UNITED STATES - CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

(DS217 & 234)

RESPONSES OF THE UNITED STATES TO THE QUESTIONS FROM THE PANEL

March 21, 2002

Questions to the United States

11. Are there any conditions governing what affected producers must do with payments under the CDSOA for qualifying expenditures? For example, may those payments be used to improve the competitive position of the affected producer in respect of a product totally unrelated to the product subject to the anti-dumping order?

Response: No. There are no conditions governing the use of the distributions under the CDSOA. In response to comments on the proposed regulations, the Customs Service stated that:

> There is no statutory requirement as to how a disbursement to an affected domestic producer is to be spent, and, absent statutory authority, Customs may not impose such a requirement.[1]

Therefore, an affected domestic producer can use the money for *any* purpose, including gifts to charity, payment of creditors, additional compensation or early retirement packages for workers, new product development, new cafeterias, or to improve the competitive position in respect of a product totally unrelated to the product subject to the antidumping order.

12. Is there any requirement that qualifying expenditure must be incurred by affected producers in relation to their competition with dumped imports specifically, rather than their competition with imported and domestic products more generally?

Response: No, there is no requirement that qualifying expenditures must be incurred in relation to competition with dumped imports specifically. The qualifying expenditures are incurred in relation to competition with *all* producers of that product - both domestic and foreign - not just the producers of the dumped product.

13. Regarding para. 65 of the US oral statement at the second meeting, what proportion of affirmative preliminary determinations become negative final determinations upon completion of the investigation?

Response: The United States does not regularly maintain information concerning all preliminary

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[1] 19 CFR Parts 159 and 178, 66 Fed. Reg. 48,546, 48,549 (Dep't Comm. 2001) (Final Rule), Common Exhibit 3.

and final determinations in every antidumping and countervailing duty investigation in one database. The United States was able to provide the information in paragraph 65 because it was based on information available on the Commission's website. In response to the Panel's question, however, the United States is in the process of reviewing available data to determine their reliability. This exercise is taking longer than expected. The United States expects to be in a position to provide a complete answer to this question by Monday, March 25, 2002, and respectfully requests the Panel to accept the information on that date.

14. In your view, did the EEC - Oilseeds I case concern nullification or impairment caused by the "application" of a measure, as opposed to nullification or impairment caused by the measure per se? Please explain.

Response: Yes. The application of the measure in that case, *i.e.*, the provision of subsidies to EC oilseed producers, was on-going so it was not an issue there. In that case, the panel considered the U.S. claim that an EC Regulation, which had been in effect for over 20 years, had nullified and impaired its Article II benefits in the sense of Article XXIII:1(b) "by the subsequent introduction of and substantial increases in producer and processor subsidies on Community oilseeds and protein animal feed components."[2] The United States submitted voluminous pricing data covering over a 10 year period and import, production, and consumption data covering a 25 year period which showed that the EC Regulation benefited oilseed producers and *actually* upset the competitive position of U.S. oilseed imports.[3] The design and architecture of the measure itself was relevant to establishing causation, *i.e.*, that it was the subsidies which *caused* the upset to the competitive relationship. Having carefully analyzed the price mechanism, the panel concluded that the product-specific measure as applied would "protect Community producers completely from the movement of prices for imports and hence prevent the lowering of import duties from having any impact on the competitive relationship between domestic and imported oilseeds." Paras. 147-148.

[2] *EEC – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins,* BISD 37S/86, paras. 53, 131-32, 135 (12/14/89).

[3] *Id.* at paras. 89-90, 92, 97, 100, 102, 104, 106, 108, Annexes D&E.

