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UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

Report of the Panel

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I. INTRODUCTION

1.1 On 21 December 2000, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, made a joint request for consultations with the United States of America under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXII:1 of the GATT, Articles 17.2 and 17.3 of the Anti-Dumping Agreement, and Articles 7.1 and 30 of the Subsidies and Countervailing Measures Agreement (the "SCM Agreement") regarding the amendment to the Tariff Act of 1930 signed into law by the President on 28 October 2000 with the title of "Continued Dumping and Subsidy Offset Act of 2000" (WT/DS217/1). On 6 February 2001, consultations were held in Geneva, but failed to resolve the dispute.

1.2 On 21 May 2001, Canada and Mexico requested consultations with the United States pursuant to Article 4 of the DSU, Article XXII:1 of GATT 1994, Articles 7.1 and 30 of the SCM Agreement and Article 17 of the Anti-Dumping Agreement regarding the same matter (WT/DS234/1). Consultations were held on 29 June 2001 in Geneva, but the parties failed to reach a mutually satisfactory resolution of the dispute.

1.3 On 12 July 2001, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 17 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement, in accordance with the standard terms of reference provided for in Article 7.1 of the DSU (WT/DS217/5). At its meeting of 23 August 2001, the Dispute Settlement Body (the "DSB") established the Panel.

1.4 On 10 August 2001, Canada and Mexico separately requested the establishment of a panel with respect to the same matter pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of GATT 1994, Article 17 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement (WT/DS234/12 and WT/DS234/13). At its meeting of 10 September 2001, the DSB agreed to those requests and, pursuant to Article 9.1 of the DSU, referred the matter to the panel established on 23 August 2001 (WT/DS234/14).

1.5 The terms of reference of the Panel are:

> "To examine, in the light of the relevant provisions in the covered agreements cited by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand in document WT/DS217/5, by Canada in document WT/DS234/12 and by Mexico in document WT/DS234/13, the matters referred by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand to the DSB in those documents and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.6 On 15 October 2001, Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with

> any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 On 25 October 2001, the Director-General accordingly composed the panel as follows:

Chairman: H.E. Mr. Luzius Wasescha

Members: Mr. Maamoun Abdel-Fattah
Mr. William Falconer

1.8 Argentina, Canada, Costa Rica, Hong Kong, China, Israel, Mexico and Norway reserved their third party rights in DS217, and were considered as third parties in the single Panel. Australia, Brazil, Canada (in respect of Mexico's complaint), the European Communities, India, Indonesia, Japan, Korea, Mexico (in respect of Canada's complaint) and Thailand reserved their third party rights in DS234.

1.9 The Panel met with the parties on 5 – 6 February 2002 and 12 March 2002. It met with the third parties on 6 February 2002.

1.10 The Panel submitted its interim report to the parties on 17 July 2002. The Panel submitted its final report to the parties on 2 September 2002.

II. FACTUAL ASPECTS

2.1 This dispute concerns the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA" or the "Offset Act"), which was enacted on 28 October 2000 as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2001.[1] The CDSOA amends Title VII of the Tariff Act of 1930 by adding a new section 754 entitled *Continued Dumping and Subsidy Offset.*[2] Regulations prescribing administrative procedures under the Act were brought into effect on September 21, 2001.[3]

2.2 The CDSOA provides that :

> Duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as "the continued dumping and subsidy offset".[4]

2.3 The term "affected domestic producers" means :[5]

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[1] Public Law 106-387, 114 Stat. 1549, 28 October 2000, sections 1001-1003.

[2] Codified as 19 USC 1675c.

[3] *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (US Customs Service 21 Sept. 2001) (final rule) (codified at 19 CFR §§ 159.61 – 159.64) (the "Regulations").

[4] United States Tariff Act of 1930, Section 754 (a).

[5] *Ibid.*, Section 754(b)(1).

> a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that –
>
> (A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.
>
> Companies, business, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.[6]

2.4 In turn, the term "qualifying expenditure" is defined by the CDSOA as "expenditure[s] incurred after the issuance of the anti-dumping duty finding or order or countervailing duty order in any of the following categories:

(A) Manufacturing facilities.
(B) Equipment.
(C) Research and development.
(D) Personnel training.
(E) Acquisition of technology.
(F) Health care benefits to employees paid for by the employer.
(G) Pension benefits to employees paid for by the employer.
(H) Environmental equipment, training or technology.
(I) Acquisition of raw materials and other inputs.
(J) Working capital or other funds needed to maintain production."[7]

2.5 The CDSOA provides that the Commissioner of Customs shall establish in the Treasury of the United States a special account with respect to each order or finding[8] and deposit into such account all the duties assessed under that Order.[9] The Commissioner of Customs shall distribute all funds (including all interest earned on the funds) from the assessed duties received in the preceding fiscal year to affected domestic producers based on a certification by the affected domestic producer that he is eligible to receive the distribution and desires to receive a distribution for qualifying expenditures incurred since the issuance of the order or finding.[10] Funds deposited in each special account during each fiscal year are to be distributed no later than 60 days after the beginning of the following fiscal year.[11] The CDSOA and regulations prescribe that (1) if the total amount of the certified net claims filed by affected domestic producers does not exceed the amount of the offset available, the certified net claim for each affected domestic producer will be paid in full, and (2) if the certified net claims exceed the amount available, the offset will be made on a *pro rata* basis based on each affected domestic producer's total certified claim.

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[6] The International Trade Commission (the "ITC") must provide to the US Customs Service ("Customs") a list of the affected domestic producers in connection with each order or finding that would potentially be eligible to receive the offset. See Section 754 (d) 1 of the United States Tariff Act of 1930.

[7] *Ibid*., § 754(b)(4), 114 Stat. 1549A-73.

[8] United States Tariff Act of 1930, Section 754(e)(1).

[9] *Ibid*., Section 754(e)(2)

[10] *Ibid*., Section 754(d)(2) and (3).

[11] *Ibid*., Section 754 (c)

2.6 Special accounts are to be terminated after "(A) the order or finding with respect to which the account was established has terminated; (B) all entries relating to the order or finding are liquidated and duties assessed collected; (C) the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c); and (D) 90 days has elapsed from the date of the notice described in subparagraph (C)." All amounts that remain unclaimed in the Account are to be permanently deposited into the general fund in the US Treasury.[12]

2.7 The CDSOA applies with respect to all anti-dumping and countervailing duty assessments made on or after 1 October 2000[13] pursuant to an anti-dumping order or a countervailing order or a finding under the Antidumping Act of 1921 in effect on 1 January 1999 or issued thereafter.[14]

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. COMPLAINING PARTIES

3.1 The complaining parties submit that the express purpose of the Offset Act is to remedy the "continued dumping or subsidisation of imported products after the issuance of anti-dumping orders or findings or countervailing duty orders". According to the complaining parties, with that objective, the Offset Act mandates the US customs authorities to distribute on an annual basis the duties assessed pursuant to a countervailing duty order, an anti-dumping order or a finding under the Antidumping Act of 1921 to the "affected domestic producers" for their "qualifying expenses" (these duties are referred to below as "offsets").

3.2 The complainants submit that the Offset Act constitutes mandatory legislation, which can itself be subject to WTO dispute settlement procedures since it leaves no discretion to the competent authorities which must pay the "offsets" whenever the conditions stipulated in the Offset Act are present.

3.3 The complaining parties argue that the "offsets" constitute a specific action against dumping and subsidisation that is not contemplated in the GATT, the Anti-Dumping Agreement (the "AD Agreement") or the SCM Agreement. Moreover, in the complaining parties' view, the "offsets" provide a strong incentive to the domestic producers to file or support petitions for anti-dumping or anti-subsidy measures, thereby distorting the application of the standing requirements provided for in the AD Agreement and the SCM Agreement. In addition, the complaining parties argue that the Offset Act makes it more difficult for exporters subject to an anti-dumping or countervailing duty order to secure an undertaking with the competent authorities, since the affected domestic producers will have a vested interest in opposing such undertakings in favour of the collection of anti-dumping or countervailing duties. In the view of the complaining parties this is not a reasonable and impartial administration of the US laws and regulations implementing the provisions of the AD Agreement and the SCM Agreement regarding standing determinations and undertakings.

3.4 For the above reasons, Australia[15], Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand consider that the Act is, in several respects, in violation of the following provisions:

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[12] United States Tariff Act of 1930, § 754(e)(4), CDSOA § 1003(a), 114 Stat. 1549A-75. Regulations, 66 Fed. Reg. 48,546, 48,554 (19 C.F.R. § 159.64(d)).

[13] Section 1003 (c) of the CDSOA.

[14] United States Tariff Act of 1930, Section 754(d)(1).

[15] We note that Australia did not pursue any claims in relation to GATT Article X(3)(a) and Articles 8 AD and 18 SCM Agreement.

- Article 18.1 of the AD Agreement, in conjunction with Article VI:2 of the GATT and Article 1 of the AD Agreement;

- Article 32.1 of the SCM Agreement, in conjunction with Article VI.3 of the GATT and Articles 4.10, 7.9 and 10 of the SCM Agreement;[16]

- Article X (3)(a) of the GATT;

- Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement;

- Article 8 of the AD Agreement and Article 18 of the SCM Agreement; and

- Article XVI.4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement.

3.5 The complaining parties submit that by being inconsistent with the above provisions, the Offset Act nullifies or impairs the benefits accruing to them under the cited agreements.

3.6 Furthermore, Mexico considers that the payments made under the Offset Act constitute specific subsidies within the meaning of Article 1 of the SCM Agreement, which causes "adverse effects" to its interests, in the sense of Article 5 of the SCM Agreement, in the form of nullification and impairment of benefits accruing directly or indirectly to Mexico. For this reason, Mexico considers that the Act is also in violation of Article 5 of the SCM Agreement.

3.7 India and Indonesia also submit that the CDSOA undermines AD Article 15 on special and differential treatment for developing country Members.

B. UNITED STATES

3.8 The United States argues that the CDSOA authorizes government payments and that the distributions made under the Act are consistent with GATT Article VI and the Anti-dumping and SCM Agreements because they are not actionable subsidies and are not “action against” dumping or a subsidy.

3.9 The United states submits that there is no evidence either that the CDSOA has been or will be administered in an unreasonable or partial manner (Art. X:3(a) of GATT 1994) so as to affect standing and undertaking determinations in anti-dumping and countervailing duty investigations. According to the United States, the complaining parties have failed to establish a *prima facie* case of a WTO violation, and in the absence of a specific violation of another WTO Agreement provision, the complaining parties’ claims under Article XVI:4 of the *Marrakesh Agreement establishing the WTO*, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must also fail.

IV. ARGUMENTS OF THE PARTIES

4.1 The main arguments, presented by the parties in their written submissions, oral statements and answers to questions, are summarized below.

[16] Canada and Mexico claimed a violation of Article 32.1 of the SCM Agreement, in conjunction with Article VI.3 of the GATT and Article 10 of the SCM Agreement. WT/DS234/12 and WT/DS234/13.

A. FIRST WRITTEN SUBMISSION OF THE COMPLAINING PARTIES

1. Australia

(a) Introduction

4.2 Australia, acting jointly and severally with a number of other Members, brings this dispute against the United States concerning the *Continued Dumping and Subsidy Offset Act* ("the Act"), which amends Title VII of the *Tariff Act of 1930* ("the Tariff Act") through the insertion of a new section 754. The Act was included in Public Law 106-387 ("the Agriculture Appropriations Act"), and was signed into law by the President of the United States on 28 October 2000. The Act applies to all anti-dumping and countervailing duty assessments made on or after 1 October 2000.

4.3 The Act as implemented provides that:

– duties assessed by the United States following the issue of a countervailing duty order, an anti-dumping duty order or a finding under the Antidumping Act of 1921

– shall be distributed

- to any manufacturer, farmer, rancher, or worker representative (including associations of such persons) that
  - was a petitioner or interested party in support of the petition for that countervailing duty order, anti-dumping duty order or finding under the Antidumping Act of 1921; and
  - remains in operation;
- for expenditure on approved items incurred in relation to the like product after the countervailing duty order, anti-dumping duty order or finding under the Antidumping Act of 1921 was issued.

(b) Legal Argument

(i) The Act is mandatory legislation

4.4 According to Australia, the Act leaves no discretion with respect to its implementation. The Act compels the distribution, by the Commissioner for Customs, of duties assessed pursuant to an anti-dumping order or finding or to a countervailing duty order. When considered in light of the findings of the Appellate Body in *United States – Antidumping Act of 1916* (hereinafter *US – 1916 AD Act)*, the Act is mandatory legislation within the meaning of the concept of mandatory as distinct from discretionary legislation as it has been developed and applied in both GATT and WTO jurisprudence. As such, the Act may be challenged in WTO dispute settlement proceedings.

(ii) The Act is inconsistent with Article 18.1 of the Anti-Dumping Agreement, in conjunction with Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement

4.5 Australia argues that the scope of GATT Article VI:2 and Articles 1 and 18.1 of the Anti-Dumping Agreement was examined in detail in *US – 1916 AD Act*. According to Australia, in that case, the Appellate Body found that Article 18.1 of the Anti-Dumping Agreement, in conjunction with

GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement, are the only provisions applicable to a measure that is a specific action against dumping and prohibit any action that is not a definitive anti-dumping duty, a provisional measure or a price undertaking. To the extent that a measure provides for "specific action against dumping" other than those permissible responses, it will necessarily be inconsistent with Article 18.1 of the Anti-Dumping Agreement, read in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement.

4.6 In Australia's view, an "anti-dumping duty order" within the meaning of the Act is the administrative instrument published by the relevant authority establishing the anti-dumping duty that may be imposed on a dumped product. It is the formal determination by the United States that there exists a situation presenting the constituent elements of dumping.

4.7 According to Australia, a finding under the Antidumping Act of 1921 within the meaning of the Act is the administrative instrument published by the relevant United States authority that formally determined that there existed a situation presenting the constituent elements of dumping. Although repealed in 1979, some findings under the Antidumping Act of 1921 continue in effect, and the United States continues to assess duties pursuant to those findings.

4.8 Australia argues that "Duties assessed pursuant to … an anti-dumping duty order, or a finding under the Antidumping Act of 1921" under the Act refers to duties that may only be assessed in response to situations presenting the constituent elements of dumping within the meaning of GATT Article VI:1, as elaborated by Article 2 of the Anti-Dumping Agreement. They are thus a "specific action against dumping of exports from another Member" within the meaning of Article 18.1 of the Anti-Dumping Agreement.

4.9 However, Australia submits, the Act does not mandate either a definitive anti-dumping duty, a provisional measure or a price undertaking, which are the only permissible responses to dumping provided by GATT Article VI, and in particular GATT Article VI:2, read in conjunction with the Anti-Dumping Agreement. Instead, the Act mandates that if duties are assessed:

- in response to situations presenting the constituent elements of dumping,
- and there exists injury, threat of injury or retardation caused by that dumping to an industry in the United States,

then those duties must be distributed to the domestic producers affected by the dumping conduct who supported the application for an anti-dumping duty investigation. According to Australia, by promulgating the Act, the United States has violated Article 18.1 of the Anti-Dumping Agreement, in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement.

(iii) The Act is inconsistent with Article 32.1 of the SCM Agreement, in conjunction with Article VI:3 of the GATT 1994 and Articles 4.10, 7.9 and 10 of the SCM Agreement

4.10 In Australia's view, the Act mandates a specific action in response to situations presenting the constituent elements of subsidisation when considered in the light of the reasoning that underpinned the findings of the Panel and Appellate Body in *US – 1916 AD Act*.

4.11 Australia argues that the distribution of assessed duties is not simply a subsidy to producers but is contingent on, and linked to, positive determinations of countervailing duty orders. The duties are only distributed to affected producers who have supported the original petition and in situations where there has been a countervailing duty order issued. If duties are not collected, i.e., if there is no countervailing duty order, then the duties are not distributed to affected producers for eligible

expenditure on the product which has been the subject of a countervailing duty investigation. The affected domestic producers will not receive a distribution of duties assessed unless they have supported the original petition and unless a special account has been established in response to a countervailing duty order. When the countervailing duty order is terminated, so too is the special account. The affected producers are no longer "entitled" or eligible to receive the duties assessed.

4.12 Australia asserts that the Act mandates action in response to situations presenting the constituent elements of subsidisation and is therefore a specific action against a subsidy within the meaning of Article 32.1 of the SCM Agreement, in conjunction with GATT Article VI. However, Australia notes, the Act does not mandate a countervailing duty, a provisional measure, a voluntary undertaking, or a countermeasure authorised by the DSB, which are the only responses to a subsidy permitted by GATT Article VI, read in conjunction with the SCM Agreement.

4.13 According to Australia, the Act ensures that both a countervailing duty and a counter-subsidy are applied to the benefit of affected domestic producers. The Act mandates a measure to counterbalance, or act against, the subsidy over and above the assessed level of subsidisation. The Act therefore mandates an additional form of relief contrary to Article 10 of the SCM, which provides that only one form of relief is available – either a countervailing duty or a countermeasure. The Act also imposes countermeasures on products from other Members not subject to the countervailing duty orders. The distribution of duties assessed to the affected domestic producers is based on qualifying expenditure incurred in relation to the product which has been the subject of a countervailing duty order. These distributed duties amount to counter-subsidies to affected domestic producers which affect the products of competing WTO Members other than those subject to the (original) countervailing duty order. Australia asserts that, as such, the offsets provided under the Act amount to counter-subsidies which affect the export of products of competing WTO Members not subject to the original countervailing duty order.

4.14 In Australia's view, the Act also mandates action which is to counterbalance the effects of a subsidy of another WTO Member without authorisation by the DSB. Australia argues that such action is only permissible where the subsidising Member has failed to implement a recommendation of the DSB regarding the challenged subsidy.

4.15 Australia submits that by promulgating the Act, the United States has violated its obligations under Article 32.1 of the SCM, in conjunction with GATT Article VI and Articles 4.10, 79 and 10 of the SCM.

(iv) The Act is inconsistent with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.16 Australia argues that the Act provides a direct and tangible financial incentive to domestic producers of the like product that is alleged to have been dumped or subsidised to support an application for an anti-dumping or countervailing duty investigation. According to Australia, the Act creates a systemic bias in favour of such an application succeeding, making it easier – indeed providing active encouragement – for the needed levels of industry support to be reached in a particular case. In the view of Australia, the Act does not accord either with the principle that the legal framework of a rules-based system must itself be impartial and objective so as not to encourage or discourage a particular outcome, or with the principle of good faith that informs the covered agreements. Australia submits that by promulgating the Act, the United States distorts, or threatens to distort, the requirement that an application be made "by or on behalf of the domestic industry", and has violated Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

(v) The Act is inconsistent with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement

4.17 Australia argues that by violating the provisions of the Anti-Dumping and SCM Agreements as outlined in Australia's submission, the United States has also violated Article XVI:4 of the WTO Agreement, as well as Article 18.4 of the Anti-Dumping Agreement and/or Article 32.5 of the SCM Agreement, which each require a Member to ensure the conformity of its laws, regulations and administrative procedures with its WTO obligations.

2. Brazil

(a) Introduction

4.18 Brazil has brought this dispute against the United States to challenge the consistency of the *Continued Dumping and Subsidy Offset Act of 2000* (hereinafter the "Byrd Amendment")[17] with United States obligations under the WTO Agreements. According to Brazil, this Act requires US authorities to distribute the proceeds of duties assessed pursuant to anti-dumping and countervailing duty orders among those domestic producers that supported the requests for the investigations which ultimately led to the imposition and assessment of such duties.

4.19 Brazil challenges the consistency of the Byrd Amendment with Article X:3(a) of the GATT 1994, Article VI of the GATT 1994 as interpreted by Articles 18.1, 5.4, 8.1 and 18.4 of the AD Agreement and Articles 10, 4.10, 7.9, 32.1, 11.4, 18.1 and 32.5 of the SCM Agreement, and Article XVI of the Agreement Establishing the WTO.

(b) Systemic issues raised by this proceeding

(i) Broadening the remedies available under WTO

4.20 Brazil argues that a finding by the panel that the Byrd Amendment is consistent with US WTO obligations under the GATT 1994, the AD Agreement and the SCM Agreement has implications that go far beyond these three agreements. In essence, such a finding would endorse the use of two forms of remedies by WTO Members to offset damages to their industries under the covered agreements: (1) the payment of monetary damages; and (2) the subsidization of injured industries in the importing country to allegedly offset damages from dumped or subsidized imports. In Brazil's view, since these are not remedies provided in the relevant agreements, a finding that such actions are consistent with those agreements is tantamount to a finding that, irrespective of the remedies available under WTO agreements, a government may unilaterally take whatever steps it deems appropriate to promote further deterrence of the complained of behaviour or to "offset" any adverse consequences of the complained of behaviour. Brazil argues that this is not limited to the agreements at issue in this proceeding, but would appear applicable to any agreements which authorize the use of tariffs as a mechanism to redress grievances.

(ii) Encouraging a proliferation in proceedings under the relevant agreements

4.21 Brazil asserts that there is little question that, if the Byrd Amendment is found to be consistent with the GATT 1994, the AD Agreement and the SCM Agreement, other countries will quickly follow the US lead. Member governments will have difficulty telling their aggrieved industries that they can not get Byrd Amendment like monetary damages and extra deterrent effects when industries

[17] Pub. L. 106-387, 114 Stat. 1549. Title X of the law, The Continued Dumping and Subsidy Offset Act of 2000, added section 754(a) to the Tariff Act of 1930. See, Common Exhibits 1 and 15.

in the largest economy in the world are enjoying these additional benefits. In short, according to Brazil, the Byrd Amendment provisions, without ever being negotiated by WTO Members or incorporated into any of the agreements, will become a part of the GATT 1994, the AD Agreement and the SCM Agreement.

4.22 Brazil argues that the proliferation of monetary damages will increase the incidence of anti-dumping and countervailing measures both in the United States and, increasingly as this practice proliferates, in other countries. Monetary damages make it more attractive for a corporation or trade association to commit resources to anti-dumping and countervailing duty investigations. According to Brazil, the additional "deterrent" effect claimed by the bill's sponsors will also make anti-dumping and countervailing duty measures more attractive.

(c) The Byrd Amendment remedy provides an additional remedy for dumping and subsidization like the remedies under the Anti-Dumping Act of 1916 which were found to be inconsistent with US WTO obligations

(i) The remedies required under the Byrd Amendment are non-discretionary and mandatory and, therefore, actionable under WTO precedent

4.23 Brazil asserts that it is well established in the jurisprudence of both GATT and WTO panels that legislation can be challenged independently of its application in specific circumstances where that legislation is mandatory, leaves no discretion as to its application and implementation, and is inconsistent with WTO obligations of a Member. According to Brazil, the Byrd Amendment is mandatory and does not allow the US authorities to decide whether or not to distribute anti-dumping and countervailing duties to the parties that support the request for the imposition of such duties.

(ii) The remedy provided by the Byrd Amendment is unquestionably a specific action against dumping

4.24 Brazil argues that the panel and Appellate Body findings in *United States – Anti-dumping Act of 1916* focused on whether Article VI of the GATT 1994 as interpreted by the AD Agreement limits specific actions against dumping to those actions provided for in Article VI or the AD Agreement.[18] In reaching its conclusion, the Panel was quite explicit in the limitations on actions against dumping, stating "…that only measures in the form of anti-dumping duties may be applied to counteract dumping…."[19] The Appellate Body reached an identical conclusion."[20]

4.25 According to Brazil, the Byrd Amendment is an action which is taken in response to situations presenting the constituent elements of dumping, precisely the situation addressed by the Appellate Body in *United States – Anti-Dumping Act of 1916.* Entitlement to the Byrd Amendment remedies is based entirely on a determination of dumping or subsidization under the relevant US laws implementing the AD and SCM Agreements.

[18] Report of the Panel, *United States – Anti-Dumping Act of 1916*, WT/DS136/R, 31 March 2000 and WT/DS162/R, 29 May 2000, para.6.230. Report of the Appellate Body, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, 28 August 2000, paras. 127-133.

[19] Report of the Panel, *United States – Anti-Dumping Act of 1916*, para. 6.230.

[20] Report of the Appellate Body, *United States – Anti-Dumping Act of 1916*, para. 126.

(iii) The remedy provided by the Byrd Amendment is an additional remedy, like the remedy at issue in the Anti-dumping Act of 1916 proceeding

4.26 In the view of Brazil, the objective of anti-dumping measures is clearly articulated in Article VI:2 of the GATT 1994 when it states that anti-dumping duties are to be imposed "in order to offset or prevent dumping." Thus, Brazil argues, the objective is remedial – the prevention of dumping or, where measures do not prevent dumping, to offset the dumping. The AD Agreement provides two remedies: (1) imposition of anti-dumping duties; and (2) price undertakings. Neither Article VI of GATT 1994 nor the AD Agreement contemplate an additional remedy that compensates the injured industry in the importing country by awarding damages for the past effects of the dumping.

4.27 Brazil asserts that in *United States – Anti-Dumping Act of 1916*, the panel decision was based on the fact that the law at issue provided "for other remedies than anti-dumping duties" and that this was not "in accordance with the provisions of GATT 1994" and "Article 18.1" of the AD Agreement.[21] The imposition of fines or imprisonment and the recovery of damages were available under the 1916 Act, in addition to the imposition of anti-dumping duties. Thus, the remedy which the panel and Appellate Body found to be inconsistent with Article VI of the GATT 1994 and Article 18.1 of the AD Agreement included the very same remedy which is at issue in this proceeding, namely the awarding of monetary damages to parties that have been found to be injured by dumping. In Brazil's view, both the damages awarded by the Byrd Amendment and the damages awarded under the 1916 Act are based on a demonstration of the constituent elements of dumping. According to Brazil, the fact that, under the Byrd Amendment, "damages" are paid out of the revenues of anti-dumping duties collected and that, under the 1916 Act, "damages" are paid directly by the entities involved in the dumping, is irrelevant. In both cases, the remedy being applied is a remedy intended to offset the injury by rewarding damages to the complaining parties.

4.28 Brazil argues that, according to its sponsors, the Byrd Amendment was intended to provide an additional "deterrent" to dumping and subsidization in the form of exporting entities assisting competitors at their own expense.[22] Also described as a "double hit"[23], the objective clearly was to provide an additional or greater remedy than just anti-dumping or countervailing duties.

(iv) The logic of the Appellate Body finding in United States – Anti-Dumping Act of 1916 *applies equally to the Byrd Amendment's distribution of the revenues from countervailing duties to complaining US entities*

4.29 Brazil asserts that Article 32.1 of the SCM Agreement is the counterpart of Article 18.1 of the AD Agreement and prohibits Members from taking "specific action against a subsidy" of another Member, unless that action is consistent with Article VI:3 of the GATT 1994, as interpreted by the SCM Agreement. Thus, Brazil argues, under the reasoning of *United States – Anti-Dumping Act of 1916*, the same limitations apply to subsidy remedies as apply to anti-dumping remedies.

(v) The Byrd Amendment remedies are more available than remedies under the 1916 Act

4.30 According to Brazil, the remedies available under the Anti-Dumping Act of 1916 are not as easily obtained as the remedies under the Byrd Amendment. As discussed in the Report of the

[21] Report of the Panel, *United States – Anti-Dumping Act of 1916*, paras. 6.204-6.205.

[22] 144 Cong. Rec. S7883-7884 (daily ed. 9 July 1998) (Statement of Senator DeWine). Senator DeWine's bill was introduced as S. 2281 in the Senate on 9 July 1998 and by Representative Regula as H.R. 2509 in the House of Representatives on 18 September 1997.

[23] 145 Cong. Rec. S497-498 (daily ed. 20 Jan. 1999).

