UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE PANEL

27 FEBRUARY 2002

Questions to the United States

Question 15. At para. 92 of its first written submission, the US asserts that "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" (whereas para. 26 refers to measures "against imports of subject merchandise and/or on the foreign producer, exporter, or importer"). Is a specific action "against" dumping or subsidization if it is applied (1) to the exporter and (2) it is burdensome? Please explain whether, and why, price undertakings within the meaning of AD Article 8, and government undertakings provided for in SCM Art. 18.1(a), do or do not constitute specific action "against" dumping or subsidization.

Part A. It is important to preface the U.S. response to the Panel's question by pointing out that the CDSOA cannot be specific action against dumping or subsidization because it does not (1) authorize action in response to the constituent elements of dumping or subsidization, or (2) apply to and burden imports or their importers, foreign producers, or exporters.

With respect to the question whether specific action is "against" dumping or subsidization if it is applied to the exporter and is burdensome, the answer is yes. Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, concern the type of action taken against dumping or subsidization. As a practical matter, imported goods are produced, exported, and imported by foreign producers, exporters, and importers. Therefore, specific action could be applied to an exporter of a dumped or subsidized import.

Part B. With respect to the question of whether undertakings are specific action "against" dumping or subsidization, the Appellate Body in *United States - Anti-Dumping Act of 1916* explained that Article VI of GATT 1994 and the Antidumping Agreement limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures, and price undertakings.[1] The three forms of action are, by definition, specific action against dumping or

[1]Appellate Body Report, *United States – Anti-Dumping Act of 1916,* WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 137.

subsidization.[2]

Even absent the Appellate Body's decision, however, undertakings under Articles 8 and 18 of the Antidumping and SCM Agreements, respectively, fall within the definition of specific action "against" dumping or subsidization in Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, because they (1) are action in response to the constituent elements of dumping or subsidization which can only be entered into with respect to conduct producing a preliminary affirmative determination of dumping or subsidization, and (2) apply to the exporter to limit its ability to export dumped or subsidized products to the importer, or apply to the government of the exporting Member to eliminate or limit the subsidy available to the exporter or take other measures concerning its effects.

Question 16. Assume that a Member enacts legislation mandating the severance of diplomatic relations with another Member whenever it finds that dumped or subsidized products are imported from that other Member. In light of the above extract from para. 92 of the US first written submission, would such severance of diplomatic relations constitute action "against" dumping or subsidization?

Severance of diplomatic relations would not be action "against" dumping or subsidization because severance of diplomatic relations does not apply to imports, or their importers, foreign producers, or exporters.

Question 17. Please comment on the meaning of the phrase "in particular" in Article 5(b) of the SCM Agreement, in light of Mexico's claim that the Byrd Amendment nullifies or impairs benefits accruing to Mexico under Article VI of GATT 1994.

The phrase "in particular" is a transitional expression used throughout GATT 1994 and the SCM Agreement. The Oxford English Dictionary defines "in particular" as "as one of a number distinguished from the rest; especially" and "one by one, individually."[3] When used in Article 5(b), the phrase illustrates the meaning of the main phrase it modifies and suggests that tariff concessions under Article II are not the only negotiated benefit which can be nullified or impaired under GATT 1994. Regardless, Mexico has not proved any nullification or impairment of benefits accruing to it under any article of GATT 1994.

Question 18. At para. 47 of its first written submission, the US asserts that "eligibility for CDSOA distributions is based on objective criteria ...". If a subsidy contained eligibility criteria or conditions that were not "objective" within the meaning of footnote 2 to the SCM Agreement,

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[2] The three forms of action in an antidumping case are also considered "measures" subject to dispute settlement pursuant to Article 17.4 of the Antidumping Agreement. *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, paras. 71-72.

[3] *See* THE NEW SHORTER OXFORD DICTIONARY 2109-2110 (L. Brown ed., 1993) (US-30).

would it ipso facto be specific within the meaning of Article 2? With reference to note 2 to Article 2.1(b) of the SCM Agreement, please explain to what extent, if any, the criteria referred to by the US are "economic in nature".

