UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

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

March 12, 2002

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

2. The complaining parties' case claims too much and, in the end, must fail as twisting commitments undertaken beyond recognition.

3. Mexico's construction of obligations under Article 5 of the SCM Agreement is untenable as it essentially converts an actionable subsidy claim into a prohibited subsidy, a result plainly contrary to the structure and distinctions between Articles 3 and 5 of the SCM Agreement.

4. Perhaps recognizing the folly of such an approach, the remaining parties do not pursue this claim. Instead, they attempt to limit a government's undeniable right to spend through invocation of Articles 18.1 and 32.1 of the Antidumping and SCM Agreements. Yet, the construction sought is so extreme that it would make the WTO into "thought police" rendering all legislation WTO-illegal that has, as a part of its genesis, the consequences of dumping and subsidization where domestic producers are beneficiaries. As I will explain later, such a construction would impose limits on a sovereign's right to spend never contemplated by GATT Contracting Parties or the WTO. Moreover, the construction sought renders other parts of the WTO Agreement meaningless.

5. In my statement today, I will not restate the arguments set forth in our second written submission, but, rather, will focus on responding to the few new or slightly modified points raised by the complaining parties in their second submissions. I will start with Mexico's

actionable subsidy claim as "[i]t is a general principle of law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it."[1] Given that the CDSOA is a subsidy program, the SCM Agreement is the most relevant agreement.

ARTICLE 5(b) OF THE SCM AGREEMENT

6. As we have previously explained at length, Mexico's Article 5(b) argument should be rejected because the CDSOA is not a "specific" subsidy and because Mexico has not demonstrated nullification or impairment or any other form of "adverse effects" under SCM Article 5.

7. Mexico is claiming only *de jure* specificity. According to Mexico, the CDSOA is *de jure* specific because each offset is a "separate and distinct subsidy." This argument is illogical on its face. Specificity analysis must be carried out for the challenged subsidy program (here the CDSOA) as a whole rather than by focusing on individual disbursements. Otherwise, no matter how broadly available and broadly distributed benefits under a government program may be, each disbursement would be considered a specific subsidy – a result that would render Article 2 a nullity.

8. Mexico claims that a textual analysis of Articles 1 and 2 supports its interpretation. Yet,

[1] *United States– Anti-Dumping Act of 1916 (EC)*, WT/DS/136/R, para. 6.76 (3/31/00).

a review of Article 2.1(a), the provision relied upon by Mexico, shows that this is not the case. Article 2.1(a) expressly states, in relevant part, that if the "legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises," the subsidy is specific. Therefore, the focus is *not* on each subsidy disbursed but on the legislation establishing the subsidy program.

9. In this case, the legislation pursuant to which the granting authority operates is the CDSOA. Mexico apparently does *not* claim that the CDSOA itself is a specific subsidy.[2] Even if it did, the CDSOA does not explicitly limit access to certain enterprises, industries or groups thereof. The benefits are available in principle to any producer of any product on which antidumping or countervailing duties could be collected. Indeed, it is difficult to imagine how a subsidy could be more broadly available than one open to any producer in the largest national economy in the world.

10. Although Mexico admits that the issue is not determinative, Mexico claims that the CDSOA cannot meet the "objective criteria" standard of Article 2.1(b). As explained in our second submission, the CDSOA *does* meet the standards in Article 2.1(b). Even if the criteria of the CDSOA were not considered to meet the description in Article 2.1(b), however, that would not mean that the CDSOA is automatically specific. Mexico would still have to demonstrate by

[2]Mexico Second Written Submission, paras. 38-40 ("Under Article 2 of the SCM Agreement, Mexico does not have to show that the CDSOA, itself, is a specific subsidy.").

positive evidence that the CDSOA benefits are *explicitly* limited on the face of the law to an industry, enterprise, or group thereof, which it has not done.

11. The Panel need not reach the question of adverse effects in this dispute because the CDSOA benefits are not "specific." Nevertheless, as we have demonstrated in our submissions, Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits.

