UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

Second Written Submission

of the

United States of America

February 27, 2002

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I. INTRODUCTION

1. In its First Written Submission to the Panel, the United States explained why the Panel should reject the complaining parties' claims with respect to the Continued Dumping and Subsidy Offset Act ("CDSOA"). In this submission, the United States responds to arguments raised in their oral statements during the first meeting of the Panel. The United States addresses the questions posed by the Panel, the European Communities ("EC") and Chile in separate documents filed together with this submission.

2. As previously explained, the CDSOA is a government payment program. The complaining parties obviously do not dispute this. Yet, despite their insistence that the CDSOA, as a subsidy program, will cause or has caused substantial adverse effects, none of the complaining parties have challenged the Act as an actionable subsidy under Article 5(c) of the SCM Agreement, for which even a showing of threat of harm is sufficient. This fact alone casts serious doubt on the credibility of the complaining parties' claims of harm.

3. It seems that the complaining parties have gone out of their way to avoid having to actually demonstrate the effects they so vigorously allege. Mexico even argues that a non-violation claim of nullification or impairment can succeed on the basis of a *per se* upset to the competitive relationship. Acceptance of Mexico's argument would turn a non-violation nullification or impairment claim on its head by making it easier to prevail using this "exceptional remedy" than asserting a violation of a particular provision.

4. Instead of pursuing the most relevant legal claim given the allegations in this dispute, the complaining parties argue that the CDSOA constitutes a "specific action against" dumping or a subsidy. The complaining parties' argument rests on essentially three points: 1) the distributions are funded by collected duties; 2) the recipient competes with foreign producers that are exporting dumped or subsidized goods; and 3) the alleged intent of the law is to counteract dumping or subsidies.

5. As explained more fully below, each of these points is legally insufficient. First, there is nothing in the agreements which distinguishes the use of AD/CVD duties from any other source of government revenue. Second, the identity of the recipient as a competitor is relevant only if the appropriate test under Articles 18 and 32 is a "presumed negative effect" on the imported good or the entity doing the exporting (or importing). As explained below, there is no basis in the text of those provisions for the application of a "presumed negative effects" test. And, third, the intent or purpose of the law is not legally relevant. As the EC and Japan argued in the *1916 Act* dispute, the purpose of the law does not determine whether it is WTO-consistent. The question is whether the actual elements of the measure satisfy the test for the scope of the provisions at issue.

6. Finally, like their allegations of harmful effects, the complaining parties' argument that the CDSOA distorts the administration of standing and undertaking provisions is without any supporting evidence. More importantly, their argument would require this Panel to rewrite the WTO obligations regarding standing determinations and the acceptance of price undertakings.

7. In short, the complaining parties have failed to satisfy their burden of establishing a *prima facie* case of a WTO violation. A WTO violation cannot be created out of unwritten obligations and pure speculation. For these and the reasons below explained more fully below, the United States respectfully requests that the Panel reject the complaining parties' claims.

II. THE CDSOA IS NOT AN ACTIONABLE SUBSIDY

8. In its oral statement, Mexico elaborated on its claim that the CDSOA is inconsistent with U.S. obligations under Article 5 of the SCM Agreement. As the complaining party in this case, Mexico bears the burden of establishing a *prima facie* case that the CDSOA is inconsistent with Article 5. Neither Mexico's first written submission nor its oral presentation, however, offered any positive evidence to support its claim.

9. As explained in our first written submission, Mexico's claim must fail because the CDSOA is not a "specific" subsidy, and Mexico has not established "adverse effects" in the form of nullification or impairment of benefits within the meaning of Article 5.

A. Article 5 Does Not Apply Because the CDSOA Is Not a "Specific" Subsidy

10. Under Article 2.1 of the SCM Agreement, a subsidy is actionable under Article 5 of the SCM Agreement if it is specific either in law (*de jure)* or in fact (*de facto*).[1] This determination of specificity must be clearly substantiated by the complaining party on the basis of positive evidence.[2] Mexico has alleged that the CDSOA, on its face, is specific because CDSOA payments are necessarily, *de jure*, limited to an industry or enterprise or "group" thereof.[3] At the first panel meeting, Mexico clarified that it is not claiming that the CDSOA is *de facto* specific.[4]

11. Mexico's actionable subsidy claim should be rejected for the reason that it has failed to

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[1] SCM Agreement at Articles 1.2 and 2.1.

[2] SCM Agreement at Article 2.4.

[3] Mexico Oral Statement, paras. 14-16.

[4] Mexico Oral Statement, paras. 13.

establish that the CDSOA is "specific" on the basis of positive evidence as required by Articles 1 and 2 of the SCM Agreement. Under Article 2.1 of the SCM Agreement, the determination of specificity turns on whether the subsidy is limited "to an enterprise or industry or group of enterprises or industries."[5] Article 2.1(a), the provision relied upon by Mexico, states in particular that

> where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific

12. The phrase "certain enterprises" is defined for purposes of Article 2.1 as "an enterprise or industry or group of enterprises or industries."[6] Thus, Article 2.1(a) covers subsidies that are *explicitly* limited to *an* enterprise or industry or *group* of enterprises or industries. For obvious reasons, Mexico does not claim that the CDSOA is limited to a single enterprise or industry. Thus, for the Panel to find that the CDSOA is a *de jure* specific subsidy, it would have to conclude that the universe of industries and enterprises which could *in principle* receive CDSOA payments can be considered a "group of enterprises or industries" under Article 2.1.

13. Although there is no WTO precedent providing interpretative guidance regarding how small and homogenous a group of beneficiaries must be in order to qualify as "a group of enterprises or industries" in the context of Article 2.1, the CDSOA does not present a close case. CDSOA benefits are not limited to an enterprise, industry, or group thereof. Any producer that meets the objective and neutral criteria is eligible for distributions. As illustrated by the language of the statute, CDSOA benefits are available in principle to any producer of any product on which antidumping or countervailing duty duties could be collected. Narrower groups than this, such as "all manufacturing" and "all agriculture," are too broad to qualify as a "group of enterprises or industries" for specificity purposes.[7] CDSOA payments are available to all agricultural producers and manufacturers, creating a universe of potential recipients far too large and varied to be considered a "group" in this context.

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[5] SCM Agreement Article 2.1.

[6] *Id*.

[7] *See e.g., Standard Chrysanthemums from the Netherlands*, 61 FR 47,888, 47,890 (Dep't Comm. 1996) (Final Results Admin. Rev.) (grants not specific because all agricultural products were eligible); *Certain Carbon Steel Products from France,* 39,332, 39-338-39 (Dep't Comm. 1982) (Final CVD Deter.) (special pensions given to miners not specific because employees of all extractive industries were eligible); *Commission Regulation 1741/2000 of 5 August 2000, Imposing a Provisional Countervailing Duty on Imports of Polyethylene Terephthalate (PET) Originating in India, Malaysia, Taiwan and Thailand*, 2000 O.J. (L199/16) paras. 100-102 (insurance premiums were not specific because they were generally available for all manufacturing and agricultural companies).

14. Mexico presented two arguments in its oral statement which are aimed at rehabilitating its specificity claim. Neither argument is persuasive.

15. First, Mexico argues that each CDSOA distribution is a *de jure* specific subsidy because the money is kept in separate accounts, is capped by the duties collected under a particular AD/CVD order, and is only distributed to enterprises that produce the domestic like product and were among the petitioners in the original proceeding.[8]

16. 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 of the SCM Agreement a nullity and one that Mexico cannot really mean to endorse. Mexico certainly provides no legal support or precedent for its unusual "one-outlay-at-a-time" analysis.

17. Second, Mexico implicitly argues that the CDSOA cannot meet the "objective criteria" standard of Article 2.1(b) and, for that reason, can be found *de jure* specific under Article 2.1(a).

18. Contrary to Mexico's assertion, the CDSOA meets the standards set out in Article 2.1(b). CDSOA distributions are based on objective criteria, and eligibility is automatic if the criteria are met. An affected domestic producer is eligible to receive a distribution for qualifying expenditures if (1) it was a petitioner or interested party in support of the petition, and (2) it remains in operation.[9] The enterprises eligible for distributions will vary from year to year as new cases are brought; as entries are liquidated and duties are, or are not, assessed; and as orders are revoked. The list of qualifying expenditures is also neutral, objective, and applies across-the-board for all domestic industries.[10]

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[8] Mexico Oral Statement, para. 17.

[9] 19 U.S.C. §§ 1675c(a) and (b).

[10] WTO Members have found subsidies not to be specific where eligibility is neutral and automatic and the actual pattern of distribution does not favor particular industries or enterprises. *Commission Regulation 123/2000 of 20 January 2000, Imposing a Provisional Countervailing Duty on Imports of Staple Fibres (PSF) Originating in Australia and Taiwan and Terminating the Anti-Subsidy Proceeding Concerning Imports of PSF Originating in the Republic of Korea and Thailand*, 2000 O.J. (L/16/3) paras. 67-72 (Taiwan's tax credits for Research & Development and Personnel Training were not specific because (1) the tax credits are generally available for all companies investing in R & D and personnel training; (2) objective criteria were established governing the eligibility of the Measures; (3) eligibility to receive the benefit was automatic and (4) the Government of Taiwan had no discretion to determine which enterprise was eligible or not.).

19. Even if the criteria of the CDSOA were not considered to meet the description in Article 2.1(b), however, that would not mean that the CDSOA is automatically specific.[11] Mexico would still have to demonstrate by positive evidence that the CDSOA constitutes a *de jure* specific subsidy, which it has not done.