Part A: Article 2 of the SCM Agreement contains progressive guidelines for the determination of whether a program is specific or non-specific. Article 2.1(b) describes subsidies that are not specific under Article 2. The fact that a subsidy does not meet the description in Article 2.1(b), however, does not mean that it is therefore deemed specific.[4]

Part B: To qualify for a distribution under CDSOA, an applicant (1) must be an affected domestic producer, and (2) must have incurred "qualifying expenditures."[5] An affected domestic producer is defined in the statute as any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that was a petitioner or supporter, that remain in operation, that have not ceased production of the covered product, and that have not been acquired by a company or business that is related to a company that opposed the investigation.

The term "economic" is defined by the New Shorter Oxford Dictionary as "relating to monetary consideration, financial" and "relating to the management of private, domestic, etc., finances."[6] This definition provides support for a broad interpretation of the term "economic." Such a broad definition encompasses the inclusion of any government or private action related to monetary or financial concerns (*e.g.* production, consumption, distribution or other such factors).

A broad interpretation of criteria that are "economic in nature" is supported by the plain language of footnote 2 and the negotiating history.[7] The examples of such criteria (*i.e.*, number of

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[4] A subsidy is specific within the meaning of Article 2.1 if it is shown to be *de jure or de facto* specific within the meaning of Articles 2.1(a) and (c) based on positive evidence.

[5] Qualifying expenditures are defined in the statute as expenditures incurred after the issuance of the antidumping or countervailing duty finding or order in any of the following categories: manufacturing facilities; equipment; research and development; personnel training; acquisition of technology; health care benefits to employees paid for by the employer; pension benefits to employees paid for by the employer; environmental equipment, training, or technology; acquisition of raw materials and other inputs; and working capital or other funds needed to maintain production.

[6] *See* THE NEW SHORTER OXFORD DICTIONARY 781(L. Brown ed., 1993) (US-31).

[7] The drafters intended for Member governments to provide clear and unambiguous language concerning the granting of subsidies to the domestic industry and wanted to establish precise and predictable criteria to limit actionable subsidies. For example, the European Communities noted:

> The main problem raised by the application of the concept of specificity is that subsidies which are de jure generally available may be, in fact, granted in a selective manner. Therefore, the concept should also cover de facto specificity. In this respect, the degree of administrative discretion enjoyed

employees or size of enterprise) clearly indicate an intent by the drafters to include a broad range of economic factors. [8]

The criteria for receiving CDSOA distributions are within the rubric of the term "economic." In supporting a petition, domestic producers act to protect their monetary and financial concerns. Domestic producers support an antidumping or countervailing duty petition because it is in their financial interest to do so. They are experiencing unfair competition in the market.

The requirement that the producer remain in operation is also based on monetary and financial considerations. By remaining in business, a company deals with those monetary and financial concerns that all companies face in maintaining their profitability and viability in the market. Finally, the qualifying expenditures are economic in nature as they relate to operating and production costs.

Question 19. The United States distinguishes between de jure and de facto specificity. Assuming for the sake of argument a subsidy is specific because it contained eligibility criteria or conditions that were not objective, would that be de jure or de facto specificity? When responding, please take into account the following statement by the Appellate Body in Canada - Autos (para. 100):

> *In our view, a subsidy is contingent "in law" upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. The simplest, and hence, perhaps, the uncommon, case is one in which the condition of exportation is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be de jure export contingent where the condition to export is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be de jure export contingent, the underlying legal instrument does not always have to provide expressis verbis that the subsidy is available only upon fulfillment of the condition of export performance. Such*

> by the granting authority and the presence (or, conversely, the absence) of objective criteria for exercising this discretion are certainly relevant. Nevertheless, these and/or any other criteria to determine whether a de jure generally available subsidy is de facto specific must be sufficiently precise to avoid rendering the specificity criterion meaningless.

Negotiating Group on Subsidies and Countervailing Measures, Elements of the Negotiating Framework, Submission by the European Community, MTN/GNG/NG10/W/31 (Nov. 27, 1989) at 5-6 (US-32).

[8] Earlier drafts of footnote 2 included economic factors such as "levels of unemployment, average per capita income, number of employees, size of enterprise, amount of equity or revenues, but could also include such factors as incidence of pollution or health and safety standards." Negotiating Group on Subsidies and Countervailing Measures, Draft Text by the Chairman, MTN/GNG/NG10/W/38/Rev.1 (Sept. 4, 1990) at Article 4.1(b), fn 4 (US-22).

conditionality can also be derived by necessary implication from the words actually used in the measure.