The United States would also like to offer the following comments in response to the questions posed to the complaining parties:

Questions to Complaining Parties

3. Subsidy A is paid to all domestic producers of product X, and the grant of that subsidy is not tied in any way to a determination of dumping on the part of exporters / foreign producers of product X. Subsidy B is paid to all domestic producers of product X, subject to a finding of dumping on the part of importers / exporters / foreign producers of product X. For the purpose of this question, please assume that subsidy A would not constitute a specific action "against" dumping (but indicate if you disagree). (a) Should subsidy B be treated as a specific action "against" dumping? (b) Why? (c) If subsidy B should be treated as a specific action "against" dumping, what is the difference between the impact of subsidies A and B that means that subsidy B constitutes specific action "against" dumping, whereas subsidy A does not? (d) Subsidy B would be expected to provide the domestic producers of product X with a competitive advantage over imported products generally. Does subsidy B provide those domestic producers with a greater competitive advantage over dumped imports in particular? Why?

Response:

(a),(b) & (c) Subsidy B is not a specific action against dumping for the same reason that subsidy A is not. Because Subsidy B does not apply to the imported good, or the importer/exporter/foreign producer, there is no basis to conclude that the subsidy is "against" dumping. This is made clear by the text of Article VI:1 of the *General Agreement on Tariffs and Trade 1994* which defines dumping. Applying that definition to Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* makes clear that Article 18.1 applies to "specific action against exports (products) from another Member (a country) being introduced into the commerce of a Member (another country) at less than the normal value of the products." For purposes of the analysis proffered by the complaining parties, the "impact" of the two subsidies is the same in terms of changing the conditions of competition between recipients of the subsidy and all other producers of the subsidy, and not just foreign producers that are dumping the product. Thus, if the Panel were to conclude that Subsidy B is a "specific action against dumping," that would mean that subsidy A is also a "specific action against dumping."

(d) First, as explained below in response to questions 4 and 5, the United States does not agree that a subsidy necessarily improves the competitive position of a producer. In any event, Subsidy B would not provide a greater competitive advantage over dumped imports than the other products that did not receive the subsidy. It is important to recall that dumping over time is evidence of a competitive advantage. The imposition of an antidumping duty levels the playing field; it does not place the dumped product at a disadvantage. Thus, there is no basis to conclude

that a domestic subsidy would give a greater competitive advantage relative to dumped products than other like products.

4. If an affected domestic producer receives an offset payment under the CDSOA, would that payment only change the competitive relationship between that domestic producer and foreign producers subject to the relevant anti-dumping order, or would it also change the competitive relationship between that domestic producer and all other producers, including other domestic producers not eligible for offset payments, and foreign producers not subject to the relevant anti-dumping order?

Response: There is no reason to believe that the CDSOA payments will necessarily change the competitive relationship between producers. An affected domestic producer can use the money for *any* purpose, including gifts to charity, payment of creditors, additional compensation or early retirement packages for workers, new product development, or new cafeterias. CDSOA payments will not necessarily be used by domestic producers to improve their competitive position with respect to the product subject to relevant antidumping or countervailing duty orders. If it is concluded that CDSOA distributions change the competitive relationship between the domestic producer that received the distribution and the foreign producer engaged in dumping, it also must be concluded, as a matter of economics, that it changes the competitive relationship between that domestic producer and all other producers of that product.

5. If offset payments may be used by affected domestic producers exclusively to bolster their competitive position vis-à-vis imports subject to the relevant anti-dumping order, does this constitute the CDSOA as a "specific action against dumping"? If so, isn't it the action by the affected domestic producers (i.e., how they use the offset payments) that constitutes action "against" dumping, as opposed to the provision of offset payments that may be used by affected domestic producers exclusively to bolster their competitive position vis-à-vis imports subject to the relevant anti-dumping order)?

Response: As explained in the answer to Question Number 11 to the United States, offset payments are made for qualifying expenditures which relate to a particular product. However, nothing in the CDSOA in any way limits how a recipient of funds can spend the money. Hence, there is no requirement for offset payments to "be used by affected domestic producers exclusively to bolster their competitive position vis-a-vis imports subject to the relevant antidumping order." Recipients can use the money for any purpose and are not limited to using the funds on the domestic like product.