20. In sum, Mexico has failed to demonstrate that the Article 2.1(a) requirement that the "legislation under which the granting authority operates, explicitly limits access to a subsidy to certain enterprises" is satisfied in this case.[12] The Panel should reject Mexico's actionable subsidy claim for this reason alone.

B. Mexico Has Failed to Demonstrate "Adverse Effects"

21. As demonstrated above, the Panel need not reach the question of adverse effects in this dispute. Nevertheless, the United States explains below that Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits.

22. Pursuant to footnote 12 in Article 5(b), the existence of nullification or impairment under Article 5 of the SCM Agreement is to be established in accordance with the practice of application of GATT Article XXIII.

23. Under GATT and WTO practice, the non-violation provisions of GATT Article XXIII:1(b) have offered an exceptional remedy that panels have approached with caution.[13] "Members negotiate the rules that they agree to follow and only exceptionally will they expect to be challenged for actions not in contravention of those rules."[14] There are three requirements of a non-violation nullification or impairment claim under Article XXIII:1(b): (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.[15]

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[11] A subsidy is specific within the meaning of Article 2.1 if it is shown to be *de jure or de facto* specific within the meaning of Articles 2.1(a) and (c) based on positive evidence.

[12] Mexico Oral Statement, paras. 15 and 16.

[13] *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos Affecting Products*, WT/DS135/AB/R, adopted 5 April 2001, para. 186 *citing* Panel Report, *Japan - Measures Affecting Photographic Film and Paper,* WT/DS44/R, adopted 22 April 1998, para. 10.37.

[14] *See European Communities – Asbestos,* para. 186.

[15] *See Japan -Film*, paras. 10.41, 10.76, 10.82, 10.86.

24. As explained in our first submission, the panel in *Japan – Film* interpreted the first requirement to mean that Article XXIII:1(b) limits non-violation claims to measures that are currently being applied.[16] Furthermore, this interpretation is supported by DSU Article 26.1 which also states that a non-violation finding must be based on "application" of the measure:

> [w]here the provisions of paragraph 1(b) of Article XXIII of GATT 1994 are applicable to a covered agreement, a panel or the Appellate Body may only make rulings and recommendations where a party to the dispute considers that any benefit accruing to it directly or indirectly under the relevant covered agreement is being nullified or impaired or the attainment of any objective of that Agreement is being impeded *as a result of the application* by a Member of any measure, whether or not it conflicts with the provisions of that Agreement.

25. Despite the clear language in GATT Article XXIII:1(b) and DSU Article 26.1, Mexico argues that footnote 12 does not prevent it from challenging the CDSOA as such under a non-violation nullification or impairment theory because Mexico has brought the claim under Article 5(b). Mexico posits that footnote 12 relates to the "determination of the existence of nullification or impairment, not the question of when a challenge can be brought under Article 5."[17]

26. A simple review of the text of footnote 12 confirms that it does not distinguish between "procedural" issues and "substantive" issues, as asserted by Mexico. The practice in determining the existence of non-violation nullification or impairment under GATT Article XXIII:1(b) includes the requirement that the measure be currently applied. In this sense, Mexico's argument is circular because the determination of the existence of nullification or impairment is based upon the application of the measure, not the measure itself.

27. For these reasons, Mexico's claim, on its face, is insufficient to satisfy the first requirement because it does not challenge the application of the CDSOA.

28. Mexico also has failed to meet the third requirement because it has not demonstrated that the competitive relationship between U.S. products and Mexican imports has been upset by a subsidy, and that Mexico did not reasonably anticipate the subsidy. With respect to this third requirement, Mexico has simply speculated that the distributions will reduce the ability of the Mexican exporter to compete and sell in the U.S. market.[18] Yet, Mexico does not even identify the affected Mexican imports. Indeed, Mexico cannot identify such imports as it chose to

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[16] *See Japan– Film*, para. 10.57.

[17] Mexico Oral Statement, para. 26.

[18] Mexico Oral Statement, paras. 5, 34.

challenge the law as such.

29. Mexico justifies its *per se* argument on the basis that the CDSOA allegedly "systematically" upsets the benefits accruing to Mexico under GATT 1994, and that there is a clear correlation and linkage between the CDSOA and the alleged upset of those benefits because the amount of distributions equals the amount of duties collected and the recipients filed or supported the AD/CVD petition.[19]

30. As explained in our first written submission, the nullification or impairment of benefits cannot be presumed in a non-violation claim.[20] In its oral statement, Mexico cites the *EEC Oilseeds* case for the proposition that it need not produce any evidence demonstrating the nullification or impairment because it is allegedly "systematic," and can instead "focus" on "whether there has been an adverse change in conditions of competition legitimately *expected* by Mexico."[21] This argument misreads *EEC -- Oilseeds*, where the Panel sustained the non-violation claim on the basis that the complainant had *shown* that the competitive relationship was *actually* upset. The Panel did not simply accept the proposition that the EEC subsidy upset that relationship *per se.* Nor did the Panel state that nullification or impairment may be presumed if it is "systematic" in nature.[22] In fact, the United States submitted voluminous data detailing the operations and mechanisms of the subsidy programs and adverse effects to show that its exporters of the particular goods in question suffered from the change in the competitive relationship. In the end, the Panel sustained the claim, having "carefully analyzed" the data.[23] Mexico has submitted no such detailed data and, in fact, as explained above, has not even managed to identify any particular products for which the competitive relationship has been or will of necessity be upset.

31. Mexico's expectations with respect to U.S. tariff concessions are only reasonable with respect to the products covered by those tariff concessions. Indeed, the 1955 Working Party Report cited by Mexico in its first submission specifically states that "a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession

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[19] Mexico Oral Statement, para. 44.

[20] The United States is not arguing that Mexico must show adverse trade effects. The requirement is that Mexico show actual upset to the competitive relationship.

[21] Mexico Oral Statement, paras. 37-39 .

[22] Mexico does not explain how a "systematic" upset of benefits differs from a non-systematic upset of benefits.

[23] *GATT Panel Report in EEC-Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, L/6627, BISD37S/86, adopted 25 January 1990, para. 147.

will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned."[24]

32. Here, the CDSOA is not a product-specific subsidy and Mexico, having challenged the law *as such*, did not (indeed, cannot) identify any products to which benefits accrue. The CDSOA itself does not identify any specific product but can apply to any product subject to an antidumping or countervailing duty order. The amount of money received under the CDSOA is not linked to the level of production or sale of that product or designed to supplement those levels. As the CDSOA is not a product-specific subsidy, Mexico's claims that CDSOA *per se* nullifies or impairs benefits under GATT Articles II and VI should be rejected.

33. Finally, even if the Panel were to accept Mexico's argument that there is *per se* nullification or impairment, there is no reason to believe that the CDSOA will cause "more than a de minimis contribution" to any nullification or impairment.[25] Mexico assumes that offsets will make it more difficult for its exporters to sell into the U.S. market in a manner that avoids the payment of anti-dumping duties or in a manner that enables sales to be made with the additional payment of anti-dumping and/or countervailing duties.[26] Yet, Mexico provides no justification for its assumption that offsets will be used to lower domestic prices or have any effect on the domestic market.[27] Under the CDSOA, domestic producers may use their offset for any purpose, including making gifts to charity, compensating workers, developing non-subject products, or paying creditors. How any of these activities could affect Mexican producers of the products subject to orders has not been established.[28]

34. Mexico has also failed to establish the third requirement when it claims that it could not

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[24] *See Report of the Working Party on Other Barriers to Trade*, BISD 3S/222. at para. 13 (3/3/55) (emphasis added).

[25] *Japan – Film*, paras. 10.57 and 10.84.

[26] Mexico First Written Submission, para. 105.

[27] Mexico also ignores the fact that antidumping duty orders do not require foreign exporters to raise U.S. prices because dumping can also be eliminated by the reduction of normal value.

[28] Panels and the Appellate Body have repeatedly refused to rely on speculation to find a WTO violation. *See e.g.* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 168-74 (Appellate Body rejects panel decision finding a violation of Article II:1 of GATS based on "pure speculation" supported by arguments rather than evidence); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted April 2001, paras. 145, 147-48, 192 (Appellate Body rejects panel decision finding that two products are "like products" under Article III:4 based on speculation in the absence of any evidence submitted on the issue of consumer tastes and habits).

have reasonably anticipated the introduction of the CDSOA because previous legislative proposals had not been enacted into law.[29]

35. This argument is without merit. Whether Mexico believed that the CDSOA would or would not become law in the United States is not germane to the Panel's inquiry. The question is whether Mexico was on notice that the United States could pass such a measure. The answer to that question is "yes." Discussions in Congress concerning measures similar to the CDSOA took place prior to and during the Uruguay Round negotiations. Thus, Mexico could have reasonably anticipated that such a measure could become law in the United States.

36. In sum, Mexico has failed to make a *prima facie* case that the CDSOA is an actionable subsidy because the CDSOA is not a "specific" subsidy and Mexico has not established "adverse effects" in the form of nullification or impairment of benefits within the meaning of Article 5.

III. THE CDSOA IS NOT A SPECIFIC ACTION AGAINST DUMPING OR A SUBSIDY

37. Despite the fact that the parties agree that the CDSOA is a subsidy, only Mexico elected to challenge the CDSOA on that basis. The remaining complaining parties argue primarily that the CDSOA is "specific action against" dumping or subsidization contrary to Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively.

