UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

February 14, 2002

1. At issue in this case is a law entitled the "Continued Dumping and Subsidy Offset Act of 2000" or, in short, the CDSOA. The CDSOA is a government payment program. Like all governments, the U.S. federal government makes payments to individuals or groups for all sorts of purposes such as health care, public welfare, agriculture, etc. Other WTO Members, including the complaining parties, maintain similar programs for their nationals.

2. The CDSOA has nothing to do with the administration of the antidumping and countervailing duty laws. The CDSOA instructs the U.S. Customs Service to distribute funds in an amount not to exceed the duties collected pursuant to antidumping and countervailing duty orders to eligible domestic producers. The amount of the distributions have nothing to do with the injury to the domestic producer or the recovery of "damages" by the domestic producer. Rather, the amount depends upon the applicant's qualifying expenditures and whether other applicants also had qualifying expenditures.

3. As a subsidy program, one would expect that the issues in this case would center on Article 3 or Article 5 of the SCM Agreement. While we've heard today general assertions of supposed harm that CDSOA will cause to the complaining parties' companies that compete with U.S. producers, none of the complaining parties have backed up their allegations by pursuing an Article 5(c) claim. In the view of the United States, this is tantamount to an admission by the complaining parties that they cannot show the harm they complain of.

4. Except for Mexico, the complaining parties' primary argument is that because the source of the funds for the distributions under CDSOA are AD/CVD duties, the CDSOA is, on its face, inconsistent with the Antidumping and SCM Agreements. The reality is that, because money is fungible, the only real connection between the funds distributed under CDSOA and the orders is that the duties collected serve to cap or limit the amount of the annual distributions.

5. There is simply no WTO obligation with respect to the uses to which AD/CVD duties might be put, or to distinguish the use of these funds from any other source of government revenue. Other than considering whether the CDSOA is an impermissible subsidy, a panel proceeding is simply not the appropriate forum to address the complaining parties' concern about the use of duties as a source of funds for domestic expenditures.

The CDSOA Is Not An Actionable Subsidy

6. It is elementary that the granting of a subsidy is not, in and of itself, restricted under the SCM Agreement. The Appellate Body recently recalled this point in its report in *United States – FSC*. To be actionable, as claimed by Mexico, the complaining party must demonstrate that the subsidy is "specific" within the meaning of Article 2 of the SCM Agreement. Mexico, however, has failed to show that the CDSOA is a specific subsidy. There is no question that CDSOA is not *de jure* specific under Article 2.1(a) as its text does not expressly limit access to certain enterprises, industries, or groups. Mexico does not even claim *de facto* specificity.

7. Even if Mexico passed the specificity hurdle, Mexico has failed to establish that the CDSOA has caused adverse effects to its interests as required by Article 5 of the SCM Agreement. Instead, Mexico claims that the CDSOA *as such* causes *per se* adverse effects in the form of nullification or impairment of benefits under Article 5(b). Mexico, however, has not established that there is a presumption in Article 5(b) that a subsidy that violates another WTO provision is an actionable subsidy without showing adverse effects. Regardless, the CDSOA is not inconsistent with any other WTO provision.

8. Nor does Mexico satisfy the following requirements to establish a claim of non-violation nullification or impairment: 1) the application of a measure; 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. Mexico has failed to establish the first and third elements at least.

9. First, Mexico's claim is insufficient on its face as Mexico does not challenge the application of the CDSOA. Second, Mexico has failed to demonstrate that the competitive relationship between any U.S. products and Mexican imports has been upset by a subsidy. 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. Indeed, Mexico cannot present such evidence as it has challenged the CDSOA on its face, not the actual distributions under the CDSOA. Finally, the United States has shown that Mexico could have reasonably anticipated that AD/CVD duties would be distributed to the domestic industry given proposed legislation in the U.S. Congress in 1988, 1990, 1991, and 1994.

10. Mexico's argument that CDSOA will *per se* nullify or impair benefits under GATT Articles II and VI flies in the face of the notion that a non-violation claim is an exceptional remedy, renders the causation requirement meaningless, and automatically converts any specific domestic subsidy program with any connection to a product on which there is a tariff concession into a non-violation nullification or impairment of benefit. In sum, Mexico has failed to sustain its burden of demonstrating that the CDSOA is a "specific" subsidy that is causing adverse effects within the meaning of Articles 2 and 5 of the SCM Agreement.

