

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

(DS217 & 234)

**EXECUTIVE SUMMARY OF THE ORAL STATEMENT
OF THE UNITED STATES
AT THE SECOND MEETING OF THE PANEL**

March 20, 2002

1. **ARTICLE 5(b) OF THE SCM AGREEMENT.** Mexico's Article 5(b) argument should be rejected because the CDSOA is not a "specific" subsidy and because Mexico has not demonstrated nullification or impairment or any other form of "adverse effects" under SCM Article 5. According to Mexico, the CDSOA is *de jure* specific because each offset is a "separate and distinct subsidy." Specificity analysis, however, must be carried out for the challenged subsidy program (here the CDSOA) as a whole rather than by focusing on individual disbursements. Otherwise, no matter how broadly available and broadly distributed benefits under a government program may be, each disbursement would be considered a specific subsidy – a result that would render Article 2 a nullity.
2. Nor does a textual analysis of Articles 1 and 2 support Mexico's interpretation. Article 2.1(a) expressly states, in relevant part, that if the "legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises," the subsidy is specific. Therefore, the focus is *not* on each subsidy disbursed but on the legislation establishing the subsidy program.
3. Although the Panel need not reach the question of adverse effects in this dispute, Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits under Article 5(b) of the SCM Agreement. Mexico's theory that an "actionable" subsidy can be established without any showing of adverse effects is inconsistent with the structure and design of the SCM Agreement and would eliminate the primary distinction between Articles 3 and 5 of the SCM Agreement. In any event, because the CDSOA does not violate any WTO Agreement provision, this point is moot.
4. Mexico's theory of a non-violation nullification or impairment claim should also be rejected. Mexico fails to understand that the application of a measure is a requirement to establish the existence of nullification or impairment. While Mexico may have the right to *bring* a challenge based on the mandatory/discretionary doctrine, that *doctrine* does not allow Mexico to bypass the required elements of a non-violation nullification or impairment claim.
5. Mexico has also failed to demonstrate that the competitive relationship in the U.S. market between domestic and Mexican products has been upset by a subsidy which was not reasonably anticipated. Mexico's argument is squarely contradicted by the relevant provisions and jurisprudence. First, GATT Article XXIII:1(b) requires that a benefit "is being nullified or impaired," not that it will be in the future. Second, Mexico mis-cites the *EEC – Oilseeds* case.
6. In any event, Mexico's *per se* argument misunderstands the nature of a non-violation claim. *Per se* nullification or impairment by definition exists only where a complainant proves an actual WTO violation. Mexico does claim a current nullification or impairment by the "maintaining" of subsidies under the CDSOA, but it is with regard to a different benefit allegedly accruing to Mexico under GATT Articles II and VI. Yet, "predictability" in planning future sales has never been recognized as a benefit accruing under GATT Articles II and VI.
7. Finally, Mexico says not to worry about opening the flood gates for non-violation nullification or impairment claims because Article 5(b) only covers subsidies that "systematically" nullify or impair benefits. However, there is simply no basis in Article 5(b) for

limiting non-violation nullification or impairment claims in this way.

8. **SPECIFIC ACTION AGAINST DUMPING OR SUBSIDIES.** Under the subsidies provisions of SCM Agreement and GATT Article XVI, a Member's right to use subsidies is subject to other Members' rights to impose countervailing duties on imports, or to take authorized countermeasures. There is no "fourth" right to bring a WTO challenge to circumvent those provisions as the complaining parties are attempting to do in this case by mounting a *per se* attack on a domestic subsidy using Articles 18.1 or 32.1 of the Antidumping and SCM Agreements, respectively.

9. The test to determine whether a measure is "specific action against" dumping or subsidies is whether the measure is (1) based upon the constituent elements of dumping or a subsidy, and (2) burdens, (3) the dumped or subsidized imported good, or an entity connected to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer. In other words, there are three criteria and just because a measure may be based upon the constituent elements of dumping does not necessarily mean that it is "against" dumping or subsidies.

