

***UNITED STATES – CONTINUED DUMPING AND SUBSIDY  
OFFSET ACT OF 2000***

**(DS 217& 234)**

**First Written Submission  
of the  
United States of America**

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## I. INTRODUCTION

1. The “Continued Dumping and Subsidy Offset Act of 2000”<sup>1</sup> (CDSOA) was signed into law on October 28, 2000. Shortly thereafter, several Members commenced these proceedings with a request for consultations concerning the CDSOA. The complaining parties argue that the CDSOA is, on its face, inconsistent with U.S. obligations under the WTO Agreement.

2. The concerns of these Members, however, appear to flow from a genuine lack of understanding as to how the new law is actually structured and how U.S. trade laws operate. Many of their allegations are based on speculation. In fact, the allegations were made well before the agency responsible for administering the CDSOA issued regulations implementing the new law or made distributions.

3. As detailed below, the U.S. federal government distributes funds under the CDSOA. The CDSOA is a government *payment* program, not an antidumping or countervailing duty or a measure imposing liability on imports or importers for dumping or subsidization. As such, the CDSOA distributions are fully consistent with GATT Article VI and the Antidumping and SCM Agreements.

4. Nor is there any evidence that the CDSOA has been or will be administered in an unreasonable or partial manner (Art. X:3(a) of GATT 1994) so as to affect standing and undertaking determinations in antidumping and countervailing duty investigations. Finally, in the absence of a specific violation of another WTO Agreement provision, the complaining parties’ dependent claims under Article XVI:4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must fail.

## II. PROCEDURAL BACKGROUND

5. On December 21, 2000, Australia, Brazil, Chile, the European Communities (“EC”), India, Indonesia, Japan, Korea, and Thailand requested consultations. In their request, they alleged that the CDSOA is inconsistent with U.S. obligations under Articles VI:2 and 3 and X:3(a) of GATT 1994; Articles 1, 5.4, 8, 18.1, and 18.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Antidumping Agreement”); Articles 1, 4.10, 5, 6, 7.9, 10, 11.4, 18, 32.1, and 32.5 of the Agreement on Subsidies and Countervailing Measures (“SCM Agreement”); and Article XVI:4 of the Marrakesh Agreement Establishing the WTO. In addition, they stated that the CDSOA may nullify or impair the benefits accruing under the above-mentioned Agreements in the manner described in Articles GATT XXIII:1(a) and (b).<sup>2</sup>

6. On May 21, 2001, Canada and Mexico separately requested consultations.<sup>3</sup> In their request, they stated that the CDSOA was inconsistent with U.S. obligations under Articles VI:2 and 3 and X:3(a) of GATT 1994; Articles 1, 5.4, 8, 18.1, and 18.4 of the Antidumping Agreement; Articles 1, 5, 6, 10, 11.4, 18, 32.1, 32.5 of the SCM Agreement; and Article XVI:4

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<sup>1</sup> 19 U.S.C. § 1675c. (Exhibit US-12).

<sup>2</sup> WT/DS217/1.

<sup>3</sup> WT/DS234/1.

of the Marrakesh Agreement Establishing the WTO. In addition, Canada and Mexico stated that the CDSOA may nullify or impair the benefits accruing under the above-mentioned Agreements in the manner described in Articles XXIII:1(a) and (b) of GATT.

7. Consultations were held with the first group of nine on February 6, 2001, and with Canada and Mexico on June 29, 2001, but failed to settle the dispute. On July 12, 2001, the first group of 9 requested establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of GATT, Article 17.4 of the Antidumping Agreement, and Article 30 of the SCM Agreement. Their panel request restated the WTO violations with the exception of GATT Articles XXIII:1(a) and (b) and SCM Agreement Articles 1, 5, and 6.<sup>4</sup>

8. On August 10, 2001, Canada separately requested establishment of a single panel pursuant to Articles 4.7, 6, and 9.1 of the DSU, Article XXIII of GATT, Article 17 of the Antidumping Agreement, and Article 30 of the SCM Agreement. In its panel request, Canada restated the WTO violations with the exception of GATT Articles XXIII:1(a) and (b) and SCM Agreement Articles 1, 5, and 6.<sup>5</sup>

9. On August 10, 2001, Mexico separately requested establishment of a single panel pursuant to Articles 4.7, 6, and 9.1 of the DSU, Article XXIII of GATT 1994, Article 17 of the Antidumping Agreement, and Articles 7.4 and 30 of the SCM Agreement. In its panel request, Mexico restated the WTO violations with the exception of GATT Articles XXIII:1(a) and (b) and SCM Agreement Article 6.<sup>6</sup>

10. At its meeting on August 23, 2001, the Dispute Settlement Body (“DSB”) established a panel to examine complaints of the first group of nine in DS 217. At its meeting on September 10, 2001, the DSB established a panel to examine the complaints of Canada and Mexico in case DS234. The DSB also agreed that the same panel established in case DS217 would also examine Canada and Mexico’s complaint in DS234.

### III. FACTUAL BACKGROUND

#### A. The Continuing Dumping and Subsidy Offset Act of 2000

11. Like all governments, the U.S. federal government spends money collected in various ways, including payments to individuals or groups. For example, U.S. government payments are made for retirement benefits, disaster relief, health care benefits, tax credits for various purposes, welfare, agricultural programs, and many other purposes.<sup>7</sup> Likewise, other WTO Members,

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<sup>4</sup> WT/DS217/5.

<sup>5</sup> WT/DS234/12.

<sup>6</sup> WT/DS234/13.

<sup>7</sup> See, e.g., 42 U.S.C. § 5178 (grants to individuals or families for disaster relief); 42 U.S.C. § 303, 402, *et seq.* (social security payments); 42 U.S.C. § 1396, *et seq.* (medicaid); 42 U.S.C. § 601, *et seq.*

including the complaining parties to this case, maintain similar programs for their nationals.<sup>8</sup> The CDSOA likewise authorizes payments to certain U.S. producers.

12. The CDSOA is administered by the U.S. Customs Service. Before the CDSOA, antidumping and countervailing duties were deposited in the general fund in the U.S. Treasury. The CDSOA now instructs Customs to establish special accounts in the amount of the duties and to disburse those funds to “affected domestic producers” for “qualifying expenditures”.<sup>9</sup> An “affected domestic producer” is defined by the Act as “any manufacturer, producer, farmer, rancher, or worker representative (including associations) that was a petitioner or supported the petition,” and remains in operation. The definition excludes companies that have ceased production of the product in question and that have been acquired by a company related to a company that opposed the investigation.<sup>10</sup> A “qualifying expenditure” is defined as an expenditure incurred after the issuance of the order in one of the following categories: a) manufacturing facilities; b) equipment; c) research and development; d) personnel training; e) acquisition of technology; f) health care benefits to employees paid by the employer; g) pension benefits to employees paid by the employer; h) environmental equipment, training or technology; i) acquisition of raw materials and other inputs; and j) working capital or other funds needed to maintain production.<sup>11</sup> These are the two criteria that must be satisfied to receive a distribution under the Act. The CDSOA does not provide for the recovery of “damages” caused by dumping or subsidies as some of the complaining parties have alleged.

13. The CDSOA does not affect the amount of duties assessed under those orders. If Customs has not liquidated the entries and assessed duties under an order during that fiscal year,

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(temporary assistance for needy families/welfare); 7 U.S.C. § 450j (indemnity payments to dairy farmers and manufacturers of dairy products); 7 U.S.C. § 450i (agricultural research grants to, *inter alia*, individuals); 7 U.S.C. § 7334 (flood risk reduction payments to farmers).

<sup>8</sup> See, e.g., *Subsidies Notifications on Behalf of Australia*, G/SCM/N/60/AUS/Rev.1 (12/19/00) (investment incentives); *Indonesia*, G/SCM/N/16/IDN/Suppl.1 (3/19/98) (funds for producers, companies, and production cooperatives in productive sectors in certain regions); *Canada*, G/SCM/N/48/CAN (5/9/00) (regional industrial development through financial assistance to business and non-profit organizations); *Chile*, G/SCM/N/60/CHL (7/4/00) (tax credits for certain investment projects); *European Communities*, G/SCM/N/60/EEC (12/4/00) (financial contributions to small and medium-sized enterprises to establish new transnational joint ventures within EU); *India*, G/SCM/N/38/IND (5/10/99) (income tax deduction for profits on exported goods); *Japan*, G/SCM/N/60/JPN/Suppl.2 (4/20/01) (farmer’s pension fund subsidy); *Korea*, G/SCM/N/71/KOR (8/2/01) (reserve for farm machinery production); *Mexico*, G/SCM/N/16/MEX, G/SCM/25/MEX, G/SCM/N/38 (11/17/98) (duty-free imports of certain machinery and equipment connected with export goods production process); *Thailand*, G/SCM/N/71/THA (3/29/01) (loans to exporters to renovate or upgrade machinery); *Brazil*, G/SCM/N/25/BRA, G/SCM/N/38/BRA, G/SCM/N/48/BRA, G/SCM/60/BRA (1/08/01) (fiscal incentives for regional development).

<sup>9</sup> 19 U.S.C. § 1675c(a).

<sup>10</sup> 19 U.S.C. § 1675c(a).

<sup>11</sup> 19 U.S.C. § 1675c(a).

the account will be empty and no distribution will be made.<sup>12</sup> Nor does the CDSOA impose any type of measure on imports or importers. The Act simply authorizes the Customs Service to distribute funds collected in a statutorily-identified manner. The only real connection between the duties collected and the funds paid is that the duties collected serve to cap the amount of the payments.

## **B. U.S. Antidumping and Countervailing Duty Laws**

14. Two different federal agencies, the U.S. Department of Commerce and the U.S. International Trade Commission, are charged with administering U.S. antidumping and countervailing duty laws. The Commerce Department considers petitions filed on behalf of the domestic industry alleging that imports are being dumped or subsidized. The International Trade Commission conducts the injury determination. In contrast to its role in administering the CDSOA, the U.S. Customs Service has only a ministerial role in assessing antidumping and countervailing duties.<sup>13</sup>

15. Before initiating an investigation, the Commerce Department applies the objective standing requirements set forth in the Antidumping Agreement and SCM Agreement to confirm that there is adequate domestic industry support for the petition.<sup>14</sup>

16. In an investigation, the Commerce Department determines whether imports have been unfairly dumped or subsidized and the International Trade Commission determines whether the domestic industry is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by reason of those imports.<sup>15</sup> If both agencies make affirmative determinations, the Commerce Department issues an antidumping or countervailing duty order instructing the Customs Service to assess duties on those imports.<sup>16</sup>

17. The Commerce Department can suspend an investigation, however, if it enters into an

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<sup>12</sup> When Customs has received instructions from the Commerce Department, Customs proceeds to liquidate the relevant entries. Liquidation is defined as the “final computation or ascertainment of the duties ... or drawback accruing on an entry” -- it is Customs’ determination of the grand total to be paid by the importer. 19 C.F.R. 159.1 Customs will include in that grand total any antidumping or countervailing duties to be assessed or owed on that entry. Under U.S. law, however, the liquidation of entries subject to an antidumping or countervailing duty order is automatically suspended if interested parties request an administrative review of those entries. Liquidation of entries can also be enjoined by a court pending judicial review of the agency’s determination concerning those entries.

<sup>13</sup> See *Mitsubishi Elec. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994) (“Customs merely follows Commerce’s instructions in assessing and collecting duties.”).

<sup>14</sup> 19 U.S.C. §§ 1671a(c)(4), 1673a(c)(4).

<sup>15</sup> 19 U.S.C. §§ 1671, 1673.

