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BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Continued Dumping and Subsidy Offset Act of 2000

(AB-2002-7)

STATEMENT OF THE UNITED STATES AT THE ORAL HEARING

November 28, 2002

Introduction

1. Mr. Chairman and members of the Division, I am pleased to appear before you today to present the views of the United States.

2. Mr. Chairman, I suggest that this dispute be known as the case of the claims that were not made.

3. In light of the sheer volume of argumentation offered by the complaining parties in support of their case, I recognize that it is hard to argue that the complaining parties, while obviously present, have been silent. Nevertheless, notwithstanding over approximately 1800 pages presented to the panel and the 375 pages presented to the Division, it is the silences in the complaining parties' arguments which speak most loudly.

4. For example, notwithstanding the obvious nature of the CDSOA as a subsidy program, only Mexico among the complaining parties brought a claim that the CDSOA breached SCM Agreement provisions proscribing actionable subsidies, and even Mexico has not pursued that claim on appeal. The reason for their silence is clear in the conclusions of the Panel on this claim: they could not show that the CDSOA is a "specific" subsidy or that it causes adverse effects, which are the required elements of an actionable subsidy claim.

5. Likewise, while the complaining parties made much of alleged changes in the conditions of competition between imported and domestic products supposedly brought about by the CDSOA, none brought a claim under Article III of the GATT 1994, the WTO provision in which this analysis is relevant. Here, as well, the reason for their silence is clear: Article III:8 provides that subsidy programs like the CDSOA are not subject to the disciplines of GATT 1994 Article III.

6. And finally, while the complaining parties argued vociferously that the CDSOA undermined the value of the benefits provided under AD Agreement Article 5.4 and SCM Agreement Article 11.4, it seems to have occurred to none to argue that the CDSOA nullified and impaired benefits in the sense of GATT 1994 Article XXIII:1(b) and DSU Article 26.1. Once again, the reasons are clear: to demonstrate non-violation nullification or impairment, they would have had to show: (1) the application of a measure by a WTO member; (2) a benefit accruing under the relevant agreement; and (3) the nullification or impairment of the benefit as a result of the application of the measure that was not reasonably anticipated.[1] Further, as the Appellate Body explained in *EC- Asbestos*, "we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'"[2]

7. Mr. Chairman, there is no great mystery in the approach the complaining parties took in this case. Recognizing that Members never specifically proscribed a program like the CDSOA in the WTO Agreement, they must have examined, then rejected, a case based on the existing WTO disciplines, because they knew that such a case would fail. It would fail because these disciplines are either inapplicable because of insurmountable limitations, such as that in GATT 1994 Article III, or because of insurmountable burdens, such as those in SCM Agreement Article 5(c), GATT 1994 Article XXIII:1(b) and DSU Article 26.1.

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[1] Panel Report on *Japan - Measures Affecting Consumer Photographic Film & Paper*, WT/DS44/R, adopted 22 April 1998, para. 10.41, 10.82.

[2] Appellate Body Report on *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS133/AB/R, adopted 12 March 2001, para. 186 (quoting *Japan – Film* at para. 10.37 with approval).

8. This of course did not end their effort to obtain findings against a program that, regardless of whether in breach of the WTO Agreement, they simply didn't like. So their approach, regrettably adopted by the Panel, was to pick and choose various concepts and disciplines from various provisions of the WTO Agreement, but apply them shorn of their limitations and conditions. In other words, the complaining parties, and then the Panel, have tried to circumvent the limitations and conditions in the WTO Agreement in the interest of obtaining findings against a program they did not like.

9. Mr. Chairman, it is not surprising that complaining parties in a dispute develop creative arguments in an attempt to overcome the legal limitations of their cases. However, it is not only surprising, but also highly problematic, when a panel is unable or unwilling to respond to these arguments with a view to what the WTO Agreement actually does and does not say.

10. The Agreement does not say that "specific action against dumping" means "providing otherwise WTO-consistent subsidies to a company injured by dumping or subsidies." Here, in their zeal to ensure findings against the CDSOA, the complaining parties created an absurdly overbroad rule that would appear to proscribe any form of assistance to companies if they are guilty of doing business in a sector injured by dumped or subsidized imports. For that is what the out-of-context and unqualified application of the "conditions of competition" test in this case amounts to. Without any of the evidence required in a prohibited or actionable subsidy case, the Panel found a new form of prohibited subsidy, one not requiring any evidentiary showing beyond *potential* receipt of money, and all through an expansive and unsupported interpretation of a phrase "specific action against dumping/subsidization."