CDSOA Is Not Specific Action Against Dumping or a Subsidy

11. The CDSOA cannot be inconsistent with U.S. obligations under the Antidumping and SCM Agreements, when read with Article VI of GATT 1994, because the statute is not within the scope of those agreements. The CDSOA does not impose any type of measure on imports or importers. The CDSOA is a statute authorizing government *payments*. I note that the U.S. is not challenging the conclusion of the Appellate Body in the *1916 Act* dispute that duties, provisional measures and undertakings are the exclusive remedies for dumping. Thus, we are not contradicting the U.S. statements in the *Norwegian - Salmon* dispute cited by some of the complaining parties today. The question is whether the CDSOA is a specific action against dumping and a subsidy.

12. The complaining parties' entire argument in this regard is built upon the Appellate Body's reasoning in *United States - Antidumping Act of 1916*. The United States notes that most, if not all, of the complaining parties offer only a cursory analysis of whether the reasoning of the Appellate Body in *1916 Act* is applicable to the SCM Agreement. For the complaining parties to prevail on their claims under GATT Article VI:3 and the SCM Agreement, however, this Panel must find that it does. For the reasons explained in footnote 64 of our written submission, it does not. Even assuming *arguendo* that it does, the CDSOA is not inconsistent with the SCM Agreement for the same reason that it is not inconsistent with the Antidumping Agreement - it does not constitute a specific action against dumping or a subsidy.

13. In *1916 Act*, the Appellate Body concluded that Article 18.1 of the Antidumping Agreement applies to actions based upon the constituent elements of dumping. The constituent elements of dumping are: (1) products imported and cleared through customs, which are (2) priced lower than their normal value.

14. The CDSOA, however, simply fails to satisfy the test articulated in the *1916 Act*. Without question, the CDSOA distributions are not based upon the constituent elements of dumping or a subsidy. As explained in our written submission, the distributions are based upon the applicant's qualification as an "affected domestic producer" who has incurred "qualifying expenditures." The Appellate Body's conclusion that the 1916 Act was a specific action against dumping was very clearly based upon the fact that the "constituent elements of dumping were built into the essential elements of civil and criminal liability under the 1916 Act."

15. The statute at issue in this dispute, the CDSOA, is completely different from the 1916 Act. The CDSOA is a government payment program based upon the definition of "affected domestic producer" and "qualifying expenditures." The Act has nothing to do with measuring the extent to which a U.S. producer has been injured or "damaged" by dumping or subsidization of imports. In contrast, the 1916 Act is a statute imposing criminal and civil liability upon importers for practices that specifically include the constituent elements of dumping.

16. The U.S. is perplexed by the complaining parties' repeated statements that disbursements under the CDSOA require the existence of a AD/CVD order. The complaining parties are simply restating the obvious. There is no question that this is the case - of course AD/CVD duties will not be collected without an order and presumably the complaining parties would not want it any other way. Thus, the action against dumping or a subsidy has already been taken.

17. The question in this case is whether the Antidumping Agreement or the SCM Agreement limit what a government can do with these revenues once collected. Nothing in these agreements speaks to this, nor is there any ban on spending this revenue. Spending this money cannot *per se* be action against dumping or a subsidy - otherwise duties once collected could never be spent. The complaining parties' reliance on the existence of AD/CVD orders is thus misplaced.

18. In addition to not being based upon the constituent elements of dumping or a subsidy, the CDSOA is not "against" dumping or subsidies. This Panel must consider the proper interpretation

of the term "against" as a matter of first impression. The ordinary meaning of the word "against" suggests that the specific action must be in hostile opposition to and in contact with dumping or a subsidy. Here, the CDSOA imposes no additional liability or burden on imported goods or importers and, therefore, cannot be considered an action "against" dumping or a subsidy.

19. Some of the complaining parties have criticized the use of the New Shorter Oxford English Dictionary's definition of the term "against." They take issue with the United States' position that to be considered "against" dumping or a subsidy, the action must impose or apply a burden or liability on the importer or imported good. They are amused by the example of the government flags flying at half-mast. Yet, the reality is that under their test, which is action taken in response to dumping, the fictitious flag law would constitute a specific action against dumping and a subsidy.

