UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE ANSWERS
OF THE UNITED STATES TO THE QUESTIONS FROM THE PANEL

March 6, 2002

Questions to the United States

1. With respect to the Panel's question concerning 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. 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.

2. With respect to the Panel's question of whether undertakings are specific action "against" dumping or subsidization, the Appellate Body in *United States - Anti-Dumping Act of 1916* explained that the permissible responses to dumping to definitive anti-dumping duties, provisional measures, and price undertakings. The three forms of action are, by definition, specific action against dumping or subsidization. Moreover, undertakings fall within the definition of specific action "against" dumping or subsidization 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.

3. With respect to the Panel's question of whether severance of diplomatic relations would constitute action "against" dumping or subsidization, such action would not be action "against" dumping or subsidization because it would not apply to imports, or their importers, foreign producers, or exporters.

4. With respect to the Panel's question on the meaning of the phrase "in particular" in Article 5(b) of the SCM Agreement, 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." 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.

5. With respect to the Panel's question concerning whether a subsidy would be *ipso facto* specific if it contained eligibility criteria or conditions that were not "objective," 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.

6. With respect to the Panel's question concerning how the criteria for CDSOA eligibility are economic in nature, 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." This definition provides support for a broad interpretation of the term "economic" that encompasses the inclusion of any government or private action related to monetary or financial concerns (*e.g.* production, consumption, distribution or other such factors). The plain language of footnote 2 and the negotiating history support a broad interpretation of criteria that are "economic in nature." The criteria for receiving CDSOA distributions are within the rubric of the term "economic." First, in supporting a petition, domestic producers act to protect monetary and financial concerns in a market where they are experiencing unfair competition. Second, the requirement that the producer remain in operation is also based on monetary and financial considerations because by remaining in business, a company deals with those monetary and financial concerns of maintaining profitability and viability in the market. Third, the qualifying expenditures are economic in nature as they relate to operating and production costs.

7. With respect to the Panel's question concerning whether a subsidy would be *de jure* or *de facto* specific if it were rendered specific because of eligibility requirements that were not objective, the United States points out that 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)). Assuming *argendo* 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.

8. Concerning the Panel's request to consider the Appellate Body's statement in *Canada-Autos* at para. 100, the request 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.

9. With respect to the Panel's question of whether imposing sanctions for failure to support a petition would violate AD Agreement Article 5.4, it is difficult to answer this hypothetical question without complete facts, but do not see why it would violate Article 5.4.

10. With respect to the Panel's question of whether the United States has changes the manner in which it performs its assessment of standing as a result of the CDSOA, the answer is no.

11. With respect to the Panel's question concerning the meaning of the Statement of Administration Policy issued on 11 October 2000 referring to "significant concerns regarding the ... consistency with [US] trade policy objectives" of the CDSOA, the U.S. Administration has changed since issuance of the statement. The current Administration cannot detail the "significant concerns" of the prior Administration as that Administration did not memorialize them.

12. Concerning the Panel's request for comment on the EC's statement that it would be important to know how many undertakings were rejected or not offered in the first place because of industry opposition, 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 and does not regularly maintain information concerning the number of undertakings rejected. The United States notes that it provided information concerning suspension agreements effective August 2001 (based on information available on the Department of Commerce website and in its public files) in Exhibit 7 of its First Written Submission. 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.

13. Concerning the Panel's request for comment on concerns raised by Indonesia and other complaining parties about the impact of the CDSOA on developing countries, the United States notes 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, and therefore cannot be entertained by the Panel. In any case, the United States continues to fulfill its Article 15 "best efforts" commitment. Article 15 only necessitates only that the developed countries "explore" constructive remedies before applying anti-dumping duties. Indonesia's argument is a misplaced effort to rewrite other Antidumping Agreement provisions, or to insert substantive rules never accepted by negotiators. Moreover, the complaining parties have provided no evidence that the CDSOA will affect the administration of U.S. laws governing undertakings; thus concerns that the CDSOA will somehow affect commitments under Article 15 are similarly unfounded.

14. With respect to the Panel's question about the extent to which subsidization can be considered an action "under" Article XVI of GATT 1994, subsidies provided to a Member's domestic producer for any reason must be consistent with or, in other words, in accordance with GATT Article XVI.

15. With respect to the Panel's request for 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.

16. With respect to the Panel's request for 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.

17. With respect to the Panel's question of whether a violation of the international law principle of good faith necessarily constitutes a violation of the WTO Agreement, 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. Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, does not 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.

18. With respect to the Panel's question of whether the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith, neither agreement nor any other provision of the WTO Agreement imposes an independent obligation on Members to act in good faith. Concerning the present case, there is no WTO provision requiring 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.

19. With respect to the Panel's question of whether there is anything in 1916 Act reports to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above, there is nothing in the reports to suggest that they considered a subsidy hypothetical. 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.

20. With respect to the Panel's question about whether there was anything in the U.S. 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, the answer is no.

UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE ANSWERS
OF THE UNITED STATES TO THE QUESTIONS FROM CHILE

March 6, 2002

1. With respect to Chile's question about the tax and accounting treatment given the money distributed under the CDSOA, the money distributed under the CDSOA is taxable income and should be reflected in the accounting books of the recipients as such.

2. With respect to what happens to the funds collected as a result of investigations initiated ex officio by the investigating authority, the U.S. Customs Service has not specifically addressed this issue. The statute, however, states that the Commission shall forward to Customs a list 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." 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.

3. With respect to Chile's question concerning how the "situation" of the industry investigated differs when in one "scenario" an order is imposed and in the second "scenario" an order is imposed, plus the domestic industry receives money collected on dumped or subsidized imports, 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.

4. With respect to Chile's question concerning how the "situation" of the domestic industry differs in the two "scenarios," in the second, the domestic industry receives a subsidy.

5. With respect to Chile's question concerning how the competitive relationship between the two industries differs in the two "scenarios," the answer will depend on the facts of the case.

6. With respect to Chile's question concerning the difference between the burden or liability to which the investigated industry is subject in the two "scenarios," 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.

7. With respect to Chile's question as to whether the CDSOA is an incentive for domestic

producers to file or support antidumping petitions in order to have access to the "funds," 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. Moreover, that a petition will result in an order is far from guaranteed and even if an order does result, payments, if any, received are contingent on a number of factors and remote in nature. 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.

8. With respect to Chile's question concerning whether it would be irrational for a company to abstain from stating its position or to express opposition to an investigation, 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.

9. With respect to Chiles's question concerning how many price undertakings were rejected, the United States references its response to Question 23 from the Panel where it indicates that it does not keep information on undertakings that have been rejected.

UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE ANSWERS OF THE UNITED STATES TO THE QUESTIONS FROM THE EUROPEAN COMMUNITIES

March 6, 2002

1. With respect to the EC's question about whether CDSOA offsets have the purpose described in the section of the CDSOA entitled "Findings," the answer is 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.

2. With respect to the EC's hypothetical concerning a monetary fine on domestic producers who do not support an application, 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.

3. With respect to the EC's question concerning whether 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, 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.