<sup>16</sup> 19 U.S.C. §§ 1671e, 1673e; see 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.212.

agreement with the foreign exporters (or the foreign government in a subsidy case) to cease exports, to eliminate dumping or the countervailable subsidy, or to eliminate the injurious effect of those exports.<sup>17</sup> Before an investigation can be suspended, however, the Commerce Department must follow certain procedural steps. These include, *inter alia*, (1) notify and consult with the petitioner concerning its intention to suspend the investigation, (2) provide petitioner with a copy of the proposed suspension agreement with an explanation as to how it will be carried out and enforced, and (3) permit all interested parties to submit comments and information for the record.<sup>18</sup> It is within the sole discretion of the Commerce Department whether to enter into a suspension agreement. Although interested parties are entitled to certain procedural rights before an agreement can be concluded, the domestic industry does not have the power to veto a proposed suspension agreement, and most agreements have been made over the objections of the domestic industry.

#### IV. LEGAL ARGUMENTS

##### A. A Member's Sovereign Right to Appropriately Lawfully Assessed and Collected Antidumping and Countervailing Duties Cannot Be Restricted *Ex Aequo et Bono*

18. The complaining parties allege that the CDSOA violates GATT 1994 Article VI and the Antidumping and SCM Agreements because specific action against dumping or subsidies is limited to duties, price undertakings, or countermeasures. Mexico further claims that CDSOA provides a specific subsidy which may cause adverse effects to its interests contrary to the SCM Agreement. According to the complaining parties, the CDSOA also violates GATT 1994 Article X:3(a) because it is not a reasonable and impartial administration of U.S. laws governing standing and undertakings in antidumping and countervailing duty investigations. Based on those allegations, the complaining parties further claim that the United States has failed to conform its laws to the WTO Agreement contrary to Article XVI:4 of the Marrakesh Agreement Establishing the WTO as well as Articles 18.4 and 32.5, respectively, of the Antidumping and SCM Agreements.

19. As explained above, the sole function of CDSOA is to distribute funds in an amount not to exceed the sums collected from duties assessed pursuant to pre-existing findings and orders to eligible domestic producers. Therefore, the complaining parties are essentially arguing that WTO members cannot enact a law which permits the distribution of revenues generated from AD/CVD duties to any recipient other than the national treasury. The complaining parties, however, can cite to no word, phrase, or paragraph in the entire WTO Agreement to support their argument. In the absence of any WTO commitment regarding the appropriation of lawfully assessed and collected duties, a panel cannot legislate, *ex aequo et bono*, otherwise.

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<sup>17</sup> 19 U.S.C. §§ 1671c(b) & (c), 1673c(b) & (c).

<sup>18</sup> 19 U.S.C. §§ 1671c(e) & 1673c(e).



20. Member State sovereignty is the legal competence of a state. Sovereign powers include the general power of government, administration, and disposition.<sup>19</sup> While it is true that WTO Members have agreed to exercise their sovereignty according to their WTO Agreement commitments, the converse is also true. A commitment not made cannot be broken. When the agreement is silent on an issue, a panel cannot find a violation.<sup>20</sup> As the Appellate Body has recognized, the WTO Agreement is the international equivalent of a contract:

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.<sup>21</sup>

As such, the WTO Agreement is the written expression of a contract which is binding on Members according to its terms.

21. The purpose of dispute settlement is to ensure the implementation of existing commitments in the WTO Agreement.<sup>22</sup> This is reflected in text of Articles 3.2 and 19.2 of the Dispute Settlement Understanding (“DSU”). Both articles provide that neither the Dispute Settlement Body’s recommendations and rulings, nor a panel, nor the Appellate Body, can add to or diminish existing WTO rights and obligations. Consistent with this, DSU Article 3.4 requires the DSB to make recommendations and rulings in accordance with those rights and obligations

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<sup>19</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 107 (5<sup>th</sup> Ed., 1998).

<sup>20</sup> Appellate Body Report on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 166 (Appellate Body finds that Article 2.1 is silent as to who the parties to the relevant sales transactions should be in determining normal value and, therefore, refuses to read into Article 2.1 an additional condition that is not expressed); GATT Panel Report on *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, paras. 243-46, 247-49 (United States not required to make certain adjustments in its subsidy calculation because no understanding regarding the calculation had been developed); GATT Panel Report on *New Zealand – Imports of Electrical Transformers from Finland*, BISD 32S/55, adopted 18 July 1985, para. 4.3 (New Zealand’s reasonable cost of production calculation was not inconsistent with Article VI of GATT when Article VI did not contain any specific guidelines).

<sup>21</sup> Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996.

<sup>22</sup> DSU Article 3.2; see GATT Panel Report on *United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, BISD 38S/30, adopted 11 July 1991, para. 4.7 (“As previous panels have emphasized, ... the purpose of the dispute settlement procedures is to ensure the implementation of existing commitments; if it is considered that the existing mechanisms are not sufficient, any changes must be sought through negotiation.”).

Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.<sup>23</sup>

Thus, panels must respect the carefully-drawn balance between Members' rights and obligations in the WTO Agreement.<sup>24</sup>

22. DSU Article 3.2 directs panels to "clarify" WTO provisions "in accordance with customary rules of interpretation of public international law." The Appellate Body has recognized that Article 31 of the Vienna Convention reflects a customary rule of interpretation.<sup>25</sup> Article 31 provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>26</sup> In applying this rule, however, the Appellate Body in *India – Patents* cautioned that the panel's role is limited to the words and concepts used in the treaty:

The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended...

Both panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*, and must not add to or diminish the rights and obligations provided in the *WTO Agreement*.<sup>27</sup>

23. It goes without saying that a panel cannot "clarify" a treaty provision that does not exist. In the situation at hand, there is nothing to indicate that WTO Members and GATT contracting parties have had, at any time in the decades since 1947, any intention of curtailing their individual national authority over how lawfully assessed and collected antidumping and

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<sup>23</sup> DSU Article 3.4 (emphasis added).

<sup>24</sup> See Appellate Body Report on *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, pg. 16.

<sup>25</sup> See Appellate Body Report on *Canada - Patent Protection Term*, WT/DS170/AB/R, adopted 12 October 2000, para. 53.

<sup>26</sup> Vienna Convention Article 31.1 (emphasis added).

<sup>27</sup> Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS 50/AB/R, adopted 16 January 1998, paras. 45-46 (emphasis added).

countervailing duties are appropriated.

24. During the series of trade negotiations that culminated in the WTO Agreement, a specific restriction on how Members could spend or distribute moneys received as antidumping or countervailing duties was never part of the bargain and was never even raised by any GATT contracting party during the negotiations. Neither the WTO Members nor the contracting parties to the GATT 1947 appear ever to have negotiated or agreed to any standards regulating how antidumping and countervailing duties, once lawfully assessed and collected, are to be spent by the importing country. Over more than half a century, questions such as the calculation of dumping margins and subsidy amounts, evaluation of injury, and the issuance and duration of orders have been discussed at length in the negotiating rounds, and the intent of the parties has then been reduced to a consensual, written understanding. During all that time, however, no debate and formal binding agreement has occurred on the uses to which antidumping and countervailing duties might be put, or to distinguish the use of these funds from that of any other government revenue. Negotiations have simply never reached that stage.

25. Consistent with this history, there is no language in Article VI of the GATT 1994, in the Antidumping Agreement, or in the SCM Agreement that expressly defines any rights and obligations of Members with respect to an importing country's expenditure of antidumping and countervailing duties properly paid into its treasury. On the contrary, Members are free to pursue their own domestic goals through spending so long as they do not do so in a way that violates commitments made in the WTO Agreement.

26. In the present dispute, the Panel is being asked by the complaining parties to read the WTO's covered agreements as imposing an affirmative duty on the United States not to appropriate lawfully assessed and collected antidumping and countervailing duties in the ways prescribed by the CDSOA. In order to arrive at this outcome, the complaining parties would have the panel: (a) overlook that no explicit mention is made anywhere in Article VI of the GATT 1994, the Antidumping Agreement, or the SCM Agreement regarding how antidumping and countervailing duties are to be expended;<sup>28</sup> (b) dismiss that the WTO's Members and the GATT's contracting parties have never negotiated this question; and (c) expand the concept of specific action against dumping or subsidization to encompass, for the first time, a measure (the distribution of moneys to "affected domestic producers") that will not operate against imports of subject merchandise and/or on the foreign producer, exporter, or importer.

27. Moreover, all of these steps would need to be taken in contravention of the axiom that there is no more important an attribute of national sovereignty than the power of the purse. At a most rudimentary level, a nation's ability to perform its many responsibilities entailed with preserving and promoting the national defense and welfare is dependent upon the state's fiscal

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<sup>28</sup> For example, there is no provision stating that antidumping and countervailing duties shall be placed only in the general account of a Member's treasury, nor is there an illustrative list of expenses that may or may not be underwritten by moneys derived from lawfully assessed and collected antidumping or countervailing duties.

authority. The corollary to this precept is that a country's control over its own finances is jealously guarded and relinquished by a national government -- if at all -- only sparingly and only after thorough deliberation and the establishment of carefully drawn limitations and guidelines. Nowhere in the WTO Agreement is there any indication of such a relinquishment with respect to the expenditure of funds derived from lawfully assessed and collected antidumping and countervailing duties.

28. The complaining parties call on the Panel to adopt arguments that go well beyond the clarification of existing provisions and preservation of rights and obligations that DSU Article 3.2 envisions. Instead, the complaining parties would have the Panel create new rights and obligations for the Members or, in other words, act *ex aequo et bono*. In effect, the complaining parties would have the Panel legislate an outcome and usurp the responsibilities of Members to negotiate their rights and obligations in the first instance.

29. The notion of a court or arbitral panel handing down an opinion *ex aequo et bono* is perhaps best known from Article 38.2 of the Statute of the International Court of Justice ("ICJ") and before it of the Permanent Court of International Justice ("PCIJ"). Article 38.2 empowers the ICJ to decide a dispute *ex aequo et bono*, as opposed to in accordance with international law, if the parties agree thereto. Adjudication *ex aequo et bono* has been variously described as "a species of legislative activity" and "an avowed creation of new legal relations between the parties"<sup>29</sup> and as being "tantamount to endowing the tribunal with a legislative power" and "wide legislative discretion."<sup>30</sup> A leading scholar of the ICJ and the PCIJ has opined that the object of Article 38.2 "seems to be to permit the Court, if the parties agree, to make adjustments to an existing legal situation and not merely to declare what the existing legal situation is."<sup>31</sup>

30. Not surprisingly, in light of the extraordinary nature of a decision *ex aequo et bono*, there never has been a case before the ICJ or the PCIJ in which the parties have ever authorized the Court to proceed under Article 38.2 on an *ex aequo et bono* basis. Indeed, the sole occasion known on which the ICJ has even spoken about this topic was in the *Tunisia/Libya Continental Shelf* case, [1982] at 60 (para. 71), in which the Court stated that it can take a decision *ex aequo et bono* "only on condition that the Parties agree . . . and the Court is then freed from the strict application of legal rules in order to bring about an appropriate settlement."<sup>32</sup>

31. There is, of course, no allowance for decisions *ex aequo et bono* with respect to the

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<sup>29</sup> SIR HERSCH LAUTERPACHT, "THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT" 213 (1982) (Exhibit US-1).

<sup>30</sup> D.T. WALKER, "THE OXFORD COMPANION TO LAW" 444 (1980) (Exhibit US-2).

<sup>31</sup> SHABTAI ROSENNE, 2, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920 - 1996, 588 (3d ed. 1997) (Exhibit US-3).

<sup>32</sup> SHABTAI ROSENNE, 3 THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920 - 1996, 1619 (3d ed. 1997) (Exhibit US-4).

WTO's covered agreements and dispute settlement. While Members could have patterned the DSU after Article 38.2 of the ICJ's Statute in this respect, this option was not chosen. In at least one instance, the importance of a panel forgoing a finding *ex aequo et bono* in dispute settlement has been determinative. In *India – Patents*, India argued that Articles 9.1 and 10.4 of the DSU -- having to do with the procedure for multiple complaints and taking fully into account both the interests of the parties to a dispute and the interests of other Members under a covered agreement at issue -- required the European Communities to combine its case against India with one previously brought by the United States against India on the same facts and legal claims.<sup>33</sup>

32. After parsing the wording of these two articles of the DSU, the panel in *India – Patents* disagreed with India, finding that the European Communities had not engaged in any breach. The panel then elaborated on its general responsibilities and role:

We note that India's rationale behind its restrictive reading of Articles 9.1 and 10.4 is that an unmitigated right to bring successive complaints by different parties based on the same facts and legal claims would entail serious risks for the multilateral trade order because of the possibility of inconsistent rulings, as well as problems of waste resources and unwarranted harassment. While we recognize that these are serious concerns, this Panel is not an appropriate forum to address these issues.