20. The sole basis of the complaining parties' argument that the CDSOA is "against" dumping and subsidies is the supposed intent or purpose of the law. Many complaining parties refer to statements by various members of the U.S. Congress and the title of the law itself. However, this Panel must look to the actual operation of the law. As emphasized by the panel in the *1916 Act* dispute, the purpose of a measure is not relevant to determining whether it falls within the scope of GATT Article VI and the Antidumping Agreement. A panel must look at what the measure actually does. The complaining parties rely heavily on the reasoning in *1916 Act*. They should not be permitted to do so in a self-serving selective manner.

21. Further, as explained in paragraphs 101-111 of our written submission, in the event that the Panel concludes that the CDSOA is an action against dumping or a subsidy, footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively, operate to allow the CDSOA as an "action" otherwise permitted. In sum, the complaining parties have failed to establish that the CDSOA is even within the scope of, let alone violates, Articles 1 and 18 of the Antidumping Agreement; Articles 4.10, 7.9, 10, and 32 of the SCM Agreement; or Article VI:2 and 3 of the GATT 1994.

The CDSOA Is Not Inconsistent With Any Obligations Related to Standing, Undertakings, or GATT Article X:3

22. The complaining parties choose to ignore the fact that the standing provisions of the Antidumping and SCM Agreements do not include any requirement that the investigating authorities examine a statement of support to determine the *subjective motivation or reason* that the domestic industry supported the initiation of an antidumping or countervailing duty investigation. Articles 5.4 and 11.4 simply require authorities to follow certain quantitative benchmarks in determining whether an investigation should be initiated. There is no allegation in this dispute that the U.S. investigating authority is failing to follow those numerical benchmarks.

23. Likewise, the undertaking provisions of the Antidumping and SCM Agreements do not require investigating authorities to accept a proposed undertaking in the first place. Nor do those provisions limit the types of reasons that may cause the administering authority to decline a proposed undertaking. The decision to accept or reject a proposed undertaking is within the complete

discretion of the investigating authorities. Thus, even if the CDSOA could be viewed as distorting the consideration of undertakings, the decision to reject a proposed undertaking cannot form the basis of a violation of Articles 8 and 18.

24. In any event, as explained in paragraphs 123-125 of our written submission, the complaining parties have offered no empirical support for their contention that the CDSOA has a distorting effect on standing determinations and the consideration of undertakings. The complaining parties' allegations are based on nothing more than mere speculation.

25. With regard to GATT Article X:3, the complaining parties have offered no arguments or evidence concerning the actual administration of the CDSOA, which is the measure at issue in this dispute. Consistent with the plain language of Article X:3(a), various panel and Appellate Body reports have concluded that Article X:3(a) only addresses the *administration* of national laws. Here, the complaining parties do not even argue that the CDSOA is being administered in an unreasonable, impartial or non-uniform manner. Nor did they identify the provisions of U.S. law relating to standing determinations and price undertakings as measures in their panel requests. Thus, even if it were concluded that the CDSOA does somehow affect the administration of U.S. laws relating to standing and price undertakings, this could not conceivably form the basis of an Article X:3(a) finding against the CDSOA, which is the only measure at issue in this dispute.

Conclusion

26. In closing, there cannot be a breach of an obligation that does not exist – and such an obligation is not created by virtue of the number of complaining parties. The CDSOA simply distributes government revenue. Contrary to Mexico's contention, the CDSOA does not meet the requirements of an actionable subsidy under Article 5(b). Unlike the 1916 Act, the CDSOA imposes no liability or burden on imported goods or importers. Furthermore, it is not based upon the constituent elements of dumping or a subsidy. In other words, it does not address dumping or subsidies *as such*. Accordingly, it is not a "specific action against" dumping or subsidies. Likewise, the CDSOA has nothing to do with standing determinations or the consideration of price undertakings. As a legal matter, the complaining parties have not identified any inconsistency with the obligations contained in the standing and undertaking provisions. As a factual matter, the complaining parties would have this Panel engage in sheer speculation.