

**BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY**

United States - Continued Dumping and Subsidy Offset Act of 2000

(AB-2002-7)

APPELLANT'S SUBMISSION OF THE UNITED STATES OF AMERICA

October 28, 2002

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Executive Summary

I. Introduction

1. At a most rudimentary level, a nation's ability to perform its many responsibilities to preserve and promote national defense and welfare depends upon its fiscal authority. Thus, a nation's control over its own finances is both fundamental and jealously guarded. However, the Panel report in this dispute claims to find a new category of prohibited subsidy - one paid to persons supporting anti-dumping or countervailing duty petitions. The Panel made this finding despite no reference to this category of prohibited subsidy in Article 3 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), the article that lists prohibited subsidies, and despite no other reference to this type of subsidy in the *Agreement Establishing the World Trade Organization* ("WTO Agreement"). In fact, the Panel claimed to find this prohibition in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") with respect to subsidies paid to those supporting anti-dumping petitions, even though the Antidumping Agreement does not purport to regulate subsidies. The Panel simply erred in adding to the text of the WTO Agreement to create this new category of prohibited subsidies and in finding that the measure at issue is inconsistent with the WTO obligations of the United States.

2. The measure at issue in this dispute is the Continued Dumping and Subsidy Offset Act ("CDSOA"), a U.S. law that directs the payment of duties to domestic producers. As a subsidy, the most appropriate legal framework for examining whether the CDSOA complies with WTO rules is under GATT 1994 Article XVI and the SCM Agreement, which establish rules to identify the types of subsidies that are prohibited or otherwise "actionable" or conversely, that are non-actionable, or permissible.

3. As recognized by the Appellate Body, the granting of a subsidy is not, in and of itself, inconsistent with the SCM Agreement.¹ The only actionable subsidies under the *SCM Agreement*

¹ *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/RW, adopted 4 August 2000, para. 47:

It is worth recalling that the granting of a subsidy is not, in and of itself, prohibited under the *SCM Agreement*. Nor does granting a "subsidy", without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*.

and GATT Article XVI are those that are “specific” to an enterprise, industry, or group thereof. Non-“specific” subsidies do not have actionable trade effects.

4. Despite the unanimous view of the parties and the Panel that the CDSOA is a subsidy, only one party challenged the CDSOA as being a specific subsidy contrary to the SCM Agreement. The Panel disagreed that the CDSOA as such violates these obligations. Instead of challenging the CDSOA under the specific provisions addressing subsidies, the complaining parties alleged, and the Panel found, that the CDSOA is inconsistent with the Antidumping Agreement’s general and “final” provision prohibiting “specific action against dumping” (Article 18.1) and the SCM Agreement’s general and “final” provision prohibiting “specific action against a subsidy” (Article 32.1).

5. The Panel only arrived at its findings of inconsistency, however, through a misconstruction of the language used in the provisions cited. The Panel appears to have neglected the distinction between “dumping” or a “subsidy” and “injury,” and so erroneously found that action that might in the Panel’s view be in response to injury is instead in response to dumping or a subsidy. Furthermore, the Panel found that action is specific action against dumping or a subsidy if the action allegedly affects the competitive position of all imports of a product, irrespective of any dumping or subsidization, compared to the competitive position of domestic production by a subsidized company.

6. In addition to misconstruing the meaning of the words “specific action against” dumping or a subsidy, the Panel ignored the fact that relevant limitations on Members’ right to provide subsidies are expressly identified in GATT 1994 Article XVI and the SCM Agreement. It further ignored that the Articles’ footnotes permit action addressing the causes or effects of dumping (or subsidization) through WTO-consistent measures other than those already addressed by GATT 1994 Article VI’s provision on antidumping/countervailing duties. If Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 do not preclude action under WTO provisions, they certainly cannot preclude a Member from exercising its sovereign right to spend government collected funds as it chooses, certainly not where such spending is not alleged or found to violate obligations under the relevant WTO subsidy provisions.

7. Moreover, the Panel paid no heed to the fact that how antidumping and countervailing duties might or should be expended has never been negotiated, or even broached, by WTO Members. Rather, by construing “no specific action against” dumping or a subsidy as it did, the Panel improperly added to and diminished Members’ rights and obligations under the WTO Agreement. It is unreasonable and unsustainable to conclude that by the term, “no specific action against” dumping or subsidization, Members consented to limit their right to spend funds in a manner elsewhere and specifically deemed non-actionable, and that Members accepted such a limitation without any negotiations or deliberations. A panel cannot rightly find obligations that have not been negotiated.

8. With respect to Antidumping Agreement Article 5.4 and SCM Agreement 11.4, the Panel’s findings contradict basic principles of treaty interpretation,² including the obligation to focus on the *text* of the treaty provision at issue.³ In addition, the Panel’s findings raise serious concerns that it did not meet its obligations as a panel to base its findings on something more than mere speculation⁴ or complaining parties’ assertions⁵ as to what the CDSOA might do or cause.

² Pursuant to DSU Article 3.2, WTO panels are to clarify the provisions of the GATT and the WTO Agreements in “accordance with customary rules of interpretation of public international law.” Articles 31 and 32 reflect these customary rules of treaty interpretation. *See United States – Standards for Reformulated and Conventional Gasoline*, Appellate Body Report, WT/DS2/AB/R, adopted 20 May 1996, p. 16.

³ Article 31 of the Vienna Convention provides that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose.” *Vienna Convention on the Law of Treaties*, opened for signature May 23, 1969, art. 31, 1155 U.N.T.S. 331 (“Vienna Convention”). As the Appellate Body has stated, the treaty interpreter must begin with, and focus on, the text of the provision to be interpreted. “Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text is desired, light from the object and purpose of the treaty as a whole may be usefully sought.” *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS55/AB/R, adopted 6 November 1998, para. 114.

⁴ *See Canada – Certain Measures Affecting the Automotive Industry*, Appellate Body Report, WT/DS139/AB/R, adopted 19 June 2000, paras. 165-74 (explaining that panels may not rely on assumptions or speculation to find a WTO violation); *Canada – Certain Measures Concerning Periodicals*, Appellate Body Report, WT/DS31/AB/R, adopted 30 July 1997, p. 23 (same); *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, paras. 145-48, 192 (same).

⁵ *United States – Measures Affecting Woven Wool Shirts and Blouses from India*, Appellate Body Report, WT/DS 33/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 responsible for providing proof thereof.”).

9. For these and the reasons expressed below, the Appellate Body should reverse the Panel's findings that the CDSOA is inconsistent with U.S. WTO obligations.

II. The Panel Erred In Finding That The CDSOA Is "Specific Action Against Dumping and Subsidization"

10. The Panel determined that a measure constitutes "specific action against dumping" if "(1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping," and "(2) it acts 'against' dumping, in the sense that it has an adverse bearing on" "the practice of dumping" "be it direct or indirect."⁶ The Panel then concluded that the CDSOA met these two conditions and therefore constitutes "specific action against dumping."⁷ As a result, the Panel found the CDSOA violates Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1.

11. For the reasons explained below, the Panel's findings should be reversed. Specifically, the Panel's standard for determining whether a measure constitutes "specific action against dumping" runs contrary to the ordinary meaning of the terms of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. It likewise ignores the articles' own footnotes and the fact that where there are limitations on a Member's right to provide subsidies, they are expressly stated. Moreover, the Panel's determination that the CDSOA as such met its standard of "specific action against dumping" rests on speculation as to what the CDSOA may do or cause, rather than on any evidence presented by complaining parties.

12. Without even reaching the substantive obligations of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, however, it is evident that the Panel's findings must be reversed on procedural grounds. By the Panel's own admission, it only arrived at its finding of violation by coupling the operation of the CDSOA with other U.S. laws and regulations governing the imposition of antidumping and countervailing duties.⁸ Such laws and regulations, however, were not within the Panel's terms of reference. As a consequence, and as elaborated

⁶ *United States - Continued Dumping and Subsidy Offset Act*, Panel Report, WT/DS217/R, WT/DS234/R, paras. 7.18, 7.33 ("CDSOA Panel Report").

⁷ CDSOA Panel Report, para. 7.46.

⁸ CDSOA Panel Report, paras. 7.36 and 7.119 n.334 ("CDSOA Panel Report").

below, the Panel exceeded its terms of reference in finding that the CDSOA in “combination” with other U.S. laws and regulations violates Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 and accordingly the Panel’s findings must be reversed.

13. Nor, finally, should the Panel’s reasoning be deemed an acceptable extrapolation from the words, “no specific action” against dumping or subsidization. The absence of the requisite consent should not be glossed over in this way, most especially as what is at stake is the critical concept of national fiscal sovereignty.

A. The Panel Erred in Determining That The CDSOA Is “Specific Action” Within The Meaning of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1

14. The first error of the Panel was in its unexplained assumption that: “A measure that may be taken only in situations presenting the constituent elements of dumping is clearly ‘specific action’ in response to dumping.”⁹ The Panel does not explain how, even if one accepts the presumption that such a measure is “in response” to dumping, the measure is “specific.” The Panel just assumes that the measure would meet the requirement in the text of being “specific.” The Panel’s finding is based not on argument and evidence, but on this unexplained assumption and should be reversed.

1. The Panel Misapplied The Appellate Body’s “Constituent Elements” Test to the CDSOA

15. The Panel erred in determining that the CDSOA acts specifically in response to dumping and/or a subsidy contrary to Articles 18.1 and 32.1 because offset payments “may be made only in situations presenting the constituent elements of dumping.”¹⁰ In doing so, the Panel misapplied the Appellate Body’s findings in *US – 1916 Act*.

⁹ CDSOA Panel Report, para. 7.19.

¹⁰ CDSOA Panel Report, para. 7.23. This error includes the Panel’s mistaken assumption that the CDSOA meets the “constituent elements” test because “offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders which may only be imposed following a determination of dumping (injury and causation).” CDSOA Panel, para. 7.21.

16. The constituent elements of dumping include: (1) products imported and cleared through customs; and (2) imported products that are priced lower than their normal value, *i.e.*, their price in a foreign country, be it the country of production or another country of export, or a constructed value based on a calculation of costs and profits.¹¹ The panel in *US – 1916 Act (EC)* elaborated that a measure falls within the meaning of “specific action against dumping” if the practice that “triggers” the imposition of the measure at issue is “dumping” as defined by GATT 1994 Article VI:1.¹²

17. In finding that the 1916 Act constituted “specific action against dumping,” the Appellate Body in *US – 1916 Act* relied on the language of the 1916 Act itself to determine whether the 1916 Act included the constituent elements of dumping. The Appellate Body stated that the wording of the 1916 Act made it clear that “the 1916 Act provides for civil and criminal proceedings and penalties when persons import products from another country into the territory of the United States, and sell or offer such products for sale at a price less than the price for which the like products are sold or offered for sale in the country of export or, in certain cases, a third country market.”¹³ In addition, the Appellate Body found that the 1916 Act fell within the scope of GATT 1994 Article VI and the Antidumping Agreement because “the constituent elements of ‘dumping’ are built into the essential elements of civil and criminal liability under the 1916 Act.”¹⁴ In other words, the 1916 Act directly imposed liability on importers if, under the 1916 Act, they were found to have imported injuriously dumped goods.

18. The CDSOA does not meet this definition of “specific action against dumping.” Principally, the language of the CDSOA does not include the constituent elements of dumping. Indeed, the Panel recognized that the CDSOA contains “no reference to the constituent elements of dumping” and found that the constituent elements of dumping are not “built into the essential elements of eligibility for offset payment subsidies.”¹⁵ Unlike the 1916 Act, the CDSOA by its

¹¹ *United States – Antidumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 130.

¹² *United States – Antidumping Act of 1916 Act (EC)*, Panel Report, WT/DS136/R, adopted 26 September 2000, para. 6.199.

¹³ *US - 1916 Act*, Appellate Body Report, para. 130.

¹⁴ *US - 1916 Act*, Appellate Body Report, para. 130.

¹⁵ CDSOA Panel Report, para. 7.21.

terms does not impose measures on dumped or subsidized products or impose any form of liability on importers/foreign producers/exporters when dumping is found, and “dumping” is not the trigger for application of the CDSOA¹⁶ Rather, the CDSOA distributes money (“triggered” by an applicant’s qualification as an “affected domestic producer”) from the U.S. government to domestic producers.

19. More fundamentally, the CDSOA is not action “in response” to dumping. The CDSOA is a government payment program under which distributions are determined by an applicant’s qualification as an “affected domestic producer”¹⁷ which has incurred qualifying expenditures.¹⁸ If anything, the Panel’s approach would suggest that the CDSOA could be perceived as action in response to “injury” which is separate from “dumping” or a “subsidy.” The fact that “injury” is distinct from “dumping” or a “subsidy” is apparent from the fact that only dumping or subsidies that cause injury are liable to antidumping or countervailing duty orders. The reason that the Panel’s approach would suggest that the CDSOA could be perceived as action in response to injury is the fact that the Panel emphasizes that only members of the injured industry receive the CDSOA subsidy and states that: “it may be expected that most or many will use the payments, and the improvement in their competitive position these will allow, to address the injury caused by dumped imports in one way or another.”¹⁹ However, it is not accurate to perceive the CDSOA

¹⁶ The fact that offset payments are funded from the collection of antidumping and countervailing duties, “which in turn may only be collected following the imposition of anti-dumping [and countervailing duty] orders, which may only be imposed following a determination of dumping (injury and causation)” does not make “dumping” or subsidization the “trigger” for CDSOA offset payments. It likewise does not create “a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments” as the Panel asserted CDSOA Panel, para. 7.21. Rather, the remote link between CDSOA distributions and determinations of dumping and/or subsidization – as the Panel articulated – suggests quite the opposite. CDSOA Panel, para. 7.21. According to the Panel’s broad interpretation of the “constituent elements” test, *any* measure “connected” to dumping or subsidization, including a host of otherwise WTO-consistent measures, would be “specific action.”

¹⁷ The CDSOA defines an “affected domestic producer” as “any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons)” of the domestic like product (1) that was “a petitioner or interested party in support of” a successful petition for an antidumping or countervailing duty order and (2) that remains in operation. 19 U.S.C. § 1675c.

¹⁸ The CDSOA defines “qualifying expenditures” as expenditures in one of the following categories: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid for by the employer; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; or (10) working capital or other funds needed to maintain production. 19 USC 1675c(b)(4) (Exhibit US-12).

¹⁹ CDSOA Panel Report, para. 7.37.

as being in response to injury. Qualifying expenditures are not based on, or defined by, any injury that an affected domestic producer might have incurred as a result of dumped or subsidized imports. The CDSOA does not require affected domestic producers to certify the level of economic harm incurred due to dumped or subsidized imports. The CDSOA only requires affected domestic producers to certify that they have had expenditures in one or more of the ten enumerated categories for the domestic product in question.²⁰

20. The Panel's approach in paragraph 7.21 cannot withstand scrutiny. There, the Panel found that because the payments follow from the collection of anti-dumping duties, the payments may only be made in situations presenting the constituent elements of dumping. Under the Panel's approach, any expenditure of the collected anti-dumping duties would be "specific action against dumping." If the collected duties were spent for international emergency relief, they would still be "specific action against dumping" according to the Panel's reasoning because they would only be made where the constituent elements of dumping were present. The Panel's erroneous findings in paragraph 7.22 do not follow from paragraph 7.21, despite what the Panel says, because the reasoning in paragraph 7.21 depends solely on the source of the funding - the collection of anti-dumping duties.

21. The only "connection" that the CDSOA has with antidumping and countervailing duty orders is that its terms limit availability of CDSOA offset payments to the universe of products covered by an existing or revoked order and "affected domestic producers" to those who supported the investigation and still produce the particular product (*i.e.*, the domestic like product of the product subject to the antidumping or countervailing duty order). Under the U.S. retrospective system, a determination of dumping or subsidization does not mean that duties will ultimately be collected on covered imports in future years.

22. Even more significantly, under the CDSOA, payments can and do occur at points in time when an order no longer exists and there is no finding that dumping or subsidization is currently occurring. It is clear that under those circumstances the payments cannot be "against" dumping or a subsidy. Since that is the case, how can the Panel find as a general matter that the CDSOA

²⁰ 19 USC 1675c(d)(2)(C) (Exhibit US-12).

payments are “specific action against” dumping or a subsidy? The Panel chose to ignore this fact in making its findings. Thus, the Panel’s conclusion that there is a “clear, direct and unavoidable connection” between the determination of dumping and CDSOA offset payments is incorrect.²¹

23. The nature of the CDSOA is to pay offsets for qualifying expenditures to a group of producers. It is a payment program to domestic producers, not action against, or in response to, dumping or subsidization. As a government payment program (*i.e.*, a subsidy), the CDSOA is an exercise of the intrinsic right of a Member – subject to any relevant limitations in the WTO Agreement – to provide subsidies. This intrinsic right cannot be circumscribed by general provisions in the Antidumping and SCM Agreements prohibiting measures taken “in response to the constituent elements of dumping” or subsidization – indeed, the CDSOA is a form of subsidization, but one found to be non-specific by the Panel.

24. The Panel was therefore incorrect to find that the CDSOA constitutes “specific action” against dumping (or a subsidy) because payments “may be made only in situations presenting the constituent elements of dumping.”

2. The Panel Failed to Read Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 in Conjunction With Footnotes 24 and 56 Thereto to Determine the Meaning of “Specific Action”

25. The Panel’s erroneous finding that the CDSOA constitutes “specific action” against dumping is compounded by its failure to explain how its interpretation of the phrase “specific action” in the main provisions of Articles 18.1 and 32.1 differed from its interpretation of the word “action” in the Articles’ footnotes. Specifically, the Panel erred in concluding that it did not need to examine Antidumping Agreement footnote 24 and SCM Agreement footnote 56 because it had already concluded that the CDSOA constitutes “specific action” against dumping and subsidization.²² The footnotes to Articles 18.1 and 32.1 are an integral part of the Articles’ “text” and inform the meaning of “specific action.”²³ Hence, when the Panel interpreted Articles

²¹ CDSOA Panel Report, para. 7.21.

²² CDSOA Panel Report, para. 7.50.

²³ As noted by the Appellate Body in *US - 1916 Act*, “action within the meaning of footnote 24 is to be distinguished from ‘specific action against dumping’ which is governed by Article 18.1 itself.” *US - 1916 Act*, Appellate Body Report, para. 123.

