<sup>1317</sup> In addition, the recommendations appear to be directed at promoting the standardization and modernization of business practices and management techniques, including computerization. Indeed, as noted in the Seventh Interim Report, imported products were expected to benefit from the systemization of distribution. Although it is possible that a measure that is formally neutral as to origin of products could nonetheless be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any specific instances where such systemization of the distribution sector in the Japanese film industry has undermined market-access conditions for US film or paper.

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

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

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

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<sup>1315</sup>Ibid, p. 122.

<sup>1316</sup>Ibid, pp. 123-124.

<sup>1317</sup>Ibid, pp.117-118.

In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim.

**(j) Concluding observations on distribution "measures"**

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

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

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

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

10.208 Finally, we would note that there is little argument from the United States in respect of the impact of these "measures" on imported paper. As argued by Japan, the only evidence cited by the United States on imported paper relates to a measure (SMEA financing to photofinishing laboratories) which we found not to be within our terms of reference.

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<sup>1318</sup>See paras. 2.2, 5.26, 6.279 and 6.339 above.

<sup>1319</sup>See para. 2.4 above.

<sup>1320</sup>The US statistics rather focus on the issue of which percentage of the primary or secondary wholesalers used to or currently do carry foreign film.



#### 4. *RESTRICTIONS ON LARGE RETAIL STORES*

10.209 The United States claims that Japan's application of (1) the Large Scale Retail Stores Law of 1 March 1974 (the "Large Stores Law")<sup>1321</sup> and related regulations and administrative "measures", including related local "measures", and (2) an amendment to the Large Stores Law, effective 14 May 1979<sup>1322</sup>, restricted the growth of an alternative distribution channel for imported film, thereby nullifying or impairing benefits accruing to the United States under GATT Article XXIII: 1(b). In light of their obvious relationship, we shall examine these two measures together in this section.

10.210 The Large Stores Law was passed by the Japanese Diet on 1 October 1973, with an effective date of 1 March 1974. The law established notification procedures to regulate the opening of large store structures (where more than one retailer may operate) and the opening and operation of retail stores operating in such structures. As originally enacted, it regulated stores with floor space in excess of 1500 square metres. The 1979 amendment effected two main changes: (1) the threshold for stores covered by the law was lowered from 1500 square metres to 500 square metres; and (2) large stores were divided into two classes -- Class I stores (1500 square metres and above) under MITI's jurisdiction, and Class II stores (500 to 1500 square metres) under the jurisdiction of local prefectural governors. The law permits the regulation of a store's size, opening date, operating hours and closing days ("store holidays").

10.211 Article 3 of the law requires that a party intending to build or open a large-scale retail store must submit, to MITI or the appropriate prefecture, an initial notification including the proposed floor area and planned opening date at least 12 months before the planned opening date. If the store is deemed to be subject to the law's procedures, the plans for the store must be explained to the appropriate authority, local retailers and consumers. Following this, the authority may recommend a reduction in the size of the store and/or a delay in the opening date and/or a change in its opening hours and store holidays. In 1982, MITI instituted, through Directive No. 36, a "prior explanation" requirement to precede the initial notification required by Article 3.<sup>1323</sup> This directive was revoked in 1992. Also in 1992, the minimum floor space requirements for Class I stores was raised from 1500 square metres to 3000 square metres (and to 6000 square metres in cities designated by ordinance).

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

10.213 Japan responds that the Large Stores Law reflects long-standing Japanese policy, dating back to the enactment of the Department Store Law in 1956<sup>1324</sup>, of regulating large stores to preserve a diversity of small, medium and large retailing competitors, a policy found in other countries as well.

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<sup>1321</sup>US Ex. 74-4; Japan Ex. C-1.

<sup>1322</sup>Law Concerning the Adjustment of Business Activities of the Retail Industry for Large Retail Stores, 1978, US Ex. 78-1.

<sup>1323</sup>US Ex. 82-2; Japan Ex. C-16.

<sup>1324</sup>US Ex. 56-2; Japan Ex. C-3.

Japan contends that the law does not concern products generally, or film in particular. The law does not regulate which products large retailers can carry, nor does it take into account which products a retailer sells when determining whether and what adjustments are necessary. Accordingly, in Japan's view, the Large Stores Law is incapable of adversely modifying competitive conditions for any imported products, including film. Japan maintains that there is no correlation between store size and the likelihood of carrying foreign film brands. Japan also argues that the law has been significantly liberalized in recent years and is more favourable to imports now than at the time of any of the relevant tariff concessions.

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

10.215 *Benefits accruing.* The United States claims that the benefits accruing to it are its legitimate expectations of improved market access resulting from Japanese tariff concessions on film at the conclusion of the Kennedy, Tokyo and Uruguay Rounds. It claims that it could not have reasonably anticipated the content of the Large Stores Law or its 1979 amendment during the Kennedy Round negotiations because at that time (1967) neither of these measures had been proposed, and because MITI's two key directives, which in the US view, laid the foundation for the law by expanding the scope of the Department Store Law, were not issued until June 1968 and September 1970, respectively.

10.216 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the enactment of the Large Stores Law in 1973 and amendments in 1978 and thereafter, while subsequent to the Kennedy Round, have represented the continuation of a long-standing policy of preserving retailing diversity through regulation of large stores. The Department Store Law, which was enacted in 1956, required new department stores to obtain permits before opening. According to Japan, the Large Stores Law merely represented an extension of this preexisting regulatory policy to new types of stores that were starting to appear, such as supermarkets and large-surface discount stores, and was enacted in an effort to block the deliberate circumvention of the earlier law. Moreover, in Japan's view, even the various versions of the Large Stores Law have always been more liberal than the Department Store Law: the Large Stores Law replaced a permission-based system with a notification system; regulations on store holiday and closing hours are now less restrictive; and approximately 96 per cent of notified plans are implemented today as compared to 84 per cent of applications being permitted under the Department Store Law. Thus, Japan argues, even if one accepts, for argument's sake, that restrictions on large stores are unfavourable to imported products, there is nothing unfavourable to imports that the United States could not have anticipated at the time of the Kennedy Round tariff concessions.

10.217 In analysing the issue of reasonable anticipation at the conclusion of the Kennedy Round, we take note of Japan's argument that Japanese policy of regulating the mix of larger and smaller stores dates back to the Department Store Law of 1956 and that, therefore, the United States should have anticipated that such a policy would continue and would evolve to take account of changes in store types. As we concluded earlier, however, in the case of measures shown by the United States to have been introduced subsequent to the conclusion of the tariff negotiations at issue, it is our view that the United States should not be held to have anticipated these measures unless Japan can show the contrary. We consider that such a broad notion of reasonable anticipation, as espoused by Japan, could have the effect of depriving this element of a non-violation case of its meaning. In our view, it is not sufficient to claim that a *specific* measure should have been anticipated because it is a continuation of a past *general* government policy. We note in this regard that the panel on *EEC - Oilseeds* rejected a similar argument that the existence of some measures at the time of the tariff concessions meant that the complaining

party (the United States) should have reasonably anticipated their significant modification or enhancement.<sup>1325</sup> We thus consider that the United States should not be deemed to have reasonably anticipated the Large Stores Law and its subsequent amendments, as of the conclusion of the Kennedy Round. Its reasonable expectations in respect of Japan's Kennedy Round concessions are limited to black and white film and paper.

10.218 Concerning expectations in respect of the Tokyo Round tariff concessions on film and paper, the United States concedes that it was aware of the Large Stores Law at that time; however, the United States argues that what negotiators could not have known, and did not know, at that time was the extent to which Japan's closed distribution system for photographic film and paper was the result of the government's distribution "countermeasures", and that the distribution "countermeasures", the Large Stores Law and the promotion "countermeasures" worked together to impede market access. The United States emphasizes that during the Tokyo Round, no contracting party other than Japan could have anticipated the actions Japan would take to dramatically expand the scope and invasiveness of the Large Stores Law following conclusion of the Round. In particular, the United States argues, the addition in 1982 of the "prior explanation" requirement, by which builders were required to meet with and try to obtain consent of local retailers before submitting the Article 3 Notification, significantly increased the burdensome nature of the law. Japan responds that the United States should have reasonably anticipated the measures in effect at the time of the tariff concession, including the Large Stores Law and its 1979 amendment. According to Japan, no significant government measures or policy changes occurred after 1979 (Directive No. 36 in 1982 not being a significant modification), and thus, there were no measures, not anticipated at the time of the 1979 tariff concessions, that were capable of upsetting the competitive position of imported film or paper.

10.219 We consider that the United States should be charged with knowledge of the Large Stores Law of 1974 prior to the conclusion of the Tokyo Round. As for the 1979 amendment, it was passed by the Diet on 15 November 1978. Although it appears that an agreement on film and paper tariffs may have been reached between Japan and the United States in August 1978, it appears that in general the bilateral Japan-US negotiations ended only in December 1978<sup>1326</sup>, after the passage of the amendment. Moreover, the negotiations in the Tokyo Round did not end until 12 April 1979, with the protocol being dated 30 June 1979. In light of these facts, we consider that the United States should reasonably have anticipated the 1979 amendment. In this regard, we recall our conclusion that knowledge of a measure's existence is not equivalent to understanding the potential impact of the measure on a specific product market. However, the United States has not demonstrated why initially it could not have reasonably anticipated the effect of the Large Stores Law, as amended, on the film or paper market. In our view, a simple statement that Japan's measures were so opaque and informal that their impact could not be assessed is not sufficient. As for the 1982 directive on "prior explanation", we accept that this particular requirement was not reasonably anticipated by the United States as of the Tokyo Round.

10.220 The United States concedes that it was aware of the Large Stores Law, as amended, as of the conclusion of the Uruguay Round, but claims that, at the time of the Uruguay Round tariff negotiations, it was not aware and could not have been aware that Japan had seized upon the Large Stores Law as a key instrument to protect and support the vertical integration of distribution in the consumer photographic materials sector. Japan responds that the law and relevant regulations have been published and that their requirements have long been publicly known facts. Moreover, Japan contends that the United States has been making these claims concerning the Large Stores Law with respect to imports generally for years, both in the "National Trade Estimate Report on Foreign Trade Barriers", published annually by the Office of the United States Trade Representative, and in bilateral talks with the Japanese Government under the Structural Impediments Initiative.

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<sup>1325</sup>EEC - *Oilseeds*, BISD 37S/86, 129, para. 149.

<sup>1326</sup>See Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation 268* (1986), Japan Ex. E-6.

10.221 In light of the fact that the Large Stores Law, its amendments and the major elements of policy underlying the law and its amendments all predate the conclusion of the Uruguay Round, and indeed appear to have been the subject of official US publications and bilateral discussions and joint reports between the United States and Japan, we find that the United States should have reasonably anticipated the essential elements of the law and its amendments, as well as their potential impact on the photographic materials sector in Japan, as of the conclusion of the Uruguay Round.

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

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

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

10.225 First, as to the relationship of large stores to imported film and paper, we note that we are presented with measures regulating large stores that are clearly neutral as to products and the origin

of products. Added to this, there is a lack of evidence as to any product-specific or origin-specific implementation of these measures. Indeed, it seems clear the motivating force behind opposition to the expansion of large stores in Japan, and in many other countries as well, is from small- and medium-sized stores concerned with the impact that such stores may have on them, and not because of a desire to hinder imports of foreign film and paper. Thus, the rationale of the Large Stores Law is the protection of small stores.

10.226 It is possible, however, that a measure that is formally neutral as to the origin of products may be shown to be applied in a manner that results in upsetting the competitive relationship between domestic and imported products to the detriment of imports. In this regard, we note that the United States asserts that the application of the Large Stores Law has negatively affected the relative competitive position of imported film in the Japanese market because it restricts the spread of large stores, which the United States claims, on the basis of survey evidence, are more likely to carry imported film. Japan contends, however, that the US evidence shows only that stores selling a high volume of film, whether they are large or small stores, are more likely to carry imported film. The United States ripostes that its survey data, when controlled for volume of sales, still shows that large stores are more likely to carry imported film. It seems to us that even if there is a greater tendency for large stores to carry imported film, access to large stores is less important for film than for other imported products since film takes up very little shelf space even taking account that a full display of all film types is comprised of many rolls of film. This would seem to be confirmed by the Japanese evidence that high-volume sellers of film, whether large or small stores, are more likely to carry imported film. However, on balance we are left with conflicting evidence and no sure way to resolve the conflict. In light of our findings in the following paragraphs, we consider that it is not necessary to make a finding on this issue.

10.227 We note our unease, however, about relying on the type of evidence offered by the United States to justify its claim here. Essentially, it argues that since a certain type of store sells more imported products than other stores, any regulation of that type of store may give rise to legitimate claims under Article XXIII:1(b). Such an argument is similar to one used to attack Sunday closing laws in the European Community, i.e., since home improvement stores sell imported products and sell more products on Sunday, limitations on Sunday trading may be assimilated to import restrictions. The EC Court of Justice refused to find a violation of the EC Treaty.<sup>1327</sup>

10.228 Second, in considering whether the Large Stores Law upsets the competitive relationship between domestic and imported film and paper, we need to analyze the evolution of Japanese regulation of large stores. We will examine the differences between what was the situation in 1967, 1979 and 1993 and what is the situation today. In particular, we will look at the following factors: the detail of the regulations (permission versus notification; approval rates and qualifications, opening hours, store holidays, store size); and the relative market position of large stores in the Japanese economy.

10.229 Compared to 1967, the regulation of large stores has been tightened in the sense that the Large Stores Law covers more retail establishments than did the Department Store Law and stores of 1000 square metres are subject to the law while the Department Store Law applied only to stores of 1500 square metres.<sup>1328</sup> To evaluate the impact of this change, however, it is necessary to consider the detail of the regulation under the two laws, as of 1967 and today. Japan notes that the Large Store Law only requires notifications as opposed to applications for permits (as required under the Department

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<sup>1327</sup>Torfaen Borough Council v. B & Q PLC, Case C-145/88, [1989] ECR 3851. For a subsequent development of relevant EC law on the application of Article 30 of the EC Treaty (prohibiting quantitative restrictions on imports and measures having equivalent effect) generally, see: Keck & Mithouard, Cases C-267 & 268/91, [1993] ECR I-6097, Punta Casa SpA v. Sindaco del Comune di Capena, Cases C-69 & 258/93, [1994] ECR I-2355.