Specific Action Against Dumping/Subsidization

11. The Panel made several fundamental legal errors in finding that the CDSOA is "specific action against dumping" and subsidization contrary to Articles 18.1 and 32.1. First, the Panel misapplied the Appellate Body's "constituent elements" test articulated in the *1916 Act* case. In that case, the Appellate Body recognized that there was a difference between "specific action" in the main provisions and "action" in the footnotes. What made action "specific" was that it was taken in response to situations presenting the constituent elements of dumping. The constituent elements of dumping are found in the definition of dumping contained in GATT Article VI:1 as elaborated in Article 2 of the Antidumping Agreement.[3] Likewise, the constituent elements of a subsidy are found in the definition of subsidy in GATT Article VI:3 and the SCM Agreement.

12. In this case, the Panel even agreed that the CDSOA does not refer to the constituent elements of dumping or subsidization and that the constituent elements are not built into the essential elements for CDSOA eligibility. This should have ended the inquiry based on the Appellate Body's constituent element test. The Panel's finding that "there is a clear, direct and unavoidable connection" between an AD or CVD determination and CDSOA distributions misconstrued the Appellate Body's decision in the *1916 Act* case which addressed an entirely different measure: one in which the cause of action depended upon the constituent elements of dumping - *i.e.*, a comparison of prices between products sold in a foreign market and those sold in the US.

[3] *United States – Anti-dumping Act of 1916*, Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, paras. 105-07, 130.

13. Here, despite what the Panel says, the basis for the Panel's finding of a "connection" between a determination of dumping or subsidization and the CDSOA distributions is that the distributions are funded with AD/CVD duties. Yet, nothing in the Antidumping or SCM Agreement speaks to or limits what a government can do with these revenues once collected. Spending this money cannot *per se* be an action against dumping or a subsidy - otherwise duties collected could never be spent. The Panel's interpretation of the Appellate Body's constituent elements test would sweep in any domestic measure which depends upon the expenditure of collected duties.

14. In addition to not being based upon the constituent elements of dumping or a subsidy, the Panel erred in finding that the CDSOA is "against" dumping or subsidies. The Panel's conclusion that the word "against" extends to action having a "direct or indirect" adverse bearing on the conditions of competition between dumped and non-dumped products has *no* textual foundation in the Agreements, and is, at best, the Panel's own invention.

15. The words "practice of" appear nowhere in Articles 18.1 and 32.1. Nor did the Panel explain what the "practice of" dumping or subsidization might be. In the context of Articles 18.1 and 32.1 dumping or subsidization cannot exist as a "practice" apart from the imported products that are dumped or subsidized and the entities that are responsible for them.

16. Second, as explained in our written submission, the adoption of a "conditions of competition" test is simply not supported by the text of Articles 18.1 or 32.1, or the context of those articles. Notwithstanding the Appellees' claims, it is not acceptable for a Panel to impute

concepts into WTO provisions in lieu of the actual words used.[4] At least one Appellee, Canada, appears to recognize the problem with the Panel's approach, arguing instead that the Panel's findings were acceptable because they were not a legal conclusion to the effect that Articles 18.1 and 32.1 mandate or include a "conditions of competition" test.[5]

17. Moreover, the Panel's reliance on the conditions of competition concept highlights the fact that the Panel appears to have implicitly assumed that the CDSOA is action in response to *injury*, and this somehow equates to dumping or subsidization. The Panel emphasized that only members of the injured domestic industry receive CDSOA distributions and expected that those payments will be used "to address the injury caused by dumped imports in one way or another."[6] Articles 18.1 and 32.1, however, do not address action against injury.[7] Injury is different and separate from dumping or subsidization as demonstrated by the fact that there can be one without the other. Only the footnotes have been found to cover actions against the causes or effects of dumping or subsidization.

18. Nor is there any indication that the object or purpose of either the Antidumping or SCM Agreement was to protect against measures distorting the conditions of competition for dumped or subsidized imports. Indeed, such a construction is at odds with the language in Article VI of GATT 1994 which explains that injurious dumping is to be condemned. Articles 18.1 and 32.1 protect against specific action inconsistent with the relevant provisions of GATT Article VI, as interpreted by the Antidumping and SCM Agreements, respectively.

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[4] *See, e.g.,* Korea Appellee Submission, para. 25; EC, India, Indonesia, and Thailand Appellee Submission, para. 71; Japan-Chile Appellee Submission, paras. 39-43.