18.1 and 32.1, it was obligated to examine the footnotes contained in those Articles to ensure that both the Articles and the footnotes were given meaning and to provide an accurate interpretation of “specific action.”²⁴

26. Footnotes 24 and 56 are virtually identical and provide that the main provision “is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.” In other words, the footnotes permit “action” consistent with other provisions of GATT 1994. In *US – 1916 Act*, both panels recognized that Members are free to address the causes or effects of dumping through other trade policy instruments allowed under the WTO Agreement.²⁵ In affirming the panels, the Appellate Body concluded that the phrase “other relevant provisions of GATT 1994” refers to provisions other than the provisions of Article VI concerning dumping.²⁶

27. Thus, the effect of the phrase “*not intended to preclude action under other relevant provisions of GATT 1994*” in footnotes 24 and 56 is to permit action involving dumping or subsidies that is consistent with GATT 1994 provisions and is not addressed by GATT 1994 Article VI provisions on dumping or countervailable subsidies, respectively. This interpretation is consistent with the *US – 1916 Act (EC)* panel’s interpretation of footnote 24 as allowing a Member to “address the effects of dumping, e.g. increased imports, or its causes (e.g., subsidisation) through other legitimate actions under the WTO Agreement, such as countervailing or safeguard measures.”²⁷ This interpretation is also consistent with the complaining parties’ admission that action otherwise permitted under the WTO Agreement, such as safeguard measures, countervailing duties (applied to dumped imports), trade adjustment

²⁴ The Appellate Body has recognized that the footnotes impart meaning to main provisions. For example, in *Chile – PBS*, the Appellate Body found that footnote 1 to Article 4.2 of the Agreement on Agriculture “imparts meaning to Article 4.2 by enumerating examples...” *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, Appellate Body Report, WT/DS207/AB/R, adopted 23 October 2002, para. 209.

²⁵ See *US - 1916 Act (EC)*, Panel Report, para. 6.199 (stating 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.); see also *US - 1916 Act (Japan)*, Panel Report, WT/DS162/R, adopted 26 September 2000, para. 6.132 (stating that reading footnote 24 as permitting action other than anti-dumping actions allowed under other provisions, as long as the measure does not address dumping as such, is fully consistent with principles of interpretation).

²⁶ *US - 1916 Act*, Appellate Body Report, para. 125.

²⁷ *US - 1916 Act (EC)*, Panel Report, para. 6.114, n.373.

assistance/restructuring support, and/or other types of production/consumer subsidies would be “action under other relevant provisions of GATT 1994.”²⁸

28. Given that footnotes 24 and 56 clarify that the prohibition against “specific action” does not encompass other legitimate actions *authorized* under the WTO Agreements, it must also be the case that “specific action” likewise does not encompass actions not otherwise circumscribed – particularly actions in the exercise of sovereign rights. As explained above, the CDSOA is a government payment program and as such is an exercise of this right to provide subsidies. The most relevant limitations on this right to provide subsidies are contained in GATT 1994 Article XVI and the SCM Agreement.²⁹ The Panel did not find the CDSOA to violate any limitations set forth in these provisions.³⁰

29. As such, the Panel should have interpreted Articles 18.1 and 32.1 in a manner so as to: (1) give meaning to the footnotes’ express permission to take “actions” authorized under other relevant provisions of the WTO Agreement – such as the establishment of a payment program consistent with rights and obligations under GATT 1994 Article XVI;³¹ and, (2) avoid the creation of any limitations on the sovereign power over fiscal matters not otherwise specifically proscribed by the WTO Agreements – such as the provision of non-specific subsidies. The Panel, however, failed on both accounts. In contrast, the Appellate Body should read footnotes 24 and 56 in conjunction with Articles 18.1 and 32.1, respectively, to find that CDSOA offsets are not “specific action” prohibited by those provisions.

²⁸ See CDSOA Panel Report, paras. 4.547, 4.577-78, 4.617, 4.652, 4.695-97, 4.743, 4.768, 4.803 (Answers to Panel Questions at question 33 filed on behalf of Australia, Brazil, Canada, EC, India, Indonesia, Thailand, Japan, Mexico, Korea, and Chile).

²⁹ The SCM Agreement limits the subsidies which are actionable to those that are specific under SCM Agreement Article 2. In this case, the Panel examined the CDSOA under the SCM Agreement and concluded that the CDSOA is a non-specific subsidy. As such, the CDSOA is permissible under the SCM Agreement. CDSOA Panel Report, para. 7.116, 7.133

³⁰ Since the original GATT 1947, Members have been subject to two separate sets of subsidy disciplines serving fundamentally different purposes. Article XVI of GATT and Parts II, III, and IV of the SCM Agreement set out the rules and procedures governing the signatory’s right to use subsidies. In contrast Article VI of GATT, and Parts I and V of the SCM Agreement provide for the right to react against imports of certain subsidized products by imposing countervailing duties, but do not restrict a signatory’s right to use subsidies.

³¹ See, e.g., U.S. Second Submission, para. 61.

B. The Panel's Definition of "Against" Was Not Made in Accordance With Rules of Treaty Interpretation

30. As recalled above, treaty interpretation is to be based on the text of the treaty, in its context and in light of the treaty's object and purpose.³² However, in defining the term "against," the Panel failed to consider the ordinary meaning of the term "against" in the context in which it was used. In addition, the Panel did not consider the ordinary meaning of "against" in light of the object and purpose of the Antidumping Agreement and GATT 1994 Article VI. Instead, in its defining "against," the Panel merely stated that action "against" dumping must have some "adverse bearing" on "dumping as a practice."³³

31. The *New Shorter Oxford English Dictionary* defines the term "against" as "of motion or action in opposition," "in hostility or active opposition to" and "in contact with."³⁴ Considering this ordinary meaning of "against" in the context of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, the specific action against dumping or a subsidy must be "in hostile/active opposition to" "dumping" or "a subsidy", and must "come into contact with" "dumping" or "a subsidy." Examples of such actions "against" dumping would be duties, quotas, or TRQs, as they act directly against dumping or a subsidy.

32. The only logical way to come into contact with dumping or subsidization is directly through the imported good itself, 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. In order to be in "hostile/active opposition to," the contact must be burdensome or negative. Thus, in

³² Moreover, as noted by the *Canada - Autos* Panel Report, para. 10.12, n.807:

To find "ordinary meaning", reference is often made to an authoritative language dictionary. However, very few – if any – words have only one dictionary meaning. Thus, even the step of choosing the relevant dictionary meaning(s) in pursuit of "ordinary meaning" – often the very first step in treaty interpretation -- necessarily involves a reference to the context in which the word is used. Referring to the object and purpose of an agreement may also be indispensable to arriving at the meaning of a word.

³³ CDSOA Panel Report, para. 7.17. Although the Panel believed this definition of "against" was consistent with the basic definitions proposed by the complaining parties and the United States, the U.S. definition of "against" incorporated "in contact with" and "in hostile opposition to." Thus, the Panel definition of "against" was not consistent with the U.S. argument that "in order to be in 'hostile opposition to,' the *contact* with the importer or imported good must be burdensome or negative." CDSOA Panel Report, para. 7.33, n.287.

³⁴ *The New Shorter Oxford English Dictionary* 38-39 (L. Brown ed., 1993).

considering the term “against” in the context of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, a specific action “against” dumping or subsidization must apply directly to the imported product or the entity responsible for it, and it must burden (*e.g.*, impose a liability on) the dumped or subsidized imported good, or an entity responsible for the dumped or subsidized imported good. The Panel’s attempt to distinguish between “dumping as a practice” and dumping as practiced by importers, foreign producers and exporters is inapposite.³⁵

Dumping cannot exist as a practice apart from the dumped products and the entities responsible for them.

33. The object and purpose of the Antidumping Agreement confirm that the action “against” dumping must operate directly on the imported good or the entity responsible for it. There is no concept of indirect action against dumping in the Antidumping Agreement, because the purpose of the Antidumping Agreement is for Members to be able to take direct action against dumped imports that injure a domestic industry (*e.g.*, imposition of antidumping duties on injuriously dumped imports). Any other interpretation of the Antidumping Agreement fails to consider its provisions in light of its object and purpose.

34. Finally, the text and object and purpose of GATT 1994 Article VI also support the interpretation that action “against” dumping must be action that operates directly on the imported good or the entity responsible for it. GATT 1994 Article VI:1 defines dumping as *products* of one country being introduced into the commerce of another country at less than normal value. This definition suggests that 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 “against” dumping must be directly against the introduction of the imported products. The Panel nowhere explained how its test related to action against the introduction of the imported products. Rather, the Panel appeared to focus on the conditions in the U.S. market *after* the introduction into that market of the imported product. The Panel failed to follow the text of the agreement.

³⁵ CDSOA Panel Report, para. 7.33.

35. Moreover, the Panel's standard for determining whether a measure acts "against" dumping is to examine whether the measure has an adverse bearing, be it direct or indirect, on the practice of dumping, *i.e.*, whether a measure burdens imports (or the entity responsible for their importation). However, the Panel did not examine whether the CDSOA burdens imports, or the entity responsible for their importation. Rather, the Panel examined whether the CDSOA burdens the conditions under which imports compete.³⁶ Examining whether the CDSOA burdens the conditions under which imports compete is not the same as examining whether the CDSOA burdens imports or "dumping as a practice."

36. Significantly, the Panel's finding of the effects on competition would apply to *all* competing products, irrespective of whether they are dumped or subsidized or even imported. It is difficult to conceive how action that applies generally to alter the conditions of competition between the subsidized company and competing producers can be assumed to be action against "dumping" or a "subsidy." It is action that applies when there is no dumping or subsidy.

37. As detailed above, the ordinary meaning of the term "against" in its context and in light of the object and purpose of the Antidumping Agreement and GATT 1994 Article VI, demonstrates that action "against" dumping must be action directly against the imported product or the entity responsible for it and must burden the dumped imported good, or an entity responsible for it. Thus, the Appellate Body should reverse the Panel's findings that the term "against" encompasses any form of "adverse bearing," whether it be direct or indirect, and should determine that action "against" dumping or subsidization signifies a measure that is direct and actively hostile to dumping or a subsidy.

C. The Panel Incorrectly Determined That Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 Include a Conditions of Competition Test

38. The Panel compounded the flaw in its legal reasoning by concluding that an "adverse bearing" on dumping is demonstrated by the effect of the CDSOA on the competitive relationship between dumped goods and domestic products.³⁷ According to the Panel, the word

³⁶ CDSOA Panel Report, paras. 7.35, 7.39.

³⁷ CDSOA Panel Report, paras. 7.35, 7.39.

“against” as used in Articles 18.1 and 32.1 “requires” a “conditions of competition test.”³⁸ The Panel is legally incorrect. There is no explicit or implicit “conditions of competition test” in either Article 18.1 or 32.1. The Panel’s decision to add one, much less without any explanation for doing so, must be reversed.

1. The Panel Failed to Provide Any Explanation for Inclusion of a Conditions of Competition Test under Articles 18.1 and 32.1

39. As an initial matter, the Panel failed to provide any explanation for application of a conditions of competition test to Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. The Panel instead stated that, although the United States argued that there was no basis to include a conditions of competition test, in its view the “primary test of whether or not a measure is ‘burdensome’ on imports is to determine whether the measure has had an adverse impact on the conditions under which the imported goods compete with like domestic goods. In other words, we consider that the US ‘burdensome’ test requires rather than disallows a conditions of competition test.”³⁹

40. The Panel’s discussion, however, leaves wholly unexplained why a determination as to whether a measure *burdens imports* (or the entity responsible for their importation) justifies an examination as to whether the measure *burdens the conditions* under which such imports *compete*. Without explanation or citation, the Panel merely asserts that “a primary test of whether or not a measure is ‘burdensome’ on imports is to determine whether the measure has had an adverse impact on the conditions under which the imported goods compete with like domestic goods.”⁴⁰ The Panel’s cursory statement neither meets the Panel’s obligations under

³⁸ *Id.*, para. 7.35.

³⁹ *Id.*, para. 7.35.

⁴⁰ CDSOA Panel Report, para. 7.35.

DSU Article 12.7 to set out “the basic rationale behind” its findings⁴¹ and under DSU Article 11 to undertake an “objective assessment of the matter” before it.⁴²

2. Articles 18.1 and 32.1 Do Not Contemplate a Conditions of Competition Test

41. A treaty interpreter is to examine the text of a treaty in its context and in light of its object and purpose.⁴³ Focusing on the text of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, there is no express mention in either Article of a conditions of competition test. Each Article simply states that no specific action “against” dumping or a subsidy can be taken except in accordance with GATT 1994 Article VI or the Antidumping and SCM Agreements, respectively. The plain meaning of “against,” as the United States explained above, is action “in connection with” or “in hostile opposition to” imports or the entities responsible for importation, or as the Panel stated, action that “bears adversely” against dumping.⁴⁴ Neither interpretation of the plain meaning includes action that affects the “conditions of competition” under which domestic product and injurious dumped/subsidized imports compete. Thus, there is no indication in the text of either Article that use of the words “against dumping” (or a subsidy) was intended to encompass a conditions of competition test.

⁴¹ DSU Article 12.7 provides that “the report of the panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.” In *Mexico - Antidumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, Article 21.5, Appellate Body Report, WT/DS132/AB/R, adopted 21 November 2000, the Appellate Body explained:

Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations. ... Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts.

Mexico – HFCS 21.5, Appellate Body Report, paras. 106-109; *see also Australia – Measures Affecting Importation of Salmon*, Appellate Body Report, WT/DS18/AB/R, adopted 6 November 1998, para. 264.

⁴² DSU Article 11 provides that “a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.”

⁴³ *See supra*.

⁴⁴ CDSOA Panel Report, para. 7.39.

42. In fact, comparison of the specific language used in Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 with the language used in GATT 1994 Article III, where historically a conditions of competition test has been used to determine whether a measure is applied “so as to afford protection” or accords imports “treatment no less favorable” than that accorded like domestic products, demonstrates that the language of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 does not permit inclusion of a conditions of competition test.

43. Before examining the specific language of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 as compared to GATT 1994 Article III, it is important to emphasize that complaining parties did not bring a claim under GATT 1994 Article III. The complaining parties also did not bring a claim under other areas of GATT/WTO jurisprudence where a conditions of competition test has occasionally been used.⁴⁵ That complaining parties did not bring their challenge to the CDSOA under GATT 1994 Article III is not surprising. GATT 1994 Article III:8(b) states that “[t]he provisions of [GATT 1994 Article III] shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article.” In other words, GATT 1994 Article III:8(b) recognizes that the payment of subsidies exclusively to domestic producers is not a relevant factor in determining whether the principles protected by GATT 1994 Article III have been upset. Thus, the CDSOA – which all parties agree is a payment of a subsidy exclusively to domestic producers – is not subject to challenge under GATT 1994 Article III.

44. The Appellate Body should, therefore, reject the Panel’s decision to impute meanings and legal concepts derived from the specific language used in GATT 1994 Article III to Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. The Panel should not have found against the CDSOA under Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 by way of an analysis developed under GATT 1994 Article III, when GATT 1994 Article III:8(b) specifically puts domestic subsidies, such as the CDSOA, beyond its reach. The Panel

⁴⁵ For example, in examination of GATT 1994 Article XXIII:1(b) non-violation nullification or impairment claims or as explanation of why a WTO *violation* necessarily results in nullification or impairment.

erred in allowing the complaining parties to circumvent this explicit limitation in Article III in this manner.

45. GATT and WTO panels have explained that application of a conditions of competition test is applicable with respect to GATT 1994 Article III claims because of the specific language used in the Article.⁴⁶ In particular, based on GATT 1994 Article III:1's prohibition on measures "applied so as to afford protection to domestic production," panels and the Appellate Body have reasoned that the "broad and fundamental" purpose of GATT 1994 Article III is to protect the "equality of competitive conditions" between imported and domestic product. The Appellate Body further explained:

[T]he purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production.'" Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions* for imported products in relation to domestic products. ... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.⁴⁷

46. With respect to the GATT 1994 Article III:2, second sentence, panels and the Appellate Body have also found that analysis of the conditions of competition between imports and domestic products is necessitated by language requiring a determination of whether domestic product and imports are "directly competitive or substitutable."⁴⁸ For example, the Appellate Body in *Korea – Alcohol* explained:

The term "directly competitive or substitutable" describes a particular type of relationship between two products, one imported and the other domestic. It is

⁴⁶ GATT 1994 Article III:1 states that measures "*affecting* the internal sale, offering for sale, purchase, transportation, distribution or use of products ... should not be applied to imported or domestic products so as to afford protection to domestic production." (emphasis added).

⁴⁷ *Japan – Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, sec. F (emphasis added); see *European Communities - Asbestos*, Appellate Body Report, paras. 97-99.

⁴⁸ GATT 1994 Article III:2, second sentence read in conjunction with its Ad Article states "[a] tax ... shall be considered to be inconsistent with [the principles of GATT III:1] in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly *competitive* or substitutable product which was not similarly taxed." (emphasis added). GATT 1994 Article III:2, first sentence, read in conjunction with GATT 1994 Article III:1, captures measures affecting competitive conditions by taxing imported products in excess of the like domestic product. See *Canada - Split Run*, Appellate Body Report, Section IV.

evident from the wording of the term that the essence of that relationship is that the products are in competition. This is made clear both from the word “competitive” which means “characterized by competition,” and from the word “substitutable” which means “able to be substituted.” The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between different products.⁴⁹

47. Panels and the Appellate Body have also found analysis of the conditions of competition applicable to claims under GATT 1994 Article III:4 given the need to determine whether a measure is one “affecting ... internal sale, offering for sale, purchase, transportation, distribution or use.”⁵⁰ For example, the GATT panel in *Italian Agricultural Machinery* explained:

The selection of the word “affecting” would imply ... that the drafters of the Article intended to cover in [Article III:4] not only the laws and regulations which directly governed the conditions of sale and purchase but also any laws or regulations which might adversely modify the conditions of competition between the domestic and imported products on the internal market.⁵¹

48. The Article 21.5 panel in *US – FSC* stated:

We recall here the Appellate Body's observation that the ordinary meaning of the word “affecting” implies a measure that has “an effect on” and thus indicates a broad scope of application.^[52] Further, we observe that the term “affecting” in Article III:4 of the *GATT 1994* has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.

We consider that a measure pursuant to which the use of domestic – but not imported – products contributes to obtaining an advantage has an impact on the

⁴⁹ *Korea – Taxes on Alcoholic Beverages*, Appellate Body Report, WT/DS75/AB/R, adopted 17 February 1999, para. 114.

⁵⁰ GATT 1994 Article III:4 provides “[imports] shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements *affecting* their internal sale, offering for sale, purchase, transportation, distribution or use.” (emphasis added).

⁵¹ *Italian Discrimination Against Imported Agricultural Machinery*, Panel Report, BISD 7S/60, 64, adopted on 23 October 1958, cited in *European Communities – Bananas*, Appellate Body Report, para. 220.