<sup>1328</sup>The Large Stores Law applies to stores of 500 square metres, but since 1994, stores of less than 1000 square metres are generally exempted from adjustment because they are in principle deemed to have no probability of adversely affecting nearby small and medium-size retailers. Standards for Evaluating Probability Under Article 7(1,4) Large Stores Law, No. 96, MITI, 1 April 1994, Japan Ex. C-7.

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

10.230 Comparing the present situation in respect of the application of the Large Stores Law to those existing at the conclusions of the Tokyo Round in 1979 and of the Uruguay Round in 1993 leads to the same result. As of the conclusion of the Tokyo Round, the Large Stores Law was in effect and applied to stores of more than 500 square metres. Since that time, the size threshold has been raised to 1000 square metres, the "normal" closing time has been extended from 6 p.m. to 8 p.m. and the required number of store holidays has been reduced from 48 to 24 days. Since 1982, both parties agree that the market share of large stores in retail sales has increased, albeit modestly. Compared to the situation prevailing at the conclusion of the Uruguay Round in 1993, the size threshold has been raised from 500 metres to 1000 square metres, the "normal" closing time has been extended from 7 p.m. to 8 p.m. and the required number of store holidays has been reduced from 44 to 24 days.

10.231 On balance, we are not persuaded that the regulation of large stores today is tighter than it was in 1967, 1979 or 1993. The evidence relating to the recent evolution of procedural requirements and conditions of operation of stores under the law suggests that there has been a substantial liberalization in the application of the law since the early 1990s, with the concomitant result that the law is now more favourable to the opening of large stores than it was at the conclusion of any of the three rounds of multilateral trade negotiations.

10.232 Finally, we consider the ramifications for the US claim under Article XXIII:1(b) of our conclusions concerning the evolution of Japan's regulation of large stores. We note that the essence of the US claims in respect of large stores differs from its claim in respect of distribution and promotion measures. In the case of those measures, the US claim is that the Government of Japan acted to impede market access for imports by taking actions that made it more difficult to sell imported film compared to the time the tariff concession was granted. The Large Stores Law claim is different. The United States concedes that there are more large stores in Japan today than there were in 1982 in total number and their share of retail sales is greater than it was in 1982. Thus, to the extent that more large stores means more favourable conditions for import market penetration, the situation today is better than it was in 1982. (There is no evidence on market shares of large stores prior to 1982.) In these circumstances, the argument would seem to be that the situation would be even better if Japan had not interfered with this favourable market evolution by slowing it. This raises the question of whether the United States can claim legitimate expectations related to expected market evolution, as opposed to expectations that the market situation at the time of a tariff concession will not be upset, e.g., by a grant of subsidies or implementation of measures that change existing competitive relationships or by restricting the use of previously permitted sales techniques. Normally, for competitive relationships to be upset, we would expect an adverse change in the situation existing at the time of the tariff concessions. In the case of subsidies, for example, a Member reasonably expects that subsidies will not be increased, not that they will be decreased. To the extent that the United States claim is viewed as being based on expectations about market evolution, the question becomes to what extent it must

establish it had reasons to expect in 1967 (or 1979 or 1993) that there would be a relative expansion of the large-store segment of Japan's economy, taking into account the existing regulation under the Department Stores Law or Large Stores Law. Even assuming that such expectations would be protected by Article XXIII:1(b), the United States has not established that it had any such expectation in 1967, 1979 or 1993.

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

##### **5. PROMOTION "MEASURES"**

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

- (1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
- (2) 1967 JFTC Notification 17 on premiums to businesses;
- (3) 1977 JFTC Notification 5 on premium offers to consumers;
- (4) 1981 JFTC Guidance on Dispatched Employees;
- (5) 1982 Self-Regulating Rules Concerning Fairness In Trade With Business;
- (6) 1982 Establishment of Fair Trade Promotion Council;
- (7) 1982 Self-Regulating Standards Concerning Display of Processing Fees; and
- (8) 1987 JFTC approval of the Retailers Fair Competition Code and the Retailers Fair Trade Council.

The text of and background material surrounding these "measures" is set out in Part II.

10.235 In general terms, the United States claims that Japan has reinforced the distribution "countermeasures" not only through legislated restrictions on retail stores but also through a system of measures limiting how photographic material manufacturers, wholesalers and retailers may promote their products in order to expand their sales of photographic film and paper in the Japanese market by means of economic inducements and aggressive advertising. The United States claims that promotion "countermeasures" have disadvantaged foreign manufacturers of film and paper by constraining their ability to use certain discounts, gifts, coupons, and other inducements, or to rely upon innovative advertising campaigns, particularly where price or price comparisons are discussed. The United States argues that Japan has implemented these promotion "countermeasures" through the Premiums Law and certain regulations issued by the JFTC under the Antimonopoly Law. Although these measures also apply to domestic film and paper producers, the United States contends that Japan has imposed them with the intention of striking against international competition by foreign imports following trade liberalization, i.e., the ability of foreign manufacturers to convert their strong capitalization and cost competitiveness into potent marketing strategies and aggressive promotional competition.

10.236 Japan responds that the Premiums Law imposes restrictions only on excessive premiums and regulates only misleading representations. In the interest of consumer protection, the Premiums Law is designed to deal effectively with unfair trade practices and encourage manufacturers to compete principally on the basis of price and quality, not unfair inducements or deceptive and misleading representations. Japan emphasizes that the law makes no distinctions between imported or domestic products. Japan further argues that the Premiums Law does not hinder vigorous price and promotional competition. Low price offers are not only permitted, but are, in Japan's view, facilitated by the law, and a broad range of promotional practices are consistent with the law. All companies, both domestic and foreign, have been and continue to be free to spend as much money as they want on advertising.

Companies are free to use any expressions they wish, so long as they do not deceive or mislead consumers. Japan also submits that no businesses have ever been restricted from offering promotional gifts or prizes by lotteries and competition, so long as they are in line with the standards set in accordance with the law to protect consumers. In Japan's view, these standards are no more rigid than those set by similar laws in many other countries. Japan also contends that in some respects, the standards are actually less rigid than those of the United States because certain types of lotteries and prize competitions prohibited in the United States have been allowed in Japan.

10.237 The United States also points out that enforcement actions under the Premiums Law may be taken by the JFTC and the 47 prefectural governments. Moreover, the JFTC has given its official sanction to so-called "fair competition codes" promulgated by private sector "fair trade councils". The United States also argues that the "fair trade councils" have authority to discipline members who violate the codes, often employing methods of coercion and monetary penalties, and that the standards established by the councils in their codes typically are adopted by the JFTC, which then applies the same rules to "outsiders" given that the Premiums Law expressly exempts the cartel-like practices of the councils from antitrust enforcement. Japan responds that private "fair competition codes" and the "fair trade councils" are not relevant to this case because no "code" or "council" covers photographic film or paper.

10.238 Bearing in mind these general arguments of the parties, we shall now proceed with our examination of each of the eight promotion "measures" in light of the three elements of a non-violation case outlined earlier.

**(a) 1967 Cabinet Decision**

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

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

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

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

"(1) When foreign capital is brought into Japan, it is possible for a parent company to use vast amounts of capital to engage in dumping, offer premiums, and conduct large-scale publicity and advertising, etc. In the future, as liberalization of direct investment in the domestic market progresses, such risk may conceivably be reinforced. Therefore, in such a situation, it is necessary to fully study whether these actions qualify

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<sup>1329</sup>US Ex. 67-6.

<sup>1330</sup>US Ex. 67-5 (B), p. 3.



as unfair trade practices as defined in Article 2 of the Antimonopoly Law and can be regulated pursuant to provisions under Article 19 of the said Antimonopoly Law or the Law Against Unjustifiable Premiums and Misleading Representations.

(2) For the application of the Antimonopoly Law, while one may not specifically select foreign capital affiliated firms for differential treatment, foreign capital affiliated firms nevertheless have the strong capital and technological background of the parent company and are usually in an economically strong position. Consequently, it is believed that they will often become the object of regulation of the Antimonopoly Law. On this point, we must be able to apply standards to deal with any disorderly activities by foreign capital because existing standards of regulation of unfair trade practices are not necessarily clear and we may, for example, clarify them by making use of a special designation or some other method".<sup>1331</sup>

10.241 The 1967 Cabinet Decision provides the following basic direction for the "countermeasures" to be taken in carrying out liberalization:

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

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

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

...

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

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

10.242 We recall the US claim that in July 1967, the Cabinet adopted the recommendations of the FIC and its Expert Committee that the Premiums Law should be used as a liberalization "countermeasure" by establishing fair competition codes. According to the United States, the government directed that the codes were to be established by industry representatives and trade associations, as provided under Article 10 of the Premiums Law, and the government would exercise "active guidance".<sup>1333</sup> Japan responds that it does not believe it is necessary to address fair competition codes or fair trade councils as none of them cover photographic film or paper. Nevertheless, Japan argues that it was considered

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<sup>1331</sup>Ibid.

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

<sup>1333</sup>US Ex. 67-5, A and B.

desirable for effective enforcement of the Premiums Law to have business entities agree on self-restraint of excessive premiums and misleading representations, and to prevent actual violations of the Premiums Law. According to Japan, it is against this background that the Premiums Law allows business entities to adopt, subject to the JFTC's approval, fair competition codes on premiums and representations. Japan also argues that, contrary to the US allegation, the Cabinet did not adopt the FIC Expert Committee Report. Therefore, Japan submits, the Japanese Government did not exercise "active guidance".

10.243 *Application of measure.* Although there can be little doubt that the 1967 Cabinet Decision as a whole constitutes a governmental measure, within the meaning of Article XXIII:1(b), the parties differ on the issue of whether or not this measure is still in effect. While Japan submits and the United States concedes that the 1967 Cabinet Decision was repealed on 26 December 1980, the United States argues that the repeal affects only that portion of the 1967 Cabinet Decision relating to controls on international investment in Japan, not the distribution policies and liberalization "countermeasures" directed by the 1967 Cabinet Decision. In reply, Japan indicates that it is impossible to adequately respond to this contention because the United States does not specify which measures it believes resulted from the 1967 Cabinet Decision, but that in any case any "measures" not specifically identified are not properly before this Panel.

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

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

10.246 Japan argues that the United States cannot properly claim to have any legitimate expectations of such improved market access because the first Japanese tariff concessions on film and paper -- limited to black and white film and paper -- occurred at the conclusion of the Kennedy Round on 30 June 1967, several weeks following the Cabinet Decision of 6 June 1967. Moreover, according to Japan, the Cabinet Decision was preceded by a high-level public debate on capital liberalization, a debate of which the United States would have been aware. Japan also argues that the Premiums Law was enacted in 1962 and that this law targeted conduct that had been identified by the JFTC as unfair trade practices as early as 1953. Accordingly, Japan claims, the United States had no legitimate basis for expecting fair competition codes would not be approved or that excessive premiums and deceptive advertising would go unregulated, or that this regulation would not be enforced vigorously. Japan argues that the measure should have been anticipated by the United States *a fortiori* as of the conclusion of the Tokyo and Uruguay Rounds.

10.247 We note that this Cabinet Decision of 6 June 1967 was published in *Kampo* (Japan's official gazette) on 21 June 1967<sup>1334</sup>, thus predating the formal conclusion of the Kennedy Round (30 June 1967) by nine days. We recall the test developed in our general discussion of reasonable anticipation to the effect that a Member is presumed to have knowledge of a measure as of the date of its publication, but that this presumption may be rebutted where the Member identifies exceptional circumstances. Because of the short time period between this particular measure's publication and the formal conclusion of the Kennedy Round, we consider it difficult to conclude that the United States should be charged with having anticipated the 1967 Cabinet Decision since it would be unrealistic to expect that the United States would have had an opportunity to reopen tariff negotiations on individual products in the last few days of a multilateral negotiating round. Accordingly, we consider that the United States, in relation to the 1967 Cabinet Decision, has legitimate expectations of improved market access emanating from the Kennedy Round. However, applying the test developed earlier, we find that the United States may not claim legitimate expectations arising from the Tokyo and Uruguay Round concessions.

10.248 *Impairment and causality.* The United States argues that improved access to the Japanese market for film and paper emanating from Japan's Kennedy Round concessions on black and white film and paper are nullified and impaired as the result of the 1967 Cabinet Decision and subsequent promotion "countermeasures" of the Japanese Government. According to the United States, the 1967 Cabinet Decision approved the use of "countermeasures" for "preventing foreign enterprises from disturbing order in our industries".<sup>1335</sup> The United States further argues that its additional expectations emanating from the Tokyo Round and the Uruguay Round, including those relating to improved market access for *colour* film and paper, are also nullified or impaired.

10.249 Japan contends that the 1967 Cabinet Decision contains only very general policy statements as to what sorts of actions the government considered to be desirable in order to modernize Japan's overall distribution sector following capital liberalization; it does not set in motion any specific measures which could be said to discriminate *de jure* or *de facto* against the access of imports to the Japanese market. Japan argues that the United States has not provided any evidence to the Panel demonstrating "impairment" resulting from the 1967 Cabinet Decision.

10.250 Our analysis of the claim that the 1967 Cabinet Decision impairs market-access benefits accruing to the United States is made particularly difficult by the fact that, as argued by Japan, the portions of the Cabinet Decision addressing the need to modernize the Japanese distribution system are in the nature of very general policy statements. The overall theme of the policy statements contained in the 1967 Cabinet Decision is to the effect that the Japanese Government should find ways to help modernize the distribution sector so as to respond to the intensified competition that capital liberalization was expected to bring. Moreover, the United States has not been able to point to any specific actions governing or consequences of promotion activities disfavoured imports emanating from the 1967 Cabinet Decision (although it does argue that in general terms most of the subsequent promotion "measures" it cites are grounded in the 1967 Cabinet Decision). Accordingly, we find that the United States has not demonstrated that the general policy statements contained in the 1967 Cabinet Decision nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b). At most, in our view, the 1967 Cabinet Decision is part of the context for later actions taken by Japan.