[5] *See* Canada Appellee Submission, para. 68.

[6] CDSOA Panel Report, para. 7.37.

[7] US Appellant Submission, para. 19.

19. Furthermore, the Panel's broad construction extends Articles 18.1 and 32.1 not just to action against dumped or subsidized imports but even to actions that alter the competitive conditions for *all* competing products, both fairly and unfairly traded. The Panel, however, failed to explain how *general* action against non-dumped or subsidized products could be *specific* action under Articles 18.1 and 32.1. We note here that even Japan-Chile recognize that footnotes 24 and 56 cover action that may have an adverse bearing on competitive conditions between dumped imports and domestic products and may also have an adverse bearing on the competitive conditions between non-dumped or subsidized imports and domestic products.[8]

20. Finally, in finding a WTO violation, the Panel relied on a series of unfounded assumptions of how the future of the CDSOA just *might* someday *indirectly* act against dumping and subsidization by resulting in more AD/CVD petitions, investigations, and orders which will "create a repressive trading environment." Appellees Canada and Korea cite *Canada – Periodicals* and/or *Argentina – Textiles* to argue that the Panel's consideration of the structure and design of the CDSOA supported its determination.[9] The Panel, however, did not limit itself to considering the design and structure of the measure subject to review, the CDSOA. Rather, the Panel erred by predicting the likely effect of the CDSOA by basing one assumption on another. For example, the Panel stated that the CDSOA "will in all probability" result in more AD/CVD petitions, which in turn, "will in all probability" result in more investigations initiated, which in turn, "will likely" result in more AD/CVD orders.[10] Yet, as the Appellate Body has

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[8] Japan-Chile Appellee Submission, para. 63.

[9] *See* Korea Appellee Submission, paras. 27-28; Canada Appellee Submission, paras. 73-74 (misciting *Argentina – Textiles*, WT/DS56/AB/R as *Argentina – Footwear*, WT/DS121/AB/R).

[10] Panel Report, para. 7.42.

recognized, a Panel cannot rely on mere speculation and assumptions to find a WTO violation. But that is precisely what the Panel did here. In any event, even if those assumptions were true, neither the Panel nor the Appellees have even attempted to show how an increase in WTO-consistent investigations and orders can be WTO-inconsistent.

21. With its string of unsupported assumptions, the Panel was trying to prove that the CDSOA is a subsidy which will have an impact on competitive conditions for imports. As our submission explained, however, domestic subsidies are not prohibited by the WTO Agreement just because they may benefit domestic products more than imports. GATT Article III:8 and Article 5 of the SCM Agreement make that much clear. The Panel's conclusion in this case with regard to Articles 18.1 and 32.1 creates obligations in the Antidumping and SCM Agreements that just do not exist.

22. If anywhere, the CDSOA should fall squarely within the scope of the footnotes because: (1) it does not refer to or contain the constituent elements of dumping or subsidization, and (2) it is a domestic subsidy compatible with GATT Article XVI.[11] The Panel erred by ignoring significant differences between the types of measures covered by the main provisions as opposed to the footnotes. The main provisions cover measures authorizing specific action that is triggered by dumping and subsidization, as such, while the footnotes cover measures authorizing action that is *not* triggered by dumping and subsidization, as such.[12] For example, the types of measures that have been found to be "specific action" include duties, provisional measures, price undertakings, and civil/criminal penalties imposed on the importer. The types of measures that

[11] U.S. Second Written Submission, para. 61.
[12] U.S. Appellant Submission, para. 27.

the parties agree could be action permitted under the footnotes include countervailing duties applied to dumped imports, safeguard measures, trade adjustment assistance, restructuring support, production subsidies, and consumer subsidies. Thus, Articles 18.1 and 32.1 do not prohibit all forms of action against dumping or subsidization.

Standing

23. Mr. Chairman, I will now turn to the standing arguments. As I noted earlier with respect to the Panel's findings on the requirements of Articles 5.4 and 11.4, the Panel found that there is a breach of these articles if the value of the these articles to the complaining parties has been undermined; that is, the Panel concluded there is a substantive breach of these provisions if, without determining whether any of the requirements for such a claim have been met, it concludes there is non-violation nullification or impairment. Several of the Appellees dispute this characterization, arguing that the breach found related to the substantive requirements of Articles 5.4 and 11.4.[13] However, their arguments to the contrary cannot change the fact that the Panel based its findings not on the requirements of these provisions. Indeed, as described at paragraph 7.63 of its Report, the Panel agreed with United States on those requirements. However, the Panel concluded that the CDSOA "may be regarded" as having undermined the benefits of Articles 5.4 and 11.4 and defeated the object and purpose of these provisions by virtue of the United States "not having acted in good faith."[14]

[13] *See, e.g.,* Appellee Submission of Korea, para. 49.
[14] Panel Report, paras. 7.63-7.64.