According to Article 11 of the DSU, the Panel's role is "to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability and conformity with the relevant covered agreements". Furthermore, under Article 3.2 of the DSU, the purpose of the panel process is to "clarify the existing provisions of [covered] agreements in accordance with customary rules of interpretation of public international law". The same paragraph goes on to state that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements", and Article 19.2 also states that ". . . in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements". Thus, the Panel is required to base its findings on the language of the DSU. We simply cannot make a ruling *ex aequo et bono* to address a systemic concern divorced

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<sup>33</sup> Panel Report on *India – Patent Protection for Pharmaceutical and Agricultural Products*, WT/DS79/R, adopted 2 September 1998.

from explicit language of the DSU.<sup>34</sup>

Panels and the Appellate Body have repeatedly declined to address systemic issues because they are a matter for serious consideration by WTO Members in the appropriate fora.<sup>35</sup>

33. In this case, nothing in the covered agreements circumscribes the ability of a Member to appropriate lawfully assessed and collected antidumping and countervailing duties. In their haste to challenge the CDSOA, the complaining parties have pieced together a supposed WTO-violation based on evidence that the statute's title, preamble, and fund recipients all relate to antidumping and countervailing duty proceedings. Yet, none of their "evidence" supports a finding of a WTO-violation:

- *Where* a statute is housed in the U.S. Code does not have any bearing on whether or not the statute is WTO-consistent.<sup>36</sup> The CDSOA could just as easily have been a trade adjustment assistance provision or a tax credit; indeed, proponents had proposed identical disbursement schemes under the alternative headings.
- *What* the ultimate goal of legislation *may* be does not have any bearing on whether the statute is WTO-consistent.<sup>37</sup> Whatever the preamble may say about the ultimate purpose of legislation, there is no guarantee that the legislation will actually be successful at achieving those goals. Members cannot challenge legislation on the basis that legislation *may* violate WTO obligations. The test to determine whether legislation violates a WTO obligation is an objective one based on what the statute actually *does*. At the end of the day, when all is said and done, the only thing the CDSOA *does* is distribute money.
- *Who* the recipients of a payment program may be does not have any bearing on whether the statute is an antidumping or countervailing measure. Nothing in the Antidumping or SCM Agreement says that Members cannot distribute the funds raised from antidumping or countervailing duties collected to whomever they choose.

34. As detailed below, the complaining parties have not cited to any provision in the WTO

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<sup>34</sup> *India – Patent Protection for Pharmaceutical and Agricultural Products*, WT/DS79/R, paras. 7.22-23 (emphasis added, footnote omitted).

<sup>35</sup> See, e.g., Panel Report on *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, para. 9.53; Appellate Body Report on *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, paras. 91-92; Panel Report on *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, WT/DS126/R, adopted 16 June 1999, para. 9.12.

<sup>36</sup> See Panel Report on *United States – Anti-Dumping Act of 1916 (EC)*, WT/DS136/R, adopted 26 September 2000, para. 6.117.

<sup>37</sup> See *United States – Anti-Dumping Act of 1916 (EC)*, WT/DS136/R, para. 6.116, citing GATT Panel Report on *EC – Parts and Components*, BISD 37/132, adopted 16 May 1990, para. 5.6.

Agreement that curtails Members' ability to appropriate funds collected through import duties because there is none. Members retain the right to control their treasury and allocate their resources. Pursuant to that authority, governments routinely make decisions to disperse funds for a wide range of purposes. Those decisions are presumptively consistent with their WTO obligations for "WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations."<sup>38</sup>

35. The absence of any WTO provisions addressing the appropriation of lawfully assessed and collected antidumping and countervailing duties is a systemic concern of the sort WTO panels and the Appellate Body have refused to address. Therefore, this panel proceeding is not the appropriate forum to address these issues *ex aequo et bono*. Panels are not invested with legislative power that would enable them legitimately to modify Member rights and obligations under existing law.

**B. The CDSOA Is Not an Actionable Subsidy and Is Not Inconsistent with Article 5 of the SCM Agreement**

36. Although all of the complaining parties included a claim under Article 5 of the SCM Agreement in their consultation requests, only Mexico has elected to pursue this claim before the Panel. Mexico does not claim that the CDSOA provides a prohibited export subsidy or import substitution subsidy within the meaning of Article 3 of the SCM Agreement. Instead, Mexico claims that the distributions paid under the CDSOA are "specific" subsidies which may cause "adverse effects" to its interests contrary to Article 5 of the SCM Agreement.

37. The limitations on the right of a government to distribute money under the SCM Agreement are not absolute: the granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement:

It is worth recalling that the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a "subsidy", without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*.<sup>39</sup>

38. Part III of the SCM Agreement sets forth the requirements for finding an actionable

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<sup>38</sup> Appellate Body Report on *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB, adopted 12 July 1999, para. 9; Panel Report on *United States – Anti-Dumping Act of 1916 (Japan)*, WT/DS162/R, adopted 26 September 2000, para. 6.98 ("there is a presumption that if a law is susceptible to an interpretation that is WTO consistent, domestic authorities will interpret that law so as to avoid a conflict with WTO obligations.").

<sup>39</sup> Appellate Body Report on *Canada – Measures Affecting The Export of Civilian Aircraft, Recourse to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, para. 47.

subsidy. Specifically, Article 5 provides that:

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

- (a) injury to the domestic industry of another Member;
- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994<sup>12</sup>;
- (c) serious prejudice to the interests of another Member.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

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<sup>12</sup> The term “nullification or impairment” is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

39. Thus, absent evidence of specificity or adverse effects, Mexico’s claim must be rejected. Here, Mexico has failed to demonstrate either.

### **1. The CDSOA Is Not a Specific Subsidy**

40. At the outset, the CDSOA does not fall within Article 5 because it does not constitute a “specific” subsidy to domestic producers. Article 1.2 of the SCM Agreement states that a subsidy is subject to the provisions of Part III (including Article 5) only if it is “specific in accordance with the provisions of Article 2.” Pursuant to Article 2.1 of the SCM Agreement, a subsidy can be either *de jure* or *de facto* specific:<sup>40</sup>

In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as “certain enterprises”) within the jurisdiction of the granting authority, the following principles shall apply:

- (a) Where the granting authority, or the legislation

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<sup>40</sup> Mexico does not claim that the CDSOA is regionally-specific or is a specific Article 3 subsidy. See SCM Agreement Articles 2.2 & 2.3.



pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.<sup>41</sup>

41. According to Article 2.4 of the SCM Agreement, “[a]ny determination of specificity ... shall be clearly substantiated on the basis of positive evidence.”<sup>42</sup> Subsidies that are not “specific” are not actionable under Article 5 of the SCM Agreement.

42. In this case, Mexico has failed to establish that the CDSOA is “specific” on the basis of positive evidence as required by Articles 1 and 2 of the SCM Agreement. As noted above, pursuant to Article 2.1(a), a *de jure* specific subsidy occurs if the legislation expressly limits access to the subsidy to certain enterprises. Here, there is no question that the CDSOA is not *de jure* specific. There is no limit in the legislation to certain enterprises. The CDSOA is potentially applicable to *any producer in any industry* in the United States.

43. Mexico argues that each distribution is a *de jure* specific subsidy because the distributions are made via special accounts, each of which is capped by the duties collected

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<sup>41</sup> SCM Agreement Article 2.1 (emphasis added, footnotes omitted).

<sup>42</sup> SCM Agreement Article 2.4.

under each AD/CVD order, and that only enterprises which produce like domestic product (and meet the other criteria) are eligible.<sup>43</sup>

44. Mexico's contention should be summarily rejected as Mexico does not even argue that the CDSOA "expressly limits" access to "certain enterprises." Rather, the points made by Mexico concern whether or not use of the CDSOA could be *de facto* specific at some time in the future. Mexico's arguments, however, ignore the structure of Article 2 which contain progressive guidelines for the determination of whether a program is specific or non-specific.

45. First, Article 2.1(a) defines a *de jure* specific subsidy as a measure that explicitly limits access to certain enterprises, industries, or groups thereof. Measures that do not explicitly limit access are not *de jure* specific. Second, Article 2.1(b) applies to measures that do not explicitly limit access, and that establish objective criteria or conditions governing eligibility for, and the amount of, a subsidy, provided that eligibility is automatic and the criteria or conditions are strictly adhered to and clearly spelled out so as to be capable of verification. Third, Article 2.1(c) applies to measures that may be non-specific under paragraphs (a) and (b) but which are otherwise *de facto* specific.

46. In this case, the CDSOA does not expressly limit access to certain enterprises, industries, or groups. It is potentially applicable to *any producer in any industry* in the United States that has filed a petition or supported an antidumping or countervailing duty investigation which resulted in an order according to which duties were collected. U.S. antidumping and countervailing duty laws are neutral with regard to who is eligible, permitting the filing of a petition by or on behalf of any domestic industry in the goods sector.

47. Consistent with Article 2.1(b), eligibility for CDSOA distributions is based on objective criteria, and eligibility is automatic if the criteria are met. The group eligible for distributions under the CDSOA is not expressly identified in the statute, but will vary over time as new cases are brought; as entries are liquidated and duties are, or are not, assessed; and as orders are revoked. Indeed, the United States has revoked over 189 antidumping and countervailing duty orders since July 1998, continued 209 orders/suspended investigations, and is currently reviewing 37 orders in sunset reviews.<sup>44</sup> Currently, the U.S. Government has more than 250 antidumping and countervailing duty orders outstanding, covering a wide variety of domestic industries and products from agriculture to high-technology.

48. The list of expenditures that qualify for reimbursement under the Act also are neutral, objective, and apply across-the-board to every eligible producer. To qualify for a distribution, an applicant must be an affected domestic producer, that was a petitioner or supported a petition, and remains in operation. An applicant must also have incurred "qualifying expenditures" which are identified in the legislation. Both of these criteria are objective. Once the criteria are met,

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<sup>43</sup> Mexico First Submission, para. 52.

<sup>44</sup> See Exhibit US-5.

eligibility is automatic.<sup>45</sup> Likewise, the amount of distribution is based on the amount of duties collected, which is also objective.

49. Nor has any positive evidence been presented in this case that the CDSOA is *de facto* specific within the terms of Article 2.1(c). It is Mexico's burden as the complaining party to present positive evidence that, although not *de jure* specific, the CDSOA is specific as a matter of fact. Mexico has presented no evidence of the actual distributions under the CDSOA and therefore has failed to meet this burden.

50. Indeed, it is doubtful that Mexico could ever show *de facto* specificity. This is because, as noted above, the distributions are potentially available to any producer in any industry. Also, the recipients will change over time as new cases are brought, existing orders are revoked and duties are or are not assessed and collected.

51. In sum, the CDSOA's eligibility requirements are automatic and available broadly -- *any producer in any industry* in the United States can be eligible under the Act. Accordingly, the Act is not *de jure* or *de facto* specific within the meaning of Article 2 of the SCM Agreement. Mexico's Article 5 claim should be rejected for this reason alone.

## 2. Mexico Has Failed to Demonstrate "Adverse Effects"

52. Mexico does not even try to make a *prima facie* case that CDSOA has caused actual adverse effects to its interests as required by Article 5. Instead, Mexico argues that the CDSOA *as such* causes *per se* adverse effects in the form of the nullification or impairment of benefits under Article 5(b).