10.251 Thus, while the 1967 Cabinet Decision may still be viewed as a measure for purposes of Article XXIII:1(b) and the United States is not charged with having anticipated the measure prior to the conclusion of the Kennedy Round, the United States should have anticipated the Decision as of the conclusion of the Tokyo and Uruguay Rounds. Moreover, the United States has not shown that the measure nullifies or impairs benefits accruing to it from the Kennedy Round in respect of black

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<sup>1334</sup>Table U of Japan's First Submission, p. 188.

<sup>1335</sup>US Ex. 67-6, p. 4.

and white film and paper, nor from the Tokyo or Uruguay Rounds in terms of black and white and colour film and paper.

**(b) 1967 JFTC Notification 17 on premiums to business**

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

"Businesses ... who manufacture (including process, hereinafter the same) the products listed in the attached table or businesses who sell such products shall not offer premiums to businesses who purchase and sell the products involved in such manufacture or sale, or who use the products to supply services to general consumers (hereinafter referred to as "other party business"), as a means of inducing the other party business to begin to transact such products, or on the condition that the other party business's transaction amount or such other transaction condition satisfy certain criteria which the [first] business has established. Provided, however, that the preceding provisions shall not apply to cases of premium offers which are within the annual limit of 100,000 yen or less per one other party business, and which are found reasonable in the light of normal business practices".<sup>1337</sup>

10.253 JFTC Notification 17 limits to 100,000 yen annually the right of manufacturers of certain goods, including manufacturers of photosensitive materials, to offer cash or other premiums to wholesalers or retailers as an inducement for the wholesaler or retailer to begin handling the manufacturer's products, or to meet other conditions established by the manufacturer (e.g., purchase tickets). An exception to this prohibition on premiums in excess of 100,000 yen (Item 2-4) allows a manufacturer to offer premiums to employees of distributors and retailers that are in a special relationship with the manufacturer (e.g., through capital investment, interlocking directorates, etc.). JFTC Notification 17 was repealed in April 1996 in the course of a review of the Premiums Law.

10.254 *Application of measure.* The United States contends that JFTC Notification 17 is a governmental measure. While conceding that the measure was repealed in April 1996, the United States argues that other provisions of Japanese law make the repeal meaningless. Specifically, premiums from manufacturers to wholesalers are still subject to Designation 9 of JFTC Notification 15 of 1982<sup>1338</sup>, i.e., the provision governing the use of "unjust inducements" under the Antimonopoly Law. That designation prohibits premium offers in excess of "normal business practice". Thus, according to the United States, given that JFTC Notification 17 set industry practice for 19 years, it is uncertain at best as to whether present restrictions under Designation 9 differ at all from the situation under Notification 17.

10.255 Japan contends that, although JFTC Notification 17 was at one time a governmental measure, it was formally repealed in April 1996. Thus, for Japan, there is no governmental measure in issue. As for the alleged continuation of the policy underlying JFTC Notification 17 through Designation 9 of JFTC Notification 15 (1982), Japan responds that the United States is belatedly raising a "measure" or policy that was not specifically identified in its panel request and which is therefore outside the Panel's terms of reference. Japan further states that under Designation 9 of JFTC Notification 15, the automatic trigger level of 100,000 yen no longer exists and the burden of proof lies with the JFTC.

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<sup>1336</sup>US Ex. 67-4; Japan Ex. D-42.

<sup>1337</sup>*Ibid.*, p. 1.

<sup>1338</sup>Designation 9 of Notification 15 (1982): "Inducing customers of a competitor to deal with oneself by offering unjust benefits in the light of normal business practice", US Ex. 82-6.

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

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

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

10.259 *Impairment and causality.* The United States contends that even though JFTC Notification 17, which sets a 100,000 yen (\$278 in 1967) maximum annual limit on the premium that a manufacturer could give to a wholesaler or retailer (or a primary wholesaler to a secondary wholesaler or retailer)

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

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

10.261 Assessing the issue of impairment and causality, we note that JFTC Notification 17 appears to be equally directed at promotional activities with respect to both domestic and foreign products. It is not specifically aimed at imports, nor does it target film and paper, even though it lists "photographic materials" among the many consumer products to which it is directed. Although there is reference in a press summary to the need to counteract the influence of US capital<sup>1339</sup>, the JFTC drafting history cites excesses in Japanese industry leading to distortions in intrinsic competition for price, quality and beneficial services, and "cut-throat sales practices promoted by huge capital power" as justifications for the measure.<sup>1340</sup>

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<sup>1339</sup>Severe Restrictions Placed on Businesses for Premium Offers: Shatokuren Hears JFTC Explanations at Jyosui Kaikan on the 12th, Nihon Shashin Kogyo Tsushin, 20 June 1967, p. 25, US Ex. 67-8, p. 1. In this press summary, JFTC explained that "[t]he primary objective of [Notification 17] is (a) rationalization of the distribution stage ... ; and (b) eliminat[ion] of the stronger prey upon the weaker sales competition based on the power of capital ... If US capital were to conduct [premium offers] directed at the Japanese distribution sector, this would be no match for [Japan], so the restrictions should be applied as a breakwater before liberalization". Ibid.

<sup>1340</sup>Restriction on Premium Offers to Businesses, JFTC, Premiums and Representations Inspection Division, Kosei Torihiki, July 1967, p. 30, US Ex. 67-10, p. 2.

10.262 On balance, in our view, the evidence suggests that this measure is directed against potential excesses in the distribution sector in general. It targets excessive premiums given by manufacturers to wholesalers and by wholesalers to retailers. It does not, however, attempt to regulate other forms of promotional activity, such as low price offers and rebates. Moreover, while we do not reject the notion that facially-neutral measures may be shown to be applied in a manner that upsets the competitive relationship between domestic and imported products to the detriment of imports, the United States has not been able to point to any single instance where implementation of JFTC Notification 17 has led to such a result in respect of US film and paper. In this regard, we note that until 1975, Kodak had a relationship with a primary wholesaler - Asanuma. That relationship later ended apparently because of Kodak's refusal to deal directly with Asanuma.<sup>1341</sup> The United States has not shown that Kodak's inability to give premiums to Asanuma was relevant to the termination. In addition, the US contextual arguments about the impact of Japanese restrictions on investments, to the extent that they are true<sup>1342</sup>, do not demonstrate anything in relation to the application of JFTC Notification 17. Finally, as to the exception provided in Item 2-4 of JFTC Notification 17, the evidence suggests that this provision, neither inherently nor in its application, discriminates against imported film or paper. Although it appears that Kodak was unable to avail itself of this exception, due to the structure of Kodak's distribution relationships, the same was true in the case of Fuji.

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

10.264 Thus, while the United States has shown that JFTC Notification 17 is a measure for purposes of Article XXIII:1(b), it is no longer in effect. Moreover, it has not shown that it should not be held to have anticipated JFTC Notification 17 in relation to its Kennedy Round expectations in respect of black and white film and paper and it has not demonstrated that JFTC Notification 17 nullifies or impairs benefits accruing to the United States in respect of black and white film and paper. In respect of colour film and paper, it has not shown any of the required elements of an Article XXIII:1(b) claim - except that it is a measure under Article XXIII:1(b).

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

10.265 The third promotion "measure" cited by the United States is JFTC Notification 5 on Restriction on Premium Offers to Consumers of 1 March 1977 ("JFTC Notification 5").<sup>1343</sup> This notification was issued pursuant to Article 3 of the Premiums Law. It was amended by JFTC Notification 2 of 16 February 1996 (which removed the ceiling of 50,000 yen for premiums to all purchasers). Subject to certain exceptions dealing, *inter alia*, with samples, discount coupons, articles presented at business openings (all subject to the condition that they be "found reasonable in the light of normal business practices"), JFTC Notification 5 provides in relevant part:

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<sup>1341</sup>Affidavit of Takenosuke Katsuoka, Japan Ex. A-11, pp. 2-4.

<sup>1342</sup>We note in this regard Japan's reference to a statement by the President of Kodak Japan, Mr. Albert Sieg, in a 1988 interview: "The glaring mistake was waiting so long to take aggressive action in this market. We should have been here with this approach ten years ago. Clearly, the momentum of our local competitors got a strong forward thrust, and our task will be much, much more difficult", A Century of Sales, in Taking on Japan (1988), pp. 35-39, Japan Ex. B-45. Japan also indicates that Kodak could have established a 50-50 joint venture, such as Kodak Nagase (set up in 1986), as early as 1971.

<sup>1343</sup>Japan Ex. D-32.

"1. The value of a premium offered to general consumers, excluding those by lotteries or prize competition ... , shall be within 10 percent of the transaction value involved in the premium offer (provided that if the amount is less than 100 yen, the limit shall be 100 yen), and which is found reasonable in the light of normal business practices".<sup>1344</sup>

10.266 We recall the US claim that JFTC Notification 5 has the effect of severely restricting the offering of premiums on photographic film and paper to general consumers. According to the United States, given the relatively low price of film and paper, the value of any premium falling within the JFTC's restrictions would be negligible.

10.267 *Application of measure.* There is no dispute in this case that JFTC Notification 5 is a governmental measure and that it is still in effect, although, as noted above, it was amended in February 1996 with the removal of the ceiling of 50,000 yen for premiums to all purchasers. We therefore find that this notification is a measure within the meaning of Article XXIII:1(b).

10.268 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds. In particular, the United States argues that it could not have anticipated JFTC Notification 5 at the conclusion of the Kennedy Round negotiations since it was not issued until 1977. There was no reason, according to the United States, that it could or should have known that Japan would take such an action. Similarly, the United States maintains that it could not have anticipated the impact of the this measure as of the conclusion of the Tokyo and Uruguay Rounds (although these Rounds were concluded subsequent to the measure).

10.269 Japan responds that the Premiums Law was enacted in 1962, that JFTC Notification 5 merely represented an elaboration of the general norms set forth in that law. According to Japan, this elaboration of general norms set out in the Premiums Law should have been reasonably anticipated by the United States, since the United States could have had no legitimate basis for expecting that excessive premiums would go unregulated, or that the Premiums Law would not be enforced vigorously. Japan further argues that the measure should have reasonably been anticipated *a fortiori* prior to Japan's concessions at the conclusion of the Tokyo and Uruguay Rounds.

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

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

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<sup>1344</sup>Ibid, p. 1.



10.272 *Impairment and Causality.* The United States claims that the JFTC's imposition of new restrictions on the use of premiums upset the conditions of competition between imported and domestic products after the Kennedy Round by severely limiting the inducements enterprises could use to attract wholesalers, retailers and consumers to their products. Specifically with regard to JFTC Notification 5, the United States argues that the imposition of limits on the value of premium offers severely restricted the offering of premiums on film and paper to general consumers, and that given the relatively low price of such products, the value of any premium falling within the JFTC's restrictions would be negligible. Although conceding that JFTC Notification 5 is facially neutral, the United States argues that its application is intended to have, and has, a disparate impact on imported film and paper. In particular, the United States argues that this measure helps preserve the dominant position of Japanese film and paper manufacturers by shielding them from significant forms of promotion competition. In short, the United States claims, JFTC Notification 5, along with other JFTC notifications, has had a "chilling effect" on the ability of foreign producers to engage in promotion activities sufficient to compete effectively with dominant domestic brands.

10.273 Japan responds that: first, the Premiums Law and JFTC notifications are trade-neutral, with the regulation of premiums and representations under the Premiums Law and JFTC notifications applying equally to imported and domestic products; second, there is nothing about restrictions on excessive premiums or on misleading representations that is inherently unfavourable to imports, nor is there anything intrinsic to imports that makes them particularly reliant on misleading representation or excessive premiums; third, there is no "chilling effect" in that the regulations are no less advantageous to imported products or products representing a lower market share than to domestic products; fourth, there is no constraint on foreign film manufacturers in promoting their products by spending as much as they want on advertising, or by competing on price and quality, lawful premiums and non-misleading representations<sup>1345</sup>; and fifth, even if regulations were eased, this would not necessarily operate to the advantage of the challenging brands in that dominant brands would likely respond with further aggressive promotional activities of their own. In any case, Japan submits that in the course of a review of its regulations under the Premiums Law in 1996, the JFTC streamlined its general rule on excessive premiums, abolished restrictions on premium offers to businesses, and raised the ceiling on prizes.

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

10.275 Assessing the issues of impairment and causality, we note that the text of JFTC Notification 5 appears to be equally directed at domestic and foreign practices of manufacturers, distributors and retailers, as well as at market incumbents and market entrants. It is not specifically aimed at imports, nor does it make any mention of or otherwise target film and paper. The evidence suggests that this measure limits one particular type of promotional activity, specifically, the value of premiums (as a

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<sup>1345</sup>According to Japan, the United States often emphasizes the disadvantage felt by a challenging brand against a dominant brand, not the market competition between imported and domestic brands.

percentage of the value of individual transactions) that may be given to general consumers by manufacturers, distributors and retailers. It does not, however, regulate other forms of promotional activity, such as low price offers, rebates or advertising generally. While we appreciate the need for competitors with a small market share in an oligopolistic market to be able to engage in promotional activities in general, we consider it significant that JFTC Notification 5 and the other specific "measures" cited by the United States do not limit general advertising expenditures or price competition in general.

10.276 Turning first to the issue of how important it is for a seller of imported film and paper in Japan to be able to offer premiums to retail customers, we note that the United States suggests that the ability to offer premiums to retail customers is essential because retailers and wholesalers will not pass on lower wholesale prices to consumers. However, while it is not clear that Kodak has generally advertised as heavily as the domestic companies, there is evidence that when Kodak did advertise heavily (in the Nagano region) its market share increased.<sup>1346</sup> This suggests that giving premiums to customers is not essential to success in the Japanese market. At the same time, even if cartel-like activities of retailers in Japan may result in suppression of price competition and a failure to pass on to consumers price cuts given by manufacturers to distributors or retailers, and even if such activity may affect the imports of foreign manufacturers disproportionately, the United States has not demonstrated -- or even claimed -- that such private anti-competitive activity, to the extent it exists, is attributable to governmental measures, and we therefore refrain from considering such hypotheses in the context of this case.