38. Articles 18.1 and 32.1 state that "[n]o specific action against dumping" or "a subsidy" "can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Article 18.1 was recently interpreted by the panels and Appellate Body in *United States – AntiDumping Act of 1916.* In that case, however, no one argued that distributions of moneys collected were "specific action against" dumping or a subsidy. On the contrary, that case involved the imposition of civil or criminal liability directly on the importer based on pricing conduct that fell within the definition of dumping. Therefore, the findings in the *1916 Act* case offer only limited guidance in this case.

39. Based on the ordinary meaning of the text and the limited guidance provided by the *1916 Act* reports, the United States submits that the test to determine whether a measure is "specific action against" dumping or subsidization is whether a measures authorizes:

(1) **specific action:** a measure based upon the constituent elements of dumping or a subsidy, *i.e.*, action based upon imported products being sold at less than normal value, or a financial contribution and a benefit is granted;

[29] Mexico Oral Statement, para. 46.

(2) **against:** which burdens (e.g. imposes a liability);

(3) **dumping or subsidization:** 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.

As explained below, the complaining parties' much broader tests for "specific action against" dumping or subsidization are not supported by the text of Articles 18.1 and 32.1 or the *1916 Act* decisions and, therefore, should be rejected.

A. Specific Action Is Action Based upon the Constituent Elements of Dumping or a Subsidy

40. In *1916 Act*, the Appellate Body found that action is "specific" when it is based upon situations or conduct presenting the constituent elements of dumping. Whether or not a law authorizes specific action can only be determined by examining the actual requirements of that law. For example, the Appellate Body examined the 1916 Act and found its civil and criminal remedies were specific action because the statute authorized that action could "be taken only with respect to conduct which presents the constituent elements of 'dumping.'"[30]

41. The complaining parties all avoid the important distinction noted by the Appellate Body between the words "specific action" in the main provision and "action" in the footnote. The absence of the word "specific" in footnotes 24 and 56 means that the modifier "specific" has meaning which must be given effect. This distinction was also recognized by the panels in *1916 Act*. The panels repeatedly stated that "specific action" is action based upon "dumping *as such*." In the view of the United States, the panels meant what they said, meaning, that the action must be based directly upon the constituent elements.

42. Unlike the 1916 Act, the CDSOA is not based upon the constituent elements of dumping or a subsidy. The plain language of the CDSOA does not instruct Customs to take action in the form of disbursements in response to situations or conduct presenting the constituent elements of dumping or subsidization. On the contrary, the CDSOA instructs Customs to take action based on certifications from an "affected domestic producer" regarding its "qualifying expenditures."[31] The criteria upon which distributions are made have nothing to do with the constituent elements of dumping or subsidization, namely, (1) imported products (a) being sold at less than normal

[30] WT/DS136/AB/R, WT/DS162/AB/R, para. 130.

[31] 19 U.S.C. § 1675c(d).

value, or (b) for which a financial contribution and a benefit is granted.

43. The complaining parties, however, ignore these important distinctions and argue that the CDSOA is "specific action" because distributions are linked, however remotely, to antidumping and countervailing duty orders.[32] They argue that the relevant test is whether an AD/CVD order is a "necessary prerequisite" or a "condition" or "contingency" for action and argue that CDSOA distributions are "triggered" by orders.[33]

44. Not only do the complaining parties' arguments broaden the definition of "specific action" beyond that established in the *1916 Act* case, they broaden the definition to such a degree that it would impose a whole host of new obligations on Members. For instance, under the complaining parties' analysis, a Member would have to be certain that all legal subsidies that it provides from the general revenue were not derived from AD/CVD duties, especially if the recipients of those legal subsidies were industries who competed with products subject AD/CVD orders. Such an obligation is not a part of the WTO Agreement and this Panel should not adopt a definition of "specific action" that would create these new obligations.

45. Although it is not clear why, Brazil objects to the "direct" relationship between the duties assessed and CDSOA payments. Brazil claims not to challenge the right of the United States to choose how its revenues are disbursed in general, but just its right to disburse antidumping and countervailing duties. It seems that, according to Brazil, if CDSOA payments were not funded by antidumping and countervailing duties (and therefore have no "direct linkage" to the collection of those duties), they would be WTO-consistent.[34]

46. Yet, the fact that CDSOA distributions are funded by AD/CVD duties is not legally relevant. The text of Articles 18.1 and 32.1 does not refer to duties or the uses to which the duties collected may be put. Moreover, the Appellate Body report in *1916 Act* cannot be interpreted as sanctioning a "linkage" to orders or duties test. Brazil even admits that there was no linkage between duties and the civil and criminal actions in the *1916 Act* case.[35] It is not clear

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[32]Canada Oral Statement, para. 28; EC Oral Statement, paras. 10, 21.

[33]*See* Australia Oral Statement, para. 7; EC Oral Statement, paras. 21; India Oral Statement, para. 5; *see* Brazil Oral Statement, para. 22. Brazil's claims that payments under the CDSOA are directly dependent on establishing the constituent elements of dumping are plagued by factual errors. While the CDSOA distributions are funded through duties collected on orders, those distributions are not based on the same statutory provisions, the same proceeding, or the same administering authorities.

[34]Brazil Oral Statement, paras. 14-16. For example, Brazil distinguishes the U.S. Trade Adjustment Assistance programs which help companies and workers injured by imports but are not directly linked to the collection of duties.

[35]Brazil Oral Statement, para. 21; *see* Korea Oral Statement, para. 9.

why CDSOA would be acceptable if only the payments were made through the general Treasury accounts rather than the special accounts.

B. The CDSOA Is Not "Against" Dumping or a Subsidy

47. Even assuming, *arguendo*, that Articles 18.1 and 32.1 do not require the CDSOA itself to contain a test comprising the constituent elements of dumping or subsidization, the complaining parties have still failed to establish that the CDSOA is an action "against" dumping or a subsidy. As explained in our first written submission, the ordinary meaning of the term "against" suggests that the action must operate directly on the imported good or the importer.

48. Furthermore, this interpretation is supported by the definition of dumping in GATT Article VI:1. That provision defines dumping as *products* of one country being introduced into the commerce of another country at less than normal value. Thus, under Article 18.1, specific action against dumping is specific action against products being introduced into the commerce of another country at less than normal value. In other words, the action must be against imported products.

49. Some complaining parties argue that the CDSOA is an action "against" dumping or subsidization because it presumably affects imported products or the exporter.[36] Reading an "effects test" into Articles 18.1 and 32.1, however, is overly broad and not supported by the text of those provisions and therefore should be rejected by the Panel.

50. Specifically, Korea interprets the word "against" to mean "in opposition to" and concludes that CDSOA acts "in opposition to" dumping by providing support to a domestic industry competing with imports.[37] The EC argues that "[e]ven if offset payments do not 'apply' directly to dumped or subsidised imports, they are objectively apt to affect such imports."[38] Australia complains about the effect that CDSOA will have on imports not subject to an order.[39] According to Brazil, CDSOA distributions have the "effect" on "exporting entities"of discouraging them from dumping or receiving subsidies.[40]

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[36]*See, e.g.,* Australia Oral Statement, para. 31; Brazil Oral Statement, para. 17.

[37]Korea Oral Statement, para. 9, 21.

[38]EC Oral Statement, para. 13.

[39]*See* Korea Oral Statement, para. 21; Australia Oral Statement, paras. 20, 31.

[40]Brazil Oral Statement, paras. 29-30. In this regard, Brazil makes two claims: (1) that CDSOA payments have the effect of offsetting and preventing dumping, and (2) that CDSOA payments are additional actions that prevent and offset the effects of dumping. *Id.*, paras. 30-31. We address Brazil's second claim in the context of our footnotes 24

51. It is evident from the quotations cited above that the complaining parties agree that the impact of the specific action must be on the imported good or an entity responsible for the dumping or subsidized good such as the importer, exporter or foreign producer.[41] The difference between the position of the complaining parties and that of the United States is that the complaining parties maintain that a *presumed negative effect* on the imported good or importer/foreign producer is sufficient to be considered "against" dumping or a subsidy, while the United States argues that the action must operate directly on the imported good (or the importer/foreign producer) as a burden or liability.

52. There is simply no basis in the text of Articles 18.1 and 32.1 for the complaining parties' effects test. The complaining parties would have this Panel rewrite those provisions to read "no specific action with a presumed negative effect on import goods or foreign producers...."[42] The ordinary meaning of the term "against" does not support an effects test, let alone a presumed effects test. Curiously, the EC believes that Articles 18.1 and 32.1 should not be interpreted as requiring a showing of "actual effects" but that "presumed effects" is, inexplicably, an acceptable interpretation.[43] Because Articles 18.1 and 32.1 do not contain either test, the Panel would be left to draft such an "effects test," in contravention of DSU Article 3.2.

53. Further, such a test is overly broad and unworkable. Under the complaining parties' theory, any type of domestic legislation which improves the position of the domestic industry could be presumed to have a negative effect on imported goods. For example, legislation allowing a tax credit to companies that compete with foreign producers could be presumed to have a negative effect on the imported goods but could not be viewed as specific action against dumping or subsidization. Indeed, one could argue that a law requiring flags to fly at half-mast in response to dumping could, over time, create a negative association in the minds of consumers with dumped goods, or that the severing of diplomatic relations would surely have an affect on

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and 56 arguments.