As discussed above, a subsidy is not necessarily specific by virtue of the presence of non-objective criteria. A showing of specificity must still be made under Article 2.1(a) or 2.1(c). If one were to assume, however, that presence of non-objective criteria makes a subsidy specific, it would not be possible to determine whether it would be *de jure* or *de facto* specific without more information about the law. If the law explicitly limited the availability of the subsidy, it would be *de jure* specific. If it, in practice, limited the subsidy to certain enterprises, it would be *de facto* specific.

The question also pre-supposes that the discussion in *Canada-Autos* has relevance to the issue of specificity. The *Canada-Autos* discussion, however, is not instructive because there is a crucial difference between the specificity provisions of Article 2.1 and the export contingency provisions of Article 3. Article 2.1(a), the "de jure" provision of specificity, states that a subsidy is specific if it "explicitly" limits access to a subsidy. "Explicitly," even under the most relaxed definition, must mean at least that the limitation to certain enterprises must be evident on the face of the legislation. Article 3.1(a), however, does not use the term "explicitly," and, as interpreted by *Canada-Autos*, could include situations where the underlying legal instrument does not provide *expressis verbis*, but implicitly, that the subsidy is contingent upon exportation. The use of word "explicitly" in Article 2.1(a) precludes identification of a subsidy as being specific based upon the hypothetical operation of the law rather than the actual words of the law.

Question 20. Would a Member violate Article 5.4 of the AD Agreement if it imposed sanctions on domestic producers that failed to support an anti-dumping petition? Please explain.

It is difficult to answer this hypothetical question without complete facts. Having said that, depending on the actual facts and application of such a measure, it might give rise to a claim of non-violation nullification or impairment. We do not see why it would breach Article 5.4.

Question 21. Has the United States changed the manner in which it performs its assessment of standing (for the purpose of Article 5.4) as a result of the CDSOA? If yes, please explain how.

No. Neither the U.S. laws implementing the WTO standing provisions,[9] nor the manner in which they are applied has changed as a result of the CDSOA.

Question 22. The Statement of Administration Policy issued on 11 October 2000 (Common Exhibit 9) refers to "significant concerns regarding the ... consistency with [US] trade policy objectives" of the CDSOA. Please provide details of the "significant concerns" referred to in that document.

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[9] 19 U.S.C. §§ 1671(4), 1673a(4); 19 C.F.R. § 351.203.

Since the statement issued on October 11, 2000, the Administration of the United States has changed. The current Administration cannot detail the "significant concerns" of the prior Administration as that Administration did not memorialize them. The current Administration has not issued a Statement of Administration Policy identifying any significant policy concerns.

Question 23. Please comment on the second sentence of para. 36 of the European Communities' oral statement.

In its oral statement, the EC argued:

> [I]n order to have a complete and meaningful picture of the relevant U.S. practice, it would be essential to know also how many undertaking[s] were rejected, or were not offered in the first place, because of the opposition expressed, formally or informally, by the domestic industry.[10]

At the outset, the United States notes that it provided information concerning suspension agreements effective August 2001 in Exhibit 7 of its First Written Submission in response to the complaining parties' speculative claims concerning the supposed effect of the CDSOA on the U.S. government's consideration of undertakings. It is the complaining parties who assert that the CDSOA has a particular effect on undertakings and therefore it is their burden to demonstrate that effect. The burden of proof rests upon the party who asserts the affirmative of a particular claim.[11]

In any event, the U.S. government could not possibly know how many undertakings were not offered in the first place because of opposition by the domestic industry. Nor does the United States regularly maintain information concerning the number of undertakings rejected. The United States was able to provide the information in Exhibit 7 because it was based on information available on the Department of Commerce's website and in its public files.

Question 24. On pages 2 and 3 of its oral statement, Indonesia has expressed a number of concerns regarding the CDSOA from the perspective of developing country Members. The same - or similar - concerns have also been expressed by other developing country parties and third parties. Please comment on the concerns raised by Indonesia.