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

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

**(d) 1981 JFTC Guidance on Dispatched Employees**

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

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<sup>1346</sup>Japan's statement that Kodak's heavy advertising and promotion in Nagano led to a doubling of its market share in the area, is not contested by the United States.

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

<sup>1348</sup>Cabinet Order No. 43 of 1979, US Ex. 79-1.

administrative guidance takes the form of a statement by a DSO official of the JFTC, in an article entitled "The Status of Distribution of Cameras". The relevant part of this article states the following:

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

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

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

10.282 Our analysis of the JFTC Guidance on Dispatched Employees focuses, in the first instance, on whether or not this particular "guidance" should be viewed as the type of administrative guidance that meets the requirements of a measure under Article XXIII:1(b). We note that neither party has devoted much space to arguing this issue. We nevertheless note that the relevant statement of the JFTC official makes explicit reference to "guidance" and advises the photographic materials industry (or a substantial part of it) "to examine the use of self-regulating measures with respect to the permanent dispatch of sales people ...". Given this explicit statement of guidance to the photographic materials industry from the government body charged with implementation of the Antimonopoly Law and the Premiums Law, we think it reasonable to assume, in the absence of substantial argument to the contrary, that this JFTC Guidance on Dispatched Employees meets the standard for governmental measures that we laid out in our general discussion of Article XXIII:1(b). This result is supported by the fact that the guidance was acted upon. Accordingly, we find that the JFTC Guidance on Dispatched Employees is a measure within the meaning of Article XXIII:1(b). Also, in the absence of any indication that this measure has been withdrawn, we find that it is still in effect although we note that its significance may be minimal given that the matter is now dealt with in the Self-Regulating Measures, described in the next section.

10.283 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated the measure at the conclusion of the Kennedy Round nor that within two years of the conclusion of the Tokyo Round, the JFTC would issue JFTC Guidance on Dispatched Employees. The United States also argues that it has legitimate expectations resulting from Japan's Uruguay Round concessions in that even in 1994 it was not aware of the impact this guidance was having on the Japanese film market.

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<sup>1349</sup>US Ex. 82-3, p. 8.

10.284 Japan responds that the United States should have reasonably anticipated such guidance in the context of the government's continuing implementation of the Premiums Law. Japan argues that the United States should have reasonably anticipated the measure *a fortiori* as of the conclusion of the Uruguay Round.

10.285 The JFTC Guidance on Dispatched Employees was published in January 1981, i.e., after the conclusion of both the Kennedy and Tokyo Rounds. In line with our previous assessment of various measures, we do not consider that the United States should be charged with having reasonably anticipated the particular application of the Premiums Law embodied in JFTC Guidance on Dispatched Employees as of the conclusion of the Kennedy Round or of the Tokyo Round. We therefore find that in relation to JFTC Guidance on Dispatched Employees, the United States has demonstrated the existence of legitimate expectations of improved market access emanating from tariff concessions granted by Japan during the Kennedy and Tokyo Rounds. These expectations are limited to black and white film and paper in respect of the Kennedy Round, but cover the full range of products at issue in respect of the Tokyo Round.

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

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

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

10.289 To the extent that the guidance does apply to the film and paper sectors, we note that in calling for the use of self-regulating measures with respect to the permanent dispatch of sales people, the JFTC Guidance on Dispatched Employees potentially limits one form of promotional activity. However,

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<sup>1350</sup>US Ex. 82-3, p. 8.

the United States has not provided any evidence to the Panel of how this particular measure has had any adverse effect on the efforts of foreign film and paper manufacturers to market their products in Japan. As noted above, there is evidence that the use of dispatched employees in the film and paper sector is not significant.

10.290 Also as noted above, this measure on its face affects domestic and imported products equally. Nonetheless, we do not rule out the possibility that a measure which appears to be formally neutral as to the origin of products may be shown to be applied in a manner that could upset the competitive relationship between domestic and foreign products to the detriment of imports. There is no evidence in the record before us that this has occurred in respect of this measure.

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

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

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

10.293 The fifth and sixth promotion "measures" cited by the United States are the Self-Regulating Measures concerning Fairness in Trade with Business, issued in June 1982 ("Self-Regulating Measures on Fairness in Trade")<sup>1351</sup>, and the Establishment of the Fair Trade Promotion Council on 23 December 1982.<sup>1352</sup> Because of the close interrelatedness of these two "measures", we shall consider them together in this section.

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

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

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

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

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

Articles of Association and the responsibilities of this Council, shall require prior approval from the Japan Fair Trade Commission".<sup>1354</sup>

10.296 *Application of measures.* The issue here is whether the establishment of the Fair Trade Promotion Council and the issuance and application of the Self-Regulating Measures on Fairness in Trade can be ascribed to the Government of Japan (the JFTC). We recall the US claims that the JFTC provided administrative guidance to the national photographic industry calling for self-regulating measures on dispatched employees (the previous measure considered above), and that thereafter the JFTC created the Fair Trade Promotion Council by administrative guidance. In relation to this latter claim, a 1992 directive of the Fair Trade Promotion Council states that

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

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

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

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

"Businesses or a trade association may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted".<sup>1358</sup>

The United States points out that Article 10(3) goes on to state that the operation of the codes and councils is subject to JFTC supervision, and that Article 10(5) exempts their activities from antitrust enforcement. Article 10(5) of the Premiums Law provides that the Antimonopoly Law "shall not apply

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<sup>1354</sup>US Ex. 83-3.

<sup>1355</sup>National Photographic Industry Fair Trade Promotions Council, Notice No. 1, 29 August 1992, US Ex. 92-7.

<sup>1356</sup>US Ex. 83-3.

<sup>1357</sup>Ibid, p. 2.

<sup>1358</sup>Premiums Law, US Ex. 62-6.

to the fair competition code that has been authorized ... and to such acts of entrepreneurs or a trade association as have been done in accordance therewith".<sup>1359</sup>

10.297 Japan responds that industry self-regulation is private-sector conduct, and not a government measure. According to Japan, the Fair Trade Promotion Council is a private-sector organization which was established by the camera industry to implement voluntary standards on dispatched employees, and has no governmental authority. Japan points out that membership in the council is non-discriminatory and open to domestic and foreign entities; Kodak is a member through its affiliation with the Camera Manufacturers' Association. Japan also argues that although the council's documents refer to "approval" and "guidance", and that the council is free to declare that it will seek the JFTC's approval or follow its guidance, such references do not delegate to the council any authority of the JFTC. Moreover, Japan argues that the JFTC has no statutory authority to approve agreements underlying the Fair Trade Promotion Council; the JFTC's action with regard to the council's enforcement of the Self-Regulating Measures on Fairness in Trade, particularly as it relates to dispatched employees, was a non-binding expression of the JFTC's view that the agreement would not immediately violate the Antimonopoly Law. In addition, Japan argues, council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law. The only legal consequence of the JFTC approval is that the JFTC must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

10.298 In considering the issue of whether or not the establishment of the Fair Trade Promotion Council and the issuance and application of the Self-Regulating Measures on Fairness in Trade should be considered as measures attributable to the Japanese Government, we note, first, that the documents evidencing the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council suggest that the particular self-regulating measures and the council are largely the product of decisions by private industry associations. At the same time, however, we note the existence of a number of references in the Premiums Law, the JFTC Guidance on Dispatched Employees, the Articles of Association of the Fair Trade Promotion Council (as well as a later directive of the council) and the Self-Regulating Measures on Fairness in Trade, suggesting a substantial connection between the JFTC and these two alleged "measures". We recall in this regard the statement by a JFTC official in 1981 that

"the *JFTC is issuing guidance* to the camera, photographic accessories, colour photo lab and related industries to examine the *use of self-regulating measures* with respect to the *permanent dispatch of sales people* so as not to go too far as manufacturers' sales promotion methods or as acts based on the buying power of volume sales stores" (emphasis added).<sup>1360</sup>

We further recall a 1992 directive of the Fair Trade Promotion Council which states:

"*This council was established under the guidance of the Japan Fair Trade Commission in December of 1982 for the purpose of securing a fair trade system in the photographic industry, deepening the exchange of ideas and understanding among businesses, and contributing to the development of the industry*" (emphasis added).<sup>1361</sup>

Moreover, Article 17 of the Fair Trade Promotion Council's Articles of Agreement provides as follows: "*Establishing or abolishing the provisions of these Articles of Association and the responsibilities of this Council shall require prior approval from the Japan Fair Trade Commission*" (emphasis added).<sup>1362</sup>

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<sup>1359</sup>Ibid.

<sup>1360</sup>US Ex. 82-3, p. 8.

<sup>1361</sup>National Photographic Industry Fair Trade Promotions Council, Notice No. 1, 29 August 1992, US Ex. 92-7.

<sup>1362</sup>US Ex. 83-3.

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

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

10.299 In light of the above statements by the JFTC and the Fair Trade Promotion Council, we consider that the Self-Regulating Measures have sufficient connection to administrative guidance of the Japanese Government to warrant a finding that they are attributable to the government within the meaning of Article XXIII:1(b). Regardless of whether the Promotion Council's Articles of Association or the 1982 Self-Regulating Measures were in fact formally approved by the JFTC, there is a sufficient likelihood that private parties will act in conformity with the Self-Regulating Measures to consider it administrative guidance within the ambit of Article XXIII:1(b).<sup>1365</sup> In our view, this finding is consistent with past GATT practice. In this regard, we note the characterization of the similar "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.<sup>1366</sup> Also, in the absence of any argument or evidence to the contrary, we find that these two measures are still in effect.

10.300 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated the measures at the conclusion of the Kennedy Round nor that by June 1982, within a few years of the conclusion of the Tokyo Round, the domestic photographic industry would respond to JFTC guidance in promulgating its Self-Regulating Measures on Fairness in Trade, or that this would be followed six months later by the formal establishment of the Fair Trade Promotion Council. Similarly, the United States argues that it was unaware of the impact of these measures on the film industry in Japan even as of the conclusion of the Uruguay Round.

10.301 We further recall the Japanese response that the Self-Regulating Measures on Fairness in Trade and the establishment of the Fair Trade Promotion Council are irrelevant to the reasonable expectations of the United States because these two actions represent private conduct.

10.302 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we recall our conclusion that normally a Member should not be considered to have anticipated measures taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. In respect of these two specific measures, we see no reason why the United States should have anticipated them. The existence of codes and councils in the Japanese business system does not imply that the United States could or should anticipate the particular rules contained in a specific action taken by a council. Thus, we find that the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Round in respect of these measures.

10.303 However, with respect to Japan's Uruguay Round concessions, which were granted subsequent to the measures, it is difficult to conclude that the United States could not reasonably anticipate these

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<sup>1363</sup>Ibid.

<sup>1364</sup>US Ex. 82-8, p. 3.

<sup>1365</sup>See *Japan - Agricultural Products*, BISD 35S/163, 242. See also paras. 10.46, 5.495 and 5.501-5.505 above.

<sup>1366</sup>Panel Report on *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* ("*Japan - Liquor Taxes*"), adopted on 10 November 1987, BISD 34S/83, 87, para. 2.7.



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

10.304 *Impairment and causality.* The United States argues that by regulating the use of dispatched employees, promotional funds and price-related representations, the Fair Trade Promotion Council serves to suppress competition for film, paper and other photographic goods. In this regard, the United States argues that the council's enforcement record reflects the extraordinary range of its activities and the potency of its enforcement powers. The United States gives the example of the council's "success in foiling Kodak's most important promotional campaign of the 1980s, the VR Trial-Pack".<sup>1367</sup> According to the United States, the council, at the behest of Zenren (the retailers' association) and working with the JFTC, determined before the campaign had even begun (in June 1983) that Kodak's anticipated advertisement of a discount price was a misrepresentation; as a result, the promotion was cut back and advertisements for the campaign were quite muted. In addition, the United States claims that the Fair Trade Promotion Council continues to apply pressure on photographic material manufacturers to reduce the number of employees they dispatch to retailers. The United States points out that as recently as July 1996, the council issued a "directive" to Kodak stating that the council has "decided in July 1995 to request [Kodak's] cooperation in continuing to reduce dispatched employees" and that Kodak is to "immediately report the status of your company to this Council".<sup>1368</sup>

10.305 Japan responds that because the formation of the Fair Trade Promotion Council and the issuance of Self-Regulating Measures on Fair Trade are private actions, there can be no cognizable impairment of US market-access conditions "as the result of" such actions. Although the council was established after consultation with the JFTC, Japan claims that such consultations did not delegate any authority to the council. Japan argues that Fair Trade Promotion Council is a private-sector organization which was established by the camera industry to implement voluntary standards on dispatched employees in that industry, and has no governmental authority, nor anything to do with film or paper. Moreover, Japan argues, there has never been a problem with or concern over dispatched employees in the photographic film or paper industry, probably because, in the case of film, most consumers choose such merchandise on their own, rather than relying on employees' sales pitches, and, in the case of paper, this is generally marketed to professionals who do not normally rely on dispatched employees. Thus, according to Japan, even assuming that the establishment of the Fair Trade Promotion Council and the issuance of Self-Regulating Measures on Fairness in Trade could be assimilated to governmental measures, there could be no basis for claiming impairment therefrom. Japan also argues that the only case of impairment cited by the United States in relation to these two measures is the alleged action to suppress Kodak's VR campaign in 1983, an action having nothing to do with the dispatch of sales personnel, that in any case the campaign was not "foiled" but went ahead essentially as planned, that the JFTC played a very minor role in discussions with Kodak's representatives concerning this campaign, and that there is simply no truth to the US allegation that Zenren, the Fair Trade Promotion Council and the JFTC acted in unison to prevent the VR campaign.

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<sup>1367</sup>The United States explains that Kodak's "VR trial pack" was devised in 1983 by Nagase Sangyo, Kodak's main importer in Japan, as a promotion strategy for the launch of a special limited edition of Kodak's VR film series. The "trial pack" included a 12-exposure roll of each speed of VR film (100, 200, 400 and 1000 ASA). It was promoted through print and television advertising and sold at a 38 per cent discount off the standard retail price.