[41] Canada claims that Articles 18.1 and 32.1 refer to action against "a particular set of practices, dumping or subsidies." Canada Oral Statement, para. 45. Canada fails to explain, however, the difference between acting against a practice and acting against the thing involved or entity engaged in that practice.

[42] Besides the apparent and ordinary meaning of "against" that suggests that there must be a direct application of the action to its object, and not simply some speculative, incidental effect, the manner in which the Agreements address "against" confirms that no effects test was intended. For example, the WTO Agreement goes to great lengths elsewhere to address situations in which a particular action is "apt" to have a certain effect, whether that means that the action can be *presumed* to have certain effects or can *be likely* to have such effects. *See, e.g.,* SCM Agreement Articles. 3 & 5(a), (c).

[43] EC Oral Statement, para. 13.

the foreign producer that is dumping.

54. Once again, if the complaining parties could show the harmful effects from the CDSOA that they allege, they would have brought a claim under SCM Agreement Article 5(c). Reading a presumed effects test into Articles 18.1 and 32.1 is not only not supported by the text of those provisions but would convert an actionable subsidy claim into a prohibited subsidy, thereby allowing the complaining parties to circumvent the requirements of Articles 3 and 5 of the SCM Agreement.

55. Finally, offering a slightly different argument, some complaining parties claim that the CDSOA is a specific action against dumping or a subsidy because the recipient of disbursements is a domestic producer that is "affected" by dumping or subsidization.

56. First, other than the alleged presumed effect on imports or foreign producers through support to the domestic competitor, which is discussed above, any additional relevance of the fact that domestic producers receive the distributions is not clear. That being said, this argument misstates the operation of the CDSOA as well as contains other factual errors. For instance, Korea is incorrect when it states that the "the amount of duties collected is decided by the measurement of the extent of domestic industry being affected."[44] That would be true if the United States applied the "lesser duty rule" in the assessment of AD/CVD duties, which it does not.

57. Korea is also incorrect when it states that the "amount of distributions under the CDSOA is closely related with the extent to which a U.S. producer has been affected by dumping or subsidization of imports."[45] Likewise, Thailand is mistaken in its arguments that CDSOA distributions constitute a recovery of damages because "when a domestic producer is 'affected,' he or she is then considered as having 'adverse' effects referred to in Article 5 of the SCM Agreement."[46]

58. As explained in our first written submission, distributions are not related to domestic producers' injury from dumped and subsidized imports. The statute includes an objective test to determine whether or not a producer may be eligible for CDSOA distributions. The phrase "affected domestic producers" used in the statute is a term of art to identify domestic producers that may be eligible for distributions because they were, at one point in time, a petitioner or supporter of a petition. The statute does not require producers to show they are injured by

[44]Korea Oral Statement, para.

[45]Korea Oral Statement, para. 15; *see also* Japan Oral Statement, para. 10.

[46]Thailand Oral Statement, para. 7.

dumped or subsidized imports to receive distributions.[47] Injury is neither a requirement nor a consideration under the CDSOA.

59. In sum, the Panel should reject a "presumed negative effects" test as the appropriate standard for determining whether an action is "against" dumping or a subsidy. There is no basis in the text of the provisions for such an interpretation. Furthermore, such an interpretation would create a new category of prohibited subsidies within the agreement, sweeping in actions with only a speculative impact on dumping or subsidization. Because the CDSOA does not apply to imports or the importer/exporter/foreign producer, this Panel should find that it is not an action "against" dumping or subsidization.

C. In Any Event, Even if the Panel Were to Conclude that the CDSOA is an Action Against Dumping or a Subsidy, Footnotes 24 and 56 Would Operate to Permit the CDSOA

60. The United States agrees that Footnotes 24 and 56 serve to clarify the scope of obligations under Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively.[48] According to footnotes 24 and 56, Articles 18.1 and 32.1 do not cover all types of action against dumping or a subsidy, just "specific" action against dumping or a subsidy.[49] Footnotes 24 and 56 cover "action" against dumping or subsidization under other relevant provisions of GATT 1994.[50] As explained in the U.S. First Written Submission, even if the CDSOA were considered to be action against dumping or subsidization, it would otherwise permitted by footnotes 24 and 56 as action under GATT Article XVI.[51]

61. As fully elaborated in the U.S. First Written Submission, the combination of (1) Articles

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[47]*See* Japan Oral Statement, para. 10; Canada Oral Statement, paras. 20, 44. Contrary to Canada's claims, payments do not "relate directly to the harm due to dumping and subsidization." Canada Oral Statement, para. 44.

[48]*See* EC Oral Statement, para. 17 ("they serve to clarify the scope of those two provisions."). The United States does not argue that footnotes 24 and 56 provide exemptions for violations of Articles 18.1 and 32.1. *See* Korea Oral Statement, para. 17; Japan Oral Statement, para. 16.

[49]Contrary to Canada's claim, the United States does not argue that Articles 18.1 and 32.1 discipline specific actions against dumping or a subsidy *other than* actions consistent with the GATT 1994. Canada Oral Statement, paras. 47-49.

[50]Korea appears to miss the distinction between "specific action" in the main provisions and "action" in the footnotes. *See* Korea Oral Statement, para. 18 ("when this Panel determines that the CDSOA is an action against dumping or a subsidy, footnotes 24 and 56 cannot save the CDSOA, contrary to the U.S. assertion.").

[51]U.S. First Written Submission, para. 111.

18.1 and 32.1 and (2) footnotes 24 and 56 creates an integrated scheme proscribing only certain actions against dumping and subsidization. Under that scheme, actions against dumping and subsidies *as such* must proceed under the Antidumping or SCM Agreement; other actions, however, such as actions under GATT Article XVI to address the effects of dumping and/or subsidies, are explicitly permitted by footnotes 24 and 56. The CDSOA, to the extent that the Panel were to find it to be an action against dumping and/or subsidies, is nevertheless clearly an action under GATT Article XVI to address the effects of such practices

62. Perhaps because footnotes 24 and 56 permit action against dumping or subsidization, most complaining parties chose not to address the U.S. argument that the CDSOA is permitted by footnotes 24 and 56 as action under GATT Article XVI in their oral statements.

63. According to the EC, action under GATT Article XVI is not covered by the footnotes because the SCM Agreement interprets Article XVI.[52] Yet, the EC does not allege that GATT Article XVI limits the form of specific action that can be taken against dumping or subsidization within the meaning of Articles 18.1 and 32.1. Nor is the EC correct that the SCM Agreement necessarily *interprets* GATT Article XVI. Even if such "interpretation" were a valid ground to exclude GATT Article XVI under footnote 56, the EC offers absolutely no reason why action under GATT Article XVI should not be permitted under *footnote 24* in the Antidumping Agreement.

64. The complaining parties ignore the fact that, like Article 1 of the Antidumping Agreement, Part V of the SCM Agreement explicitly incorporates GATT Article VI in Article 10. These provisions read as follows:

[52]EC Oral Statement, para. 18. The EC's argument appears to be loosely based on the Appellate Body's interpretation of footnote 24. In the *1916 Act* case, the Appellate Body explained that Article 18.1 permits action taken in accordance with the provisions of Article VI of GATT 1994, as interpreted by the Antidumping Agreement, concerning dumping. Footnote 24, therefore, permits action under "other relevant provisions of GATT 1994" other than provisions in Article VI concerning dumping. It would follow that the reference to "relevant" GATT provisions in footnote 56 would refer to GATT provisions other than provisions in Article VI concerning subsidies. WT/DS136/AB/R, WT/DS162/AB/R, para. 125.

Article 1	**Article 10**
An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.[53]	Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of the GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.[54]

Just as Articles 1 and 11.1(a) of the Safeguards Agreement have been construed to require adherence to both GATT Article XIX and the Safeguards Agreement, Articles 1 and 10 require adherence to both GATT Article VI and the Antidumping and Part V of the SCM Agreements. respectively.[55]

65. However, there is no similar language in the SCM Agreement with regard to GATT Article XVI. Indeed, in *United States - FSC*, the Appellate Body stated that "whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the SCM Agreement."[56] Thus, the Parts II and III of the SCM Agreement do not strictly interpret GATT Article XVI.

66. Further, without any supporting authority, the EC attempts to craft additional limitations on measures permitted under footnotes 24 and 56. The EC argues that the term "under" actually means "confer and regulate positively the right" to take action.[57] Yet, the ordinary meaning of the term "under" suggests that action "in accordance with" other GATT provisions is

[53] Antidumping Agreement Article 1 (emphasis added).

[54] SCM Agreement Article 10 (emphasis added, footnote omitted).

[55] *See* Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia,* WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, paras. 69-70 ("Articles 1 and 11.1(a) of the *Agreement on Safeguards* express the full and continuing applicability of Article XIX of the GATT 1994, which no longer stands in isolation, but has been clarified and reinforced by the *Agreement on Safeguards*."); *see also* WT/DS136/AB/R, WT/DS162/AB/R, para. 118 ("Article VI of the GATT 1994 must be read together with the provisions of the *Anti-Dumping Agreement*.").

[56] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R adopted 20 March 2000, paras. 116-17.

[57] EC Oral Statement, para. 19.

permissible.[58] This is also consistent with both panel reports in the *1916 Act* case which interpreted the word "under" in footnote 24 to mean "compatible with."[59]

67. The EC further states that footnote 24 clarifies that Article 18.1 "does not prevent Members from taking action in response to situations that involve dumping, where the existence of dumping is not the event that triggers such action."[60] Apparently, for the EC, the distinction between "specific action" in the main provision and "action" in the footnote is whether or not the existence of dumping "triggers" such action.