Appellate Body, the 1916 Act imposes certain requirements, in addition to showing the existence of injurious dumping, on parties seeking damages and on the government in order to obtain the requested civil or criminal remedy.[24] Indeed, the requirements of the Anti-Dumping Act of 1916 are such that the act has seldom been used and there have never been court imposed sanctions or remedies.[25] In contrast, Brazil argues, the Byrd Amendment is applicable to every situation where anti-dumping and/or countervailing duties are imposed and all companies that supported the request for the investigation which led to the imposition of duties are automatically eligible to receive the monetary damage payments.

(d) The Byrd Amendment compromises objective assessments in determining whether the request for an investigation has the minimum level of support required for initiation under Article 5.4 of the AD agreement and Article 11.4 of the SCM Agreement

(i) Under the Byrd Amendment, it is impossible for US authorities to objectively and impartially determine whether support is based on the possible monetary rewards or the desire to seek imposition of anti-dumping and countervailing duties

4.31 Brazil argues that, under Article 17.6 of the AD Agreement, authorities are held to certain standards in their determinations of the facts, specifically whether authorities' establishment of the facts was proper and whether their evaluation was unbiased and objective. Article X:3 of the GATT 1994, applicable to investigations under either the AD or SCM Agreements, requires that laws, regulations, decisions and rulings be administered in an "impartial and reasonable manner." The Appellate Body has stated that the notion of "good faith" is incorporated into Article X:3 and "informs the provisions of the Anti-Dumping Agreement, as well as other covered agreements."[26] Thus, there is clearly a threshold of objectivity, impartiality and good faith in acting under the relevant agreements.

4.32 According to Brazil, both Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement require authorities to make determinations regarding the level of support for the request for investigations under the AD and SCM Agreements respectively.[27] The relevant request is seeking an investigation that will result in the imposition of remedial measures to offset the effects of any injurious dumping or subsidization found during the investigation. The question under both Articles is whether there is sufficient industry support for the initiation of investigations to obtain such remedial measures.

4.33 Brazil submits that the ability of US authorities to make such a determination in light of the existence of the Byrd Amendment is seriously, indeed fatally, compromised. The result of either an anti-dumping or a countervailing duty investigation under the Byrd Amendment will also affect whether those parties supporting the request for an investigation are eligible, if the investigation results in the assessment of either anti-dumping or countervailing duties, for the monetary benefits provided under the Byrd Amendment. In Brazil's view, the requesting parties under the Byrd Amendment no longer have a single interest in pursuing the investigation, namely the imposition of anti-dumping or countervailing measures. These parties now have an additional interest, namely

[24] Report of the Appellate Body, *United States – Anti-Dumping Act of 1916*, para. 131-132.

[25] Report of the Panel, *United States – Anti-Dumping Act of 1916*, para. 6.42.

[26] Report of the Appellate Body, *United States – Anti-Dumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, WT/DS184/AB/R, para. 101.

[27] Brazil notes that an important concern in the Uruguay Round negotiations, a concern ultimately reflected in the results, was to ensure that investigations were only initiated where warranted and, in particular, where supported by a substantial portion of the industry. According to Brazil, this, in turn, led to the threshold determinations which are being compromised by the Byrd Amendment. See, T. Stewart (ed.), The GATT Uruguay Round, A Negotiating History (1986-1992), Vol. II: Commentary, at 1575-88.

qualifying for the monetary benefits provided by the Byrd Amendment. Logically, Brazil argues, there is no way that US authorities can distinguish whether support for a request for an investigation is motivated by the interest in the remedial effects of the anti-dumping and countervailing measures or by the desire not to forego the possible monetary benefits of an investigation in the form of Byrd Amendment payments.

(ii) Monetary damages will also increase the likelihood of adding respondents in order to increase the revenues generated by the anti-dumping and/or countervailing duties, usually to the detriment of smaller suppliers from developing countries

4.34 Brazil asserts that the question of industry support for a request under Article 5.4 of the AD Agreement and/or Article 11.4 of the SCM Agreement not only relates to the level of industry support for a request, but also to the scope of that request in terms of the responding countries to be included. Because of the ability of authorities to cumulatively assess the effects of imports from multiple sources under Article 3.3 and 15.3 of the AD and SCM Agreements respectively, requesting industries have substantial discretion in determining which countries and how many countries to include within the scope of the request. Where anti-dumping and/or countervailing measures are the sole issue, requesting parties may not wish to expend the additional resources necessary to develop information on dumping from smaller sources. The requesting parties may well consider that the costs outweigh the benefits of pursuing these additional countries. However, Brazil argues, with the possibility of now collecting monetary damages on each additional entry of covered merchandise, the evaluation of the requesting industry may well be altered. According to Brazil, the question is not solely whether measures are required on one or more additional suppliers (or groups of negligible suppliers which together account for more than 7 per cent of imports, as permitted under Article 5.8 of the AD Agreement), but also whether the inclusion of one or more additional suppliers will increase the duty revenues and, therefore, the amount of monetary damages available for distribution to the industry. In Brazil's view, it is thus quite possible that the decision to include specific respondents is as dependent, if not more dependent, on the prospect of monetary rewards as it is on the need for anti-dumping or countervailing measures. Brazil argues that this distortion is most likely to adversely affect smaller suppliers and developing countries. Large suppliers are always more likely to be included than small suppliers simply because of their impact on the market in terms of volume, import penetration and prices. Absent a monetary incentive, smaller suppliers are often left out of investigations because the cost of pursuing duties on these suppliers outweighs the benefits of any duties on such a small volume of supply.

(e) The Byrd Amendment compromises the ability of US authorities to terminate or suspend investigations pursuant to voluntary undertakings under Articles 8.1 and 18.1 of the AD and SCM Agreements respectively

4.35 Brazil argues that for the same reasons that the Byrd Amendment compromises the ability to determine the level of support for initiation of an investigation, it also compromises the ability to make determinations about the suspension or termination of investigations under Article 8.1 of the AD Agreement and Article 18.1 of the SCM Agreement. By virtue of the Byrd Amendment, the monetary damages awarded from the proceeds of the anti-dumping or countervailing duties collected have become part of the "remedy" in the United States under its laws implementing the AD and SCM Agreements respectively. In becoming a part of the "remedy", the monetary damages also inevitably become part of the evaluation of whether the acceptance of voluntary undertakings in lieu of the imposition of duties is an acceptable alternative to address the underlying dumping and/or subsidization. According to Brazil, in becoming a part of this evaluation, the issue of monetary damages becomes an element not contemplated by either the AD or SCM Agreements and, therefore, compromises the ability of US authorities to evaluate voluntary undertakings in the manner required by these agreements.

(f) The Byrd Amendment prevents US authorities from administering the US anti-dumping and countervailing duty laws in a uniform, impartial and reasonable manner as required by Article X:3(a) of the GATT 1994

4.36 Brazil asserts that while it is clear that the Byrd Amendment violates substantive obligations of the GATT 1994, the AD Agreement and the SCM Agreement as set forth above, the Byrd Amendment also leads to the violation of the procedural and due process safeguards of Article X:3(a) of GATT 1994. Article X:3(a) imposes an obligation on Members to "administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings…." Furthermore, in *United States – Stainless Steel* the panel affirmed that the anti-dumping laws and regulations were "laws and regulations" within the meaning of Article X:1 of the GATT 1994 and, therefore, within the scope of the laws, regulations, decisions and rulings to which Article X:3(a) applies.[28]

4.37 According to Brazil, the Byrd Amendment fatally compromises the ability of US authorities to determine the level of industry support for the imposition of anti-dumping or countervailing measures. The issue of support is not limited to the determination of support for the initial requests under Articles 5.4 and 11.4 of the AD and SCM Agreements respectively. This issue, Brazil argues, arises, for example, under Commerce Department regulation 351.222 relating to the revocation of anti-dumping duty orders.[29] Paragraph (g), for example, provides that the Secretary of Commerce may revoke an anti-dumping duty order where "producers accounting for substantially all of the production of the domestic like product to which the order…pertains have expressed a lack of interest in the order…."[30] Similarly, under paragraph (i) of the same regulation, the Secretary may revoke an order where the "domestic interested parties have provided inadequate response to" the notice initiating a 5 year sunset review. According to Brazil, in these cases, the extent to which the industry is willing to "express interest" in the continuation of an anti-dumping order or to provide an "adequate response" in order to avoid the revocation of an existing anti-dumping duty order can be crucial to the outcome. Indeed, absent the expression of industry interest in a changed circumstances review or an adequate response in a sunset review, the anti-dumping duty order is automatically revoked.[31] Yet, in Brazil's view, the industry position is inevitably influenced by the effects of their position – not opposing a revocation in a changed circumstances review and not providing adequate responses in a sunset review – on their ability to continue to enjoy monetary damages from the US authorities as long as the duties remain in place. According to Brazil, the US authorities in these situations have no greater ability to make an impartial, objective determination regarding the support, or lack thereof, for the continuation of anti-dumping measures than they have in evaluating the degree of support for the initial request. Thus, Brazil argues, how the law is administered in terms of revocations will vary depending on the extent to which a domestic industry is influenced by the desire to continue to obtain the monetary damage payments.

(g) The Byrd Amendment also violates United States' obligations to bring its laws into conformity with the WTO Agreement

4.38 Brazil argues that based on the inconsistencies of the Byrd Amendment with the GATT 1994, the AD Agreement and the SCM Agreement, the US is in violation of Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (WTO Agreement) which requires each

[28] Report of the Panel, *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* - WT/DS179/R, 22 December 2000 (Adopted 1 February 2001) para. 6.49, n.62.

[29] 19 CFR 351.222 (2000). See, Common Exhibit 12.

[30] 19 CFR 351.222(g).

[31] 19 CFR 351.222(i).

Member to "ensure conformity of its laws, regulations and administrative procedures with its obligations as provided in" the annexes to that agreement.

(h) Request for findings and recommendations

4.39 Based on the foregoing, Brazil respectfully requests that the Panel find that:

(a) The Byrd Amendment is inconsistent with US obligations under the various provisions of the GATT 1994, the AD Agreement, the SCM Agreement and the WTO Agreement;

(b) The specific actions to address dumping and subsidization in the Byrd Amendment are contrary to Articles VI:2 and VI:3 of the GATT 1994, Article 18.1 of the AD Agreement, and Articles 10, 4.10, 7.9 and 32.1 of the SCM Agreement;

(c) The financial incentives mandated in the Byrd Amendment and provided to domestic producers that support requests for anti-dumping and countervailing duty investigations result in inconsistencies with Articles 5.4 and 11.4 of the AD and SCM Agreements respectively;

(d) The financial incentives mandated in the Byrd Amendment and provided to domestic producers prevent US authorities from acting consistently with Articles 8.1 and 18.1 of the AD and SCM Agreements respectively;

(e) The Byrd Amendment results in administration of the US anti-dumping and countervailing duty laws in a manner inconsistent with the procedural safeguards of Article X:3(a) of the GATT 1994; and

(f) The cumulative violations specified above result in a violation of Article XVI of the WTO Agreement, Article 18.4 of the AD Agreement, and Article 32.5 of the SCM Agreement.

4.40 Brazil also requests that the panel recommend that the United States bring the law at issue into conformity with its obligations under the cited agreements and repeal the Byrd Amendment.

3. Canada

(a) Introduction

4.41 According to Canada, at issue in this dispute is the *Continued Dumping and Subsidy Offset Act of 2000* (CDSOA), a law enacted by the United States to amend Title VII of the *Tariff Act of 1930*.[32] The CDSOA requires that duties assessed pursuant to anti-dumping or countervailing duty orders "shall" now be distributed to "affected domestic producers" who qualify for the distribution. To qualify, producers must file or support an anti-dumping or countervailing duty application (in US law, a "petition") that results in the issuance of an order under which duties are collected. Therefore, Canada argues, in the CDSOA, the US government has enacted law that effectively pays producers to initiate or support petitions and, because duties can only be paid out if collected, to see that

[32] Title X (Sections 1001 – 1003) of the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001* (Common Exhibit-1).The CDSOA is also referred to as the "Byrd Amendment". The CDSOA adds a new section 754 entitled the "Continued Dumping and Subsidy Offset." (Common Exhibit-15).

undertaking agreements are not entered into. Canada submits that the CDSOA breaches the United States' WTO obligations in the following ways.

4.42 First, according to Canada, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping Agreement) and the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), in conjunction with the General Agreement on Tariffs and Trade 1994 (GATT 1994) limit the actions Members can take to offset injurious dumping and subsidization. In the context of dumping, the Appellate Body confirmed in *United States – Anti-Dumping Act of 1916*[33] that these actions are restricted to definitive anti-dumping duties, provisional measures and undertakings. In Canada's view, the Appellate Body's findings apply equally to limit actions that can be taken under the SCM Agreement and GATT 1994. The CDSOA provides for payments meant to offset injurious dumping or subsidization. Canada argues that this is a remedy that is not permitted. As such, Canada submits, it contravenes Article 18.1 of the Anti-Dumping Agreement in conjunction with Article VI of GATT 1994 and Article 1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement in conjunction with Article VI of GATT 1994 and Article 10 of the SCM Agreement.

4.43 Second, in Canada's view, the Anti-Dumping and SCM Agreements require that an investigating authority only initiate anti-dumping or countervailing duty investigations if they determine that the requisite level of industry support for the application exists. Creating monetary incentives for domestic producers to either bring or support petitions, in turn makes it more likely that the Department of Commerce (DOC) will find that a particular petition has sufficient support to initiate an investigation. According to Canada, in distorting the domestic industry support provisions of the *Tariff Act of 1930*, the CDSOA therefore, breaches Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

4.44 Third, Canada argues that the Anti-Dumping and SCM Agreements provide the means for the early resolution of anti-dumping and countervailing duty investigations through the acceptance of undertakings. Under US law, the acceptance of undertakings by the DOC is effectively tied to the relevant domestic industry consenting to any proposed agreement. In creating a financial reward that is only available in cases where duties are assessed, the CDSOA provides US producers with an incentive to withhold their consent. As a result, the CDSOA undermines the ability of the suspension agreement provisions of US law to operate in a manner consistent with the United States' WTO obligations under Article 8.1 of the Anti-Dumping Agreement and Article 18.1 of the SCM Agreement.

4.45 Fourth, according to Canada, in addition to the substantive WTO violations identified above, the CDSOA also makes the administration of US anti-dumping and countervailing duty law unfair, unreasonable and partial, contrary to Article X:3(a) of GATT 1994. It creates incentives that make it more likely that domestic producers will bring or support petitions and thwart undertakings. This makes it impossible to have a reasonable and impartial administration of US trade remedy laws in breach of Article X:3(a) of GATT 1994.

4.46 Finally, Canada argues that for the same reasons identified above, the United States has failed to ensure that its laws, regulations and administrative procedures are in conformity with its WTO obligations as required by Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the WTO Agreement), Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement.

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[33] *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000.

(b) The CDSOA

4.47 According to Canada, before the CDSOA was enacted, anti-dumping and countervailing duties were part of the general revenue of the United States. As a result of the CDSOA all duties assessed pursuant to anti-dumping or countervailing duty orders or a finding under the Antidumping Act of 1921, will now be distributed on an annual basis to affected domestic producers for qualifying expenditures.[34] These payments are called "Offsets".[35]

4.48 Canada asserts that to obtain an Offset, an applicant must submit a certification to the Assistant Customs Commissioner indicating it meets the requirements of the CDSOA. Only a petitioner or those domestic producers or associations who supported a petition ("affected domestic producers") that resulted in an order imposing duties and remain in operation are eligible to receive an Offset. Affected domestic producers may only receive Offsets for "qualifying expenditures". These are expenses incurred after an anti-dumping or countervailing duty order is issued that relate to the production of a product covered by the order and fall within an enumerated category.

4.49 Canada is of the view that the CDSOA is structured to ensure that all duties to be paid out to affected domestic producers are segregated into individual accounts based on individual orders issued by the DOC. At least 90 days before the end of a fiscal year, the Commissioner of Customs must publish in the Federal Register, a Notice of Intention to distribute Offsets. Affected domestic producers whose certified claims are accepted will subsequently receive payments from the account established for the order under which the claim is made. Any funds remaining in a Special Account are to be permanently deposited into the general fund of the US Treasury.

4.50 Canada asserts that proponents of the CDSOA have repeatedly explained why it was necessary to enact the legislation. Shortly after the CDSOA was enacted, Senator Byrd stated that, even where the DOC and the ITC impose duties to respond to unfair trade practices, such "compensatory duties are ineffective in providing relief to the domestic industry", and again that "current law has simply not been strong enough… ". Senator DeWine, who sponsored earlier versions of the Act, stated that those earlier versions "would take the 1930 Act one step further" beyond imposing duties and that it was "time we impose a heavier price on dumping and subsidization."[36]

4.51 Canada posits that the substance of the bill and the manner in which it was passed raised many concerns within Congress and the Administration. Congressional concerns were best summarized in the statement by Senator Nickles who called the CDSOA a mistake, and said it was improper for a trade provision to be added to an agriculture bill, that it could not have passed in the normal process, and that it was not consistent with WTO rights in "any way, shape or form." President Clinton himself asked Congress to override the CDSOA and the Clinton Administration, in its Statement of Administration Policy, declared that the CDSOA was unnecessary because "the purpose of the anti-dumping and countervailing duties themselves" was to restore conditions of fair trade, and that the Act raised concerns regarding the consistency with US trade policy objectives including the potential for "trading partners to adopt similar mechanisms." These statements

[34] United States Tariff Act of 1930, § 754(a) in CDSOA, § 1003(a), 114 Stat. 1549A-73. (Common Exhibit-1). Canada's submission will refer to "orders and findings" as "orders".

[35] Regulations detailing procedures for payments under the Act came into effect on 21 September 2001. 66 Fed. Reg. 48,546 (US Customs Service 21 Sept. 2001) (final rule). (Common Exhibit-3)

[36] See paragraphs 27 to 31 of Canada's First Submission.

demonstrate that US lawmakers are themselves aware of the trade distorting potential of the CDSOA as well as the fact that it is WTO inconsistent.[37]

(c) Legal argument

(i) WTO rules limit the action Members can take against dumping or subsidization

The CDSOA is a "specific action against dumping" that is not in accordance with GATT 1994 and the Anti-Dumping Agreement

4.52 Canada argues that in *United States – Anti-Dumping Act of 1916*, the Appellate Body found that to understand the requirements of Article VI it must be read together with the provisions of the Anti-Dumping Agreement. It also found that the scope of Article VI of GATT 1994 was clarified, in particular, by Article 18.1 of the Anti-Dumping Agreement. It stated that Article 18.1 of the Anti-Dumping Agreement prohibits all "specific action against dumping" that is not "in accordance with the provisions of the GATT 1994 as interpreted by [the Anti-Dumping] Agreement". Moreover, the ordinary meaning of the phrase "specific action against dumping" is action that is taken in response to situations presenting the constituent elements of "dumping". It follows that "specific action against dumping" must, at a minimum, encompass actions that may be taken only when the constituent elements of "dumping" are present.

4.53 Canada asserts that the Appellate Body concluded that, to be permitted, these forms of actions are limited to definitive anti-dumping duties, provisional measures and price undertakings.[38] As no other form of "action" is authorized by Article VI:2, as interpreted by the Anti-Dumping Agreement, any action against dumping taken in any other form will violate Article 18.1 of the Anti-Dumping Agreement and Article VI:2 of GATT 1994.[39]

4.54 According to Canada, Offsets will only be paid out after an anti-dumping or countervailing duty order has been issued and duties collected. Therefore, action under the CDSOA "is taken in response to a situation that presents the constituent elements of dumping". As such the CDSOA constitutes a "specific action against dumping".

4.55 Canada submits that this conclusion is evidenced in a number of ways related to the fact that the CDSOA segregates and distributes duties on the basis of particular orders. First, the Act and the Regulations require that duties under each order are kept in order-specific accounts. Second, only petitioners or domestic persons who supported a particular petition can receive payments from these accounts. Third, "affected domestic producers" can only receive Offsets for "qualifying expenditures" incurred after the issuance of a particular order. These expenditures must relate to the production of the product covered by that order. Finally, in situations where funds in a particular account are insufficient to pay all qualifying expenditures claimed, payments will be made on a pro rata basis.

4.56 According to Canada, that the CDSOA constitutes "specific action against dumping" is also evident in section 1002, in which Congress effectively declares that it is a "specific action against dumping" needed to "strengthen US trade laws" because the application of anti-dumping and countervailing duties fails to ensure that "market prices [return] to fair levels." Moreover, as reflected in its title, the "Continued Dumping and Subsidy Offset Act of 2000" was designed to "offset" dumping or subsidies. "Offset" means "[a] counterbalance to or compensation for something

[37] See paragraphs 32 to 35 of Canada's First Submission.
[38] *United States – Anti-Dumping Act of 1916*, para. 137.
[39] See paragraphs 39 to 47 of Canada's First Submission.

else…"[40] As the drafters of the CDSOA and its predecessors have repeatedly stated, Offsets are meant to compensate domestic producers for injury caused by continued dumping or subsidization of imports.

4.57 Canada posits that, having demonstrated that the CDSOA is a "specific action against dumping", the question becomes whether the CDSOA is a "specific action against dumping" that is "in accordance with the provisions of [Article VI:2] of GATT 1994 as interpreted by the [Anti-Dumping] Agreement." The CDSOA is clearly not a definitive anti-dumping duty, a provisional measure or an undertaking. Rather, the CDSOA is an action in the form of a payment meant to "offset" the effects of injurious dumping.[41] Accordingly, it is inconsistent with Article 18.1 of the Anti-Dumping Agreement in conjunction with Article VI:2 of GATT 1994. The CDSOA also undermines the importance of the long-standing trade policy objective of Members, reflected in the Agreements, to limit actions against unfair trade practices to those that restore the "level playing field", the competitive balance between domestic products and imports. As Article VI:2 makes clear, the aim of a duty is to neutralize trade distorting effects caused by dumping through applying a charge that removes the price differential between such imports and domestic goods.[42]

The CDSOA is a "specific action against a subsidy" that is not in accordance with GATT 1994 as interpreted by the SCM Agreement

4.58 In Canada's view, the legal reasoning of the Appellate Body in *United States - Anti-Dumping Act of 1916* applies equally to similar provisions regarding measures that can be taken to counteract injurious subsidization under the SCM Agreement and Article VI:3 of GATT 1994.

4.59 Canada argues that, except for replacing "subsidy" for "dumping of exports", Article 32.1 of the SCM Agreement is identical to Article 18.1 of the Anti-Dumping Agreement. Like Article 18.1 of the Anti-Dumping Agreement in the context of Article VI:2 of GATT 1994, Article 32.1 of the SCM Agreement can be said to clarify the scope of application of Article VI of GATT 1994 in the context of subsidies. It follows that "specific action against a subsidy" should similarly be interpreted as any action taken "when the constituent elements of [subsidization] are present". It also follows that, as in the case with Article 18.1, Article 32.1 can be interpreted to prohibit "specific action against a subsidy" that does not accord with Article VI of GATT 1994 as interpreted by the SCM Agreement.

4.60 Canada argues that the CDSOA operates in the context of the issuance of countervailing duty orders and the assessment and distribution of countervailing duties. As a result, for purposes of this challenge, the CDSOA raises issues in the context of Part V of the SCM Agreement and Article VI:3 of GATT 1994. Therefore, in Canada's view, the issue as to whether the CDSOA might constitute a "countermeasure" that is an allowable "specific action against a subsidy", under Parts II or III of the Agreement, is not necessarily raised in this dispute.[43] However, to the extent the Panel considers these issues, Canada submits that the CDSOA cannot be considered to be a "specific action against a subsidy" that is in accordance with Parts II or III of the SCM Agreement because, at a minimum, it has not been authorized as a "countermeasure" by the DSB.

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[40] *The New Shorter Oxford English Dictionary*, Vol. 2 (Oxford: Clarendon Press, 1993), p. 1985. (Exhibit CDA-7)

[41] According to Canada, the CDSOA does not have anything to do with "offsetting" injury as meant by Article VI and the Antidumping Agreement. Payments under the CDSOA are made in addition to the application of a definitive final duty directed at injury. Instead of levelling the playing field between imports and domestic products, the CDSOA goes beyond and in effect prevents this "levelling" by transferring duties to industry members in the form of compensation for qualifying expenditures.

[42] See paragraphs 55 to 59 of Canada's First Submission.

[43] These remedies are not cumulative - see Footnote 35 to Article 10 of the SCM Agreement.

4.61 It is the view of Canada that Part V of the SCM Agreement, in conjunction with Article VI:3 of GATT 1994, provides for remedies similar to those permitted under the Anti-Dumping Agreement, in conjunction with Article VI:2 of GATT 1994. More specifically, Articles 10, 17, 18 and 19 of Part V of the SCM Agreement, in conjunction with Article VI of GATT 1994 allow for three types of "countervailing measures", namely: countervailing duties, provisional measures and undertakings. Therefore, any "specific action against a subsidy" taken in the context of a countervailing duty investigation that is not one of these actions is not in accordance with Article VI of GATT 1994 and Part V of the SCM Agreement.[44]

4.62 Canada asserts that, as provided for in section 1003 of the CDSOA, Offsets will be made with respect to duties assessed under not only anti-dumping orders but also countervailing duty orders. Therefore, for the same reasons set out in the context of "specific action against dumping",[45] Canada submits that the CDSOA constitutes a "specific action against a subsidy". As the CDSOA is also clearly neither a countervailing duty, provisional measure or an undertaking, it is a "specific action against a subsidy" that is not in accordance with Article VI of GATT 1994 as interpreted by the SCM Agreement. Accordingly, it violates Article 32.1 of the SCM Agreement in conjunction with Article VI of GATT 1994.

(ii) The CDSOA prevents the United States from making domestic industry support determinations in accordance with the Anti-Dumping or SCM Agreements

4.63 In Canada's view, Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement set out the requisite support needed from a domestic industry for a dumping or countervailing duty investigation to be initiated. They establish procedural requirements that must be complied with before an anti-dumping or countervailing duty investigation can be initiated.[46]

4.64 Canada submits that in agreeing to the text of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, the Members agreed to requirements that mandate investigating authorities to both examine the support for an application before initiation and establish quantitative thresholds by which that examination is to be judged.[47] As the United States itself has acknowledged, these provisions establish a "predictable standard for determining whether an application is supported by the domestic industry."[48] Therefore, any measure that undermines the "examination" required to establish the requisite level of industry support under Article 5.4 of the

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[44] This, Canada argues, is supported by the object and purpose of the provisions. The aim of countervailing duties is to neutralize trade distortions caused by subsidies in order to re-establish the competitive balance between foreign and domestic products. Article VI:3 of GATT 1994 and footnote 36 of the SCM Agreement both define a countervailing duty as a "special duty levied for the purpose of offsetting any subsidy." The negotiating history of Article VI clarifies that Members intended to limit actions to counteract subsidization to the application of countervailing duties. See *United States – Anti-Dumping Act of 1916 (Complaint by Japan)*, Report of the Panel, WT/DS162/R, adopted 26 September 2000, paras. 6.226 – 6.228.

[45] See paragraphs 14 to 16 above and paragraphs 48 to 53 and 68 of Canada's First Submission.

[46] Predecessor provisions of these articles were also considered to be essential procedural requirements. See Footnote 70 of Canada's First Submission.

[47] During the Uruguay Round negotiations, a number of proposals were tabled that sought to require investigating authorities to examine the support for an application before initiation to ensure that the application was properly filed "by or on behalf of" the domestic industry. See for example "Amendments to the Anti-Dumping Code: Submission by Canada," MTN.GNG/NG8/W/65, 22 December 1989, Section I(a)(i), p. 1. (Exhibit CDA-9).

[48] See "Statement of Administrative Action" in *Message from the President of the United States Transmitting the Uruguay Round Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements*, H.R. Doc. No. 103-316, Vol. 1 at 656 (1994), p. 812, referring to Article 5.4 of the ADA. (Exhibit CDA-10)

Anti-Dumping Agreement and Article 11.4 of the SCM Agreement must necessarily result in a Member being unable to fulfil the obligations imposed by these provisions.