12. Mexico claims adverse effects in the form of nullification or impairment under Article 5(b) of the SCM Agreement. As we have previously explained, footnote 12 in Article 5(b) states that the existence of nullification or impairment in this context is to be established in accordance with the practice of application of the relevant GATT provisions. Mexico's interpretation of those relevant GATT provisions turns them upside down and should be rejected. As we have explained at paragraph 55 of our first written submission, recognizing a violation claim of nullification or impairment under Article 5(b) would eliminate the primary distinction between Articles 3 and 5 of the SCM Agreement. Under Mexico's theory, an "actionable" subsidy can be established without any showing of adverse effects. Such an interpretation is inconsistent with the structure and design of the SCM Agreement.

13. In any event, because the CDSOA does not violate any WTO Agreement provision, this point is moot.

14. Mexico's theory of a non-violation nullification or impairment claim should also be rejected as it would turn this exceptional remedy inside out. First, Mexico argues that somehow it is unnecessary to challenge the actual application of the CDSOA to claim non-violation nullification or impairment. Mexico contends that, despite footnote 12, only two of the three elements of a non-violation claim must be established under Article 5(b). What Mexico fails to understand, however, is that the application of a measure is a requirement to establish the existence of nullification or impairment. While Mexico may have the right to *bring* a challenge based on the mandatory/discretionary doctrine,[3] that *doctrine* does not allow Mexico to bypass the required elements of a non-violation nullification or impairment claim.

15. Mexico also argues that the panel's decision in *Japan – Film* on this issue is irrelevant because it was considering legislation that was no longer in effect. The panel's statement, however, was made in the context of several measures, some of which were being applied and some of which had expired. The Panel in *Japan – Film* specifically stated that a cognizable Article XXIII:1(b) claim must show "application of a measure by a WTO Member."[4] The panel explained that a "measure" included a law or regulation enacted by a government.[5] The mere fact that there was a measure was not enough. According to the panel, Article XXIII:1(b) is

[3]Mexico Second Written Submission, para. 60.

[4]WT/DS44/R, para. 10.41.

[5]*Id.* at para. 10.43.

written in the present tense and uses the phrase "application of any measure." Therefore, the panel concluded:

> It thus stands to reason that, given that the text contemplates nullification or impairment in the present tense, caused by application of a measure, "whether or not it conflicts" (also in the present tense), the ordinary meaning of this provision limits the non-violation remedy to measures that are currently being applied.[6]

16. Mexico's arguments notwithstanding, this reasoning is directly applicable to the question of whether a measure must be applied.

17. Second, as we have previously explained, Mexico has also failed to meet the third requirement because it has not demonstrated that the competitive relationship in the U.S. market between domestic and Mexican products has been upset by a subsidy which was not reasonably anticipated. Without a shred of evidence, Mexico hypothesizes that the CDSOA distributions will reduce the ability of the Mexican exporter to compete and sell in the U.S. market. Yet, Mexico does not and cannot even identify the allegedly affected Mexican imports because it chose to challenge the law *as such*. In other words, Mexico has not shown a relevant competitive relationship in the first place.

18. Mexico instead asserts that, "when they are granted," CDSOA subsidies "*per se* will cause adverse effects" and that Mexico is "entitled to rely on the assumption that the introduction of a subsidy by the CDSOA will have an adverse effect on negotiated concessions." By this

[6] *Id.* at para. 10.57.

statement, Mexico admits that the so-called "granting" of subsidies under the CDSOA is not causing and has not caused adverse effects. It is Mexico's argument that it *will* cause adverse effects, and Mexico knows this because it is relying on an assumption.

19. Mexico's argument is squarely contradicted by the relevant provisions and jurisprudence. First, under GATT Article XXIII:1(b), the requirement is that a benefit "is being nullified or impaired," not that it will be nullified or impaired at some point in the unknown future.

20. Second, Mexico continues to mis-cite the *EEC – Oilseeds* case for the proposition that it need not produce any evidence of actual upset in the competitive relationship to show non-violation nullification or impairment. In fact, the case stands for the exact opposite proposition. The *EEC – Oilseeds* panel sustained the non-violation claim on the basis that the complainant had *shown* that the competitive relationship was *actually* upset. In particular, the panel found the subsidy in question was carefully designed to insulate domestic producers of oilseeds from changes in import prices of oilseeds which resulted in a complete nullification of the negotiated tariff reductions. Thus, the case was decided on the basis of evidence demonstrating actual adverse effects on the competitive relationship between imported and domestic oilseeds. The CDSOA, by contrast, is not product-specific and, unlike *EEC – Oilseeds*, Mexico does not and cannot identify any particular products for which the competitive relationship has been upset.