<sup>1368</sup>Promotion Council, Issue No. 8-1, 22 July 1996, US Ex. 96-7.

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

10.307 Concerning the VR campaign, we first note that this Kodak promotion scheme had nothing to do with the dispatching of employees or promotional money, the two general activities regulated by the Self-Regulating Measures. Indeed, the evidence of record suggests, as argued by Japan, that the issue of dispatching sales personnel was of little significance in the photographic film and paper market. Even before the adoption of the code, MITI's 1970 Guidelines themselves indicated that dispatching of employees was not a common occurrence in the Japanese film market<sup>1369</sup>, and the 1990 MITI Guidelines basically recommend restricting the use of dispatched employees "to sales of new products where specialized knowledge and skills are required ...".<sup>1370</sup> And, indeed, the United States has not indicated to the Panel how, or even if, dispatching of employees has been or is used in the Japanese film and paper market, nor has it cited examples of how the use of promotional money has been limited.

10.308 Second, we are not persuaded by Japan's argument that the problems cited by the United States in respect of the Kodak VR campaign solely concerned a private-sector action by the Fair Trade Promotion Council. The evidence advanced by the two parties shows that the action against the VR trial pack had its origins with Zenren, the photo retailers' association, putting pressure on Kodak's distributor (Nagase) to limit promotion, in particular its pricing discounts on this new type of film. Indeed, the evidence suggests that Zenren succeeded in persuading Kodak to reduce the scope and duration of this promotional discount scheme. In addition to this private initiative by Zenren, however, the evidence also suggests that JFTC officials, at the urging of the Fair Trade Promotion Council, issued guidance to Kodak concerning potential issues under the Antimonopoly Law in relation to operation of the VR campaign. According to the United States, the guidance related to disclosing the limited nature of the offer, the number of Trial Packs involved, the stores carrying them and the terms of the offer. Also, Kodak was requested by JFTC officials to adjust its second shipment and to announce at store counters when the products were sold out.<sup>1371</sup> It is not clear to us that compliance with most of these terms would seriously hinder the VR campaign. In any event, Japan contests whether such guidance was given. In this regard, we note that other evidence submitted by the United States suggests that the VR campaign was limited by promises made to Zenren.<sup>1372</sup> Considering all the evidence taken together, it appears that the pressure put on Kodak's subsidiary by Zenren was by far the major factor impacting the VR campaign. The pressure from Zenren has not been shown to have emanated in any way from the JFTC. Thus, we find that the United States has not come forward with a sufficient demonstration of how statements made to Kodak representatives by JFTC and council officials in relation to the VR campaign could be said to have impaired competitive market-access conditions accruing to the United States. According to the evidence of record, it appears that Kodak did carry out a

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<sup>1369</sup>Cover note to the 1970 Guidelines, US Ex. 70-3; 1970 Guidelines, US Ex. 70-4; Japan Ex. B-24. Specifically, the MITI Guidelines state that "[d]ispatched employees are rarely seen at general photography materials retailers. There are dispatched employees in the DPE departments of large retailers; however, few are systematized practices and the dispatch is made only in special cases". Ibid. See para. 2.19 above.

<sup>1370</sup>MITI, Guidelines for Improving Business Practices, 25 June 1990, US Ex. 90-5, p. 6.

<sup>1371</sup>Affidavit of Ishikawa Sumio, Nagase official, US Ex. 97-10.

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

successful if somewhat abbreviated VR campaign. Finally, we note that this 14 year-old incident is the only one cited by the United States.

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

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

**(f) 1984 Self-Regulating Standards**

10.311 The seventh promotion "measure" cited by the United States is the Promotion Council's issuance in May 1984 of "Self-Regulating Standards Concerning Display of Processing Fees for Colour Negative Film" ("1984 Self-Regulating Standards").<sup>1373</sup> These standards prescribe the manner in which prices for film developing and printing may be represented. Specifically, they define the information that film processing businesses ("those who receive colour film directly from the general consumer for processing") should use in connection with representations of prices for colour film developing and printing, including the printing fee, developing fee, processing time, and paper manufacturer. The standards mandate "provisions in regard to the representation of photo processing fees for colour negative film ... and printing fee[s] for service-size prints for direct orders from general consumers until the Fair Competition Code is established".<sup>1374</sup> According to the standards,

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

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

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

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

<sup>1374</sup>US Ex. 84-4.

<sup>1375</sup>Ibid.

<sup>1376</sup>Ibid.

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

10.314 In analyzing whether or not the 1984 Self-Regulating Standards should be assimilated to governmental action, we recall that whereas the Fair Trade Promotion Council is clearly a grouping of private-sector trade associations, it nonetheless has elaborate links to the JFTC. We also note that an article appearing in a specialized industry publication just two weeks after the issuance of the 1984 Self-Regulating Measures states that "[t]he Council established 'Self-Regulating Standards Regarding Development and Printing Price Representations' on May 15, and reported them to the Japan Fair Trade Commission" (emphasis added).<sup>1377</sup> The article goes on to state that "[t]he self-regulating standards are only a temporary measure until a fair competition code is established", and that "[i]t took the Council a long time and instructions from JFTC to establish these self-regulating standards" (emphasis added).<sup>1378</sup> Even though the 1984 Self-Regulating Standards were apparently not formally approved by the JFTC, in view of these express references to the dependence of the Fair Trade Promotion Council on liaison with the JFTC for the establishment of these standards, we consider that there is a sufficient likelihood that private parties will act in conformity with the 1984 Self-Regulating Standards to consider them administrative guidance attributable to the Japanese Government. Thus, the 1984 Self-Regulating Standards, as such, have sufficient connection to the Japanese Government to warrant a finding that they are a measure within the ambit of Article XXIII:1(b).<sup>1379</sup> This finding is consistent with past GATT practice. In this regard, we note the characterization of the similar "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.<sup>1380</sup> As to whether or not this measure is still in effect, given that the text of the measure itself indicates that the measure is only temporary "until the Fair Competition Code is established", we are not persuaded, but shall assume for the following analysis, that it is still in effect.

10.315 *Benefit accruing.* We recall the US claim that the benefits accruing to it are legitimate expectations of improved market access to the Japanese film and paper market emanating from tariff concessions made by Japan in the Kennedy, Tokyo and Uruguay Rounds, and that, in particular, it could not have anticipated that in May 1984, after both the Kennedy and Tokyo Rounds, the domestic photographic industry, through the Fair Trade Promotion Council, would respond to JFTC guidance in promulgating its second set of self-regulating measures, the 1984 Self-Regulating Standards. The United States similarly argues that even as of the conclusion of the Uruguay Round it was not aware of the impact of this measure on the film and paper market. We further recall the Japanese response that the 1984 Self-Regulating Standards are irrelevant to the reasonable expectations of the United States because this action of the Fair Trade Promotion Council represents private conduct and was an "outgrowth" of the previously applied policies.

10.316 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we note that this measure applies only to colour film. Thus, the Kennedy Round is not relevant. Additionally, we recall our conclusion that normally a Member should not be considered to have anticipated a measure taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we see no reason why the United States should have anticipated this particular consumer protection measure simply because fair competition codes and fair

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<sup>1377</sup>US Ex. 84-3.

<sup>1378</sup>Ibid.

<sup>1379</sup>See *Japan - Agricultural Products*, BISD 35S/163, 242.

<sup>1380</sup>Panel Report on *Japan - Liquor Taxes*, BISD 34S/83, 87; See also paras. 2.7 and 5.509-5.510 above.

trade councils as such already existed in Japan prior to the Tokyo Round. Thus, we find that in relation to the 1984 Self-Regulating Standards, the United States has legitimate expectations of improved market access emanating from the Tokyo Round.

10.317 With respect to Japan's Uruguay Round concessions, which were granted subsequent to 1984, it is difficult to conclude that the United States could not reasonably anticipate this already existing measure. Again, although we can conceive of circumstances where the exporting WTO Member may not reasonably be aware of the significance of a measure or of a possible differential impact on imports until some time after its original publication, the United States has not demonstrated the existence of any such circumstance here. This lack of evidence is especially telling in light of the fact that the Self-Regulating Standards relate specifically to colour film. Accordingly, we find that the United States has not demonstrated that in relation to the 1984 Self-Regulating Standards, it has legitimate expectations of improved market access emanating from the Uruguay Round concessions.

10.318 *Impairment and causality.* The United States argues that by regulating the use of price-related representations through the 1984 Self-Regulating Standards, the Fair Trade Promotion Council serves to restrict competition for film and paper, and that the council's enforcement record reflects the extraordinary range of its activities and the potency of its enforcement powers. Japan responds that the 1984 Self-Regulating Standards are private-sector regulation directed at ensuring fairness in regard to the representation of processing and printing fees for colour film, and that the United States has not demonstrated how this alleged "measure" upsets competitive market-access conditions for imported colour film in the Japanese market. Japan further argues that the purpose of the Self-Regulating Standards is consumer protection, without regard to the origin of the product.

10.319 Addressing the issue of impairment and causality, we note that the 1984 Self-Regulating Standards regulate the type of information that photo processing firms are required to provide when advertising colour film processing and printing. In essence, this measure appears directed at consumer protection, in particular, preventing misleading price representations in the film-processing industry. We also note that the United States has not suggested to the Panel, nor demonstrated where or how operation of the 1984 Self-Regulating Standards of the Fair Trade Promotion Council, which seem to be neutral as to the origin of colour film, have impacted Kodak or otherwise upset the competitive relationship between domestic and imported colour film in Japan. Accordingly, we find that the evidence of record does not demonstrate that application of the 1984 Self-Regulating Standards -- to the extent that this has occurred -- nullifies or impairs benefits accruing to the United States.

10.320 Thus, the 1984 Self-Regulating Standards may be viewed as a measure for purposes of Article XXIII:1(b) and the United States has shown that it should not be held to have anticipated the standards in respect of its expectations on colour film and (indirectly) paper from the Tokyo Round. It has not shown, however, that they nullify or impair benefits within the meaning of Article XXIII:1(b). In respect of the Uruguay Round, it has shown only one of the required elements of an Article XXIII:1(b) claim -- the existence of a measure.

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

10.321 The eighth and final promotion "measure" cited by the United States is the JFTC approval, in March 1987, of the Retailers Fair Competition Code ("Fair Competition Code") and its enforcement body, the Retailers Fair Trade Council ("Retailers Council").<sup>1381</sup> On 31 March 1987, acting pursuant to Article 10(1) of the Premiums Law, the JFTC approved the Fair Competition Code and its enforcement body, the Retailers Council. The objectives of the Fair Competition Code are stated to be "to protect

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

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

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

10.323 Japan responds that the Fair Competition Code by its terms does not apply, and never has been applied, to film or paper. Rather, according to Japan, the code (and the Retailers Council established therein) consists of 47 prefecture-wide retailers associations, representing 6600 individual business entities, and deals only with representations pertaining to the retail sale of cameras and related products; premiums are completely outside its scope. Japan submits that the JFTC has never allowed and has no intention to allow application of the code to film or paper.

10.324 *Application of measure.* The issue here is not whether the JFTC's approval of the Retailers' Fair Competition Code and its enforcement body, the Retailers Council, in and of itself should be viewed as a governmental measure. Clearly, the act of approval by a governmental body -- the JFTC -- is a government measure. Rather, the issue is whether such approval by the JFTC means that actions taken by the Retailers Council under the code and the provisions embodied in the code may be assimilated to governmental measures.

10.325 On this point, the United States alleges that, just as Japan did in the case of the Fair Trade Promotion Council, Japan has deputized the Retailers Council as an enforcement surrogate for the JFTC under the Premiums Law. It argues that the Retailers Council is particularly illustrative of the

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<sup>1382</sup>Ibid, p. 1.

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

<sup>1384</sup>US Ex. 87-4; Japan Ex. D-66, p. 9.

relationship between a trade association and a fair trade council, and demonstrates the powers effectively delegated to a trade association by the Japanese Government. The United States further argues that the Japanese Government should be held accountable for the effects of fair competition codes and the activities of fair trade councils, including trade associations acting under the aegis of a code or council because the codes and councils are the creation of Japanese law, specifically Article 10 of the Premiums Law, subsection (1) of which provides:

"Businesses or a *trade association* may, upon obtaining authorization from the Fair Trade Commission in accordance with the Rules of the Fair Trade Commission, with respect to matters relating to premiums or representations, conclude or establish an agreement or a code, aiming at preventing unjust inducement of customers and maintaining fair competition. The same shall apply in the event alterations thereto are attempted" (emphasis added).<sup>1385</sup>

The US position is that Article 10(1) makes clear that the establishment of the code is subject to approval by the JFTC. Similarly, that Article 10(3) of the Premiums Law states that the operation of the codes and councils is subject to JFTC supervision. The United States emphasizes, moreover, that the power of the Retailers Council and Zenren is even greater because Article 10(5) of the Premiums Law states that Japan's Antimonopoly Law "shall not apply to the fair competition code that has been authorized ... and to such acts of entrepreneurs or a trade association as have been done in accordance therewith". The United States also argues that in a previous panel, that on *Japan - Liquor Taxes*, Japan claimed that fair competition codes promulgated by fair trade councils in Japan were "legal regulations" of the Japanese Government.<sup>1386</sup>

10.326 Japan responds that the Retailers Council's Fair Competition Code constitutes self-regulation among business entities approved by the JFTC in accordance with the Premiums Law, and that the Retailers Council is a voluntary organ established by the code to implement this self-regulation. Japan contends that the Retailers Council is merely responsible for the observance of the code against misleading representations and has no authority to enforce the Premiums Law, nor may it restrict low price offers. According to Japan, whereas the Retailers Council may take private enforcement action against code members, it may not apply the code to non-members: outsiders are not subject to any action of the council for any non-compliance with the code. Japan further contends that council actions under an approved code are not exempt from the operation of the substantive provisions, e.g., prohibitions of unfair trade practices, of the Antimonopoly Law; in the same way that activities of other associations are subject to the Antimonopoly Law, anything a council does is actionable. The only legal consequence of JFTC approval, Japan argues, is that the JFTC must first revoke the approval before it enforces the Antimonopoly Law against an approved code or implementation thereof.