24. The Appellees also try to recharacterize the Panel's analysis of a "good faith" principle and "object and purpose" so as to render it more defensible. Some argue that the Panel merely considered the object and purpose and "good faith" in interpreting the agreement obligations.[15] Again, however, the Panel's conclusions at paragraphs 7.63-7.66 speak for themselves. The Panel found in paragraph 7.66 that the CDSOA "renders the . . . test of . . . Article[s] 5.4 and . . . 11.4 completely meaningless" and is therefore in breach of U.S. obligations under these articles without ever separately identifying any obligation beyond implicit requirements not to "undermine" the value of these provisions or to "defeat" their object and purpose. This is nothing but a truncated analysis of non-violation nullification or impairment, one that relies on conclusory statements rather than facts.

25. Moreover, even had the Panel relied on the "good faith principle" or the "object and purpose" of Articles 5.4 and 11.4 as described by some of the Appellees, this would not have saved the Panel's conclusion that the CDSOA breaches these provisions. Appellees assert that the "formalistic" interpretation of these provisions presented by the United States cannot be correct because it would defeat their object and purpose,[16] yet they fail to explain precisely what the correct interpretation is or how that interpretation can be squared with the ordinary meaning of the text of these provisions. Articles 5.4 and 11.4 clearly state that an application "*shall* be considered to have been made 'by or on behalf of the domestic industry'" if supported in accordance with the numerical thresholds set forth in those provisions. As the Panel correctly

[15] *See, e.g.,* Appellee Submission of the EC, India, Indonesia and Thailand, paras. 123, 142; Appellee Submission of Canada, para. 115.

[16] Appellee Submission of the EC, India, Indonesia and Thailand, para. 142.

concluded, an authority is not required to undertake an examination of the motives of those expressing support or opposition for an application.

26. The Appellees pay lip service to this conclusion, stating that there is no "general requirement to determine the precise reasons" for expressions of support.[17] Nevertheless, for Appellees, a requirement to examine motives is found in Articles 5.4 and 11.4.[18] Support must be "genuine," which may be presumed – except in the face of a measure like the CDSOA, which "destroys the presumption."[19] Then, the U.S. authorities' inability to "read the minds" of U.S. producers means that U.S. authorities can't properly determine support.[20]

27. Mr. Chairman, Articles 5.4 and 11.4 do not speak of presumptions, their destruction, or mind-reading. By their explicit terms these provisions *require* a determination that an application has adequate support if numerical thresholds are met. There is no more basis to conclude that the CDSOA breaches Articles 5.4 and 11.4 on this basis than there is because it "defeats" the object and purpose of these provisions or "undermines" their value.

28. Nor does this conclusion change when one considers the arguments of some Appellees regarding the Article 5.4 and 11.4 requirements to "determine" that an application is made by or on behalf of an industry through an "examination" of the degree of support.[21] The Panel did not base its findings on interpretation of the word "examination" or "determine." Moreover, in

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[17] Appellee Submission of the EC, India, Indonesia and Thailand, para. 135.

[18] Appellee Submission of the EC, India, Indonesia and Thailand, para. 135.

[19] Appellee Submission of the EC, India, Indonesia and Thailand, para. 135-36; Appellee Submission of Canada, para. 110.

[20] Appellee Submission of the EC, India, Indonesia and Thailand, para. 136.

[21] Appellee Submission of Canada, para. 98; Appellee Submission of the EC, India, Indonesia and Thailand, para. 123.

raising this point, Appellees forget that they raised their challenge to the CDSOA as such, independent from any application of the law and separate from the administration of U.S. standing laws. In fact, the Panel found that the "CDSOA does not require the administering authority to administer [U.S. trade remedy laws] and implementing regulations in any particular way" and that because the CDSOA was not administrative in nature, it could not be found inconsistent with the obligation to administer laws and regulations in a "uniform, impartial and reasonable manner."[22] The Hot-Rolled Appellate Body decision cited by the EC is not on point as in that case, the Appellate Body stated that "the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally."[23] There is simply no issue in this case with respect to *how* U.S. investigating authorities *conduct* their "examination" of whether the requisite numerical benchmarks of industry support are satisfied under Articles 5.4 and 11.4.