53. Mexico argues that adverse effects in the form of nullification or impairment of benefits can be established through: (1) an Article XXIII:1(a) claim of violation of other provisions; or (2) a non-violation claim that the CDSOA nullifies or impairs benefits under GATT 1994 Articles II and VI.

54. "Nullification or impairment" is addressed in GATT Article XXIII. Subparagraph 1(a) covers violation claims and subparagraph 1(b) covers non-violation claims of nullification or impairment of benefits accruing under the Agreement.

55. Under GATT and WTO panel practice and DSU Article 3.8, a violation of a WTO provision constitutes a *prima facie* case of nullification or impairment within the meaning of Article XXIII:1(a). According to DSU Article 3.8, this "normally" creates a rebuttable presumption of an adverse impact on other Members. It is not clear to the United States, however, that a violation claim of nullification or impairment was intended to be brought within

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<sup>45</sup> Brazil explicitly agrees that eligibility for distributions is automatic once the criteria are met. Brazil First Submission, para. 27.

the terms of Article 5(b) – that this is indeed a “normal” situation referred to in DSU Article 3.8 – because to do so would automatically create a presumption that a subsidy that violates another WTO provision is an actionable subsidy, without any showing of adverse effects. This eliminates the primary distinction between prohibited subsidies under Article 3 where effects are presumed and actionable subsidies under Article 5 where the complaining party must demonstrate adverse effects.

56. In any event, as explained in the sections that follow, the CDSOA does not violate any other provision, including GATT 1994 Articles VI:2 and VI:3, which are the basis for Mexico’s argument. Therefore, Mexico’s alleged violation of Article 5(b) by virtue of a violation of GATT provisions should be rejected for that reason alone.

57. Mexico’s argument relating to non-violation nullification or impairment also should be rejected. As the Appellate Body explained in *EC- Asbestos*, “we consider that the remedy in Article XXIII:1(b) should be approached with caution and should remain an exceptional remedy.”<sup>46</sup> The Appellate Body elaborated as follows:

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. 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*. 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.* (Emphasis in original.)<sup>47</sup>

58. In *Japan - Film*, the panel explained that GATT Article XXIII:1(b) requires three findings: (1) the application of a measure by a WTO member; (2) a benefit accruing under the relevant agreement; and (3) the nullification or impairment of the benefit as a result of the application of the measure that was not reasonably anticipated.<sup>48</sup>

59. Mexico’s claim is, on its face, insufficient to satisfy those requirements because it does not challenge the *application* of the CDSOA. GATT 1994 Article XXIII:1(b) expressly refers to

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<sup>46</sup> Appellate Body Report on *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS133/AB/R, adopted 12 March 2001, para. 186.

<sup>47</sup> *Id.*

<sup>48</sup> Panel Report on *Japan - Measures Affecting Consumer Photographic Film & Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.41.

the “application” of a measure. Moreover, Article XXIII:1(b) is written in the present tense suggesting that the measure must be currently applied, not that it will be applied in the future:

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

The panel in *Japan - Film* relied upon the use of the present tense of Article XXIII:1(b) in concluding that it should be invoked only for “measures that are currently being applied.”<sup>49</sup> The panel explained that “[i]t thus stands to reason that, given that the text [of Article XXIII:1(b)] contemplates nullification in the present tense, caused by the 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.”<sup>50</sup>

60. Mexico argues that, despite the plain language of Article XXIII:1(b), Article 5(b) of the SCM Agreement should be interpreted as not requiring the application of a measure. Mexico argues that the specific language of the provisions incorporated into Article 5(b) is modified by the phrase “though the use of any subsidy” in the chapeau to Article 5(b) (which Mexico argues actually means “granting or maintaining”).<sup>51</sup> Mexico cites no authority for this argument.

61. There is no basis for concluding that the analysis of non-violation nullification or impairment under subparagraph (b) of Article 5 is modified from that under the GATT 1994 by the language of the chapeau of Article 5. To the contrary, footnote 12 in Article 5 states that “[t]he term ‘nullification or impairment’ is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification and impairment shall be established in accordance with the practice of application of these provisions.” The practice regarding non-violation nullification or impairment claims is that the measure must be applied. Thus, that is the test that should be used under Article 5(b).

62. The United States does not contend that a subsidy that has not yet been disbursed can never be challenged as an actionable subsidy under Article 5. Only if the claim is brought under subparagraph (b) based upon a non-violation nullification or impairment of benefits must the measure be challenged as applied. Because Mexico has not challenged actual disbursements under the CDSOA, its non-violation claim should be rejected for this reason alone.

63. Mexico also has failed to satisfy the third element required for a non-violation nullification or impairment claim: that is, it has failed to demonstrate that the competitive relationship between U.S. products and Mexican imports has been upset by a subsidy, and that

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<sup>49</sup> *Japan - Film*, WT/DS44/R, para. 10.57.

<sup>50</sup> *Japan - Film*, WT/DS44/R, para. 10.57.

<sup>51</sup> Mexico First Submission, para. 77.

the subsidy was not reasonably anticipated by Mexico.

64. As noted by Mexico, to satisfy the third element, a complaining party must show a “clear correlation between the measures and the adverse effect on the relevant competitive relationships.”<sup>52</sup> In other words, the complaining party must show causation. Even if the competitive relationship has changed to the detriment of imports, Mexico still needs to establish that this adverse effect has been caused by the measures in question.

65. Past complainants have not succeeded with their non-violation claims because of the lack of evidence on causality. The burden of proof in non-violation cases is high. DSU Article 26.1(a) (“Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994”) requires that a party making non-violation claims must present a detailed justification in support of its claims: “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. . . .”

66. Here, Mexico has not presented a detailed justification or even identified any products for which the competitive relationship has been upset. Simply put, Mexico has presented no evidence that U.S. producers of products that compete with Mexican products have actually received a distribution under the CDSOA, let alone a “clear correlation” between the distributions and any disruption of a competitive relationship. Without such evidence, the “relevant competitive relationship” has not even been established.

67. Mexico argues that the distribution of duties under the CDSOA will *per se* nullify or impair the benefits accruing to Mexico under GATT Articles II and VI.<sup>53</sup>

68. This argument must be rejected as it renders the third element required for a non-violation claim meaningless and flies in the face of the notion that a non-violation claim is an exceptional remedy that should be approached with caution. Acceptance of Mexico’s argument would automatically convert any specific domestic subsidy program which is related to a product on which there is a tariff concession into a non-violation nullification or impairment of benefits. Such an interpretation is unreasonable and must be rejected.

69. Mexico’s argument is also directly contrary to DSU Article 26.1 and GATT/WTO panel practice. As noted above, DSU Article 26.1 specifically requires a “detailed justification” in support of a claim. Furthermore, in *Japan - Film* the panel required that the competitive relationship between domestic and imported film at the time when market access was improved through a tariff concession had to be compared with the competitive relationship between domestic and imported products after the introduction of the measures at issue. Even if the competitive relationships had changed to the detriment of imports, the United States still needed

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<sup>52</sup> *Japan-Film*, para. 10.82.

<sup>53</sup> Mexico First Submission, para. 98, 104.

to establish this adverse effect and that it had been caused by the measure at issue.<sup>54</sup>

70. The *Japan - Film* panel noted 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>55</sup>

71. In *EEC-Oilseeds*, a dispute involving a subsidy and the benefits accruing under a tariff concession, the panel sustained the non-violation claim but only after requiring that the complaining party show that the competitive relationship was actually upset. The panel did not consider that the subsidy *per se* upset the benefits accruing under Article II just because it had been granted on products on which there were tariff concessions. Instead, the panel noted that it had “carefully analysed” the evidence presented in concluding that there was a disruption in the competitive relationship.<sup>56</sup>

72. Thus, Mexico’s argument that no evidence of nullification or impairment is necessary must be rejected.

73. Finally, Mexico’s non-violation claim should be rejected because Mexico could “reasonably anticipate” before the tariff concession negotiated during the Uruguay Round entered into force on January 1, 1995 that antidumping and countervailing duties would be distributed to the domestic industry. As early as 1988, a provision for the distribution of antidumping duties had been proposed in the U.S. Congress.<sup>57</sup> And, again, in 1990 and 1991, legislation was proposed that would distribute antidumping duties to domestic producers.<sup>58</sup> Further, as noted by Japan and Chile, a legislative payment program nearly identical to the CDSOA was proposed in the U.S. Congress in April 1994 (H.R.4206) and then again in June 1994 (H.R. 4716).<sup>59</sup> Thus, the CDSOA could have been reasonably anticipated by Mexico at the

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<sup>54</sup> *Japan - Film*, DS/44/R, paras. 10.82-10.84.

<sup>55</sup> *Japan - Film*, DS/44/R, para. 10.83, fn 1547, citing to *Uruguay Recourse*, BISD 11S/95, 100, para. 15; *Japan - Semi-conductors*, BISD 35S/116, 161, para. 131; *US - Agricultural Waiver*, BISD 37S/228, 261-62, paras. 5.20-5.23.

<sup>56</sup> GATT Panel Report on *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Protein*, L/6627 - 37S/86, adopted 25 January 1990, para. 147.

<sup>57</sup> Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100<sup>th</sup> Cong. s. 167 (1987) (Exhibit US-17).

<sup>58</sup> Countervailing and Antidumping Duty Amendment Act of 1990, H.R. 5320, 101<sup>st</sup> Cong., 2d Sess. s. 7 (1990) (Exhibit US-18); Countervailing and Antidumping Duty Amendment Act of 1991, H.R. 3272, 102<sup>nd</sup> Cong., 1st Sess. s. 7 (1991) (Exhibit US-19).

<sup>59</sup> GATT Fair Trade Enforcement Act of 1994, H.R. 4206, 103<sup>rd</sup> Cong. s. 103 (1994) (Exhibit US-15); Antidumping Compensation Act of 1994, H.R. 4716, 103<sup>rd</sup> Cong. s. 2 (1994). See Japan and Chile First Submission, para. 3.15 (Exhibit US-16).

time the concessions were granted.

74. In sum, there are several points at which Mexico fails to sustain its burden as the complaining party asserting an actionable subsidy claim. At the outset, Mexico has failed to demonstrate that the CDSOA constitutes a “specific” subsidy within Articles 1 and 2 of the SCM Agreement. Mexico’s actionable subsidy claim can be rejected for this reason alone.

75. Mexico also fails to sustain its assertion that the CDSOA is causing adverse effects to its interests under Article 5(b) of the SCM Agreement. Both the first and third elements of a non-violation claim have not been established in this case. Mexico does not challenge the application of the CDSOA as required for such a claim. Finally, Mexico has failed to establish that the CDSOA was not reasonably anticipated by Mexico and that those distributions have upset a competitive relationship between any domestic products and Mexican imports.

76. For all of these reasons, Mexico’s actionable subsidy claim should be rejected by the Panel.

**C. The CDSOA Is Not Inconsistent with GATT Article VI, or Articles 1 and 18 of the Antidumping Agreement, or Articles 10, 4.10, 7.9, and 32 of the SCM Agreement**

77. The complaining parties claim that the CDSOA is inconsistent with U.S. obligations under the Antidumping and SCM Agreements, read in conjunction with GATT Article VI:2 and 3. Because it does not mandate the imposition of antidumping or countervailing measures, or any other type of specific action against dumping or subsidies, on imports or their importers, the CDSOA is not within the scope of GATT Article VI, or the various provisions of the Antidumping and SCM Agreements cited by the complaining parties. The CDSOA is simply a statute authorizing governmental *payments*.

78. Article 18.1 of the Antidumping Agreement is almost identical to Article 32.1 of the SCM Agreement. Article 18.1 provides:

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

79. Article 32.1 provides:

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.

80. In *United States - Antidumping Act of 1916*, the two primary issues were whether GATT 1994 Article VI and the Antidumping Agreement limit the permissible remedies for dumping to antidumping duties, and whether the 1916 Act constituted a “specific action against dumping.”



The Appellate Body concluded that GATT 1994 Article VI:2 read in conjunction with the Antidumping Agreement limit the permissible remedies for dumping to duties, provisional measures or price undertakings.