4.65 In Canada's opinion, this conclusion is further supported by Article 17.6(i) of the Anti-Dumping Agreement. The Appellate Body has found, that in effect, Article 17.6(i) defines when *investigating authorities* can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their "establishment" and "evaluation" of the relevant facts.[49] It follows that an investigating authority's determination of industry support levels must be "unbiased and objective" and "proper". The Appellate Body has stated that, to be "objective", an examination must conform to "the dictates of the basic principles of good faith and fundamental fairness" and that the relevant facts must "… be investigated in an unbiased manner, without favouring the interests of any interested party … ."[50] Canada sees no reason why this reasoning would not apply to a determination of domestic industry support in a countervailing duty investigation.

4.66 Canada argues that one of the primary conditions for receiving an Offset under the CDSOA is that an affected domestic producer bring or support a petition. In other words, it effectively pays affected domestic producers to either bring or support petitions. It follows that if a particular US producer does not do one or the other, such producer not only foregoes receipt of an Offset but it also faces a situation in which its domestic competitors, who receive Offsets, gain a competitive advantage over them. These monetary incentives thus favour the interests of US domestic producers who bring or support petitions over those who do not and importers. They make it impossible for the DOC to determine what level of support a petition actually has because they necessarily distort levels of support or opposition to a particular petition.

4.67 According to Canada, this conclusion is supported by evidence of circumstances in which the CDSOA has already been used to garner support for petitions. For instance, prior to the filing of the petition in the current anti-dumping and countervailing duty investigations involving Canadian softwood lumber, a letter was circulated to US softwood lumber companies asking that they support the petition to commence a countervail investigation.[51]

4.68 Therefore, Canada submits, as a result of the CDSOA, establishment of the domestic support thresholds in the United States can no longer be relied on to mean what they were intended to mean: namely that the industry believes itself to be injured by imports and therefore feels that an investigation is necessary. In distorting the domestic industry support provisions of the *Tariff Act of 1930* in this manner, the CDSOA breaches Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

(iii) The CDSOA prevents the United States from considering undertaking proposals in a manner consistent with the Anti-Dumping and SCM Agreements

4.69 Canada asserts that both the Anti-Dumping Agreement and the SCM Agreement allow domestic investigating authorities to suspend or terminate anti-dumping and countervailing duty investigations where exporters (or governments in the case of countervailing duty investigations) enter into voluntary agreements to stop the unfair trade practices alleged in a petition.

4.70 In Canada's view, by resolving issues raised in investigations through agreement, undertaking agreements restore competitive relationships between imports and domestic products with minimal

[49] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 56.

[50] *Ibid*., para. 193.

[51] See Exhibit CDA-11. For another example, see also CDA-12.

disruption including that caused by the imposition of a duty. Measures that undermine the ability to enter into undertaking agreements, therefore, thwart the purpose reflected in the Members' agreement to these provisions.

4.71 Canada notes that the ability of the DOC to enter into undertakings, or as they are called under US law, "suspension agreements", is found in the *Tariff Act of 1930*.[52] The DOC can only enter into such agreements if certain criteria are met. These criteria include the requirements that the DOC notify and consult with the petitioner regarding a proposed suspension agreement, provide the petitioner with a copy of the proposed agreement and allow the petitioner to submit comments on it and consult with the petitioner on those comments.

4.72 Canada argues that recent US case law makes clear that the DOC can effectively only enter into suspension agreements with the consent of the petitioner.[53] As set out above, under the CDSOA, only an "affected domestic producer", i.e., a person who either filed or supported a petition, is eligible to receive an Offset. These persons will only receive an Offset if a particular investigation is completed and an anti-dumping or countervailing duty order issued. In other words, these persons will only receive Offsets if a suspension agreement is not entered into. Thus, the CDSOA gives these persons a financial stake in seeing that a suspension agreement is not agreed to.

4.73 According to Canada, if Members were able to undermine the ability of their investigating authorities to enter into undertakings, Articles 8 and Article 18 would be rendered meaningless. As has been demonstrated, before the CDSOA was enacted, the DOC, effectively, could only enter into suspension agreements with the consent of the domestic industry involved. Now, with the CDSOA, not only does the DOC need domestic industry approval to enter into suspension agreements, but the US government has also enacted a law that will only benefit US producers if they do not provide that approval. As a consequence, the CDSOA undermines the ability of the suspension agreement provisions of US law to operate in a manner consistent with the United States' WTO obligations under Article 8.1 of the Anti-Dumping Agreement and Article 18.1 of the SCM Agreement.

(iv) The CDSOA results in the unfair, unreasonable and partial administration of US anti-dumping and countervailing duty law

4.74 Canada submits that under WTO rules a Member must not only ensure the conformity of the substance of its laws with its WTO obligations, but it is also required to administer its laws in a fair, reasonable and impartial manner. This obligation is provided for in Article X:3(a) of GATT 1994. Article X:3(a) applies to all laws, regulations, decisions and rulings "of the kind described in [Article X:1]." Article X:1 refers to all "laws, regulations, judicial decisions and administrative rulings of general application …". As the CDSOA is an amendment to the *Tariff Act of 1930*, and the *Tariff Act of 1930* is itself a law of general application, the CDSOA is subject to the requirements of Article X:3(a).[54]

4.75 Canada notes that the Appellate Body has found that the obligation contained in Article X:3(a) concerns fairness and recognizes that the unfair administration of laws can itself have

[52] United States Tariff Act of 1930, § 704 with respect to countervailing duty investigations and § 734 for anti-dumping investigations. (Common Exhibit-15)

[53] *Bethlehem Steel Corp. v. United States*, 146 F. Supp. 2d 927, 930 (Ct. Int'l Trade 2001) (Exhibit CDA-13, p. 4), citing H. Rep. No. 96-317 at 63, 67. See paragraphs 86 to 88 of Canada's First Submission.

[54] See the Panel Report in *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, adopted 1 February 2001, footnote 62.

adverse effects. It noted that "Article X:3 … establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations … ."[55]

4.76 According to Canada, in *Argentina – Measures Affecting The Export Of Bovine Hides and The Import of Finished Leather*, the Panel was of the view that Article X:3(a) can involve an examination of whether there is a possible impact on the competitive situation for traders due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, etc.[56] In that case, the Panel concluded, in particular, that an inherent danger created by a conflict of interest in involving domestic industry in the customs clearance process of the hides its domestic suppliers exported led to an administration of laws that was not "impartial."[57]

4.77 Canada is of the opinion that the CDSOA similarly affects the administration of US anti-dumping and countervail laws. It leads to the application of those laws, with respect to both determinations of industry support and the acceptance of undertakings, in a manner that is neither reasonable nor impartial.

4.78 According to Canada, the CDSOA creates incentives that distort the process by which the DOC establishes domestic industry support, as well as the ability of the DOC to enter into undertakings. This has the potential to exacerbate the number of investigations initiated and continued against imports where such investigations may be without merit. By making it profitable to indicate support for petitions or avoid undertakings, the CDSOA also creates an "inherent danger" that US anti-dumping and countervailing duty laws will be "applied in a partial manner so as to permit persons with adverse commercial interests to" thwart the entry of imports. As a result, imports face treatment that is not fair, reasonable or impartial. Accordingly, the CDSOA results in a violation of Article X:3(a) of GATT 1994.

(v) The CDSOA also violates the United States' obligation to bring its law into conformity with the WTO Agreements

4.79 Canada argues that Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement oblige Members to bring their domestic law into conformity with their obligations under the WTO Agreements. The fact that the CDSOA provides for the application of a remedy that is not a permitted "specific action against dumping" or a permitted "specific action against a subsidy", violates the domestic industry support and undertaking provisions of the Anti-Dumping and SCM Agreements and results in an unfair, unreasonable and partial administration of US laws, means that the United States has failed to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the WTO Agreements and thus the United States should also be found in violation of its obligations under Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement.

(d) Request for findings and recommendations

4.80 For these reasons, Canada respectfully requests that the Panel find that the CDSOA is inconsistent with the specific provisions of the Anti-Dumping Agreement, SCM Agreement, GATT 1994 and the WTO Agreement as identified above and that the United States has failed to

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[55] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, adopted 12 October 1998, para. 183.

[56] *Argentina – Measures Affecting The Export Of Bovine Hides and The Import of Finished Leather*, Report of the Panel, WT/DS155/R, adopted 16 February 2001, para. 11.77.

[57] *Ibid*., paras. 11.99-11.100.

ensure that its laws are in conformity with the Anti-Dumping Agreement, the SCM Agreement, GATT 1994 and the WTO Agreement. Canada also requests that the Panel recommend that the United States bring its measure into conformity with the Anti-Dumping Agreement, the SCM Agreement, GATT 1994 and the WTO Agreement.

4. Chile and Japan

(a) Introduction

4.81 Japan and Chile argue that the Continued Dumping and Subsidy Offset Act of 2000 (hereinafter referred to as the "Act") is a violation by the United States of its obligations under the WTO agreements. The Act is a mandatory, non-discretionary legislation that requires the US authorities to distribute assessed anti-dumping and countervailing duties among the domestic producers that support an investigation that ultimately leads to the imposition of those duties.

4.82 Japan and Chile will demonstrate that the Act is inconsistent with the General Agreement on Tariffs and Trade 1994 ("GATT"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADA"), the Agreement on Subsidies and Countervailing Measures ("ASCM") and the *Marrakesh Agreement Establishing the WTO* (the "WTO Agreement").

(b) Factual aspects

(i) Legislative history of the Act

4.83 According to Japan and Chile, the text that became the Act derives directly from a proposal introduced by Sen. Michael DeWine in the 105th Congress in 1998. Sen. DeWine then introduced the same bill as S.61 in the 106th Congress with Sen. Robert Byrd as one of the co-sponsors. On 3 October 2000, late in the 106th Congress, Sen. Byrd attached S.61, with some modifications, to the Agriculture and Related Agencies Appropriations Act for Fiscal Year 2001 (H.R. 4461).

4.84 Japan and Chile assert that the Act did not proceed through regular legislative channels, such as House Ways and Means Committee and Senate Finance Committee, due to the lack of support that would otherwise have enabled it to pass through those channels. Instead, it was attached to the FY 2001 agricultural appropriations bill because the appropriations measure was a "must-pass" bill and enjoyed broad bipartisan support. The appropriations bill contained many popular provisions, including funding for agricultural programmes.

4.85 According to Chile and Japan, the Act triggered significant opposition within the United States. The Chairman of the Ways and Means Committee (the committee with jurisdiction over the measure in the House of Representatives) and the Chairman of the Senate Finance Committee (the committee with jurisdiction over the measure in the Senate) both expressed their serious concerns and opposition to the Act. In signing the Agricultural Appropriations measure to which it was attached, President Clinton voiced his strong opposition to the Act. In the October 2000 Statement of Administration Policy, the US Administration stated that "there are significant concerns regarding administrative feasibility and consistency with our trade policy objectives, including the potential for trading partners to adopt similar mechanisms". Early in 1994, the US Administration had already succeeded in opposing the attempt by petitioner interests to add similar compensation provisions to the Uruguay Round implementing legislation. The Act also triggered significant criticism from the United States public. Also, Japan and several other WTO Members expressed their opposition to the Act to the US Congress and Administration, and formally protested the Act in the Committee on Anti-Dumping Practices and in the Committee on Subsidies and Countervailing Measures.

(ii) Factual description of the Act

4.86 Japan and Chile argue that the Act amends the Tariff Act of 1930, which is the principal statute governing US anti-dumping and countervailing proceedings, by adding a new Section 754. Section 754(a) provides for the annual distribution of duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921, to the affected domestic producers for qualifying expenditures.

4.87 Chile and Japan note that the Act requires the Commissioner of Customs to establish and maintain "special accounts" and to deposit into those accounts all anti-dumping or countervailing duties (including interest earned on such duties) that are assessed under the anti-dumping order or finding or the countervailing duty order with respect to which the account was established.

4.88 Japan and Chile recall that no later than 60 days after the first day of a fiscal year, the funds available in a special account will be distributed to "affected domestic producers" who have incurred "qualifying expenditures" on a pro rata basis. Distributions from a special account to "affected domestic producers" are referred to as "dumping and subsidy offsets."

4.89 Japan and Chile further note that each fiscal year, a party seeking dumping and subsidy offsets is required to certify that it desires and is eligible to receive a distribution. Section 754(b)(1) defines the term "affected domestic producer" to include "any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons)" that was a petitioner or an interested party supporting the original anti-dumping or countervailing petition and that remains in operation. The Act excludes from the definition of "affected domestic producers" those companies, businesses or persons that have ceased the production of the product in question or that have been acquired by a company or business that is related to a company that opposed the investigation. No persons other than 'affected domestic producers' are entitled to receive the distributions.

4.90 Chile and Japan assert that once the anti-dumping or countervailing duties are imposed, the subsequent actions mandated by the Act are automatic and must be necessarily performed, culminating in the distribution of the duties to domestic producers. The design and intended operation of the Act demonstrates a linkage between dumping and subsidization and the distribution of assessed duties.

(c) Legal arguments

(i) The Act constitutes mandatory, non-discretionary legislation that is actionable as such under WTO law

4.91 Japan and Chile recall that it is established in GATT and WTO jurisprudence that legislation that mandates action that is inconsistent with the WTO rules and leaves no discretion to the executive branch of government, can be challenged as such, i.e., independently from the application of that legislation in specific instances. The Act is a mandatory legislation that accords no discretion to the executive branch of the US government with respect to the distribution of the assessed anti-dumping and countervailing duties to domestic producers. This is demonstrated by the repeated use of the word "shall" in several key provisions of the Act (e.g., "[D]uties assessed pursuant to a countervailing duty order, an anti-dumping duty order…shall be distributed…to the affected domestic producers", "[s]uch distribution shall be made not later than 60 days after the first day of a fiscal year", "[t]he Commissioner shall distribute all funds … to affected domestic producers…."). Therefore, the Panel clearly has the authority and the mandate to review the consistency of the Act as such with the provisions of the WTO agreements cited in the request for the establishment of the Panel.

(ii) The Act mandates specific action against dumping in violation of Article 18.1 of the ADA, read in conjunction with Article VI:2 of the GATT and Article 1 of the ADA

4.92 Chile and Japan argue that the Appellate Body in *United States – Antidumping Act of 1916* stated that Article 18.1 of the ADA prohibits a Member from taking specific action against dumping of exports from another Member, unless that action is in accordance with Article VI:2 of the GATT, as interpreted by the ADA. The Appellate Body concluded that "[i]f specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the Anti-Dumping Agreement, such action will violate Article 18.1." Japan and Chile will demonstrate that the Act mandates specific action against dumping that is not permissible under Article VI and is therefore in violation of Article 18.1 of the ADA.

4.93 According to the Appellate Body, the ordinary meaning of the phrase "specific action against dumping from another Member" in Article 18.1 of the ADA is "action that is taken in response to situations presenting the constituent elements of dumping." The Appellate Body also indicated that "specific action against dumping" is a measure that "encompass[es] action that may be taken only when the constituent elements of dumping are present."

4.94 Chile and Japan submit that the specific action required by the Act – offset payments – is directed against dumping of exports by other Members and thus, by definition, requires that the constituent elements of dumping be present; the payments authorized by the Act will be distributed to affected domestic producers only when these elements are present. This is demonstrated by the fact that where the constituent elements of dumping are not present, there can be no imposition of an anti-dumping duty order or anti-dumping duty finding and, evidently, without an anti-dumping duty there simply are no assessed duties to distribute to the domestic producers under the Act. This means that the action mandated by the Act (i.e., the distribution of the assessed duties to the domestic producers) can only take place if and when the United States determines that the constituent elements of dumping are present and, accordingly, levies an anti-dumping duty on the importation of the product concerned. The Act, therefore, provides for specific action against dumping, as that phrase has been interpreted by the Appellate Body.

4.95 Chile and Japan argue that the Act mandates "specific action against dumping" is further demonstrated by its use of the word "offset" to describe the authorized payments. The Act seeks to counterbalance or compensate domestic producers for alleged damage suffered from "continued dumping and subsidization" of products imported into the United States after an anti-dumping or countervailing duty is imposed on those products. Sponsors of the Act in the US Congress described the distributions under the Act as a "mechanism to help injured US industries recover from the harmful effects of illegal foreign dumping and subsidies" as a way "to counter the adverse effects of foreign dumping and subsidization of US industries" and as means of "compensation for damages caused by dumping or subsidization." By so doing, the sponsors acknowledge that they are "specific action against dumping."

4.96 In Chile and Japan's view, the sponsors intended the distribution of anti-dumping and countervailing duties as a deterrence mechanism against dumping and subsidization, in addition to the anti-dumping and countervailing duties levied on the products in question. Such an intended and express objective further demonstrates that the distribution mandated by the Act constitutes specific action against dumping.

4.97 Chile and Japan assert that in the US – Antidumping Act of 1916 case, the Appellate Body held that Article 18.1 requires that specific action against dumping of exports be in accordance with Article VI, as interpreted by the ADA, and concluded that "Article VI is applicable to any 'specific action against dumping' of exports. Article VI must also be read in conjunction with Article 1 of the

ADA, which imposes an obligation on Members to act in accordance with Article VI of the GATT when applying an anti-dumping measure. It also held that the provisions of the ADA, including Article 18.1, govern the application of Article VI in so far as anti-dumping is concerned.

4.98 The Appellate Body stated conclusively that paragraph 2 of Article VI limits the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Thus, to the extent that a law or regulation mandates specific action against dumping that is neither a definitive anti-dumping duty, a provisional measure nor a price undertaking, such legislation would be contrary to Article VI and would, therefore, violate Article 18.1.

4.99 Chile and Japan posit that the distribution of offsets under the Act is neither a definitive anti-dumping duty, a provisional measure or a price undertaking and is, therefore, not in accordance with Article VI:2. It is in fact a distinct and separate remedy against dumping that is neither contemplated by nor in accordance with Article VI or the ADA. Therefore, since the Act mandates specific action against dumping that is not permissible under Article VI:2, it is contrary to Article 18.1 of the ADA.

(iii) The Act mandates specific action against subsidies in violation of Article 32.1 of the ASCM, read in conjunction with Article VI:3 of the GATT and Articles 10, 4.10 and 7.9 of the ASCM

4.100 Chile and Japan argue that as the subsidies counterpart to Article 18.1 of the ADA, Article 32.1 of the ASCM prohibits a Member from taking "specific action against a subsidy" of another Member, unless that action is in accordance with Article VI:3 of the GATT, as interpreted by the ASCM. Apart from the reference to subsidization as opposed to dumping, Article 32.1 of the ASCM does not differ from Article 18.1 of the ADA. Therefore, the analysis under Article 18.1 of the ADA above, including the interpretation developed by the Appellate Body in US – Antidumping Act of 1916 of the phrase "specific action against", applies mutatis mutandis to Article 32.1 of the ASCM. Thus, "specific action against a subsidy of another Member" under Article 32.1 of the ASCM is action taken in response to situations that present the constituent elements of subsidization. Also, to qualify as a "specific action against a subsidy" a measure must encompass action that may be taken only when the importing country determines that the constituent elements of subsidization are present.

4.101 Chile and Japan asserts that where the constituent elements of subsidization are not present, there can be no imposition of a countervailing duty and without such duty there simply are no assessed duties to distribute to the domestic producers under the Act. Thus, the distribution of "offsets" under the Act is entirely dependent on a determination by the United States that the constituent elements of subsidization are present. Moreover, countervailing duties will only be distributed to domestic producers pursuant to the Act if and when the United States determines that a subsidized product is being imported into its territory and countervailing duties are collected. The Act, therefore, provides for specific action against a subsidy of another Member. The use of the word "offset" by the Act to describe the authorized payments to domestic producers lends further evidence that those payments constitute specific action against subsidization. The statements made by the co-sponsors of the Act further demonstrate that the Act was intended to serve as a deterrence mechanism against subsidization and that the distribution mandated by the Act constitutes specific action against subsidization.

4.102 According to Chile and Japan, Article 32.1 of the ASCM requires that a specific action against a subsidy of another Member be in accordance with Article VI of the GATT, as interpreted by the ASCM. Articles 10, 4.10 and 7.9 of the ASCM interpret and elaborate Article VI:3. These provisions, read in conjunction, limit the permissible remedies that a Member may take in response to subsidization. Footnote 35 to Article 10 of the ASCM provides that only one form of relief shall be available to a Member to protect against the effects of a particular subsidy in its domestic market, and specifies that the only possible form of relief is either a countervailing duty or a countermeasure

authorized by the DSB. The relief conferred by the Act to the domestic producers is neither a countervailing duty nor a countermeasure authorized by the DSB. It is a separate form of relief not contemplated or authorized by the ASCM.

4.103 Chile and Japan submit that Article VI:3 as interpreted by the ASCM establishes that the permissible remedy to "offset" any subsidy bestowed by another Member is a "countervailing duty". The Act, however, counterbalances or compensates affected domestic producers for subsidization bestowed by another Member by distributing among those producers the assessed countervailing duties. In itself, the action mandated by the Act is not a countervailing duty. Nor is the distribution of duties provided for by the Act the other permissible form of relief authorized by Articles 4.10 or 7.9 of the ASCM: a countermeasure authorized by the DSB. The distribution of countervailing duties is therefore not one of the available forms of relief against subsidization under the ASCM.

4.104 Chile and Japan are of the view that the Act, therefore, mandates "specific action against a subsidy" that is not in accordance with Article VI:3 of the GATT, as interpreted by inter alia footnote 35 of Article 10 and Article 32.1 of the ASCM, read in conjunction with Articles 4.10 and 7.9 of that Agreement. As such, the Act is contrary to Article 32.1 of the ASCM.

(iv) The Act is inconsistent with the requirements in Article 5.4 of the ADA and Article 11.4 of the ASCM regarding standing to initiate an investigation

4.105 Chile and Japan argue that by limiting distribution of anti-dumping and countervailing duties only to those producers that support an application to initiate an anti-dumping or countervailing investigation, the Act provides a direct financial incentive to domestic producers to support rather than oppose or express neutrality toward an application. In this way, the Act undermines, circumvents, and is therefore inconsistent with, the requirements of Article 5.4 of the ADA and 11.4 of the ASCM, both of which set forth the minimum level of producer assent necessary for an application to be considered as having been made "by or on behalf of the domestic industry."

4.106 According to Chile and Japan, Articles 5.4 of the ADA and 11.4 of the ASCM require a positive determination by the authorities, carried out on the basis of an examination of the degree of support for, or opposition to, an application to initiate an anti-dumping or countervailing investigation. The examination must show that the application has been made "by or on behalf of the domestic industry". An application is considered to have been made "by or on behalf of the domestic industry" only where the examination shows that an application passes both positive and negative tests. A positive test requires that a majority of those in the industry who express views supports an application. A negative test bars initiation of any application that fails to gain the positive support of producers representing at least 25 per cent of production. This interpretation is confirmed by the Uruguay Round negotiating history of Articles 5.4 and 11.4.

4.107 In the view of Chile and Japan, Members must observe the general principle of good faith, recognized by the Appellate Body as a pervasive principle that informs the covered agreements, in the application and interpretation of the ADA and the ASCM. When a treaty provision specifies, as do Articles 5.4 and 11.4, that actions of private parties are necessary to establish a Member's right to take certain action, government provision of a financial incentive for those private parties to act one way rather than another is inconsistent with the requirement that Members perform their treaty obligations in good faith. The Act is thus inconsistent with Articles 5.4 of ADA and 11.4 of ASCM and with the United States' obligation to perform them in good faith.

4.108 Chile and Japan submit that the Act is further inconsistent with Articles 5.4 of ADA and 11.4 of ASCM because it frustrates the purpose of "examination" under these Articles. The determination on the support under Articles 5.4 of ADA and 11.4 of ASCM must be based on the examination of

true support for, or opposition to, the application, i.e., a claim that the domestic industry is injured by allegedly dumped imports. As expressly stated in Article 4.1 of ADA and Article 16.1 of ASCM, the ADA and the ASCM contemplate to exclude domestic parties' support or opposition from the examination under Articles 5.4 of ADA and 11.4 of the ASCM, if such support or opposition is distorted by other interests. The prospect of a payout from eventual anti-dumping or countervailing duties induces industry members to change from silence or even opposition to support of a petition, making it easier to meet the 25 per cent threshold and facilitating initiation of investigations. The incentive created by the Act prevents the US investigation authority from distinguishing the true support by the domestic producers of the investigation from the support of a prospective distribution of duties. The Act thus frustrates the purpose of Articles 5.4 of the ADA and 11.4 of the ASCM, and therefore is inconsistent with these Articles.

4.109 In addition, Chile and Japan assert that the Act impedes Articles 5.4 of ADA and 11.4 of ASCM from being applied in a neutral and impartial manner to meet their underlying requirements and conditions contemplated in Articles 5.1 of ADA and 11.1 of ASCM. The purpose of the "by or on behalf of " requirement in Articles 5.1 and 11.1 is to ensure that the investigation is initiated only when the domestic producers as a whole share a common recognition that they are truly in need of trade remedies in the form of anti-dumping or countervailing duties against dumped or subsidized imports. However, where a Member provides a direct financial incentive to domestic producers to support the investigation, the quantitative requirement inherent in the thresholds does not perform its intended function. It renders Articles 5.4 and 11.4 meaningless, since Members would be allowed to initiate investigations without having objectively determined if the application has been made "by or on behalf of" the domestic industry. The Act, therefore, is inconsistent with Article 5.4 of the ADA and 11.4 of the ASCM and with the United States' obligation thereunder.

(v) The Act is inconsistent with the undertaking provisions in Articles 8.1 of the ADA and 18.1 of the ASCM

4.110 Chile and Japan argue that the undertaking provisions in Articles 8.1 of the ADA and 18.1 of the ASCM provide an alternative to the actual imposition of countervailing duties or anti-dumping duties. Those provisions require every Member to make a good faith effort to consider proposed undertakings and to utilize them where possible. Such interpretation is also supported by the provisions of Articles 8.3 of the ADA and 18.3 of the ASCM, which require authorities to have a proper reason for rejecting an offered undertaking.

4.111 In the opinion of Chile and Japan, under the United States' anti-dumping and countervailing duty laws, petitioners have an effective veto over the decision by the administering authorities to accept an undertaking or a "suspension agreement." All parties to an investigation, including petitioners, are permitted to comment on a proposed suspension agreement. The petitioners are also entitled to exercise considerable control over decisions to terminate a suspension agreement and to re-start an investigation. A recent decision by the US Court of International Trade affirms that the US administering authorities' normal practice is in fact to seek and obtain "the consent of petitioners" before undertaking a suspension agreement.

4.112 Chile and Japan assert that the Act deters domestic producers from allowing the US authorities to accept and maintain undertakings pursuant to Articles 8.1 of the ADA and 18.1 of the ASCM, because acceptance or maintenance of such undertakings would mean that offsets would not be distributed. The Act, therefore, effectively decreases the likelihood that the investigating authority will be able to accept or maintain undertakings.

4.113 As a result, Chile and Japan submit, the Act undermine the aim of Articles 8.1 of the ADA and 18.1 of the ASCM, effectively renders them meaningless, and therefore is inconsistent with and violates these Articles.

(vi) As a result of the Act, the United States' administration of trade laws is inconsistent with Article X:3(a) of the GATT

4.114 In the view of Chile and Japan, the Act directs the United States to administer its anti-dumping and countervailing duty laws in a way that makes it impossible for the United States to comply with its obligations under Article X:3(a) of the GATT. As a result of the Act, therefore, the United States administers its anti-dumping and countervailing duty laws in violation of Article X:3(a) of the GATT.