⁵² *European Communities – Regime for the Importation, Sale, and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, para. 220.

conditions of competition between domestic and imported products and thus “affects” the internal “use” of imported products.⁵³

49. An examination of whether imports are disadvantaged is also called for by GATT 1994 Article III:4's language instructing that imports be accorded no “less” favorable treatment “than” that afforded domestic products. Whether imports have been afforded treatment *less* favorable *than* that afforded domestic products necessarily requires comparison of the treatment afforded. Such “treatment” may include an advantage granted to domestic products that is not also granted to imports.⁵⁴ Thus, panels examining GATT Article III:4 claims may look at how treatment advantages domestic products or disadvantages imports.

50. In contrast to GATT 1994 Article III, there is no indication in the *language* of Article 18.1 or Article 32.1 of a design to protect an equality of competitive conditions. Notably, neither Article includes the words “protection”, “affecting”, “treatment no less favourable than,” or “directly competitive or substitutable.”

51. The Panel, however, has effectively equated the language in Articles 18.1 and 32.1 providing for no specific action “against” dumping or a subsidy with the markedly different language in GATT 1994 Article III. In particular, the Panel appears to have given the word “against” the same meaning as prior panels and the Appellate Body give the word “affecting” with respect to measures according “treatment less favorable” or “applied so as to afford protection.”⁵⁵ In essence, the Panel transformed Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1's prohibition with respect to “specific action against dumping” into a prohibition with respect to “action affecting conditions of competition.”

⁵³ *United States – Tax Treatment for Foreign Sales Corporations*, Article 21.5 Panel Report, WT/DS108/RW, adopted 29 January 2002, paras. 8.147-48; *see also Canada – Auto Measures*, Panel Report, para. 10.80 (stating essentially the same).

⁵⁴ *United States – Tax Treatment for Foreign Sales Corporations*, Article 21.5, Appellate Body Report, WT/DS108/AB/R, adopted 29 January 2002, para. 218.

⁵⁵ *Compare* the Panel's conclusion at paragraph 7.35 (“[A] primary test of whether or not a measure is “burdensome” on imports is to determine whether the measure has had an adverse impact on the conditions under which the imported goods compete with like domestic goods”) *with* *Canada – Auto Measures* Panel, para. 10.80 (“The word ‘affecting’ in Article III:4 of the GATT has been interpreted to cover not only laws and regulations which directly govern the conditions of sale or purchase but also any laws or regulations which might adversely modify the conditions of competition between domestic and imported products.”).

52. To give meaning to the specific words of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, as well as of GATT 1994 Article III, however, the word “against” with respect to “dumping” must have a meaning different than the word “affecting” with respect to measures affording less favorable treatment or applied so as to afford protection.⁵⁶ At a minimum, action that is “against” dumping implies action that is more immediately “in connection with” or more directly “in opposition to” imports than action that “affects” imports so as to afford “protection to domestic production” or in a manner that accords them “treatment less favorable.” Indeed, as the Appellate Body has explained, the word “affecting” implies a “broad scope of application.”⁵⁷

53. There is no textual basis (such as words prohibiting “protection to domestic production” or according “less favorable treatment” to imports) to impute the same “broad scope of application” to the word “against.” Moreover, a WTO panel has already recognized the error of transferring GATT 1994 Article III concepts to other WTO provisions with markedly different language.⁵⁸ Thus, it is not enough that the CDSOA may⁵⁹ indirectly, at some point in time and to some unknown degree, adversely affect competition between non-subsidized products (sometimes including injurious dumped/subsidized imports) and domestic products, to arrive at the conclusion that the CDSOA is action “against” dumping.

D. The Panel’s Supposition That the CDSOA Has an Adverse Impact on the Conditions of Competition Is Too Remote to Find a WTO Violation

54. Even assuming *arguendo* that a conditions of competition test is applicable to analysis of Articles 18.1 and 32.1, the CDSOA’s impact on the conditions of competition would be too remote and indirect – even applying GATT Article III jurisprudence – to result in a violation. For example, in *US - FSC (21.5)*, the Appellate Body considered whether a tax exemption

⁵⁶ Indeed, the Appellate Body has recognized that even identical words in different subparagraphs of the same article may not have the same exact meaning. See *European Communities - Asbestos*, Appellate Body Report, para. 93-100 (declining to equate the meaning of “like” in GATT Article III:2 with the meaning of “like” in GATT Article III:4.)

⁵⁷ See *EC - Bananas*, Appellate Body Report, para. 220; *Canada – Auto Measures*, Appellate Body Report, para. 210.

⁵⁸ *Canada – Auto Measures*, Panel Report, para. 10.215.

⁵⁹ Assuming *arguendo* that the CDSOA even has such a tangential impact on the conditions of competition.

affected the internal use of imported products.⁶⁰ The Appellate Body determined that, on its face, the tax exemption created an incentive to use domestic over imported products and thus, violated GATT 1994 Article III:4's prohibition on discriminatory treatment. To confirm its determination, the Appellate Body stated:

[A]ny taxpayer that seeks to obtain a tax exemption under the ETI measure must ensure that, in the manufacture of qualifying property, it does not "use" imported input products, whose value comprises more than 50 percent of the fair market value of the end-product. The fair market value rule, thus, places an express maximum limit on the extent to which the value of qualifying property can be attributable to imported input products. A manufacturer's use of imported input products always counts against the 50 percent ceiling in the fair market value rule, while in contrast, the same manufacturer's use of like domestic input products has no such negative implication. Manufacturers wishing to obtain the ETI tax exemption are not restricted, in any way, on the use they make of domestic inputs. The fair market value rule, therefore, influences the manufacturer's choice between like imported and domestic input products if it wishes to obtain the tax exemption under the ETI measure.⁶¹

The Appellate Body concluded that the fair market value rule affected the internal use of imported products, within the meaning of GATT 1994 Article III:4, as compared with like domestic products.⁶²

55. The CDSOA does not give an incentive to domestic producers to spend money to bolster their competitive position vis-à-vis dumped imports. Domestic producers will receive CDSOA disbursements regardless of how they decide to spend their money. In the case of the CDSOA, the Panel simply speculated that domestic producers *might* use CDSOA distributions to bolster their competitive position. Indeed, while domestic producers might bolster their competitive position, it is not the CDSOA which gives them this incentive. Moreover, unlike *US - FSC* (21.5) where the relevant advantage was guaranteed if domestic producers acted on the incentive to use domestic products, the CDSOA does not guarantee that producers will be successful in any attempts to bolster their competitive position. The remoteness of the connection between the

⁶⁰ *US - FSC*, Article 21.5, Appellate Body Report, paras. 210-213.

⁶¹ *US - FSC*, Article 21.5, Appellate Body Report, paras. 211-212.

⁶² *US - FSC*, Article 21.5, Appellate Body Report, para. 213.

CDSOA and some “adverse bearing” on the conditions of competition is exemplified by the Panel’s statement that the CDSOA gives a subsidy, which in combination with antidumping and countervailing duties, creates a competitive disadvantage for dumped products, which then “acts (albeit indirectly) against dumping and subsidization”.⁶³

56. The United States submits that as the Panel’s supposition is too remote to give rise to a WTO violation, the Appellate Body should reverse the Panel’s finding that the CDSOA creates a competitive disadvantage for dumped or subsidized products, which acts against dumping and subsidization.

1. The Panel’s Conclusion That the CDSOA Has an Adverse Bearing on the Conditions of Competition Is Pure Speculation

57. Not only did the Panel err in imputing a conditions of competition test to Articles 18.1 and 32.1, but it likewise erred in assuming that mere supposition demonstrated that the CDSOA adversely bears on the conditions of competition for injurious dumped/subsidized imports.⁶⁴ The speculation relied on by the Panel is not a substitute for evidence and is not a permissible basis on which to find a WTO violation.

58. The Appellate Body has consistently found that WTO panels need to support their findings with evidence. They cannot rely on assumptions or speculation to find a WTO violation.⁶⁵ For example, in *Canada - Auto Measures*, the Appellate Body explained that WTO panels must analyze the relevant evidence on the record -- “assumptions are not enough.”⁶⁶ In

⁶³ CDSOA Panel Report, para. 7.36-7.37.

⁶⁴ In fact, in its discussion of the second way in which the CDSOA has an adverse bearing on the conditions of competition, the Panel cites an Appellate Body discussion of a GATT 1994 Article III:4 claim for the proposition that it does not need to support its contentions with actual evidence. See CDSOA Panel Report, para. 7.42 n.294.

⁶⁵ See, e.g., *Canada – Auto Measures*, Appellate Body Report, 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); *EC - Asbestos*, Appellate Body Report, paras. 145, 147-48, 192 (3/12/01) (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); *US – Wool Shirts*, Appellate Body Report, p. 14 (“We 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 responsible for providing proof thereof.”).

⁶⁶ *Canada – Auto Measures*, Appellate Body Report, para. 165.

that dispute, the Appellate Body reversed the Panel's findings because "[t]he Panel merely asserted its conclusion, without explaining how or why it came to its conclusion. This is not good enough."⁶⁷

59. Likewise, in *Canada – Periodicals*, the Appellate Body reversed the panel because its findings were not based on "exhibits and evidence before it" but rather on a "single hypothetical example." In that case the Appellate Body found it unacceptable to conclude that two products *were* like products on the basis of a hypothetical that suggested the two products *could* be like. According to the Appellate Body, such a "lack of proper legal reasoning based on inadequate factual analysis" could not be used by the panel to "logically arrive at the conclusion" it did.⁶⁸

60. In order to reach its decision that the CDSOA has an adverse bearing on the conditions of competition, and thus violates Articles 18.1 and 32.1, the Panel had to rely on the following assumptions/conclusions about the CDSOA:

- (1) The CDSOA mandates the distribution of a subsidy to domestic producers based on qualifying expenditures which are "costs incurred by domestic producers in competing with dumped imports subject to an order;"⁶⁹
- (2) Domestic producers will direct CDSOA disbursements to bolster their competitive position vis-à-vis dumped imports;⁷⁰
- (3) Domestic producers will be successful in using CDSOA disbursements to bolster their competitive position vis-à-vis dumped imports so as to gain a competitive advantage;
- (4) This competitive advantage will prevent foreign producers/exporters from lowering prices to compete with domestic product thereby creating a competitive disadvantage for dumped imports;⁷¹ and
- (5) This competitive disadvantage acts (albeit indirectly) against dumping and subsidization."⁷²

⁶⁷ *Canada – Auto Measures*, Appellate Body Report, para. 166.

⁶⁸ *Canada – Periodicals*, Appellate Body Report, p. 23.

⁶⁹ CDSOA Panel Report, para. 7.36.

⁷⁰ CDSOA Panel Report, para. 7.37.

⁷¹ CDSOA Panel Report, para. 7.39.

⁷² CDSOA Panel Report, para. 7.36. See also CDSOA Panel Report, para. 7.39 where the Panel states that the competitive advantage gained by domestic producers "effectively penalizes" dumped imports.

61. The Panel's series of assumptions/conclusions are based on mere supposition and therefore are too remote and contingent to support the conclusion that the CDSOA "adversely bears" on the conditions of competition.

62. The Panel's first assumption/conclusion is simply incorrect.⁷³ The CDSOA does not mandate that qualifying expenses be based on costs incurred by domestic producers in competing with dumped imports subject to an order. The CDSOA merely mandates the distribution of a subsidy to "affected domestic producers" based on qualifying expenditures. These qualifying expenditures are defined as expenditures in any of ten enumerated categories that are economic in nature, and which all companies incur on a daily basis as part of their ordinary course of business.⁷⁴ The CDSOA, contrary to the panel's assumption, does not define qualifying expenditures as costs incurred by domestic producers in competing with dumped or subsidized imports subject to an order.

63. With respect to the Panel's second assumption/conclusion, there is nothing in the text of the CDSOA that directs, or even provides any incentive for, domestic producers to spend disbursements in any particular manner (or even to spend the distributions at all). Private parties may use offset payments for any purpose, or no purpose at all.⁷⁵ Moreover, the domestic producers' eligibility for disbursements (*i.e.*, the subsidy) is not connected in any way to what the domestic producers do with the subsidy once received. As long as a company meets the objective criteria of the CDSOA (an affected domestic producer who has incurred qualifying expenditures), the company is eligible to receive distributions. In fact, the Panel recognized that CDSOA disbursements merely "allow" (as opposed to require) affected domestic producers to spend disbursements so as to bolster their competitive position over dumped products.⁷⁶

⁷³ CDSOA Panel Report, para. 7.36.

⁷⁴ CDSOA § 754(b)(4).

⁷⁵ For example, domestic producers may use disbursements for gifts to charity, payment of creditors, additional compensation or early retirement packages for workers, new product development, new cafeterias, or improvement in the competitive position in respect of a product totally unrelated to the product subject to the antidumping or countervailing duty order. *See* U.S. Responses to Panel Questions (3/21/02), p. 1.

⁷⁶ CDSOA Panel Report, paras. 7.35 and 7.37.

64. Despite this recognition, the Panel went on to state that “it may be *expected* that most or many will use the payments, and the improvement in their competitive position these will allow, to address injury caused by dumped imports in one way or another. *It is not necessary to specify how this will be done.*”⁷⁷ This is speculation, not evidence that private parties will use CDSOA distributions to better their competitive relationship. The Panel’s mistaken belief that mere speculation without any supporting evidence is sufficient to establish a violation of a WTO provision is legally incorrect.⁷⁸

65. The Panel attempted to explain why speculation was sufficient by noting that it did not need evidence because “money is fungible” and “what the recipient actually does with the cash received is irrelevant.”⁷⁹ The Panel’s explanation completely undermines its findings. Under the Panel’s conditions of competition test, what affected domestic producers do with “the cash received” is relevant because what domestic producers choose to do with the distributions determines if the competitive relationship is affected between domestic and foreign producers of the product covered under the dumping order. For example, if domestic producers decide to give the money to charity in their communities or use the money for research and development of products unrelated to the products covered by the orders, the conditions of competition between domestic product and dumped imports will not be affected. Therefore, the Panel’s reasoning is contradictory and illogical.

66. As regards the Panel’s third assumption/conclusion, there is nothing in the text of the CDSOA or in the history of government payment programs generally which ensures that even if domestic producers do use the money distributed in the production of the product covered by an order that domestic producers will be successful in improving their competitive position *vis-a-vis* foreign producers/exporters. Producers make choices every day about how to spend economic

⁷⁷ CDSOA Panel Report, para. 7.37. The Panel’s use of the phrase “address the injury caused by dumped imports” suggests that the CDSOA addresses the effects or causes of dumping or subsidization. As noted above, injury is distinct from dumping or a subsidy, yet the Panel’s findings depend on the erroneous assumption that there is no distinction. The Panel’s findings are thus in error.

⁷⁸ See *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001, paras. 11.49-11.55 (stating that it “is not enough” that the action alleged by the complaining party is *possible* or that the measure at issue may *appear* to restrict exports; the complaining party “must prove it”); see also *id.* paras. 11.28-11.33, 11.40-11.43.

⁷⁹ CDSOA Panel Report, para. 7.37.

resources, some of which have their intended effect and some of which do not. The CDSOA does not mandate how moneys are to be used. Thus, there is nothing in the statute to support the speculation that companies will use CDSOA distributions to bolster their competitive position by lowering prices. As explained, producers can use CDSOA distributions for any purpose they choose, including not using them on the product for which they incurred qualifying expenditures in the past.

67. Once again, the Panel's assumption/conclusion is not based on what the CDSOA, on its face, says. Rather, the Panel's assumption/conclusion is supposition based on remote possibilities of what the CDSOA's effect might be at some point in time, to some degree, and in some particular application.⁸⁰

68. The Panel's fourth assumption/conclusion – that foreign producers will be unable to lower prices to compete with domestic product – is not based on what the CDSOA as such does. As explained above, the CDSOA does not provide a guarantee that the domestic producer will be successful in improving its competitive position, or do so through lowering prices. Moreover, nothing in the CDSOA directs the domestic producer to lower its prices, nor does the CDSOA prohibit a foreign producer from being able to lower its prices.

69. In this instance, the Panel is not only assuming that the domestic producers will be successful in improving their competitive position, but that they will improve it specifically by lowering their U.S. prices on the products covered by the order. Then, based on this assumption, the Panel makes a further assumption that foreign producers of dumped goods will be unable to lower their prices to meet the domestic producers' lowered prices. As a result of this assumed inability of the foreign producers to lower their prices, the Panel speculates that the foreign producers will suffer a competitive disadvantage. However, the Panel offers no support for any of these assumptions. Instead, the Panel merely engages in speculation based on remote possibilities of how the CDSOA may at some point in time, to some degree, and in some

⁸⁰ Because the complaining parties have challenged the CDSOA as such, it is neither relevant nor within the Panel's term of reference to consider what the CDSOA may do at some point in time or in some particular application.

particular application affect the conditions of competition for dumped imports. Furthermore, the Panel's speculation was simply inaccurate. The Panel stated:

While non-"affected domestic producers" and foreign producers/exporters not subject to orders are able to lower their prices in order to meet the improved competitive position of the "affected domestic producers" resulting from the offset payments, the fact that the offset subsidies are combined with anti-dumping orders means that foreign producers/exporters subject to orders are unable to do so. This is because any reduction in their prices will be nullified under United States law by the imposition by the United States of correspondingly increased anti-dumping duties.

However, the Panel's assumption that producers subject to orders cannot lower their prices without increased anti-dumping duties is based on an implicit assumption that the producers will lower their prices only by increasing dumping. A producer could, of course, lower its prices in both the export and home market without increasing its dumping margin. The Panel's statement that foreign producers/exporters not subject to order can lower their prices implies that they will lower their prices in both the home and export market (otherwise they would be dumping). The Panel fails to explain why other producers can lower their prices without dumping while producers engaged in dumping can only lower their prices through increased dumping.

70. WTO panels are to examine the evidence on the record, make an objective assessment of the facts based on that evidence, and then explain the reasons and the support for their conclusions. However, the Panel's fifth assumption/conclusion, that a competitive disadvantage indirectly acts against dumping, rests on four assumptions/conclusions and turns of events that are purely speculative, incorrect, or lacking internal consistency or logical explanation.⁸¹

71. The Appellate Body has stressed the importance of evidence in determining whether a measure violates a WTO provision. As noted by the Appellate Body, assumptions are not enough.⁸² Nevertheless, the Panel indulged in speculation in determining that the CDSOA will

⁸¹ The Panel also states that the competitive advantage of the CDSOA penalizes foreign producers/exporters engaged in dumping. The Panel concluded that since the CDSOA combines the imposition of an anti-dumping order with the imposition of a penalty, the CDSOA acts as such to impose a double remedy on dumped imports. *See* CDSOA Panel Report, para. 7.39. However, the CDSOA does not penalize foreign producers, it simply gives domestic producers a subsidy. A permissible subsidy under the WTO Agreement cannot be considered a penalty.

