***** CHECK AGAINST DELIVERY *****

UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

Arbitrations on the "Reasonable Period of Time"

Statement of the United States at the Oral Hearing

May 6, 2003

1. Good morning, Mr. Taniguchi. The United States appreciates the opportunity to appear before you today to further explain why the 15 months we have proposed to implement the recommendations and rulings of the Dispute Settlement Body ("DSB") in these cases is a "reasonable period of time." We appreciate your willingness to serve as the arbitrator in this matter and we recognize and thank you for the work and time involved on your part.

A Reasonable Period of Fifteen Months is Justified

2. We have outlined in our submission why a fifteen-month "reasonable period of time" is justified. I will not wholly repeat those arguments here, other than to say that this proposed reasonable period of time was based on the practicalities of the U.S. legislative process, past experience in legislative implementation, and the technical complexity of necessary measures. It is worth noting that the United States is not requesting a period of time to implement changes to the regulations promulgated under the Continued Dumping and Subsidy Offset Act ("CDSOA"). Rather, in order to minimize implementation time, the United States has limited its request to a

reasonable period of time for legislative changes. I would now like to take this opportunity to respond to some of the claims made by Canada and the other complainants in their submission.

A 6-Month Period of Time Is Unsupported and Unreasonable.

3. In their submission, the complaining parties do little more than emphasize that implementation should be "prompt" and then assert that the United States should need no more than six months to enact legislation. We have no quarrel with the fact that implementation of DSB recommendations and rulings must be "prompt" - in fact, we have been and remain strong advocates of prompt compliance. However, mere invocation of this term, or of the fact that implementation should be done in the shortest period possible within the Member's legal system, cannot itself serve to justify an unrealistic and unsupported implementation period. The complaining parties's proposal appears to express nothing more than their desired time frame for implementation, without regard to how the U.S. legislative process actually operates.

4. While it is true that the U.S. legislative process has few mandatory time frames, as explained in our written submission, there are approximately 10 legislative steps that a bill goes through before it becomes law. The complaining parties' proposal that the reasonable period of time expire on July 27, 2003, does not allow sufficient time for those steps - which include pre-legislative work and consultations, transmittal and introduction of proposed legislation in Congress, referral to committees and subcommittees of jurisdiction, public hearings, "mark-ups," reporting of proposed legislation by the committees to the full House and Senate, consideration by the House and Senate, reconciliation of any differences between the House and Senate

versions in conference committee, consideration by the House and the Senate of the reconciled version, and signature by the President. Further, the complaining parties' request ignores the basic reality that legislation in the United States overwhelmingly passes at the end of a congressional session.

5. In their submission, the complaining parties cite the passage of the Continued Dumping and Subsidy Offset Act ("CDSOA") itself as an example of legislation that was passed expeditiously. As noted in our letter dated May 2, 2003, however, this type of provision was not new to Congress in 2000, but was first introduced years earlier. Since 1988, similar provisions had been debated and considered by Congress on several occasions. For example, in 1988, a provision for the distribution of antidumping duties was proposed in the U.S. Congress.[1] And, again, in 1990 and 1991, legislation was proposed that would distribute antidumping duties to domestic producers.[2] Finally, 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).[3] Thus, the actual figure for the time required to pass the CDSOA legislation was 12 years.

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[1] Trade and International Economic Policy Reform Act of 1987, H.R. 3, 100th Cong. s. 167 (1987).

[2] Countervailing and Antidumping Duty Amendment Act of 1990, H.R. 5320, 101st Cong., 2d Sess. s. 7 (1990); Countervailing and Antidumping Duty Amendment Act of 1991, H.R. 3272, 102nd Cong., 1st Sess. s. 7 (1991).

[3] GATT Fair Trade Enforcement Act of 1994, H.R. 4206, 103rd Cong. s. 103 (1994); Antidumping Compensation Act of 1994, H.R. 4716, 103rd Cong. s. 2 (1994).