21. In any event, Mexico's *per se* argument misunderstands the nature of a non-violation

claim. *Per se* nullification or impairment by definition exists only where a complainant proves an actual WTO violation.

22. Mexico does claim a current nullification or impairment by the "maintaining" of subsidies under the CDSOA, but it is with regard to a different benefit allegedly accruing to Mexico under GATT Articles II and VI. It is not the benefit of the negotiated tariff concession under those articles, but, rather, the alleged benefit of "predictability" in planning future sales. Mexico cites no authority for this argument, and indeed there is none. "Predictability" in planning future sales has never been recognized as a benefit accruing under GATT Articles II and VI.

23. Finally, Mexico says not to worry about opening the flood gates for non-violation nullification or impairment claims because Article 5(b) only covers subsidies that "systematically" nullify or impair benefits. However, there is simply no basis in Article 5(b) for limiting non-violation nullification or impairment claims in this way.

24. In sum, Mexico's Article 5(b) claim should be rejected as Mexico has failed to make a *prima facie* case that the CDSOA is an actionable subsidy because it has not proven that CDSOA benefits are "specific" or cause "adverse effects" in the form of nullification or impairment of benefits.

SPECIFIC ACTION AGAINST DUMPING OR SUBSIDIES

Articles 18.1 and 32.1

25. Let's turn now to the specific action against dumping and subsidies claim. In general, the obligations that the United States has undertaken to limit its use of non-agricultural domestic subsidies are found in the subsidies provisions of SCM Agreement and GATT Article XVI. Under those provisions, a Member's right to use subsidies is subject to other Members' rights to impose countervailing duties on imports, or to take authorized countermeasures. There is no "fourth" right to bring a WTO challenge to circumvent those provisions as the complaining parties are attempting to do in this case by mounting a *per se* attack on a domestic subsidy using Articles 18.1 or 32.1 of the Antidumping and SCM Agreements, respectively.

26. As explained in our second submission, the test to determine whether a measure is "specific action against" dumping or subsidies is whether the measure is (1) based upon the constituent elements of dumping or a subsidy, and (2) burdens, (3) the dumped or subsidized imported good, or an entity connected to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer. We could not agree more with Brazil when it "caution[s] against confusing the 'constituent elements of dumping' from the questions of whether the subsequent action is 'specific action'" against dumping. In other words, there are three criteria and just because a measure may be based upon the constituent elements of dumping does not necessarily mean that it is "against" dumping or subsidies.

27. As explained in our submissions, the CDSOA does not satisfy this test. In their second submissions, however, the complaining parties disagree with the United States, and each other, on the test for "specific action" under Articles 18.1 and 32.1. Some parties claim that the CDSOA is specific action "based upon" the constituent elements of dumping or a subsidy because an AD/CVD order is a condition precedent to distributions.

28. However, funding CDSOA distributions with AD/CVD duties is not any different than funding state retirement homes in terms of the presence of the constituent elements of dumping or subsidies. In both cases, the payment "is simply contingent on the collection of antidumping duties, since these duties are established as the source of funding" as Brazil put it in response to question 7 from the Panel. And, as the EC stated in response to the same question, "[i]t is only the funding of such action which is dependent upon a finding of dumping."

29. The complaining parties' arguments that the CDSOA is based on the constituent elements of dumping and subsidies ignore the important distinction between "specific action" in the main provisions of Articles 18.1 and 32.1 and "action" in the footnotes. Indeed, the complaining parties overlook the fact that antidumping and countervailing duty orders can also be "conditions precedent" to action permitted under the footnotes. What makes "specific action" different is that it is action based *directly* upon the constituent elements. Whether or not a law authorizes specific action can only be determined by examining the actual requirements of that law. A review of the CDSOA confirms that it is not based *directly* upon the constituent elements of

dumping or subsidies.

30. Finally, other complaining parties argue that the CDSOA is "specific action" because the recipient is a domestic producer that is "affected" by dumping or subsidization. The statute, however, does not require producers to show they are injured by dumped or subsidized imports to receive distributions and, as we have previously explained, the amount of the distribution has nothing to do with measuring or recovering damages. In any event, is it not clear why that fact, if true, would even be relevant to whether distributions are "specific action" under Articles 18.1 and 32.1.