81. In reaching this conclusion, the Appellate Body found that Article 18.1 clarified the scope of application of GATT Article VI. The Appellate Body concluded that the phrase “specific action against dumping” in Article 18.1 meant “action that is taken in response to the constituent elements of dumping.”<sup>60</sup> The constituent elements of dumping were defined by the panels, and implicitly approved by the Appellate Body, as: “1) there must be products imported and cleared through customs (“introduction into the commerce”); and 2) those imported products must be priced at a price lower than their normal value, i.e., their price in a foreign country, be it the country of production or another country of export, or a constructed value based on a calculation of costs and profits.”<sup>61</sup>

82. With regard to the second issue, whether the 1916 Act constituted a “specific action against dumping,” the Appellate Body found that “the civil and criminal proceedings and penalties [against importers] provided for in the 1916 Act are ‘specific action against dumping’” because the “constituent elements of ‘dumping’ are built into the essential elements of civil and criminal liability under the 1916 Act.”<sup>62</sup>

83. Applying the reasoning of the Appellate Body in the *1916 Act* to the facts of this case, it is clear that the CDSOA does not constitute a “specific action against dumping” or a “specific action against a subsidy.” First, the distributions are not based upon the constituent elements of dumping or a subsidy. Second, as explained below, the CDSOA is not an action “against” dumping or a subsidy.

#### **1. The CDSOA Is Not Based upon the Constituent Elements of Dumping or a Subsidy**

84. As noted above, the Appellate Body concluded that Article VI and the Antidumping Agreement apply to “action that is taken in response to the constituent elements of dumping.” These include: “1) there must be products imported and cleared through customs (“introduction into the commerce”); and 2) those imported products must be priced at a price lower than their normal value, i.e., their price in a foreign country, be it the country of production or another country of export, or a constructed value based on a calculation of costs and profits.”<sup>63</sup>

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<sup>60</sup> Appellate Body Report on *United States - Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 122.

<sup>61</sup> Panel Report on *United States - Antidumping Act of 1916*, WT/DS136/R, WT/DS162/R, adopted 26 September 2000, para. 6.104, 6.117.

<sup>62</sup> *US-1916 Act*, AB Report, para. 130.

<sup>63</sup> *US -1916 Act*, EC panel report, para. 6.104, Japan panel report, para. 6.117.

85. Assuming for the sake of argument<sup>64</sup> that the reasoning of the *1916 Act* Appellate Body report applies to Article VI:3 and the SCM Agreement, the constituent elements of a subsidy would seem to include a financial contribution which confers a benefit which has been granted, directly or indirectly on the manufacture, production or export of a product and that product has been imported into the territory of another Member.<sup>65</sup>

86. Article VI and the Antidumping and SCM Agreements do not apply to the CDSOA because it is not based upon the constituent elements of dumping or a subsidy. As noted above in the factual background section, the distributions under the CDSOA are based upon the applicant's qualification as an "affected domestic producer" who has incurred "qualifying expenditures." Contrary to some complaining parties' description, the Act does not provide for the recovery of "damages." The amount of the distributions under the CDSOA have nothing to do with measuring the extent to which a U.S. producer has been affected by dumping or subsidization of imports.

87. The complaining parties' argument that the CDSOA is based upon the constituent elements of dumping and a subsidy because the distributions are made only after there has been a finding of dumping or subsidization ignores the specific conclusions of the Appellate Body and panel reports in *1916 Act*. The Appellate Body found that the 1916 Act fell within the scope of Article VI and the Antidumping Agreement because "the constituent elements of 'dumping' are built into the essential elements of civil and criminal liability under the 1916 Act."<sup>66</sup> The *1916 Act* panel elaborated on this point. The panel explained that "whenever a Member addresses a practice that meets the definition of Article VI:1, it has to abide by the WTO rules governing anti-dumping."<sup>67</sup> The panel report then states in a footnote that

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<sup>64</sup> Although Articles 18.1 and 32.1 contain essentially identical language, GATT Article VI:3 is not the same as Article VI:2. In addition, Article 10 of the SCM Agreement is substantially different from Article 1 of the Antidumping Agreement. Significantly, Article 10 refers to "countervailing duties" while Article 1 refers to "antidumping measures." The Appellate Body found that Article 1 encompasses all measures taken against dumping since there was no limitation on the particular types of measures. *1916 Act*, AB Report, para. 119. Article 10, in contrast, refers to "countervailing duties," not "measures" taken against subsidies. Hence, it would seem that GATT Article VI:3 read in conjunction with Article 10 does not limit the permissible remedies for subsidies to duties. Instead, those provisions operate to impose the requirements of Part V of the SCM Agreement only when the measure taken is duties. For these reasons, it is not clear to the United States that the reasoning of the Appellate Body in the *1916 Act* dispute should apply wholesale to Article VI:3 and the SCM Agreement. The U.S. assumes *arguendo* that it does because the CDSOA does not constitute a specific action against dumping or a subsidy in any event.

<sup>65</sup> See GATT 1994 Article VI:3.

<sup>66</sup> *US-1916 Act*, AB Report, para. 130.

<sup>67</sup> *US-1916 Act*, EC panel report, para. 6.114.

[t]his is without prejudice to a Member choosing to address the effects of dumping, e.g. increased imports, or its causes (e.g. subsidisation) through other legitimate means under the WTO Agreement, such as countervailing or safeguard measures. However, it cannot choose to address “dumping” **as such** with instruments or in ways that are different from those allowed in the WTO Agreement for that purpose. This is, in our view, the meaning of footnote 24 to Article 18.1 of the Antidumping Agreement....<sup>68</sup>

88. In other words, the scope of Article VI and the Antidumping Agreement extends to measures which address dumping *as such*. Dumping *as such* refers to action based upon the constituent elements of dumping. Indeed, later in the same report, the 1916 Act panel states again: “If a Member’s legislation is based on a test that meets the definition of Article VI:1, Article VI applies.”<sup>69</sup>

89. It is undeniable that the CDSOA is not based upon a test that includes the constituent elements of dumping or a subsidy. Therefore, it does not address dumping or subsidization *as such* and is not within the scope of Article VI and the Antidumping and SCM Agreements.

## **2. The CDSOA Is Not a Specific Action “Against” Dumping or Subsidization**

90. Because there was no question in *United States – Anti-Dumping Act of 1916* that the penalties under the 1916 Act, if ever applied, would directly affect importers, the need did not arise for the panels or Appellate Body to discuss whether the specific action was “against” dumping, or otherwise interpret the word “against.” The Appellate Body’s statement that Article 18.1 covers actions “in response” to dumping, therefore, provides no guidance as to the meaning of the term “against.”

91. Indeed, it is clearly possible for an action to be “in response to” dumping or a subsidy but not be “against” dumping or a subsidy. For example, a government could require, by law, that in response to any situation presenting the constituent elements of dumping or subsidization, the agency collecting duties must distribute the duties to a charity. Or, the government could require that government flags fly at half-mast for 48 hours following a finding of dumping or subsidization. In each of these cases, the measures are clearly “in response to” or connected to dumping or subsidization, but are just as clearly *not* “against” dumping or subsidization.

92. Thus, this Panel must consider the proper interpretation of the term “against.” The ordinary meaning of the term “against” is “of motion or action in opposition,” “in hostility or active opposition to,” and “into contact with.”<sup>70</sup> The ordinary meaning suggests that the specific

<sup>68</sup> *US -1916 Act*, EC panel report, fn 373.

<sup>69</sup> *US-1916 Act*, EC panel report, para. 6.116.

<sup>70</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY, 38-39 (L. Brown ed., 1993).

action therefore must be in “hostile opposition to” dumping/subsidization, and must “come into contact with” dumping/subsidization. The only logical way to come into contact with dumping or subsidization is through the imported good itself, or the importer. In order to be in “hostile opposition to,” the contact with the importer or imported good must be burdensome or negative. Thus, to consider a specific action as “against” dumping or subsidization, the action must apply to the imported good or the importer, and it must be burdensome.

93. Under this interpretation, the earlier examples of actions in response to dumping or subsidization that are clearly not “against” dumping or subsidization would be appropriately excluded. Civil and criminal penalties against the importer, by contrast, would unquestionably burden the importer, and therefore would be covered. Indeed, the Appellate Body in *1916 Act* referred to the fact that the measure in that dispute imposed a “liability”: “the constituent elements of ‘dumping’ are built into the essential elements of civil and criminal *liability* under the 1916 Act.”<sup>71</sup>

94. Here, unlike the 1916 Act, there is no question that the CDSOA imposes no burden or liability on imported goods or importers. In fact, the CDSOA has nothing to do with imported goods or importers. The CDSOA is a payment program which provides for the distribution of money to “affected domestic producers” with “qualifying expenditures.” The amount of money distributed is limited by the amount of AD/CVD duties collected. That is the only connection to dumping or subsidization. The actual elements or requirements of the CDSOA do not act “against” dumping or subsidization because they do not apply to (have any contact with) imported goods or importers.

95. The complaining parties do not even argue that the elements of the CDSOA are “against” dumping. Instead, they focus on the alleged purpose or intent of the CDSOA. The complaining parties’ submissions are replete with assertions about the “intent” of the law, the “purpose” of the law, and the “objective” of the law. That is essentially the sole basis for the complaining parties’ claim that the CDSOA is “against” dumping and subsidies. According to the complaining parties, it is against dumping and subsidies because it was intended to be so.

96. However, the purpose or intent of the CDSOA is legally irrelevant. The resolution of this dispute does not depend upon what the CDSOA is intended to do but what it actually *does*. The panel in *1916 Act* rejected the argument that the intent or purpose of a measure was relevant in determining whether it constituted a “specific action against dumping”<sup>72</sup>:

While we agree that Article VI applies when Members have recourse to a given trade policy instrument, i.e. anti-dumping action, we do not agree that application of Article VI is dependent on the objective pursued by the Member concerned... Article VI

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<sup>71</sup> *US -1916 Act*, AB report, para. 130.

<sup>72</sup> See *US -1916 Act*, EC panel report, para. 128-30; *US - 1916 Act*, Japan panel report, para. 6.134.

is based on an objective premise. If a Member's legislation is based on a test that meets the definition of Article VI:1 {dumping}, Article VI applies. The stated purpose of the law cannot affect this conclusion.<sup>73</sup>

97. The panel cited *EC - Parts and Components*, where the panel also rejected the argument that the policy purpose of a measure could determine whether it fell within the scope of the provisions in question.<sup>74</sup> In that case, the panel explained that “[o]nly at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2.”<sup>75</sup>

98. Thus, despite U.S. arguments that the 1916 Act was intended to remedy the antitrust problem of predatory pricing, the panel, which was affirmed by the Appellate Body, found that the purpose or intention of the law could not exclude it from the scope of Article VI.<sup>76</sup>

99. It therefore must also be true that the stated purpose of a measure cannot bring it within the scope of Article VI and the Antidumping and SCM Agreements if the actual elements of the measure do not satisfy the test for the scope of those articles. Here, the CDSOA is not an action *against* dumping or subsidies because it imposes no burden or liability on imports or importers, nor is it an action against dumping or subsidies *as such, i.e.*, it is not based upon the constituent elements of dumping or a subsidy. Accordingly, this Panel should find that GATT Article VI and Articles 1 and 18 of the Antidumping Agreement and Articles 10 and 32 of the SCM Agreements do not apply to the CDSOA.

100. Therefore, even disregarding the fact that the CDSOA itself does not include a test based upon the constituent elements of dumping or subsidization, the CDSOA is not a specific action against dumping or subsidization because it is not “against” dumping or a subsidy.

### **3. In Any Event, Footnotes 24 and 56 Confirm That the CDSOA Is Not Within the Scope of Article VI and the Antidumping and SCM Agreements**

101. As explained above, the CDSOA does not constitute “specific action against” dumping or a subsidy and, therefore, is not within the scope of GATT Article VI or Articles 18.1 and 32.1 of the Antidumping and SCM Agreements. It is not based upon the constituent elements of dumping or a subsidy, and does not impose any burden or liability upon importers or imported

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<sup>73</sup> *US - 1916 Act*, EC panel report, para. 6.116, *citing* GATT Panel Report on *EC - Regulation on Parts and Components*, BISD 37/132, adopted 16 May 1990, para. 5.6.