The United States prefaces this answer by noting that Article 15 of the Antidumping Agreement is not within this Panel's terms of reference as it was not identified in any of the panel requests. Therefore, the concerns raised by Indonesia and other developing countries should not be

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[10]EC Oral Statement, para. 36.

[11]Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* WT/DS33/AB/R, adopted 23 May 1997, at 14.

entertained. In any case, the United States fulfills its Antidumping Agreement Article 15 "best efforts" commitment in all cases and will continue to do so. To the extent that Article 15 of the SCM Agreement is a substantive requirement, it necessitates only that the developed countries "explore" constructive remedies before applying anti-dumping duties.

Indonesia's argument is a misplaced effort to use Article 15 to rewrite other Antidumping Agreement provisions, or to insert substantive rules never accepted by negotiators. Moreover, as discussed in the U.S. First and Second Written Submissions, the complaining parties have provided no evidence that the CDSOA will affect the administration of U.S. laws governing undertakings. Therefore, the concerns of developing parties that the CDSOA will somehow affect commitments under Article 15 are similarly unfounded.

Questions to All Parties

Question 32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

To the extent a Member provides subsidies to its domestic industries for any reason, the subsidies must be consistent with or, in other words, in accordance with GATT Article XVI.

Question 33. Please provide an example of a "non-specific" action against dumping.

Non-specific action against dumping is an action covered by the terms of footnote 24 of the Antidumping Agreement. Non-specific action does not include action against dumping, as such, but would include action against the causes or effects of dumping. It is action, however, that does apply to dumped imports or the importer/exporter/foreign producer. One such example is a safeguard.

Question 34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

A Member might conclude that it already has enough undertakings in place and lacks the resources (or does not want to devote the resources) to properly monitor and administer additional undertakings. Or, a Member might consider that negotiating price commitments represents bad policy and that the only desirable form of antidumping measure is a duty equal to the full calculated margin of dumping.

Question 35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

Part A: No. There must be a violation of a particular WTO obligation. A violation of the good

faith *principle* cannot constitute a violation of the WTO Agreement without a violation of a particular obligation in the agreement. Furthermore, nowhere in Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, is there listed an international law principle of good faith. Nor does the WTO distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the agreement and would have the consequences provided in the WTO Agreement. Nor is it clear what is meant by a violation of the international law principle of good faith. If this means action that does not breach any provision of the WTO Agreement,[12] then perhaps the closest analog would be the potential to claim a non-violation nullification or impairment where that applies under the WTO.[13]

Part B: Neither the AD Agreement nor any other provision of the WTO Agreement imposes an independent obligation on Members to act in good faith.

With respect to the present case before the Panel, there is no WTO provision requiring WTO Members to judge the subjective motivations of domestic producers in supporting an antidumping or countervailing duty petition or opposing an undertaking. According to AD Article 5.4 and SCM Article 11.4, the United States is only obligated to meet certain numerical thresholds of domestic industry support before initiating an investigation. According to AD Article 8 and SCM Article 18, undertakings need not be accepted at all. Thus, even if the CDSOA did provide some motivation for domestic producers to support a petition or oppose an undertaking, it would not "threaten" action inconsistent with WTO obligations, or impede the United States from upholding its obligations in good faith under AD Articles 5.4 and 8 and SCM Articles 11.4 and 18.

Question 36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1

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[12] Some commentators have argued for an international law principle of good faith that means "the avoidance of an international obligation by the enactment or application of laws which, while not involving a direct incompatibility with the obligation, enabled the substance of it not to be performed in practice." 2 Sir Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice" 610 (1986).

[13] Note that even here WTO Members have been careful about making non-violation nullification or impairment claims available as demonstrated by Article 26.1 of the DSU. Perhaps the reason WTO Members have been careful about making non-violation nullification and impairment claims available is reflected in the words of the jurist and scholar, Sir Hersch Lauterpacht in discussing the principle of abuse of rights (which some have analogized to the principle of good faith) (following his review of the few cases by the World Court in which abuse of rights had been considered through the mid-1950s):

> These are but modest beginnings of a doctrine which is full of potentialities and which places a considerable power, not devoid of a legislative character, in the hands of a judicial tribunal. There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of justice, must be wielded with studied restraint.