68. The EC's "trigger" test is inconsistent with the panel reports in *1916 Act* and should be rejected by this Panel. The panels in the *1916 Act* case recognized that action could be taken to address dumping and subsidization as long as it did not address dumping and subsidization, as such:

> We consider that footnote 24 does not prevent Members from addressing the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement. Nor does it prevent Members from adopting other types of measures which are compatible with the WTO Agreement.[61]

According to the panel in the Japan case, "[r]eading footnote 24 as permitting actions other than anti-dumping actions allowed under other provisions, as long as the measure does not address dumping as such, is fully consistent with the principle of useful interpretation."[62] The EC panel interpreted footnote 24 as allowing Member States to address, not the act of dumping, but the "effects of dumping, e.g. increased imports, or its causes (e.g., subsidisation) through other legitimate means under the WTO Agreement, such as countervailing or safeguard measures."[63] Similarly, the panel in *Indonesia – Auto Industry* noted that footnote 56 recognizes that "actions

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[58]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1993) (the word "under" is defined, *inter alia*, as "in accordance with") (Exhibit US-20).

[59]WT/DS136/R, para. 6.199; WT/DS162/R, para. 6.218.

[60]EC Oral Statement, para. 21 (emphasis added); *see* Japan Oral Statement, para. 16 (the footnotes "allow actions under other provisions of the GATT *only where such actions are not taken to counter or address dumping as such*.").

[61]WT/DS136/R, para. 6.199; WT/DS162/R, para. 6.218.

[62]WT/DS162/R, para. 6.132.

[63]WT/DS136/R, n.373.

against subsidies remain possible" under other provisions of GATT 1994.[64] Thus, footnotes 24 and 56 address actions against dumping and subsidies.

69. The United States maintains that the CDSOA does not fall within the scope of Articles 18.1 or 32.1 or the footnotes thereto in the first instance. However, if the Panel were to conclude that the CDSOA is action against dumping or a subsidy, footnotes 24 and 56 would operate to permit the CDSOA.

IV. THE CDSOA DOES NOT VIOLATE WTO OBLIGATIONS CONCERNING STANDING AND UNDERTAKING DETERMINATIONS

A. The CDSOA Does Not Affect the Administration of U.S. Laws Governing Standing Determinations and is Not Inconsistent with Articles 5.4 of the Antidumping Agreement and 11.4 of the SCM Agreement

70. In their oral statements before the Panel, the complaining parties elaborate on their claims that the CDSOA causes the United States to be unable to fulfill its obligations under Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4 to determine the "degree of support for, or opposition to," an antidumping or countervailing duty petition. The complaining parties argue that the CDSOA calls into question the "credibility"[65] of any petition or expression of support for relief under U.S. antidumping and countervailing duty laws, thus making it "impossible" for the United to determine the "true," "real," or "proper" level of support.[66]

71. The complaining parties' theories, however, are not grounded in the language of Articles 5.4 and 11.4. To express "support" for something means to "[u]phold or maintain the validity or authority of (a thing)"; "give assistance in (a course of action)"; "[s]trengthen the position of (a person or community) by one's assistance or backing"; "uphold the rights, opinion, or status of"; "stand by, back up"; "[p]rovide authority for or corroboration of (a statement etc.)"; "bear out, substantiate"; "speak in favor of (a proposition or proponent)."[67] The word "support" as used in Articles 5.4 and 11.4 does not require an inquiry into the reasons for that support.

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[64]Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry,* WT/DS54/R, WT/DS55/R, WT/DS64/R, adopted 23 July 1998, n.659.

[65]EC Oral Statement, para. 23.

[66]EC Oral Statement, paras. 23; Japan Oral Statement, para. 23; Canada Oral Statement, para. 53; *see also* Australia Oral Statement, para. 25 ("truly being made"); Norway Third Party Submission, para. 17 ("genuine interest").

[67]THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3152-53 (L. Brown ed., 1993) (Exhibit US-21).

72. Even if relevant, however, the complaining parties again fail to submit any evidence to support their claims.[68] In fact, the complaining parties admit they "cannot provide such evidence."[69] Instead, the complaining parties rely on pure speculation as to what might happen as a result of the enactment of the CDSOA. Speculation about what a statute may do or not do, however, is not sufficient to support a claim of inconsistency.[70] As the United States stated in its First Written Submission, there is simply no evidence, nor could there be, that the CDSOA has caused or will cause domestic producers to file or support an antidumping or countervailing duty petition they otherwise would not.[71]

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[68]Korea contends that the U.S. demand for evidence that the CDSOA distorts the standing provisions in the manner the complaining parties say it does is tantamount to asking for an "effects test." Korea then asserts that an "effects test" is irrelevant if the measure has been found to violate a WTO provision, citing the Appellate Body in the alcohol cases. Korea Oral Statement, para. 28 & n.22. Korea misunderstands the burden of proof. The complaining parties in this case have the burden to prove their alleged violation that the CDSOA distorts the standing requirement and, thus, breaches U.S. standing obligations in Articles 5.4 and 11.4 of the Antidumping and SCM Agreements, respectively.

[69]EC Oral Statement, para. 29.

[70]Panels and the Appellate Body have repeatedly refused to rely on speculative arguments to find a WTO violation. *See* Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, adopted 27 July 2000, paras. 6.12, n.28, 6.13-14 (Appellate Body declines to use limited evidence and legal arguments presented to speculate about the meaning and operation of U.S. law); Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry,* WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, paras. 168-74 (Appellate Body rejects panel decision finding a violation of Article II:1 of GATS based on "pure speculation" supported by arguments rather than evidence); Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products,* WT/DS135/AB/R, adopted April 2001, paras. 145, 147-48, 192 (Appellate Body rejects panel decision finding that two products are "like products" under Article III:4 based on speculation in the absence of any evidence submitted on the issue of consumer tastes and habits); Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, p. 14 ("[W]e find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsibile for providing proof thereof.").

[71]Even if relevant to a challenge of a statute, as such, Canada's "evidence" that producers have been swayed by prospects of CDSOA offsets is limited to a letter to, *not from*, lumber producers which also states that (1) the petition to be filed establishes an "excellent case" on its merits, and (2) petitioners/supporters cannot count on obtaining funds under CDSOA especially for petitions filed against Canada. *See* Canada First Written Submission, para. 79, Ex. CDA-11. Such a letter does not reflect any desire on the part of lumber producers to file/support a petition to receive offsets especially given evidence that (1) domestic producers publicly announced their consideration of a petition months before CDSOA was enacted, (2) the level of the domestic industry support for the petition in 2001 of 67% was comparable/less than industry support for the petition in 1986 of 70%, and (3) the long-standing nature of the lumber dispute. *See Certain Softwood Lumber Products from Canada,* 66 Fed. Reg. 21,328, 21,330 (Dep't Comm. 2001) (Notice of Initiation) (US-23); U.S. Dep't Commerce Memorandum re Initiation of Countervailing Duty Investigation in *Certain*

73. Because the complaining parties have failed to provide any evidence that the United States is misapplying the industry support requirements under Articles 5.4 and 11.4, and because the legal standards advocated by the complaining parties are without any basis in the agreements, the Panel should reject their arguments.

1. CDSOA Does Not, In Any Way, Alter The United States' Application Of The Standards Required By Articles 5.4 Of The Antidumping Agreement And 11.4 Of The SCM Agreement

74. Articles 5.4 and 11.4 contain identical standing requirements for initiating investigations. Under these provisions, the administering authorities must determine whether the AD or CVD application "has been made by or on behalf of the domestic industry." The provisions then specifically define the conditions under which the applications will be considered to have been made "by or on behalf of the domestic industry." These conditions are expressed as numerical benchmarks.

75. Articles 5.4 and 11.4 are implemented in U.S. law in sections 702(c)(4) and 732(c)(4) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1671a(c)(4) and 1673a(c)(4)). These provisions were not modified in any way by the CDSOA. The CDSOA does not change any of the requirements for initiating an AD or CVD investigation, and it does not reduce the level of domestic support necessary to file a petition for relief on behalf of an industry. Thus, *on its face*, the CDSOA does not make it any more likely that any investigation will be initiated by the Commerce Department. In addition, it is undisputed that the Commerce Department continues to apply the numerical industry support benchmarks set forth in the Antidumping and SCM Agreements and that the CDSOA has not had any impact on the *manner* in which the Commerce Department applies those benchmarks.

76. In sum, neither the CDSOA nor the manner in which CDSOA has been implemented violates the requirements of Articles 5.4 and 11.4.

2. Administering Authorities Are Not Required To Consider The Motivations Behind Expressions Of Support For, Or Opposition To,

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Softwood Lumber Products from Canada, Inv. No. C-122-602 (July 5, 1986) (US-24). Nor does Canada's other "evidence" of shrimp producers' awareness of CDSOA before filing their petition against Canadian shrimp in December 2001 establish that the domestic producers filing/supporting that petition were motivated by offsets especially given other evidence that the domestic producers were concerned about dumped imports. *See* Canada First Written Submission, para. 80, Ex. CDA-12; *see also U.S. West Coast Shrimpers File Dumping Complaint Against Canadians,* Fishlink Sublegals, at 7 (6/29/01) (US-25); Dan McGovern, *Groups explore possible shrimp antidumping suit,* WorldCatch (12/19/01) (US-26).