⁸² *Canada - Auto Measures*, Appellate Body Report, para. 165.

affect the conditions of competition. Moreover, its assumptions/conclusions lacked internal consistency and were not logical. Accordingly, the Appellate Body should reverse the Panel's conclusion that the CDSOA has an adverse impact on the conditions of competition between injuriously dumped/subsidized imports and goods produced by affected domestic producers.

2. The CDSOA Does Not Provide an Incentive for Domestic Producers to Support or File a Petition

72. The Panel determined that the "adverse bearing on dumping created by the offset payments is compounded by the additional consequence of the CDSOA that it will have the effect of providing a financial incentive for domestic producers to file" or at least support a petition.⁸³ The Panel surmised that the CDSOA provides a financial incentive to file or support a petition that:

- (1) "will in all probability" result in more antidumping and countervailing duty petitions, which in turn,
- (2) "will in all probability" result in more investigations initiated which, in turn,
- (3) "will likely" result in more antidumping and countervailing duty orders, which
- (4) will "disrupt the trading environment for foreign producers/ exporters that may be engaged in dumping" and thus
- (5) acts against dumping.⁸⁴

73. The Panel stressed (1) that it did not need actual evidence to support its supposition and (2) that an increased number of orders will disrupt the trading regime – or as the Panel stated "create a repressive trading environment" – "*even if* the substantive requirements of the Antidumping and SCM Agreements for the imposition of the anti-dumping and countervailing measures are fully respected."⁸⁵ Indeed, the Panel did not rely on its later finding that the CDSOA violates standing obligations under Antidumping Agreement Article 5.4 and SCM

⁸³ CDSOA Panel Report, para. 7.42.

⁸⁴ CDSOA Panel Report, para. 7.42.

⁸⁵ CDSOA Panel Report, para. 7.42 n.300.

Agreement Article 11.4 to support its conclusion that an increase in investigations and/or orders will adversely bear on the conditions of competition. The Panel's reasoning is erroneous on several accounts.

74. Foremost is the fact that even if the CDSOA were to result in more investigations being initiated and, in turn, more orders being put in place, such a result could not lead to a violation of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. This fact is evident from the very language of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, which states that no specific action against dumping/subsidization can be taken "except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Orders imposed, as well as investigations initiated and conducted, pursuant to laws consistent with the provisions of GATT 1994 Article VI and the Antidumping and SCM Agreements, by definition, constitute measures in accordance with the provisions of GATT 1994 and the Antidumping and SCM Agreements.

75. With respect to the present case, no complaining party asserted, nor did the Panel find, any provision of U.S. law relating to the imposition of antidumping or countervailing duty orders to be inconsistent with U.S. obligations under GATT 1994 or the Antidumping and SCM Agreements, including U.S. standing laws. Moreover, the Panel did not base its finding that the CDSOA adversely bears on the conditions of competition by way of any "financial incentive" on its later (incorrect) finding that the CDSOA violates Antidumping Agreement Article 5.4 or SCM Agreement 11.4. In fact, the Panel expressly noted that the disruptive nature of the CDSOA on the trading regime (caused by increased petitions and/orders) was independent of any other potential violations of the Antidumping or SCM Agreement.⁸⁶ As such, any increase in WTO-consistent investigations and orders cannot result in violations of Antidumping Agreement Article 18.1 or SCM Agreement Article 32.1.

76. Further, the Panel did not identify a WTO violation. Contrary to the Panel's belief, use of validly imposed WTO-consistent trade remedies cannot be said to create a "repressive trade

⁸⁶ CDSOA Panel Report, para. 7.42 n.300 (stating an increase in petitions and/orders (or the prospect thereof) "will likely create a repressive trading environment *even if* the substantive requirements of the Antidumping and SCM Agreements ... are fully respected"). In any event, as explained *infra*, the CDSOA is fully consistent with standing obligations under Antidumping Agreement Article 5.4 and SCM Agreement 11.4.

regime.”⁸⁷ The very provision of trade remedies in the WTO Agreement through GATT 1994 Article VI and the Antidumping and SCM Agreements belies the Panel’s contention, unless the Panel is suggesting that the WTO itself is a “repressive trade regime.” The WTO-consistency of the CDSOA cannot turn on whether it leads to an increase in WTO-sanctioned activity.⁸⁸

77. Assuming *arguendo* that an increase in WTO-consistent antidumping and countervailing duty investigations and orders could lead to a WTO violation, the CDSOA does not provide a “financial incentive.” As explained in detail below with respect to the Panel’s findings with respect to Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4, there is no evidence that the CDSOA *will* induce producers to file or support antidumping and/or countervailing duty petitions they otherwise would not. Nor is there evidence that any such incentive *will* lead to an increase in investigations or orders.⁸⁹

78. Nor does the Panel’s supposition that the CDSOA may have such a result in an “indefinite number of cases” compensate for this lack of evidence.⁹⁰ Indeed, the case the Panel cited to support the notion that it did not need to “establish” that the CDSOA will have such a result was an Appellate Body discussion of a GATT 1994 Article III:4 claim as to whether the disputed measure accorded “treatment less favorable” to imports and as a result upset the “equality of competitive conditions” protected under GATT 1994 Article III.⁹¹ As explained above, GATT 1994 Article III jurisprudence is not transferable to analysis under Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, and there is no “expectation” in these Articles of an equality of competitive conditions between domestic products and injurious

⁸⁷ CDSOA Panel Report, para. 7.42, n.300. Even if it did, that alone would be insufficient to find a WTO violation. According to the Appellate Body in *US – Shrimp*, “[m]aintaining, rather than undermining, the multilateral trading system is necessarily a fundamental and pervasive premise underlying the *WTO Agreement*; but it is not a right or an obligation, nor is it an interpretative rule which can be employed in the appraisal of a given measure...” *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, para. 116.

⁸⁸ Complaining parties have not challenged the CDSOA under a claim of non-violation nullification or impairment.

⁸⁹ See *infra* Section III discussing standing.

⁹⁰ CDSOA Panel Report, para. 7.42 n. 299.

⁹¹ The case the Panel cited was *United States – Tax Treatment for “Foreign Sales Corporations”*, WT/DS108/AB/R, adopted 20 March 2000, para. 221. CDSOA Panel Report, para. 7.42, n299. The language cited, however, does not in fact appear in that case. Rather, the language comes from the Appellate Body’s decision in of the DSU Article 21.5 proceeding in *United States – Tax Treatment for “Foreign Sales Corporations”*, Article 21.5, WT/DS108/AB/RW, Appellate Body Report, adopted on 29 January 2002.

dumped and/or subsidized imports. As such, speculation that a measure might or could upset the conditions of competition is not sufficient to find that the measure acts “against” dumping.⁹² In fact, it is just the opposite. The expectation is that dumping or subsidies have distorted the conditions of competition. It is thus ironic that the Panel would want to protect conditions of competition that are distorted.

79. The complaining parties still must meet their burden to *establish a prima facie* case that the disputed measure acts in the manner alleged.⁹³ If this burden is not met, the Panel does not have the authority, as it apparently believes it does, to assume that the CDSOA will create a “financial incentive” in an “indefinite number of cases” and, in turn, that the CDSOA wrongly will lead to increased antidumping and countervailing duty investigations and to increased antidumping and countervailing duty orders.⁹⁴

E. The Panel Incorrectly Relied On the CDSOA’s “Legislative History” to Confirm that the CDSOA Constitutes Specific Action Against Dumping or a Subsidy

80. To confirm its erroneous finding that the CDSOA constitutes specific action “against” dumping or subsidization, the Panel relied on the supposed “purpose” of the CDSOA. According to the Panel the “stated purpose of the CDSOA” as contained in the CDSOA’s “Findings” is to act against continued dumping or subsidization.⁹⁵ The Panel’s reliance on any stated purpose or legislative history of the CDSOA was erroneous.

⁹² In fact, in the cited case, the Appellate Body stated that whether a measure violates the GATT 1994 Article III:4 less favorable treatment provision “must be grounded in close scrutiny of the fundamental thrust and effect of the measure itself. This examination cannot rest on simple assertion, but must be founded on a careful analysis of the measure and of its implications in the marketplace.” *US- FSC*, Article 21.5, Appellate Body Report, para. 215. In that case, the Appellate Body found that the measure on its face discriminated between imported and domestic products and therefore violated GATT 1994 Article III:4's prohibition on less favorable treatment. *Id.* at paras. 217, 222.

⁹³ See *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, Panel Report, WT/DS221/R, adopted 30 August 2002, para. 6.22-6.30; *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.18.

⁹⁴ CDSOA Panel Report, para. 7.42.

⁹⁵ CDSOA Panel Report, para. 7.41.

81. As a general matter, panels and the Appellate Body have taken the position that they do not “interpret” domestic laws *as such* but determine whether those laws are WTO consistent.⁹⁶ Because there was no allegation that the CDSOA is ambiguous, the only relevant question before the Panel was whether by its *terms* the CDSOA constituted specific action against dumping and subsidization.

82. Debates surrounding the passage of the CDSOA or the “Findings of Congress” introducing the CDSOA would only be relevant to its interpretation if the terms of the CDSOA were ambiguous and its operation unclear. In this regard, this case differs from the *1916 Act* case, where the operation of the statute was claimed to be ambiguous and the legislative history was consulted to determine whether the statute could be interpreted as only an antitrust statute, or something else.⁹⁷ Likewise, in the *FSC* case, the purpose of the measure was a relevant consideration under the WTO provision in question, footnote 59 to the SCM Agreement.⁹⁸

83. In contrast, nothing about the operation of the CDSOA is claimed here to be ambiguous. Nor is the purpose of a measure relevant to whether it constitutes “specific action against dumping.” The question is not whether or not U.S. legislators *intended* the CDSOA to be specific action against dumping, but rather, whether the law, as such, acts against dumping or subsidies. Indeed, the Panel appears to admit as much in responding to the U.S. argument that the stated purpose of a measure cannot bring it within the scope of Article VI and the Antidumping and SCM Agreements. Rather than address the U.S. concern, the Panel simply explained that it was not using the stated purpose of the CDSOA as the basis for its conclusion that the CDSOA constitutes specific action against dumping and subsidization.⁹⁹ To the extent the Panel nonetheless used any stated purpose of the CDSOA as grounds to bolster its erroneous

⁹⁶ See *India – Patent Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, WT/DS50/AB/R, adopted 16 January 1998, para. 66 (12/19/97) (stating that in interpreting a statute *de jure* discriminates it is not “necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish regulatory intent”); *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, para. 7.18; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p.29.

⁹⁷ See *US - 1916 Act (EC)*, Panel Report, paras. 6.40-6.67, 6.108-6.119, 6.140-6.162; *US - 1916 Act (Japan)*, Panel Report, paras. 6.37-.38, 6.44, 6.59, 6.139, 6.142

⁹⁸ See *United States – Tax Treatment for “Foreign Sales Corporations”*, Article 21.5, WT/DS108/AB/RW, Appellate Body Report, para. 150.

⁹⁹ CDSOA Panel Report, para. 7.41.

finding that the CDSOA constitutes specific action against dumping or subsidization contrary to Antidumping Agreement Article 18.1 and SCM Agreement 32.1, the Panel should be reversed.

F. In Identifying Permissible Responses To Subsidization, The Panel Incorrectly Concluded That The Appellate Body's Interpretation of Antidumping Provisions in US - 1916 Act Applied Equally To Subsidy Provisions

84. In finding that the CDSOA violated Articles 18.1 and 32.1, the Panel relied on the Appellate Body's analysis in *US - 1916 Act*.¹⁰⁰ In *US - 1916 Act*, the Appellate Body examined whether GATT 1994 Article VI's provisions on dumping were applicable to a measure that imposed criminal and civil penalties against persons found to have engaged in "dumping."¹⁰¹ Based on the *language* of GATT Article VI:2 read in conjunction with the *language* of Antidumping Agreement Articles 1, 9 and 18.1, the Appellate Body in *US - 1916 Act* concluded that GATT Article VI encompassed "all measures taken against dumping" – *i.e.*, Article VI was not limited solely to governing the imposition of antidumping duties, price undertakings and provisional measures as the United States had argued.¹⁰²

85. Although the Appellate Body's findings in *US - 1916 Act* were explicitly grounded in the language of provisions examined, in particular Article VI:2 and Antidumping Agreement

¹⁰⁰ CDSOA Panel Report, paras. 7.7-7.18.

¹⁰¹ *US - 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R, Appellate Body Report, paras. 103-133.

¹⁰² In the 1916 Act case, the United States asserted that the GATT Article VI:2's use of the word "may" ("[i]n order to offset or prevent dumping, a contracting party *may* levy on any dumped product an anti-dumping duty") indicated that while Members "may" choose to impose an antidumping duty as the means to offset injurious dumping, Members may also choose to impose other types of antidumping measures. *US - 1916 Act*, Appellate Body Report, para. 112. According to the United States, only the former choice would be bound by the rules of GATT 1994 Article VI. The Appellate Body disagreed, however, that use of the word "may" necessarily suggested the permissibility of other measures used to counteract dumping. Although admitting it was "inconclusive" based solely on the language of GATT 1994 Article VI, the Appellate Body found based on language used elsewhere in the WTO Agreement that GATT 1994 Article VI did in fact apply to measures other than antidumping duties that were used to counteract dumping. Specifically, the Appellate Body found that use of the word "measure" in Antidumping Agreement Article 1 seemed to suggest that GATT Article VI was intended to "encompass all measures taken against dumping" and was not limited in application to the imposition of antidumping duties. *US - 1916 Act*, Appellate Body Report, paras. 117-20. Thus, based *inter alia* on the language of GATT Article VI:2 and Antidumping Agreement Article 1, the Appellate Body concluded that the 1916 Act, which imposed criminal and civil penalties on individuals engaged in dumping, was governed by the rules set forth under GATT Article VI.

Article 1,¹⁰³ the Panel in the present dispute dismissed the U.S. position that, due to textual differences in the Antidumping and SCM Agreements, the Appellate Body's analysis in the 1916 Act case was not transferrable to claims that the CDSOA was an impermissible specific action against a subsidy. The Panel stated, "[s]ince the Appellate Body's analysis was not based exclusively on Antidumping Agreement Article 1, we fail to see why a different approach should apply in respect of the permissible responses to subsidization, simply because of a difference between the text of Antidumping Agreement 1 and SCM Agreement 10."¹⁰⁴ The Panel then proceeded to apply the same approach employed in the 1916 Act case with respect to antidumping provisions and a measure allegedly "against dumping" to judge whether the CDSOA was "specific action against a subsidy" in violation of SCM Agreement Article 32.1.

86. The Panel's application of the 1916 Act approach to SCM Agreement Article 32.1, however, ignores the fact that the 1916 Act approach derived from the particular words of GATT 1994 Article VI and the Antidumping Agreement. In particular, the Appellate Body's analysis in the 1916 Act case focused on the phrase "may levy ... an anti-dumping duty" used in GATT 1994 Article VI:2 and the phrase "anti-dumping measure" used in Antidumping Agreement Article 1.¹⁰⁵ Based *inter alia* on these words, the Appellate Body found that GATT 1994 Article VI encompassed "all measures taken against dumping," not just the three measures identified by the United States.¹⁰⁶

87. The words "may levy ... an anti-dumping duty" and "anti-dumping measures" do not appear in the parallel provisions of GATT 1994 Article VI or the SCM Agreement, namely GATT 1994 Article VI:3 or SCM Agreement Article 10.

¹⁰³ *US - 1916 Act*, Appellate Body Report, paras. 113-14 ("may" in GATT 1994 Article VI:3), 118-20 ("measure" in Antidumping Agreement Article 1).

¹⁰⁴ CDSOA Panel Report, para. 7.7.

¹⁰⁵ *US - 1916 Act*, Appellate Body Report, paras. 113-14, 118-20.

¹⁰⁶ *US - 1916 Act*, Appellate Body Report, paras. 120, 130.

Antidumping Provisions:	Subsidies Provisions:
<p><i>GATT 1994 Article VI:2:</i> In order to offset or prevent dumping, a contracting party <u>may levy</u> on any dumped product an <u>anti-dumping duty</u> not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.</p>	<p><i>GATT 1994 Article VI:3:</i> <u>No countervailing duty shall be levied</u> on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term “<u>countervailing duty</u>” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.</p>
<p><i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i> <i>Part I</i> <i>Article 1: Principles</i> <u>An antidumping measure shall be applied only under the circumstances provided for under Article VI of GATT 1994 and pursuant to investigations initiated¹ 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.</u></p> <p>¹ ...</p>	<p><i>Agreement on Subsidies and Countervailing Measures</i> <i>Part V: Countervailing Measures</i> <i>Article 10: Application of Article VI of GATT 1994⁵</i> Members shall take all necessary steps to ensure that the imposition of a <u>countervailing duty³⁶</u> 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 GATT 1994 and the terms of this Agreement. <u>Countervailing duties may only be imposed pursuant to investigations initiated³⁷ and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.</u></p> <p>³⁵ ...</p> <p>³⁶ The term “<u>countervailing duty</u>” shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.</p> <p>³⁷ ...</p>

88. In addition, as the text of the provisions indicate, the apparent purpose of Antidumping Agreement Article 1 is to establish “principles” for the agreement implementing Article VI (*i.e.*, rules for the imposition of *measures* governed by Article VI) whereas the purpose of SCM Agreement Article 10 is to establish that GATT Article VI applies to the imposition of countervailing *duties* and that the imposition of countervailing *duties* must comply with the SCM Agreement. In other words, while the Antidumping Agreement governs the imposition of antidumping *measures* – which according to the Appellate Body may encompass items other than

antidumping duties – the SCM Agreement governs the imposition of countervailing *duties* – which by its terms would not appear to allow for the same expansive reading given to the word “measure” as used in the Antidumping Agreement. Thus, it does not follow, as the Panel assumed, that the Appellate Body’s approach in the 1916 Act case, built around the language of GATT Article VI:2 and Antidumping Agreement Article 1, applies wholesale to the SCM Agreement which contains different language and a different purpose.

89. Indeed, the DSU and fundamental principles of treaty interpretation affirm the inappropriateness of applying the 1916 Act approach to judge the CDSOA’s consistency with the SCM Agreement. Under the DSU and customary rules of treaty interpretation, differences in the texts of WTO Agreement provisions must be given effect.¹⁰⁷ Accordingly, the Appellate Body has rejected treaty interpretations that fail to give legal effect to all words used.¹⁰⁸ The Panel’s wholesale adoption of the Appellate Body’s reasoning in the 1916 Act case, without recognizing the key differences in language and purpose of the Antidumping as compared to the SCM Agreement, however, is not in keeping with these principles.