10.327 In analyzing the extent to which actions taken by the Retailers Council under the Fair Competition Code may be assimilated to governmental measures within the meaning of Article XXIII:1(b), we consider that it may be helpful to focus on the status these actions are given in the eyes of the Japanese Government and the photographic industry. On this issue, we note the references made by the United States to Article 10 of the Premiums Law, particularly Article 10(1) which states that trade associations may obtain JFTC approval to set up fair competition codes, Article 10(3) which states that the operation of codes and councils is subject to JFTC supervision, and Article 10(5) which states that Japan's Antimonopoly Law shall not apply to fair competition codes that have been authorized or to the actions of businesses or trade associations under the codes.<sup>1387</sup> Viewed in the context of the JFTC having approved the Fair Competition Code and the Retailers Council, and of Article 10(5) appearing to give a governmental exemption from certain provisions of the Antimonopoly Law to actions by the Retailers

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<sup>1385</sup>Premiums Law, US Ex. 62-6; Japan Ex. D-1.

<sup>1386</sup>BISD 34S/83, 86-87, para. 2.7.

<sup>1387</sup>US Ex. 62-6; Japan Ex. D-1.

Council and code members under the code, it is difficult to conclude that investigation, enforcement and governmental liaison actions of the Retailers Council under the code are purely private actions of a private trade association. The likelihood that such actions have governmental or quasi-governmental character is reinforced by the reference in the Fair Competition Code, in Article 1 thereof, to the "objective" of "establishing rules regarding representations made in retail transactions for cameras and related products based on [Article 10(1) of the Premiums Law]", and the further reference in Article 18(2) to the requirement that "[p]rior to establishing or making amendments to the regulations in accordance with Clause 1 above, [the Retailers Council] shall obtain approval from the Japan Fair Trade Commission".<sup>1388</sup>

10.328 Accordingly, we find that in light of the JFTC approval of the Fair Competition Code and the Retailers Council and the JFTC sanctioning of actions taken by the Retailers Council under the Fair Competition Code, those actions have sufficient connection to administrative guidance of and approval by the Japanese Government to warrant a finding that they are measures attributable to the government within the meaning of Article XXIII:1(b). In view of the above-described involvement of the JFTC, we consider that there is a sufficient likelihood that private parties will act in conformity with the Fair Competition Code as if it were a legally binding measure.<sup>1389</sup> This finding is consistent with past GATT practice. In this regard, we recall the characterization of "fair competition codes" approved by the JFTC as "legal regulations" in the 1987 *Japan - Liquor Taxes* case.<sup>1390</sup> Finally, we note that a finding to the contrary would create a risk that WTO obligations could be evaded through a Member's delegation of quasi-governmental authority to private bodies. In respect of obligations concerning state trading, the provisions of GATT explicitly recognize this possibility. In this regard, an interpretative note to Articles XI, XII, XIII, XIV and XVIII states: "Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" include restrictions made effective through state-trading operations". The existence of this note demonstrates that the drafters of the General Agreement recognized a need to address explicitly one aspect of the government-delegation-of-authority problem. In our view, it supports our finding that *measure* for purposes of Article XXIII:1(b) should be interpreted so as to prevent actions by entities with governmental-like powers from nullifying or impairing expected benefits.

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

10.330 In assessing the issue of what the United States should have anticipated at the conclusion of the Kennedy and Tokyo Rounds, we recall our conclusion that normally a Member should not be considered to have anticipated a measure taken after the conclusion of a negotiating round, absent some reason to reach a contrary result. Here, we see no reason why the United States should have anticipated these particular measures. The fact that fair competition codes and fair trade councils existed in Japan prior to the Uruguay Round, and were authorized by Article 10 of the Premiums Law, does not imply

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<sup>1388</sup>Retailers Fair Competition Code, US Ex. 87-4; Japan Ex. D-66.

<sup>1389</sup>See *Japan - Agricultural Products*, BISD 35S/163, 242.

<sup>1390</sup>BISD 34S/83, 87, para. 2.7.



that specific embodiments of codes and councils should be foreseeable. Thus, we find that in relation to the Fair Competition Code and the Retailers Council, the United States has legitimate expectations of improved market access emanating from the Kennedy and Tokyo Rounds

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

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

10.333 As to the first issue, the US position is that the code applies, both *de jure* and *de facto*, to film and paper. The United States points out that Article 2.2 of the code provides that "[t]o attain the objectives outlined in the above Article, businesses are to respect the spirit of this code even when the products being dealt with do not correspond exactly to Cameras and Related Products".<sup>1391</sup> The United States goes on to say that an industry member explained that it would "indeed have been impossible to persuade Zenren members whose main line of business is development printing to contribute if [the regulations] only [apply to] hardware".<sup>1392</sup> In the US view, Japan has invited its photographic industry to devise and enforce rules in their self-interest, and market realities associated with such industry cooperation should not be ignored.

10.334 Japan, on the other hand, argues that the code, by its terms and in its application, does not cover film or paper, and that observance of the "spirit of the code", as provided for in Article 2.2 thereof, may not extend to items not included in the "camera category". According to Japan, even if the industry were to decide to expand the scope of the code to include these products, such a decision would have no impact on the operation of the Premiums Law or the Antimonopoly Law, unless it were approved by the JFTC. Japan argues that the JFTC has never allowed and has no intention of allowing application of the code to film or paper.

10.335 Our assessment of this initial issue is that the code clearly covers cameras but that it is unclear from the evidence submitted whether the code's stipulations extend and have been applied to film and paper. However, for the purpose of the rest of our analysis, we shall assume that the code does extend to those products.

10.336 In respect of Articles 3 and 4 of the code, the United States argues that those articles on their face discriminate against imports with respect to representations concerning the country of origin of the product. Article 3, pertaining to storefront displays, and Article 4, governing fliers, require advertisements to indicate the country of origin for imported merchandise; such indication is not required of products of Japanese origin, unless such domestic merchandise looks similar to (i.e., may be confused with) imported products.

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

<sup>1392</sup>Discussion on Progress of Fair Trade Council Focuses on Making Competition Codes Fully Known, Zenren Tsuho, August 1987, pp. 16-20, US Ex. 87-7, Japan Ex. D-70. Cf. Japan's differing translation of this phrase. We note that the Panel's translation experts appear to agree that the US translation is the more accurate. See Translation Issue 18, Part XI.

10.337 Japan responds that the intention behind the requirement of providing country-of-origin designations for imported products is simply to provide adequate information to consumers. Moreover, Japan argues, the United States has not shown how the application of this provision has upset the competitive conditions of imported film or paper.

10.338 On this issue, while being sensitive to the possibility that a discriminatory country-of-origin designation requirement could result in impairment of competitive relationships, we initially note that GATT Article IX specifically allow origin-marking requirements. Thus, we hesitate to condemn automatically the requirements in the code, although they go beyond marking. Moreover, we note that the code requires indications of origin in respect of certain domestic, as well as imported products, and that Japan has provided an explanation for treating domestic and imported products differently with respect to country-of-origin designations. More significantly, the United States has failed to demonstrate how such a designation requirement in the code has upset competitive relationships between domestic and imported film or paper.

10.339 In respect of the third issue -- the applications of the code -- the United States argues that the Fair Competition Code provides the Retailers Council with authority to take enforcement actions for misrepresentations in promotions not only under the code itself, but also under the Premiums Law and related competition laws. Specifically, Article 14.7 of the code states that the Retailers Council shall perform, *inter alia*, "[a]ctivities pertaining to making the [Premiums Law] and other laws and ordinances pertaining to fair trade widely understood and preventing violations thereto". In the US view, the Retailers Council acts as a substitute enforcement body for the JFTC. The United States goes on to argue that the Retailers Council applies the code to promotional activities of non-members, not just those businesses that have agreed to adhere to the code. This practice, according to the United States, comports with what the United States says is the position of the Japanese Government that competition codes must apply industry-wide in order to have their intended effect. The United States goes on to state that the JFTC has confirmed that it relies upon fair competition codes when applying the Premiums Law to "outsiders".<sup>1393</sup> In addition, the United States argues that the JFTC, through its approval of the code, confers not only broad authority on private parties to act as surrogate enforcers, but also exempts them from prosecution for their activities. On this point, the United States cites the JFTC Secretary General as stating that "even if the contents of the codes or the actions based on the codes violate the Antimonopoly Law, no proceedings to restrict them will be taken based on the Antimonopoly Law".<sup>1394</sup> The United States also cites the director of the JFTC's division on premiums and representations guidance as stating that "[t]he approval of the Code means that the role we play to take enforcement actions<sup>1395</sup> on violations will be left to the Fair Trade Council. If this expectation is not met, [the approval] will have no meaning".<sup>1396</sup>

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

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<sup>1393</sup>On this point, the United States cites a Zenren circular from February 1988, entitled "Don't Give Up Exposing and Forwarding Materials [Regarding Violations] - Japan Fair Trade Commission Probing Non-Members' 'Representations Violations'", Zenren Tsuho, US Ex. 88-2; Japan Ex. D-83. This circular mentions that "[a]lmost all who have received repeated caution or warnings were non-members, that is, while a member's stance is rectified by a verbal caution, a more severe warning in writings is issued to a non-member". The circular also presents "some recent good examples in which outsiders who have been exposed [for violations] many times, in particular, have been silenced or for which the Japan Fair Trade Commission has already initiated investigations". Ibid.

<sup>1394</sup>Competition Policy Law, Itoga Shogo, JFTC Secretary General, Jirei Dokusen Kinshi Ho, 15 December 1995, US Ex. 95-20, p. 5.

<sup>1395</sup>Japan translates "teki-hatsu" as "discovery", not "enforcement actions", Japan Ex. D-82. The Panel's translation experts do not agree on the appropriate translation in context, but lean towards a translation suggesting an action that is more active than that of "discovery". See Translation Issue 20, Part XI.

<sup>1396</sup>Fair Trade Council Established, Operated by Zenren, Will Respect "Fair Competition Code" - Urgent Need to Have Code Known by October Start, Zenren Tsuho, July 1987, p. 3, US Ex. 87-5.

outsiders are not subject to any action of the council for non-compliance with the code. The JFTC, on the other hand, makes its own judgment about the conduct of outsiders, but will only take action if it is determined that the conduct is a violation of the Premiums Law. Japan further argues that because the rules on misleading representations in the codes are based on the Premiums Law, there is no fundamental difference between the concept of misleading representations under the Premiums Law and under the codes. However, Japan emphasizes, the enforcing authority of the JFTC under the Premiums Law may not be delegated to a private body.

10.341 We note initially that the evidence put forward on this issue, in particular the February 1988 circular of Zenren, indicates that even though the terms of the Fair Competition Code do not expressly apply to "outsiders", the Retailers Council has in fact encouraged members to report suspected "violations" by non-members and has succeeded in pressuring non-members to comply with the code, relying on the fact that non-members that do not comply with the code are subject to Antimonopoly Law enforcement actions. The evidence also suggests that this action by the Retailers Council is accomplished with the full knowledge -- and at least tacit approval -- of the JFTC.

10.342 We then recall Japan's claim that the United States has failed to indicate which specific provisions of the code or which specific activities of the Retailers Council have upset the competitive conditions of imported photographic film and paper. For Japan, the reason for this US omission is that no "code" or "council" has ever affected the importation of film or paper.

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

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

- In 1979, i.e., before the measure, Kodak conducted a contest offering video cassette recorders as prizes worth approximately 100,000 yen. The JFTC allegedly informed Kodak that its contest was improper.<sup>1398</sup>
- In 1987, Kodak attempted to devise joint promotions with McDonald's but was frustrated by the ten-percent limitation on premiums that may be offered to general consumers. Kodak wanted to give away free Kodak Panorama single-use cameras with McDonald's meals. Because of the ten-percent rule, Kodak allegedly had to settle for a promotion in which purchasers of a McDonald's meal got a 'luck draw' which gave them a chance to win a Panorama camera through a drawing.<sup>1399</sup>
- Also in 1987, Kodak had negotiated an arrangement with the Ministry of Posts and Communications according to which Kodak would sell photographic post cards at post offices across Japan at prices undercutting the going retail price. Consumers would be able to charge the cost of the postcards against their savings deposits at the post offices. However, the ministry

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<sup>1397</sup>Affidavit of Sumi Hiromichi, 27 November 1996, US Ex. 96-10, para. 24 ff.

<sup>1398</sup>Affidavit of Yasuyuki Suzuki, 13 February 1997, US Ex. 97-6.

<sup>1399</sup>Affidavit of William Jack, 13 February 1997, US Ex. 97-2, pp. 7-8.

withdrew from the arrangement, allegedly because of pressure exercised by Zenren, and allegedly issued administrative guidance to Kodak to withdraw from the plan. Kodak allegedly was forced to comply because of commercial risks involved in disobeying the ministry's guidance.<sup>1400</sup>

- In 1990, the JFTC allegedly intervened in a promotion conducted by a Kodak-affiliated photofinishing laboratory, Nakamurabashi Photo Station. Nakamurabashi offered a premium of a photo album, worth around 200 yen, in connection with film developing. The JFTC allegedly found this promotion to be too radical and gave guidance to take sufficient precautions on subsequent promotional activities.<sup>1401</sup>

10.345 To this, Japan responds that in the cases of which it is aware, actions were taken because premiums involved were in excess of the lawful ceiling. Japan argues that origin of the product had nothing to do with the JFTC's actions, and similar campaigns for domestic products would have been equally held unlawful. Also, according to Japan, premiums regulations have been further relaxed, in particular since 1994, and are subject to continuous JFTC review. The "new general premiums rule" has been applied to all industries as of April 1996, and that since that time the JFTC has been reviewing premiums regulations applicable to individual industries, including industry-specific JFTC notifications and private "fair competition codes", in order to ensure consistency with the new general premiums rule. As a result, out of 29 industry-specific notifications, ten have been abolished or amended as of March 1997.<sup>1402</sup> Notification 17 on Premiums to Businesses was abolished on 16 February 1996. According to Japan, no one in the relevant Japanese government office remembers the alleged 1987 incident, recounted by the United States, involving Kodak's attempted "post card" campaign. Japan argues that, in any case, the above alleged actions taken by the JFTC and the Ministry of Post and Telecommunications have nothing to do with the 1987 JFTC approval of the Fair Competition Code and the Retailers Council. Finally, Japan submits, since film and paper fall outside the scope of any fair competition code, and are not subject to any action by a fair trade council, the US arguments on the "chilling effect" of these codes and councils could make sense only in relation to Kodak cameras, and not to film products on which the United States bases its complaint in the present proceeding.

