UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

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

February 5, 2002

1. Thank you, Mr. Chairman and Members of the Panel. We are pleased to be here today to present the views of the United States.

2. Let me begin by saying that, due to the large number of written submissions filed on behalf of the complaining parties, the United States has not attempted to respond to every mis-characterization and inaccuracy contained in those submissions. We have focused our attention on the complaining parties' primary legal arguments. Of course, we stand ready to address any point or argument the Panel finds relevant.

3. At issue in this case is a law entitled the "Continued Dumping and Subsidy Offset Act of 2000" or, in short, the CDSOA. The first step in determining whether the CDSOA is WTO-consistent is understanding exactly what the law does and what it does not do. The answer is quite simple. 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.

4. The CDSOA has nothing to do with the administration of the antidumping and countervailing duty laws. The CDSOA instructs the United States 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. There are essentially two requirements to receive a distribution. One, the applicant must be an "affected domestic producer" which basically means that the applicant must have been a petitioner or supported an antidumping or countervailing petition. Second, the applicant must have incurred "qualifying expenditures," which includes, for example, money spent on

manufacturing facilities, equipment, research and development, etc. The amount of the distributions under the Act have nothing to do with 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.

5. 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. Yet, despite the fact that all of the complaining parties included an actionable subsidy claim in their panel requests, Mexico is the only party to pursue that claim before the Panel. And Mexico brings that claim under subparagraph (b), not paragraph (c) which requires a showing of actual harm such as the impediment of imports, price undercutting, lost sales, etc. Even the threat of harm is enough under Article 5(c). While we've heard today general assertions of supposed harm that the 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. If the harm is "real" as stated by Canada today, why didn't Canada bring an actionable subsidy claim under Article 5(c)? 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. Further, as explained in our first written submission, the United States considers that Mexico's claim under Article 5(b) is without merit. I will come back to Mexico's argument momentarily.

6. Except for Mexico, the complaining parties' primary argument is that because the source of the funds for the distributions under the CDSOA are antidumping and countervailing 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 the CDSOA and antidumping and countervailing duty orders is that the duties collected under those orders serve to cap or limit the amount of the annual distributions under the CDSOA.

7. The complaining parties are essentially arguing that the WTO Agreement imposes a limit on the uses to which AD/CVD duties as a source of revenue may be put by a government. No word, phrase, or paragraph in the entire WTO Agreement, however, supports their argument. Furthermore, GATT and WTO negotiators have not raised or addressed how Members can spend or distribute moneys received as AD/CVD duties.

8. As the Appellate Body cautioned in *India – Patents,* a panel's role is limited to the words and concepts used in the agreement. Under DSU Article 19.2, a panel cannot add to or diminish the rights and obligations provided in the covered agreements. The complaining parties are asking this Panel to adopt arguments that would unlawfully expand the existing obligations under the WTO Agreement. There is simply no WTO obligation with respect to the uses to which antidumping and countervailing 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' concerns about the use of antidumping and countervailing duties as a source of funds for domestic expenditures.

9. As I just mentioned, the appropriate legal framework for analyzing the CDSOA is the SCM

Agreement. That is because the disciplines relevant to government payment programs are contained in the subsidies provisions of the SCM Agreement (and the Agreement on Agriculture for those products). Because the CDSOA is a payment program, the relevant legal question is whether the CDSOA is a prohibited or actionable subsidy. As you know, none of the complaining parties argue that the CDSOA is a prohibited subsidy (and indeed it is not), and only Mexico has pursued an actionable subsidy claim. I will turn now to Mexico's argument.

The CDSOA Is Not An Actionable Subsidy

10. Mexico asserts that the CDSOA is an actionable subsidy under Article 5(b) of the SCM Agreement. 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*:

> Article 1.1 of the SCM Agreement sets out a definition of a "subsidy" for the purposes of that Agreement. Although this definition is central to the applicability and operation of the remaining provisions of the Agreement, Article 1.1 itself does not impose any obligation on Members with respect to the subsidies it defines. It is the provisions of the SCM Agreement which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1.