90. Rather, the Panel should have interpreted GATT 1994 Article VI:3 in conjunction with SCM Agreement Article 10 to find that GATT 1994 Article VI:3, and, in turn, SCM Agreement Article 32.1, do not encompass a measure such as the CDSOA. Specifically, GATT Article VI:3 and SCM Agreement Article 10 only speak in terms of “countervailing duties” and, therefore, do not govern measures that are not “countervailing duties.” The CDSOA, however, does not impose countervailing or any other type of duties on products or their importers. Therefore, GATT Article VI:3 and SCM Agreement Article 10 do not apply to the CDSOA, and accordingly cannot be used to support the proposition that SCM Agreement 32.1, read in conjunction with these articles, operates to preclude a measure such as the CDSOA.

91. For these reasons, the Appellate Body should reverse the Panel’s determination that the 1916 Act approach applies equally to claims under GATT 1994 Article VI:3 and the SCM Agreement. The Appellate Body should then complete the Panel’s legal analysis to find that

¹⁰⁷ See *Japan -- Alcoholic Beverages*, Appellate Body Report, p.12.

¹⁰⁸ See *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, para. 135.

Article 10 read in conjunction with GATT 1994 Article VI:3 does *not* encompass all measures taken against subsidization.

92. In addition, the United States demonstrates below that the Panel erred in finding that the CDSOA breaches Article 32.1 of the SCM Agreement because it is not a “specific action against a subsidy.”

III. The Panel Erred in finding that the CDSOA Is Inconsistent with the Standing Requirements of Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4

A. The Panel Erred in Failing to Base Its Conclusion on the Text of the Relevant Provisions

93. Articles 5.4 and 11.4 of the Antidumping and SCM Agreements contain identical standing requirements for initiating investigations. Under these provisions, the administering authorities must determine whether the antidumping or countervailing application “has been made by or on behalf of the domestic industry.” The provisions then specifically define the conditions under which the application will be considered to have been made “by or on behalf of the domestic industry.” These conditions are expressed as objective numerical benchmarks:

The application shall be considered to have been made “by or on behalf of the domestic industry” if it is supported by those domestic producers whose collective output constitutes more than **50 percent** of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less **25 percent** of total production of like product produced by the domestic industry.¹⁰⁹ [emphasis added]

95. Agreeing with the United States, the Panel found that these articles “require[] only that the statistical thresholds be met, and imposes no requirement that the investigating authorities

¹⁰⁹ The Panel actually misstates these threshold requirements. Contrary to the Panel’s assertion that Articles 5.4 and 11.4 ensure that investigations are not initiated that “do not have the support of at least 50 percent of the industry,” the standing test in Articles 5.4 and 11.4 is not 50% of the industry, but a majority of the production produced by domestic producers expressing an opinion, and not less than 25% of the industry’s total production. See CDSOA Panel Report, para. 7.61.

inquire into the motives or intent of a domestic producer in electing to support a petition.”¹¹⁰ The Panel also concluded that the United States has implemented its obligations under Articles 5.4 and 11.4 in United States 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), 1673a(c)(4)), and that the CDSOA did not in any way amend or modify these statutory provisions.

96. The Panel was indeed correct in this conclusion as the CDSOA simply provides that duties collected pursuant to an antidumping or countervailing duty order shall be distributed to “affected domestic producers” for “qualifying expenditures.”¹¹¹ The CDSOA does not change any of the requirements under U.S. law for initiating an AD or CVD investigation and, specifically, does not change U.S. laws on the thresholds of industry support necessary to initiate an investigation. U.S. standing laws remain the same now as they were before enactment of the CDSOA.

97. Further, as the Panel also correctly concluded, WTO standing obligations do not include a requirement to examine the reason for domestic support. The Panel’s finding to this effect should have ended its inquiry. As the Panel found, the United States has implemented its standing obligations in domestic law, and the CDSOA by its terms does not change these laws. Therefore, the United States cannot then be found in violation of Articles 5.4 and 11.4 simply by the enactment of the CDSOA. The Panel’s conclusion to the contrary constitutes legal error and should be reversed.

98. In this case, the Panel found that the CDSOA is inconsistent with Articles 5.4 and 11.4 not because it is inconsistent with the text of those provisions, but because it allegedly “undermines the value of those provisions to the countries with whom the United States trades,” and because it allegedly “defeats the object and purpose” of those articles.¹¹² Yet, neither of

¹¹⁰ CDSOA Panel Report, para. 7.63.

¹¹¹ The CDSOA defines an “affected domestic producer” as “any manufacturer, producer, farmer rancher, or worker representative (including associations) that was a petitioner or supported the petition,” and remains in operation and “qualifying expenditures” as an expenditure incurred after issuance of the order in question in ten enumerated categories. *See* 19 U.S.C. § 1675c (Exhibit US-12).

¹¹² According to the Panel, the question is whether “the CDSOA has undermined the value of the provisions of Antidumping Article 5.4 and SCM Article 11.4 to the countries with whom the United States trades” and “whether the CDSOA defeats this object and purpose of Antidumping Article 5.4 and SCM Article 11.4.” CDSOA Panel Report, paras. 7.63, 7.64.

these is a proper basis for finding a violation if the measure in question is consistent with the text of the provisions in question.

99. The Appellate Body has repeatedly directed panels to the *words* of the agreement to determine the intentions of parties: “The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties.”¹¹³ On a different occasion, the Appellate Body stated that “[i]t is in the *words* constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought.”¹¹⁴ The Appellate Body also explained that examination of the words of a treaty “should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.”¹¹⁵

100. Here, the Panel did not use the object and purpose of the provisions to impute words into the agreement that are not there.¹¹⁶ Indeed, the Panel’s error is even more egregious. In this case, the Panel used the object and purpose of the provisions as the basis for finding a violation. The Panel in this case did not find a violation based on the actual terms of the standing provisions. On the contrary, the Panel agreed that Articles 5.4 and 11.4 only require that certain statistical thresholds of industry support be met before initiation of an investigation, that U.S. laws implement this requirement, and that the CDSOA does not change those laws.¹¹⁷ A finding

¹¹³ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, para. 45 (emphasis added).

¹¹⁴ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, para. 114.

¹¹⁵ *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Appellate Body Report, para. 45 (emphasis added).

¹¹⁶ In fact, during the Uruguay Round domestic producer *motives* for filing a petition was not an issue but rather there was concern about whether expressions of support made by one party (or a government) were representative of the domestic industry as a whole. Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4, therefore, were drafted to include a requirement that domestic industry support be affirmatively established through certain numerical and objective thresholds. The underlying reasons for that support was not an issue during the negotiations and is not relevant under Articles 5.4 and 11.4. *See* U.S. Second Submission, para. 80.

¹¹⁷ CDSOA Panel Report, paras. 7.59. 7.63.

of a breach must be based on the words of the agreement; it cannot be based solely on a perceived inconsistency with a provision's supposed object and purpose.¹¹⁸

101. Likewise, a violation cannot be based solely on the conclusion that the measure, although consistent with the text of the relevant provisions, "undermines the value" of those provisions to other trading partners. Having found no actual violation of the text, the Panel in this case appears to confuse violations of Articles 5.4 and 11.4 with a non-violation claim of nullification and impairment under GATT Article XXIII:1(b). According to the Appellate Body in *EC – Asbestos*, GATT 1994 Article XXIII:1(b) provides a separate cause of action for non-violation claims:

[I]t seems to us useful to make certain preliminary observations about the relationship between Articles XXIII:1(a) and XXIII:1(b) of the GATT 1994. Article XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994....¹¹⁹

¹¹⁸ Notably, the Panel appears to have derived the "object and purpose" of the standing provisions from a statement by the EC that the standing provisions were introduced "in response to the controversial practice of the United States authorities of presuming that an application was made by or on behalf of the domestic industry unless a major proportion of the domestic industry expressed active opposition to the petition." See CDSOA Panel, para. 7.61 (citing EC 1st Written Submission, footnote 49). The "object and purpose" of WTO provisions, however, is not to be sought in assertions about the "circumstance" existing at the time of a provision's drafting. When panels have looked to a WTO provision's "object and purpose," they have looked, for example, to (1) goals or "principles" listed within the particular treaty (*US – Underwear*); (2) language in the Preamble of the particular agreement (*Canada – Dairy*); and (3) the Preamble and the purposes of the WTO Agreement (*US – Section 301*). See *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, Panel Report, WT/DS24/R, adopted 25 February 1997, para. 7.19; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Panel Report, WT/DS103/R, WT/DS13/R, adopted 27 October 1999, paras. 7.25-7.26; *United States – Section 301*, Panel Report, WT/DS152/R, adopted 27 January 2000, para. 7.71. Indeed, the Vienna Convention refers to a "the preparatory work of the treaty and the circumstances of its conclusion" as "supplemental" materials that may be used to "confirm" a text's meaning when that text is ambiguous or leads to absurd results. Vienna Convention Art. 32. Thus, the circumstances existing at the time of Articles 5.4 and 11.4's drafting cannot be used to impute an obligation under Articles 5.4 and 11.4 that has no textual basis in the Articles (as the Panel admits at paragraph 7.63) and or elsewhere in the WTO Agreements. See U.S. Second Submission, para. 79 (stating that there is no stated purpose for the standing provisions).

¹¹⁹ *EC – Asbestos*, Appellate Body Report, para. 185 (emphasis added).

The purpose of GATT Article XXIII:1(b) is to provide a remedy for measures that frustrate or undermine the improved competitive opportunities legitimately expected from a tariff concession.¹²⁰ In *Korea – Government Procurement*, the panel explained that the “basic premise [of a non-violation claim] is that Members should not take actions, even those consistent with the letter of the treaty, which might serve to undermine the reasonable expectations of negotiating partners.”¹²¹ The panel elaborated:

The vast majority of actions taken by Members which are consistent with the letter of their treaty obligations will also be consistent with the spirit. However, upon occasion, it may be the case that some actions, while permissible under one set of rules (e.g., the Agreement on Subsidies and Countervailing Measures is a commonly referenced example of rules in this regard), are not consistent with the spirit of other commitments such as those in negotiated Schedules. That is, such actions deny the competitive opportunities which are the reasonably expected effect of such commitments.¹²²

According to the panel in *Korea – Government Procurement*, non-violation claims require proof that “measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom.”¹²³

102. In this case, however, no complaining party raised a non-violation claim under GATT Article XXIII:1(b). In finding that the CDSOA “defeats” the object and purpose of Articles 5.4 and 11.4 and undermines their value to countries with whom the United States trades, the Panel in this case confused the basis for finding a violation of WTO obligations with the basis for making a finding of non-violation nullification and impairment.

103. In justifying its non-textual approach to treaty interpretation, the Panel refers to the “principle of good faith,” a “general rule of conduct” requiring a party to refrain from acting so as to defeat a treaty provision’s object and purpose.¹²⁴

¹²⁰ *Id.*, quoting *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, Panel Report, adopted 25 January 1990, BISD 37S/86, para. 144

¹²¹ *Korea – Measures Affecting Government Procurement*, Panel Report, WT/DS163/R, adopted 19 June 2000, para. 7.93.

¹²² *Id.* para. 7.99.

¹²³ *Id.* at para. 7.99.

¹²⁴ CDSOA Panel Report, para. 7.64.

104. The Panel further states that, in creating “the spectre” of an investigation being improperly initiated, “the United States may be regarded as not having acted in good faith.”¹²⁵

105. There is no basis for using an alleged principle of “good faith” to depart from the text of the agreements as negotiated. There is also utterly no basis or justification in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of “good faith” as a substantive obligation agreed to by WTO Members.

106. Dispute settlement panels are subject to clear and unequivocal limits on their mandate: they may clarify “existing provisions” of covered WTO agreements and may examine the measures at issue in light of the relevant provisions of the covered WTO agreements.¹²⁶

Nowhere in Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, is there listed an international law principle of good faith. Nor does the WTO Agreement distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the Agreement and would have the consequences provided in the Agreement.

107. Likewise, WTO Members have, in DSU Article 26.1, explicitly provided for panel consideration of measures which, though not in breach of specific agreement provisions, nevertheless nullify or impair the benefits provided under the Agreement. However, even here WTO Members have been careful to strictly condition the availability of non-violation nullification or impairment claims, as set forth in Article 26.1. The Panel, through its approach of finding a breach to the “object and purpose” of Articles 5.4 and 11.4, based on consideration of the “good faith principle,” thoroughly circumvented these requirements and undermined the utility of non-violation claims. What Member, facing the requirements of DSU Article 26.1, would choose to pursue that approach when, based only on a panel’s subjective judgement of “good faith” and “object and purpose,” it can find a substantive breach?

108. Further, the manner in which the Panel chose to create and apply a substantive principle of “good faith” in this dispute illustrates the wisdom of the WTO negotiators in limiting the

¹²⁵ CDSOA Panel Report, paras. 7.63-7.64.

¹²⁶ DSU Articles 3.2, 7.1.

mandate of dispute settlement panels to application of the provisions of the covered agreements; namely, that, unlike the clearly identifiable provisions of the WTO Agreement, properly defining and applying substantive principles of international law is not a straightforward exercise that can or should be exercised by panel fiat. Specifically, the Panel appears to have grounded its application of a “principle of good faith,” and its determination to find a breach of a treaty’s “object and purpose,” in Article 18 of the Vienna Convention.¹²⁷ Leaving aside the fact that not all WTO Members, including the appellant in this case, are parties to the Vienna Convention, Article 18 relates specifically to the period prior to a treaty’s entering into force.¹²⁸ Whether the Panel overlooked this obvious limitation or intentionally disregarded it in the interest of supporting its desired outcome, the fact remains that WTO Members sought to avoid these types of debates by limiting WTO dispute settlement to application of the provisions of the covered agreements.

109. In disregarding the text of Articles 5.4 and 11.4 in its analysis, the panel crossed the line into legislating. In this regard it is worth recalling one relevant context in which Members have clearly incorporated a “principle of good faith” into WTO dispute settlement, the context of Vienna Convention Article 31(1), which reflects a customary rule of interpretation of international law incorporated through DSU Article 3.2. There it is set forth that *treaty interpreters* – such as the Panel in this case – have an obligation to interpret the treaty in good faith – in accordance with the ordinary meaning to be given to the *terms* of the treaty in their context and in the light of the treaty’s object and purpose. In disregarding the terms of WTO Agreement, both those raised by the complaining parties and those limiting the scope of panel proceedings, the Panel breached this most fundamental of obligations.

110. For the reasons stated above, the Panel’s legal conclusion that the CDSOA is inconsistent with Articles 5.4 and 11.4 of the Antidumping and SCM Agreements, respectively, because it “undermines the value” of those provisions and frustrates their object and purpose should be reversed.

¹²⁷ CDSOA Panel Report, para. 7.64 and n.314.

¹²⁸ Vienna Convention, Art. 18 (“Obligation not to defeat the object and purpose of a treaty prior to its entry into force”).

B. The Panel Erred in Basing Its Conclusion on Whether the CDSOA Creates a Financial Incentive for Domestic Producers to Support AD/CVD Investigations and Improperly Shifting the Burden of Proof to the United States

111. Despite its finding that the text of Articles 5.4 and 11.4 does not impose an obligation to inquire into the motives or the reasons behind a domestic producer's expression of support for an investigation, the Panel conducted an analysis of whether the CDSOA creates a financial incentive to support AD/CVD investigations. In other words, despite its finding that motive is not relevant under the text of the provisions, the Panel examined whether the CDSOA could provide a motive for support.¹²⁹

112. As the Panel correctly recognized, Articles 5.4 and 11.4 only require that certain numerical thresholds be met prior to initiation of an investigation.¹³⁰ These numerical thresholds do not contain an obligation to question the motives a particular domestic producer may have in choosing to support or oppose a petition, nor do these numerical thresholds delineate "proper" and "improper" reasons for supporting a petition. Because motive is legally irrelevant under Articles 5.4 and 11.4, it was legal error for the Panel to conclude that the CDSOA creates a financial incentive to support AD/CVD petitions and therefore "in effect mandates" domestic producers to support such petitions and then to use this conclusion as a basis for finding that the CDSOA is inconsistent with Articles 5.4 and 11.4.

113. As further support for its finding that the CDSOA breaches Articles 5.4 and 11.4 even though it does not amend or modify relevant statutory provisions in U.S. law, the Panel stated that the CDSOA creates the "spectre" of such investigations being initiated without proper

¹²⁹ CDSOA Panel Report, para. 7.63. In any event, the United States considers that Articles 5.4 and 11.4 do not prohibit measures which may provide an "incentive" to file antidumping or countervailing duty petitions. Many governments take steps to facilitate the filing of cases for particular groups (*e.g.*, small business advisory services or requirements for companies to belong to associations). Others may make the cost of bringing a case so low as to effectively "encourage" cases to be brought. Still others may "advertise" that antidumping and countervailing duty relief is available and provide companies information on how to file a case. None of these actions are bases for finding interference with standing obligations. *See, e.g.*, 2nd U.S. Submission, para. 84-86 and Exhibit US-28 (explaining that 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 and that such actions are taken by authorities in Canada, the European Communities, and elsewhere).

¹³⁰ CDSOA Panel Report, para. 7.63; *see also* U.S. First Submission, para. 119.

industry support.¹³¹ In this statement, the Panel further illustrates its abandonment of any semblance of a proper interpretative approach in favor of a policy-based judgment amounting to “we don’t like it.” The definition of “spectre” is “something unpleasant or dangerous that is imagined or expected.”¹³² Thus, apparently the Panel believed that “imagining” or “expecting” the CDSOA to result in investigations initiated without the proper level of industry support is sufficient grounds to conclude that the CDSOA *will* have such a result and consequently, that “imagining” or “expecting” the CDSOA to violate Articles 5.4 and Article 11.4 justifies concluding that the CDSOA in fact violates those provisions.¹³³ The Panel’s belief turns on their head elementary principles of treaty interpretation and rules on burden of proof.¹³⁴ By basing its conclusion on what amounts to nothing more than assumption and speculation, the Panel improperly shifted the burden of proof to the United States. It is well-established in GATT/WTO jurisprudence that a party asserting a claim must provide proof thereof.¹³⁵ The Panel’s entire analysis is nothing more than speculation about what the CDSOA might do or cause. Such speculation, however, is not a basis on which to find a Member in violation of its WTO obligations.¹³⁶

¹³¹ CDSOA Panel Report, para. 7.63.

¹³² WordPerfect Concise Oxford English Dictionary; *see also The New Shorter Oxford English Dictionary* 2974 (1993) (defining specter as a “haunting or terrifying presentiment”); *Webster’s Encyclopedic Unabridged Dictionary of the English Language* 1366 (1989) (defining specter as “some object or source of terror or dread”); *Merriam-Webster Collegiate Dictionary* (2001) (on-line version) (defining specter as “something that haunts or perturbs the mind: phantasm” and “phantasm” as “a product of fantasy: as **a**: delusive appearance: illusion **b**: ghost, specter **c**: figment of the imagination”).