31. The complaining parties have also failed to establish that the CDSOA is an action "against" dumping or a subsidy. The ordinary meaning of the term "against" suggests that the action must operate *directly* on the imported good or the entity connected to it. This interpretation is supported by the definition of dumping in GATT Article VI:1. That provision defines dumping as *products* of one country being introduced into the commerce of another country at less than normal value. Thus, under Article 18.1, specific action against dumping is specific action against products being introduced into the commerce of another country at less than normal value.

32. In other words, the action must be *directly* against imported products. As a practical matter, imported goods are produced, exported, and imported by foreign producers, exporters,

and importers. Therefore, the object of "specific action" under Articles 18.1 and 32.1 extends to the entity connected to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer. This is consistent with the panel and Appellate Body reports in *1916 Act*.

33. Brazil agrees with the United States that flags flying at half-mast after issuance of an antidumping duty order could be action "in response to" but not "against" dumping.[7] Brazil, however, claims that the CDSOA is "against" dumping because it "seeks" to counteract dumping. In other words, Brazil relies upon the supposed purpose of the law, not its actual operation. I will come to the relevance of the purpose of the law in a moment.

34. Other complaining parties suggest that alternative dictionary definitions of the word "against" are more appropriate. They contend that word "against" in Articles 18.1 and 32.1 means "in response to," "in opposition to," "in competition with, " to the disadvantage of," "in resistance to," "counter to," and "as protection from." Whether translating the English, French, or Spanish words, complaining parties' selections are not informed by the context of word "against" in Articles 18.1 and 32.1 as part of the Antidumping and SCM Agreement provisions on antidumping and countervailing duty measures.

35. In that context, there are already four examples of measures that are "specific action

[7]Brazil Answers to Panel Question No. 1.

against" dumping as identified by the Appellate Body in the *1916 Act* case: (1) duties on imports, (2) provisional measures on imports, (3) price undertakings for imports, and (4) civil and criminal penalties on importers.[8] Each one of the measures imposes a limitation or burden *directly* on the imported goods or the entity connected to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter, or foreign producer.

36. None of the measures apply *indirectly* in ways unrelated to the imported dumped or subsidized good, which is the basis of the complaining parties' argument that a subsidy to a domestic producer that competes with a foreign producer of a dumped or subsidized good is a specific action against dumping or subsidies.[9]

37. Although the complaining parties started out arguing that the CDSOA is a specific action against dumping and subsidies because it has a "presumed negative effect" on the foreign producer and/or the imported good that is being dumped or subsidized, their argument has evolved. Now, many of the complaining parties argue that the CDSOA is a specific action against dumping or subsidies because of its supposed effect on the competitive relationship or the conditions of competition between imported and domestic goods.

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[8]*United States – Anti-Dumping Act of 1916,* WT/DS136/AB/R, WT/DS162/AB/R, para. 137(8/28/00). The three forms of action in an antidumping case are also considered "measures" subject to dispute settlement pursuant to Article 17.4 of the Antidumping Agreement. *United States – Anti-Dumping Act of 1916,* WT/DS136/AB/R, WT/DS162/AB/R, paras. 71-72(8/28/00).

[9]EC Second Written Submission, para. 30.

38. Again, there is no basis in the text of Articles 18.1 and 32.1 for a conditions of competition test. According to the complaining parties, a measure that results in a change in the conditions of competition between domestic and imported goods, which happens to include imported goods that have been dumped or subsidized, constitutes a "specific action against" dumping or subsidies. Yet, even if the subsidy is considered to have changed the conditions of competition between the producers of the good that received the distribution and all other producers, both foreign and domestic, that did not, it does not mean that measure acts against dumping or subsidies.

39. What the complaining parties are asking this Panel to do is rewrite Articles 18.1 and 32.1. There is no basis in the text as written for a presumed negative effects test or a conditions of competition test. Moreover, such a test is overly broad as it would cover any other type of domestic legislation that improved the position of the domestic industry.

40. To support their "effects" argument, the complaining parties urge this Panel to rely on the CDSOA's legislative history. 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. Nor is it appropriate for a Panel to study the legislative history of a law in order to interpret a *WTO* provision. The CDSOA's legislative history would only be relevant to its interpretation if the statute were ambiguous and the Panel then needed it to determine the fact of

the CDSOA.