4.115 Chile and Japan argue that Article X:3(a) reflects both the notion of good faith and the notion of due process. It establishes certain minimum standards for procedural fairness in the administration of trade regulations. The obligations contained in Article X:3(a) may be viewed as a specific incorporation of the fundamental international legal principle of *abus de droit*, requiring WTO Members to refrain from engaging in an abusive exercise of their rights.

4.116 It is Chile and Japan's view that while the United States has the right to administer anti-dumping and countervailing duty laws, it is under an obligation to administer those laws in a reasonable, impartial and uniform manner. In other words, the United States may not abuse its right to administer those laws.

4.117 According to Chile and Japan, having in place a law that creates a financial incentive for affected domestic producers renders the administration of the United States' anti-dumping and countervailing duty laws per se unreasonable in violation of Article X:3(a). The Act will artificially increase the number of anti-dumping and countervailing duty cases brought in the United States, for the simple reason that the domestic industry will seek the imposition of anti-dumping and countervailing duties in the expectation of receiving financial gain in the form of offsets. The application of measures similar to the Act by all WTO Members would lead to an intolerable situation, thus underscoring the unreasonableness of the measure. The application of a measure that would lead to an explosion of the number of trade-restricting and trade-distorting measures and that puts at risk the proper functioning of the international trading system, cannot in any way be seen as a reasonable administration of anti-dumping and countervailing duty laws.

4.118 Chile and Japan argue that the mandated distribution of duties under the Act also makes an impartial administration of the US anti-dumping and countervailing duty laws impossible in violation of Article X:3(a). The presence of a financial incentive for applying US anti-dumping and countervailing duty laws create an "inherent danger" that those laws will not be administered in an impartial manner. In particular, by giving an incentive to domestic producers the Act will automatically increase the level of support by the domestic industry for the application expressed by domestic producers of the like product. Similarly, the Act will curtail the likelihood that the United States will accept alternative solutions (such as voluntary undertakings), since the domestic producers will oppose the acceptance of an undertaking by the authority in the expectation that they will receive a financial gain from the imposition of anti-dumping or countervailing duties. Additionally, the Act will encourage the domestic industry to put pressure on the US Department of Commerce to find higher dumping margins or a higher degree of subsidization because the petitioners and those who support the petition will gain economically from such higher margins.

4.119 Chile and Japan submit that a Member's obligation to administer its trade laws in a uniform manner pursuant to Article X:3(a) requires that Members apply their trade laws in a consistent and

predictable manner. By distributing the anti-dumping and countervailing duties to domestic producers based on their support of the investigation, the Act raises the question of "potential frivolous suits", distorts the determination of support and undermines the provisions for undertakings, and deters WTO Members from exporting to the United States. These significant changes introduced by the Act considerably affect exporters from other WTO Members, impeding the predictability they would have in a normal situation where anti-dumping and countervailing duty laws are administered in a manner consistent with the WTO rules. Thus, the Act prevents the United States from administering its anti-dumping and countervailing laws in a uniform manner.

4.120 Chile and Japan submit that therefore the United States acts inconsistently with Article X:3(a) of the GATT 1994 because the Act prevents the United States from administering its anti-dumping and countervailing duty laws in a reasonable, impartial and uniform manner.

(vii) The Act violates the general obligation of the United States to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the WTO agreements

4.121 Chile and Japan assert that the United States, as a result of its demonstrated violation of the ADA, the ASCM and the GATT, is also violating its general obligation under Article XVI of the WTO Agreement, Article 18.4 of the ADA and Article 32.5 of the ASCM to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.

(d) Conclusion

4.122 For the reasons stated above, Japan and Chile respectfully request the Panel to find that the Act violates:

- Article 18.1 of the ADA, in conjunction with Article VI:2 of the GATT and Article 1 of the ADA;
- Article 32.1 of the ASCM, in conjunction with Article VI:3 of the GATT and Articles 10, 4.10, and 7.9 of the ASCM;
- Article 5.4 of the ADA and Article 11.4 of the ASCM;
- Article 8 of the ADA and Article 18 of the ASCM;
- Article X:3(a) of the GATT
- Article XVI:4 of the WTO Agreement, Article 18.4 of the ADA and Article 32.5 of the ASCM.

4.123 Japan and Chile also request the Panel to find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to Japan and Chile under the cited agreements. Japan and Chile therefore request the Panel to recommend that the United States bring the Act into conformity with the corresponding covered agreements. Furthermore, and pursuant to Articles 3.7 and 19.1, second sentence, of the DSU, Japan and Chile request that the Panel suggest the withdrawal of the inconsistent Act as the only possible way for the United States to implement such recommendations. It is the main features and the basic rationale of the Act that violate the cited provisions. Therefore, only by actually repealing the Act could the United States bring it into conformity with the covered agreements and comply with the recommendations.

5. European Communities, India, Indonesia and Thailand

(a) Introduction

4.124 The European Communities, India, Indonesia and Thailand (the "complainants") bring this complaint against the *Continued Dumping and Subsidy Offset Act of 2000* (the "CDSOA"), also known as the Byrd Amendment, which was signed into law by the President of the United States on 28 October 2000.

4.125 According to the European Communities, India, Indonesia and Thailand, the Byrd Amendment seeks to provide an additional remedy against dumping and subsidisation which is neither contemplated nor permitted by the WTO Agreements. Moreover, that additional remedy is unnecessary. In addition, the Byrd Amendment affects the application by the United States of other remedies permitted by the WTO Agreements (duties and undertakings) in a manner which is inconsistent with those agreements. In particular, the Byrd Amendment will increase unnecessarily the number of investigations initiated by the US authorities and, as a result, the number of anti-dumping and countervailing duty measures. Moreover, the Byrd Amendment will render more difficult, if not impossible, the acceptance of undertakings by the US authorities.

(b) The measure in dispute

(i) Description of the Byrd Amendment

4.126 The European Communities, India, Indonesia and Thailand recall that the CDSOA provides that:

> Duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the continued dumping and subsidy offset.

4.127 The term "affected domestic producers" is defined by the CDSOA as including those producers that made or supported the petition leading to the finding or order. In turn, the term "qualifying expenses" includes certain categories of expenses incurred after the issuance of the order or finding with respect to the production of the same product that is the subject of the order or finding concerned.

(ii) Legislative history of the Byrd Amendment

4.128 According to the European Communities, India, Indonesia and Thailand, the Byrd Amendment was rushed through the US Congress in a rather unusual manner. It was attached by its sponsors to a totally unrelated, "must-pass" bill, at a late stage of the legislative process and was not the subject of any proper debate.

4.129 The adoption of the Byrd Amendment was unsuccessfully opposed by the US Administration. The Statement of Administration Policy issued on 11 October 2000 states that the "distribution of the tariffs themselves to producers is not necessary to the restoration of conditions of fair trade". Although President Clinton signed the bill including the Byrd Amendment, he criticised it and called upon Congress to override it or amend it.

(c) Claims

(i) Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement

4.130 The European Communities, India, Indonesia and Thailand submit that the Byrd Amendment is inconsistent with Article 18.1 of the Anti-Dumping Agreement and with Article 32.1 of the SCM Agreement because

(a) the *offset* payments constitute specific action against dumping and subsidisation; and

(b) such action is not in accordance with the provisions of the GATT, as interpreted by the Anti-Dumping Agreement and the SCM Agreement.

4.131 Furthermore, the European Communities, India, Indonesia and Thailand argue that contrary to the "findings" asserted by the US Congress in the CDSOA, the *offset* payments are not necessary to remedy the injurious effects of dumping and subsidisation. Rather, the Byrd Amendment gives double protection to the US industry, as acknowledged by the US Administration.

<u>The offset payments constitute specific action against dumping and subsidisation</u>

The structure and design of the Byrd Amendment

4.132 The European Communities, India, Indonesia and Thailand assert that the analysis of the terms of the Byrd Amendment shows clearly that the *offset* payments operate as specific action against dumping and subsidisation, as this notion has been interpreted by the Appellate Body in United States – 1916 Anti-Dumping Act. In fact, the *offset* payments mandated by the Byrd Amendment are made

- only if an anti-dumping order or finding or a countervailing duty order has been issued;
- exclusively to the domestic producers "affected" by the dumping or subsidisation which is the subject of such order or finding;
- from the monies collected pursuant to such order or finding; and
- in order to compensate the "affected" producers for injuries caused by the dumping or subsidisation in question.

The purpose of the Byrd Amendment

4.133 In the view of the European Communities, India, Indonesia and Thailand, the Byrd Amendment is premised on the mistaken notion that the imposition of anti-dumping and countervailing duties does not provide a sufficient remedy to the US industry, because dumping and subsidisation "continue" after the imposition of such measures. The stated purpose of the Byrd Amendment is to "offset" the effects of such "continued" dumping or subsidisation by making cash payments to the affected domestic producers.

4.134 These complainants argue that that purpose is highlighted by the title of the Byrd Amendment (the Continued Dumping and Subsidy Offset Act of 2000), as well as by the name given to the payments made under the Byrd Amendment (the "continued dumping and subsidy offset"). Moreover, the purpose to counter "continued" dumping and subsidisation is openly stated in Section 1002 of the

CDSOA, which sets out the "findings" of the US Congress providing the justification for the enactment of the act.

4.135 According to these complainants, the legislative history of the Byrd Amendment provides further confirmation that it was designed as a specific response against dumping and subsidisation. *A*ccording to its main proponents, the purpose of the Byrd Amendment is to deter foreign exporters from "continuing" to export dumped or subsidised products and, failing that, to compensate the US producers for the injury caused by such "continued" dumping or subsidisation.

The offset payments are not in accordance with the GATT provisions, as interpreted by the Anti-Dumping Agreement and the SCM Agreement

The Anti-Dumping Agreement

4.136 In the view of the European Communities, India, Indonesia and Thailand, as confirmed by the Appellate Body in United States – 1916 Anti-Dumping Act, Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. The *offset* payments mandated by the Byrd Amendment are neither import duties, nor provisional measures in the form of duties or securities, nor price undertakings given by the exporters. Therefore, they are not action taken "in accordance with" the provisions of the GATT, as interpreted by the Anti-Dumping Agreement.

The SCM Agreement

4.137 The European Communities, India, Indonesia and Thailand note that Articles VI and XVI of the GATT, as interpreted by the SCM Agreement, allow Members to take one of the following three types of action against subsidisation:

- "countervailing measures" imposed in accordance with Part V of the SCM Agreement;
- "countermeasures" against a "prohibited subsidy" imposed in accordance with Part II of the SCM Agreement; or
- "countermeasures" against subsidies that cause "adverse effects" to the interests of the Member concerned imposed in accordance with Part III of the SCM Agreement.

4.138 These complainants argue these three remedies are not cumulative, as clarified by Footnote 35 of the SCM Agreement.

4.139 The European Communities, India, Indonesia and Thailand posit that Part V of the SCM Agreement permits the adoption of three types of "countervailing measures": countervailing duties; provisional measures; or voluntary undertakings given by the subsidising Government or the foreign exporter. The offset payments do not fall within any of those three types of measures and, therefore, are not actions "in accordance" with Part V of the SCM Agreement.

4.140 In the view of the European Communities, India, Indonesia and Thailand, the adoption of "countermeasures" under Parts II or III of the SCM Agreement must be authorised in advance by the DSB. Such authorisation can be granted only if certain conditions are met. The United States has not received, nor indeed requested, an authorisation from the DSB to make the offset payments by way of

"countermeasures". Moreover, none of the conditions for receiving such an authorisation would be satisfied.

4.141 Furthermore, these complainants submit, footnote 35 provides that countervailing measures and countermeasures authorised under Parts II and III cannot be applied cumulatively. Yet, under the Byrd Amendment, the *offset* payments can be made only if the subsidy concerned has already been the subject of a countervailing duty order. Therefore, the same subsidy cannot be the subject of a "countermeasure".

The offset payments provide double protection to the US industry

4.142 The European Communities, India, Indonesia and Thailand argue that the Byrd Amendment is based on the specious theory that the "continuation" of dumping and subsidisation after the issuance of an anti-dumping or a countervailing duty order causes injuries which are not remedied by those orders. That theory is unfounded. Under US law, anti-dumping and countervailing duties are, as a general rule, liquidated on the basis of dumping and subsidisation that occurs after the relevant order is issued. Thus, it is true that, to the extent that duties are collected, this implies that dumping or subsidisation have "continued". However, such "continued" dumping or subsidisation is already redressed by the collection of the duties themselves. Therefore, the *offset* payments are a remedy for injury which has already been remedied by the collection of anti-dumping duties or countervailing duties.

4.143 The European Communities, India, Indonesia and Thailand posit that the fallacy underlying the "findings" of the US Congress was duly exposed by the Statement of Administration Policy of 11 October 2001. The effect of the Byrd Amendment is, in reality, to give a "double hit" to foreign exporters. In President Clinton's own words, the Byrd Amendment "will provide select US industries with a subsidy above and beyond the protection level needed to counteract foreign subsidies".

(ii) Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.144 According to the European Communities, India, Indonesia and Thailand, the Byrd Amendment provides a financial inducement to domestic producers for making applications for the imposition of anti-dumping or countervailing measures, or for supporting the applications made by other domestic producers. The provision of that financial inducement is inconsistent with Article 5.4 of the Anti-Dumping Agreement and with Article 11.4 of the SCM Agreement for the following reasons:

(a) it is incompatible with the obligation of the US authorities to conduct an objective examination of the relevant facts for establishing whether an application is made "by or on behalf of the domestic industry";

(b) it prevents the US authorities from ascertaining whether an application is made "by or on behalf of the domestic industry" before initiating an investigation; and

(c) it frustrates the object and purpose of those two provisions, which is to limit the initiation of investigations to those instances where the domestic industry has a genuine interest in the adoption of anti-dumping or countervailing measures.

The Byrd Amendment provides a financial inducement to file applications or support those made by other producers

4.145 The European Communities, India, Indonesia and Thailand note that the Byrd Amendment provides that the *offset* is to be paid only to the "affected domestic producers", a category which is defined as including the petitioners and those interested parties who support the petition. Accordingly, no *offset* is paid to any domestic producer who either opposes actively or does not support the application. As a result, the European Communities, India, Indonesia and Thailand argue, the Byrd Amendment has the effect of 1) stimulating the filing of applications; and 2) making it easier for the applicants to obtain the support of other domestic producers, so as to meet the quantitative thresholds laid down in Article 5.4 of the Anti-Dumping Agreement and in Article 11.4 of the SCM Agreement.

The Byrd Amendment is incompatible with the obligation of the US authorities to make an objective examination of the relevant facts for establishing whether an application is made "by or on behalf of the domestic industry"

4.146 The European Communities, India, Indonesia and Thailand are of the view that like any other factual "examination" mandated by the Anti-Dumping Agreement or the SCM Agreement, the "examination" of the relevant facts for establishing whether an application is made "by or on behalf of the domestic industry" must be conducted in an objective manner. This requirement is not stated expressly in Article 5.4 of the Anti-Dumping Agreement or in Article 11.4 of the SCM Agreement, but it is a corollary of the principle of good faith which informs all the covered agreements. The Appellate Body has noted that in order to be "objective" an examination must conform to "the dictates of the basic principles of good faith and fundamental fairness". More precisely, an "objective" examination requires that the relevant facts "be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties in the investigation."

4.147 The European Communities, India, Indonesia and Thailand submit that the Byrd Amendment is incompatible with this fundamental requirement. Through the promise of offset payments, the US Government is unduly influencing the very facts which its authorities are required to "examine". Moreover, as a result, it becomes more likely that those authorities will determine that an application is made "by or on behalf of the domestic industry". This is nothing short of an attempt to manipulate the outcome of the determination required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. Furthermore, by so doing, the US authorities favour the interests of certain parties (the producers who support genuinely the imposition of measures) over those of other interested parties (including not only the exporters but also the domestic producers who oppose the initiation).

The Byrd Amendment makes it impossible for the US authorities to ascertain whether the application is made "by or on behalf of the domestic industry"

4.148 According to the European Communities, India, Indonesia and Thailand, a domestic producer cannot be considered to have made an "application", or to "support" it, within the meaning of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, if it does so exclusively in order to qualify for the offset payments provided under the Byrd Amendment. When the "support" of a domestic producer is "bought" with the promise of a financial reward, such "support" cannot be regarded as genuine and cannot be taken into account for the purposes of the determination required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

4.149 The European Communities, India, Indonesia and Thailand submit that by its very existence, the Byrd Amendment calls into question the credibility of any application or expression of support

made by the US producers. In fact, following the adoption of the Byrd Amendment, it has become impossible for the US authorities to tell whether a domestic producer has made an "application" or expressed its "support" for an application made by another producer because it is truly interested in the adoption of anti-dumping or countervailing measures or, rather, because it wants to share in the distribution of the offset. As a result, the Byrd Amendment prevents the US authorities from ascertaining whether an application is genuinely made "by or on behalf of the domestic industry" and, consequently, from making a proper determination to that effect before initiating an investigation

The Byrd Amendment defeats the object and purpose of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.150 In the view of the European Communities, India, Indonesia and Thailand, the Anti-Dumping Agreement and the SCM Agreement limit the discretion of Members to impose anti-dumping or countervailing measures by providing that, except in "special circumstances", no investigation shall be initiated unless an application has been made "by or on behalf of the domestic industry". The object and purpose of such prohibition is self-evident. If the potential beneficiaries of an anti-dumping measure or of a countervailing measure do not consider them to be in their interest, there is no good reason, in the absence of "special circumstances", for the authorities of the importing Member to impose a measure which restricts trade among the WTO Members. Yet, the Byrd Amendment makes it possible, and indeed encourages, the initiation of investigations and, consequently, the imposition of anti-dumping and countervailing measures, in cases where the domestic industry has no genuine interest in the adoption of such measures, thereby defeating the object and purpose of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

(iii) Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement

4.151 The European Communities, India, Indonesia and Thailand argue that the Byrd Amendment provides a financial inducement to domestic producers for opposing the acceptance of undertakings. The provision of that inducement is inconsistent with Article 8.3 of the Anti-Dumping Agreement and with Article 18.3 of the SCM Agreement for the following reasons:

(a) it will lead to the rejection of undertakings without a proper "reason";

(b) it is incompatible with the obligation of the US authorities to conduct an objective examination of whether the acceptance of an undertaking would be "appropriate"; and

(c) it undermines the object and purpose of those two provisions, which is to provide an alternative remedy to the imposition of duties.

4.152 The European Communities, India, Indonesia and Thailand posit that the authorities of the importing Member enjoy wide discretion in order to decide whether or not to accept an undertaking. Nevertheless, such discretion is not unlimited. It is implicit in Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement that the authorities cannot reject an undertaking without examining first whether it would be "appropriate" to accept it. For the reasons already explained, such examination must be "objective". In other words, it must conform to "the dictates of the basic principles of good faith and fundamental fairness".

4.153 Furthermore, the European Communities, India, Indonesia and Thailand argue, Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement make it clear that the authorities must have a "reason" for rejecting an undertaking. Those two provisions do not limit *a priori* the types of "reasons" which can be invoked by the authorities. But this does not mean that the

authorities can invoke all sorts of motives for rejecting an undertaking. The "reasons" alluded in Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement must be pertinent for deciding whether the acceptance of an undertaking is "appropriate". At a minimum, they should be related to the specific terms or circumstances of the undertaking under consideration or to a Member's "general policy" with respect to undertakings.

The Byrd Amendment provides a financial inducement to petitioners for opposing the acceptance of the undertakings offered by the exporters

4.154 The European Communities, India, Indonesia and Thailand assert that if the US authorities accept an undertaking, no anti-dumping or countervailing duties will be assessed and, consequently, no *offset* will be distributed to the affected domestic producers. Thus, under the Byrd Amendment, the petitioners have a pecuniary interest in opposing the acceptance of undertakings by the authorities.

The petitioners' opposition is given "considerable" weight by the US authorities when deciding whether to accept an undertaking

4.155 The European Communities, India, Indonesia and Thailand argue that under US law, the petitioners play an active and privileged role in the procedure leading to the decision whether to accept an undertaking. Furthermore, the US authorities have stated that the petitioners' opposition is something to which they accord "considerable weight" when assessing whether to accept an undertaking. In fact, undertakings are very rarely, if ever, accepted against the petitioner's opposition.

The Byrd Amendment will lead to the rejection of undertakings without a valid "reason"

4.156 In the opinion of the European Communities, India, Indonesia and Thailand, following the adoption of the Byrd Amendment, the petitioners are likely to object systematically to any undertakings offered by the exporters, not because they consider them less effective than the imposition of duties, but rather because they have a vested financial interest in the imposition of duties. Unlike the petitioners' legitimate concern that an undertaking may be less effective than the imposition of duties, the pecuniary interest of the petitioners in receiving the *offset* is an extraneous consideration, which has no bearing on whether an undertaking is an "appropriate" remedy. Therefore, following the adoption of the Byrd Amendment, the petitioners' opposition cannot be regarded as a proper "reason" for rejecting an undertaking.

The Byrd Amendment is incompatible with the obligation of the US authorities to make an objective examination of whether the acceptance of an undertaking would be appropriate

4.157 The European Communities, India, Indonesia and Thailand submit that through the *offset* payments, the US authorities are unduly influencing the outcome of the examination of the "appropriateness" of accepting an undertaking which they are required to make under Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement. Moreover, they do it in a way which favours the interests of the petitioners over those of the exporters.

The Byrd Amendment frustrates the object and purpose of Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement

4.158 The European Communities, India, Indonesia and Thailand assert that the object and purpose of Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement is to provide an alternative remedy to injurious dumping and subsidisation which, while giving equivalent protection to the domestic producers, is more beneficial for the exporters. The Byrd Amendment, together with the US policy of according "considerable" weight to the petitioners' opposition, will render very

difficult, if not impossible, the acceptance of undertakings, thereby defeating the object and purpose of Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement. This consequence of the Byrd Amendment is particularly pernicious for developing country Members. By making virtually impossible the acceptance of undertakings, the purpose of the obligation imposed by Article 15 of the Anti-Dumping Agreement will also be defeated by the Byrd Amendment.

(iv) Article X:3 (a) of the GATT

4.159 The European Communities, India, Indonesia and Thailand are of the view that the *offset* payments mandated by the Byrd Amendment lead to an unreasonable and partial administration of the US laws and regulations concerning the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings within the framework of such investigations. For that reason, the Byrd Amendment is inconsistent with Article X.3(a) of the GATT.

The US anti-dumping and countervailing duty laws and regulations concerning the initiation of investigations and undertakings fall within the scope of Article X:1

4.160 The European Communities, India, Indonesia and Thailand posit that the "administered measures" at issue are the provisions concerning the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings which are contained in the Tariff Act of 1930 and in the implementing regulations issued by the US Department of Commerce. It is beyond question that those measures are "laws and regulations" and that they are "of general application". Furthermore, those measures "pertain" to "rates of duty, taxes or charges" or to "other requirements, restrictions or prohibitions on imports". Therefore, they fall within the purview of Article X:1, with the consequence that their "administration" is subject to the requirements imposed by Article X :3 (a).

The Byrd Amendment leads to an "unreasonable" administration of the US laws and regulations concerning the initiation of investigations and the acceptance of undertakings

4.161 In the view of the European Communities, India, Indonesia and Thailand, the Byrd Amendment leads to an "unreasonable" administration of the US laws and regulations concerning the initiation of investigations because it provides a strong financial incentive to file or support applications. As a result, anti-dumping and countervailing measures will be imposed in cases where the domestic industry has no genuine interest in the adoption of such measures.

4.162 The European Communities, India, Indonesia and Thailand argue that the Byrd Amendment also leads to an "unreasonable" administration of the US laws and regulations concerning undertakings. Together with the US policy of according "considerable" weight to the petitioners' opposition, the Byrd Amendment will render more difficult, if not impossible, the acceptance of undertakings. Thus, foreign exporters will be deprived of an alternative, more beneficial, remedy for no other reason than the interest of the domestic producer in securing a windfall financial gain.

The Byrd Amendment leads to the "partial" administration of the US laws and regulations concerning the initiation of investigations and the acceptance of undertakings

4.163 In the opinion of the European Communities, India, Indonesia and Thailand, the *offset* payments result in the "partial" administration of the US laws and regulations concerning the initiation of investigations because they increase artificially the level of support for the applications. This favours certain parties at the expense of other interested parties. The *offset* payments also lead to a "partial" administration of the US laws and regulations concerning undertakings because, as a result, the exporters' interest in obtaining an alternative remedy *in lieu* of the imposition of duties is subordinated to the pecuniary interest of the domestic producers.

(v) Article 18.4 of the Anti-Dumping Agreement, Article 32.5 of the SCM Agreement and Article XVI:4 of the WTO Agreement

4.164 The European Communities, India, Indonesia and Thailand submit that by being inconsistent with Articles 18.1, 5.4 and 8.3 of the Anti-Dumping Agreement and with Articles 32.1, 11.4 and 18.3 of the SCM Agreement, the Byrd Amendment is also inconsistent with Article 18.4 of the Anti-Dumping Agreement and with Article 32.5 of the SCM Agreement, respectively.

4.165 By being inconsistent with Articles 18.1, 5.4 and 8.3 of the Anti-Dumping Agreement, with Articles 32.1, 11.4 and 18.3 of the SCM Agreement and with Article X :3 (a) of the GATT, the European Communities, India, Indonesia and Thailand argue, the Byrd Amendment is also inconsistent with Article XVI:4 of the WTO Agreement.

6. Korea

(a) Introduction

4.166 Korea argues that the Appellate Body already has adjudicated the primary issue in this proceeding. In *US – Anti-Dumping Act of 1916*, the Appellate Body affirmed the Panel's conclusion that, in the context of an anti-dumping (AD) (or countervailing duty (CVD)) investigation, Members may take one and only one action – they may impose duties equal to or less than the margin of dumping (or the subsidy level).[58] Moreover, a Member may impose AD or CVD duties only after complying with all applicable provisions of the relevant agreements.[59]

4.167 Unfortunately, according to Korea, just like the 1916 Act, the Byrd Amendment[60] creates a specific action, other than imposition of AD or CVD duties, to be taken where imports are found to be dumped or subsidized. Therefore, just like the 1916 Act, the Byrd Amendment is inconsistent with a host of US obligations under various WTO agreements, including Article VI of GATT 1994, Articles 5.4, 8 and 18.1 of the AD Agreement and Articles 11.4, 18 and 32.1 of the SCM Agreement.

(b) Statement of the facts

4.168 Korea posits that the relevant facts are few and quite straightforward. On 28 October 2000, the President of the United States signed into law the Byrd Amendment,[61] and simultaneously asked Congress to repeal the law:

> I call on the Congress to override this provision, or amend it to be acceptable, before they adjourn.[62]

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[58] WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000) (*1916 Act*).

[59] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 18.1; Agreement on Subsidies and Countervailing Measures, Article 32.1; *1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000).

[60] The Continued Dumping and Subsidy Offset Act (known as the Byrd Amendment), codified as Section 754 of Title VII of the Tariff Act of 1930, Public Law 106-387 (28 October 2000), 114 Stat. 1549, Title X – Continued Dumping and Subsidy Offset (Byrd Amendment). The text of the Byrd Amendment is provided in Common Exhibit 1. The US Customs Service regulations promulgated pursuant to the law, 66 Fed. Reg. 48546-55 (21 September 2001), are provided in Common Exhibit 3.

[61] The Byrd Amendment is provided in Common Exhibit 1.

[62] 28 October 2000 Press Release from the US Mission to the European Union (http://www.useu.be/ISSUES/clin1028.html) (visited 22 October 2001) (*see* Exhibit ROK-2).