6. In their submission, the complaining parties cite several previous Article 21.3 arbitration awards. A consideration of all of these supports the U.S. request in this proceeding. For example, they cite the award in *EC – Beef Hormones* in support of the proposition that implementation should be prompt, without acknowledging either that the EC in that dispute proposed a reasonable period of time of 39 months or, more importantly, that the arbitrator in that case found that "prompt" enactment of legislation requires 15 months.

7. In *Japan – Alcohol*, another arbitration report cited by the complaining parties, the arbitrator decided on a reasonable period of time of 15 months to implement legislative changes. But even in that case, Japan did not implement within 15 months, instead reaching an agreement with the United States for implementation four years after adoption.

8. In fact, not one of the arbitral awards cited by the complaining parties involved less than 10 months for legislation. In *Indonesia - Autos*, Indonesia requested 15 months as a reasonable period of time for legislative implementation, but the arbitrator awarded 12 months. In *Chile - Price Bands*, although Chile requested 18 months to implement legislative changes, the arbitrator awarded 14 months as a reasonable period of time. Similarly, in *Chile - Alcohol*, Chile was awarded 14 months and 9 days for implementation through legislative changes. And the United States recalls that Article 3.2 of the DSU states that the dispute settlement system is intended to provide "security and *predictability* to the multilateral trading system."

9. In contrast, in *Australia - Salmon*, the arbitrator did award eight months but it was based upon the fact that the parties agreed that implementation involved an administrative, not

legislative, process. The *Australia – Salmon* arbitrator cited *EC – Hormones* in stating that less than 15 months was justified for administrative, as opposed to legislative, changes.[4] Likewise, the award in *Canada - Pharmaceuticals* of 6 months was based upon the fact that Canada had proposed *administrative* measures to achieve implementation.

10. That legislative changes take longer than administrative measures is well recognized. For example, the arbitrator in *Canada - Pharmaceuticals* explained:

> [I]f implementation is by *administrative* means, such as through a regulation, than the "reasonable period of time" will normally be shorter than for implementation through *legislative means...* . To be sure, the administrative process can sometimes be long: but the legislative process can oftentimes be longer.[5]

11. Likewise, the arbitrator in *United States - Section 110(5)* stated that "a legislative change is likely, absent evidence to the contrary, to be more time-consuming than an administrative change."[6]

12. Thus, prior arbitral awards do not support the complaining parties recommendation of 6 months for implementation through legislative means. In fact, of the five complaining parties that have had arbitrations on the reasonable period of time for implementation through *legislative* measures, none of them have proposed that they be given anything resembling 6 months to implement a legislative measure, and they received from 10 months up to more than15 months. They include *EC - Bananas* (over 15 months) and *Hormones (*15 months), *Japan - Alcohol* (15

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[4] WT/DS18/9, para. 43.
[5] WT/DS/114/13, para. 49.
[6] WT/DS160/12,para. 34.

months), *Korea - Alcohol* (over 11 months), *Canada - Patent Term* (10 months), and *Chile-Liquors* (over 14 months) *and Price Bands* (14 months). Indeed, the shortest *proposal* was by Canada in *Canada-Patent Term* of 14 months and 2 days.

13. The complaining parties also cite the arbitrations in *United States – 1916 Act* and *United States – Section 110* as showing that arbitrators have recognized the flexibility in the U.S. legislative process and expect prompt legislative action from the United States. What the complaining parties disregard, however, is that, in those cases, by "prompt", the arbitrator meant 10 to 12 months – again, for legislation alone. And, significantly, in both cases, the reasonable period of time was eventually extended by the Dispute Settlement Body to the *end* of the congressional session, as originally requested by the United States. It is misleading for the complaining parties to suggest that the arbitrators considered 6 or 7 months a reasonable period of time for the United States to implement through legislative means in those disputes.