10. Some parties claim that the CDSOA is specific action "based upon" the constituent elements of dumping or a subsidy because an AD/CVD order is a condition precedent to distributions. However, funding CDSOA distributions with AD/CVD duties is not any different than funding state retirement homes in terms of the presence of the constituent elements. What makes "specific action" in the main provisions of Articles 18.1 and 32.1 different from "action" in the footnotes is that it is action based *directly* upon the constituent elements. Whether or not a law authorizes specific action can only be determined by examining the actual requirements of that law.

11. Other complaining parties argue that the CDSOA is "specific action" because the recipient is a domestic producer that is "affected" by dumping or subsidization. The statute, however, does not require producers to show they are injured by dumped or subsidized imports to receive distributions and the amount of the distribution has nothing to do with measuring or recovering damages. In any event, is it not clear why that fact, if true, would even be relevant to whether distributions are "specific action" under Articles 18.1 and 32.1.

12. The complaining parties have also failed to establish that the CDSOA is an action "against" dumping or a subsidy. The ordinary meaning of the term "against" suggests that the action must operate *directly* on the imported good or the entity connected to it. This interpretation is supported by the definition of dumping in GATT Article VI:1 which defines dumping as *products* of one country being introduced into the commerce of another country at less than normal value. The object of "specific action" under Articles 18.1 and 32.1 extends to the entity connected to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer. This is consistent with the panel and Appellate Body reports in *1916 Act*.

13. Complaining parties' alternative definitions of the word "against" are not informed by its context in Articles 18.1 and 32.1. In that context, there are already four examples of measures

that are “specific action against” dumping as identified by the Appellate Body in the *1916 Act* case: (1) duties on imports, (2) provisional measures on imports, (3) price undertakings for imports, and (4) civil and criminal penalties on importers. Each one of the measures imposes a limitation or burden *directly* on the imported goods or the entity connected to, in the sense of being responsible for, the dumped or subsidized good. None of the measures apply *indirectly* in ways unrelated to the imported dumped or subsidized good.

14. Many of the complaining parties argue that the CDSOA is a specific action against dumping or subsidies because of its supposed effect on the competitive relationship or the conditions of competition between imported and domestic goods. There is no basis in the text of Articles 18.1 and 32.1 for a conditions of competition test. Even if the subsidy is considered to have changed the conditions of competition between the producers of the good that received the distribution and all other producers, both foreign and domestic, that did not, it does not mean that measure acts against dumping or subsidies. A presumed negative effects test or a conditions of competition test is overly broad as it would cover any other type of domestic legislation that improved the position of the domestic industry.

15. To support their “effects” argument, the complaining parties urge this Panel to rely on the CDSOA’s legislative history. The CDSOA’s legislative history would only be relevant to its interpretation if the statute were ambiguous and the Panel then needed it to determine the fact of the CDSOA. Nothing about the operation of the CDSOA is ambiguous, and Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, only limit *specific action* against dumping or subsidies.

16. In conclusion, under complaining parties’ test the first Member to subsidize can prevent, other Members from granting subsidies just by virtue of the fact that they were first. This reading cannot reasonably be a proper construction of Article 32.1 and would lead to perverse results. It is also not supported by the structure of the SCM Agreement including footnote 35 as well as the distinction between prohibited and actionable subsidies. The complaining parties are attempting to insert another category of prohibited subsidies, besides export subsidies, into the SCM Agreement, *i.e.* counter-subsidies. The Panel should reject such a distorted interpretation.

17. If this Panel finds that the CDSOA is an “action against” dumping or subsidies, then the United States submits that it is otherwise permitted under footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively as action under GATT Article XVI to address the effects dumping and/or subsidies. No party disputes that the CDSOA authorizes “action” in the form of a subsidy, and no party disputes that the CDSOA is consistent with GATT Article XVI. The complaining parties have themselves argued that the CDSOA is intended to offset the effects of continued dumping or subsidies. Therefore, if the Panel finds that the CDSOA authorizes action against dumping and/or subsidies, it is nevertheless action under GATT Article XVI to address the effects of such practices.