4.169 According to Korea, the US Government further conceded that the offset provides an additional measure that is not necessary to restore free trade:

> . . . unfair trade laws have as their purpose the restoration of conditions of fair trade. However, that is the purpose of the anti-dumping and countervailing duties themselves, which accomplish that purpose. By raising the price of imports they shield domestic producers from import competition and allow domestic manufacturers to raise prices, increase production and improve revenues. Consequently, distribution of the tariffs themselves to producers is not necessary to the restoration of conditions of fair trade.[63]

4.170 Korea asserts that the Byrd Amendment is mandatory. Where the conditions for its application are met, the US authority must implement the statute's directive.[64] The authority has no discretion to do otherwise, due to the use of mandatory words in the text of the statute.[65] In sum, the United States has adopted a law mandating that, where an AD or CVD order or finding has been imposed or made, the US authorities must, in addition to collecting the AD or CVD duties, distribute the duties to the US producers that requested the investigation.

(c) Argument

(i) The Byrd Amendment is inconsistent with provisions of GATT 1994, the Anti-Dumping Agreement and the SCM Agreement because it constitutes an impermissible "specific action" against imports

4.171 Korea argues that Article 18.1 of the AD Agreement has been interpreted to "limit the *anti-dumping instruments* that may be used by Members to those expressly contained in Article VI and the Anti-Dumping Agreement."[66] In *United States - 1916 Act*, the Panel found the 1916 Act to be inconsistent with US WTO obligations, concluding that "[e]xcept for provisional measures and price undertakings, the *only* type of remedies foreseen by the Anti-Dumping Agreement is the imposition of duties."[67]

4.172 The Appellate Body affirmed these findings, holding that Article VI:2 of GATT 1994 and Article 18.1 of the AD Agreement, read together, prohibit Members from taking specific action against dumping that is not stipulated in Article VI:2 and the AD Agreement, *i.e.*, any measure other than (or in addition to) provisional remedies, price undertakings and anti-dumping duties applied in accordance with Article VI:2 and the AD Agreement.[68]

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[63] Statement of Administrative Policy, distributed by US Office of Management and Budget (11 October 2000) (http://www.whitehouse.gov/omb/legislative/sap/106-2/hr4461-h.html) (visited 22 October 2001) (emphasis added) (provided in Common Exhibit 9).

[64] *See, e.g., 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000) at paras. 88-91 (upholding the Panel's finding that the 1916 Act is mandatory and concluding that the discretion of the US Department of Justice not to bring actions under the 1916 Act "is not . . . of such a nature or of such breadth" to make the act discretionary). Here, the US Executive Branch has no discretion at all regarding whether and when to implement the Byrd Amendment.

[65] *See, e.g.*, Byrd Amendment, Sections 754(a) ("Duties assessed . . . shall be distributed . . . .") and 754(c) ("The Commissioner [of US Customs] shall prescribe procedures for distribution . . . . Such distribution shall be made not later than . . . .") (emphases added) (Common Exhibit 1).

[66] *1916 Act*, WT/DS162/R at 6.216 (emphasis in original).

[67] *Id.* (emphasis added). *Id.* at paras. 6.230-6.231.

[68] *1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R at paras. 137-138.

4.173 Korea asserts that Article 32.1 of the SCM Agreement is the analog provision to Article 18.1 of the AD Agreement. With the exception of the words "a subsidy of" and "dumping of exports", the two provisions are identical. Because the provisions are nearly identical in text and are identical in terms of context and purpose, one fairly can draw on the reports of the panel and Appellate Body in *United States - 1916 Act*.

4.174 According to Korea, these reports indirectly indicate that Article 32.1 (like Article 18.1 of the AD Agreement) clarifies that a Member may impose on subsidized imports only those remedies (may take only those "specific actions") specifically provided for under Article VI and the SCM Agreement. When the specified conditions are met, a Member may impose a countervailing duty to offset a subsidy. But, due to Article VI of GATT 1994 and Article 32.1 of the SCM Agreement, it may not take any other specific actions against subsidized imports.[69]

4.175 In Korea's view, however, the Byrd Amendment imposes on US authorities a requirement to take an additional mandatory specific action after they have conducted an AD or CVD investigation, have determined that relief is appropriate and have imposed relief in the form of a duty on imports of the subject merchandise. The Amendment requires the US authority to transfer the duties collected directly to the US companies that supported the petition.[70]

4.176 Moreover, Korea submits, the transfer of duties collected from imports directly to the domestic competitors of the affected companies, as well as the law itself which mandates this transfer, is a "specific action" that is inconsistent with Article VI of GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. Just as with the 1916 Act, which imposed impermissible "'specific action against dumping' in the form of civil and criminal proceedings and penalties,"[71] the Byrd Amendment imposes a specific action against dumping and subsidized imports in the form of a direct transfer of assets from the affected foreign company to its domestic competitors.

4.177 It is Korea's opinion that the Byrd Amendment is a specific action against dumping and/or subsidies because it requires the US Customs Service to take action (administer the offset) "*only* when the constituent elements of 'dumping' [or a subsidy] are present."[72] Thus, the offset is available only when the conditions for imposing an anti-dumping or countervailing duty are satisfied (*i.e.*, only when dumping or subsidization causing material injury exists) and only when a duty is imposed.[73] Moreover, the offset is available only to "affected domestic producers", which the statute defines as "any manufacturer, producer, farmer, rancher or worker representative (including associations of such persons)" that was a petitioner or an interested party in support of the petition and that remains in operation.[74]

4.178 Finally, Korea argues that the offset payments to the "affected domestic producer" are transferred directly from a "special account" that must be created for the duties assessed and collected under each individual AD or CVD order.[75] Thus, the offsets are paid directly from the duties

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[69] *See id*.; *1916 Act*, WT/DS162/R (29 May 2000) at paras. 6.216 and 6.230-6.231.

[70] Byrd Amendment, Sections 754(b)(1) and 754(d)(3) (Common Exhibit 1). Therefore, as discussed above, the Byrd Amendment is a mandatory law and can be challenged regardless of whether it has been implemented in a specific case. *See, e.g., 1916 Act*, WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000) at paras. 88-91.

[71] *Id.* at para. 137.

[72] *Id.* at para. 122.

[73] *See* Byrd Amendment, Section 754(a) (Common Exhibit 1).

[74] *Id.* at Sections 754(b)(1)(A) and (B).

[75] *Id.* at Section 754(e).

collected to compensate the "affected domestic producers" for injuries caused by the dumping or subsidy of which they complained.

4.179 Therefore, Korea posits, the Byrd Amendment mandates an impermissible "specific action" just as the 1916 Act does. Indeed, in many ways the Byrd Amendment is far more pernicious and trade distortive than is the 1916 Act. The 1916 Act is limited to certain forms of international price discrimination. The Byrd Amendment, however, applies not only to dumping but also to subsidies – it has a far larger scope. Also, the 1916 Act is rarely invoked. But, the Byrd Amendment applies to all AD and CVD proceedings resulting in the imposition of duties.[76] Thus, it profoundly alters the conditions of competition to favour US producers in all US markets for all products.

4.180 According to Korea, this analysis is confirmed by the statements of many US Congressmen, including Senator Byrd (Democrat – West Virginia), who crafted, introduced and ensured enactment of the Amendment by the US Congress.

4.181 For the reasons set forth above, Korea urges the Panel to find that the Byrd Amendment mandates the imposition of an impermissible specific action and, thus, that the United States is in violation of Article VI of GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

(ii) The Byrd Amendment is inconsistent with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement because it impermissibly distorts and undermines the standing threshold, encouraging abuse of otherwise permissible actions, and rendering these WTO Provisions meaningless

4.182 Korea argues that Article 5.4 of the AD Agreement sets forth the standard for determining whether an application for an AD investigation is supported by "the industry," *i.e.*, whether the companies that support the requested investigation are sufficient to constitute "the industry." If the support does not exceed the stated threshold, an authority may not initiate the investigation. Under Article 5.4, an authority cannot initiate an investigation unless: (i) the investigation is supported by producers accounting for more than 50 per cent of the total production of the like product (by volume or value) produced by that portion of the industry that supports or opposes the petition; and (ii) those in support account for at least 25 per cent of total domestic production.

4.183 Korea asserts that the threshold established in Article 11.4 of the SCM Agreement is, for all practical purposes, identical to that set forth in Article 5.4 of the AD Agreement.

4.184 According to Korea, as the negotiating history indicates, these thresholds were designed to balance carefully a number of competing rights and interests, primarily the right of an industry to seek relief from unfair trade practices versus the interest in ensuring that it is the industry, and not a sector of it, or for that matter, an individual company, that is seeking relief. Indeed, perhaps the most important concern was that the provision be drafted to ensure that complaints or petitions be filed only when warranted and only when supported by a substantial enough portion of an industry.[77] The balancing took place in a context in which AD or CVD duties were the only possible forms of relief (apart from negotiated settlements).

[76] It applies to all assessments made on or after 1 October 2000 in connection with all AD and CVD orders and findings in effect as of 1 January 1999 or issued thereafter. 66 Fed. Reg. 48546 (third column) (21 September 2001) (Common Exhibit 3).

[77] *See*, *e.g.*, T. Stewart (Ed.), The GATT Uruguay Round, A Negotiating History (1986-1992), Vol. II: Commentary (Kluwer: 1993) at pp. 1452, 1575-88 (explaining that the thresholds were established to address "concern[s] with the possibility that unwarranted complaints would be filed and unwarranted investigations commenced." (p. 1575) (footnote omitted)).

4.185 In Korea's view, the Byrd Amendment distorts and undermines the balancing of interests agreed upon by the negotiators. Indeed, this alteration is the purpose of the Amendment. The Amendment vastly increases the incentive for companies to support a petition by providing cash transfers from importers to affected producers, but only to those domestic producers supporting the petition.[78] Producers that oppose a petition are not eligible for the offsets.[79]

4.186 Korea argues that the Byrd Amendment therefore creates a powerful incentive for every company in every industry not only to bring petitions without merit, but also to support any petition that is brought. The potential of receiving the offset induces companies that otherwise would be uninterested to show interest and to support a petition which they otherwise would not support. Moreover, because the mere initiation of an investigation often distorts trade patterns, regardless of whether AD or CVD duties eventually are imposed, the Byrd Amendment is trade distortive. In short, by offering a "cash reward," the Amendment encourages overuse and abuse of the US AD and CVD laws.

4.187 Due to the Byrd Amendment, Korea asserts, the standards set forth in Article 5.4 and Article 11.4 are meaningless as applied in the United States, and the two provisions are reduced to "inutility." By adopting the Byrd Amendment as law, the United States signals that it interprets Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement as allowing the Byrd Amendment and action under it. By doing so, the United States has adopted an interpretation that reduces to inutility Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement. The Byrd Amendment therefore is based on a fundamental misreading of these provisions – an impermissible interpretation.[80]

4.188 In the view of Korea, the US government has taken action – in passing the Byrd Amendment – that improperly influences the very facts that the US authority is supposed to examine in making its determination. Thus, the US has violated its obligation to conduct an objective examination[81] under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.

4.189 Korea submits that the United States has violated this obligation because it has used the Byrd Amendment to manipulate the situation to bias the process and to increase the likelihood that the US authority will conclude that the relevant domestic industry supports a given petition.

(iii) The Byrd Amendment is inconsistent with Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement because it impermissibly deters agreements on undertakings

4.190 In Korea's view, the Byrd Amendment is inconsistent with WTO provisions regarding undertakings, in particular, Article 8.1 of the AD Agreement and Article 18.1 of the SCM Agreement. It reduces these provisions to inutility and renders them useless in the context of US AD and CVD

[78] Byrd Amendment, Sections 754(a) and (b)(1)(A) and (B) (Common Exhibit 1).

[79] *Id.*

[80] "[I]nterpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (29 April 1996) at p. 23. *See also, e.g., Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (14 December 1999) at paras. 80-81.

[81] *See, e.g., US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001) at para. 196, regarding Article 3.1 of the AD Agreement:

If an examination is to be "objective", the investigation and evaluation of the relevant factors must be even handed. Thus, investigating authorities are not entitled to conduct the investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.

proceedings. Under US practice, the US government must consult with the affected industry before accepting an undertaking.[82] But the Byrd Amendment creates an incentive for the US industry to oppose undertakings. This is because a price undertaking can not exceed the amount of the margin or subsidy.[83] By supporting the imposition of duties, the domestic industry may receive not merely the imposition of the duties as allowed by the WTO agreements and US law (which, in essence, results in price levels consistent with a price undertaking), but also the direct transfer of the duties collected.

4.191 Korea argues that in this manner, the Byrd Amendment also leads directly to abuse of AD and CVD measures. This is because measures are imposed in situations that, absent the Byrd Amendment and the incentives it creates, would lead to undertakings.

4.192 Korea submits that, similar to the impact of the Byrd Amendment on the standing assessment, the Byrd Amendment is an action taken by the United States which biases the process by which undertakings are reached to decrease substantially the likelihood that the domestic industry that supports the petition (the petitioners) will support an undertaking. Therefore, by passing the Byrd Amendment, the United States has violated its obligation to have its authority undertake an objective examination[84] of whether accepting an undertaking under Article 8.3 of the AD Agreement or Article 18.3 of the SCM Agreement would be "appropriate" in the circumstances, which include the views of petitioners.

(d) Conclusion

4.193 For the reasons set forth above, Korea asks the Panel to find that, by maintaining the Byrd Amendment, the United States is in violation of Article VI of GATT 1994, Articles 5.4, 8 and 18.1 of the AD Agreement and Articles 11.4, 18 and 32.1 of the SCM Agreement. Korea requests the Panel to recommend that the United States bring its laws into conformity with its obligations under these WTO provisions.

4.194 Finally, Korea respectfully requests the Panel to suggest that, to meet its WTO obligations, the United States should repeal the Byrd Amendment.[85]

7. Mexico

(a) Introduction

4.195 Mexico argues that at issue in this dispute is whether the Continued Dumping and Subsidy Offset Act of 2000 (the "Act") is consistent with certain obligations of the United States under the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), and the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement").

4.196 The terms of reference of the Panel are:

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[82] *See* 19 USC. §§ 1671c(e)(1), 1673c(e)(1); 19 C.F.R. § 351.208(f)(2)(iii). Moreover, if, within 20 days of the publication of the notice of suspension, the US authority receives a request to continue its investigation from even one single domestic producer that is a party to the investigation, the authority must continue the investigation. 19 USC. §§ 1671c(g)(2), 1673c(g)(2) (*see* Exhibit ROK-4 and Common Exhibit 15).

[83] *See* Article 8.1 of the AD Agreement; Article 18.1 of the SCM Agreement.

[84] *See* n. 81 above.

[85] *See, e.g., 1916 Act*, WT/DS162/R at para. 6.292.

"To examine, in the light of the relevant provisions of the covered agreements cited by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand in document WT/DS217/5, by Canada in document WT/DS234/12 and by Mexico in document WT/DS234/13, the matters referred by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand to the DSB in those documents, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

(b) The facts

4.197 According to Mexico, the relevant facts can be summarized as follows:

- On 28 October 2000, the Act was enacted. It amended Title VII of the Tariff Act of 1930, by adding a new section 754 (codified at 19 USC. 1675c):
  - The Act provides that assessed duties received on or after 1 October 2000, pursuant to a countervailing duty order, an anti-dumping duty order or an anti-dumping duty finding must be distributed to certain affected domestic producers for certain qualifying expenditures that these producers incur after the issuance of such an order or finding; and
  - The distribution is known as the continued dumping and subsidy offset.
- On 29 December 2000, the Chairman of the US International Trade Commission provided US Customs with a list of qualifying domestic producers who may be eligible to receive a disbursement of anti-dumping or countervailing duty assessments under the Act (the "ITC List"). The ITC List includes reference to duties applicable to products of Mexico.
- On 3 August 2001, US Customs published in the Federal Register a Notice of Intent to Distribute Offset indicating Customs' intention to distribute assessed anti-dumping or countervailing duties that were collected in fiscal year 2001 (the "Notice of Intent to Distribute").
- On 21 September 2001, US Customs issued the final rule to amend the Customs Regulations to implement the provisions of the Act (the "Final Rule").
- Assessed duties received in fiscal year 2001 had to be distributed to affected domestic producers by 30 November 2001.

(c) Legal arguments

4.198 It is Mexico's view that the Act mandates the United States authorities to act in a manner that is inconsistent with the WTO Agreements. Consequently, Mexico argues that it is entitled to challenge the Act "as such".

(i) Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement

4.199 According to Mexico, on the facts of this dispute, the Act is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

4.200 Mexico asserts that these provisions state that no "specific action" may be taken against dumping of exports from another Member or a subsidy of another Member except in accordance with the provisions of the GATT 1994 as interpreted by the two Agreements. Under these provisions, a limited set of specifically defined actions are the only remedies available.

4.201 Mexico argues that the Act establishes a regime for the systematic collection of funds received from anti-dumping and countervailing duties on imported products and their distribution to certain United States producers of like products who were petitioners or in support of a petition related to the order or finding upon which the duties were levied. The funds that are distributed are referred to in the Act as "offsets", and their distribution is mandated.

4.202 Mexico submits that the regime established by the Act is plainly a specific action against dumping of exports of another Member and subsidies of another Member because the Act directly and systematically offsets the dumping and subsidizing of exports and, thereby, amounts to a response to situations presenting the constituent elements of dumping and subsidizing. The distribution of offsets under the Act is directly linked to and caused by the imposition of the United States' anti-dumping and countervailing duties, the funds that are distributed are created by the existence of dumping and subsidization, the amount of the funds is equal to the amount of such dumping and subsidization, and the funds are distributed as offsets to domestic producers of products that are "like" those found to have been dumped and subsidized.

4.203 In Mexico's view, the specific action taken under the Act is not consistent with the provisions of the GATT 1994 as interpreted by the AD Agreement and the SCM Agreement. It effectively doubles the protection conferred upon United States producers by the application of anti-dumping and countervailing duties. This additional remedy distorts trade flows, upsets expected competitive relationships and provides unreasonable trade protection that cannot, under any reasonable interpretation, be regarded as "in accordance with the provisions of the GATT 1994". Accordingly, it is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

(ii) Article 5 of The SCM Agreement

4.204 Mexico asserts that on the facts of this dispute, the Act is also inconsistent with paragraph (b) of Article 5 of the SCM Agreement. That provision disciplines actions by Members that cause, through the use of any subsidy, adverse effects to the interests of other Members. "Adverse effects" include nullification or impairment of benefits accruing directly or indirectly to a Member under the GATT 1994.

<u>The granting of subsidies by the Act nullifies or impairs benefits accruing to Mexico</u>

4.205 Mexico argues that by virtue of Articles 7.1 and 7.3 of the SCM Agreement, a WTO Member can invoke the remedy provisions in Part III of the Agreement with respect to the granting of any actionable subsidy by another Member.

4.206 In Mexico's view, the offsets are subsidies within the meaning of Article 1.1 of the SCM Agreement in that they constitute a direct transfer of funds in the form of cash grants which automatically confer a benefit to the recipient. They are specific within the meaning of Articles 1.2 and 2 of that Agreement, because, by law, access to the subsidies is limited to a defined universe of recipients. This universe is comprised of enterprises who produce products that are "like" the products that generated the offset payments, who were either petitioners or in support of the petition that gave rise to the duties on those products, who are still in operation and who were not acquired by a related company that opposed the original investigation. Accordingly, they are subject to the provisions of Part III of the SCM Agreement, which include Article 5.

4.207 Mexico asserts that the distribution of offsets under the Act is explicitly mandated and amounts to the granting of subsidies which, in turn, amounts to the "use of" subsidies within the meaning of Article 5 of the SCM Agreement. Through the use of such subsidies, the Act nullifies or impairs benefits accruing directly or indirectly to Mexico under the GATT 1994 within the meaning of paragraph (b) of Article 5 of the SCM Agreement.

4.208 Mexico argues that the benefits that are being nullified or impaired accrue to Mexico under Articles II and VI of the GATT 1994. With respect to Article II, in cases where anti-dumping and countervailing duties are in place against imports of Mexican products, Mexico can legitimately expect that the competitive relationship between Mexican and like United States products will be defined by a tariff, at most, equal to the United States' tariff binding under Article II:1 plus permissible anti-dumping and/or countervailing duties as contemplated under Article II:2(b) and no more. With respect to Article VI, in cases where anti-dumping and countervailing duties are imposed on imports of products from Mexico, Mexico can legitimately expect that the competitive relationship between Mexican and like United States products will be modified by the imposition of the duties by, at most, the maximum anti-dumping and countervailing duties permitted under Article VI:2 and VI:3 of the GATT 1994 and no more.

4.209 According to Mexico, at the time these benefits accrued to it under Articles II and VI of the GATT 1994, Mexico could not have reasonably anticipated the introduction of the Act.

4.210 Mexico asserts that upon granting, the subsidies mandated by the Act *per se* nullify or impair the above-noted benefits in that they systematically upset the expected competitive relationship between Mexican and like United States products in cases where anti-dumping and countervailing duties apply. In addition to the expected tariffs under GATT Article II and duties under GATT Articles II:2(b), VI:2 and VI:3, the competitive relationship between the imported and like domestic products is established and, thereby, upset by the subsidies. The nullification or impairment is direct and systematic and it reflects the explicit objective of the Act - to enhance the remedial effect of United States' anti-dumping and countervailing duty laws.

4.211 In the circumstances of this dispute, Mexico submits, the granting of subsidies *per se* causes nullification or impairment within the meaning of Article 5(b) of the SCM Agreement, and thereby violates that provision. Since the Act mandates the granting of subsidies it necessarily results in action that is inconsistent with a WTO provision.

<u>The maintaining of subsidies by the act nullifies or impairs benefits accruing to Mexico</u>

4.212 Mexico is of the view that in addition, by virtue of Articles 7.1 and 7.3 of the SCM Agreement, a WTO Member can invoke the remedy provisions in Part III of the SCM Agreement with respect to the maintaining of any actionable subsidy by another Member.

4.213 Mexico posits that the Act provides the means or infrastructure for the granting of the subsidies and, thereby, "maintains" those subsidies within the meaning of Articles 7.1 and 7.3. Maintaining subsidies in circumstances where the granting of subsidies is mandated and other actions have been taken with respect to the subsidies amounts to the "use of" a subsidy within the meaning of Article 5 of the SCM Agreement.

4.214 According to Mexico, the maintenance of subsidies in such circumstances nullifies or impairs benefits accruing to Mexico under the GATT 1994. The above-noted benefits and Mexico's associated legitimate expectations pertain to both current trade and to the creation of predictability needed to plan future trade. In the circumstances of this dispute, the mere existence of the Act

impairs the predictability of the conditions of future trade and, thereby, the ability of Mexican exporters who face United States' anti-dumping and countervailing duties to plan for that trade.

4.215 Accordingly, Mexico asserts, the maintenance of subsidies by the Act in the specific circumstances of this dispute, which amounts to the use of subsidies, causes nullification or impairment within the meaning of Article 5(b) and thereby violates that provision.

(iii) Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement

4.216 Mexico argues that Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement set out minimum requirements regarding the initiation of anti-dumping or countervailing duty investigations. Both provisions state that an investigation cannot be initiated unless the authorities have determined that an application has been made "by or on behalf of the domestic industry".

4.217 Mexico submits that when the investigating authorities determine whether an application is made "by or on behalf of the domestic industry", the determination must be conducted in an objective manner and must conform to the principles of good faith.

4.218 In Mexico's view, the Act creates a financial incentive for domestic producers to file or support petitions for the initiation of an investigation, rather than abstaining from doing so. The incentive distorts the functioning of the thresholds regarding standing and, hence distorts the examination that the investigating authority is required to make in order to determine whether the application has been made "by or on behalf of the domestic industry". This makes it impossible for the investigating authority to carry out the "objective examination" it is obliged to undertake.

4.219 Thus, according to Mexico, the Act violates Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.

(iv) Article 8 of the AD Agreement and Article 18 of the SCM Agreement

4.220 In Mexico's opinion, Article 8 of the AD Agreement and Article 18 of the SCM Agreement allow domestic investigating authorities to suspend or terminate anti-dumping and countervailing duty investigations where the exporter (or the government in countervailing duty investigations) provides a satisfactory voluntary undertaking.

4.221 When investigating authorities determine whether undertakings should be agreed to, the determination must be conducted in an objective manner and must conform to the principles of good faith.

4.222 Mexico argues that the Act creates a financial incentive for the petitioners to oppose the acceptance of undertakings and, therefore, will lead to the rejection of such undertakings without proper reason. This makes it impossible for the investigating authority to conduct an objective examination of whether undertakings would be appropriate and thereby renders the price undertaking provisions in the two Agreements inutile.

4.223 Thus, in Mexico's view, the Act violates Article 8 of the AD Agreement and Article 18 of the SCM Agreement.

(v) Article X:3(a) of the GATT 1994

4.224 Article X:3(a) of the GATT 1994 requires Members to administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and administrative rulings of general application

pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports. The United States' anti-dumping and countervailing duty laws and regulations are subject to this provision.

4.225 Mexico asserts that by mandating United States authorities to act inconsistently with their obligations under the AD Agreement and the SCM Agreement regarding standing determinations and price undertakings, the Act does not lead to a reasonable and impartial administration of the United States' laws and regulations implementing those provisions.

4.226 Accordingly, Mexico submits, the Act is inconsistent with Article X:3(a) of the GATT 1994.

(vi) Article XVI:4 of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement

4.227 Mexico asserts that Article XVI:4 of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement require the United States to bring its anti-dumping and countervailing duty laws into conformity with the WTO Agreements including the GATT 1994, the AD Agreement and the SCM Agreement.

4.228 Mexico is of the opinion that as a consequence of being inconsistent with the above-noted provisions of the AD Agreement, the SCM Agreement and the GATT 1994, the Act is not in conformity with those covered Agreements and, is therefore inconsistent with Article XVI:4 of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement.

(d) Findings requested

4.229 For the foregoing reasons, Mexico respectfully requests that the Panel find that the Act is inconsistent with:

(a) Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement on the grounds that it mandates specific action against dumping of exports from another Member and subsidies of another Member, which is not in accordance with the provisions of GATT 1994, as interpreted by the two Agreements.

(b) Paragraph (b) of Article 5 of the SCM Agreement on the grounds that:

(i) It mandates the granting of subsidies in a manner and in circumstances that will necessarily nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994; and

(ii) it maintains subsidies in a manner and in circumstances that nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994.

(c) Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.

(d) Article 8 of the AD Agreement and Article 18 of the SCM Agreement.

(e) Article X:3(a) of the GATT 1994.

(f) Article XVI:4 of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement.

4.230 Mexico also requests that the Panel find, pursuant to Article 3.8 of the DSU, that as a result of the infringements of the provisions cited above, the United States has nullified or impaired the benefits accruing to Mexico under the Anti-Dumping Agreement, the SCM Agreement, the GATT 1994 and the WTO Agreement. Mexico also requests that the Panel recommend that the United States bring its measure into conformity with its obligations under the AD Agreement, the SCM Agreement, the GATT 1994 and the WTO Agreement and take appropriate steps to remove the adverse effects of the subsidies or withdraw the subsidies at issue. Mexico further requests that, in the exercise of its powers under Article 19.1 of the DSU, the Panel suggest that the United States repeal the Act.

B. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

(a) Introduction

4.231 The United States asserts that the "Continued Dumping and Subsidy Offset Act of 2000" (CDSOA) was signed into law on October 28, 2000. The CDSOA is a government payment programme administered by the US 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 anti-dumping (AD) or countervailing (CVD) duty orders, complainants filed this case alleging that the CDSOA is, on its face, inconsistent with US obligations under the WTO Agreement. Complainants, however, have failed to make a *prima facie* case of a WTO violation for the following reasons.

4.232 According to the United States, the 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*.

(b) Article 5 of the SCM Agreement

4.233 The United States argues that 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.

4.234 First, according to the United States, 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 anti-dumping or countervailing duty investigation resulting in the collection of duties and remains in operation. 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.

