UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

March 6, 2002

I. INTRODUCTION

1. In this submission, the United States responds to arguments raised in their oral statements during the first meeting of the Panel. Despite their insistence that the Continued Dumping and Subsidy Offset Act ("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. 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.

2. 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. 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.

THE CDSOA IS NOT AN ACTIONABLE SUBSIDY

3. 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." The phrase "certain enterprises" is defined for purposes of Article 2.1 as "an enterprise or industry or group of enterprises or industries." Thus, Article 2.1(a) covers subsidies that are *explicitly* limited to *an* enterprise or industry or *group* of enterprises or industries.

4. 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.

5. 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. 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.

6. 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. 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.

7. Mexico also 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). Contrary to Mexico's assertion, 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. 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.

8. 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. Mexico would still have to demonstrate by positive evidence that the CDSOA constitutes a *de jure* specific subsidy, which it has not done.

9. The Panel need not reach the question of adverse effects in this dispute. Nevertheless, Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits. 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. 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. 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.

10. According to the panel in *Japan – Film,* the first requirement means that Article XXIII:1(b) limits non-violation claims to measures that are currently being applied. 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.

11. 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). 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.

12. 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. Yet, Mexico does not even identify the affected Mexican imports. Indeed, Mexico cannot identify such imports as it chose to challenge the law as such.

13. The nullification or impairment of benefits cannot be presumed in a non-violation claim. 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." 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. 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. 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.

14. Mexico's expectations with respect to U.S. tariff concessions are only reasonable with respect to the products covered by those tariff concessions. 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.

15. Nor is there any reason to believe that the CDSOA will cause "more than a de minimis contribution" to any nullification or impairment. Mexico provides no justification for its assumption that offsets will be used to lower domestic prices or have any effect on the domestic market. 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.

16. Mexico has also failed to establish the third requirement when it claims that it could not have reasonably anticipated the introduction of the CDSOA because previous legislative proposals had not been enacted into law. 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.

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

17. 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; (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.

18. 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.

19. 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.

20. 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. 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, including the requirement that all legal subsidies provided from the general revenue should not be derived from AD/CVD duties, especially if the recipients of those legal subsidies are industries who competed with products subject AD/CVD orders.

21. Nor is the fact that CDSOA distributions are funded by AD/CVD duties 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. There was no linkage between duties and the civil and criminal actions in the *1916 Act* case. It is not clear why CDSOA would be acceptable if only the payments were made through the general Treasury accounts rather than the special accounts.

22. The complaining parties have also failed to establish that the CDSOA is an action "against" dumping or a subsidy. The ordinary meaning of the term "against" suggests that the action must operate directly on the imported good or the importer. 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.

23. Indeed, 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. They would, however, have this Panel rewrite Articles 18.1 and 32.1 to read "no specific action with a presumed negative effect on import goods or foreign producers..." in contravention of DSU Article 3.2. Further, such a test is overly broad and unworkable by including any type of domestic legislation which improves the position of the domestic industry.

24. 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.

25. Finally, some complaining parties claim that the CDSOA is a specific action against dumping or a subsidy because the recipient is a domestic producer that is "affected" by dumping or subsidization. The statute, however, does not require producers to show they are injured by dumped or subsidized imports to receive distributions.

26. 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. 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.

27. According to the EC, action under GATT Article XVI is not covered by the footnotes because the SCM Agreement interprets Article XVI. 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.

28. The EC argues that the term "under" actually means "confer and regulate positively the right" to take action. Yet, the ordinary meaning of the term "under" suggests that action "in accordance with" other GATT provisions is permissible. 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."

29. 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." The panels in the *1916 Act* case and *Indonesia – Auto Industry*, however, recognized that action could be taken to address dumping and subsidization (including its effects or causes) as long as it did not address dumping and subsidization, as such. Thus, footnotes 24 and 56 address actions against dumping and subsidies. 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.

THE CDSOA DOES NOT VIOLATE WTO STANDING OBLIGATIONS

30. With respect to WTO obligations on standing, the complaining parties' theories 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)." The word "support" as used in Articles 5.4 and 11.4 does not require an inquiry into the reasons for that support. Even if relevant, however, the complaining parties again fail to submit any evidence to support their claims. Speculation about what a statute may do or not do, however, is not sufficient to support a claim of inconsistency.

31. Articles 5.4 and 11.4 contain identical standing requirements for initiating investigations which are expressed as numerical benchmarks. 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. These provisions were not modified in any way by the CDSOA. *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.

32. There is no requirement for administering authorities to determine the reasons for the positions taken by members of the domestic industry. Arguments from the complaining parties that the "object and purpose" of the standing provisions or their Uruguay Round negotiating history support reading a qualitative assessment requirement into the standing provisions are similarly unavailing. There is no stated purpose of the standing provisions. Moreover, 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. The concern was about whether assertions of support made by one party (or a government) were representative of the domestic industry as a whole. The underlying reasons for that support was not an issue during the negotiations and is not relevant under Articles 5.4 and 11.4.

33. 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." 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. The United States

must second guess whether producers' expression of support are "true." This is an unworkable requirement and one that would render it impossible for any Member to exercise its standing obligations in "good faith."

34. Even assuming, *arguendo*, 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. The very existence of the Antidumping and SCM Agreements gives domestic interests a strong financial inducement to file, and support, petitions. If the mere provision of an inducement to file or support petitions is found to violate Articles 5.4 and 11.4, however, 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. Such a one-sided interpretation is unreasonable.

35. Finally, the United States notes that CDSOA conditions eligibility for disbursements on whether the domestic party indicated such support to the *International Trade Commission.* 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.

36. As a practical matter, 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. Payments received under the CDSOA are not a consequence or *quid pro quo* of an expression of support for an antidumping or countervailing duty petition. 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). 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.

37. 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.

THE CDSOA DOES NOT VIOLATE WTO UNDERTAKING OBLIGATIONS

38. The Antidumping and SCM Agreements do not create an obligation for administering authorities to enter into undertakings. 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." Indeed, the complaining parties are well aware of this gap in their argument.

39. Further, the complaining parties' argument misrepresents the significance under U.S. law of domestic industry views regarding proposed undertakings. 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." 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. 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. Indeed, the domestic industry has opposed more than 75 percent of the undertakings which the United States has *accepted* since 1996.

40. 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. 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. 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. 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.

THE CDSOA DOES NOT VIOLATE GATT ARTICLE X:3

41. The complaining parties have 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' 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. Because U.S. implementation of its AD and CVD laws is not within the terms of reference of this dispute, the Panel should reject the Article X:3(a) claims.

42. Moreover, 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. 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. 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.

43. 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. Yet, in that case, the Argentine law concerned access to confidential information and the law had been applied. In this case, the complaining parties have attempted to use Article X:3(a) to challenge CDSOA as such. Unlike the Argentine law, 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.

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