UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

January 21, 2002

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

1. The "Continued Dumping and Subsidy Offset Act of 2000" (CDSOA) was signed into law on October 28, 2000. The CDSOA is a government payment program administered by the U.S. Customs Service. The CDSOA instructs Customs to establish special accounts for funds to be distributed annually to eligible domestic producers. Because the special accounts are sourced with duties collected by Customs on pre-existing antidumping (AD) or countervailing (CVD) duty orders, complainants filed this case alleging that the CDSOA is, on its face, inconsistent with U.S. obligations under the WTO Agreement. Complainants, however, have failed to make a *prima facie* case of a WTO violation for the following reasons.

2. Complaining parties are essentially arguing that WTO members cannot enact a law which permits the distribution of revenues generated from AD/CVD duties to any recipient other than the national treasury. No word, phrase, or paragraph in the entire WTO Agreement, however, supports their argument. A review of the negotiating history since 1947 confirms that a specific restriction on how Members can spend or distribute moneys received as AD/CVD duties was not raised or addressed during negotiations. As the Appellate Body cautioned in *India – Patents,* the panel's role is limited to the words and concepts used in the treaty. Under the WTO Agreement, Members retain the right to control their treasury, allocate their resources, and disburse funds for a wide range of purposes. A Member's sovereign right to appropriate lawfully assessed and collected duties cannot be restricted by this Panel *ex aequo et bono*.

Article 5 of the SCM Agreement

3. Mexico claims that Article 5(b) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") limits the ability of the United States to disburse funds under the CDSOA. The granting of a subsidy is not, in and of itself, prohibited under the SCM Agreement. On the contrary, a subsidy must be "specific" within the meaning of Article 2. Mexico, however, has failed to establish that the CDSOA is "specific" on the basis of positive evidence as required by Articles 1 and 2 of the SCM Agreement.

4. First, there is no question that the CDSOA is not *de jure* specific because it does not expressly limit access to certain enterprises, industry, or groups. It is potentially applicable to *any producer in any industry* in the United States that has filed a petition or supported an antidumping or countervailing duty investigation resulting in the collection of duties. Consistent with Article 2.1(b), eligibility for the CDSOA distributions is based on objective criteria, and eligibility is automatic if the criteria are met. Second, Mexico provided no positive evidence that the CDSOA is *de facto* specific within the terms of Article 2.1(c). Given that distributions are potentially available to any producer in any industry and recipients will change over time, it is

doubtful that Mexico could ever show *de facto* specificity. Subsidies that are not "specific" are not actionable under Article 5 of the SCM Agreement.

5. Mexico does not even try to make a *prima facie* case that the CDSOA has caused actual adverse effects to its interests as required by Article 5 of the SCM Agreement. Instead, Mexico claims that the CDSOA *as such* causes *per se* adverse effects in the form of nullification or impairment of benefits under Article 5(b). It is not clear to the United States, however, that Article 5(b) creates a presumption that a subsidy that violates another WTO provision is an actionable subsidy without any showing of adverse effects. Such an interpretation would eliminate the primary distinction between prohibited subsidies under Article 3 where effects are presumed and actionable subsidies under Article 5 where the complaining party must demonstrate adverse effects. Regardless, the CDSOA does not violate any other WTO provision.

6. Nor does Mexico's claim satisfy the three requirements articulated in *Japan – Film* to establish a non-violation nullification or impairment. First, Mexico has failed to challenge the *application* of the CDSOA. Second, Mexico has failed to demonstrate that the competitive relationship between U.S. products and Mexican imports has been upset by a subsidy, and that the subsidy was not reasonably anticipated by Mexico.

7. Mexico has presented no evidence that U.S. producers of products that compete with Mexican products have actually received a distribution under CDSOA, let alone a "clear correlation" between the distributions and any disruption of a competitive relationship. Without such evidence, the "relevant competitive relationship" has not even been established.

8. Mexico's related argument that distributions under the CDSOA will *per se* nullify or impair benefits under Articles II and VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") is unreasonable and must be rejected. Not only does it fly in the face of the notion that a non-violation claim is an exceptional remedy, but such an interpretation would render the causation requirement meaningless and automatically convert any specific domestic subsidy program related to a product on which there is a tariff concession into a non-violation nullification or impairment of benefits.