4.235 The United States argues that 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.

4.236 The United States asserts that Mexico's claim does not satisfy the three requirements articulated in *Japan – Film* to establish a non-violation nullification or impairment either. First, Mexico has failed to challenge the *application* of the CDSOA. Second, Mexico has failed to demonstrate that the competitive relationship between US products and Mexican imports has been upset by a subsidy, and that the subsidy was not reasonably anticipated by Mexico.

4.237 In the United States' opinion, Mexico has presented no evidence that US 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.

4.238 The United States posits that 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 programme related to a product on which there is a tariff concession into a non-violation nullification or impairment of benefits.

4.239 Finally, the United States submits that Mexico could have reasonably anticipated, before the tariff concession negotiated during the Uruguay Round entered into force on 1 January 1995, that anti-dumping and countervailing duties would be distributed to the domestic industry. In fact, there was proposed legislation in the US 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.

(c) GATT Article VI, the Antidumping Agreement and the SCM Agreement

4.240 The United States is of the view that 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."

4.241 First, the United States submits, 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 US producer has been affected by dumping or subsidization of imports.

4.242 Second, according to the United States, 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.

4.243 The United States asserts that 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 programme. 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.

1.244 It is the view of the United States that 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.

4.245 The United States argues that 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 not 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.

4.246 The United States posits that 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 programme.

(d) Standing, undertakings and GATT Article X:3

4.247 According to the United States, 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 US 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 US 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.

4.248 Contrary to the complaining parties' arguments, the United States submits, 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.

4.249 According to the United States, 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 anti-dumping 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.

4.250 The United States asserts that 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.

4.251 The United States is of the view that 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.

4.252 The United States argues that again the 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.

4.253 In the view of the United States, 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 anti-dumping 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.

4.254 Finally, the United States submits, 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.

C. FIRST ORAL STATEMENTS OF THE COMPLAINING PARTIES

1. Australia

(a) Introduction

4.255 In its statement, Australia identifies the core legal claims made in this case and addresses some of the specific arguments made by the United States. Australia notes that Australia's written submission sets out these claims in greater detail.

(b) First Claim: Article 18.1 of the Anti-Dumping Agreement in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement

4.256 The first claim made by Australia is that the United States has violated Article 18.1 of the Anti-Dumping Agreement, read in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement, because the Act constitutes a specific action against dumping in a manner inconsistent with the Anti-Dumping Agreement.

4.257 In the case United States – Anti-dumping Act of 1916, the Appellate Body found that "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". The Appellate Body also found that Article 18.1 of the Anti-Dumping Agreement prohibits the taking of any such action when it is not in accordance with the provisions of GATT 1994 as interpreted by the Anti-Dumping Agreement.

4.258 According to Australia, it is readily apparent, and indeed confirmed by the United States' first written submission, that the Act mandates a specific action in response to situations presenting the constituent elements of dumping, and that this action is not in accordance with the provisions of GATT 1994 as interpreted by the Anti-Dumping Agreement.

4.259 Australia argues that under the Act, an anti-dumping order is a necessary prerequisite for the automatic disbursement of collected anti-dumping duties to affected domestic producers. An anti-

dumping order is also a formal determination by the United States that there exists a situation presenting the constituent elements of dumping.

4.260 According to Australia, in its first submission, the United States confirms that, in order to make an anti-dumping order, there must have been a petition from the domestic industry, an examination by the US Commerce Department of the standing requirements, an initiation of an investigation, a determination of injury, and a determination of dumping.

4.261 Australia posits that there is a clear linkage and contingency between the disbursement under the Act and the constituent elements of dumping (that is, the investigation, finding of injury and positive determination of dumping and the imposition of duties). The US Customs Service has no discretion in establishing special accounts to disburse the funds collected to affected domestic producers for qualifying expenditures.

4.262 Australia argues that as a result of the Act, the disbursement of anti-dumping duties to affected domestic producers is now part and parcel of the process of any successful anti-dumping application, and as the disbursement does not fall within the specific actions covered by the Anti Dumping Agreement, it is therefore action that is inconsistent with Article 18.

4.263 Australia asserts that in its first submission, the United States has sought to argue that the "offsets" are nothing more than a government payment programme, and are simply a distribution of government monies collected. The United States also claims that the only connection between the duties collected and the funds paid is that the duties collected cap the amount of payments.

4.264 Australia submits that these arguments are without merit. If, as the United States says, the Act is simply a government payment system based on eligible expenditure, why has the United States not distributed the payments to those who did not support the trade remedy action? Why are not all domestic producers of the like product entitled to the payments? The Act does not simply disburse revenues or cap payments in any case: it is a clear and systematic extension of the United States' framework of rules for the imposition of anti-dumping duties. It is a prohibited specific action against dumping.

(c) Second Claim: Article 32.1 of the SCM Agreement in conjunction with GATT Article VI:3 and Articles 4.10, 7.9 and 10 of the SCM Agreement

4.265 Australia's second claim is that the United States has violated Article 32.1 of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), in conjunction with GATT Article VI:3 and Articles 4.10, 7.9 and 10 of the SCM Agreement, because the Act constitutes a specific action against subsidisation in a manner inconsistent with the SCM Agreement and GATT 1994.

4.266 Australia is of the view that the Appellate Body's reasoning in the United States – Anti-Dumping Act of 1916 in relation to dumping applies equally to the obligations relating to actions against subsidisation. In other words, the Act mandates a prohibited specific action in response to situations presenting the constituent elements of subsidisation.

4.267 Australia argues that once a countervailing duty order or finding is issued, the Act mandates a number of subsequent actions that have the effect of providing an additional remedy against the effects of a subsidy. That additional remedy is the distribution of assessed duties pursuant to a countervailing duty order to the affected domestic producers for qualifying expenditures.

4.268 Australia is of the opinion that this distribution of assessed duties is not simply payment of subsidies to producers as the United States argues. If that were so, why does the United States not distribute the payments to those producers who do not support the trade remedy action? Again, the Act is a clear and systematic extension of the United States' framework of rules for the imposition of countervailing duty orders. It is an action in response to situations presenting the constituent elements of subsidisation and it is an action that is not in accordance with the United States' WTO obligations.

4.269 According to Australia, it has shown in its first submission that the Act mandates action not permitted under the SCM Agreement or GATT Article VI to counteract or offset the effects of a subsidy.

(i) Article 10 of the SCM Agreement

4.270 Australia asserts that the SCM Agreement expressly provides for specific action to be taken against subsidies. However, Article 10 of the SCM Agreement only permits certain forms of relief – either a countervailing duty or a countermeasure. Further, footnote 35 to Article 10 makes clear that relief, whether a countervailing duty or countermeasure, must be in relation to the "effects" of a particular subsidy in the domestic market of an importing Member.

4.271 Australia posits that in the context of the SCM Agreement, the United States measure is particularly pernicious because it penalizes non-subsidized exports. In its first submission, Australia argues, it has shown that the Act operates as a countermeasure against products from other WTO Members that were included in the original countervail investigation but were not subjected to the countervailing duty orders. The assessed duties distributed under the Act to the affected domestic producers are based on qualifying expenditure incurred in relation to the product which has been the subject of a countervailing duty order. As such, the Act provides counter-subsidies which affect the competitive relationship between the domestic products and products of other WTO Members not subject to the original countervailing duty order.

(ii) GATT Article VI:3

4.272 Australia argues that similarly, the only remedy available under GATT Article VI:3 is a countervailing duty. Moreover, GATT Article VI:3 determines the level of the countervailing duty that can be imposed against subsidised imports. Australia considers that it has shown that, contrary to GATT Article VI:3, the Act provides, indeed ensures, that there is a remedy to affected domestic producers that is in addition to the countervailing duties imposed by the United States. Having assessed duties pursuant to a countervailing duty order, the Act mandates the provision of additional measures to counteract or offset a subsidy over and above the level of subsidisation.

4.273 Australia considers that the United States thereby imposes a remedy which exceeds the level of subsidisation that has been determined by the Commerce Department. Affected domestic producers receive a benefit from both the levied countervailing duty and the payment to them of the assessed duties thereby providing a remedy at a level in excess of the level of subsidy assessed under the countervailing duty order.

4.274 Australia asserts that the United States always imposes the full margin of duty. Even if the United States imposed the lesser duty rule, the payments disbursed to affected domestic producers would exceed the assessed levels of subsidisation and injury.

(d) Third Claim: Article 5.4 of the Anti-Dumping Agreement/Article 11.4 of the SCM Agreement

4.275 The third claim made by Australia is that the Act distorts, or threatens to distort, the degree of support for, or opposition to, an application for an anti-dumping or countervailing duty investigation among domestic producers of the like product. As such it is inconsistent with Article 5.4 of the ADA and Article 11.4 of the SCM Agreement.

4.276 According to Australia, the Act creates a systemic bias in favour of supporting domestic producers through the provision of a financial incentive or reward. It contravenes the fundamental principle that the legal framework of a rules-based system must itself be established in an impartial and objective manner. It frustrates the intent of Articles 5.4/11.4 to establish whether an application is truly being made by or on behalf of domestic industry.

(e) Fourth Claim: Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.4 of the SCM Agreement

4.277 Australia argues that by violating any of the provisions as outlined above, the United States has also in its view violated Article XVI:4 of the WTO Agreement, as well as Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement.

(f) United States' arguments

4.278 Australia submits there are some significant flaws in the US arguments, particularly in misquoting the Appellate Body in the case of United States – Anti-Dumping Act of 1916.

4.279 Australia asserts that the Appellate Body found that "specific action against dumping" of exports within the meaning of Article 18.1 is action in response to situations presenting the constituent elements of dumping. The United States has omitted two key words that formed part of the Appellate Body's statement – "situations presenting".

4.280 In other words, according to Australia, specific action against dumping is any action taken in response to conduct by which products of one country are introduced into the commerce of another country at less than the normal value of the products.

4.281 Further, according to Australia, the United States argues that in order for a specific action to be characterised as action against dumping or subsidisation, the action must apply to the imported goods or importer and it must be "burdensome". The Act, the United States says, imposes no burden or liability on imported goods and importers.

4.282 Australia rejects these arguments. The United States in effect argues for an overlay of conditions and criteria to be read into the Anti-Dumping Agreement and the SCM Agreement and GATT Article VI which is clearly not there. The offset payments under the Act alter the competitive relationship between such goods and the domestically-produced like products in ways not contemplated by the GATT, the Anti-Dumping Agreement or SCM Agreement. Indeed, it also affects the competitive position of exporters to the US market for products that have been found not to have been subsidised or dumped.

(g) Conclusion

4.283 In conclusion, according to Australia, the number of co-complainants, and third parties, involved in this dispute reflects the breadth of concern by the WTO membership over the actions of the United States in promulgating this mandatory legislation.

4.284 Australia argues that the WTO Agreements provide the framework for a secure and predictable multilateral trading system. They also provide a system of permissible trade remedies against dumping and subsidisation which respect the rights and benefits of all WTO Members. The United States legislation constitutes action which is both inconsistent with those Agreements and seriously undermines the proper functioning of the multilateral trading system.

4.285 Australia is of the view that, if permitted to stand, the United States legislation would precipitate an undermining of trade remedy rules and encourage the proliferation of remedy actions.

2. Brazil

(a) Introduction

(i) Systemic concerns

4.286 Brazil believes the panel should consider three systemic concerns in its deliberations.

4.287 First, to what extent does the promise of monetary rewards to the complaining party encourage the filing of cases which otherwise would never have been filed? Or to what extent does it promote the pursuing of reviews of the amounts of anti-dumping and countervailing duties in order to maximize revenues even when the desired protection has been achieved? Brazil believes that it is inevitable that monetary rewards will encourage more cases and will encourage domestic industries to pursue these cases, once filed, more vigorously than in the absence of the potential receipt of these monetary rewards. Brazil submits that these cases already cost the Brazilian industries hundreds of thousands of dollars to defend. In addition, each annual review costs a responding company similar amounts. With the Byrd Amendment, even if a domestic industry has obtained the measure of relief necessary to eliminate the injury, there remains the incentive to pursue reviews in order to increase revenues. Thus, according to Brazil, the real costs to exporting industries will increase, both in terms of higher defense costs and higher duties. In short, according to Brazil, with an incentive to maximize the duties because it means higher revenues for the domestic industry, the narrow objectives of the AD and SCM Agreements no longer define the process or the remedy. An additional objective – creating the maximum revenue possible for the complaining domestic industry – has been introduced.

4.288 The second concern of Brazil relates to the message that would be conveyed if this panel endorsed the notion that monetary rewards were an appropriate remedy under the WTO. Brazil argues that if this panel endorsed the Byrd Amendment payments, it would be making a finding that, irrespective of restrictions on remedies available under WTO agreements, a government may unilaterally take whatever additional steps it deems appropriate. The US believes that, so long as it does not directly increase the financial burden on the offending party, any action should be permitted, even those linked directly to the WTO authorized remedy, in serving the same objectives.

4.289 Brazil argues that, as pointed out in Brazil's submission, the US steel industry in a pending safeguards action has suggested that the revenues from higher duties imposed as safeguard measures be used to finance the government assumption of liabilities that are responsible for many of the problems of the industry. Monetary rewards or "damages" have never been a part of the WTO or

GATT systems for enforcing obligations. Brazil submits that this panel should not open the door to this possibility.

4.290 Finally, Brazil argues that, as a developing country, it has additional concerns about the disproportionate new burdens created by the Byrd Amendment for developing country exporters. According to Brazil, both the AD and SCM Agreements provide for the cumulative assessment of the effects of imports from multiple sources on injury to the domestic industry in the importing country. This approach, commonly referred to as "cumulation", is permitted under Article 3.3 of the AD Agreement and Article 15.3 of the SCM Agreement. In effect, cumulation allows for inclusion of marginal suppliers in anti-dumping and countervailing measures in circumstances under which these suppliers alone would not be causing injury to the importing country industry.

4.291 Brazil asserts that the effects of cumulation are felt mostly by developing countries because industries in these countries tend to be the smaller, newer, marginal suppliers to major markets. Yet, the use of the cumulation provisions of the agreements has been tempered by the need to balance the marginal costs of adding additional suppliers with the marginal benefit of including those suppliers. However, the Byrd Amendment is likely to encourage the filing of more cases against marginal suppliers, primarily developing country suppliers, under the cumulation provisions of the agreements in order to create maximum revenues for distribution to the complaining industries. As such, the Byrd Amendment is likely to have a disproportionate impact on developing country industries, exactly the opposite of the special and differential treatment which is encouraged under Article 27 of the SCM Agreement and Article 15 of the AD Agreement.

(ii) The United States attempts to mischaracterize the issue in this proceeding as one of sovereign rights rather than one of sovereign obligations

4.292 Brazil posits that the essence of the US argument in support of the Byrd Amendment is captured in paragraph 20 of the First Submission of the United States:

> While it is true that WTO Members have agreed to exercise their sovereignty according to their WTO Agreement commitments, the converse is also true. A commitment not made cannot be broken. When the agreement is silent on an issue, a panel cannot find a violation.

4.293 The US continues in paragraph 25 by claiming:

> Members are free to pursue their own domestic goals through spending so long as they do not do so in a way that violates commitments made in the WTO Agreement.

4.294 Brazil argues that it is clear from these two examples that the US wishes to characterize the issue in this proceeding as an unwarranted intrusion on the ability of a Member to spend its revenues as it sees fit, including assisting industries injured by imports. In fact, Brazil asserts, this is not the issue. The issue before the panel is very specific, namely whether the distribution of anti-dumping and countervailing duty revenues by the US is inconsistent with the limitations on anti-dumping and countervailing measures specified in the AD and SCM Agreements and, therefore, in violation of US WTO obligations.

4.295 Brazil is of the view that no one is challenging the right of the US to choose how its revenues are disbursed. The issue is whether in the particular situation of the Byrd Amendment, the US distribution of anti-dumping and countervailing duty revenues to the requesting parties is consistent with US WTO obligations. There is a direct link between the imposition of anti-dumping and countervailing duties under the Tariff Act of 1930 (the US law authorizing investigation of dumping

and subsidization and the imposition of anti-dumping and countervailing duties) and the entitlement to payments under the Byrd Amendment. Without a finding of dumping and subsidization and the collection of anti-dumping and countervailing duties, there are no payments under the Byrd Amendment. Thus, the question is not whether the US is free to spend the revenues from anti-dumping and countervailing duties as it sees fit, but rather whether there is a direct relationship between the payments under the Byrd Amendment and US WTO obligations under the AD and SCM Agreements such that those payments are linked to and become part of the remedies for dumping and subsidization.

4.296 Brazil argues that one needs to distinguish between payments which benefit domestic parties injured by imports and payments which are linked directly to and are part of the anti-dumping and countervailing measures permitted by the agreements. For example, the US has an extensive programme of so-called Trade Adjustment Assistance intended to help companies and workers that are injured by import competition. However, there is no direct linkage between the entitlement to or the revenues for such assistance and the collection of anti-dumping and countervailing duties, as is the case with the Byrd Amendment. Indeed, according to Brazil, that is precisely what distinguishes the Byrd Amendment, namely the direct relationship between the entitlement and distribution of revenues and anti-dumping and countervailing measures.

4.297 Brazil asserts that the US takes the position that the language of Articles 18.1 and 32.1, respectively, of the AD and SCM Agreements – "specific action against" dumping and subsidies – means that the action must "apply to the imported good or the importer, and it must be burdensome."[86] Brazil addresses its view of the interpretation of this language below, but argues that even using the US interpretation, the Byrd Amendment is specific action against an importer and is burdensome. The parties requesting the imposition of anti-dumping and countervailing duties must be, after all, direct competitors with the imported product and, therefore, with the importers and exporters of that product. If they were not direct competitors, then they would not have standing to request the imposition of duties. These same parties then receive the proceeds of the duties paid on the competing imported product and can use these payments in competition with the imported product, the importers and the exporters. They can use the funds for a variety of activities which enhance their competitiveness, including research and development, capital expenditures, and for the purchase of equipment and raw materials. Costs that they would otherwise incur are now covered by the Byrd Amendment payments. The assumption through the Byrd Amendment payments of some of the costs of the domestic industry in the importing country necessarily increases their competitiveness. The imported product, the importer and the exporter are, therefore, all facing a greater competitive burden, namely domestic competitors in the import market that are more competitive as a result of the Byrd Amendment payments. As such, there is an additional burden on imported products, importers and exporters as a result of the Byrd Amendment, precisely the criteria specified by the US as falling within the language "specific action against."

(iii) The Byrd Amendment provides remedies to counter dumping and subsidization of imports which are in addition to remedies authorized by the relevant agreements

4.298 The panel and Appellate Body in *United States - Anti-dumping Act of 1916* ("1916 Act")[87] addressed the parameters of measures permitted under the AD Agreement. Specifically, two issues were addressed: (1) whether Article VI of the GATT 1994 as interpreted by the AD Agreement limits

[86] United States – Continued Dumping and Subsidy Act of 2000, First Written Submission of the United States of America, DS217 and 234, para.92, 14 January 2002.

[87] *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000 and Report of the Panel, WT/DS136/R, 31 March 2000 and WT/DS162/R 29 May 2000.

specific actions against dumping to those actions provided for in Article VI or the AD Agreement; and (2) whether additional measures targeted at dumping were within the scope of the limitations imposed by Article VI and the AD Agreement.[88]

4.299 Brazil argues that the starting point of the analysis of both the panel and Appellate Body was Article 18.1 of the AD Agreement. As the panel knows, Article 18.1 prohibits "specific action against dumping…. except in accordance with the provisions of the GATT 1994, as interpreted by this [AD] Agreement." The Appellate Body defined "specific action against dumping" as "action that is taken in response to situations presenting the constituent elements of 'dumping'."[89]

4.300 According to Brazil, the first question this panel must address is whether actions under the Byrd Amendment are actions taken in response to situations presenting the constituent elements of "dumping." The answer to this question in the case of the Byrd Amendment is even clearer than it was in the case of the 1916 Act.

4.301 Brazil posits that the 1916 Act proceeding involved: (i) a statute that was wholly independent of the statute under which anti-dumping duties are imposed in the United States (i.e., the anti-dumping provisions of the Tariff Act of 1930); (ii) standards that were different than the standards under which anti-dumping duties are determined (for example, the 1916 Act also includes "intent to destroy or injure" as part of the substantive finding on which relief is based, an element not present in the Tariff Act of 1930 or the AD Agreement); and (iii) remedies which were not dependent on or linked to actions or determinations related to the imposition of anti-dumping measures under the anti-dumping provisions of the Tariff Act of 1930. Notwithstanding the above,[90] the statute was found to be inconsistent with US obligations under the AD Agreement.

4.302 Brazil asserts that in contrast, the Byrd Amendment only applies in situations where there have been affirmative determinations of dumping and injury under the anti-dumping provisions of the Tariff Act of 1930 and an anti-dumping duty order has been issued. Thus, entitlement to the Byrd Amendment remedies is directly dependent on establishing the "constituent elements of 'dumping'" because the entitlement arises out of the same determination of dumping and injury, made under the same statute, in the same proceeding, and by the same authorities as do the underlying anti-dumping measures which give rise to the entitlement. In short, there are no Byrd Amendment remedies unless there is an anti-dumping duty order under the provisions of the Tariff Act of 1930 that implement the AD Agreement. The very same elements must be established to obtain anti-dumping measures and Byrd Amendment remedies.

4.303 Brazil submits that having established that the Byrd Amendment provides remedies based on the "constituent elements of 'dumping'", the second question for the panel is whether the distribution of the revenues from anti-dumping duties under the Byrd Amendment constitutes "a specific action against dumping…not in accordance with the AD Agreement." In the words of the panel in the 1916 Act proceeding, does the Byrd Amendment provide "for other remedies than anti-dumping duties."[91]

4.304 Brazil believes that the statements by the sponsors and supporters of the Byrd Amendment are quite persuasive on the issue of whether the Byrd Amendment payments are an additional remedy. Senator Byrd stated:

[88] Id. Report of the Appellate Body at paras. 127-133
[89] Id. at para. 126
[90] Id. at paras. 127-133.
[91] Id. Report of the Panel at paras. 204-205.

> The US agriculture and manufacturing sectors have been able to avail themselves of legal remedies to challenge foreign actions, but have not had adequate means to recover from the losses resulting from those actions. Now, such a mechanism will be in place and US farmers and workers of all trades affected by unfair trade practices will be able, in essence, to recover monetarily….[92]

4.305 Senator DeWine, who originally conceived of the idea of distributing the revenues of anti-dumping and countervailing duties to complaining parties, very specifically stated that the payments contemplated under the Byrd Amendment are intended to "compensate for damages" and to have the effect of discouraging "foreign companies from dumping and subsidization, since it would actually assist US competitors at their expense."[93] Brazil notes that he calls the distribution of duties under the Byrd Amendment a "double hit."[94]

4.306 Brazil is of the opinion that while the intention of the WTO agreements is not to intrude on the ability of sovereigns to spend their tax revenues as they see fit, there are constraints on spending tax revenues in a manner which leads to violations or non-violation nullification and impairment of obligations under those agreements. There are numerous situations in which WTO obligations, whether specific limitations or general obligations, affect the freedom of Members to spend or forego revenues when such actions are inconsistent with WTO obligations.

4.307 Brazil argues that the objective of anti-dumping measures is clearly articulated in Article VI:2 of the GATT 1994. It is to "offset or prevent" dumping. Antidumping duties impose a penalty on products that are dumped; this ultimately discourages or prevents dumping. If anti-dumping duties do not discourage or prevent dumping, then their assessment in cases where dumping continues offsets the effects of dumping. Similarly, anti-dumping measures in the form of price undertakings prevent dumping because the exporter agrees to eliminate all of the margin of dumping or at least as much as is necessary to eliminate the injurious effects of dumping.

4.308 According to Brazil, the AD Agreement authorizes anti-dumping duties and price undertakings as the only measures to offset or prevent dumping. Logically, this means that any measures other than anti-dumping duties and price undertakings that offset or prevent dumping are not authorized by the AD Agreement. Article 18.1 does not qualify the actions that are not permitted; rather it states "no specific action." It does not say that no specific action shall be taken with respect to the imported product or that no specific action may be taken with respect to the exporter or importer. It says "no specific action." Thus, any actions which have the effect of offsetting or preventing dumping, other than anti-dumping duties and price undertakings authorized by the AD Agreement fall within the prohibition of Article 18.1. It is immaterial whether the action imposes an additional burden on the export product or the exporter. What is relevant is whether the actions go beyond those authorized in the agreement and have the effect of further offsetting or preventing dumping.

4.309 Clearly, in Brazil's view, the Byrd Amendment payments have the effect of offsetting and preventing dumping. First, they provide additional incentive for the exporting entity not to dump because every time an exporter dumps a product the revenues from the anti-dumping duties go to his competitors in the importing country market. Second, they provide an additional offset for the

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[92] 146 Cong. Rec. S10697 (daily ed. 18 October 2000) (statement by Senator Robert Byrd). See, Common Exhibit 11.

[93] 144 Cong. Rec. S7883-7884 (daily ed. 9 July 1998) (Statement of Senator DeWine). Senator DeWine's bill was introduced as S. 2281 in the Senate on 9 July 1998 and by Representative Regula as H.R. 2509 in the House of Representatives on 18 September 1997.

[94] Id.

industry in the importing country by rewarding that industry with what are, in effect, damages. Indeed, what motivated the Byrd Amendment was the desire to provide additional penalties for dumping to discourage dumping and additional "offsets" in the form of damages to the aggrieved companies in the importing country if the dumping continues.

4.310 Brazil considers that the Byrd Amendment payments are additional actions that prevent and offset the effects of dumping. These payments are not authorized by the AD Agreement and, as such, are inconsistent with the agreement.

(iv) The Byrd Amendment payments are also specific action against subsidies not authorized by the Agreement on Subsidies and Countervailing Measures

4.311 Brazil asserts that Article 32.1 of the SCM Agreement is the counterpart of Article 18.1 of the AD Agreement. It prohibits Members from taking any "specific action against a subsidy" unless that action is consistent with Article VI:3 of the GATT 1994, as interpreted by the SCM Agreement. As such, the arguments that Byrd Amendment payments are inconsistent with the SCM Agreement are identical to the arguments that these payments are inconsistent with the AD Agreement.

3. Canada

(a) Introduction

4.312 Canada argues that the measure before the Panel is the Continued Dumping and Subsidy Offset Act of 2000, also known as the Byrd Amendment. Canada's oral submission addresses four central substantive issues, but first it sets out what this dispute is not about.

(b) "Request" for adjudication *ex aequo et bono*

4.313 Canada does not seek adjudication *ex aequo et bono*, or to establish a "new legal relationship". It asks the Panel to interpret and apply disciplines duly incorporated into the subject agreements and determine whether those disciplines encompass the measure at issue. Correctly interpreted and applied, those disciplines prohibit measures like the Byrd Amendment. In so finding, the Panel will not be acting *ex aequo et bono* but holding the United States to the legal obligations it negotiated and undertook.

(c) The Byrd Amendment violates GATT 1994 and the Anti-Dumping and SCM Agreements

4.314 Canada asserts that five elements in the operation of the Byrd Amendment are crucial to the way it should be viewed, and assessed, by the Panel. None of these elements is contested by the United States.

- **first**, anti-dumping and countervailing duties collected must be distributed to the producers that qualify under a specific order;

- **second**, all duties collected following an affirmative determination of the existence of dumping or a subsidy causing injury are distributed to qualifying producers, and it is only anti-dumping and countervailing duties under a specific order that are so distributed;

- **third**, the duties are distributed to only those producers that have brought or supported a petition for the imposition of those duties;

- **fourth**, Byrd Amendment payments reimburse expenditures related to the product that competes with the imported products covered by an order; and

- **fifth**, the Byrd Amendment "offsets" what it characterises as "continued dumping or subsidy". Duties collected pursuant to a determination are distributed to producers supporting that particular investigation or determination, for harm they have suffered because of dumping and subsidisation of products against which they compete.