41. 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. Likewise, in the *FSC* case, cited by Japan-Chile, the purpose of the measure was a relevant consideration under the WTO provision in question, footnote 59 to the SCM Agreement. In contrast, nothing about the operation of the CDSOA is ambiguous, and Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, only limit *specific action* against dumping or subsidies. Under those provisions, it does not matter whether or not Congress intended a law requiring flags to be flown at half-mast to be specific action against dumping. What matters is whether the law acts against dumping or subsidies, as such. Hence, contrary to the complaining parties' suggestion, the United States has not taken inconsistent positions in these cases.

42. Moreover, we note that the domestic case law cited by Japan-Chile does not hold otherwise. As the U.S. Supreme Court has recognized, "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"[10] The Supreme Court will not then "inquire into the motives of legislators."[11] The cases cited by the

[10] *Connecticut National Bank v. Germain,* 503 U.S. 249, 253-54 (1992), *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981).

[11] *Tenney v. Brandhove,* 341 U.S. 367, 377 (1951).,

complaining parties either (1) did not in fact rely on legislative history or intent to interpret the statute at issue, because it was clear on its face, or (2) did rely to a certain extent on such legislative history and intent, including Congressional findings, because the statute was *not* clear on its face. The latter alternative does not apply to the CDSOA, and the complaining parties do not argue that it does. For the convenience of the Panel, we have attached a brief, but more in-depth, discussion of the cases cited by Japan-Chile in Exhibit US-33.

43. In conclusion, accepting their argument that a Member cannot grant domestic subsidies in response to another Member's subsidies would create perverse incentives. Under that test, the first Member to subsidize can prevent, using Article 32.1, other Members from granting subsidies just by virtue of the fact that they were first.

44. This reading cannot reasonably be a proper construction of Article 32.1. Members regularly engage in counter-subsidization. Take, for instance, Canada's subsidization within the last year of Bombardier to secure business with Air Wisconsin in response to and on exactly the same subsidized terms as those given by Brazil to Embraer for the same purpose.

45. Indeed, this whole case, the case we are in right now, is a specific action taken in response to a subsidy, the CDSOA. Yet, the complaining parties argue that footnote 35 in the SCM Agreement limit specific actions against a subsidy to countervailing duties, provisional measures, price undertakings and countermeasures under Articles 4 and 7 of the SCM

Agreement.

46. However, if they are right that Article 32.1 is broad enough to strike down a counter-subsidy, then footnote 35 would have included it as a permissible form of relief. It does not. Thus, under their own arguments, this case is not permitted under footnote 35.

47. My point is that, their interpretation of Article 32.1 is not only unsupported by the text of Article 32.1 itself, but also is not supported by the structure of the SCM Agreement including footnote 35 as well as the distinction between prohibited and actionable subsidies. The complaining parties are attempting to insert another category of prohibited subsidies, besides export subsidies, into the SCM Agreement, *i.e.* counter-subsidies. The Panel should reject such a distorted interpretation.

Footnotes 24 and 56

48. Now moving on to footnotes 24 and 56. If this Panel finds that the CDSOA is an "action against" dumping or subsidies, then the United States submits that it is otherwise permitted under footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively. Footnotes 24 and 56 serve to clarify the scope of obligations under Articles 18.1 and 32.1. The United States does not contend that the footnotes constitute exceptions to the prohibition contained in Articles 18.1 and 32.1. Rather, if the Panel finds that the CDSOA is an action against dumping or a subsidy (but not specific action), the footnotes operate to permit it.

49. No party disputes that the CDSOA authorizes "action" in the form of a subsidy. No party has alleged that CDSOA is not consistent with GATT Article XVI. The complaining parties have themselves argued that the CDSOA is intended to offset the effects of continued dumping and subsidies. Therefore, if the Panel finds that CDSOA authorizes action against dumping and/or subsidies, it is nevertheless action under GATT Article XVI to address the effects of such practices.