11. To be actionable, as claimed by Mexico, the complaining party must demonstrate that the subsidy is causing adverse effects within the meaning of Article 5. Even before that step, however, the complaining party must demonstrate that the subsidy is "specific" within the meaning of Article 2 of the SCM Agreement.

12. Here, Mexico has failed to meet either of these requirements. First, Mexico has failed to show that the CDSOA is a specific subsidy. There are two types of specificity under the SCM Agreement: *de jure* or explicit specificity and *de facto* specificity. There is no question that the CDSOA is not *de jure* specific under Article 2.1(a) as the text of the CDSOA does not expressly limit access to certain enterprises, industries, or groups. On the contrary, by its terms, it is potentially applicable to *any producer in any industry* in the United States that has filed a petition or supported an antidumping or countervailing duty investigation resulting in the collection of duties. Currently, the U.S. government has more than 250 antidumping and countervailing duty orders outstanding, covering a wide variety of domestic industries and products from agriculture to high-technology. Consistent with the standard for non-specificity in Article 2.1(b), eligibility for the CDSOA distributions is based on objective criteria, and eligibility is automatic if the criteria are met. Article 2.1(b) does not relate to *de facto* specificity only, as claimed by Mexico today.

13. Nor is there any evidence that the CDSOA is *de facto* specific within the terms of Article 2.1(c). Indeed, Mexico does not even claim *de facto* specificity as it elected to challenge the CDSOA on its face. Given that distributions are potentially available to any producer in any industry and recipients will change over time, it is doubtful that Mexico could ever show *de facto* specificity.

14. Subsidies that are not "specific" are not actionable under Article 5 of the SCM Agreement. Thus, the Panel need not even reach the question of adverse effects.

15. In any event, 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. Mexico does not even attempt to show actual adverse effects. 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). First, Mexico 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 any showing of adverse effects. Such an interpretation would eliminate the primary distinction between prohibited subsidies where effects are presumed and actionable subsidies where the complaining party must establish adverse effects. Regardless, as explained in our written submission, the CDSOA is not inconsistent with any other WTO provision.

16. Nor does Mexico satisfy the requirements to establish a claim of non-violation nullification or impairment. It is important to remember that a non-violation claim of nullification and impairment is an exceptional remedy and should be approached with caution by the Panel. There are three elements of a non-violation claim: 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.

17. Mexico has failed to establish the first and third elements at least. First, Mexico's claim is insufficient on its face as Mexico does not challenge the application of the CDSOA. As explained in our written submission, GATT Article XXIII:1(b) expressly refers to the "application" of a

measure. Mexico's argument that the term "application" actually means "non-application" is not persuasive in light of the instruction contained in footnote 12 to Article 5.

18. Mexico also has failed to satisfy the third element. That is, Mexico has failed to demonstrate that the competitive relationship between any U.S. products and Mexican imports has been upset by a subsidy, and that the subsidy was not reasonably anticipated by Mexico.

19. 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. Without such evidence, the "relevant competitive relationship" has not been established.

20. Mexico's argument that distributions under the CDSOA will *per se* nullify or impair benefits under GATT Articles II and VI is untenable and must be rejected. Not only does it fly in the face of the notion that a non-violation claim is an exceptional remedy, but such an interpretation would render the causation requirement meaningless and automatically convert 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 benefits.

21. Finally, the United States has shown that Mexico could have reasonably anticipated during the Uruguay Round negotiations that antidumping and countervailing duties would be distributed to the domestic industry. There was proposed legislation in the U.S. Congress for similar distributions to the domestic industry in 1988, 1990, 1991, and 1994.

22. 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.

23. Let's turn now to the complaining parties' impermissible remedy claims.

CDSOA Is Not Specific Action Against Dumping or a Subsidy

24. The complaining parties allege that the CDSOA is inconsistent with U.S. obligations under the Antidumping and SCM Agreements, when read with Article VI of GATT 1994, because it allegedly mandates impermissible specific action against dumping or a subsidy. These claims should be rejected because the CDSOA is not within the scope of GATT Article VI or the Antidumping or SCM Agreements. The provisions cited by the complaining parties address the imposition of antidumping or countervailing duty measures on imports or importers. The CDSOA does not impose any type of measure on imports or importers. As I explained earlier, 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.