¹³³ Supposition that the CDSOA makes it *possible* that domestic producers would support a petition for what the Panel views as “improper” reasons is not enough to sustain a finding of violation. *See Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, adopted 16 February 2001, paras. 11.49-11.55 (stating that it “is not enough” that the action alleged by the complaining party is *possible* or that the measure at issue may *appear* to restrict exports; the complaining party “must prove it”); *United States – Preliminary Determinations With Respect to Certain Softwood Lumber from Canada*, Panel Report, WT/DS236/R, para. 7.157 (“The WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application.”).

¹³⁴ *See US – Wool Shirts*, Appellate Body Report, p. 14 (burden of proof).

¹³⁵ *US – Wool Shirts*, Appellate Body Report, p. 14 (expressing the rule, well-established under GATT/WTO jurisprudence, that the parties asserting a claim must provide proof thereof);

¹³⁶ *See supra European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Appellate Body Report, WT/DS48/AB/R, adopted 13 February 1998, para. 133 (expressing the panels’ obligation base its conclusions on finding of facts); *US – Wool Shirts*, p. 14 (expressing the rule, well-established under GATT/WTO jurisprudence, that the parties asserting a claim must provide proof thereof); *Canada – Auto Measures*, Appellate Body Report, paras. 128-32, 171-74 (expressing that speculation is not a basis for a finding of WTO-inconsistency).

114. In particular, the Panel surmised that the CDSOA will induce domestic producers to support a petition in order to “keep open their eligibility for offset payments for reasons of competitive parity” with other domestic producers who do support the petition. As a result, according to the Panel, “the majority of petitions will achieve the level of support” required by Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4.¹³⁷ The Panel’s statement is at odds with the CDSOA and the operation of U.S. standing laws, even if one were to accept the undocumented assertion that some subset of domestic producers who would otherwise oppose the initiation of a petition would take action to be able to receive distributions, if any, that might be made years later if an order is issued.

115. Under U.S. law, two governmental entities are involved in antidumping and countervailing duty investigations: Commerce and the U.S. International Trade Commission (“ITC”). Commerce alone (and not the ITC) makes a determination of whether there is sufficient domestic industry support for initiation of an antidumping or countervailing duty investigation.¹³⁸ This initiation stage of a proceeding is conducted within a 20-day period following the filing of a petition.¹³⁹ If Commerce determines that the petitioners meet the standing requirements, an investigation is then initiated.¹⁴⁰ The ITC will conclude its preliminary injury investigation only if Commerce makes an affirmative initiation decision. The ITC makes no independent decision regarding initiation and has affirmatively disclaimed responsibility for standing findings.

116. In contrast to the measurement of industry support for a petition and initiation of an investigation, the necessary declaration of support to qualify for CDSOA distributions is made by U.S. producers solely before the ITC (and not before Commerce).¹⁴¹ Equally important, the

¹³⁷ CDSOA Panel Report, para. 7.62.

¹³⁸ 19 U.S.C. §§ 1671a(c)(4), 1673a(c)(4). *See* Exhibit US-13. The initiation stage of the proceeding can be extended to 40 days if standing is not demonstrated from the face of the petition and polling of domestic producers is necessary.

¹³⁹ 19 U.S.C. §§ 1671a(c)(1)(A)(ii), 1673a(c)(1)(A)(ii). *See* Exhibit US-13.

¹⁴⁰ 19 U.S.C. §§ 1671a(c)(2), 1673a(c)(2). *See* Exhibit US-13.

¹⁴¹ 19 U.S.C. § 1675c (Exhibit US-12). The CDSOA states that the “Commission [ITC] shall forward ... a list of petitioners and persons with respect to each order and finding and a list of persons that indicated support of the petition by letter or thorough questionnaire response.” For investigations conducted prior to assumption of obligations under the WTO Agreement/GATT codes (*i.e.*, long before enactment of the CDSOA) or other situations where ITC records do not permit identification of those who supported the petition (situations existing only cases initiated many years before CDSOA was enacted), the ITC may consult with Commerce to identify “affected domestic producers.” 19 U.S.C. § 1675c(d)(1) (Exhibit US-12).

CDSOA declaration of support is not required at the ITC until after the initiation proceeding by Commerce has been concluded and may contradict previously expressed opposition to the petition filed with Commerce. Indeed, a domestic producer can take its position as late as the final injury investigation questionnaire, which can be issued more than 200 days after a petition is filed.

117. As a result of this bifurcated, independent, and sequential process,¹⁴² the position of a member of the domestic industry on initiation in no way compromises its eligibility for any future CDSOA distributions that might result. There is nothing in the CDSOA or U.S. standing laws that prevents a domestic producer from indicating adamant opposition to a petition at Commerce during the initiation stage and then, if the investigation nonetheless proceeds, supporting a petition before the ITC so as to remain eligible for any future distributions that may result under the CDSOA.¹⁴³ There is, thus, no basis to speculate that the CDSOA will induce domestic producers to support a petition for reasons of “competitive parity,” and that such inducement will result in more petitions meeting the required threshold levels of support. The Panel's conclusion to the contrary demonstrates its failure to consider and understand the structure and operation of the CDSOA and the U.S. antidumping and countervailing duty statutes' provision on standing and initiation.

118. The Panel's failure to understand the operation of U.S. law is compounded by its consideration of the only two purported pieces of “evidence” that have been advanced in support of complaining parties' claim. Specifically, neither piece of “evidence” stands for the proposition cited by the Panel – namely, that the CDSOA creates a financial incentive for domestic producers to support or file petitions and, as a consequence, results in the initiation of investigations without “proper” industry support.

119. One of the pieces of “evidence” cited is described as a letter from a domestic producer in which it reportedly changed its position to favor the softwood lumber from Canada petitions out

¹⁴² Cf. *United States – Import Measures on Certain Products from the European Communities*, Appellate Body Report, WT/DS165/AB/R, adopted 10 January 2001, para. 75 (finding the fact that two separate U.S. agencies acted separately, on two separate occasions, and pursuant to two distinctly separate legal authorities to reinforce the notion that the measures examined were separate and legally distinct).

¹⁴³ See U.S. Second Submission, para. 86 (explaining the distinction to the Panel).

of a desire to participate in any potential CDSOA distributions. The determination of industry support and the decision to initiate the softwood lumber investigations,¹⁴⁴ however, had been made long before the domestic producer purportedly changed its position (in fact, 294 days before).¹⁴⁵ In addition, the domestic producer's view was registered before the ITC,¹⁴⁶ not Commerce. As explained above, it is Commerce that makes decisions on standing and initiation. The letter, thus, could not possibly stand for the proposition that the CDSOA influenced the initiation of the softwood lumber investigations or undermined the standing obligations of AD Agreement Article 5.4 or SCM Agreement Article 11.4. At most the "evidence" would support the conclusion that domestic producers who do not favor initiation of an investigation may register their opposition at Commerce and, if an investigation is nonetheless initiated, still seek qualification for distributions under the CDSOA before the ITC.

120. Moreover, the examination of the letter reveals that the letter is not what the Panel claimed it to be. It is neither a letter from a "domestic producer" nor a letter changing positions.¹⁴⁷ In fact, the company that authored the letter states therein that it is expressing its "continuing" support for the petitions (*i.e.*, it is not expressing a change in position), citing a letter it submitted to the ITC over a month earlier in which the producer had already expressed support for the petition.¹⁴⁸ Moreover, the company had entered an appearances before the ITC

¹⁴⁴ CDSOA Panel Report, para. 7.62 (stating the letter was submitted after initiation).

¹⁴⁵ See Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21332, 21333 (Apr. 30, 2001) (citing Attachment I to the *Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada* dated April 23, 2001); Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 21328, 21339 (Apr. 30, 2001) (citing Attachment I to the *Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products from Canada* dated April 23, 2001) (Exhibit US-23).

¹⁴⁶ CDSOA Panel Report, para. 7.62 (stating the letter was submitted to the ITC).

¹⁴⁷ See Exhibit-Canada 20.

¹⁴⁸ This letter, submitted to the ITC on February 11, 2002 (Exhibit US-33), was referenced in another submission addressed to Commerce on the same day. In the submission to Commerce, the company in question stated that the ITC letter was not contradictory to positions taken earlier – *i.e.*, the ITC letter was not expressing a change in positions. Comments submitted on behalf Fred Tebb & Sons., Inc. ("Tebb") to Commerce (Feb. 11, 2002) at 4 n.9. Other submissions made by the company in question in the softwood lumber investigations and available on the public record reveal that it, in fact, never opposed the petitions. Its concern in the subject investigations was to ensure that the scope of the investigations covered all "remanufacturers" of softwood lumber, and in this respect "incorporated by reference all of the reasons propounded by [petitioners]" for not excluding remanufactured softwood lumber products from the scope of the investigation. See Comments [submitted to Commerce on behalf of Tebb] on Product Coverage and Scope of Investigation (July 19, 2001), Exhibit A at 1-2; Written Brief submitted to Commerce and ITC on behalf of Tebb (April 25, 2001) at 3-5; Comments to Commerce (Feb. 11, 2002) at 4;

and Commerce as a “foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise” - not a domestic producer.¹⁴⁹ Thus, the letter is irrelevant to the issue for which the Panel cited it. Contrary to the claim of the Panel, the company did not change its position.

121. The Panel also cited a letter in which a U.S. producer purportedly urged other domestic producers to support a petition against Canadian softwood lumber imports by citing the CDSOA.¹⁵⁰ Examination of the letter referencing the CDSOA, however, shows that it was not written by a domestic producer, but instead by a law firm *informing* domestic producers of the merits and circumstances of their case, as well as various provisions of U.S. law including the CDSOA.¹⁵¹ Importantly, the letter counsels that petitioners/supporters cannot count on obtaining funds under the CDSOA. The letter does not try to use the CDSOA to induce other domestic producers to support a petition. It certainly does not promise CDSOA disbursements if domestic producers support the petition.¹⁵² Furthermore, there is no indication that the letter actually had

Rebuttal Brief submitted to Commerce on behalf of Tebb (Feb. 28, 2002) at 2-3; Commerce, Issues & Dec. Memo., CVD Inv. No. C-122-839 (Mar. 21, 2002) at 6 (internet version), *available at* <<http://ia.ita.doc.gov/frn/summary/canada/02-7849-1.txt>>. These documents are available on the public record. ITC documents are available on the internet <<http://dockets.usitc.gov/eol/public/>> (on the left sidebar, click on 701, then click on investigation number 701-414). Commerce documents are available for public inspection at the Commerce's Public Records Unit in Washington, D.C.

¹⁴⁹ All documents cited in this paragraph are available on the public record. ITC documents are available on the internet <<http://dockets.usitc.gov/eol/public/>> (on the left sidebar, click on 701, then click on investigation number 701-414). Commerce documents are available for public inspection at the Commerce's Public Records Unit in Washington, D.C. See Entry of Appearance submitted to the ITC (April 19, 2001) (stating that the company is an interested party under 19 U.S.C §1677(9)(A) as a “foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise.”); Entry of Appearance submitted to Commerce (May 18, 2001) (same). These documents are available on the public record. ITC documents are available on the internet <<http://dockets.usitc.gov/eol/public/>> (on the left sidebar, click on 701, then click on investigation number 701-414). Commerce documents are available for public inspection at the Commerce's Public Records Unit in Washington, D.C.

¹⁵⁰ CDSOA Panel Report, para. 7.62 (referencing “evidence” cited in paragraph 7.45).

¹⁵¹ The letter sent to domestic producers from the Coalition for Fair Lumber Imports attaching the law firm's letter does not mention the CDSOA as a reason for domestic producers to support the petition and states that the attached letter from the law firm provides information on the “state of legal affairs.” See Canada-Exhibit 12.

¹⁵² U.S. Second Submission, para. 72 n.71. Furthermore, the United States submitted evidence that the domestic producers to whom the letter was addressed (1) publicly announced their consideration of a petition months before CDSOA was enacted; and (2) the level of the domestic industry support for the petition in the year the case was brought (2001 – *i.e.*, after the enactment of the CDSOA) was 67%, whereas industry support for a petition for the same product and industry in 1986 was 70%. See U.S. Second Submission, para. 72, n.71.

the effect of influencing any domestic producers to support the petition, much less to support a petition it otherwise would not but for the potential to become eligible for CDSOA offsets.

122. Despite the fact that neither letter cited by the Panel stands for the proposition that the CDSOA induces domestic producers to file or support petitions, the Panel nonetheless found both to be “evidence of the inevitable impact of the CDSOA on the position of the domestic industry vis-a-vis antidumping/countervailing duty applications.”¹⁵³ In reality, there was no evidence to support the Panel’s conclusion. As such, there was no evidence on the record with which complaining parties could meet their burden to establish a *prima facie* case and, as a consequence, the Panel’s finding amounts to a shifting of the burden of proof to the United States.

123. As there was no evidence to support a finding of violation, the Panel’s analysis is nothing more than speculation about what the CDSOA might do or cause. Such speculation, however, is not a sufficient basis on which to make a finding of WTO-inconsistency.¹⁵⁴ Moreover, had the Panel not merely speculated that the CDSOA creates a financial incentive and instead made the factual findings necessary to support its conclusion, it would have recognized that the filing of “frivolous” or “disingenuous” petitions is strongly discouraged by rigorous strictures in the U.S. legal system,¹⁵⁵ and that there are a variety of steps the United States could, and in fact, does take, to ensure that petitions filed meet the “proper” and required threshold levels of support prior to initiating an investigation. The Panel, however, never examined U.S. laws or regulations governing or relating to the initiation of antidumping and countervailing duty investigations. Any conclusions the Panel thus drew were based on its own assumptions about how the U.S. system might work. Again, as the Appellate Body has simply stated: “This is not good enough.”¹⁵⁶

¹⁵³ CDSOA Panel Report, para. 7.62.

¹⁵⁴ As the Appellate Body has stated, assumptions or speculation do not substitute for proper legal reasoning and factual analysis. See *Canada – Periodicals*, Appellate Body Report, Sec. V.A; *Canada – Auto Measures*, Appellate Body Report, paras. 128-32, 164-67, 171-74, 185.

¹⁵⁵ U.S. law comprehensively details the requirements necessary to properly filed antidumping and countervailing duty petitions. See, e.g., 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1) and 19 C.F.R. §§ 351.202(b), 207.11. Frivolous petitions are also precluded by the operation of U.S. antitrust laws which provide only a narrow exception to the legal rubric prohibiting concerted action by domestic producers to reduce competition.

¹⁵⁶ *Canada – Auto Measures*, Appellate Body Report, para. 165-66.

IV. The Panel Exceeded Its Terms Of Reference By Examining Claims Concerning The CDSOA In Combination With Other U.S. Laws And Regulations

124. Under DSU Article 7, a panel's terms of reference are limited to the claims set out in the complaining parties' request for establishment of a panel.¹⁵⁷ As noted by the Appellate Body:

Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provisions of the DSU. The jurisdiction of a panel is established by that panel's terms of reference, which are governed by Article 7 of the DSU. A panel may consider only those claims that it has the authority to consider under its terms of reference. A panel cannot assume jurisdiction that it does not have.¹⁵⁸

125. In this case, the complaining parties' request for establishment set out a challenge to the CDSOA as such, *i.e.*, the complaining parties challenged the CDSOA prior to implementation and independent of any other laws. In particular, the complaining parties alleged that CDSOA "offsets" constitute specific action that is "not contemplated" or "envisioned" in the GATT 1994, the Antidumping Agreement, or the SCM Agreement.¹⁵⁹

126. While the Panel acknowledged that the CDSOA was the measure at issue, the Panel proceeded to find that the CDSOA violates Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 because the combination of antidumping duties (or countervailing duties) and the CDSOA transfers a competitive advantage to affected domestic producers.¹⁶⁰ In explaining why the CDSOA constitutes "specific action against dumping" and "a subsidy," the Panel admitted that the CDSOA itself does not alter conditions of competition (*i.e.*, what the Panel believed is the "specific action against dumping"). Instead, the Panel explained that it was

¹⁵⁷ See *EC- Bananas*, Appellate Body Report, para. 143. Moreover, the "'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference...[A] matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference." *Brazil - Measures Affecting Desiccated Coconut*, Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, section VI, p. 25.

¹⁵⁸ *India - Patent Protection Pharmaceutical Products*, Appellate Body Report, para. 92 (emphasis added).

¹⁵⁹ CDSOA request for establishment, WT/DS217/5 (July 13, 2001), p. 1; WT/DS234/12 (August 10, 2001), p. 1; WT/DS234/13 (August 10, 2001), p. 1.

¹⁶⁰ CDSOA Panel Report, paras. 7.36, 7.113.

the combination of the offset payment subsidies and the antidumping duties (or countervailing duties) that causes adverse effects and alters the conditions of competition:

[O]ur finding that the CDSOA constitutes “specific action against dumping” and subsidy is not based on adverse effects resulting from the use of a subsidy. Although our finding that the CDSOA constitutes “specific action against dumping” and subsidy rests on the adverse impact of the CDSOA on exporters/foreign producers engaged in dumping, that adverse impact does not result exclusively from the provision of offset payment subsidies (or through the use of a subsidy). The adverse impact results from a combination of anti-dumping duties and offset payment subsidies in the particular circumstances of the CDSOA.¹⁶¹

127. The complaining parties' request for establishment, however, did not include a challenge to provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties, or a challenge to the CDSOA in conjunction with provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties. In fact, the complaining parties did not even mention the provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties in their request for establishment. Therefore, the Panel's terms of reference were limited to determining whether the CDSOA, as such, violates identified provisions of the WTO Agreement.

128. Although the Panel could review relevant provisions of U.S. law for interpretative purposes, the Panel was not at liberty to examine the CDSOA and other provisions of U.S. law in order to find a WTO violation. In other words, the Panel could not find a WTO violation because the CDSOA, in conjunction with the U.S. laws on the imposition of antidumping and countervailing duties, violates U.S. obligations under the WTO Agreement.¹⁶²

¹⁶¹ CDSOA Panel Report, para. 7.119, n .334.

¹⁶² For example, in *United States – Section 211*, the measure at issue was Section 211 of the United States Omnibus Appropriations Act. However, the principal U.S. federal statute on trademark and trade name protection is the Trademark Act of 1946 (the "Lanham Act"). Thus, the Appellate Body could only use the Lanham Act to the extent that it was relevant for the interpretation of Section 211. It did not make findings on Section 211 in combination with the Lanham Act. *United States – Section 211 of the Omnibus Appropriations Act of 1998*, Appellate Body Report, WT/DS176/AB/R, adopted 1 February 2002, paras. 93-97.