50. The complaining parties, however, argue that the CDSOA cannot be permitted by footnotes 24 and 56 because it is "specific action" addressing dumping or subsidies, as such. They maintain that the AD/CVD orders would have to be "incidental" to distributions, and distributions would have to be "triggered" by some "other occurrences" for the CDSOA to be action within the meaning of footnotes 24 and 56.[12]

51. As I said earlier, when read from beginning to end, the CDSOA does not include any of the constituent elements of dumping or a subsidy. AD/CVD orders are incidental to distributions only in the sense that they serve as the source of funds. Distributions are triggered by certifications not orders. Therefore, if this Panel finds that the CDSOA is an action against dumping or subsidies, it should otherwise be permissible action under footnotes 24 and 56.

[12]Japan-Chile Second Submission, para. 54; Canada Second Written Submission, para. 54.

52. The ordinary meaning of the term "under" in footnotes 24 and 56 suggests that action "in accordance with" other GATT provisions is permissible. Without any supporting authority, however, complaining parties insist that action cannot be taken "under" GATT Article XVI because that Article does not provide a positive right to grant subsidies as a trade remedy. Their restrictive reading of the footnotes, however, is inconsistent with both panel reports in the *1916 Act* case which interpreted the word "under" in footnote 24 to mean "compatible with" or "permitted."[13]

53. Further, this approach implies that the WTO is about "conferring rights" on Members. This is a very surprising statement. Members, as sovereign governments, have retained all their rights to take any action that they have not agreed to forego. The WTO is not written as a series of "authorizing" provisions, but instead as a series of disciplines on measures. The complaining parties cite no basis for inverting the structure of the WTO. Putting asides the specifics of footnotes 24 and 56 for the moment, the U.S. wonders in general how many provisions the complaining parties consider confer a "right" on Members and then how they explain the ability of Members to take any measure other than one of those "authorized."

54. In any event, there are two groups of GATT Articles referenced in the main provisions of Articles 18.1 and 32.1 and their footnotes. The main provisions in Articles 18.1 and 32.1 refer to

[13]WT/DS136/R, paras. 6.199, 6.202; WT/DS162/R, paras. 6.218, 6.228.

one group consisting of those GATT Articles that limit the form of specific action that can be taken against dumping or subsidies, such as those provisions in Article VI that discuss antidumping and countervailing duties.[14] The footnotes refer to the "other" group of GATT Articles consisting of those GATT Articles that do not limit the form of specific action that can be taken against dumping or subsidies. It seems that the complaining parties, however, have confused the distinction between the two groups.

55. In this case, no party disputes that the CDSOA is a subsidy, and no party disputes that the CDSOA is consistent with GATT Article XVI. Therefore, if this Panel finds that a domestic subsidy can be action taken against dumping or subsidies, then footnotes 24 and 56 permit action against dumping or subsidies to be taken in the form of a domestic subsidy in accordance with Article XVI.

STANDING

56. With respect to the standing, the crux of the complaining parties' argument remains that "support" for a petition must be "genuine" or "true." Yet, the text of Articles 5.4 and 11.4 do not contain such a requirement. Those articles provide objective, numerical benchmarks for determining whether the standing thresholds have been met. The United States has implemented those requirements in its antidumping and countervailing duty law. Those provisions were not modified in any way by the CDSOA. Moreover, it is undisputed that the CDSOA has not had

[14] *See* WT/DS136/AB/R, WT/DS162/AB/R, para. 125.

any impact on the *manner* in which the Commerce Department applies those benchmarks.

57. The complaining parties have provided no support for their claim that the CDSOA "*by its very operation* precludes the possibility of an examination in good faith of industry support under Articles 5.4 and 11.4." They do *not* assert that the CDSOA prevents the United States from calculating in good faith whether these numerical thresholds are met, but rather that this good faith calculation is not enough. The United States must second guess whether producers' expressions of support are "true." This is just not required by the agreements. Further, it is an unworkable requirement and one that would render it impossible for any Member to exercise its standing obligations in "good faith."

58. In their second written submissions, the complaining parties go over the same ground one more time. Not only is there no textual basis for their claims in the Antidumping or SCM Agreements or their negotiating history, but their claims are speculative at best, and illogical at their worst. As we pointed out in our second submission, it is highly improbable that CDSOA is a factor in a domestic company's or union's consideration of whether to support a petition.