<sup>74</sup> *US - 1916 Act*, EC panel report, fn 376.

<sup>75</sup> *EC - Parts and Components*, BISD 37/132, para. 5.7.

<sup>76</sup> *US - 1916 Act*, EC panel report, para. 6.117; *US - 1916 Act*, Japan panel report, para. 6.135.

goods. If this Panel determines that, notwithstanding these facts, the CDSOA is an action against dumping or a subsidy, footnotes 24 and 56 to Articles 18.1 and 32, respectively, operate to permit the CDSOA.

102. The footnote to both articles is identical. Both footnote 24 in the Antidumping Agreement and footnote 56 in the SCM Agreement provide:

This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

103. Footnotes 24 and 56 serve to clarify the meaning of Articles 18.1 and 32.1. The Appellate Body recognized that footnote 24 “generally refers to “action” and not, as does Article 18.1, to ‘specific action against dumping’ of exports.”<sup>77</sup> The Appellate Body explained, “[a]ction within the meaning of footnote 24 is to be distinguished from ‘specific action against dumping’ of exports, which is governed by Article 18.1 itself.”<sup>78</sup> Therefore, the general reference to “action” in footnotes 24 and 56 is not the same type of focused and directed action which applies to oppose dumping or subsidies *as such* within the meaning of Articles 18.1 and 32.1.

104. The ordinary meaning of the term “preclude” is “to shut out, exclude; prevent, frustrate; make impossible.”<sup>79</sup> Thus, the ordinary meaning of the phrase “not intended to preclude action” within the context of Articles 18.1 and 32.1 is that action is *permitted*.

105. In *1916 Act*, both panels recognized that Members are free to address the causes or effects of dumping (and subsidies) through other trade policy instruments allowed under the WTO Agreement:

We consider that footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement.<sup>80</sup>

106. According to the panel in the Japan case, “[r]eading footnote 24 as permitting actions other than anti-dumping actions allowed under other provisions, as long as the measure does not address dumping *as such*, is fully consistent with the principle of useful interpretation.”<sup>81</sup> The EC panel report explained that footnote 24 allows Members to address the “effects of dumping,

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<sup>77</sup> *US - 1916 Act*, AB report, para. 123.

<sup>78</sup> *Id.*

<sup>79</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2326 (L. Brown ed., 1993).

<sup>80</sup> *US - 1916 Act*, EC panel report, para. 6.199; Japan panel report, para. 6.218.

<sup>81</sup> *US - 1916 Act*, Japan panel report, para. 6.132.

e.g. increased imports, or its causes (e.g., subsidisation) through other legitimate means under the WTO Agreement, such as countervailing or safeguard measures.”<sup>82</sup>

107. In affirming the panels, the Appellate Body concluded that the phrase “other relevant provisions of GATT 1994” refers to provisions other than the provisions of Article VI concerning dumping.<sup>83</sup> It follows that the reference to “other relevant provisions of GATT 1994” in footnote 56 of the SCM Agreement refers to provisions other than the provisions in Article VI concerning subsidies.

108. In sum, the ordinary meaning of the phrase “*not intended to preclude action under other relevant provisions of GATT 1994*” in footnotes 24 and 56 is to permit action involving dumping or subsidies (but not specifically against) that is consistent with GATT provisions other than GATT Article VI. This interpretation is consistent with the EC panel’s interpretation of footnote 24 as allowing a Member to “address the effects of dumping, e.g. increased imports, or its causes (e.g., subsidisation) through other legitimate means under the WTO Agreement, such as countervailing or safeguard measures.”<sup>84</sup>

109. GATT Article XVI is a “relevant provision of GATT 1994” within the meaning of footnotes 24 and 56. Article XVI is entitled “Subsidies” and therefore is without question “relevant” to subsidies. Article XVI, and agreements interpreting it, have long recognized that Members have the general right to use subsidies. Since the original GATT 1947, Members have been subject to two separate sets of subsidy disciplines serving fundamentally different purposes. Article XVI of GATT 1947 and Parts II, III, and IV of the SCM Agreement set out the rules and procedures governing the signatory’s right to use subsidies. While Article VI of GATT 1947, and Parts I and V of the SCM Agreement provided for the right to react against imports of subsidized products by imposing countervailing duties, they do not restrict a signatory’s right to use subsidies.<sup>85</sup>

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<sup>82</sup> *US - 1916 Act*, EC panel report, fn.373.

<sup>83</sup> *US - 1916 Act*, AB report, para. 125.

<sup>84</sup> EC panel report, fn.373. Eight of the complaining parties specifically describe the CDSOA as remedying or offsetting the “effects” of dumping. For example, the EC, India, Indonesia and Thailand claim that “[t]he stated purpose of the Byrd Amendment is to ‘offset’ the *effects* of such ‘continued’ dumping or subsidisation...” EC et al. First Submission, para. 38. Likewise, Canada states that “the CDSOA is an action in the form of a payment meant to ‘offset’ the *effects* of injurious dumping.” Canada First Submission, para. 54. Also, Mexico states that “[t]he stated objective and aim of the Act is to offset the *effects* of dumping and subsidizing.” Mexico First Submission, para. 42. Finally, Japan and Chile refer to the purpose of the Act as a “mechanism to help injured U.S. industries recover from the harmful effects of illegal foreign dumping and subsidies, as a way to counter the adverse *effects* of foreign dumping and subsidization of U.S. industries...” Japan & Chile First Submission, para. 4.34.

<sup>85</sup> See GATT Panel Report on *United States – Imposition of Countervailing Duties on Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, adopted 28 April 1994, paras. 238-39. Another GATT provision which further recognizes the general right to use subsidies is GATT Article III:8(b). Article III:8(b) specifically exempts the payment of subsidies exclusively to domestic producers from the national treatment

110. The appropriate legal framework for the consideration of the CDSOA is as a subsidy. As explained above, although a subsidy, the CDSOA does not constitute a specific subsidy or an actionable subsidy. Like Part III of the SCM Agreement, GATT Article XVI recognizes that Members may provide non-export subsidies to the extent that they do not cause serious prejudice to the interests of other Members.<sup>86</sup> For example, Section A of Article XVI concerns subsidies in general, as opposed to export subsidies, and states:

If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.<sup>87</sup>

111. The CDSOA distributions are permitted under Article XVI because they do not cause serious prejudice to the interests of other Members. Indeed, the complaining parties do not argue that disbursements under the CDSOA have caused or will cause serious prejudice to their interests. Therefore, if the CDSOA is considered to be an action against dumping, the distributions are otherwise permitted by the footnotes to Articles 18.1 and 32.1 as action under another relevant GATT provision.<sup>88</sup>

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provisions of Article III. GATT 1994 Article III:8(b).

<sup>86</sup> GATT 1994 Article XVI; see *Second Report of Group of Experts on Anti-Dumping and Countervailing Duties*, BISD 9S, para. 32 (January 1960) (“The fact that the granting of certain subsidies was authorized by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which subsidies had been paid.”).

<sup>87</sup> GATT 1994 Article XVI:1.

<sup>88</sup> Antidumping Agreement, Article 18, fn.24; SCM Agreement Article 32, fn.56.



**4. Articles 4.10 and 7.9 of the SCM Agreement  
Do Not Contain An Obligation Which Can Be Violated**

112. Articles 4.10 and 7.9 of the SCM Agreement provide for the DSB to authorize countermeasures if a Member has not implemented DSB recommendations and rulings with regard to a prohibited subsidy and an actionable subsidy, respectively. They both state, in relevant part: “[t]he DSB shall grant authorization to the complaining Member to take [appropriate] countermeasures...” The articles do not contain an obligation or prohibition on Members and therefore cannot form the basis of a violation of the SCM Agreement. For this reason, the claim that the CDSOA *violates* Articles 4.10 and 7.9 should be rejected.

113. Indeed, Australia is the only complaining party to actually argue that the CDSOA is a violation of Articles 4.10 and 7.9.<sup>89</sup> Japan and Chile assert that the CDSOA is a countermeasure which has not been authorized by the DSB and therefore is in violation of Article 32.1 (not Articles 4.10 and 7.9).<sup>90</sup> The EC, India, Indonesia and Thailand assert that the U.S. has not requested or received authorization from the DSB to take a countermeasure, but that “the Panel need not reach this issue.”<sup>91</sup> Finally, Canada states that the CDSOA “raises issues in the context of Part V of the SCM Agreement and Article VI:3 of GATT 1994.” And, therefore, “in Canada’s view, the issue as to whether the CDSOA might constitute a ‘countermeasure’ that is an allowable ‘specific action against a subsidy’ is not necessarily raised in this dispute.”

114. Even if the Panel could somehow construe Articles 4.10 and 7.9 as containing an obligation which could form the legal basis of a violation, the CDSOA is not a “countermeasure” within the meaning of Articles 4.10 and 7.9. The CDSOA was not enacted in order induce another Member to implement DSB recommendations and rulings. In fact, the CDSOA has nothing to do with the actions of other Members. As explained above, the CDSOA is a payment program. It is not a “specific action against a subsidy” of another Member. It is not based upon the constituent elements of a subsidy, and imposes no liability or burden on imported goods or importers.

**D. The CDSOA Does Not Affect the Administration of U.S. Laws  
Governing Standing Determinations and is Not Inconsistent with  
Articles 5.4 of the Antidumping Agreement and 11.4 of the SCM  
Agreement**

115. The complaining parties claim that the CDSOA breaches Articles 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement by compromising the ability of U.S. authorities to make objective assessments of whether AD and CVD petitions have the support

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<sup>89</sup> Australia First Submission, para. 97, 102.

<sup>90</sup> Japan and Chile First Submission, para. 4.46.

<sup>91</sup> EC, India, Indonesia, Thailand First Submission, para. 52.

required for initiation under these provisions.<sup>92</sup> However, the complaining parties offer no evidence that CDSOA in any way affects how U.S. administering authorities apply the objective criteria set forth in Articles 5.4 and 11.4 for determining industry support for petitions. Instead, the complaining parties engage in speculation on the impact of CDSOA on the willingness of private companies to support AD/CVD petitions, and attempt to read into Articles 5.4 and 11.4 a non-existent requirement for authorities to undertake subjective analyses of the motives of domestic companies in order to separate out allegedly improper motives. The Panel should reject these arguments.

116. Articles 5.4 and 11.4 of the Antidumping and SCM Agreements contain identical standing requirements for initiating investigations. Under these provisions, the administering authorities must determine whether the antidumping or countervailing application “has been made by or on behalf of the domestic industry.” The provisions then specifically define the conditions under which the application will be considered to have been made “by or on behalf of the domestic industry.” These conditions are expressed as objective numerical benchmarks:

The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than **50 percent** of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less **25 percent** of total production of like product produced by the domestic industry. [emphasis added]

117. These provisions are implemented in U.S. law in sections 702(c)(4) and 732(c)(4) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1671a(c)(4), 1673a(c)(4)).<sup>93</sup> These statutory provisions are not affected by the CDSOA. They are the same now as they were before enactment of the CDSOA. The Commerce Department continues to apply the objective numerical benchmarks set forth in the Antidumping and SCM Agreements in determining whether the application has been made “by or on behalf of the domestic industry.”

118. The complaining parties argue that the Commerce Department cannot conduct its examination of the objective benchmarks with “impartiality” and in “good faith” because it will be unable to ascertain the “motivation” behind the domestic industry’s expression of support.<sup>94</sup>

119. Contrary to the complaining parties’ arguments, a simple review of the text confirms that there is no requirement in Articles 5.4 and 11.4 that administering authorities determine the

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<sup>92</sup> *E.g.*, Brazil First Submission, paras. 28-35.