14. Finally, the complaining parties assert that their 6-month proposal is justified because they believe that implementation of the DSB recommendations and rulings in these cases is not complicated. Mr. Taniguchi, the complaining parties assume that repeal of the CDSOA is the only acceptable manner of implementation. As you are aware, the method of implementation is up to the United States to determine, not the complaining parties. Such issues are beyond the scope of Article 21.3 arbitration proceedings.

15. In any event, the complaining parties' assertion that implementation is not technically complex is incorrect. As explained in our written submission, simple repeal of the measure is

not the only option for bringing the CDSOA into conformity with the United States' WTO obligations. The Appellate Body did not state that *any* expenditure of funds would be WTO-inconsistent. Thus, a possible legislative option would be to revise the CDSOA to disburse the funds in a manner consistent with our WTO obligations. As noted in our written submission, based on several consultations with Congress to date, it appears that legislators are seriously considering this option. The difficulty arises in devising a permissible expenditure of the funds as there are many factors to consider. These include, for example, whether the criteria for eligibility as a recipient of the expenditure would be "inextricably linked to, and strongly correlated with, a determination of dumping." In addition, any potential expenditure of funds must be analyzed under the WTO's domestic subsidy rules.

16. As noted in our written submission and letter of May 2nd, Members are not required to undertake *extraordinary,* rather than normal, legislative procedures in order to implement DSB recommendations and rulings. Repeal is not the only road to implementation in these cases and, even if it were, this could not justify an unrealistic period for implementation which ignores legislative realities. Even in *1916 Act* and *Section 110(5)*, where the United States did not rely upon the complexity of the necessary legislative measures, the arbitrator awarded 10 months and 12 months, respectively, as the reasonable period of time for legislative implementation of the DSB's recommendations and rulings in those disputes.

17. The complaining parties also argue that the fact that repeal of the CDSOA was included as provision in the Fiscal Year 2004 budget "implies a recognition" on the part of the United States that repeal of the CDSOA will be completed by the end of the current fiscal year,

September 30, 2003. This is incorrect. The Fiscal Year 2004 budget submitted to Congress was simply the vehicle for the Administration to propose repeal of the CDSOA. Unlike other elements of the budget, the repeal of the CDSOA is not tied to the end of the fiscal year and in particular it is not intended to be included in appropriations acts. Thus, its inclusion in the proposed budget says nothing about the timing of the legislation.

18. Finally, the complaining parties seem to suggest that the determination of the reasonable period of time should take into account the level of harm that may be suffered by the complaining parties. Other arbitration reports have recognized, however, that "factors unrelated to an assessment of the shortest period of time possible for a Member to implement, within its legal system, . . . are irrelevant to determining the "reasonable period of time" under Article 21.3(c) of the DSU."[7] The level of harm that may be suffered by the complaining parties is simply not relevant to an assessment of the length of the reasonable period of time for implementation through legislative means by the United States. In *Canada - Patent Term*, the arbitrator specifically rejected Canada's argument that the low commercial value of the patents expiring during the proposed reasonable period of time was somehow relevant to the determination of the reasonable period of time.[8] Nor was the ongoing, daily harm in *Bananas* or *Hormones* or any of the other arbitration proceedings considered to be a factor to used in determining the reasonable period of time. Thus, the timing of the next distribution under the

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[7] *Canada - Autos*, WT/DS139/DS142/12, para. 55.

[8] WT/DS170/10, para. 48.

CDSOA is not legally relevant to a determination of the reasonable period of time for the United States to implement the DSB's recommendations and rulings in these disputes.

19. In sum, the complaining parties' proposed deadline of July 27th for implementing legislation is unrealistic and unsupported. It is inconsistent with all evidence of what the U.S. legislative process requires, and is at odds with the complaining parties' own citations to examples of "prompt" implementation in other arbitrations.

20. In conclusion, given the nature and the complexity of the U.S. legislative process, the technical complexity of the implementation in this instance, as well as the previous record of how long it takes for legislative implementation, it would be unreasonable to allow less than 15 months to complete necessary legislation.