59. For distributions even to be possible, the petition must prove (1) dumping or subsidization, (2) injury, and (3) causation, and an order must be imposed. That a petition will result in an order is far from guaranteed: from 1980 to 2000, only 36.1% of the petitions filed resulted in affirmative determinations by both the U.S. Department of Commerce (dumping or

subsidization) and the U.S. International Trade Commission (injury and causation). Whether the producer will then receive payments under the CDSOA is then further contingent on (1) the level of imports, if any (2) the level of the margins, if any (3) the number producers supporting the petition, (4) the number of producers filing certifications, and (5) the amount of qualifying expenditures.

60. Any payments made under the CDSOA as a result of a successful petition would be at some unknown, future date. The time from filing a petition until duties are assessed and eligible for distribution under the CDSOA is measured in years and dependent on a series of factors: (1) whether an administrative review is requested (by a foreign producer, importer, domestic producer); (2) whether an appeal is taken to the U.S. Court of International Trade and then to the U.S. Court of Appeals for the Federal Circuit; and (3) whether there are remands to the agency for further consideration of particular issues and reexamination by the reviewing court(s). While entries can be liquidated in as little as two years after merchandise enters the United States, liquidation in many cases is 3 to 5 years after entry and can be as long as 10 years in unusual situations. The "promise" of a remote, uncertain and unknown payment is hardly worth gambling a million plus dollars on a "frivolous" antidumping or countervailing duty case as complaining parties suggest. Moreover, petitioners who file frivolous antidumping and countervailing duty cases subject themselves to potential antitrust scrutiny.

61. Even assuming *arguendo*, that the CDSOA has an effect on the domestic producers' decision to support or oppose a petition, it is not clear what effect that would necessarily be. Domestic producers could decide to oppose petitions for all the same reasons that they have historically opposed petitions. Some complaining parties even point out that a domestic producer could decide to oppose relief if it thinks that a domestic competitor would be likely to receive a higher offset, to oppose relief to avoid retaliation, or to oppose relief based on its own desire to import the product.[15]

62. Whatever the effect, it remains the case that the mere provision of such an inducement is not contrary to the Antidumping Agreement or the SCM Agreement. If that were not the case, *any* change in methodology that favors the domestic industry could induce a domestic party to file or support a petition. Such a broad, one-sided interpretation (which is exactly what Australia argued today) of Articles 5.4 and 11.4 is unreasonable.

UNDERTAKINGS

63. With respect to undertakings, the complaining parties' second submissions simply restate the arguments from their first submissions. As we have previously explained, the complaining parties' arguments misrepresent the significance under U.S. law of domestic industry views regarding proposed undertakings. U.S. law merely requires that the Commerce Department, *to*

[15]Canada Second Written Submission, para. 75; Australia Second Written Submission, para. 32; EC-India-Indonesia-Thailand, para. 68; Korea Second Written Submission, para. 41.

the extent practicable, consult with the domestic industry before determining whether an undertaking is in the "public interest." Thus, the views of the domestic industry do not in any way dictate the outcome of the public interest analysis and, for this reason, they do not determine the decision to accept or reject a proposed undertaking. The recent U.S. court decisions in *Bethlehem Steel* cited by the complaining parties do not hold otherwise. Again, we have provided a brief, but more extensive, discussion of *Bethlehem Steel* in the attached Exhibit US-34.

64. The only evidence presented to this Panel establishes that the domestic industry has opposed more than 75 percent of the undertakings which the United States has *accepted* since 1996. While the United States does not suggest that Commerce can abuse its discretion, there is no basis to conclude that the CDSOA can compromise Commerce's discretion in considering whether to accept proposed suspension agreements.[16]

65. As a practical matter, the complaining parties do not seem to understand why petitioners would ever support undertakings after the CDSOA. Yet, proposed suspension agreements in the United States are considered after a preliminary determination of dumping or subsidies and injury but *before* any final determinations. If Commerce enters into a suspension agreement and there is no request for the investigation to be continued, the investigation is suspended before

[16]*See, e.g.,* Canada Second Written Submission, para. 77; EC-India-Indonesia-Thailand, para. 74.

final determinations are ever reached.[17] Given that only 36.1% of the petitions filed result in affirmative final determinations by Commerce (dumping or subsidization) and the Commission (injury), a petitioner has ample incentive to support a suspension agreement which is likely to provide relief than take its chances on affirmative final determinations.