10.346 Reviewing the arguments and evidence on the specific examples of alleged impairment put forward by the United States, we note that none of these appears to have a clear connection to the 1987 JFTC approval of the Fair Competition Code and the Retailers Council, nor to any actions taken by the Retailers Council under the code. Specifically, the 1979 offer of video cassette recorders as prizes predated the measure by approximately eight years and allegedly involved direct intervention by the JFTC, not the Retailers Council; the 1987 plan to give away Kodak Panorama cameras with McDonald's meals allegedly came up against the JFTC's ten percent rule on premiums, not any action by the Retailers Council; the 1987 plan for Kodak to sell photographic post cards through Japanese post offices allegedly fell through due to pressure from Zenren and guidance from the Ministry of Posts and Telecommunications, not any action by the Retailers Council; and the 1990 promotion conducted by a Kodak-affiliated photofinishing laboratory, Nakamurabashi Photo Station, allegedly was terminated as the result of direct intervention by the JFTC, again not because of any action by the Retailers Council. Moreover, we are not convinced that any of these actions by the JFTC or the Ministry of Posts and Telecommunications has upset the competitive relationship between domestic and imported film or paper. Finally, we consider that the US claim of "chilling effect" is made as a very general argument, and is not supported by sufficient evidence.

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<sup>1400</sup>Affidavit of Mikio Suzuki, 13 February 1997, US Ex. 97-3, pp. 1-4.

<sup>1401</sup>Affidavit of Isshi Norito, 13 February 1997, US Ex. 97-5, pp. 1-3.

<sup>1402</sup>Kampo, 16 February 1996, Japan Ex. D-30; Kampo, 10 December 1996, Japan Ex. D-31.

10.347 For the above reasons, we find that the United States has not demonstrated that the JFTC approval of the Fair Competition Code and the Retailers Council in March 1987, or any subsequent action by the Retailers Council, nullifies or impairs benefits accruing to the United States in terms of Article XXIII:1(b).

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

**(h) Concluding observations on promotion "measures"**

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

**6. COMBINED EFFECTS**

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

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

10.352 We recall the Japanese response that since none of the alleged distribution "measures" individually adversely affect imported products or alter the conditions of competition faced by importing products, considering them as a "set of measures" in no way alters the fact that the measures do not upset competitive market-access conditions for imported film or paper. Japan argues, in brief, that "nothing combined with nothing is still nothing".

10.353 In our view, it is not implausible that individual measures which do not impair benefits when considered in isolation, could nonetheless have an adverse impact on conditions of competition when

considered collectively. However, for such a legal theory to be shown to have factual relevance in the present case, the United States must adduce relevant specific evidence and provide a detailed justification showing how this evidence supports the theory. In considering the US allegations in relation to "combined effects", we recall our discussion of the facts that (i) the various "measures" cited by the United States -- distribution and promotion "measures" and restrictions on large stores -- were introduced over a period of several decades, and (ii) a number of these "measures" are no longer in effect. We also recall our discussion of the timing problems as between the issuance of the "measures" and the emergence of standard transaction terms and single-brand distribution in the Japanese market. Against this background, to the extent that the United States claims that various "measures" in the areas of distribution, promotion and large stores set in motion policies which are said to have a complementary and cumulative effect on imported film and paper, we consider that it is for the United States to provide this Panel with a detailed showing of how these alleged "measures" interact with one another in their implementation so as to cause effects different from, and additional to, those effects which are alleged to be caused by each "measure" acting individually.

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

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

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

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

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

10.358 The United States also claims that independently of the role that the Large Stores Law plays in supporting the oligopolistic distribution system in the Japanese film and paper market, the restrictions on large stores have limited market access by curtailing an alternate channel to market foreign products. The United States argues that even if unrestricted growth in large stores would not alter the exclusive manufacturer domination over Japanese wholesalers, it still would allow expansion of a sales channel that, according to the United States, has been more friendly to imports in Japan. The United States offers the example of Agfa which allegedly makes at least half its film sales in Japan to the Daiei supermarket chain, Japan's largest retailer. If Daiei's growth had not been retarded for three decades by repressive Japanese government regulation, the United States maintains, it might be an even larger chain today and Agfa's sales to it would be greater. On the other hand, the United States argues, if Japan's primary wholesalers were not in exclusive relationships with Japanese manufacturers and were willing to carry foreign film, the need to rely on large stores as an alternative would be much reduced. Thus, in addition to the alleged action of the Large Stores Law in combination with the distribution "measures", the United States claims that the Large Stores Law (and related "measures") *by itself*, in the context of a closed distribution system, nullifies or impairs benefits with the meaning of Article XXIII:1(b).

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<sup>1403</sup>MITI's 1969 Survey Report on Transaction Terms, Japan Ex. B-1, p. 309; US Ex. 15.

<sup>1404</sup>Ibid. Japan argues that although it is unlikely that the initial quote would be viewed as identifying a threat, the corrected quote clearly indicates that "free competition" was viewed as "desirable". Ibid.

<sup>1405</sup>Ibid.

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

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

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

10.362 Japan rebuts the US claim that the alleged promotion "measures", as a set, have impaired benefits accruing to the United States, since, in the Japanese view, none of the alleged "measures" individually adversely affect imported products or alter the conditions of competition facing imported products. Japan reiterates that even when the distribution policies and the "measures" related to the Premiums Law are individually considered as a "set of measures", they do not in any way disadvantage imports because, in Japan's view, combining nothing with nothing still produces nothing.



10.363 Again we note that for the US theory of combined effects to be shown to have factual relevance in the present case, it must be based on a detailed justification and convincing evidence of record. We recall in this regard our findings in relation to the alleged promotion "measures", in particular our findings that the United States has not demonstrated that any of these alleged "measures" -- individually -- has upset the competitive market-access conditions for imported film or paper. While a few specific promotional activities (e.g., false advertising, certain premiums) are regulated on a nondiscriminatory basis, tools such as truthful advertising and price competition are permitted. Altogether, the United States offers only a few examples, spread over many years, where Kodak promotional activities were limited in any way. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence as to how these same "measures", "operating as a set", have negatively impacted the distribution of imported film and paper in Japan, we find that the United States has not demonstrated that the combined effects of the promotion "measures", in the context of an alleged closed distribution system, impair competitive market-access conditions for imported US film or paper in Japan.

10.364 Finally, the United States claims that the promotion "countermeasures" as a set have operated *in combination* with Japanese Government efforts to restructure the distribution system through the distribution "countermeasures" and large stores "measures" to nullify or impair benefits within the meaning of Article XXIII:1(b).

10.365 Japan responds that the US claims of the three categories of "measures" acting in combination with each other are factually and logically flawed. In Japan's view, the United States has not submitted credible evidence that the "measures" were intended to act or in fact did act in combination. Japan also alleges that the United States has not provided evidence that the Large Stores Law in any way sought to affect foreign product given that the law currently applies and has always applied uniformly to all entities seeking to provide retailing services. Similarly, Japan contends that the United States has not provided evidence of JFTC actions adversely affecting foreign products (para. 4.27).

10.366 Here again, we recall our findings that the evidence presented by the United States fails to show that any of the individual "measures" -- distribution "measures", "measures" restricting large stores, or promotion "measures" -- nullifies or impairs benefits accruing to the United States in respect of competitive market-access expectations for imported film or paper. In light of these earlier findings and the fact that the United States has not presented additional argument or adduced additional evidence in support of its claim that all these "measures" have worked in concert to upset US market-access expectations, we find that the United States has not demonstrated that the three categories of "measures" *in combination* nullify or impair benefits accruing to the United States within the meaning of Article XXIII:1(b).

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

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

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

- (1) 1967 Cabinet Decision on Liberalization of Inward Direct Investment;
- (2) 1967 JFTC Notification 17 on premiums to businesses;
- (3) 1968 Sixth Interim Report on Distribution Modernization Outlook and Issues;
- (4) 1969 Seventh Interim Report on Systemization of Distribution Activities;
- (5) 1969 Survey Report regarding Transaction Terms;
- (6) 1970 Guidelines for Rationalizing Terms of Trade for Photographic Film;
- (7) 1971 Basic Plan for the Systemization of Distribution; and
- (8) 1975 Manual for Systemization of Distribution by Industry: Camera and Film.

Before examining these eight distribution measures in light of Article III:4<sup>1407</sup>, we wish to make several general observations concerning this GATT provision and its proper interpretation in the instant case.

10.369 Article III:4 provides in relevant part as follows:

"4. The products of the territory of a Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use".

We consider that in line with GATT/WTO precedent, under this provision the United States is required to demonstrate the existence of: (a) a law, regulation or requirement affecting the internal sale, offering for sale or distribution of imported film or paper; and (b) treatment accorded in respect of the law, regulation or requirement that is less favourable to the imported film or paper than to like products of national origin.<sup>1408</sup> We note that the parties do not disagree on this point.

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

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

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<sup>1406</sup>We found in paragraph 10.21 above that three additional distribution "measures" cited by the United States -- specifically, application of the international contract notification provisions of JFTC Rule No. 1 under Article 6 of the Antimonopoly Law (April 1971), JDB funding for Konica's wholesalers (1976) and SMEA funding for photoprocessing laboratories (July 1977) -- are not within the terms of reference of this Panel because they were not raised in the request for the establishment of the Panel in a manner consistent with Article 6.2 of the DSU. We have therefore excluded them from further consideration.

<sup>1407</sup>Because the arguments of the European Communities under Article III:4 largely coincide with those of the United States, we do not address the EC's arguments separately.

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

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

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

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

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

10.372 As for the burden of proof, as stated earlier (section D), we note that it is for the party asserting a fact, claim or defence to bear the burden of providing proof thereof. Once that party has put forward sufficient evidence to raise a presumption that what is claimed is true, the burden of producing evidence shifts to the other party to rebut the presumption.<sup>1412</sup> Thus, in this case, including the claims under Articles III and X, it is for the United States to bear the burden of proving its claims. Once it has raised a presumption that what it claims is true, it is for Japan to adduce sufficient evidence to rebut any such presumption.

**(a) Laws, regulations or requirements**

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

10.374 We further recall our reference in that same section to previous GATT cases dealing with what may constitute "all laws, regulations and requirements" under Article III:4. There we noted that, in

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

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

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

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

<sup>1413</sup>See paras. 10.47-10.50.

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

10.375 We note that the parties disagree as to the breadth of interpretation to be given to the phrase "all laws, regulations and requirements" in Article III:4. The United States argues that the phrase speaks to government actions, i.e. action taken in the name of a WTO Member, by government officials or parties authorized to act on the government's behalf, in pursuit of government policies. According to the United States, the very language of Article III:4 indicates that it was intended to cover "all" government action which would include the formulation of government policy and its implementation. The United States maintains that a Member should bear responsibility if its governmental action accords less favourable treatment to imported products than to domestic products, regardless of the method used by the Member to achieve this result. In the US view, no single or set of criteria should be dispositive, an approach which, the United States asserts, comports with the Appellate Body's admonition in *Japan - Alcoholic Beverages* to take a case-specific approach and to refrain from applying WTO rules in a way that ignores "real facts and real cases in the real world".<sup>1416</sup> Japan responds that for a party to be subject to a government requirement, it must either (i) be legally obligated to carry out the request, or (ii) receive some advantage from the government in exchange for compliance. In other words, there must be either a government sanction or the withholding of a government benefit that is attached, formally or substantively, to non-compliance.

10.376 A literal reading of the words *all laws, regulations and requirements* in Article III:4 could suggest that they may have a narrower scope than the word *measure* in Article XXIII:1(b). However, whether or not these words should be given as broad a construction as the word *measure*, in view of the broad interpretation assigned to them in the cases cited above, we shall assume for the purposes of our present analysis that they should be interpreted as encompassing a similarly broad range of government action and action by private parties that may be assimilated to government action. In this connection, we consider that our previous discussion of GATT cases on administrative guidance in relation to what may constitute a "measure" under Article XXIII:1(b), specifically the panel reports on *Japan - Semi-conductors* and *Japan - Agricultural Products*, is equally applicable to the definitional scope of "all laws, regulations and requirements" in Article III:4.

10.377 Of the eight distribution "measures" at issue, we recall our earlier findings that only four of these "measures" -- the 1967 Cabinet Decision, the 1967 JFTC Notification 17, the 1970 Guidelines and the 1971 Basic Plan -- are or were measures within the meaning of Article XXIII:1(b). Of these four, we found that JFTC Notification 17 is no longer in effect. Thus, of the eight distribution

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<sup>1414</sup>Canada -- FIRA, BISD 30S/140, 158, para. 5.4.

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

<sup>1416</sup>Citing *Japan - Alcoholic Beverages*, p. 31.

"measures" cited by the United States, we have already found that only the 1967 Cabinet Decision, the 1970 Guidelines and the 1971 Basic Plan are to be considered as measures within the meaning of Article XXIII:1(b). Applying the assumption outlined above as to the similarity of *laws, regulations and requirements* in Article III:4 to *measures* in Article XXIII:1(b), we shall accordingly assume that these three measures meet the definition of *laws, regulations [or] requirements* within the meaning of Article III:4. Further, for the sake of completeness of our analysis, in examining whether less favourable treatment is accorded to imported products, we shall assume that the other five distribution "measures" cited by the United States are also *laws, regulations [or] requirements* under Article III:4.