<sup>93</sup> See Exhibit US-13.

<sup>94</sup> Brazil First Submission, para. 28.

*reason* for the domestic industry's support. The obligation is to determine whether the *quantitative* benchmarks have been met. It is important to note that the complaining parties are not arguing that the CDSOA impedes the fulfilment of that obligation. Rather, the complaining parties argue that the *reason* for support is not appropriate. The complaining parties would have this Panel read into the agreements a requirement that the administering authority must determine that, in addition to the expression of support, the domestic industry support for the investigation is "true"<sup>95</sup> or "genuine."<sup>96</sup> Japan and Chile even argue that seeking the imposition of AD/CVD duties is not enough if the "principal intent" behind supporting the initiation of an investigation is to benefit from the distribution of future duties.<sup>97</sup>

120. A consideration of the requirements of Antidumping Agreement Article 17.6 that the authorities' establishment of the facts is proper and their evaluation unbiased and objective in no way changes the conclusion that there is no breach of Article 5.4. The objective, quantitative nature of the analysis of industry support under Article 5.4 leaves little or no scope for an improper analysis: either the number of companies expressing support for the petition meet the threshold, or they do not. Indeed, Article 5.4 serves to make the determination of industry support simple and objective. Against this, the complaining parties now suggest that a subjective analysis of motives is required.

121. Aside from the fact that there is no textual basis for such an interpretation of Articles 5.4 and 11.4, such a requirement would be unworkable. Obviously, administering authorities are not in a position to determine the subjective motivations of private parties.

122. This does not prevent the complaining parties from purporting to do so. Based on the assumption that a consideration of motives is relevant to the analysis under Articles 5.4 and 11.4, the complaining parties engage in unsupported speculation that many companies supporting a petition would not possibly have done so in the absence of CDSOA, and that CDSOA renders the determination of support a forgone conclusion. However, even were these considerations relevant to the question of whether CDSOA causes U.S. administering authorities to ignore the clear numerical standards set forth in Articles 5.4 and 11.4, or whether there is somehow a breach of these provisions if authorities do not screen out those with "improper" motives, the complaining parties offer no empirical support for their contention.

123. This is not surprising. It is highly unlikely that the complaining parties could ever summon credible evidence that the CDSOA has distorted the decisions of companies in supporting petitions, let alone that it has distorted the authorities' application of the standing requirements in breach of Article 5.4 and 11.4. To establish such distortion, the complaining parties would have to show that, "but for" the distributions, domestic producers would not otherwise have filed a petition or supported an investigation, and that the participation of those

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<sup>95</sup> Japan-Chile First Submission, para. 4.62.

<sup>96</sup> EC-India-Indonesia-Thailand First Submission, para. 84.

<sup>97</sup> Japan-Chile First Submission, para. 4.67.

producers was necessary to establish standing in that investigation. Needless to say, the complaining parties have presented no such evidence.

124. At the same time as they speculate on the impact of CDSOA on decisions of private firms on whether to support petitions, the complaining parties ignore the strong incentives already present for companies harmed by dumped and subsidized imports to support anti-dumping petitions in order to obtain relief from these unfairly traded imports. In the United States and elsewhere, when domestic producers are concerned about dumping or subsidized import competition, there is reason for them to come together to file a petition. The laws are intended to neutralize internationally-recognized (and, in the case of injurious dumping, “condemned”) unfair trade practices by requiring a change in pricing practices or the payment of additional duties by importers for competing products that are unfairly priced. It is to the economic benefit of domestic producers to seek such relief. It is generally irrational to oppose relief.

125. Accordingly, it is rare for domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions. For example, a survey of the year prior to the enactment of the CDSOA shows that all of the petitions filed met the legal thresholds for support.<sup>98</sup> Thus, if there is sufficient support *anyway*, it cannot be said that the CDSOA will affect the number of cases meeting the thresholds of Articles 5.4 and 11.4, even if such an increase could constitute a breach of those articles.

126. In sum, acceptance of the complaining parties’ argument would rewrite the obligations contained in Articles 5.4 and 11.4 of the Antidumping and SCM Agreements. There is no textual basis in those provisions for requiring that administering authorities assess the subjective motivation of the producers’ expression of support. The test for industry support is comprised of two objective quantitative benchmarks. The complaining parties do not claim that the United States is failing to abide by those benchmarks.

127. Further, the complaining parties have presented no evidence that the CDSOA actually distorts the application of the standing requirements. There is no evidence that producers are supporting investigations which they would have opposed in the absence of the CDSOA *and* that their support was necessary to initiate the investigation. The complaining parties’ arguments are based upon sheer speculation. In fact, the logical conclusion from the facts available is that there is no effect on standing determinations.

128. For these reasons, the complaining parties’ argument that, as a result of the CDSOA, the United States has acted or will act inconsistently with its obligations under Articles 5.4 and 11.4 of the Antidumping and SCM Agreements should be rejected.

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<sup>98</sup> Exhibit US-6.

**E. The CDSOA Does Not Affect the Acceptance of Undertakings and is Not Inconsistent with Articles 8.1 of the Antidumping Agreement and 18.1 of the SCM Agreement**

129. Articles 8 and 18 of the Antidumping and SCM Agreements, respectively, contain provisions concerning price undertakings. The statutory provisions implementing U.S. obligations on undertakings are set forth in sections 704 and 734 of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1671c, 1673c).<sup>99</sup> As with U.S. standing requirements, the CDSOA does not make any change to the U.S. undertaking provisions. They are the same now as they were before enactment of the CDSOA, and the complaining parties have not demonstrated that CDSOA requires U.S. administering authorities to breach Articles 8.1 and 18.1 in any way.

130. The complaining parties argue that the CDSOA breaches Articles 8 and 18 because the Act allegedly makes it more difficult for exporters to secure an undertaking with the competent authorities, since the affected domestic producers will have a vested interest in opposing such undertakings in favour of the collection of anti-dumping or countervailing duties.<sup>100</sup>

131. The complaining parties' argument regarding undertakings should be rejected as there is no obligation under Articles 8 and 18 to accept a proposed undertaking. Indeed, this is explicitly recognized by at least four of the complaining parties in their written submissions. Japan, Chile, Canada and Brazil acknowledge that neither the Antidumping or the SCM Agreement impose an obligation on the authorities to accept proposed undertakings.<sup>101</sup>

132. Moreover, and more importantly, neither article circumscribes the reasons that may cause an administering authority to decline to accept a proposed undertaking. Both articles state that an undertaking "need not be accepted if the authorities of the importing Member consider the acceptance *impractical*" because the number of exporters is too great, or "*for other reasons, including reasons of general policy.*"<sup>102</sup> The ordinary meaning of "impractical" is that which is "not practical" or "not available or useful in practice," or "not inclined or suited to action."<sup>103</sup> The articles do no limit or define the reasons that an administering authority may find an undertaking to be "impractical." They simply say "other reasons." Even the European Communities, India, Indonesia and Thailand recognize that the agreements do not limit the types of reasons which can be invoked by the administering authority.<sup>104</sup>

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<sup>99</sup> Exhibit US-14.

<sup>100</sup> EC-India-Indonesia-Thailand First Submission, para. 104.

<sup>101</sup> Japan and Chile First Submission, para. 4.70, Canada First Submission, para. 90, Brazil First Submission, para. 36.

<sup>102</sup> Antidumping Agreement Article 8.3; SCM Agreement Article 18.3.

<sup>103</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1325, 2317 (L. Brown ed., 1993).

<sup>104</sup> EC-India-Indonesia-Thailand First Submission, para. 96.

133. Despite this recognition, these four parties go on to argue that, notwithstanding the text of the provisions, the “reason” for rejecting an undertaking must be “relevant” or “pertinent” because otherwise it would not be “true.”<sup>105</sup> At another point, these parties state that the reason must be “proper.”<sup>106</sup> They also asserts that the administering authority must determine whether the acceptance of an undertaking would be “appropriate” before it decides against it.<sup>107</sup>

134. Of these terms, the only one to even appear in Articles 8 and 18 is the word “inappropriate.” And that term relates to the procedural step of supplying the reasons for rejecting an undertaking to the exporters, not the standard for considering an undertaking. As explained above, the articles provide that the authorities need not accept an undertaking if it is “impractical.” They do not limit the reasons that may lead authorities to conclude that acceptance of an undertaking is impractical.

135. The only obligations contained in Articles 8 and 18 are certain procedural steps that are to be followed under certain circumstances if an undertaking is offered. Both articles provide that, “where practicable,” the administering authority shall provide “the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.”<sup>108</sup> Thus, authorities do not have to supply the reason for rejecting an offered undertaking if it is not “practicable.” Further, they do not have to afford exporters the opportunity to comment if it is “not possible.”

136. Contrary to the argument of the EC, India, Indonesia and Thailand, the articles do not require that the administering authorities determine that the undertaking is “inappropriate” before they can reject it. The sentence in Articles 8.3 and 18.3 containing the term “inappropriate” addresses the circumstances under which the exporter is to be provided the reasons for the rejection. It does not change the standard for accepting or rejecting an undertaking, which is addressed earlier in the same paragraph. The logical reading of the two sentences is that, once an administering authority has concluded that an undertaking is impractical for whatever reason, the undertaking is also considered to be “inappropriate.” To interpret the second sentence as imposing a different standard would render the first sentence of the paragraph, which specifically addresses the rejection of an undertaking, meaningless and a nullity.<sup>109</sup>

137. Because there is no limit on the reasons an administering authority may believe the

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<sup>105</sup> EC-India-Indonesia-Thailand First Submission, para. 96,102.

<sup>106</sup> EC-India-Indonesia-Thailand First Submission, para 106.

<sup>107</sup> EC-India-Indonesia-Thailand First Submission, para 108.

<sup>108</sup> Antidumping Agreement Article 8.3, SCM Agreement Article 18.3.

<sup>109</sup> See Appellate Body Report on *United States - Reformulated and Conventional Gasoline*, WT/DS4/AB/R, adopted 20 May 1996, p. 23.

acceptance of an offered undertaking to be “impractical,” it is within the complete discretion of the administering authority to accept or reject that undertaking. Thus, even assuming *arguendo* that the CDSOA renders it more difficult for exporters to secure price undertakings, there is no WTO violation because there is no *obligation* to enter into a price undertaking in the first place.

138. Putting aside the fact that the decision is within the discretion of the administering authority, the complaining parties’ argument should be rejected because they have provided no evidence that the CDSOA has had or will have any actual effect on the Commerce Department’s consideration of proposed undertakings. Instead, like their claim regarding standing determinations, the complaining parties’ argument is based upon pure speculation. The complaining parties would have this Panel believe, without offering any factual support, that the domestic industry’s views are conclusive as to whether the U.S. Commerce Department accepts an undertaking and that Commerce is abdicating its responsibility to administer U.S. law.

139. Not surprisingly, the complaining parties do not, and indeed cannot, provide any evidence to support these allegations. A review of U.S. law and the facts show that the contrary is true. Domestic producers in the U.S. do not enjoy an “effective” veto over proposed undertakings—only the competent authority and the exporters determine whether to agree to an undertaking.<sup>110</sup> The rights afforded to domestic producers in the context of proposed undertakings are procedural in nature, not substantive.

140. Even those procedural rights grant domestic producers only a limited role in voicing their opinion on proposed undertakings. According to the U.S. statute, Commerce must “*notify* the petitioner of, and *consult* with the petitioner concerning, its intention to suspend the investigation, and notify other parties to the investigation and the Commission not less than 30 days before the date on which it suspends the investigation.”<sup>111</sup> In addition, Commerce must provide petitioners with a copy of the proposed agreement and an explanation as to how the agreement will be carried out.<sup>112</sup> Finally, Commerce must permit all interested parties, including the exporters, to submit comments and information.<sup>113</sup>

141. It is the Commerce Department, and not the domestic industry, that makes the decision whether to accept an undertaking. This is borne out by a review the facts. There have been 13 undertakings accepted by the Commerce Department since 1996.<sup>114</sup> The vast majority of these were entered into over the vehement opposition of the domestic producers. A review of the 12 undertakings concluded prior to the CDSOA shows that the domestic industry opposed the

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<sup>110</sup> See Antidumping Agreement Articles 8.3, 8.5; SCM Agreement Articles 18.3, 18.5.