9. Finally, Mexico could have reasonably anticipated, before the tariff concession negotiated during the Uruguay Round entered into force on January 1, 1995, that antidumping and countervailing duties would be distributed to the domestic industry. In fact, there was proposed legislation in the U.S. Congress for the distribution of duties in 1988, 1990, 1991, and 1994. In sum, Mexico has failed to sustain its burden of demonstrating that the CDSOA is a "specific" subsidy that is actionable within the meaning of Articles 1, 2, and 5 of the SCM Agreement.

GATT Article VI, the Antidumping Agreement and the SCM Agreement

10. Claims that the CDSOA is a specific action against dumping or a subsidy contrary to GATT 1994 Article VI or the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("*Antidumping Agreement") and SCM Agreement must also fail. Assuming that the reasoning of *United States – Antidumping Act of 1916* applies to the facts of this case, it is clear that the CDSOA does not constitute a "specific action against dumping" or a "specific action against a subsidy."

11. First, the distributions are not based upon a test that includes the constituent elements of dumping or a subsidy. Rather, the distributions are based upon the applicant's qualification as an "affected domestic producer" who has incurred "qualifying expenditures." The CDSOA does not provide for the recovery of "damages": the amount of the distributions have nothing to do with measuring the extent to which a U.S. producer has been affected by dumping or subsidization of imports.

12. Second, the CDSOA is not an action "against" dumping or a subsidy. Because there was no question in *United States – Antidumping Act of 1916* that civil or criminal penalties under the 1916 Act applied to importers, neither the panels nor the Appellate Body in that case discussed whether the specific action was "against" dumping. In contrast, this Panel must consider the proper interpretation of the term "against" in Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively.

13. The ordinary meaning of the term "against" suggests that the specific action must be in "hostile opposition to" dumping/subsidization and must "come into contact with" dumping/subsidization. Thus, to consider a specific action "against" dumping or subsidization, the action must apply to the imported good or the importer, and it must be burdensome. Unlike the 1916 Act, the CDSOA imposes no burden or liability on imported goods or importers. The CDSOA has nothing to do with imported goods or importers; it is a payment program. Therefore, this Panel should find that Article VI of the GATT 1994, Articles 1 and 18 of the Antidumping Agreement, and Articles 10 and 32 of the SCM Agreement do not apply to the CDSOA.

14. In the event that the Panel concludes that the CDSOA is an action against dumping and a subsidy, footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively, operate to exclude the CDSOA from the scope of Article VI and the Antidumping and SCM Agreements. Footnotes 24 and 56 clarify the meaning of Articles 18.1 of the Antidumping Agreement and 32.1 of the SCM Agreement, respectively, by stating that they are "not intended to preclude action under other relevant provisions of GATT 1994…." The general reference to "action" in footnotes 24 and 56 is not the same type of focused and directed action which applies to oppose dumping or subsidies *as such* within the meaning of Articles 18.1 and 32.1. The ordinary

meaning of the phrase "not intended to preclude action" within the context of Articles 18.1 and 32.1 is that action is *permitted.* According to the panel in *United States – Antidumping Act of 1916*, Members are free to address the causes or effects of dumping (and subsidies) through other trade policy instruments that are consistent with GATT 1994 provisions other than GATT 1994 Article VI.

15. The CDSOA is an action consistent with GATT 1994 Article XVI entitled "Subsidies." Article XVI is a "relevant provision of GATT 1994" which recognizes that Members have the general right to use subsidies and may provide non-export subsidies to the extent that they do no cause serious prejudice to the interests of other Members. The complaining parties do not argue that disbursements under the CDSOA have caused or will cause serious prejudice to their interests. Therefore, if the CDSOA is considered to be an action against dumping, the distributions are otherwise permitted by the footnotes to Articles 18.1 and 32.1 as action under another relevant GATT provision.

16. The complaining parties also overlook the fact that Articles 4.10 and 7.9 of the SCM Agreement do not contain an obligation or prohibition on Members and, therefore, cannot form the basis of a violation of the SCM Agreement. Even if the Panel could somehow construe Articles 4.10 and 7.9 as containing such an obligation, the CDSOA is not a "countermeasure" within the meaning of Articles 4.10 or 7.9. The CDSOA is not a specific action against dumping or a subsidy. Nor was it enacted in order to induce another Member to implement DSB recommendations and rulings: it has nothing to do with the actions of other Members. The CDSOA is a payment program.