4.315 According to Canada, the Byrd Amendment thus adds a new element to the anti-dumping and countervailing duty regime of the United States. It is not a general subsidy that could have been present in any legislation but rather a specific action against dumping or a subsidy in breach of the obligations of the United States under the WTO Agreement.

4.316 Canada posits that the legal provisions at issue are Articles 18.1 of the Anti-dumping Agreement, 32.1 of the SCM Agreement and VI of GATT 1994. Each requires that specific action against dumping or subsidies accord with Article VI of GATT 1994.

4.317 In Canada's view, in the *1916 Anti-Dumping Act* case the Appellate Body made two findings that are relevant to this case. First, it found that a "specific action" against dumping taken in a form other than a form authorized under Article VI of GATT 1994, as interpreted by the Anti-Dumping Agreement violates Article 18.1. These forms are limited to definitive anti-dumping duties, provisional measures, and price undertakings.

4.318 Second, Canada argues, the Appellate Body noted, "specific action against dumping … at a minimum encompass[es] action that may be taken only when the constituent elements of 'dumping' are present." The Japan panel findings in the *1916 Anti-Dumping Act* case clarify this point. It notes that to the extent that a measure responds to the constituent elements of dumping, it constitutes a "specific action against dumping."

4.319 According to Canada, Article 32.1 of the SCM Agreement similarly contains a prohibition on "specific action against a subsidy of another Member" when such action is not taken in accordance with Article VI of GATT 1994 as interpreted by the SCM Agreement.

4.320 Canada asserts that the basic operating elements of the measure place it squarely within the term "specific action against dumping [or a subsidy]." The United States mentions only two, but in fact three elements must be present for the Byrd Amendment to operate. All three relate to and are dependent on one another: first, an order imposed after a finding that there is a situation presenting the constituent elements of dumping or a subsidy; second, an affected domestic producer must have brought or supported the originating petition; third, a qualifying expenditure must relate to a product covered by the order**.**

4.321 According to Canada, these three elements have one thing in common: the order. Payments under the Byrd Amendment have one purpose: to respond to, counteract, and specifically act against dumping or a subsidy. The Byrd Amendment has one object: to further harass goods found to be dumped or subsidised. Though a "specific action", the Byrd Amendment is not an anti-dumping or countervailing duty, a provisional measure or an undertaking and therefore violates Articles VI of the GATT, 18.1 of the Anti-dumping Agreement and 32.1 of the SCM Agreement.

(d) US arguments are without merit

4.322 Canada argues that the legislative history of the Byrd Amendment simply establishes what section 1002 of the Byrd Amendment sets out expressly: that its purpose is to condemn injurious dumping and to neutralize subsidies that cause injury. It clarifies the nature of the measure before the Panel.

4.323 Canada asserts that the United States quotes the *1916 Anti-Dumping Act* panel and the Appellate Body finding that "the scope of Article VI and the Antidumping Agreement extends to measures that address dumping as such" and states that the Byrd Amendment does not. Canada considers it is worthwhile recalling the context in which that particular finding was made. The United States had argued that the 1916 Act "did not 'specifically target' dumping, but rather predatory pricing," and had additional requirements and therefore it was not against dumping "as such". The Appellate Body concluded that Members' practices should not escape discipline by simply characterising a practice as something other than dumping or subsidisation, by adding other requirements. It went on to find that the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping".

4.324 According to Canada, the Byrd Amendment is action that may only be taken when the constituent elements of dumping (or a subsidy) are present. The primary trigger for the application of the Byrd Amendment is a finding of dumping or subsidy causing injury and the imposition of an order. An order is only imposed in US anti-dumping and countervailing duty laws where the elements of dumping or a subsidy have first been established. The logical conclusion is inescapable: the Byrd Amendment is an action that takes place only where the constituent elements of dumping or a subsidy are present.

4.325 Canada posits that the text of the relevant legal provisions also militates against the US interpretation of the word "against". Articles 18.1 and 32.1 describe a "specific action" against a practice – dumping or a subsidy – rather than a good or an importer. The terms of the Byrd Amendment as well as its operation show that it is "specific action against dumping" or a subsidy. Payments – called "offsets" – are, by the express terms of the act, made to "condemn" and "neutralize" dumping or subsidies; payments are made only to those producers "affected" by dumping or subsidization; payments must relate directly to harm due to dumping and subsidization; and duties collected following each determination are segregated to ensure that payments are tied to particular dumping or subsidy findings. Byrd Amendment payments are thus a response to, or an action against, a particular set of practices, dumping and subsidies.

4.326 Finally, Canada submits, the US arguments concerning footnotes 24 and 56 turn Articles 18.1 and 32.1 into logical nonsense. The United States argues that Articles 18.1 and 32.1 discipline "specific actions against dumping" or a subsidy other than actions consistent with the GATT 1994. But if the US argument is correct, the prohibition of Articles 18.1 and 32.1 reaches only those measures that are already inconsistent with the GATT 1994. Canada asserts that this makes no sense: if the drafters saw a need to prohibit "specific action against dumping" or a subsidy other than those set out in "Article VI", it was to target "actions" that might otherwise be consistent with the GATT 1994 – that is, action that is not caught by other provisions. Any other reading of footnotes 24 and 56 would lead to the conclusion that Article 18.1 and 32.1 prohibited only those measures that were already inconsistent with the GATT 1994.

(e) Standing, undertakings and administration of laws

(i) Standing

4.327 Canada argues that for the obligation in Articles 5.4 and 11.4 to have any meaning, "examination" and "determination" ought to be objectively verifiable. It is not enough that the investigating authority satisfy itself of the support of the domestic industry. Rather, at minimum, the "determination" must be based on an objective "examination" of the "degree of support" of the domestic industry for an application.

4.328 Canada is of the view that the US arguments do not address the substance of the complainants' submissions. The Byrd Amendment's monetary rewards render suspect producers' participation in a petition and, as a result, the real degree of support of the domestic industry. The Byrd Amendment in effect makes it impossible for the United States to complete the examination required of it under Articles 5.4 and 11.4. An obligation to determine "quantitative" thresholds is meaningless where the law provides incentives to participants to decide one way or another – monetary reward for support and the threat of subsidised competition if no support is forthcoming.

4.329 Finally, Canada challenges the Byrd Amendment as such. Canada asserts that the United States has an obligation to examine and determine in good faith that a petition is supported by the domestic industry. Providing a monetary reward for producers to support an anti-dumping or a countervailing duty petition by its very operation precludes the possibility of an examination in good faith of industry support under Articles 5.4 and 11.4.

(ii) Undertakings

4.330 Canada asserts that Articles 8.1 of the Anti-dumping Agreement and 18.1 of the SCM Agreement require that a Member provide administering authorities the ability to enter into "price undertakings" to facilitate the early termination of investigations. Neither provision requires investigating authorities to accept undertakings, however, a good faith implementation of this obligation must mean that having granted such an authority, such discretion, Members must not subsequently undermine it.

4.331 According to Canada, under US law and pursuant to judicial decisions, views of the injured domestic industry must be given enormous weight by the authorities in accepting undertakings – weight that amounts to an effective veto for the industry. The Byrd Amendment provides a monetary reward for a domestic industry that sees anti-dumping and countervailing duty investigations taken to completion. The prospect of monetary reward does affect the decision of domestic producers to support an ongoing investigation over an undertaking. The Byrd Amendment renders the discretion to enter into undertakings meaningless, undermines the US obligation to consider undertakings in good faith and therefore violates Articles 8.1 of the Anti-dumping Agreement and 18.1 of the SCM Agreement.

(iii) The Byrd Amendment violates Article X:3 of the GATT 1994

4.332 Canada argues that Article X:3 of the GATT 1994 requires that Members administer their laws in a fair, reasonable and impartial manner. Where, because of certain requirements, the administration of a measure can be demonstrated to be necessarily unfair or unreasonable, a complainant does not need to adduce evidence of actual harm. That is, Members of the WTO should be permitted to prevent harm to their interests under Article X, rather than complain about it after the fact.

4.333 Canada is of the opinion that the Byrd Amendment mandates the payment of a monetary reward for supporting an anti-dumping and countervailing duty petition and penalises those domestic producers that do not. It necessarily encourages more petitions and makes it more likely that industry support will be established. It encourages domestic industry to thwart undertaking agreements. A law cannot be said to be or appear to be reasonable, neutral, fair and objective if there is an incentive that encourages a particular objective. The Byrd Amendment is, therefore, in breach of Article X:3(a) of GATT 1994.

(f) Conclusion

4.334 Canada asks the Panel to find the United States in violation of the specified WTO obligations and, as a consequence, in violation of Articles XVI:4 of GATT 1994, 18.4 of the Anti-dumping Agreement and 32.5 of the SCM Agreement.

4. Chile

(a) Introduction

4.335 Chile wishes to reaffirm each and every one of the arguments presented in the first written submission by Japan and Chile, and reiterates its conviction that the Continued Dumping and Subsidy Offset Act of 2000, is incompatible with GATT 1994; the Anti-Dumping; the SCM Agreement; and the WTO Agreement.

4.336 First, Chile argues, the Byrd Amendment is yet another on the long list of measures applied by the United States Government to restrict imports of certain products on the grounds that they constitute dumped and/or subsidised imports.

4.337 Chile asserts that according to the Annual Report (2001) of the WTO Dispute Settlement Body, 34 disputes over anti-dumping and/or countervailing measures have been initiated to date, of which 41 per cent were against the United States – i.e. more than one quarter of the disputes brought to the WTO against this country.

4.338 Chile considers that there are two reasons for these figures. The first is the considerable number of anti-dumping and countervailing measures applied by the United States. Between 1990 and 2000, there was an annual average of more than 30 final determinations of dumping and above six final determinations of subsidisation. Statistics also show that anti-dumping and countervailing measures affect – or, rather, benefit – only a small number of sectors, i.e. mainly the iron and steel, chemicals, textiles and agricultural sectors. Indeed, 56 per cent of anti-dumping duties in force on 1 December 2001 were being levied on steel or metal products. The figure for countervailing measures is even more significant, with 73 per cent of countervailing duties in force on 1 December last imposed on steel products, most of which are also subject to anti-dumping duty.

4.339 Chile is of the view that the figures indicate that the United States trade defence legislation is frequently used for purposes extremely different from the original objectives, as enshrined in the WTO Agreements. Chile's experience seems to substantiate such a view. Over the past 20 years, more than 50 per cent of Chile's exports to the United States have been – and some continue to be – subject to trade defence investigations, actions and measures.

4.340 Chile argues that the figures issued last week by the United States Customs Service reveal the perverse impact of this Act not only on international trade but potentially also on the North American market itself. 61 per cent of the US$206 million distributed during the fiscal year 2001 went to firms in the iron and steel and metallurgic industries. And among them, two firms in the same line of

business received more than US$90 million, that is, almost half of the total amount distributed. Over the preceding 12 months, one of those firms had reportedly posted losses in an amount almost equivalent to the funds received under the Amendment. In other words, a firm that had incurred losses is now able to show profits.

4.341 Chile asserts that this raises a whole number of questions. For example, what is the tax treatment applicable to funds distributed under the Byrd Amendment? How are firms required to account for such funds? Is the additional income divided among the shareholders?

4.342 According to Chile, competitors must certainly be most concerned to see firms receiving not inconsiderable amounts – as high as US$60 million in some cases – from the US tax authorities. This represents a massive transfer of funds from exporters/importers to producers by decision and action of the government, which, in normal circumstances, would have credited such revenues to the Treasury's general accounts. This is why Chile finds interesting the analysis conducted by Mexico, which views this mechanism also as a subsidy incompatible with the WTO.

4.343 Chile believes that another way of quantifying what the Byrd Amendment implies is to compare the amount distributed and the WTO budget (US$85 million) as well as the budget of General Directorate of International Economic Relations of the Chilean Ministry of Foreign Affairs, DIRECON (US$35 million) The sums distributed during the fiscal year 2001 would be enough to finance the WTO for a period of almost two and a half years. Or would finance Chile's entire foreign trade policy and export promotion programmes, including salaries and maintenance of offices in Chile and abroad for almost 6 year.

4.344 Chile asserts that the second point that emerges from its analysis is the inconsistency of certain provisions of US legislation, and the practice of its investigating authorities, with the obligations undertaken by the United States in the WTO. A number of panels as well as the Appellate Body have repeatedly revealed a pattern of inconsistencies in the legislation and practice of the United States, which interpret and apply the provisions of the Anti-Dumping Agreement in a manner that is not consistent with the meaning and scope of the provisions, as they were negotiated.

4.345 Chile is of the view that for US firms, the situation is as follows. Filing anti-dumping and countervailing duty petitions gives them a twofold advantage, by depriving imports of their competitive advantage while the firms themselves receive frequently substantial financial contributions, as evidenced by the figures. Moreover, legislation and practice make it easier – if not highly likely – to secure a favourable outcome, since even the weak disciplines of the WTO are not being respected.

4.346 According to Chile, the Byrd Amendment has turned into an easy, speedy and almost certain way of appropriating federal funds. Moreover, this is an almost compulsory step if a firm is not to lose its competitive edge in the domestic market. It is not therefore a matter of "subjective motivation", as suggested by the United States, but a quasi-obligation.

4.347 Chile posits that anti-dumping measures in particular constitute interference in decisions reached on the basis of market forces. The Byrd Amendment constitutes additional interference. It is like adding insult to injury. Instead of using federal government funds to help adjust the domestic industry to the new terms of competition, the Byrd Amendment is an incentive for beneficiaries to continue producing with less competition and an invitation or incitement to other firms to follow a similar course and seek to appropriate federal funds without giving up or providing anything in exchange.

4.348 Second, Chile argues that the sovereign authority of nations to use the revenues they collect is restricted by the commitments and obligations undertaken under WTO Agreements.

4.349 Chile has not questioned the sovereign right of the US to freely use the tax revenues it collects. Chile's argument is that such a right is restricted by international commitments, a fact that the United States itself recognises. There are commitments expressly undertaken in the field of taxation or allocation of tax revenues, such as those made under the Agreements on Agriculture, Trade in Services, Subsidies and Countervailing Measures and the GATT 1994, but others as well, as Chile states it pointed out in the first written submission with Japan.

4.350 Chile asserts that the sovereign right of the United States to use revenues from the levy of anti-dumping and countervailing duties is restricted by the commitment not to apply measures against dumping or subsidies other than those expressly prescribed in the Anti-Dumping and SCM Agreements. This sovereign right is also restricted by the fact that if funds are used in the manner contemplated in the Byrd Amendment, the investigating authorities will not be able to fulfil, in an objective and impartial manner, the obligations imposed by the two aforementioned Agreements, *inter alia* those set forth in Articles 5.4 and 8.1 of the Anti-Dumping Agreement and Articles 11.4 and 18.1 of the SCM Agreement.

4.351 And third, according to Chile, contrary to what the United States argues, the Byrd Amendment is indeed an action against dumping and subsidisation.

4.352 The preamble to the Amendment is clear. It states that continued dumping or subsidisation after the issuance of anti-dumping orders or countervailing duty orders can frustrate the remedial purpose of United States trade laws, adding that the purpose of the latter is the restoration of conditions of fair trade. This is why Congress deemed it necessary to strengthen trade legislation and achieve that remedial purpose.

4.353 Chile does not question the fact that the ultimate goal of legislation may not be successfully achieved. The issue at stake is, as the United States itself emphasises when it refers to the Report of the Panel in *United States – Anti-Dumping Act of 1916* and the Panel's finding that the purpose of a law does not exclude the latter from the scope of Article VI and hence from the scope of the WTO Agreements. What is more, as case law clearly demonstrates, there is no requirement whatsoever to prove that a tax measure has a particular impact on trade. Therefore, Chile believes it should not await the impact the Byrd Amendment in order to determine whether the Amendment is incompatible with the WTO.

4.354 Chile argues that the object of the Byrd Amendment is to strengthen US trade laws in order to achieve the remedial purpose contemplated in those laws.

4.355 Chile asserts that according to the *Diccionario de la Real Academia de la Lengua Española*, the term "remedy" means "a measure taken in order to redress an injury or disadvantage". This is precisely the purpose stated by the US legislature in the preamble to the Amendment. And this is precisely what, according to WTO case law, is limited to anti-dumping duties, provisional measures and prices undertakings, and hence, in the case of subsidies, to countervailing duties and countermeasures authorised by the Dispute Settlement Body.

4.356 According to Chile, the United States cleverly uses a definition of the word "against" that differs entirely from the meaning given by those who negotiated the Anti-Dumping Agreement. The Spanish version of the Agreement uses the expression "*en contra de*", which in English means "against". In Spanish the term could never be equated with "*en contacto con*" ("in contact with"). Chile argues that this is not the first time that the United States has used an English-language

dictionary to make its own interpretation of the provisions of the WTO Agreements. The Agreements are in force in three languages, all three versions being equally authentic. Hence, in order for panels to determine the meaning and scope of the provisions of the covered Agreements, the intent of those who negotiated them must be taken into account in a manner that it does not contradict the wording of the different versions.

4.357 Chile submits that in this particular case, the wording of the Spanish and English versions is clear, "against" and "en contra" meaning "in opposition to, contrary to" and "*en oposición a, en contraposición con*".

(b) Conclusion

4.358 Chile asserts that the Continued Dumping and Subsidy Offset Act of 2000 is yet another example of the inconsistency of the legislation and practice of the United States with the commitments undertaken in the WTO. Not only it provides for a perverse incentive to initiate dumping and countervailing duty investigations but also violates certain provisions of the WTO Agreements by providing for action against dumping and subsidies which both the Agreements and case law restrict to specific measures. Likewise, the Amendment contravenes the obligation of the United States investigating authorities to apply US anti-dumping and countervailing duty laws in a reasonable, impartial and uniform manner, and to proceed in an objective and impartial manner in determining the domestic industry's degree of support and analysing price undertaking proposals. Consequently, the United States is also in breach of its obligations to ensure the conformity of its laws, regulations and administrative procedures with the covered Agreements.

4.359 Chile respectfully requests the Panel to confirm the above violations and inconsistencies and expressly to recommend that the United States repeal the Amendment in question. It thanks the Panel for the opportunity to express its views.

5. European Communities

(a) A Member's Right to appropriate anti-dumping and countervailing duties must be exercised in conformity with its WTO obligations

4.360 According to the European Communities, the United States argues that, since the WTO Agreement contains no provisions addressing the appropriation of anti-dumping and countervailing duties, Members have an unrestricted right to spend those funds as they wish.

4.361 The European Communities submits that it is not disputed that the WTO Agreement contains no such provision. But from this it does not follow that any action financed from "lawfully assessed and collected" anti-dumping and countervailing duties must be necessarily in conformity with the WTO Agreement. A measure that constitutes "specific action" against dumping or subsidisation does not escape the prohibition contained in Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, respectively, simply because it is financed from "lawfully assessed and collected" anti-dumping or countervailing duties. The US argued unsuccessfully already in 1916 – Act that, since the Anti-Dumping Agreement did not regulate specifically the type of measures provided by the 1916 Antidumping Act, such measures were not subject to the Anti-Dumping Agreement.

4.362 The EC agrees that this Panel may not decide this dispute ex aequo et bono. However, since no complainant has requested the Panel to do so, the arguments to that effect made by the United States are pointless.

(b) Articles 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement

4.363 The United States argues that the Byrd Amendment is not "based upon the constituent elements of dumping or subsidisation", but instead upon the applicant's qualification as an "affected domestic producer" with "qualifying expenditures". It is the view of the European Communities that the relevant analysis cannot stop at that point but must also take account of the meaning of the notion of "affected domestic producer". Under the Byrd Amendment, an "affected domestic producer" is a producer "affected" by dumping or subsidisation, which has been the subject of an anti-dumping or a countervailing duty order. Thus, it is undeniable that the offset payments are not just "based upon", but indeed conditional upon a finding of dumping or subsidisation.

4.364 According to the European Communities, the United States further alleges that the Byrd Amendment is not action "against" dumping or subsidisation because it does not "apply" directly to the imported goods or the importers. In the view of the European Communities, the United States cites no authority in support of this proposition, other than a dictionary definition, according to which one of the ordinary meanings of the term "against" is "into contact with". The same dictionary gives other meanings of the term "against" which are far more pertinent in this context, but have been conveniently omitted from the US submission. These include, for example, "in competition with", "to the disadvantage of", "in resistance to" and "as protection from". These meanings evidence that the notion of action "against" dumping or subsidisation may include not only action that imposes a direct "liability" on dumped or subsidised imports (or importers), but also action that affords protection to the domestic producers by giving them an advantage over the dumped or subsidised imports with which they compete.

4.365 In the opinion of the European Communities, the reason why distributing duties to a charity or raising the flag at half-mast are not "specific action against dumping or subsidisation" is because they are manifestly inapt to have any impact whatsoever on dumping or subsidisation, and not because they do not "apply" directly to imports or importers. The same cannot be said of the offset payments under the Byrd Amendment. Even if the offset payments do not "apply" directly to dumped or subsidised imports, they are objectively apt to affect such imports. Whether or not they achieve that result in specific instances is irrelevant because Article 18.1 and 32.1 are not subject to any "actual effects" test.

4.366 Moreover, according to the European Communities, the complainants have shown that the stated purpose of the Byrd Amendment is to provide an additional remedy against dumping and subsidisation. The United States argues that the purpose of the Byrd Amendment is "legally irrelevant" by citing the two panel reports in *United States - 1916 Act*. Yet those reports do not stand for the proposition that the purpose of a measure is always irrelevant, but rather for the proposition that the stated purpose of a measure is not necessarily decisive.

4.367 The European Communities argues that the panels in 1916 Act were concerned that if the characterisation of a measure as "specific action against dumping" were dependent upon its stated purpose, it would become extremely easy for Members to escape the prohibition contained in Article 18.1. This concern does not arise here. There appears to be no disagreement between the parties regarding the purpose of the Byrd Amendment. The US submission denies the legal relevance of the purpose of a measure in the abstract, but does not argue that the Byrd Amendment has a different purpose from that shown by the complainants. Nor has the United States argued that the Byrd Amendment is inapt to achieve its stated purpose. Indeed, to argue that would be tantamount to accusing the US legislators of being either insincere or incompetent.

4.368 The European Communities asserts that the United States contends that the offset payments are "permitted" by footnotes 24 and 56 because they are subsidies allowed by Article XVI of the

GATT. This argument is flawed on several counts. First, the United States appears to have misunderstood the relationship between Articles 18.1 and 32.1 and their respective footnotes. Footnotes 24 and 56 are not exceptions to Articles 18.1 and 32.1. Rather, they serve to clarify the scope of those two provisions. If a measure constitutes specific action against dumping or subsidisation, it stands prohibited by those Articles and cannot be "permitted" by the footnotes. Second, the United States disregards that the SCM Agreement does not interpret only the subsidies provisions of Article VI of the GATT. The SCM Agreement is also an interpretation of Article XVI. Therefore, Article XVI cannot be one of the "other relevant provisions of GATT 1994" mentioned in footnote 56. Third, footnotes 24 and 56 allude to action taken "under other relevant provisions" of the GATT. This is not the same as action "consistent with some other GATT provision". The "other relevant provisions" referred to in footnotes 24 and 56 are those GATT provisions which confer and regulate positively the right to take a certain type of remedial action, such as Article VI, Article XIX, or Articles XII and XVIII. Article XVI is not one of such "relevant provisions". Fourth, the United States disregards that a measure may be consistent with Parts II and III of the SCM Agreement and still be prohibited, on different grounds, by another WTO provision (e.g. with Article III:2 of the GATT).

4.369 Finally, in the view of the European Communities, the United States misconstrues the findings of the two panels in 1916 Act. Those panels have explained that the purpose of footnote 24 is to clarify that Article 18.1 does not prevent Members from taking action in response to situations that involve dumping, where the existence of dumping is not the event that triggers such action. For example, Article 18.1 does not preclude the adoption of safeguard measures under Article XIX of GATT against an increase in imports, even if such increase is the result of dumping, because the reason for imposing the safeguard measure is the increase in imports as such, and not the existence of dumping. Unlike safeguard measures, the offset payments are conditional upon a finding or subsidisation. For that reason, it is indisputable that they constitute specific action against dumping of subsidisation rather than the type of "non-specific" action envisaged in footnotes 24 and 56.

(c) Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.370 The European Communities posits that the US's submission nowhere addresses the EC' argument that the Byrd Amendment is incompatible with the obligation to conduct an objective, good faith, examination of whether an application is made "by or on behalf of the domestic industry" because, through the offset payments, the US authorities are unduly influencing the very facts which they are supposed to examine.

4.371 The EC also argues that, by its very existence, the Byrd Amendment calls into question the credibility of any applications and expressions of support made by the US producers and, as a result, makes it impossible for the US authorities to reach a proper determination of support, whether positive or negative. In response to this second argument, the United States contends that Articles 5.4 and Article 11.4 do not require that the administering authorities assess the "subjective motivations" of the producers' expressions of support. The only requirement is "to determine whether the quantitative benchmarks have been met".

4.372 However, according to the European Communities, those two requirements cannot be dissociated. A formal declaration of support is not always evidence of "support" within the meaning of Articles 5.4 and 11.4. The EC is not suggesting that the authorities must seek actively to ascertain what the United States calls the "subjective motivations" of the domestic producers in each and every investigation. As a general rule, the authorities may legitimately assume that a producer who declares formally its support for an application does indeed support the application. But if there is evidence calling into question the credibility of a declaration of support, the administering authorities cannot ignore such evidence without violating Articles 5.4 and 11.4. The same is true, and indeed *a fortiori*,

where, as in the case at hand, the declarations of support have been influenced by the action of the authorities themselves, which therefore cannot pretend to ignore the effects of those actions. Therefore, the formalistic position taken by the United States would lead to absurd and unreasonable results and cannot be correct.

4.373 The European Communities argues that the United States further contends that, in any event, the complainants have not provided any evidence showing that, in practice, "producers are supporting investigations they would have opposed in the absence of the CDSOA and that their support was necessary to initiate the investigation". The reason why the complainants cannot provide such evidence is precisely because, as a result of the Byrd Amendment, it has become impossible, both for the complainants and for the US authorities, to tell whether a domestic producer supports the imposition of measures as such or the distribution of the offset. The appropriate consequence to be drawn from this is not that the Byrd Amendment can have no effects on the level of support, but rather that the US authorities are no longer in a position to make a proper determination of support, whether positive or negative, before initiating an investigation, contrary to the requirement imposed by Articles 5.4 and 11.4.

4.374 In the opinion of the European Communities, the indisputable fact is that the Byrd Amendment provides a strong financial incentive to file or support applications. It may well be that in some cases such incentive will be inconsequential because, as argued by the United States, the domestic producers would have filed or supported the application anyway. But in an indefinite number of other cases the Byrd Amendment will have a decisive impact on the outcome of the support determination. Such possibility is enough to conclude that the Byrd Amendment is inconsistent with Articles 5.4 and 11.4.

(d) Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement

4.375 The European Communities asserts that the United States alleges that the Byrd Amendment cannot violate Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement because, in any event, the administering authority enjoys "complete discretion" in order to decide whether or not to accept an undertaking. The EC disagrees. The first sentence of Articles 8.3 and 18.3 makes it clear that the administering authority must have a "reason" for rejecting an undertaking and, hence, that such rejection is not within the authority's "complete discretion". Although Articles 8.3 and 18.3 do not limit a priori the types of reasons which may be invoked by the authority, this does not mean that the authority can invoke all sorts of motives. The petitioner's opposition may be a pertinent "reason" for rejecting an undertaking where it reflects the legitimate concern that the undertaking will not provide equivalent protection. On the other hand, the interest of the petitioners in securing the windfall of the offset payments is an extraneous consideration, which cannot be regarded as a pertinent "reason" for rejecting an undertaking.