18. **STANDING.** The text of Articles 5.4 and 11.4 do not contain a requirement that “support” for a petition must be “genuine” or “true,” but rather establish objective, numerical benchmarks. The United States has implemented these benchmarks which have not been

modified in any way by the CDSOA.

19. The complaining parties have provided no support for their claim that the CDSOA precludes a good faith examination of industry support under Articles 5.4 and 11.4. Complaining parties do *not* assert that the CDSOA prevents the United States from calculating in good faith whether these numerical thresholds are met, but rather that this good faith calculation is not enough. The United States must second guess whether producers' expressions of support are "true." This is not required by the agreements and is an unworkable requirement.

20. It is highly improbable that CDSOA is a factor in a domestic company's or union's consideration of whether to support a petition. CDSOA distributions, if any, are contingent on a number of factors and at some unknown, future date. The "promise" of a remote, uncertain and unknown payment is hardly worth gambling a million plus dollars on a "frivolous" antidumping or countervailing duty case. Moreover, petitioners who file frivolous antidumping and countervailing duty cases subject themselves to potential antitrust scrutiny.

21. Even assuming *arguendo*, that the CDSOA has an effect on the domestic producers' decision to support or oppose a petition, it is not clear what effect that would necessarily be. Whatever the effect, it remains the case that the mere provision of such an inducement is not contrary to the Antidumping Agreement or the SCM Agreement.

22. **UNDERTAKINGS.** U.S. law merely requires that the Commerce Department, *to the extent practicable*, consult with the domestic industry before determining whether an undertaking is in the "public interest." Views of the domestic industry do not in any way dictate the outcome and, for this reason, they do not determine the decision to accept or reject a proposed undertaking. The *Bethlehem Steel* cases do not hold otherwise. Indeed, the only evidence presented to this Panel establishes that the domestic industry has opposed more than 75 percent of the undertakings which the United States has *accepted* since 1996.

23. Complaining parties do not seem to understand why petitioners would ever support undertakings after the CDSOA. Given that only 36.1% of the petitions filed result in affirmative final determinations by Commerce and the Commission, a petitioner has ample incentive to support a suspension agreement which is likely to provide relief than take its chances on affirmative final determinations. In sum, the complaining parties have failed to make a *prima facie* case that the CDSOA violates the standing or undertaking obligations in the Antidumping and SCM Agreements.

24. **GATT ARTICLE X:3(a).** The complaining parties made it perfectly clear that the allegedly offending measure with respect to Article X:3(a) is U.S. implementation of its antidumping and countervailing duty laws, not U.S. implementation of the CDSOA. The complaining parties did not, however, explain where in their requests for the establishment of a panel the allegedly offending measures are cited. Complaining parties' Article X:3(a) claims are thus, not within this Panel's terms of reference and must be rejected.

25. Some complaining parties assert that the CDSOA "administers" the trade laws. The United States administers its trade laws, not the CDSOA. In fact, the Department of Commerce,

which handles standing and undertakings determinations, does not administer the CDSOA, the Customs Service does. *Argentina - Hides* provides no guidance on this issue.

26. Even if the complaining parties can overcome the jurisdictional defect, their arguments they case entirely on the unsupported belief that the CDSOA will influence domestic interests to bring or support an investigation, or oppose an undertaking. Moreover, there is no requirement in the agreements that the administering authority (1) examine the reasons behind industry support for petitions or (2) accede to domestic industry opposition to an undertaking. In contrast to *U.S.-301*, in the instant case the complaining parties have been unable to demonstrate that the CDSOA requires, *or permits a Member to engage in*, any prohibited conduct.