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77. A simple review of the texts of Articles 5.4 and 11.4 confirms that there is no requirement for administering authorities to determine the reasons for the positions taken by members of the domestic industry. Moreover, there is no requirement under the Antidumping Agreement or the SCM Agreement to distinguish between "genuine" and "disingenuous" expressions of support. The obligation under Articles 5.4 and 11.4 is to determine whether certain *quantitative* benchmarks have been met. What "incentives" may have prompted a petitioner to file or support a case are simply irrelevant to a determination of industry support under Articles 5.4 and 11.4 of the AD and SCM Agreements, respectively.

78. Arguments from the complaining parties that the "object and purpose"[72] of the standing provisions or their Uruguay Round negotiating history[73] support reading a qualitative assessment requirement into the standing provisions are similarly unavailing.

79. There is no stated purpose of the standing provisions.[74] Moreover, the negotiating history cited by complaining parties does not reveal any intention on the part of negotiators to require that investigating authorities quiz domestic producers on their motives for filing/supporting petitions. Instead, the negotiating history reflects the objection of certain countries to (1) initiations by the government, (2) petitions from a single producer or Congressman, or (3) presumptions of support.

80. Concerns over "frivolous" or "unfounded" investigations were not discussed during the Uruguay Round in the context of whether expressions of support made by individual producers were "genuine." Rather, the concern was about whether assertions of support made by one party (or a government) were representative of the domestic industry as a whole.[75] Articles 5.4 and

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[72] *See* Japan Oral Statement, para. 23 (asserting that the AD and SCM Agreements' standing provisions were established to protect against support by biased domestic producers"); Argentina Third Party Submission, para. 6 (asserting that the object and purpose of the AD and SCM Agreement standing provisions is the "due selection of domestic producers that could be interested" in supporting a petition).

[73] *See, e.g.,* Korea Oral Statement, para. 24.

[74] Argentina's claim that the object and purpose of the standing provisions is the "due selection of domestic producers that could be interested" in supporting a petition is simply unsupported by the text of the Agreements. Argentina Third Party Submission, para. 6 (p.2).

[75] For example, in *United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden,* paras. 5.10, 5.19, ADP/47 (20 August 1990) (unadopted), cited by Japan-Chile in their First Written Submission at pages 42-43, the panel was concerned with whether the investigating authority had verified that the petition was brought on behalf of domestic producers and had not just accepted petitioner Specialty Tubing

11.4, therefore, were drafted to include a requirement that domestic industry support be affirmatively established through certain numerical and objective thresholds.[76] The underlying reasons for that support was not an issue during the negotiations and is not relevant under Articles 5.4 and 11.4.

81. Lacking any language in the agreements or their negotiating history to suggest an obligation to consider the subjective motives of producers in supporting a petition, the complaining parties turn to the concept of "good faith."[77] The United States does not deny that WTO Members must uphold their obligations under the covered agreements in good faith. The United States has done so both pre- and post-CDSOA enactment. The complaining parties, however, provide no support for their claim that the CDSOA "*by its very operation* precludes the possibility of an examination in good faith of industry support under Articles 5.4 and 11.4."[78]

82. As explained below, claims that the CDSOA will encourage domestic producers to file or support dumping and countervailing duty investigations they otherwise would not are unfounded. Moreover, the only obligation the United States assumed under Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4 is to ensure that antidumping and countervailing duty cases are not initiated unless certain numerical threshold levels of support are met.

83. The 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.[79] The United States must go a step further. It must second guess whether producers' expression of support are "true." As stated in the U.S. First Written Submission, this is an unworkable requirement and one that would render it impossible for any Member to exercise its standing obligations in "good faith."

3. The Mere Provision Of An Inducement To File Or Support Petitions Would Not Be Contrary To The Antidumping Agreement Or The SCM Agreement

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Group's statement that it had brought the suit on behalf of the domestic industry. *See also* MTN.GNG/NG8/W/64 (Proposal by Norway) cited in Norway Third Party Submission, para. 25; MTN.GNG/NG8/W/65 (Proposal by Canada); MTN.GNG/NG10/W/9/Rev.1 (Checklist of Issues), cited in Japan-Chile First Written Submission, paras. 4.53-54.

[76]*See* Terence P. Stewart, Susan G. Markel, Michael T. Kerwin, *Antidumping*, *in* 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 1417-18, 1425, 1452-53, 1575-88 (Terence P. Stewart ed., 1993) (US-27).

[77]*E.g.,* Japan Oral Statement, para. 21; Canada Oral Statement, para. 57.

[78]Canada Oral Statement, para. 57.

[79]*See, e.g.,* Canada Oral Statement, para. 56.

84. Even assuming, *arguendo*, that the Panel were to conclude that the CDSOA provides some inducement to file or support petitions, the mere provision of such an inducement is not contrary to the Antidumping Agreement or the SCM Agreement. Injurious dumping is, after all, a pernicious trade practice which is to be "condemned" under the GATT Article VI:1. WTO Members routinely encourage their industries to file antidumping petitions. For example, some Members produce pamphlets and offer assistance in understanding how the laws against unfair trade work, and explain how industries and producers may file applications. Such actions are taken by authorities in Canada, the European Communities, and elsewhere.[80] In fact, representatives of the WTO Secretariat often travel on "missions" to Member countries to explain to authorities and their constituents how to file and prosecute AD and CVD applications. Each of these actions promotes the filing of petitions.

85. Moreover, the very existence of the Antidumping and SCM Agreements gives domestic interests a strong financial inducement to file, and support, petitions. Members that implement these agreements want the financial health of industries that have been injured by unfair trade to improve – the potential for such improvement afforded by AD and CVD laws offers injured industries an incentive to pursue their rights under those laws. Japan's notion of excluding the participation of "biased domestic petitioners"[81] reveals a failure to recognize the most basic reason for supporting AD and CVD investigations: the benefits that may be provided under the AD and CVD laws give injured domestic parties a "bias" in favor of relief for the domestic industry.

86. Finally, if the mere provision of an inducement to file or support petitions is found to violate Articles 5.4 and 11.4, Members will lose control over the implementation of their own AD and CVD laws. Simply stated, *any* change in methodology that favors the domestic industry may induce a domestic party to file or support a petition. Under the complainants' theory, however, even if the new methodology were consistent with all other provisions of the Antidumping and SCM Agreements, the fact that the change happens to benefit the domestic industry under the facts of a particular case, and thus gives domestic interests an incentive to support a petition in that case, would cause the change to violate Articles 5.4 and 11.4. Such a one-sided interpretation is unreasonable.

87. Further, in order to clear up any confusion on this point, the United States notes that, under U.S. law, the Commerce Department is charged with determining whether the standing

[80]For example, Members, including Australia, the EC, and India, offer advisory services to assist certain companies in preparing and filing petitions. *See* US-28.

[81]Japan Oral Statement at para. 23.

criteria set forth in Articles 5.4 and 11.4 have been satisfied.[82] CDSOA, however, does not condition eligibility for disbursements under an AD or CVD order on whether, during the underlying investigation, a domestic party indicated support for the petition to the *Commerce Department.* Rather, the CDSOA conditions eligibility for disbursements on whether the domestic party indicated such support to the *International Trade Commission.*[83] The information submitted by domestic parties to the International Trade Commission on this issue has no bearing whatsoever on the Commerce Department's standing determination.

4. In Any Event, There Is No Evidence That The CDSOA Affects Standing Determinations

88. In its presentation to the Panel, the EC posed a hypothetical question:

> For example, assume that a Member enacts a legal provision to the effect that, once a domestic producer has filed a petition, all the other domestic producers must support such petition. Such a provision would render a *complete nullity* the requirements imposed by Article 5.4 and 11.4.[84]

The United States observes, as did Canada on another aspect of this case, that the EC's example is not before the Panel.[85] Nevertheless, the example provided would appear to preclude an "examination" of the degree of support for a petition, and would instead mandate a particular degree of support. As such, it would be incompatible with the obligations in ADA Article 5.4 and SCM article 11.4. As demonstrated below, however, CDSOA does not mandate a particular level of support.

89. In fact, given the great uncertainty at the time a petition is filed as to how much, if any, duties will be distributed under CDSOA, and given the many years that are likely to pass before any such distribution will take place, it is highly improbable that CDSOA is a factor at all in a domestic company's or union's consideration of whether to support a petition.

90. Simply filing or supporting a petition is not enough to receive payments under the

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[82] 19 U.S.C. §§ 1671a(c)(4) and 1673a(c)(4).

[83] 19 U.S.C. § 1675c(d)(1).

[84] EC Oral Statement, para. 27 (emphasis added).

[85] "Mr. Chairman, Members of the Panel, those examples are not before the Panel.... We do not ask the Panel to definitively determine the boundaries of what constitutes 'specific action'; we do submit, however, that wherever the line is drawn, the *Byrd Amendment* falls on the wrong side of it." Oral Statement of Canada, para. 46.

CDSOA. For distributions even to be possible, the petition must prove (1) dumping or subsidization, (2) injury, and (3) causation, and an order must be imposed. That a petition will result in an order is far from guaranteed: from 1980 to 2000, only 36.1% of the petitions filed resulted in affirmative determinations by both U.S. Department of Commerce (dumping or subsidization) and the U.S. International Trade Commission (injury and causation).[86] Whether the producer will then receive payments under the CDSOA is then further contingent on (1) the level of imports, (2) the level of the margins, (3) the number producers supporting the petition, (4) the number of producers filing certifications, and (5) the amount of qualifying expenditures.