25. 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.

26. 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.

27. 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."

28. 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.

29. The U.S. is perplexed by the complaining parties' repeated statements that disbursements under the CDSOA require the existence of an 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.

30. 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.

31. In addition to not being based upon the constituent elements of dumping or a subsidy, the CDSOA is not "against" dumping or subsidies. In *1916 Act*, the Panel and Appellate Body had no reason to interpret the term "against" because the criminal and civil penalties authorized by the act were imposed directly upon importers. Thus, this Panel must consider the proper interpretation of the term "against" as a matter of first impression. As explained in our written submission, 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.

32. 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.

In response today, the EC states that the flag example is not inconsistent because it will have no impact on dumping or subsidization. Yet, the CDSOA also has no impact on dumping or subsidization. Again, the complaining parties repeatedly claim that their companies will be harmed (in other words, affected or impacted) by the distributions, but they do not offer any proof of such harm. Nor do they make a claim under the provision where harm from a domestic subsidy is most relevant, Article 5(c) of the SCM Agreement.

33. 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. In other words, the Panel must look at what the law does, not what its policy purpose is. In *1916 Act*, the U.S. argued that the intent or the purpose of the 1916 Act was to address the antitrust conduct of predatory pricing and therefore was not within the scope of Article VI and the Antidumping Agreement. The EC and Japan countered, quite vigorously, that the purpose of the law was not relevant. The panel agreed and rejected the U.S. argument. 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.

34. In *1916 Act*, there was no question that the civil and criminal penalties imposed on importers operated "against" dumping. Here, it is equally clear that the operation of the CDSOA imposes no burden or liability on imported goods or importers. The CDSOA has nothing to do with imported goods or importers; it is a payment program.

35. For these two reasons, the CDSOA is not a "specific action against" dumping or a subsidy contrary to GATT Article VI, Articles 1 and 18 of the Antidumping Agreement, and Articles 10 and 32 of the SCM Agreements.

36. 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.

37. 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

38. Let's turn now to standing and undertakings. The complaining parties also speculate that the

CDSOA will affect the administration of U.S. laws governing standing and undertaking determinations and, therefore, violates Articles 5.4 and 8 of the Antidumping Agreement, and Articles 11.4 and 18 of the SCM Agreement.

39. 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.

40. 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.

41. 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.

42. With regard to price undertakings, the complaining parties' allegation that the Commerce Department will no longer enter into price undertakings because the domestic industry will always oppose them is specious. First, it is the Commerce Department, not the domestic industry, which decides whether to accept a price undertaking. Exhibit US-7 shows that 75% of the U.S. undertakings effective in August 2001 were entered into by the Commerce Department despite the fact that the domestic industry *opposed* them. Thus, there is simply no factual basis to conclude that the CDSOA has had or will have any effect on the Commerce Department's consideration of proposed undertakings.

43. 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. It is not actual harm, as argued by Canada today, but actual administration that must be shown. Here, the complaining parties do not even argue that the CDSOA is being administered in an unreasonable, impartial or non-uniform manner.

44. Instead, the complaining parties argue that the United States is failing to administer its national laws relating to standing and price undertakings in a reasonable, impartial and uniform manner. However, the complaining parties did not 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

45. 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. As such, the most relevant agreement is the SCM Agreement. Mexico is the only complaining party to pursue a subsidy claim. As we explained in our written submission and today, contrary to Mexico's contention, the CDSOA does not meet the requirements of an actionable subsidy under Article 5(b).

46. The complaining parties' remaining arguments are misplaced and should be rejected by the Panel. The CDSOA has nothing to do with imported goods or importers. Unlike the 1916 Act, it 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.

47. 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.

48. For the reasons stated today and in our written submission, the United States requests that the Panel find that the CDSOA is not an actionable subsidy under Article 5(b) of the SCM Agreement, and is not inconsistent with GATT Articles VI and X:3, or the various provisions of the Antidumping and SCM Agreements cited by the complaining parties.

49. Thank you, Mr. Chairman and Members of the Panel. This concludes my oral statement.