66. In sum, the complaining parties have failed to make a *prima facie* case that the CDSOA violates the standing or undertaking obligations in the Antidumping and SCM Agreements. The fact that complaining parties have chosen to challenge the CDSOA, *as such*, does not mean that they do not have the burden to prove that the statute, on its face, mandates WTO-inconsistent action.[18] Having failed to do that, this Panel should reject the complaining parties' standing and undertaking claims.

GATT ARTICLE X:3(a)

67. At the first meeting of the Panel, the complaining parties elaborated on their allegation that CDSOA distributions are inconsistent with Article X:3(a) of the GATT 1994 because they supposedly interfere with the good faith application of the required standing and undertakings criteria, and because the CDSOA law itself will be copied by other Members. The complaining parties made it perfectly clear that the allegedly offending measure with respect to Article X:3(a)

[17] 19 U.S.C. §§ 1671c(f)(3), 1671c(g), 1673c(f)(3), 1673c(g); 19 C.F.R. § 351.208(I) & (g).

[18] *See* Korea Second Written Submission, para. 44 ("because this is an 'on its face' claim, such proof is not required.").

is U.S. implementation of its antidumping and countervailing duty laws, not U.S. implementation of the CDSOA. The complaining parties did not, however, explain where in their requests for the establishment of a panel the allegedly offending measures are cited. It seems that it is the EC and others that do not "get it."

68. The complaining parties' panel requests allege WTO breaches by the CDSOA, not by means of the provisions of U.S. law under which U.S. authorities determine the adequacy of industry support for petitions or consider whether to accept price undertakings. Article 6.2 of the DSU, however, requires, *inter alia*, that the request for the establishment of a panel "identify the specific measures at issue." Failure to comply with this requirement has been interpreted by the Appellate Body to be a jurisdictional defect. That fact that the complaining parties claim that the CDSOA is causing the authorities to administer U.S. standing and undertaking provisions in contravention of Article X:3(a) does not change that it is the U.S. laws on standing and undertakings that are the measures that are claimed to violation Article X:3(a), and therefore, those measures were required to be identified in the panel requests. Thus, the claims under Article X:3(a) regarding the administration of U.S. standing and undertaking laws are not within this Panel's terms of reference and must be rejected.

69. Some complaining parties assert that the CDSOA "administers" the trade laws of the United States and that CDSOA is, therefore, the measure at issue for purposes of the Article X:3(a) claims. It is unclear what is meant by this statement as the CDSOA is not about how the

U.S. administers its standing and undertaking provisions or any other provision of U.S. trade law. Indeed, the United States administers its trade laws, not the CDSOA. In fact, the Department of Commerce, which handles standing and undertakings determinations in AD and CVD cases, does not administer the CDSOA, the Customs Service does.

70. Some of the parties have also cited *Argentina - Hides*. That case provides no guidance on this issue, however, because, as the EC noted this morning, Argentina did not raise the point concerning the measures that must be identified in the panel request and the panel did not consider it.

71. Even if the complaining parties can overcome the jurisdictional defect in the Article X:3(a) claims, their arguments are without merit. They rest their case entirely on the belief that the CDSOA will influence domestic interests to bring or support an investigation, or oppose an undertaking, contrary to what domestic interests would have done without the CDSOA. The complaining parties have not, however, provided evidence that, "but for" the CDSOA, domestic interests would not otherwise have supported a petition or opposed an undertaking. Moreover, even if they had brought forth such evidence, it would not implicate the actions of the United States in implementing the Antidumping and SCM Agreements. As pointed out in our specific analyses of standing and undertakings, there is no requirement in the agreements that the administering authority (1) examine the reasons behind industry support for petitions or (2) accede to domestic industry opposition to an undertaking.

72. Australia, citing the panel determination in *US-301*, maintains in its second written submission that "the mere possibility that the Act could distort" the application of the standing requirements is sufficient to find a breach of the principle of good faith. In *U.S.-301*, however, the conduct in question *was found to be prohibited by a WTO agreement*, and the discussion cited by Australia revolved around whether a Member could -- by law -- reserve to itself the discretion to engage in such prohibited conduct. In the instant case, on the other hand, the complaining parties have been unable to demonstrate that the CDSOA requires, *or permits a Member to engage in*, any prohibited conduct.

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

CONCLUSION

74. For these reasons and the reasons set forth in our written submissions, the United States requests that the Panel reject the complaining parties' claims. This concludes my oral statement. Thank you, Mr. Chairman and members of the Panel.