91. For example, relatively small import volumes and low margins coupled with a large number of supporting producers and high qualifying expenditures would result in a small pool of duties divided among a large number of producers. Considered against the million plus U.S. dollars it costs to bring an antidumping or countervailing duty case before Commerce and the Commission, and defending it against any possible court challenges, it would be irrational for domestic producers to bring a "frivolous" or "disingenuous" antidumping or countervailing duty case for a sum certain with the hope of a contingent and uncertain "payoff."

92. Any payments made under the CDSOA as a result of a successful petition would be at some unknown, future date. The time from filing a petition until duties are assessed and eligible for distribution under the CDSOA is measured in years and dependent on a series of factors: (1) whether an administrative review is requested (by a foreign producer, importer, domestic producer); (2) whether an appeal is taken to the U.S. Court of International Trade and then to the U.S. Court of Appeals for the Federal Circuit; and (3) whether there are remands to the agency for further consideration of particular issues and reexamination by the reviewing court(s). While entries can be liquidated in as little as two years after merchandise enters the United States, liquidation in many cases is 3 to 5 years after entry and can be as long as 10 years in unusual situations. 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 as complaining parties suggest.[87]

93. In an attempt to bolster their arguments, however, complaining parties analogize payments made under the CDSOA to "bribes," "threats of violence" or "legal provisions" requiring domestic producers to support a petition.[88] The analogy is seriously flawed. Payments received under the CDSOA are not a consequence or *quid pro quo* of an expression of support

[86] *Antidumping and Countervailing Duty Handbook*, USITC Pub. 3482, at figure 9 (Dec. 2001) (US-29).

[87] Nor can a petition be considered "frivolous" if the investigating authority finds dumping or subsidization, injury, and causation.

[88] See, e.g., Japan First Written Submission, para. 4.61, EC Oral Statement, paras. 25, 27.

for an antidumping or countervailing duty petition. Unlike threats of physical harm or government sanctions for failure to support a petition, the act of supporting a petition does not guarantee that distributions will be made. Numerous contingencies other than evidence of support, many of which are out of the domestic producer's control, must occur before distributions can be made. The analogies complaining parties draw simply exemplify the fear and misinformation upon which complaining parties' arguments rest.

94. In sum, the complaining parties have presented no evidence that CDSOA has an impact on the manner in which the United States applies the standing requirements. Further, acceptance of the complaining parties' arguments would rewrite the obligations contained in Articles 5.4 of the Antidumping Agreement and 11.4 of the SCM Agreement. There is no basis in those provisions for requiring administering authorities to assess the subjective motivations behind the producers' expressions of support. Moreover, acceptance of the complaining parties' claim that the agreements prohibit the provision of *any* inducements to file or support petitions would turn the entire international AD/CVD regime on its head. No longer would Members be able to encourage domestic producers to vindicate their rights against injurious dumping and/or the injurious provision of countervailable subsidies. Indeed, such a restriction would cause Members to lose much of their control over the implementation of the Antidumping and SCM Agreements.

95. For these reasons, the Panel should reject the complaining parties' argument that, as a result of CDSOA, the United States has acted or will act inconsistently with its obligations under Articles 5.4 and 11.4 of the Antidumping and SCM Agreements.

B. The CDSOA Does Not Affect the Administration of U.S. Laws Governing Undertakings and is Not Inconsistent with Articles 8 of the Antidumping Agreement and 18 of the SCM Agreement

96. In oral statements before the Panel, complaining parties repeatedly argue that CDSOA will increase domestic opposition to undertakings such that the United States will fail to comply with its obligations under Articles 8 of the Antidumping Agreement and 18 of the SCM Agreement.[89] Because, as explained below, this argument misconstrues both the obligations created by the Antidumping and SCM Agreements and the U.S. law that implements those obligations, the Panel should reject it.

97. At the most fundamental level, the complaining parties' argument fails because the Antidumping and SCM Agreements do not create an obligation for administering authorities to

[89] *See, e.g.* Canada Oral Statement, para. 56

enter into undertakings. Although Articles 8 and 18 specify rules for Members to follow when they choose to enter into undertakings, nothing in those articles requires a Member – under any circumstances – to accept an undertaking. Moreover, when a Member chooses to consider a proposed undertaking, the agreements are quite clear that the undertaking may be rejected because it is "impractical" or for any other "policy reason."[90] Indeed, the complaining parties are well aware of this gap in their argument.[91]

98. Further, the complaining parties' argument misrepresents the significance under U.S. law of domestic industry views regarding proposed undertakings.[92] U.S. law merely requires that the Commerce Department, *to the extent practicable*, consult the consuming and domestic industries before determining whether an undertaking is in the "public interest."[93] Moreover, the law stipulates that, in analyzing the public interest, the Commerce Department is to take into account the following factors: U.S. international economic interests, the impact on consumer prices and supplies of merchandise, and the impact on the competitiveness of the domestic industry.[94] Thus, the views of the domestic industry do not in any way dictate the outcome of the public interest analysis and, for this reason, they do not determine the decision to accept or reject a proposed undertaking.

99. The legal significance of domestic industry views regarding proposed undertakings is evidenced by the actual experience of the United States. The domestic industry has opposed more than 75 percent of the undertakings which the United States has *accepted* since 1996.[95]

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[90] Art. 8.3 of the AD Agreement and Art. 18.3 of the SCM Agreement.

[91] *See*, *e.g.* EC Oral Statement, para. 33.

[92] Contrary to arguments raised by Norway, domestic producers do not enjoy an "active" and "privileged" role in the decision of whether to accept or reject a proposed undertaking. Norway Third Party Submission, para. 28. While under U.S. law domestic producers are afforded the opportunity to comment and must be provided with copies of the proposed agreement, there is nothing in U.S. law which affords domestic producers a "privileged" position. If anything, foreign exporters enjoy the "privileged" role as they are the parties who actually negotiate the undertaking with the administering authority.

[93] The statutory provisions implementing U.S. obligations for undertakings are set forth in sections 704 and 734 of the Tariff Act of 1930, as amended (*i.e.* 19 U.S.C. §§ 1671c, 1673c). Like the standing requirements, the CDSOA does not make any changes to these U.S. undertaking provisions.

[94] Sections 704(a)(2)(B), 704(d)(1)(A), 734(a)(2)(B), and 734(d)(1).

[95] U.S. First Submission, Ex. US-7. Instead of actually attempting to collect evidence, the EC merely argues that it is "essential to know how many undertaking[s] were rejected, or were not offered in the first place, because of the opposition expressed, formally or informally, by the domestic industry." EC Oral Statement, para. 36.

100. The complaining parties continue to be unable to provide any evidence that CDSOA will influence domestic producer positions on undertakings in the manner they suggest.[96] Like their standing arguments, complaining parties rely on pure speculation about the "effects" of CDSOA. For the same reasons such speculation is insufficient to support complaining parties' standing claims, it is insufficient to support their undertakings claims.

101. Finally, the oral statements of Indonesia, India, and Argentina focus on the impact on developing countries of the alleged "disincentives" created by CDSOA with respect to undertakings.[97] According to Argentina, CDSOA stands as an "obstacle[] to the creation and establishment of new export-oriented industries" in contravention of the requirement under Article 15 of the Antidumping Agreement that special consideration be afforded to developing country Members (including exploration of constructive remedies prior to the imposition of antidumping or countervailing duties).[98]

102. None of these statements, however, refers to any *evidence* that CDSOA creates "disincentives" for the United States to enter into undertakings with developing country Members. In fact, U.S. law stipulates that a key factor in the decision to accept an undertaking is the international economic interests of the United States. It is without question that the advancement of the economies of developing countries is an important international economic interest of the United States.[99] Moreover, Argentina's claims regarding Article 15 of the Antidumping Agreement are simply not within the Panel's terms of reference and therefore cannot be considered.

103. In conclusion, complaining parties make speculative and fallacious claims about how CDSOA will decrease the likelihood of undertakings in violation of the Antidumping and SCM

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[96] Even if relevant to a challenge to a statute as such, Canada's citation to a statement made by Senator Baucus does not rise to the level of evidence. Senator Baucus is not a lumber producer and, like complaining parties, is merely speculating about the effect he believes CDSOA will have on domestic producers. *See* Canada Oral Statement, para. 61 & Ex. CDA-14. Moreover, domestic producers' desire to "settle" does not determine whether the administering authority accepts an undertaking. Japan's "evidence" that CDSOA played a role in undertaking negotiations in softwood lumber likewise does not rise to the level of evidence. *See* Japan Oral Statement, para. 25. The anonymous INSIDE U.S. TRADE source explaining the likelihood of a "settlement" versus that of an offset was merely summarizing U.S. law. Contrary to Japan's claim, the source did not say that offsets "would stand in the way of the conclusion of a suspension agreement." Japan-Chile First Submission, para. 4.74.

[97] India Oral Statement, para. 7; Indonesia Oral Statement, para. 11; and Argentina Third Party Submission, para. III.3.

[98] Id.

[99] The Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol.1, at 921 (1994).