Sir Hersch Lauterpacht, "The Development of International Law" 162 (reprint 1982) (1958).

of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

Part A. No. The panels and Appellate Body in that case were concerned with the issue of whether or not civil and criminal penalties imposed on importers were specific action against dumping within the meaning of Article 18.1 of the Antidumping Agreement. Based on a review of the reports, there is nothing to suggest that they considered a subsidy hypothetical.

ADDRESSED ONLY TO THOSE PARTIES THAT WERE PARTIES OR THIRD PARTIES IN THE 1916 ACT PROCEEDINGS: Was there anything in your submissions to the panel or Appellate Body in the 1916 Act proceedings that would have caused the panel or the Appellate Body to address the meaning of Article 18.1 of the AD Agreement in the context of the pure subsidy hypothetical set forth in question 3 above?

Part B. No.

UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE EC

27 FEBRUARY 2002

Question 1. Would the United States agree that the offset payments have the purpose described in the section of the CDSOA entitled "Findings"? If not, what is the purpose of the offset payments?

No. The "findings" are not part of the law and, in any event, do not identify a purpose. If a purpose is not specifically identified in a law, the purpose of the law is reflected in the language of the law itself. Here, the CDSOA is intended to distribute funds to recipients that meet the criteria set forth in the Act.

Question 2. Assume that a Member imposes a monetary fine on those domestic producers who do not support an application. Would that measure be consistent with Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement? Please identify the relevant wording of those provisions supporting your answer. Given the U.S. position that it is "generally irrational" to oppose relief, would that measure have any influence on the outcome of the support determination? Would the complainants have to show that the domestic producers would not have supported the application in the absence of the fine? Given the U.S. position that the only requirement imposed by Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement is to ascertain whether the quantitative thresholds are met, why should it matter whether the domestic producers support the application in order to escape the fine or for other "subjective motives"? Would a monetary fine provide necessarily a stronger incentive than the offset payments, regardless of their respective amounts?

This hypothetical is not before the Panel, and the United States believes it is more useful to focus on the measure at issue. Having said that, depending on the actual facts and application of such a measure, it might give rise to a claim of non-violation nullification or impairment. We do not see why it would breach Articles ADA 5.4 and SCM 11.4.

Question 3. Do Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement apply to dumping and subsidisation which do not involve imports into the territory of the Member taking the action? If so, how should the term "against" be interpreted in those situations?

First, the premise of this question is incorrect. Articles 18.1 and 32.1 apply to specific action

taken against dumping or a subsidy (not to "dumping or subsidization"). Second, Members do not take specific action against dumping or a subsidy which do not involve imports into their territory.

UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

ANSWERS OF THE UNITED STATES TO QUESTIONS FROM CHILE

27 FEBRUARY 2002

Question 1. We would like to know what tax treatment you give the money distributed under the Continued Dumping and Subsidy Offset Act of 2002 and how these funds are supposed to be reflected in the accounting books of the recipients.

Money distributed under the CDSOA is taxable income and should be reflected in the accounting books of the recipients as such.

*Question 2. What happens to the funds collected as a result of investigations initiated ex officio by the investigating authority? Are the companies from the domestic industry that supported an ex officio investigation -- for example through statements to the press -- entitled to request compensation for expenses incurred***?**

The issue of how funds collected as a result of investigations that were self-initiated by the U.S. Department of Commerce has not specifically been addressed by the U.S. Customs Service. The statute, however, states that the Commission shall forward a list to Customs of "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response."[14] Even if there is no "petitioner," Customs will still receive a list of supporters identified by letters or through their questionnaire responses. The relevant letters and questionnaire responses are those filed in the "Commission's record" or, in select cases, entries of appearances in administrative reviews conduced by the Commerce Department.

Question 3. Let us imagine two possible scenarios: in the first scenario, the investigating authority determines the existence of dumping and/or subsidies, and an antidumping and/or countervailing duty is ultimately imposed. The investigated company will have incurred defence costs as well as other expenses related to the investigation, added to which it is required to pay duties which make its exports more expensive. The domestic industry, on the other hand, which has also incurred expenses during the investigation, can increase its prices thanks to the duties which make the foreign competition more expensive. In the second scenario, in addition to these circumstances, the domestic industry receives, by law, the money collected on imports which were determined to have been dumped and/or subsidized.