**(b) No less favourable treatment**

10.378 We recall the US claim that the eight distribution "measures" in issue accord less favourable treatment to imported film and paper than to like domestic film and paper in the Japanese market. In contrast, Japan argues that the United States has failed to show that the alleged "measures" extend less favourable treatment to imported film or paper.<sup>1417</sup>

10.379 Recalling the statement of the Appellate Body in *Japan - Alcoholic Beverages* that "Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products"<sup>1418</sup>, we consider that this standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the "no less favourable treatment" standard in Article III:4. We note in this regard that the interpretation of equal treatment in terms of effective equality of competitive opportunities, first clearly enunciated by the panel on *US - Section 337*<sup>1419</sup>, has been followed consistently in subsequent GATT and WTO panel reports.<sup>1420</sup> The panel report on *US - Section 337* explains the test in very clear terms, noting that

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

10.380 We recall our earlier findings that none of the eight distribution "measures" cited by the United States had been shown to discriminate against imported products, either in terms of a *de jure* discrimination (a measure that discriminates *on its face* as to the origin of products) or in terms of a *de facto* discrimination (a measure that in its application upsets the relative competitive position between domestic and imported products, as it existed at the time when a relevant tariff concession was granted).

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<sup>1417</sup>Neither party contests the fact that imported film and paper are "like products" to domestic (i.e., Japanese) film and paper, and we see no reason to examine this particular requirement of an Article III:4 case.

<sup>1418</sup>*Japan - Alcoholic Beverages*, p. 16, citing *US - Taxes on Petroleum Products and Certain Imported Substances*, BISD 34S/136, para. 5.1.9 and *Japan - Liquor Taxes*, BISD 34S/83, para. 5.5(b).

<sup>1419</sup>*US - Section 337*, BISD 36S/345, 386-387, para. 5.11.

<sup>1420</sup>See, e.g., *Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, adopted on 18 February 1992, BISD 39S/27, paras. 5.12-5.14 and 5.30-5.31; *US - Malt Beverages*, BISD 39S/206, para. 5.30; *US - Gasoline*, WTO/DS2/R, para. 6.10; *Canada - Periodicals*, WT/DS31/R, adopted on 30 July 1997, p. 75; *Bananas III*, WT/DS27/R, paras. 7.179-7.180.

<sup>1421</sup>*US - Section 337*, BISD 36S/345, 386-387, paras. 5.11.

In this connection, it could be argued that the standard we enunciated and applied under Article XXIII:1(b) -- that of "upsetting the competitive relationship" -- may be different from the standard of "upsetting effective equality of competitive opportunities" applicable to Article III:4. However, we do not see any significant distinction between the two standards apart from the fact that this Article III:4 standard calls for no less favourable treatment for imported products in general, whereas the Article XXIII:1(b) standard calls for a comparison of the competitive relationship between foreign and domestic products at two specific points in time, i.e., when the concession was granted and currently.

10.381 Here, as in our examination of the same measures in light of the US claim of non-violation nullification or impairment, the evidence cited by the United States indicates that the measures neither (i) discriminate on their face against imported film or paper (they are formally neutral as to the origin of products), nor (ii) in their application have a disparate impact on imported film or paper. As previously noted in the non-violation analysis, we are not persuaded that the 1967 Cabinet Decision or the 1970 Guidelines are directed at promoting vertical integration in the photographic materials distribution sector with a view to impeding market access for foreign products. Further, there are serious difficulties of timing in the US arguments on causation such that we are not persuaded that there is a meaningful nexus between the 1967 Cabinet Decision or the 1970 Guidelines and the largely pre-existing market structure. Moreover, the recommendations of the 1971 Basic Plan appear to be neutral as to the source of the products, promoting standardization and modernization of business practices and management techniques, including computerization. Additionally, as we also noted earlier, single brand wholesale distribution is the common market structure -- indeed the norm -- in most major national film markets, including the US market. It is unclear why the same economic forces acting to promote single brand wholesale distribution in the United States would not also exist in Japan.

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

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

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

- (1) in the context of the Premiums Law and relevant fair competition codes, Japan's failure to publish the JFTC's and the fair trade councils' enforcement actions that establish or modify criteria applicable in future cases; and
- (2) in the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance through which regional MITI offices, prefectural governmental and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement.

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<sup>1422</sup>We note that whereas the US request for the establishment of this Panel (WT/DS44/2) makes reference to violations of both Article X:1 and Article X:3, the United States has made no legal claims under Article X:3 in its submissions to the Panel. Accordingly, we limit our examination of claims under Article X to claims made under paragraph 1 thereof.

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

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

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

We note that the US claims relate not to laws, regulations or judicial decisions, but to *administrative rulings* and that the main issue presented by the US claims in this area is whether the administrative rulings, which the United States maintains Japan has failed to publish, are administrative rulings of *general application*. In particular, the United States maintains that Japan enforces the Premiums Law and the Retailers Fair Competition Code as well as the Large Stores Law primarily through informal, *unpublished* enforcement actions in a manner inconsistent with Article X:1.

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

10.386 There are, however, no other GATT or WTO precedents directly on point.<sup>1425</sup> In particular, there are no precedents on whether or not the Article X:1 publication requirement with respect to administrative rulings of general application extends, as argued by the United States, to the disposition of individual matters by an administrative agency that establish or substantially revise criteria or principles which may be applied in future cases. This said, Japan apparently made a very similar argument to the panel on *EEC - Parts and Components* in challenging the EEC's practices regarding the acceptance of undertakings pursuant to the EEC's anti-dumping regulation and the determination of the origin of parts used in assembly operations.<sup>1426</sup> Because the *EEC - Parts and Components* panel decided the case on other grounds, it did not address the Article X claim.

10.387 We recall that Japan stands by its argument made to the panel in *EEC - Parts and Components*, but contends that this argument is inapposite to the present case. Specifically, Japan contends that it has duly published all laws, regulations, judicial decisions and administrative rulings of general application relating to the Premiums Law and Large Stores Law in a manner enabling governments and traders to become acquainted with them. Japan maintains that the United States fails to identify

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<sup>1423</sup>Panel Report on *United States - Restrictions on Imports of Cotton and Man-Made Fibre Underwear* ("US - Restrictions on Underwear"), WT/DS24/R, adopted on 25 February 1997, para. 7.65.

<sup>1424</sup>Ibid. This finding was upheld by the Appellate Body. Appellate Body Report on *US - Restrictions on Underwear*, WT/DS24/AB/R, adopted on 25 February 1997.

<sup>1425</sup>In a number of cases where panels examining quantitative restrictions have found those restrictions to be inconsistent with Article XI:1, the panels have declined to make findings with respect to "subsidiary claims" raised concerning the consistency with Article X of the administration of the quantitative restrictions, stating, for instance, that Article X "dealt with the administration of quotas that may be *applied consistently* with the General Agreement" (emphasis added). *Japan - Agricultural Products*, adopted on 2 February 1988, BISD 35S/163, 242, para. 5.4.2.

<sup>1426</sup>BISD 37S/132, 155, para. 3.53.

any particular unpublished enforcement or other actions that fall under the definition of "general application" and, therefore, has failed to discharge its burden of proof.

10.388 In our view, it stands to reason that inasmuch as the Article X:1 requirement applies to all administrative rulings of general application, it also should extend to administrative rulings in individual cases where such rulings establish or revise principles or criteria applicable in future cases. At the same time, we consider that it is incumbent upon the United States in this case to clearly demonstrate the existence of such unpublished administrative rulings in individual matters which establish or revise principles applicable in future cases. We shall now proceed to examine in turn the two claims made by the United States.

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

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

### **(a) Premiums Law enforcement actions**

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

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

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



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

**(b) Actions under "Fair Competition Codes"**

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

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

10.396 We note that this US claim is not limited to film or paper. Assuming that the enforcement actions of the various "fair trade councils" under the various "fair competition codes" are to be assimilated to "administrative rulings" of the Japanese Government<sup>1427</sup> under Article X:1, we must still determine whether any of these administrative rulings are of the type requiring publication under Article X:1. On this issue, we are again confronted with a lack of evidence as to the nature of any alleged unpublished enforcement actions effecting changes to JFTC or code enforcement criteria. The record is devoid of any specific allegation by the United States as to any action taken by any of the councils that is at odds with the basic principles set forth in the codes. In these circumstances, we find that the United States has failed demonstrate the existence of any such administrative rulings by

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<sup>1427</sup>We recall in this connection our findings that certain actions of the Promotion Council and the Retailers Council may be assimilated to governmental measures within the meaning of Article XXIII:1(b).

any of the councils, establishing or modifying criteria applicable in future cases, the non-publication of which could be viewed as a violation of Article X:1.

### 3. *"MEASURES" TAKEN IN THE CONTEXT OF THE LARGE STORES LAW*

10.397 The United States claims that in the context of the Large Stores Law and relevant local regulations, Japan's failure to publish guidance pursuant to which regional MITI offices, prefectural governmental and local authorities make applicants for a new or expanded store under the Large Stores Law coordinate their plans with local competitors before submitting a notification for government review, and continue to impose a "prior explanation" requirement, is inconsistent with Article X:1. Although MITI issued an administrative directive in January 1992 formally abolishing the "prior explanation" requirement under the Large Stores Law, the United States argues that MITI did so through the circulation of a pamphlet which, in the US view, did not amount to a publication "in such a manner as to enable governments and traders to become acquainted with [the directive]", as required by Article X:1. Moreover, the United States argues, MITI regional offices and prefectural and local governments continue in many cases to give administrative guidance requiring or requesting large store owners to undertake prior consultations and effectively to make adjustments with local retailers and small store competitors before submitting their formal notifications under Article 3 of the Large Stores Law to the government. The United States maintains that in numerous cases, retailers proposing to open or expand large stores continue to feel compelled to negotiate with small retailers because the law and MITI guidance give the local retailers ample possibility to force severe adjustments on large retailers who do not negotiate with them in advance.

10.398 Japan responds that in January 1992 MITI issued a directive to MITI branches and prefectural governments, formally eliminating the "prior explanation" requirement under the Large Stores Law. According to Japan, procedural requirements for notifications of new stores were published in, e.g., the 1992 and 1994 Public Briefing Circulars.<sup>1428</sup> Japan states that these describe in detail what is expected of large store owners under the law and reflect the 1992 policy decision to abolish the previous "prior explanation" procedures. As a result of the abolition of this provision, Japan contends, none of the MITI branches, prefectural governments, or other local governments may either require or recommend that large store owners provide prior explanation to, or undertake prior consultations with, local retailers. Japan emphasizes that it is prepared to take corrective action against any entity acting in violation of this decision. In addition, Japan states that, based on its authority under Article 15(5) of the Large Stores Law, it has explicitly prohibited all prefectural and local governments from requiring or recommending prior explanation through additional local regulations based upon their regulatory authority delegated by the Local Autonomy Law. In sum, Japan argues that (i) the United States has not pointed to any administrative rulings of general application which have not been published, and (ii) because the central government has either corrected or will correct any local policies that may deviate from published policy, such local deviations do not constitute general rules "made effective" by the government, as required by Article X:1.

10.399 Considering the above, we note that we are faced with conflicting argument and evidence on whether or not there is unpublished administrative guidance promoting continuation through informal means of the formally abolished government policy requiring "prior explanation" by large stores. However, the issue under Article X:1 is not whether or not unpublished administrative rulings are being issued, but rather, whether or not such administrative rulings are rulings of "general application". As we indicated in our analysis of the Article X:1 claims with respect to enforcement actions under the Premiums Law, we consider that the concept of administrative rulings of "general application" may in principle encompass administrative rulings in individual cases which establish or modify criteria applicable in future cases. The key issue here, therefore, in respect of alleged continuing unpublished

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<sup>1428</sup>Instructing Parties Filing Notifications of New Type-I Large Scale Retail Stores to Hold Public Briefing, Sankyoku, Nos. 25 and 26, MITI, 29 January 1982, Japan Ex. C-17, Nos. 93 and 94, MITI, 1 April 1994, Japan Ex. C-18.

guidance under the Large Stores Law, is whether or not any such guidance, assuming its existence, establishes or modifies criteria applicable in future cases, or is otherwise a ruling of "general application".

10.400 On this more specific issue, the United States argues that according to a 1995 survey by Japan's Management and Coordination Agency ("MCA"), several MITI regional offices and prefectural governments continued to require or recommend such prior explanations as a matter of general policy.<sup>1429</sup> The MCA surveyed the prior consultation practices at six MITI regional offices and six prefectural or local governments. According to the United States, the report indicates that nine of the twelve jurisdictions regularly required or urged large stores to undertake prior consultation and adjustment. The United States identified seven specific instances in which the "prior explanation" policy was imposed after it had purportedly been revoked. Japan responds that nothing in the MCA survey suggests that any MITI branch or prefectural government suggests either prior explanation or prior consultation as a general policy. Moreover, according to Japan, the MCA survey indicates that guidance by MITI branches and local governments to provide "prior explanations" occurred only in exceptional cases when the survey was conducted in 1995. Japan argues that it has recently taken corrective measures against all inappropriate practices identified in the MCA report.

10.401 On the basis of our own appreciation of the evidence and arguments submitted by the parties, we consider that (i) the Japanese Government at the national level has published a directive formally eliminating the "prior explanation" requirement under the Large Stores Law, but (ii) there is anecdotal evidence of certain continued guidance at the sub-national level in Japan urging large stores owners to continue the practice of prior explanation and adjustment. However, we also consider that the United States has not demonstrated that such guidance amounts to -- or should be assimilated to -- rulings which establish or modify criteria applicable in future cases, or is otherwise in the nature of administrative rulings of "general application". We therefore find that in relation to Japan's administration of the Large Stores Law and relevant local regulations, the United States has not provided sufficient evidence of a violation of Article X:1.

## H. CONCLUSIONS

10.402 In light of our findings in sections E.3, E.4, E.5 and E.6 above, we conclude that the United States has not demonstrated that the Japanese "measures" cited by the United States individually or collectively nullify or impair benefits accruing to the United States within the meaning of GATT Article XXIII:1(b).

10.403 In light of our findings in Section F above, we conclude that the United States has not demonstrated that the Japanese distribution "measures" cited by the United States accord less favourable treatment to imported photographic film and paper within the meaning of GATT Article III:4.

10.404 In light of our findings in Section G above, we conclude that the United States has not demonstrated that Japan failed to publish administrative rulings of general application in violation of GATT Article X:1.

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<sup>1429</sup>Results of the Survey Regarding the Liberalization of Regulations, MCA (1995), US Ex. 95-15, p. 15.