Agreements. Their argument ignores the fact that an obligation to enter into undertakings does not exist under the agreements. Moreover, and most importantly, it does not take into account the U.S. legal framework – or, for that matter, actual U.S. experience – regarding undertakings. Accordingly, as the complaining parties have presented no legal or factual basis for concluding that CDSOA is inconsistent with either Article 8 of the Antidumping Agreement or Article 18 of the SCM Agreement, the Panel should reject the complaining parties' efforts to attack CDSOA on the basis of those provisions.

C. The CDSOA Does Not Violate GATT Article X:3

104. At the first meeting of the Panel, the complaining parties elaborated on their allegation that CDSOA distributions are inconsistent with Article X:3(a) of the GATT 1994. They made it perfectly clear that the allegedly offending measure with respect to Article X:3(a) is U.S. implementation of its AD and CVD laws, not U.S. implementation of CDSOA. The complaining parties did not, however, explain where in their requests for the establishment of a panel the allegedly offending measure is cited. As explained below, because U.S. implementation of its AD and CVD laws is not, therefore, within the terms of reference of this dispute, the Panel should reject the Article X:3(a) claims. Moreover, although the Panel should not consider the substance of the Article X:3(a) claims, the United States notes that the complaining parties have not presented any meritorious bases for relief under that provision.

105. The complaining parties advance the following claims under Article X:3(a): (1) CDSOA interferes with the "good faith" application of the standing criteria under Articles 5.4 of the Antidumping Agreement and 11.4 of the SCM Agreement; (2) CDSOA interferes with the "good faith" conclusion of suspension agreements under Articles 8 of the Antidumping Agreement and 18 of the SCM Agreement; and (3) CDSOA is likely to be copied by other countries and, therefore, to accelerate the use of antidumping and countervailing measures in the multilateral trading system.

106. For example, Canada argued that the trade laws "cannot be said to appear to be neutral and objective, discretion cannot be said to be exercised objectively, if there is an incentive that encourages a particular objective."[100] The EC argued that CDSOA "results in an unreasonable and partial administration of the provisions of the U.S. antidumping and countervailing duty laws and regulations governing the initiation of investigations and the acceptance of undertakings."[101] In addition, the EC cited the WTO Appellate Body decision in *Argentina - Hides and Skins*, for the proposition that Article X:3(a) may apply with respect to generally applicable measures that

[100]Canada Oral Statement at para. 67.

[101]EC Oral Statement at para. 39.

give "rise to an 'inherent danger' that the administered measures would be applied in a partial manner."[102] Japan stated that its submissions clearly indicate that the Article X:3(a) claim is not based on evidence that CDSOA is being misapplied, it is based on "evidence of the administration of the United States *antidumping and countervailing duty laws*."[103] Japan went on to argue that CDSOA is inherently "unreasonable as demonstrated by the fact that the application of similar measures by all WTO members would lead to an intolerable situation in the multilateral trading system and a spiraling circle of zero-sum 'subsidy/countervailing duty' measures."[104] Norway summed up the complainants' arguments as follows:

> Against this background [an "artificial" increase in both the level of support for investigations and the degree of opposition to the use of undertakings], the United States acts inconsistently with Article X:3(a) of GATT 1994 because the Byrd Amendment prevents the administration of US anti-dumping and countervailing duty law in a reasonable, impartial and uniform manner.[105]

107. The complaining parties' panel requests allege WTO breaches by means of CDSOA, not by means of the provisions of U.S. law under which U.S. authorities determine the adequacy of industry support for petitions or consider whether to accept price undertakings.[106] Article 6.2 of the DSU, however, requires, *inter alia*, that the request for the establishment of a panel "identify the specific measures at issue." Failure to comply with this requirement has been interpreted by the Appellate Body to be a jurisdictional defect.[107] Thus, the claims under Article X:3(a) regarding the administration of U.S. standing and undertaking laws are not within this Panel's terms of reference and must be rejected.[108]

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[102] *Id.* at para. 42 (citing Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001).

[103] Japan Oral Statement at para. 27.

[104] *Id.* at 28.

[105] Norway Third Party Written Submission, para. 44.

[106] *See* WT/DS217/5, WT/DS234/12, WT/DS234/13.

[107] *See* Panel Report, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AD/R, adopted 25 November 1998 (because there was no "matter" properly within the terms of reference, the Appellate Body considered that the merits of the claims were not properly before it, and it therefore made no findings on the substantive issues raised).

[108] If the standing and undertaking provisions of U.S. law are presumptively WTO-consistent, it is not clear how this Panel can find that their administration is contrary to GATT Article X:3(a) by virtue of another law, CDSOA, whose administration has not been challenged. *Compare* Panel Report, *United States - Anti-Dumping Measures on Certain*

108. Assuming, *arguendo*, that the complaining parties could overcome the above-described jurisdictional defect, their arguments are without merit. The complaining parties have not produced any evidence that any particular AD or CVD investigation has been handled by the United States in a non-uniform, partial, or unreasonable manner as a result of CDSOA.

109. The complaining parties' entire Article X:3(a) argument rests on their belief that the CDSOA will influence domestic producers to bring or support an investigation, or oppose an undertaking, they otherwise would not. They have, however, not even provided evidence that, "but for" the CDSOA, domestic producers would not otherwise have supported a petition or opposed an undertaking. Moreover, even if they had brought forth such evidence, it would not implicate the actions of the United States in implementing the Antidumping and SCM Agreements. As pointed out in the sections of this submission dealing specifically with standing and undertakings, there is no requirement in those agreements that the administering authorities (1) examine the reasons behind industry support for petitions or (2) accede to domestic industry opposition to an undertaking.

110. The complaining parties rely on *Bovine Hides* to support their claim that a law can be inconsistent with Article X:3(a) if it gives rise to the "inherent danger" of partial administration.[109] Yet, in that case, the Argentine law concerned access to confidential information. Moreover, the law had been applied and the panel found that the law permitted Argentine producers with adverse commercial interests to be present during the customs clearance process and to have access to confidential information – thereby endangering the impartial administration of the customs laws.[110]

111. In the present case, by contrast, the complaining parties have attempted to use Article X:3(a) to challenge CDSOA as such, not its administration. Further, the CDSOA will hardly give rise to an "inherent danger" of partial administration because it does not affect Commerce's administration of U.S. standing and undertaking provisions.

112. Finally, in regard to the claim that the CDSOA-type laws will proliferate, the United States notes that, even if this were true, it would have no bearing on Article X:3(a). Moreover, to the extent that the complaining parties maintain that such proliferation will cause more AD or

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Hot-Rolled Steel Products from Japan, WT/DS184/R, adopted 23 August 2001, paras. 7.267, 7.277 (2/28/01) (panel refuses to find violation of the more general Article X:3(a) when it could not find that the particular action taken in an antidumping investigation was inconsistent with a specific provision of the Antidumping Agreement governing such actions).

[109] See EC Oral Statement at para. 42.

[110] *Bovine Hides* at para. 11.96, 11.99, 11.100.

CVD cases to be pursued, complaining parties are simply reiterating their unsubstantiated claims about the impact of CDSOA on standing inquiries and undertaking decisions.

113. For these reasons, the Panel should reject the complaining parties' claim that, as a result of the CDSOA, the United States has acted or will act inconsistently with its obligations under Article X:3(a) of the GATT.

V. CONCLUSION

114. For the reasons expressed above and in the U.S. First Written Submission and Oral Statement, the United States respectfully requests that this Panel reject the claims of the complaining parties in their entirety.

LIST OF EXHIBITS

20. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1993)

21. THE NEW SHORTER OXFORD ENGLISH DICTIONARY 3152-53 (L. Brown ed., 1993)

22. Negotiating Group on Subsidies and Countervailing Measures, Draft Text by the Chairman, MTN/GNG/NG10/W/38/Rev.1 (Sept. 4, 1990) at Article 4.1(b), fn 4.

23. *Certain Softwood Lumber Products from Canada,* 66 Fed. Reg. 21,328, 21,330 (Dep't Comm. 2001) (Notice of Initiation)

24. U.S. Dep't Commerce Memorandum re Initiation of Countervailing Duty Investigation in *Certain Softwood Lumber Products from Canada*, Inv. No. C-122-602 (July 5, 1986)

25. *U.S. West Coast Shrimpers File Dumping Complaint Against Canadians,* Fishlink Sublegals, at 7 (6/29/01)

26. Dan McGovern, *Groups explore possible shrimp antidumping suit,* WorldCatch (12/19/01)

27. Terence P. Stewart, Susan G. Markel, Michael T. Kerwin, *Antidumping*, *in* 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 1417-18, 1425, 1452-53, 1575-88 (Terence P. Stewart ed., 1993)

28. European Commission, Guide on How to Draft an Anti-Dumping Complaint; Trade Policy Instruments, Existing Instruments: Anti-Dumping, How to Introduce an Anti-Dumping Complaint?; Australian Customs Service, Australia's Anti-Dumping and Countervailing Duty Administration; Ministry of Commerce, Udyog Bhavan, New Dehli, Anti-Dumping Application Proforma

29. *Antidumping and Countervailing Duty Handbook,* USITC Pub. 3482, at figure 9 (Dec. 2001).

30. Definition of "in particular," THE NEW SHORTER OXFORD DICTIONARY 2109-2110 (L. Brown ed., 1993).

31. Definition of "economic," THE NEW SHORTER OXFORD DICTIONARY 781 (L. Brown ed., 1993).

32. Negotiating Group on Subsidies and Countervailing Measures, Elements of the Negotiating Framework, Submission by the European Community, MTN/GNG/NG10/W/31 (Nov. 27, 1989) at 5-6.