[14] 19 U.S.C. § 1675c(d).

How does the situation of the industry investigated (the exporting industry) differ between the first scenario and the second?

It is not clear what is meant by "situation." If the question intends to ask how the exporting industry is affected by the subsidy to the domestic industry, the answer will depend on the facts. In other words, the exporting industry may or may not be affected.

How does the situation of the domestic industry differ between the first scenario and the second?

The domestic industry has received a subsidy.

How does the competitive relationship between the two industries differ between the first scenario and the second scenario?

Again, whether the competitive relationship is affected by a subsidy to the domestic industry will depend on the facts.

Does the United States consider that the industry investigated (the exporting industry) is subject to a burden or liability, inter alia financial, in both scenarios? What is the difference between the burden or liability to which the industry investigated is subject in the first scenario and in the second scenario?

In the first scenario, the duty is imposed on the good being produced (or sold) by the exporting industry/foreign producer. Thus, a duty is an additional financial burden to the exporting industry. However, whether the exporting industry is financially burdened by a subsidy to the domestic industry (scenario two above) will depend on the facts. It may or may not be affected.

Question 4. In paragraph 12 of its oral statement, the United States asserts that the CDSOA does not expressly limit access to certain enterprises, industries or groups. On the contrary, it is potentially applicable to any producer in any industry in the United States ... Thus, to have access to the CDSOA, that producer must file a petition for an anti-dumping or subsidies investigation or support an investigation, which must result in the collection of duties. The question is: does the United States not consider that, regardless of any other motivation, the CDSOA is an incentive for the producer to do what is required by the Act in order to have access to the funds, in other words to file petitions for anti-dumping or subsidies investigations or to support petitions?

No. As explained in the U.S. Second Written Submission to the Panel, the CDSOA does not serve as a real incentive to file or support petitions. The costs of participating in an investigation for an industry, already materially injured or threatened with material injury, could be far greater than the disbursements received years later.

That a petition will result in an order is far from guaranteed: from 1980 to 2000, only 36.1% of the petitions filed resulted in affirmative determinations by both the U.S. Department of Commerce (dumping or subsidization) and the U.S. International Trade Commission (injury and causation).[15]

Whether the producer will then receive payments under the CDSOA is then further contingent on (1) the level of imports, (2) the level of the margins, (3) the number producers supporting the petition, (4) the number of producers filing certifications, and (5) the amount of qualifying expenditures. For example, relatively small import volumes and low margins coupled with a large number of supporting producers and high qualifying expenditures would result in a small pool of duties divided among a large number of producers.

Any payments made under the CDSOA as a result of a successful petition would be at some unknown, future date. The time from filing a petition until duties are assessed and eligible for distribution under the CDSOA is measured in years and dependent on a series of factors: (1) whether an administrative review is requested (by a foreign producer, importer, domestic producer); (2) whether an appeal is taken to the U.S. Court of International Trade and then to the U.S. Court of Appeals for the Federal Circuit; and (3) whether there are remands to the agency for further consideration of particular issues and reexamination by the reviewing court(s). While entries can be liquidated in as little as two years after merchandise enters the United States, liquidation in many cases is 3 to 5 years after entry and can be as long as 10 years in unusual situations.

The "promise" of a remote, uncertain and unknown payment is not an incentive to spend a million plus dollars without knowing whether an order will be issued, the amount of duties that may be collected, or the share of those duties to be received by the company.

Question 5. Similarly, does the United States not consider that given the prospect of receiving public funds in return for support for the initiation of an investigation, it would be irrational – from an economic point of view – for a company to abstain from stating its position or to express opposition?

No. Depending on the producer, it may or may not be irrational, from an economic point of view, for a domestic producer to abstain from stating a position or expressing opposition in the remote chance of receiving distributions.

Question 6. In Exhibit No. 7 the United States identifies all of the price undertakings currently in force. Could the United States tell us how many price undertakings were rejected and why they were rejected?

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[15] *Antidumping and Countervailing Duty Handbook,* USITC Pub. 3482, at figure 9 (Dec. 2001) (Exhibit US-29).

See U.S. Answer to Panel Question 23.