1. The Canadian authorities consider that the Panel has erred fundamentally in interpreting its terms of reference and as a result has not directly addressed the real issue put to it. The essence of the Canadian complaint was that the use by the United States of the special adjudicative process under Section 337 for determining patent infringement by imports, as well as any exclusion order emanating from this process, represents treatment of imported products clearly less favourable than that accorded to products of national origin and is "not necessary" in terms of the relevant GATT exception.

2. However, the Panel focused its examination on the GATT status of an exclusion order per se. We would have no objection to an exclusion order against imports from a specified foreign producer if it were issued under the same legal process to which domestic producers were subject. Such an order would simply be the equivalent of an injunction against a party located within the jurisdiction. Instead of confining itself to the question of whether it was necessary for the United States to issue an exclusion order to enforce its patent laws against foreign products, the Panel ought to have addressed the question of whether it was necessary for the United States to maintain a discriminatory adjudicative process for patent cases involving imported products. The answer to that question, in our view, would clearly have had to be in the negative. We are not aware of any contracting party other than the United States which finds it necessary to have such a discriminatory system for enforcing its patent laws. And this is not just a theoretical concern, for the denial of national treatment inherent in the Section 337 process can have very practical consequences in terms of inhibiting imports and subjecting foreign producers to harassment.

3. I would draw your attention to the fact that the Panel focused on the GATT Status of Exclusion Orders issued by the International Trade Commission not only under the first heading of its terms of reference, but also under the second heading dealing with the use of Section 337 in patent-based cases. The second part of the terms of reference was
intended not only to permit examination of the general issue of using Section 337 in cases other than the particular one of spring assemblies, but also to consider the GATT consistency of this process, whether or not it results in an exclusion order. In our view the Section 337 process itself if not consistent with Article III, is "not necessary" in terms of Article XX(D), and a Section 337 investigation is a measure contrary to the GATT as soon as it is initiated.

4. I should also note that the Panel qualified its conclusions by emphasizing that it was under existing United States law that Section 337 orders would often be necessary. This would seem to suggest that if a contracting party elects not to equip itself with effective enforcement procedures with respect to imports for its law of general application, then it is free to deny national treatment, even to the extent of having a discriminatory adjudicative process. Such a conclusion would have unfortunate implications for the future of the national treatment principle under GATT.

5. Another important concern to which the report gives rise is the acceptance by the Panel that it is consistent with the GATT for a contracting party to employ "general" as opposed to "specific" exclusion orders. This was not a problem in relation to the first heading of the terms of reference, since the Canadian firm would have been affected in the same way regardless of whether the exclusion order was general or specific. But in its consideration of the wider issue, the Panel found that general exclusion orders may be the only effective way for a contracting party to enforce its patent laws against imports since otherwise foreign producers who were not a party to the proceedings might start to infringe the patent. They did not take into account that the same problem may exist with respect to domestic producers and that most countries, including the United States, do not deal with this problem in the internal market by authorizing the use of general injunctions against the production or use of designated products rather than against named parties. To do so would be taken to be an offence against principles of natural justice. There is no compelling reason why, when a domestic firm cannot be deprived of its right to produce or sell goods without due process, the same principle should not apply to foreign producers and importers. In any event, we would think it important for the contracting parties to have a fuller assessment of the implications of general exclusion orders before approving a conclusion which could constitute an unfortunate precedent.

6. The approach taken by the Panel resulted in the issue of national treatment not being addressed as an integral part of its conclusion regarding the use of exclusion orders. However, the Panel did take note of the United States system of dual procedures and observed that there might be merit in consideration being given to simplifying and improving the legal procedures for patent infringement cases. We would urge the United States to accept this suggestion. In our view the United States could make its system unquestionably consistent with the GATT by removing
patent-based cases from the ambit of Section 337, either by legislative or executive action, and empowering the United States courts to issue specific exclusion orders against imports.

7. Mr. Chairman, it is with regret that we have felt obliged to take issue with the report, particularly since the members of the Panel served in a dedicated way in a rather thankless task undertaken on behalf of the contracting parties. It is also with regret that we were not able to achieve a solution through bilateral discussions.

8. Turning now to the question of the disposition of the report. We believe that it is neither necessary nor desirable for the Council to adopt it or take a substantive decision on this item for the following reasons:

   (1) Since the report does not directly address the fundamental issue, it does not provide an adequate basis for the contracting parties to make a ruling;

   (2) Since the Canadian firm has taken the only course open to it to be able to continue to supply its customers by transferring production of spring assemblies to the United States, and is unlikely to move it back to Canada even if the exclusion order were rescinded, there is now no urgency in further pursuing this particular case;

   (3) Since there has been no finding on the main issue, it would be open to Canada or any other contracting party to initiate a new dispute settlement proceeding if required.

9. In these circumstances it would suffice for the record to show that the Council took no decision in the matter and this particular item would be dropped from the agenda.

10. I look forward to hearing the views of the other contracting parties on these important issues.