29. Again, the determination is dictated by the numerical requirements of Articles 5.4 and 11.4, and there is no mind-reading requirement in these provisions that may be read into the obligation to examine the level of industry support. Authorities fulfill their obligation to examine the level of support by examining the petition or polling the industry to determine

[22]CDSOA Panel Report, para. 7.144 (denying complaining parties' GATT Article X:3 claim).

[23]*United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* WT/DS184/AB/R, Appellate Body Report, adopted on 23 August 2001, para. 193

whether expressions of support accurately attributed to those expressing them meet the numerical thresholds in Articles 5.4 and 11.4.

30. As already noted, the Appellees attempt to recharacterize the Panel's treatment of the "good faith principle" to suggest that the Panel was not applying it as an independent obligation enforceable through the DSU, which they presumably agree is not warranted. However, their extended discussion of "the good faith principle" sheds no light on how properly to interpret Articles 5.4 and 11.4 in accordance with the principles of interpretation set forth in Vienna Convention Article 31. They have not described how, precisely, this discussion alters the approach to the interpretation of Articles 5.4 and 11.4 set forth in Vienna Convention Article 31 and applied in every WTO dispute – to interpret an agreement in good faith in accordance with the ordinary meaning of its terms in their context and in light of the agreement's object and purpose. Yet, the fact that this Panel's analysis radically departed from that in other disputes is beyond question – it purported to create in the WTO agreement a separate obligation of good faith which can lead to the breach of any agreement provision, without regard to its terms. In their zeal to protect the Panel's finding, the Appellees support this approach as well, notwithstanding assertions to the contrary. They refer to the statement that the "good faith principle" "finds expression" in various WTO Agreement provisions, but this does not permit the enforcement of a "good faith" principle as such, any more than the reflection of the notion of "precaution" in various SPS Agreement provisions allows for independent enforcement of a

"precautionary principle" not found in the WTO Agreements (let alone in customary international law).[24]

31. Further, the invocation of the alleged "object and purpose" of Articles 5.4 and 11.4 cited by the Panel – to thwart the supposed nefarious efforts of the United States prior to the Uruguay Round to initiate investigations without adequate industry support – is likewise irreconcilable with a proper analysis based on the principles of the Vienna Convention Articles 31 and 32. This is not "object and purpose," which is to be derived from the text of the WTO Agreement itself, but self-serving, one-sided characterization of the circumstances leading to the negotiation of Articles 5.4 and 11.4.[25] Were it supported by anything but the EC's assertions, this might at most constitute "supplementary means" of interpretation under Article 32, available *only* to confirm the meaning derived through an Article 31 analysis or where that analysis leaves a provision's meaning ambiguous or leads to an absurd result.

32. The Panel's uncritical acceptance of the EC's assertions[26] as to the "object and purpose" of Articles 5.4 and 11.4 was unfortunately matched by its uncritical acceptance of the Appellees' assertions regarding how the CDSOA operates. As explained in our appellant submission,[27] this amounted to relieving the complaining parties of their burden of proof, and in fact reversing it. According to the Panel, the CDSOA "effectively mandates" producers to support an application,

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[24] *See European Communities,* Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, Appellate Body Report, adopted on 13 February 1998, paras. 123-125.

[25] *See* U.S. Appellant Submission, para. 100 n.118.

[26] CDSOA Panel Report, para. 7.61.

[27] U.S. Appellant Submission, paras. 115-117.

"will result in more petitions," and will have an "inevitable impact."[28] All of this, despite the uncontested fact that, under the CDSOA, relevant expressions of support are not made before the agency determining the level of support for a petition, and may be made months after the determination under Articles 5.4 and 11.4 is complete. There is absolutely no basis for the Panel to have drawn such an absolute conclusion that the law on its face "effectively mandates" support for a petition.

33. Presumably, the Panel considered it necessary to draw this conclusion, whether defensible or not, out of recognition that, since the complaining parties were challenging the law as such, it would not be sufficient to find a mere possibility that, in a particular case, the CDSOA might affect the level of industry support. Even this would have required more evidence than the mere assertions presented by complaining parties with respect to a law that, at the time of panel establishment, had never even been applied.