Standing, Undertakings and GATT Article X:3

17. Claims that the CDSOA breaches Article 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement by compromising the ability of U.S. authorities to make objective assessments of whether AD and CVD petitions have the support required for initiation are unsupported and must be rejected. Complaining parties offer no evidence that the CDSOA in any way affects how U.S. authorities apply the objective criteria set forth in Articles 5.4 and 11.4 for determining industry support for petitions. Instead, the complaining parties engage in speculation on the impact of the CDSOA on the willingness of private companies to support AD/CVD petition and attempt to read into Article 5.4 and 11.4 a non-existent requirement for authorities to undertake subjective analyses of the motives of domestic companies.

18. Contrary to the complaining parties' arguments, there is no requirement in Articles 5.4 and 11.4 that the administering authority determine the *reason* for the domestic industry's support. The obligation is to determine whether the *quantitative* benchmarks have been met. The objective, quantitative nature of the analysis of industry support leaves little or no scope for

an improper analysis: either the number of companies expressing support for the petition meet the threshold, or they do not.

19. A requirement to determine the subjective motivations of private parties would be unworkable. Even if relevant, it is highly unlikely that complaining parties could ever summon credible evidence that "but for" the distributions, domestic producers would not otherwise have filed a petition or supported an investigation, and that the participation of those producers was necessary to establish standing in that investigation. It is rare for domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions. Thus, if there is sufficient support *anyway*, it cannot be said that the CDSOA will affect the number of cases meeting the thresholds of Articles 5.4 and 11.4, even if such an increase could constitute a breach of those articles.

20. Claims that the CDSOA breaches Article 8 of the Antidumping Agreement and Article 18 of the SCM Agreement by making it more difficult for exporters to secure an undertaking with the competent authorities are likewise unsupported and must be rejected. There is no obligation in Articles 8 and 18 to accept a proposed undertaking. Moreover, and more importantly, neither article circumscribes the reasons that may cause an administering authority to decline to accept a proposed undertaking as "impractical." The articles do not require the administering authority to determine that the undertaking is "inappropriate" before rejecting it. The sentence in Article 8.3 and 18.3 containing the term "inappropriate" addresses the circumstances under which the exporter is to be provided the reasons for the rejection. It does not change the standard for accepting or rejecting an undertaking.

21. It is within the complete discretion of the administering authority to accept or reject an undertaking. Thus, even assuming *arguendo* that the CDSOA renders it more difficult for exporters to secure price undertakings, there is no WTO violation because there is no *obligation* to enter into a price undertaking in the first place.

22. Again, complaining parties have provided no evidence that the CDSOA has had or will have any actual effect on the Commerce Department's consideration of proposed undertakings. Domestic producers do not enjoy an "effective" veto over proposed undertakings – only the competent authority and the exporters determine whether to agree to an undertaking. The vast majority of undertakings in the United States since 1996 have been entered into over the vehement opposition of domestic producers. Nor is there any reason to believe that the domestic industry will oppose an undertaking as a result of the CDSOA. If conditions of fair trade can be achieved through an undertaking, domestic producers who file petitions will be supportive of an agreement. Even if the CDSOA were to change the position of domestic producers, however, there is nothing to suggest a change in the Commerce Department's independent action.

23. The complaining parties have offered no arguments or evidence concerning the actual administration of the CDSOA and, therefore, cannot allege a violation of Article X:3(a) of the GATT 1994. Consistent with the plain language of Article X:3(a), various panel and Appellate Body reports have concluded that Article X:3(a) only addresses the *administration* of national laws. The complaining parties, however, have provided no evidence at all concerning the day-to-day administration of the CDSOA. Even if it were concluded that the CDSOA somehow affects the administration of laws relating to the initiation of antidumping and countervailing duty investigations and to price undertakings, this could not conceivably form the basis of an Article X:3(a) finding against the CDSOA.

24. Finally, because the CDSOA is not inconsistent with any WTO Agreement provision, the complaining parties' claims under Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must also fail.