<sup>111</sup> 19 U.S.C. § 1673 c (e)(1); 19 U.S.C. § 1671 c (e)(1).

<sup>112</sup> 19 U.S.C. § 1673 c (e)(2); 19 U.S.C. § 1671 c (e)(2).

<sup>113</sup> 19 U.S.C. § 1673 c (e)(3); 19 U.S.C. § 1671 c (e)(3).

<sup>114</sup> See ITA Website at <http://ia.ita.doc.gov/stats/suspensions/suspensions.htm>.

proposed undertaking in 9 (or 75%) of those cases.<sup>115</sup> Since the CDSOA, there has been one additional undertaking which the Commerce Department accepted over the objections of domestic producers.<sup>116</sup> Therefore, there is no factual basis to conclude that domestic producers have usurped the role of the Commerce Department by exercising an “effective” veto over whether to accept an undertaking.

142. Nor is there any reason to believe that the domestic industry will oppose an undertaking as a result of the CDSOA. The domestic industry supports or opposes an undertaking depending upon the facts of the case. For example, domestic producers in the antidumping investigation of hot-rolled flat-rolled carbon-quality steel products objected to a suspension agreement in that case because it would deny them relief against 63% of the unfairly traded imports that had caused injury to the domestic industry.<sup>117</sup> In the antidumping investigation of cold-rolled flat rolled carbon quality steel products, the domestic producers opposed the suspension agreement which they thought guaranteed Russian steel producers a share of the U.S. market at low prices.<sup>118</sup> In contrast, in the antidumping investigations of ammonium nitrate and sodium azide, domestic producers supported suspension agreements because they thought that they would allow imports to participate in the market in a non-disruptive manner.<sup>119</sup>

143. Domestic producers who file petitions are seeking a return to conditions of fair trade. If this can happen with an undertaking, domestic producers will be supportive of an agreement. The complaining parties have presented no evidence that the CDSOA has caused domestic producers to oppose an undertaking that they would have otherwise supported. Even if the CDSOA were to change the position of the domestic producers, there is nothing to suggest a change in the Commerce Department’s independent action.

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<sup>115</sup> See Exhibit US-7.

<sup>116</sup> *Certain Hot-Rolled Carbon Steel Flat Products from Kazakhstan*, Inv. No. A-834-806 (initialed 8/17/01). Since the CDSOA was enacted, another suspension agreement was proposed in *Greenhouse Tomatoes from Canada*, but the Commerce Department did not find it acceptable and the agreement was not presented to the domestic industry for its views.

<sup>117</sup> See Petitioners' Letter, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, A-351-828, at 2 (June 28, 1999) (Exhibit US-8).

<sup>118</sup> See Petitioners' Letter, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation of Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation, A-821-810, at 2 (Dec. 29, 1999) (Exhibit US-9).

<sup>119</sup> See Wilmer, Cutler & Pickering's Letter on behalf of American Azide Corporation, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation on Sodium Azide from Japan, A-588-839, at 1 (Dec. 20, 1996) (Exhibit US-10); see Akin, Gump's Letter on behalf of Committee for Fair Ammonium Nitrate Trade, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation on Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, A-821-811, at 2 (May 10, 2000) (Exhibit US-11).



144. In sum, there is no obligation in Articles 8 and 18 to accept a proposed undertaking. This decision is within the complete discretion of the administering authority. Thus, even if the CDSOA could be considered to affect the Commerce Department's decision (which it does not), there would be no breach because there is no obligation in the first place. Articles 8 and 18 allow the administering authority to reject an undertaking for *any* reason.

145. Further, the complaining parties have presented no evidence that the CDSOA has had or will have any effect on the Commerce Department's consideration of proposed undertakings. Indeed, the evidence available shows that, contrary to the complaining parties' unsubstantiated allegations, the domestic industry does not enjoy an "effective" veto over undertakings. The Commerce Department often accepts undertakings over the opposition of the domestic industry and continues to do so notwithstanding the passage of the CDSOA.

146. Finally, the complaining parties have presented no evidence that the CDSOA has caused or will cause domestic producers to oppose undertakings that they would have otherwise supported.

147. For these reasons, the complaining parties' argument that the United States has acted or will act inconsistently with its obligations under Articles 8 of the Antidumping Agreement and 18 of the SCM Agreement should be rejected.

**F. The Complaining Parties Have Offered No Arguments Concerning the Administration of the CDSOA, and the CDSOA is Not Inconsistent with Article X:3(a) of the GATT 1994.**

148. Several of the complaining parties<sup>120</sup> assert that the CDSOA distributions are inconsistent with GATT Article X:3(a), which requires Members to administer their laws in an impartial and reasonable manner, because the CDSOA is not a reasonable and impartial administration of the U.S. laws and regulations implementing the provisions of the Antidumping and the SCM Agreements regarding standing determinations and undertakings. Because the complaining parties have failed to present any evidence of the actual administration of the CDSOA, their GATT 1994 Article X:3(a) claim should be rejected.

149. Article X:3(a) provides:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.<sup>121</sup>

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<sup>120</sup> Australia and Korea did not make this claim.

<sup>121</sup> GATT 1994, Article X:3(a) (emphasis added). Article X:3(a) refers to Article X:1 of GATT 1994, which provides:

Laws, regulations, judicial decisions and administrative rulings of general application,

150. Consistent with its plain language, various panel and Appellate Body reports have concluded that Article X:3(a) only addresses the *administration* of national laws. For example, the Appellate Body in *European Communities -- Bananas* wrote:

The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.<sup>122</sup>

151. The party who asserts a fact has the burden of providing proof thereof.<sup>123</sup> The complaining parties, however, have provided no evidence at all concerning the day-to-day administration of CDSOA and have, therefore, failed to establish a *prima facie* violation of

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made effective by any contracting party, 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 transfer of payments therefor, 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. Agreements affecting international trade policy which are in force between the government or a governmental agency of any other contracting party and the government or governmental agency of any other contracting party shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

<sup>122</sup> See Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 200 (emphasis in the original); see also Appellate Body Report on *European Communities – Measures Affecting The Importation of Certain Poultry Products*, WT/DS69/AB/R, adopted 23 July 1998, para. 115 (Appellate Body emphasizes that, to the extent Brazil's appeal related to the substantive content of the EC rules rather than to their publication or administration, it fell outside of Article X); Panel Report on *Argentina – Measures Affecting The Export of Bovine Hides and The Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001, para. 11.60, n.366; Panel Report on *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, paras. 7.267-68.

<sup>123</sup> See Panel Report on *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, adopted 27 July 2000, paras. 6.13-14.

Article X:3(a).<sup>124</sup>

152. The sole “evidence” presented by the complaining parties with respect to Article X:3(a) does not relate to the administration of the CDSOA itself, but, rather, consists of their speculation concerning the impact of the CDSOA on the number of antidumping petitions filed or undertakings accepted. As described in the previous sections of this submission, this speculation is groundless. However, even were it otherwise, decisions by private parties on whether to file or support petitions, or by the U.S. Department of Commerce in determining whether to accept a petition or voluntary undertaking, have nothing to do with the administration of the *CDSOA* by the U.S. Customs Service, and are not themselves even within the terms of reference of this dispute.<sup>125</sup> Thus, even if it were concluded that CDSOA somehow affects the administration of laws relating to initiation of antidumping and countervailing duty investigations and to price undertakings, this could not conceivably form the basis of an Article X:3(a) finding against the CDSOA. Nor could such a conclusion be translated into an Article X:3(a) finding against the U.S. standing or undertaking laws themselves, since these laws are not the subject of this dispute. The CDSOA is not inconsistent with GATT 1994 Article X:3(a).

**G. The CDSOA is Not Inconsistent with Article XVI:4 of the Marrakesh Agreement Establishing the WTO, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement Because the CDSOA is Not Inconsistent with Other WTO Obligations**

153. The complaining parties allege that the CDSOA is inconsistent with Article XVI:4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement, based on their conclusion that the CDSOA is also inconsistent with provisions of the GATT 1994, the Antidumping Agreement and the SCM Agreement. Because the CDSOA is not inconsistent with any WTO Agreement provision, the complaining parties’ claims under Article XVI:4 of the Marrakesh Agreement Establishing the WTO, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must also fail.

**V. CONCLUSION**

154. The CDSOA authorizes government payments. The distributions are consistent with GATT Article VI and the Antidumping and SCM Agreements because they are not actionable subsidies and are not “action against” dumping or a subsidy.<sup>126</sup>

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<sup>124</sup> *Id.* at paras. 6.12, n.28, 6.13-14.

<sup>125</sup> The complaining parties’ panel requests allege WTO breaches by the CDSOA, and not by the provisions of U.S. law under which U.S. authorities determine the adequacy of industry support for petitions or consider whether to accept price undertakings. *See* WT/DS217/5, WT/DS234/12, WT/DS234/13.

<sup>126</sup> At one point, the EC, India, Indonesia and Thailand argue that the CDSOA violates Article 15 of the Antidumping Agreement. EC-India-Indonesia-Thailand First Submission, para. 111. This

155. Nor is there any evidence that the CDSOA has been or will be administered in an unreasonable or partial manner (Art. X:3(a) of GATT 1994) so as to affect standing and undertaking determinations in antidumping and countervailing duty investigations. Thus, the complaining parties have failed to establish a *prima facie* case of a WTO violation. In the absence of a specific violation of another WTO Agreement provision, the complaining parties' claims under Article XVI:4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must also fail.

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provision was not included in their panel request, however, and therefore is not within this Panel's terms of reference pursuant to DSU Article 6.2. *See* WT/DS217/5.

## LIST OF EXHIBITS

1. Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (1982) at 213.
2. David M. Walker, *The Oxford Companion to Law* (1980) at 444.
3. Shabtai Roseanne, *Jurisdiction: general concepts in II The Law and Practice of the International Court 1920-1926* (1997) at 588.
4. Shabtai Roseanne, *Procedure in III The Law and Practice of the International Court 1920-1926* (1997) at 1619.
5. Orders Revoked and Continued and Upcoming Sunset Reviews
6. Standing Determinations for Cases Initiated Between January 1, 1995 and September 30, 2001
7. Suspension Agreements Effective August 2001
8. Petitioners' Letter, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation of Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, A-351-828, at 2 (June 28, 1999).
9. Petitioners' Letter, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation of Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation, A-821-810, at 2 (Dec. 29, 1999).
10. Wilmer, Cutler & Pickering's Letter on behalf of American Azide Corporation, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation on Sodium Azide from Japan, A-588-839, at 1 (Dec. 20, 1996).
11. Akin, Gump's Letter on behalf of Committee for Fair Ammonium Nitrate Trade, Comments on the Proposed Agreement Suspending the Antidumping Duty Investigation on Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation, A-821-811, at 2 (May 10, 2000).
12. 19 U.S.C § 1675c (“The Continuing Dumping and Subsidy Offset Act”)
13. 19 U.S.C §§ 1671a, 1673a
14. 19 U.S.C. §§ 1671c, 1673c

15. GATT Fair Trade Enforcement Act of 1994, H.R. 4206, 103<sup>rd</sup> Cong. s. 103 (1994).
16. Antidumping Compensation Act of 1994, H.R. 4716, 103<sup>rd</sup> Cong. s. 2 (1994).
17. Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100<sup>th</sup> Cong. s. 167 (1987).
18. Countervailing and Antidumping Duty Amendment Act of 1990, H.R. 5320, 101<sup>st</sup> Cong., 2d Sess. s. 7 (1990)
19. Countervailing and Antidumping Duty Amendment Act of 1991, H.R. 3272, 102<sup>nd</sup> Cong., 1st Sess. s. 7 (1991)