34. In lieu of any evidence on the actual operation of the CDSOA, the Panel resorted to a series of unfounded assumptions to conclude that the "inevitable impact" of the CDSOA was to induce some subset of domestic producers to support petitions they otherwise would not. The Panel's conclusion, however, completely ignores that the CDSOA has done nothing to affect the reasons domestic producers have for opposing petitions. A domestic producer could be expected to oppose a petition when it believes that it is not in its economic interest to support it – for example, the producer is owned by a foreign producer or exporter of the subject merchandise, is

[28] CDSOA Panel Report, paras. 7.62, 7.66.

itself an importer of the subject merchandise (who must pay a duty deposit at the time of importation), or hopes that dumped or subsidized imports will drive its domestic competitors, but not itself, out of business. The CDSOA does not assuage these real and immediate economic considerations. In contrast, any distributions under the CDSOA are remote – anywhere from 2 to 10 or more years after initiation – and dependent on a variety of contingencies, that may or may not occur.[29] Importantly, under the U.S. retrospective system, where final antidumping and countervailing duty liability is determined after importation, changes in foreign producer or exporter practice affect the amount of duties, if any, collected. For example, if the foreign producer stops dumping, no duties will ever be assessed or available for distribution under the CDSOA. Tellingly, in 2001 approximately 70% of applicants received less than $10,000 with 58% receiving no distribution at all. Given that the cost of bringing an antidumping case exceeds $1 million, it is hard to believe that the promise of CDSOA distributions would be an incentive.[30] Claims of the "sky falling" from the introduction of the CDSOA are simply unfounded. In fact, data notified to the WTO shows that the U.S. initiated less than half the number of antidumping and countervailing duty investigations in the first six months of 2002 than in the same period for

[29] *See, e.g.,* U.S. Second Written Submission, paras. 89-92.

[30] U.S. Customs Service, CDSOA FY2001 Disbursements Final, *available at* http: //www.customs.ustreas.gov/impoexpo/annual_report_table.xls (Canada Exhibit-18).

the prior year.[31] Industries bring cases based on whether they perceive meritorious cases to exist at the particular point in time, as the fluctuation in cases initiated over the past decade reflects.[32]

35. This leads once again to the point we made at the outset, that the complaining parties relied on generalized assertions relating to the operation of the CDSOA and how it allegedly undermines the "object and purpose" and "the value" of Articles 5.4 and 11.4 because they simply did not wish to pursue a non-violation claim, which they knew would fail. As the Appellate Body explained in *EC- Asbestos*, "we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy.'"[33] Regrettably, the Panel made the exceptional ordinary, by loosely applying the concepts of a non-violation claim, without any of the requirements necessary to establish either such a claim or to establish a violation claim. The Panel should be reversed.

Conclusion

36. In conclusion, the Panel demonstrated their misunderstanding of Member obligations to the very end by suggesting that the United States should take issues that are not defined in the WTO Agreement and seek clarification through negotiations. The United States has accepted

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[31] Available at http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls ; http://www.wto.org/english/tratop_e/scm_e/scm_stattab2_e.htm (first 6 mos. 2002); G/ADP/N/78/USA (Sept. 5, 2001); G/SCM/N/75/USA (Sept. 5, 2001) (first 6 mos. 2001).

[32] WTO Semi-Annual Reports Under Article 25:11 of the SCM Agreement for the United States (Cases Initiated 1994-2002); WTO Semi-Annual Reports Under Article 16.4 of the Antidumping Agreement for the United States (Cases Initiated 1994-2002); GATT Semi-Annual Reports Under Article 14.4 of the Antidumping Code for the United States (Cases Initiated 1991-1993); GATT Semi-Annual Reports Under Article 2.16 of the Subsidies Code for the United States (Cases Initiated 1991-1993).

[33] Appellate Body Report on *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS133/AB/R, adopted 12 March 2001, para. 186.

only the obligations articulated in the various agreements making up the WTO. If our trading partners are unhappy with action taken by the United States to provide domestic subsidies under the CDSOA, the proper place for resolution is in negotiations not in a dispute settlement proceeding when no actionable subsidy or allegation of non-violation nullification or impairment has been claimed or demonstrated, and when GATT Article III:8(b) excludes domestic subsidies from the types of measures that may be viewed as impermissibly altering the conditions of competition.

37. For these reasons and the reasons set forth in our written submission, the United States requests that the Appellate Body reverse the Panel findings on these issues. This concludes my oral statement. Thank you, Mr. Chairman and members of the Division.