129. WTO panels and the Appellate Body have repeatedly found that a panel is limited to examining the measures in its terms of reference.¹⁶³ For example, in *US – Import Measures*, the Appellate Body determined that the only measure in dispute was the U.S. March 3, 1999 decision to increase bonding requirements. The Appellate Body found that the April 19, 1999 action to impose 100% duties on certain European Community products was not within the panel's terms of reference because it was not identified in the request for consultations (as it did not exist on March 4, 1999 when the request was made) and it was not formally the subject of consultations held on April 21, 1999. Although the Appellate Body acknowledged that the EC panel request referenced U.S. suspension of concessions on April 19, 1999, it concluded that this reference alone was not sufficient to bring the April 19 measure within the panel's terms of reference.¹⁶⁴

130. Similarly, the *US – Section 129* panel, in examining Canada's challenge to Section (c)(1) of the U.S. Uruguay Round Agreements Act (URAA), determined that the only measure before it was Section 129(c)(1).¹⁶⁵ Thus, the panel's examination was limited to what Section 129(c)(1), as such, required. To the extent that other provisions of U.S. antidumping or countervailing duty law required the United States to take action, the panel determined it was not called upon to examine such provisions. The panel concluded that its terms of reference did not include making findings regarding whether Section 129(c)(1), in combination with other provisions of US law, required the United States to take any actions which Canada considered contrary to WTO law.¹⁶⁶

131. Likewise, in this dispute, the Panel was limited to examining whether the CDSOA, as such, violated U.S. obligations under the WTO Agreement. Its terms of reference did not permit an examination of whether the CDSOA, in combination with any other U.S. law, violates U.S. obligations under the WTO Agreement. Therefore, the Panel exceeded its terms of reference by

¹⁶³ See, e.g., *United States – Section 129*, Panel Report; *EC – Bananas*, Appellate Body Report, paras. 141-143; *India – Patent Protection Pharmaceutical Products*, Appellate Body Report, para.89.

¹⁶⁴ See *United States – Import Measures*, Appellate Body Report, paras. 68-70.

¹⁶⁵ The panel noted that Canada's request for establishment specified that the measure at issue was Section 129(c)(1) of the U.S. URAA. Canada did not specifically identify any other measure in its request for establishment. The panel also noted that although Canada made numerous references to the provisions of title VII of the United States Tariff Act of 1930, as amended, those provision were not themselves measures within the panel's terms of reference. Therefore, the panel examined whether Section (c)(1), taken alone, was inconsistent with the WTO provisions invoked by Canada. See *United States – Section 129*, Panel Report, paras. 6.2-6.5.

¹⁶⁶ *United States – Section 129*, Panel Report, para. 6.84 n. 123; see also *United States – Section 129*, Panel Report, para. 6.69 n.112, para. 6.80 n.120, and para. 6.90 n.126.

examining whether the CDSOA, in combination with U.S. laws on the imposition of antidumping duties (or countervailing duties), violates Articles 18.1 and 32.1.

V. The CDSOA Is Consistent With WTO Agreement Article XVI:4 and Does Not Nullify or Impair Benefits Accruing to the Complaining Parties

132. For the reasons stated above, the CDSOA is consistent with GATT 1994 Articles VI:2 and VI:3, Antidumping Agreement Articles 5.4, 18.1 and 18.4, and SCM Agreement Articles 11.4, 32.1 and 32.5. Therefore, the United States requests that the Appellate Body reverse the Panel's finding that the CDSOA violates Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*.

133. For the reasons stated above, the CDSOA is consistent with GATT 1994 Articles VI:2 and VI:3, Antidumping Agreement Articles 5.4, 18.1 and 18.4, and SCM Agreement Articles 11.4, 32.1 and 32.5. Therefore, the United States requests that the Appellate Body reverse the Panel's finding that the benefits accruing to the complaining parties under the WTO Agreement have been nullified or impaired.

VI. The Panel Erred in Issuing an Advisory Opinion on a Measure Outside of Its Terms of Reference.

134. The Panel also erred in its finding that the CDSOA "may only be made in situations presenting the constituent elements of dumping" by rendering an advisory opinion on a measure not before it. The Panel stated in paragraph 7.22 that: "Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph - that offset payments may be made only in situations presenting the constituent elements of dumping." However, there was no measure before the Panel where payments were funded directly from the U.S. Treasury. Accordingly, there was no basis for the Panel to opine on what its findings would be if such a measure were presented to it. The Panel has no authority to make findings on a matter not before it, and this finding should be reversed.

VII. The Panel Erred In Denying The United States Request for the Issuance of Separate Reports

135. The United States invoked its right under Article 9.2 of the DSU to have the Panel issue a separate report in the dispute brought by Mexico. The Panel declined to abide by its plain obligation under the DSU and instead created a number of conditions and procedural bars that the Panel used to evade its obligation.¹⁶⁷ The United States respectfully requests that the Appellate Body reverse this conclusion as it is not supported by the plain meaning of DSU Article 9.2, and would both diminish the rights of the United States under -- and create obligations for the United States in addition to those in -- the covered agreements. This is in direct contravention of Articles 3.2 and 19.2 of the DSU.

136. The Panel appears to begin from the erroneous presumption that panels are authorized to add conditions to the rights provided under the covered agreements.¹⁶⁸ There is no legal basis for such a presumption. Indeed, Article 19.2 of the DSU expressly provides the opposite. Article 19.2 provides that:

In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.

137. The relevant provision of Article 9.2 is simple, clear, and straightforward. The second sentence states: "If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned." This sentence is not difficult to read. *If* a party so requests, then the panel *shall* issue separate reports. Yet the Panel, rather than following this clear directive, chose to ignore the plain language of Article 9.2 and take upon itself the task of re-writing the obligation, apparently so it would be more to the Panel's liking. Article 9.2 does not contain any conditions, much less the conditions fabricated by the Panel. It is significant that the negotiators chose to use the word "shall" and not, for example, "should" in the text of Article 9.2. According to Black's Law Dictionary, "shall" "in ordinary usage means 'must' and is

¹⁶⁷ CDSOA Panel Report, paras. 7.3-7.6.

¹⁶⁸ As the United States noted to the Panel, the DSU is itself a covered agreement. *See* Appendix 1 to the DSU.

inconsistent with a concept of discretion.”¹⁶⁹ The use of the word “shall” in the text of the article creates an unequivocal obligation for a panel to issue separate reports when so requested by one of the parties.

138. This was the basis for the panel’s decision in *European Communities - Regime for the Importation, Distribution and Sale of Bananas* to grant the EC’s request for four separate panel reports. In that dispute, the panel found that, despite the administrative burden, “the terms of Article 9 ... require us to grant the EC request [for separate reports].”¹⁷⁰ Even the complaining parties in that dispute “conceded that the DSU appeared to require the Panel to accede to the EC’s request, if the EC insisted on separate panel reports.”¹⁷¹

139. In addition to being inconsistent with the plain language of Article 9.2, the Panel’s refusal to issue separate reports in this dispute despite the U.S. request diminishes the rights of the United States in violation of Articles 3.2 and 19.2 of the DSU.

140. Article 3.2 of the DSU provides, in relevant part, that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” As explained above, Article 9.2 of the DSU grants Members the unqualified right to the issuance of separate panel reports upon request. Thus, a refusal by the Panel to issue separate reports despite the U.S. request would nullify the rights granted to the United States by Article 9.2, in violation of Articles 3.2 and 19.2 of the DSU.¹⁷²

141. The Panel offered three reasons for its findings. None of them is consistent with the text of the DSU. The Panel’s reasons were as follows:

¹⁶⁹ *Black’s Law Dictionary*, 6th edition.

¹⁷⁰ Report of the Panel in *European Communities - Regime for the Importation, Distribution and Sale of Bananas*, WT/DS27/R/USA, adopted as modified by the Appellate Body in other respects on 25 September 1997, para. 7.55 (“*EC - Bananas*”).

¹⁷¹ *Id.*, para. 2.43.

¹⁷² The United States notes that in the first instance the Panel’s findings that it need not accept the U.S. request for separate reports is in breach of DSU Article 19.2 which is specifically directed to panel findings. Adoption of the Panel’s findings would be in breach of DSU Article 3.2 since adoption would result in DSB recommendations and rulings that “add to or diminish the rights and obligations provided in the covered agreements.”

(a) *First*, the Panel considered that the request was untimely. There is no deadline for the request, however, in the text of Article 9.2.¹⁷³

(b) *Second*, the Panel considered that the United States had failed to describe how it would be prejudiced if a single report were issued. Again, there is simply no requirement to demonstrate prejudice in the text of Article 9.2, nor is there any basis for assigning such a burden to the requesting party.¹⁷⁴ Presumably any concern about “prejudice” to any Member was resolved during the negotiations that resulted in the simple, unconditional text of Article 9.2.

(c) *Third*, the Panel considered that separate final reports must be preceded by separate interim reports. Again, the text of Article 9.2 does not require a separate interim report.¹⁷⁵ Nor does Article 15.2 of the DSU require separate interim reports. The Panel is incorrect to suggest that without a separate interim report, Mexico would have been denied its rights to request a review of precise aspects of its interim report. Mexico was given the opportunity to comment on the interim report, including the Panel’s analysis of every claim raised by Mexico (both the Mexico-specific claims and the claims it shares with other complaining parties). Thus, the requirement of Article 15.2 that Mexico receive an interim report “including both the descriptive sections and the Panel’s findings and conclusions” has been fulfilled. The United States also identified for the Panel one method of providing separate reports that would have preserved the interim report as provided to Mexico. In addition, if the Panel were genuinely concerned about this point, it was within the Panel’s power to provide separate interim reports. The Panel cannot choose not to provide separate interim reports and then rely on its own decision as a basis to deny the U.S. its rights under Article 9.2.

142. In addition to lacking any textual support, the Panel’s analysis also improperly creates new obligations. As explained above, the Panel’s requirements that the request be made at an earlier juncture and that the requesting party describe potential prejudice are not found anywhere in the text of Article 9.2 or any other provision of the DSU. As such, the Panel’s adoption of these requirements creates additional obligations not found in a covered agreement in violation of Articles 19.2 and 3.2 of the DSU.

¹⁷³ And while no deadline is provided in Article 9.2 and so any concern by the Panel on “timeliness” is not legally relevant, the United States notes that the Panel’s “deadline” was only announced after the fact, with no notice to the parties.

¹⁷⁴ If prejudice were legally relevant, rather than being a condition imported into the text by the Panel with no legal basis, one could just as easily consider that it should be the panel or the other party that would have to demonstrate prejudice in order to defeat a request for a separate panel report. And like the first condition, although not legally relevant, the Panel also imposed this one after the fact with no prior notice to the parties.

¹⁷⁵ The Panel again creates a condition not found in Article 9.2 - separate interim reports - and then uses this invented condition to override the plain text that *is* found in Article 9.2. The Panel so erred.

143. For these reasons, the United States requests that the Appellate Body find that the Panel's conclusion and failure to issue separate panel reports constitutes legal error.

VIII. Conclusion

144. In joining the WTO, Members have agreed to comply with the obligations contained in the various agreements. However, WTO violations cannot be created because one or many Members are unhappy with the actions of another Member where no obligations have been assumed. Dispute settlement panels are prohibited from creating new rights or new obligations. Creating new rights and obligations is the responsibility of the Members through negotiations. Ironically, the Panel in concluding its extraordinarily flawed report recognized that at least one issue raised in the case might best be resolved through negotiations. By resolving it itself, in the absence of the obligation it found, it turned the structure of the DSU and the rights and obligations of Members on their head.

145. The CDSOA was found not to be an actionable subsidy under GATT 1994 Article XVI and the SCM Agreement – the provisions of the WTO directly relevant to the government payment program in this dispute. Complaining WTO Members should not be allowed to circumvent these specific provisions through creation of new limitations on a government's right to appropriate funds. It is not the function of dispute settlement panels to impose obligations on the United States or any other Member that have not been accepted under existing agreements. If Members are unhappy with WTO-consistent actions, they should raise the matter in negotiations, and not distort the purpose and operation of the dispute settlement system. The Panel erred in its failure to conform to fundamental limitations on its authority. The United States asks the Appellate Body to reverse the Panel's findings in the areas reviewed in this submission and to reaffirm the fundamental limitations that exist on the dispute settlement system to adjudicate obligations undertaken, not to search for and create obligations that some might like to exist.

146. For the reasons stated above, the United States respectfully requests the Appellate Body to reverse the Panel's findings that the CDSOA violates GATT 1994 Articles VI:2 and VI:3, Antidumping Agreement Articles 5.4, 18.1 and 18.4, and SCM Agreement Articles 11.4, 32.1 and 32.5, and WTO Agreement Article XVI:4.

**BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY**

United States - Continued Dumping and Subsidy Offset Act of 2000

(AB-2002-7)

**EXECUTIVE SUMMARY OF THE
APPELLANT'S SUBMISSION OF THE UNITED STATES OF AMERICA**

October 28, 2002

I. Introduction

147. The measure at issue in this dispute is the Continued Dumping and Subsidy Offset Act (“CDSOA”), a U.S. law that directs the payment of duties to domestic producers. As a subsidy, the most appropriate legal framework for examining whether the CDSOA complies with WTO rules is under GATT 1994 Article XVI and the SCM Agreement. The Panel disagreed that the CDSOA as such violates these obligations. Instead of challenging the CDSOA under the specific provisions addressing subsidies, all complaining parties alleged, and the Panel found, that the CDSOA violates the general and “final” provision prohibiting “specific action against dumping” or “a subsidy” contained in Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively. In addition, the Panel found, that the CDSOA violates the Antidumping and SCM Agreements’ requirement that antidumping and countervailing duty investigations only be initiated if certain numerical thresholds of industry support are met (Articles 5.4 and 11.4, respectively). The Appellate Body should reverse the Panel’s findings.

II. The Panel Erred In Finding That The CDSOA Is “Specific Action Against Dumping and Subsidization”

148. The Panel determined that a measure constitutes “specific action against dumping” if “(1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping,” and “(2) it acts ‘against’ dumping, in the sense that it has an adverse bearing on” “the practice of dumping” “be it direct or indirect.” The Panel then concluded that the CDSOA met these two conditions and therefore constitutes “specific action against dumping.”

149. The CDSOA, however, does not meet the definition of “specific action against dumping” as developed in *US – 1916 Act*. Principally, the language of the CDSOA does not include the constituent elements of dumping. Indeed, the Panel recognized that the CDSOA contains “no reference to the constituent elements of dumping” and found that the constituent elements of dumping are not “built into the essential elements of eligibility for offset payment subsidies.”

Unlike the 1916 Act, the CDSOA by its terms does not impose measures on dumped or subsidized products or impose any form of liability on importers/foreign producers/exporters when dumping is found, and “dumping” is not the trigger for application of the CDSOA. Rather, the CDSOA distributes money (“triggered” by an applicant’s qualification as an “affected domestic producer”) from the U.S. government to domestic producers.

150. More fundamentally, the CDSOA is not action “in response” to dumping. The only “connection” that the CDSOA has with orders is that its terms limit availability of CDSOA offset payments to the universe of products covered by an existing or revoked order and “affected domestic producers” to those who supported the investigation and still produce the particular product. Under the U.S. system, CDSOA payments can and do occur at points in time when no order continues to exist or even when no dumping or subsidization is currently occurring. Thus, the Panel’s conclusion that there is a “clear, direct and unavoidable connection” between the determination of dumping and CDSOA offset payments is incorrect.

151. The Panel’s erroneous finding that the CDSOA constitutes “specific action” is compounded by its failure to explain how its interpretation of the phrase “specific action” in the main provisions of Articles 18.1 and 32.1 differed from its interpretation of the word “action” in the Articles’ footnotes. Specifically, the Panel erred in concluding that it did not need to examine the Articles’ footnotes because it had already concluded that the CDSOA constitutes “specific action” against dumping and subsidization. The footnotes to Articles 18.1 and 32.1 are an integral part of the Articles’ “text” and inform the meaning of “specific action.” The Panel should have interpreted Articles 18.1 and 32.1 in a manner so as to: (1) give meaning to the footnotes’ express permission to take “actions” authorized under other relevant provisions of the WTO Agreement (2) avoid the creation of any limitations on the sovereign power over fiscal matters not otherwise specifically proscribed by the WTO Agreements. The Appellate Body should read footnotes 24 and 56 in conjunction with Articles 18.1 and 32.1, respectively, to find that CDSOA offsets are not “specific action” prohibited by those provisions.

152. The Panel also failed to consider the ordinary meaning of the term “against” in the context in which it was used or in light of the object and purpose of the Antidumping Agreement and GATT 1994 Article VI. In considering the term “against” in the context of Articles 18.1 and 32.1, a specific action “against” dumping or subsidization must apply directly to the imported product or the entity responsible for it, and it must burden (*e.g.*, impose a liability on) the dumped or subsidized imported good, or an entity responsible for the dumped or subsidized imported good. The Panel’s attempt to distinguish between “dumping as a practice” and dumping as practiced by importers, foreign producers and exporters is inapposite. Dumping cannot exist as a practice apart from the dumped products and the entities responsible for them.

153. The object and purpose of the Antidumping Agreement confirm that the action “against” dumping must operate directly on the imported good or the entity responsible for it. There is no concept of indirect action against dumping in the Antidumping Agreement, because its purpose is for Members to be able to take direct action against dumped imports that injure a domestic industry (*e.g.*, imposition of duties). Any other interpretation of the Antidumping Agreement fails to consider its provisions in light of its object and purpose. The text and object and purpose of Article VI also support the interpretation that action “against” dumping must be action that operates directly on the imported good or the entity responsible for it.

154. Even assuming *arguendo* that the Panel correctly equated “against” with “adverse bearing,” the definition of the term “adverse bearing” suggests that there must be a direct, not an indirect, bearing on dumping or subsidization. Having an “adverse bearing” on dumping or subsidization signifies that a measure is directly hostile to dumping or subsidization, such as duties, tariffs, or quotas. Moreover, the Panel’s standard for determining whether a measure acts “against” dumping is to examine whether the measure has an adverse bearing, be it direct or indirect, on the practice of dumping, *i.e.*, whether a measure burdens imports (or the entity responsible for their importation). However, the Panel did not examine whether the CDSOA burdens imports, or the entity responsible for their importation. Rather, the Panel examined whether the CDSOA burdens the conditions under which imports compete. Examining whether

the CDSOA burdens the conditions under which imports compete is not the same as examining whether the CDSOA burdens imports or “dumping as a practice.”

155. The Panel compounded the flaw in its legal reasoning by concluding that an “adverse bearing” on dumping is demonstrated by the effect of the CDSOA on the competitive relationship between dumped/subsidized goods and domestic products. According to the Panel, the word “against” as used in Articles 18.1 and 32.1 “requires” a “conditions of competition test.” The Panel is legally incorrect. There is no explicit or implicit “conditions of competition test” in either Article 18.1 or 32.1. The Panel’s decision to add one, much less without any explanation for doing so, must be reversed.