In addition, the United States notes that it disagrees with the premise of this question that improving the competitive relationship of a domestic producer can be considered as acting "against" dumping. There is no basis to include a "conditions of competition" test or, "improving a competitive relationship" test in Articles 18.1 and 32.1 of the Antidumping and

SCM Agreements, respectively. If improving the competitive position is found to be relevant, it is action by the affected domestic producer, a private party, and not the CDSOA because there is no requirement that affected domestic producers use the distributions to bolster their competitive position with regard to the products subject to the AD/CVD orders.

6. *Is it possible to distinguish the CDSOA from the 1916 Act (for the purpose of Article 18.1 of the AD Agreement) because action under the latter (i.e., a court order imposing a fine or imprisonment) had an automatic, direct, negative impact on entities engaged in dumping, whereas action under the CDSOA (i.e, untied subsidies) does not? Please explain.*

Response: Yes. The two measures are wholly different. The only connection between the CDSOA and dumping is the fact that the distributions are funded with AD/CVD duties. First, the CDSOA is not based upon the constituent elements of dumping. In contrast, the 1916 Act included the constituent elements of dumping as two of its essential elements. Second, the CDSOA does not apply to imported goods or the importer/exporter/foreign producer, and therefore, the effect on those entities and thus on dumping is a matter of speculation. In contrast, the 1916 Act imposed monetary penalties or imprisonment directly on the importer.[4] A court order imposing a fine or imprisonment on an importer has an automatic, direct, negative impact on the entity engaged in dumping. In contrast, there is no automatic, direct, negative impact from CDSOA payments on entities engaged in dumping.

7. *Please comment on paras 44, 45 and 46 of the US oral statement at the second substantive meeting.*

Response: The U.S. would like to note that the Canadian counter-subsidies in the aircraft dispute were found to be WTO-inconsistent because they were found to be prohibited export subsidies under Article 3 of the SCM Agreement, not because they were "specific action against a subsidy." In fact, that argument was not raised in that dispute. As the United States noted at the Panel meeting, complainants' argument that subsidies in response to a subsidy are "specific action against a subsidy" would create an additional category of "prohibited subsidy." However complainants have been unable to find textual support for their argument, which would have far-reaching effects. Indeed the text of the SCM Agreement shows the opposite. There is nothing in Article 3 of the SCM Agreement to create such an additional category even though Article 3 lists the categories of prohibited subsidies, nor is there any indication that Article 32.1 was intended to be a "back door" means of creating such a category.

8. *Can a measure be "against" dumping if it does not have an adverse bearing on either the imported product per se, or the importer, the exporter or foreign producer of that product? If so,*

[4] In the words of Article VI:1 of the GATT 1994, the CDSOA (unlike the 1916 Act) does not act to prevent (or "against") products being introduced in commerce at less than normal value.

how?

Response: No. In the view of the United States, the measure must not only have an adverse bearing on either the imported product, or the importer/exporter/foreign producer, but it must apply to one of them to be considered a "specific action against" dumping or a subsidy.

9. The complaining parties assert, on the basis of para. 122 of the Appellate Body report on 1916 Act, that action "in response to" dumping is necessarily action "against" dumping. If action taken "in response to" dumping is of benefit to dumping, dumped imports, or those engaged in dumping, would such action be "against" dumping?

Response: No. The Panel's question points out the inherent weakness in the complaining parties' arguments. The complaining parties' suggested "response" test would include any action in any way responsive to dumping or subsidization. Such an interpretation is inconsistent with the ordinary meaning of the word "against" in the context of the Antidumping and SCM Agreements, as well as GATT Article VI. The complaining parties err in relying on the terminology used by the Appellate Body to describe obligations under Article 18.1 when the term "against" was not specifically considered. In that case, the question was not raised because the 1916 Act imposed civil or criminal liability directly on the importer based on pricing conduct that fell within the definition of dumping. In this case, the CDSOA is a payment program which does not apply "against" the imported product or the entity responsible for it.