156. As an initial matter, the Panel failed to provide any explanation for application of a conditions of competition test to Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. The Panel’s discussion leaves wholly unexplained why a determination as to whether a measure *burdens imports* (or the entity responsible for their importation) justifies an examination as to whether the measure *burdens the conditions* under which such imports *compete* contrary to the Panel’s obligations under DSU Articles 12.7 and 11.

157. Focusing on the text of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, there is no express mention in either Article of a conditions of competition test. In fact, the language of Articles 18.1 and 32.1 does not permit a conditions of competition test. Complaining parties did not bring a claim under GATT 1994 Article III or under other areas of GATT/WTO jurisprudence where a conditions of competition test has occasionally been used. Indeed, that complaining parties did not bring their challenge to under Article III is not surprising given that Article III:8(b) recognizes that the payment of subsidies exclusively to domestic producers is not a relevant factor in determining whether the principles protected by GATT 1994 Article III have been upset. The Appellate Body should reject the Panel’s decision to impute meanings and legal concepts derived from the specific language used in Article III to

Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1. The Panel erred in allowing the complaining parties to circumvent this explicit limitation in Article III.

158. In contrast to GATT 1994 Article III, there is no indication in the *language* of Article 18.1 or Article 32.1 of a design to protect an equality of competitive conditions. Notably, neither Article includes the words “protection”, “affecting”, “treatment no less favourable than,” or “directly competitive or substitutable.” The Panel, however, has effectively equated the language in Articles 18.1 and 32.1 providing for no specific action “against” dumping or a subsidy with the markedly different language in GATT 1994 Article III. To give meaning to the specific words of Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1, as well as of GATT 1994 Article III, however, the word “against” with respect to “dumping” must have a meaning different than the word “affecting” with respect to measures affording less favorable treatment or applied so as to afford protection. Indeed, as the Appellate Body has explained, the word “affecting” implies a “broad scope of application.”

159. There is no textual basis (such as words prohibiting “protection to domestic production” or according “less favorable treatment” to imports) to impute the same “broad scope of application” to the word “against.” Moreover, a WTO panel has already recognized the error of transferring GATT 1994 Article III concepts to other WTO provisions. It is not enough that the CDSOA may indirectly, at some point in time and to some unknown degree, adversely affect competition between injurious dumped/subsidized imports and domestic products, to arrive at the conclusion that the CDSOA is action “against” dumping. Even assuming *arguendo* that a conditions of competition test is applicable to analysis of Articles 18.1 and 32.1, the CDSOA’s impact on the conditions of competition would be too remote and indirect – even applying GATT Article III jurisprudence – to result in a violation.

160. The Panel likewise erred in assuming that mere supposition demonstrated that the CDSOA adversely bears on the conditions of competition for injurious dumped/subsidized imports. The Appellate Body has consistently found that WTO panels need to support their

findings with evidence. In order to reach its decision that the CDSOA has an adverse bearing on the conditions of competition, and thus violates Articles 18.1 and 32.1, however, the Panel had to rely on a series of assumptions/conclusions about the CDSOA which are too remote and contingent to support the conclusion that the CDSOA “adversely bears” on the conditions of competition. The Panel’s fifth assumption/conclusion, that a competitive disadvantage indirectly acts against dumping, rests on four assumptions/conclusions and turns of events that are purely speculative, incorrect, or lacking internal consistency or logical explanation.

161. The Panel determined that the “adverse bearing on dumping created by the offset payments is compounded by the additional consequence of the CDSOA that it will have the effect of providing a financial incentive for domestic producers to file” or at least support a petition. The Panel’s reasoning is erroneous. Foremost is the fact that even if the CDSOA were to result in more investigations being initiated and, in turn, more orders being put in place, such a result could not lead to a violation of Articles 18.1 and 32.1. This fact is evident from the very language of the Articles, which states that no specific action against dumping/subsidization can be taken “except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.” Orders imposed, as well as investigations initiated and conducted, pursuant to laws consistent with the provisions of GATT 1994 Article VI and the Antidumping and SCM Agreements, by definition, constitute measures in accordance with the provisions of GATT 1994 and the Antidumping and SCM Agreements.

162. With respect to the present case, the Panel did not find, any provision of U.S. law relating to the imposition of antidumping or countervailing duty orders to be inconsistent with U.S. WTO obligations. Moreover, the Panel did not base its finding that the CDSOA adversely bears on the conditions of competition by way of any “financial incentive” on its later (incorrect) finding that the CDSOA violates Antidumping Agreement Article 5.4 or SCM Agreement 11.4. In fact, the Panel expressly noted that the disruptive nature of the CDSOA on the trading regime (caused by increased petitions and/orders) was independent of any other potential violations of the Antidumping or SCM Agreement. As such, any increase in WTO-consistent investigations and

orders cannot result in violations of Articles 18.1 and 32.1. Use of validly imposed WTO-consistent trade remedies cannot, as the Panel believed, create a “repressive trade regime.”

163. Assuming *arguendo* that an increase in WTO-consistent antidumping and countervailing duty investigations and orders could lead to a WTO violation, the CDSOA does not provide a “financial incentive.” As explained below with respect to the Panel’s Article 5.4 and 11.4 findings, there is no evidence that the CDSOA *will* induce producers to file or support antidumping and/or countervailing duty petitions and no evidence that any such incentive *will* lead to an increase in investigations or orders. The Panel’s supposition that the CDSOA may have such a result does not compensate for this lack of evidence.

164. To confirm its erroneous finding that the CDSOA constitutes specific action “against” dumping or subsidization, the Panel relied on the supposed “purpose” of the CDSOA. As a general matter, panels and the Appellate Body have taken the position that they do not “interpret” domestic laws *as such* but determine whether those laws are WTO-consistent. Because there was no allegation that the CDSOA is ambiguous, the only relevant question before the Panel was whether by its *terms* the CDSOA constituted specific action against dumping and subsidization. It is not relevant whether U.S. legislators *intended* the CDSOA to be specific action against dumping. To the extent the Panel used any purpose of the CDSOA as grounds to bolster its erroneous finding that the CDSOA constitutes specific action against dumping or subsidization contrary to Articles 18.1 and 32.1, the Panel should be reversed.

165. Finally, in identifying permissible responses to subsidization, the Panel incorrectly concluded that the Appellate Body’s interpretation of antidumping provisions in *US - 1916 Act* applied equally to subsidy provisions. The Panel’s application of the 1916 Act approach to SCM Agreement Article 32.1, however, ignores the fact that the 1916 Act approach derived from the particular words of GATT 1994 Article VI and the Antidumping Agreement which do not appear in the parallel provisions of GATT 1994 Article VI or the SCM Agreement. In addition, as the text of the provisions indicate, the apparent purpose of Antidumping Agreement Article 1 is to

establish “principles” for the agreement implementing Article VI (*i.e.*, rules for the imposition of *measures* governed by Article VI) whereas the purpose of SCM Agreement Article 10 is to establish that GATT Article VI applies to the imposition of countervailing *duties* and that the imposition of countervailing *duties* must comply with the SCM Agreement. Thus, it does not follow, as the Panel assumed, that the Appellate Body’s approach in the 1916 Act case, built around the language of GATT Article VI:2 and Antidumping Agreement Article 1, applies wholesale to the SCM Agreement which contains different language and a different purpose. Rather, the Panel should have interpreted GATT 1994 Article VI:3 in conjunction with SCM Agreement Article 10 to find that GATT 1994 Article VI:3, and, in turn, SCM Agreement Article 32.1, do not encompass a measure such as the CDSOA.

III. The Panel Erred in Finding That the CDSOA Is Inconsistent With the Standing Requirements of Antidumping Agreement Article 5.4 and SCM Agreement Article 11.4

166. The Panel found that Articles 5.4 and 11.4 of the Antidumping and SCM Agreements “require[] only that the statistical thresholds be met, and impose[] no requirement that the investigating authorities inquire into the motives or intent of a domestic producer in electing to support a petition.” The Panel also concluded that the United States has implemented its obligations under Articles 5.4 and 11.4 in U.S. laws and that the CDSOA did not in any way amend or modify such laws. The Panel’s finding that WTO standing obligations do not include a requirement to examine the reason for domestic support to should have ended its inquiry. If the United States has implemented its standing obligations in domestic law, and the CDSOA by its terms does not change these laws, the United States cannot then be found in violation of Articles 5.4 and 11.4 simply by the enactment of the CDSOA. The Panel’s conclusion to the contrary constitutes legal error and should be reversed.

167. The Panel found that the CDSOA is inconsistent with Articles 5.4 and 11.4 because it allegedly “undermine[s] the value of [those provisions] to the countries with whom the United States trades,” and because it allegedly “defeats the object and purpose” of those articles. The

Appellate Body, however, has repeatedly directed panels to the *words* of the agreement to determine the intentions of parties and has explained that as set out in Article 31 of the *Vienna Convention*, principles of treaty interpretation do not condone the imputation into a treaty of words or concepts that are not there. Here, the Panel's error is more egregious: the Panel used the object and purpose of the provisions, rather than the terms of the standing provisions as the basis for finding a violation. A finding of a breach must be based on the words of the agreement; it cannot be based solely on a perceived inconsistency with a provision's supposed object and purpose.

168. Likewise, a violation cannot be based solely on the conclusion that the measure, although consistent with the text of the relevant provisions, "undermines the value" of those provisions to other trading partners. The Panel in this case appears to confuse violations of Articles 5.4 and 11.4 with a non-violation claim of nullification and impairment under GATT Article XXIII:1(b). GATT 1994 Article XXIII:1(b), however, provides a separate cause of action. The purpose of GATT Article XXIII:1(b) is to provide a remedy for measures that frustrate or undermine the improved competitive opportunities legitimately expected from a tariff. Non-violation claims require proof that "measures have been taken that frustrate the object and purpose of the treaty and the reasonably expected benefits that flow therefrom." In this case, however, no complaining party raised a non-violation claim under GATT Article XXIII:1(b). In finding that the CDSOA "defeats" the object and purpose of Articles 5.4 and 11.4 and undermines their value to countries with whom the United States trades, the Panel in this case confused the basis for finding a violation of WTO obligations with the basis for making a finding of non-violation nullification and impairment.

169. In justifying its non-textual approach to treaty interpretation, the panel refers to the "principle of good faith." The Panel states that, in creating "the spectre" of an investigation being improperly initiated, "the United States may be regarded as not having acted in good

faith.”¹⁷⁶ There is utterly no basis in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of “good faith” as a substantive obligation agreed to by WTO Members. Dispute settlement panels are subject to clear and unequivocal limits on their mandate: they may clarify “existing provisions” of covered WTO agreements and may examine the measures at issue in light of the relevant provisions of the covered WTO agreements. Likewise, WTO Members have, in DSU Article 26.1, explicitly provided for panel consideration of measures which, though not in breach of specific agreement provisions, nevertheless nullify or impair the benefits provided under the Agreement. The Panel, through its approach of finding a breach to the “object and purpose” of Articles 5.4 and 11.4, based on consideration of the “good faith principle,” thoroughly circumvented these requirements and undermined the utility of non-violation claims.

170. Despite its finding that the text of Articles 5.4 and 11.4 does not impose an obligation to inquire into the motives behind a domestic producer’s support for an investigation, the Panel nonetheless conducted an analysis of whether the CDSOA creates any such motives for support. Because motive is legally irrelevant under Articles 5.4 and 11.4, it was legal error for the Panel to conclude that the CDSOA creates a financial incentive to support AD/CVD petitions and therefore “in effect mandates” domestic producers to support such petitions and then to use this conclusion as a basis for finding that the CDSOA is inconsistent with Articles 5.4 and 11.4.

171. To further illustrates its abandonment of any semblance of a proper interpretative approach in favor of a policy-based judgment, the Panel stated that the CDSOA creates the “spectre” of such investigations being initiated without proper industry support. As the definition of “spectre” is “something unpleasant or dangerous that is imagined or expected,” apparently the Panel believed that “imagining” or “expecting” the CDSOA to result in investigations initiated without the proper level of industry support is sufficient grounds to conclude that the CDSOA *will* have such a result and consequently, that “imagining” or

¹⁷⁶ CDSOA Panel Report, paras. 7.63-7.64.

“expecting” the CDSOA to violate Articles 5.4 and Article 11.4 justifies concluding that the CDSOA in fact violates those provisions. By basing its conclusion on what amounts to nothing more than assumption and speculation, the Panel improperly shifted the burden of proof to the United States. The Panel’s entirely speculative analysis is not a basis on which to find a Member in violation of its WTO obligations.

172. The Panel’s finding is also at odds with the CDSOA and the operation of U.S. standing laws. Under U.S. law, Commerce alone (and not the ITC) makes a determination of whether there is sufficient domestic industry support for initiation of an antidumping or countervailing duty investigation. This initiation stage of a proceeding is conducted within a 20-day period following the filing of a petition. If Commerce determines that the petitioners meet the standing requirements, an investigation is then initiated. The ITC makes no independent decision regarding initiation and has affirmatively disclaimed responsibility for standing findings. The necessary declaration of support to qualify for CDSOA distributions is made by U.S. producers solely before the ITC (and not before Commerce). Equally important, the CDSOA declaration of support is not required at the ITC until after the initiation proceeding by Commerce has been concluded and may contradict previously expressed opposition to the petition filed with Commerce. Indeed, a domestic producer can take its position as late as the final injury investigation questionnaire, which can be issued more than 200 days after a petition is filed. As a result of this bifurcated, independent, and sequential process, the position of a member of the domestic industry on initiation in no way compromises its eligibility for any future CDSOA distributions that might result.

173. The Panel’s failure to understand the operation of U.S. law is compounded by its consideration of the only two purported pieces of “evidence” that have been advanced in support of complaining parties’ claim. One of the pieces of “evidence” cited is described as a letter from a domestic producer in which it reportedly changed its position to favor the softwood lumber from Canada petitions out of a desire to participate in any potential CDSOA distributions. Commerce’s decision to initiate the investigations, however, had been made 294 days before the

domestic producer purportedly changed its position before the ITC. Moreover, the examination of the letter reveals that the letter is not what the Panel claimed it to be. It is neither a letter from a “domestic producer” nor a letter changing positions. In particular, the company that authored the letter states therein that it is expressing its “continuing” support for the petitions (*i.e.*, it is not expressing a change in position).

174. The Panel also cited a letter in which a U.S. producer purportedly urged other domestic producers to support a petition against Canadian softwood lumber imports by citing the CDSOA. Examination of the letter referencing the CDSOA, however, shows that it was not written by a domestic producer, but instead by a law firm *informing* domestic producers of the merits and circumstances of their case, as well as various provisions of U.S. law including the CDSOA. Thus, in reality, there was no evidence to support the Panel’s conclusion. As such, there was no evidence on the record with which complaining parties could meet their burden to establish a *prima facie* case and, as a consequence, the Panel’s finding amounts to a shifting of the burden of proof to the United States.

175. The Panel’s analysis is nothing more than speculation about what the CDSOA might do or cause. Had the Panel not merely speculated, it would have recognized that the filing of “frivolous” or “disingenuous” petitions is strongly discouraged by rigorous strictures in the U.S. legal system, and that there are a variety of steps the United States could, and in fact, does take, to ensure that petitions filed meet the “proper” and required threshold levels of support prior to initiating an investigation. The Panel, however, never examined U.S. laws or regulations governing or relating to the initiation of antidumping and countervailing duty investigations. Any conclusions the Panel thus drew were based on its own assumptions about how the U.S. system might work. Again, as the Appellate Body has simply stated: “This is not good enough.”

IV. The Panel Exceeded Its Terms Of Reference By Examining Claims Concerning The CDSOA In Combination With Other U.S. Laws And Regulations

176. Under DSU Article 7, a panel's terms of reference are limited to the claims set out in the complaining parties' request for establishment of a panel. In this case, the complaining parties' request for establishment set out a challenge to the CDSOA as such, *i.e.*, the complaining parties challenged the CDSOA prior to implementation and independent of any other laws. While the Panel acknowledged that the CDSOA was the measure at issue, the Panel proceeded to find that the CDSOA violates Antidumping Agreement Article 18.1 and SCM Agreement Article 32.1 because the combination of antidumping duties (or countervailing duties) and the CDSOA transfers a competitive advantage to affected domestic producers. The complaining parties' request for establishment, however, did not include a challenge to provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties, or a challenge to the CDSOA in conjunction with provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties. In fact, the complaining parties did not even mention the provisions of U.S. laws or regulations relating to the imposition of antidumping or countervailing duties in their request for establishment. Therefore, the Panel exceeded its terms of reference by examining whether the CDSOA, in combination with U.S. laws on the imposition of antidumping duties (or countervailing duties), violates Articles 18.1 and 32.1.

V. The CDSOA Is Consistent With WTO Agreement Article XVI:4 and Does Not Nullify or Impair Benefits Accruing to the Complaining Parties

177. For the reasons stated above, the CDSOA is consistent with GATT 1994 Articles VI:2 and VI:3, Antidumping Agreement Articles 5.4, 18.1 and 18.4, and SCM Agreement Articles 11.4, 32.1 and 32.5. Therefore, the United States requests that the Appellate Body reverse the Panel's finding that the CDSOA violates Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization and the Panel's finding that the benefits accruing to the complaining parties under the WTO Agreement have been nullified or impaired.

VI. The Panel Erred In Denying The United States Request for the Issuance of Separate Reports

178. The Panel erred in denying the U.S. request under Article 9.2 of the DSU for the issuance of a separate panel report in the dispute brought by Mexico. The United States respectfully requests that the Appellate Body reverse this conclusion as it is not supported by the plain meaning of DSU Article 9.2, and would both diminish the rights of the United States under -- and create obligations for the United States in addition to those in -- the covered agreements. This is in direct contravention of Articles 3.2 and 19.2 of the DSU.

179. Article 3.2 of the DSU provides, in relevant part, that “[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 9.2 of the DSU grants Members the unqualified right to the issuance of separate panel reports upon request. Thus, a refusal by the Panel to issue separate reports despite the U.S. request would nullify the rights granted to the United States by Article 9.2, in violation of Articles 3.2 and 19.2 of the DSU.

180. The Panel’s three reasons for denying the U.S. request were not consistent with the text of the DSU. There is no deadline for the request, however, in the text of Article 9.2. There is no requirement to demonstrate prejudice in the text of Article 9.2, nor is there any basis for assigning such a burden to the requesting party. The text of Article 9.2 does not require a separate interim report. In addition to lacking any textual support, the Panel’s analysis also improperly creates new obligations. As explained above, the Panel’s requirements that the request be made at an earlier juncture and that the requesting party describe potential prejudice are not found anywhere in the text of Article 9.2 or any other provision of the DSU. As such, the Panel’s adoption of these requirements creates additional obligations not found in a covered agreement in violation of Articles 19.2 and 3.2 of the DSU.