4.376 The United States also argues that the rights afforded to the petitioners in the context of a proposed undertaking are procedural in nature, not substantive. According to the European Communities, it remains, nevertheless, that no other party enjoys the same rights. Moreover, the United States does not dispute that the stated policy of its authorities is to accord a "considerable weight" to the petitioners' opposition. Clearly, this policy goes beyond granting merely procedural rights.

4.377 The United States further alleges that, in practice, the majority of undertakings accepted by the US authorities since 1996 were entered into over the opposition of the petitioners. However, in the view of the European Communities, in order to have a complete and meaningful picture of the relevant US practice, it would be essential to know also how many undertakings were rejected, or

were not offered in the first place, because of the opposition expressed, formally or informally, by the domestic industry.

4.378 Finally, the United States argues that there is no reason to believe that the domestic industry will oppose an undertaking as a result of the Byrd Amendment. However, it may well be that, as argued by the United States, the petitioners' primary main concern is "a return to the conditions of fair trade". According to the European Communities, that objective can be achieved as well through the imposition of duties. The Byrd Amendment allows the petitioners to have it both ways: they can have a "return to conditions of fair trade" and, in addition, the windfall of the offset payments.

(e) Article X:3 (a) of the GATT

4.379 The European Communities argues that the reply given by the United States to the complainants' claim under Article X:3 (a) suggests that the United States has misunderstood this claim. First, this claim is not concerned with the administration of the Byrd Amendment. The EC's claim is that the Byrd Amendment results in an unreasonable and partial administration of the provisions of the US anti-dumping and countervailing duty laws and regulations governing the initiation of investigations and the acceptance of undertakings. Thus, the "administrative" measure at issue is the Byrd Amendment, whereas the "administered" measures are the US anti-dumping laws and regulations. Second, this claim was clearly stated in the request for the establishment of a panel.

4.380 Third, the United States alleges that the complainants have provided no evidence concerning the "day-to-day administration". This, the European Communities asserts, suggests that the United States has misunderstood also the scope of the obligations imposed by Article X:3 (a). As explained by the panel in Argentina – Hides and Skins, Article X.3 (a) is not concerned only with individual acts of enforcement or with "unwritten" administrative practices. It may apply as well with respect to generally applicable measures. The same panel concluded that the administrative measure at issue was incompatible with Article X:3(a) because it gave rise to an "inherent danger" that the administered measures would be applied in a partial manner.

4.381 The European Communities submits that the complainants have demonstrated that the Byrd Amendment creates an "inherent danger" that the US anti-dumping and countervailing duty laws will be applied in a partial and unreasonable manner. Such "inherent danger" is of itself sufficient to find that the Byrd Amendment is inconsistent with Article X:3 (a) of the GATT.

(f) Article 5 (b) of the SCM Agreement

4.382 The European Communities argues that the United States argues, among other things, that the offset payments are not "specific". This is clearly incorrect. The Byrd Amendment explicitly limits access to the offset payments to "certain enterprises": the "affected domestic producers", which are defined as those which have filed or supported an application for the imposition of anti-dumping or countervailing duties. This condition is not "economic in nature" and, therefore, is not an "objective" condition or criterion within the meaning of Article 2.1 (b) of the SCM Agreement.

6. India

4.383 In its first submission India along with certain complainants had offered a comprehensive factual framework and legal arguments establishing why the Continued Dumping and Subsidy Offset Act (CDSOA/Byrd Amendment) violates the obligation of US under WTO Agreements. In order to avoid unnecessary repetition, India in its statement offers some preliminary remarks on some of the assertions made by the United States in its first written submission.

4.384 The United States asserts that the CDSOA is not an action against dumping or subsidisation because "it imposes no burden or liability on imports or importers". However, in India's view, there is no basis either in the Anti-dumping Agreement or in the SCM Agreement for this requirement in order to take specific action against dumping or subsidization. The Appellate Body has in the 1916 Anti dumping Act case held that "specific action against dumping" is "action that is taken in response to situations presenting the constituent elements of dumping". It is not clear the basis on which the United States seeks to introduce an additional requirement of an action imposing a burden or liability on imports or importers for it to be characterized as an action against dumping.

4.385 India is of the view that on the basis of certain findings of the Appellate Body in the 1916 Anti dumping Act case the United States argues that the constituent elements of dumping or subsidization be "built into" the act for a violation to occur. While the Appellate Body had found that "the constituent elements of dumping are built into the essential elements of civil and criminal liability under the 1916 Act", it did not anywhere specify that the constituent elements of dumping should be built into the Act to arrive at a finding that the Act provides for specific action against dumping.

4.386 According to India, although there is no requirement for the constituent elements of dumping to be built into the Act for a violation to occur, in fact such elements are built into the CDSOA. Under the CDSOA the offsets crucially depend upon "duties assessed pursuant to a countervailing duty order, an anti dumping duty order or a finding under the Anti dumping Act of 1921". Absent any such order or finding, there will be no duties collected and no offsets granted. Thus the CDSOA requires the constituent elements of dumping and subsidization to be present as an absolute condition for the distribution of the duties. The offsets are clearly contingent on the presence of anti dumping duties or countervailing duties. The United States cannot deny that the constituent elements of dumping and subsidization are built into the CDSOA.

4.387 India notes that due to the CDSOA the domestic producers in the United States have a financial incentive to support anti dumping or countervailing duty investigations as the offset is to be paid only to the petitioners and those interested parties who support the petition. Thus the CDSOA has the effect of stimulating the filing of applications and making it easier for the applicants to obtain the support of other domestic producers so as to meet the threshold requirements in Article 5.4 and 11.4 .

4.388 The United States asserts that "Article 8 and 18 allow the administering authority to reject an undertaking for any reason". It is India's submission that Article 8 does not provide such rejections to be made for any arbitrary reason. The availability of the offsets gives the petitioners, whose views are taken, substantial pecuniary incentive to oppose the acceptance of undertakings. Thus the offsets would result in a greater probability of rejection of offer of undertakings, which does not accord with the test of practicability or appropriateness envisaged in Article 8.3 of the Anti-dumping Agreement.

4.389 India considers that its joint submission has clearly pointed out that the consequence of the Byrd Amendment would be particularly pernicious for developing country members as the offsets would virtually make impossible the acceptance or price undertakings, which, as may be recalled, have been recognized as a possible constructive remedy under Article 15 of the Anti-dumping Agreement.

4.390 India submits that, while the United States has chosen not to respond to this point on the plea that violation of Article 15 was not included in the Panel request, the fact remains that the CDSOA would be particularly detrimental to the interests of developing countries.

7. Indonesia

4.391 Indonesia supports the EC's statement on various legal issues in which Indonesia together with the EC and other complainants have previously presented joint submissions. Indonesia wishes in addition to raise some points regarding the effect of the "Continued Dumping and Subsidy Offset Act of 2000" (hereinafter referred to as "CDSOA") to developing countries.

4.392 Indonesia considers that the issues raised in the first written submission of the United States on the Byrd Amendment largely mirrors those covered in the dispute settlement proceeding on the United States Anti-dumping Act of 1916. These arguments have already been addressed and answered by the Panel with the Appellate Body subsequently recommending that the DSB request the United States to bring the 1916 Act into conformity with its obligations under Article VI of the GATT 1994.

4.393 Bearing in mind the financial, human resources and time involved, Indonesia regrets that a further dispute settlement procedure is found necessary when most of the issues being raised have already been the subject of extensive consideration by a previous Panel and Appellate Body.

4.394 Indonesia wishes also to refer to the multilateral trade context, in which this dispute settlement procedure is taking place. In the past few years, one of the most prominent features of international trade has been the increased use of the anti-dumping and subsidies laws as instruments of trade defence; and in order to ensure that these instruments do not represent a guise for protectionism, Indonesia considers that it is in the general interest of all members to ensure that their national laws are consistent with the WTO Agreements concerned.

4.395 Indonesia argues that the CDSOA is obviously protectionist as it offers an incentive for the US domestic industry to file applications and seek protection through the application of anti-dumping duties. The effect of this amendment will also be to undermine trade flows to the United States, and the uncertainty resulting will contribute to the creation of trade harassment, which is often complained by Indonesian exporters.

4.396 Overall, according to Indonesia, the role model being projected by the US does not bode well for the future, given that no other Members of the WTO regulate distribution of duties directly to the affected domestic industry. The case that was filed by 11 Members of the WTO has significantly pointed out that concerns over such a Law have already spread out to many WTO members.

4.397 From Indonesia's point of view, the introduction of the CDSOA serves to detract from the problems of developing countries to participate more fully in international trade. As Indonesia is aware, even with normal and fair trade conditions, developing countries have already had many internal problems to cope with such as in the area of financial and human resources, as well as infrastructure. These problems must not be added by unfair practices introduced by Indonesia's trading partner such as CDSOA.

4.398 Indonesia would like to emphasize that the effect of the CDSOA on developing countries is very detrimental, as the CDSOA further disadvantages developing countries' products after the imposition of anti dumping or countervailing duties. Domestic industries in developing countries are clearly being treated unfairly in foreign markets such as the US, if they, then, have to encounter another difficult problem where their competitors in the US receive such a payment.

4.399 Indonesia argues that, recognizing the different levels of development, the WTO has already provided the concept of "special and differential treatment" to facilitate participation of developing

countries in the Multilateral Trading System. However, this measure is not sufficient, if not followed by a conducive trade environment in the markets of Indonesia's trading partners such as United States.

4.400 As has been stated in Indonesia's first written submission, the impact of the CDSOA also undermines the provisions of Article 15 of the Anti Dumping Agreement on special and differential treatment for developing countries. Indonesia considers that the Byrd Amendment not only undermines price-undertakings as a constructive remedy, but it also severely affects the prospects of the forthcoming trade negotiations where other possible remedies other than duties might also be raised.

4.401 According to Indonesia, the need to take effective action also reflects the major concern of developing countries of the importance of implementing existing commitments. In this respect, the need to effectively implement the special and differential treatment provisions in the WTO Agreements has been underscored on several occasions, and the future commitment to do so underpins the decision reached by the Ministerial Conference in Doha as contained in the documents on the "*Implementation – Related Issues and Concerns*" (WT/MIN(01)/17), as well as the "*Ministerial Declaration*" (WT/MIN(01)/DEC/1). Taken together, the commitment of all Members is clear that there is a reaffirmation that the provisions for special and differential treatment are an integral part of the WTO Agreement, and Article 15 of the Anti Dumping Agreement is a mandatory provision.

4.402 Indonesia argues that with the CDSOA there is little doubt that the US authorities are unable to implement the mandatory provisions of Article 15 of the Anti-dumping Agreement, bearing in mind the offset provisions concerned and the fact that the application of duties is not the constructive remedy envisaged in the Agreement.

4.403 In conclusion, Indonesia respectfully requests the Panel to recommend that the United States bring the CDSOA into full conformity with its obligations under the WTO Agreements.

8. Japan

4.404 Japan asserts it has made every effort to present a clear and straightforward case that would allow this Panel to reach a decision as expeditiously as possible. In its first written submission, Japan offered a complete factual framework and legal arguments that demonstrate that the Continued Dumping and Subsidy Offset Act of 2000 (hereinafter referred to as "the Act") is a violation by the United States of its obligations under the WTO Agreements. Japan is now offering some preliminary remarks concerning some of the assertions made by the United States in its first written submission.

4.405 According to Japan, the United States argues, at great length, that the complainants request this Panel to make a finding ex aequo et bono. At no time has Japan requested or sought a finding *ex aequo et bono*.

4.406 The United States also claims, erroneously Japan argues, that there are no legal provisions in the WTO agreements that in any way curtail the ability of a Member to appropriate funds collected through import duties. Japan has pointed to specific and unequivocal treaty language in the GATT 1994 and the Annex 1 WTO agreements that limit the right of a Member to allocate revenues. As elaborated in Japan's first submission, Article 18.1 and 32.1 are two clear examples of provisions that circumscribe the ability of a Member to appropriate collected anti-dumping and countervailing duties. The Panel and the Appellate Body decisions in the US-Foreign Sales Corporation case are the most recent illustration of the limitation that the WTO rules impose on a Member's sovereign power to spend or forego revenue.

4.407 Japan argues that together with the other complaining parties, it has shown that the distribution of assessed anti-dumping and countervailing duties mandated by the Act does violate WTO commitments, including the commitment not to take specific action against dumping or subsidization that is not in accordance with the GATT or consistent with the Antidumping Agreement and the SCM Agreement.

4.408 Japan also draws the Panel's attention to the observations made by the United States at paragraph 75 in the panel report of the Norwegian Salmon anti-dumping case. The United States referred to the negotiating history of Article VI, and explicitly noted "that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit imposition of tougher countermeasures than merely offsetting duties." The United States went on to note that, in the end, the negotiators chose to limit the remedy for injurious dumping to offsetting duties. With the Act, the United States unilaterally has reversed, for itself, the consensus reached by the negotiators of Article VI and resorted to other forms of countermeasures.

4.409 Japan argues that the United States insists on drawing analogies and offering hypothetical situations that significantly alter the factual framework under which the Panel must conduct its analysis. Japan is not challenging the distribution of anti-dumping and countervailing duties in the abstract. The Act mandates the distribution of duties specifically and exclusively to domestic producers that supported the petition. This limitation is not irrelevant or incidental. The identity of the recipients of the distribution is crucial. The argument by the United States that nothing in the WTO could curtail a Member's right to apportion collected duties is based on different circumstances and simply irrelevant to this case. The Panel must examine the conformity of the measure, in light of the existing circumstances.

4.410 In the opinion of Japan, the United States also misrepresents the relevance that the stated purpose of the Act has in this case. The statements of the sponsors are evidence of what the Act actually does and how it operates. Those statements demonstrate that the Act provides a specific remedy against dumping and subsidization. The findings by Congress, contained in Section 1002 of the Act, are evidence that the Act is a "response" to dumping or subsidization that in fact "counters" and "addresses" dumping and subsidization as such.

4.411 Japan asserts that the United States acknowledges the close connection between actions mandated by the Act and the dumping and subsidization, but goes to great lengths to try to lessen its importance. Japan argues that it is clear, however, that there is an intimate and dependent connection between them. The degree of proximity and nature of this connection further demonstrate that the Act indeed addresses and counteracts dumping and subsidization as such, and is therefore within the purview of GATT Article VI and the Antidumping and the SCM Agreement.

4.412 Japan notes that the United States argues that the Act does not provide for the recovery of damages, and that a description to the contrary is incorrect. Japan wishes to recall that the main co-sponsors of the Act, not the complainants, first described the Act as a means of "compensation for damages caused by dumping or subsidization", explicitly declaring before Congress that the Act would transfer the duties to US companies "to compensate for damages." Moreover, whether the "damages" provided for by the Act cover the entire amount of the injury caused by dumping or subsidization is not relevant to the issue of whether the payments provided for by the Act are a form of damages. The fact is that the Act provides monetary benefits to injured domestic producers as a countermeasure against dumping or subsidization.

4.413 Japan recalls that in the 1916 Antidumping Act case, the United States tried to narrow the scope of Article VI:2. It failed, both at the Panel and at the Appellate Body. Here again the United States tries, unsuccessfully, to narrow the scope of Article VI:2 by fabricating a test that has no

legal or textual basis in Article VI and that relies on the presence or causation of a "burden or liability" to "imports or importers" to determine whether a measure falls within the scope of Article VI:2.

4.414 According to Japan, the United States also misconstrues the language of Art. 18.1. Contrary to the United States assertion, "specific action against dumping" does not require action based on the constituent elements of dumping, imposing a burden or liability on importers or imports. There is simply no textual basis for this interpretation of the phrase "specific action against dumping." The Appellate Body interpreted that phrase in the 1916 Antidumping Act case as "action taken in response to situations presenting the constituent elements of 'dumping'."

4.415 Japan is of the view that the United States' attempt to extract the word "against" from its context and re-interpret it are equally grave. The ordinary meaning of that word in Articles 18.1 and 32.1 was made abundantly clear by the Appellate Body. According to the Appellate Body and the Panel in the 1916 Act case, actions that "address" or "counteract" dumping or are taken "in response to situations that present the constituent elements of dumping," fall within the scope of Article VI of the GATT. Even by the United States own admission "the scope of Article VI and the Antidumping Agreement extends to measures which address dumping as such." In trying to re-interpret that word, the United States also admits that the actions mandated by the Act are indeed a "response" to dumping.

4.416 Japan argues that nothing requires that the constituent elements of dumping or subsidization be "built into" the Act in order for a violation to occur, as the United States argues. The Appellate Body's statement quoted by the United States is a description of the 1916 Antidumping Act. The fact that the 1916 Act had those elements "built in" and that, on that basis the Panel found that it was specific action against dumping, does not mean that under all circumstances, those elements need to be built into the measures in order for a violation to be found.

4.417 Notwithstanding the above, Japan and the other complainants have demonstrated that the constituent elements of dumping and subsidization are indeed built into the Act. The Appellate Body in the 1916 Antidumping Act case interpreted "built in" to mean "required". Japan recalls that the Act requires the constituent elements of dumping and subsidization to be present as an absolute condition to the distribution of the duties.

4.418 In Japan's view, the United States argument that the action against dumping in this case is permitted or excused under footnote 24 and footnote 56 of the Antidumping and the SCM Agreement, respectively, should also be rejected. Footnote 24, as interpreted by the Panel and the Appellate Body in the 1916 Antidumping Act case, and footnote 56, which parallels footnote 24, allow actions under other provisions of the GATT only where such actions are not taken to counter or address dumping as such. As the actions mandated by the Act are clearly taken to address dumping or subsidization as such, the United States cannot pretend to exempt them from the disciplines laid down in the Antidumping and the SCM Agreement.

4.419 Japan submits that most of the arguments made with respect to dumping apply as well to Article 32.1 of the SCM Agreement. Japan asserts that in its written submission, it explains how the Act mandates specific action that constitutes a form of relief that is neither contemplated nor authorized by the GATT Article VI:3 or the SCM Agreement and is, therefore, a violation of Article 32.1 of the SCM Agreement.

4.420 Japan is of the opinion that the misrepresentation by the United States of Japan's and Chile's arguments regarding the parallelism between Articles 18.1 and 32.1, however, should not go unanswered. Japan asserts that it has not argued that the interpretation by the Appellate Body of

Article VI:2 applies or can be extended to Article VI:3. What Japan did say is that the Appellate Body's interpretation of the phrase "specific action against" of Article 18.1 applies to the parallel phrase in Article 32.1.

4.421 The United States asserts that "GATT Article VI:3 read in conjunction with Article 10 of the SCM Agreement does not limit the permissible remedies for subsidies to duties." According to Japan, footnote 35 of that provision, however, states that only one form of relief shall be available to a Member to protect against the effects of a particular subsidy in its domestic market, and specifies that the only possible form of relief is either a countervailing duty or a countermeasure authorized by the DSB. The United States expressly admits in its submission that the Act "is not a 'countermeasure' within the meaning of Articles 4.10 and 7.9." The United States also concedes that the Act does not mandate the imposition of countervailing duties. It must be concluded, therefore, that the Act is not in accordance with Article VI:3, for it is a specific action taken in response to subsidization that is neither a countervailing duty nor a countermeasure. As such, the distributions mandated by the Act are specific action against a subsidy, in violation of the SCM Agreement.

4.422 Japan turns to its claims concerning the so-called "standing requirement" and the "voluntary undertaking" provisions of the Antidumping and the SCM Agreement.

4.423 Japan argues that no matter how the United States wishes to characterize its measure, the fact is that the United States is offering a financial incentives to domestic producers to support anti-dumping or countervailing investigations. Even if the objective numerical benchmarks, carefully negotiated and inscribed in Articles 5.4 and 11.4, remain unchanged in US statues, the Act has made it impossible for the United States authorities to apply these benchmarks in a good faith manner.

4.424 According to Japan, the percentages that serve as thresholds in Articles 5.4 and 11.4 are neither arbitrary nor aleatory. The Act, however, eliminates the effectiveness of these multilaterally negotiated benchmarks. They will no longer be an effective protection against frivolous suits. The decision by domestic producers to support or oppose a petition must not be distorted by Government-sponsored financial incentives. The Act, however, distorts those provisions and is, therefore, a violation by the United States of its obligations.

4.425 In the view of Japan, the United States arguments addressed Articles 5.4 and 11.4 only superficially. It did not rebut the fundamental inconsistencies identified by Japan and the other complainants. It avoided responding to the complainant's arguments concerning the object and purpose of Articles 5.4 and 11.4. Those provisions do more than simply establish a meaningless obligation to count numbers. Instead, they utilize percentages as tools to protect imports from unwarranted and unjustified remedial action by determining whether there is true support by domestic producers for the adoption of trade remedies. The United States did not respond either to the evidence presented by Japan and Chile on the level of determination required for the negative and positive tests. As noted by Japan and Chile, Articles 4.1 and 16.1 inform Articles 5.4 and 11.4. Consequently, offering a financial incentive to domestic producers renders meaningless the guarantees established by the Antidumping and SCM Agreement to protect against expression of support by biased domestic producers.

4.426 Japan submits that the Act is also inconsistent with the voluntary undertaking provisions of Articles 8.1 of the ADA and 18.1 of the ASCM. The availability of offsets under the Act gives US petitioners a substantial financial incentive to frustrate the acceptance and maintenance of undertakings.

4.427 Japan believes it is not necessary for Japan to provide evidence that the Act has already caused domestic producers to oppose an undertaking that they would otherwise have supported, since

Japan challenges the WTO-consistency of the Act as such. Nevertheless, Japan has provided evidence that the financial incentive has played a role in the negotiations regarding undertakings in the case of Canadian exports of softwood lumber.

4.428 Finally, Japan submits it also demonstrated that the United States acts inconsistently with Article X:3(a) of the GATT 1994 because the Act prevents the United States from administering its anti-dumping and countervailing duty laws in a reasonable, impartial and uniform manner.

4.429 According to Japan, the United States misrepresents Japan's claims under Article X:3(a) by saying that "complaining parties have failed to present any evidence of the actual administration of the [Act]". As Japan made clear in its submission, it is not evidence of the administration of the Act that needs to be provided, but rather evidence of the administration of the United States anti-dumping and countervailing duty laws. That evidence is the Act itself, which prevents the United States from administering its anti-dumping and countervailing duty laws in a reasonable, impartial and uniform manner.

4.430 Japan is of the view that the United States did not address most of claims by Japan and Chile under Article X:3(a). Rather, it commented only on the complainant's claims under Article X:3(a) that relate to undertakings and standing. However, Japan's challenge of the Act's consistency with Article X:3(a) is not limited to those two issues. Neither did the United States rebut the charge that the Act is inherently unreasonable as demonstrated by the fact that the application of similar measures by all WTO Members would lead to an intolerable situation in the multilateral trading system and a spiralling circle of zero-sum "subsidy/countervailing duty" measures.

9. Korea

(a) Introduction

4.431 Korea considers that the Appellate Body in *US – Anti-Dumping Act of 1916* already has adjudicated the primary issue in this proceeding, *i.e.*, Members may take one and only one action against dumping--they may impose duties equal to or less than the margin of dumping. This logic extends without modification to countervailing duty proceedings.

(i) The Byrd Amendment constitutes an impermissible "specific action"

4.432 In Korea's view, just like the 1916 Act, the Continued Dumping and Subsidy Offset Act of 2000 (the CDSOA or Byrd Amendment) creates a specific action, other than imposition of AD or CVD duties, to be taken where imports are found to be dumped or subsidized. That action is that the US authority must transfer the duties collected from imports directly to the US companies that supported the petition. This "specific action against dumping" (or subsidy) is inconsistent with Article VI of GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

4.433 According to Korea, the counter-arguments contained in the First Submission of the United States do not withstand scrutiny and are not supported by the language of the relevant provisions.

4.434 First, in Korea's view, the US interpretation of "[t]he ordinary meaning of the term 'against'" is contrary to the interpretation of "against" in Article 18.1 of the AD and Article 32.1 of the SCM. Only on the basis of an irrelevant ordinary meaning of "against" does the US argue that "the actual elements or requirements of the CDSOA do not act 'against' dumping or subsidization because they do not apply to (have any contact with) imported goods or importers." The proper interpretation is

that Article 18.1 stipulates "specific action against *dumping"*, a process, rather than "specific action against (dumped) imported *goods or importers*" as argued by the US. Thus, the available ordinary meaning of "against" shows that the CDSOA is a specific action "against" dumping (or subsidy). This interpretation is confirmed by the panels and the Appellate Body in *US-1916 Act*.

4.435 Second, the US claims that the AB report in *US- 1916 Act* provides no guidance as to the meaning of the term "against". The US seems to argue that the CDSOA, even though it is "in response to" dumping, is not "against" dumping. The examples presented by the United States do not support this argument.

4.436 Third, the US argues that constituent elements of dumping are not built into the CDSOA. Again, in Korea's view, the AB's consideration of this issue in *US–1916 Act* shows that the US argument cannot withstand scrutiny. In addition, contrary to the US argument, the constituent elements of dumping are "built into" the CDSOA and the amount of the distributions under the CDSOA is closely related to the extent to which a US producer has been affected by dumping or subsidization of imports.

4.437 Fourth, the US argues that, if the Panel determined that the CDSOA is an action against dumping or a subsidy, footnotes 24 and 56 to Articles 18.1 and 32 operate to permit the CDSOA. In Korea's view, the US argument would be valid on only one condition, which is if footnotes 24 and 56 provided an exemption for the violation of Articles 18.1 and 32 in the nature of Article XX or Article XXIV of GATT. But, there is no textual basis to argue that footnotes 24 or 56 provide such an exemption. Moreover, the US itself inadvertently admits that footnotes 24 and 56 cannot provide a safe harbour for an action which has already been found to be an action against dumping.

4.438 In short, Korea submits that like the 1916 Act, the Byrd Amendment mandates an impermissible "specific action." It profoundly alters the conditions of competition to favour US producers in <u>all</u> US markets for all products. This analysis is confirmed by the opinions of the President who signed the Amendment into law and of various other US government officials.

(ii) The Byrd Amendment violates the standing threshold

4.439 Korea argues that the Byrd Amendment is inconsistent with Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement. It distorts and undermines the standing threshold, encouraging abuse of otherwise permissible actions, and rendering these WTO provisions meaningless. These thresholds were designed to balance carefully a number of competing rights and interests, primarily the right of an industry to seek relief from unfair trade practices versus the interest in ensuring that it is the industry, and not a sector of it, or for that matter, an individual company, that is seeking relief.

4.440 First, Korea asserts, the US argues that the obligation arising under Article 5.4 is limited to verifying the number of companies expressing support for the petition. Under Article 26 of the Vienna Convention on the Law of Treaties and Article X:3(a) of GATT, this cannot be a good faith implementation of a treaty obligation.

4.441 Second, according to Korea, the US argues that the complaining parties offer no empirical support for their contention that the CDSOA encourages domestic companies to support a petition. The Appellate Body has repeatedly stated that an "effects test" is irrelevant if the measure has been found to violate the provisions of the WTO. The United States also improperly supports its argument by claiming that it is "generally" irrational for domestic companies to "oppose" relief. The quantitative target envisaged in Article 5.4 is not the number of companies "opposing" the petition,

but the number of companies "supporting" the petition. Moreover, it is not irrational for domestic companies not to support a petition.

4.442 Korea submits that, by enacting the Byrd Amendment, the US government has improperly influenced the very facts that the US authority is supposed to examine in making its determination. Thus, the US has violated its obligation to conduct an objective examination under Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement.

(iii) The Byrd Amendment violates provisions on undertakings

4.443 Korea is of the view that the Byrd Amendment is inconsistent with Article 8 of the AD Agreement and Article 18 of the SCM Agreement because it impermissibly deters agreements on undertakings. The Byrd Amendment creates an incentive for the US industry to oppose undertakings. By supporting the imposition of duties, the domestic industry may receive not merely the imposition of the duties as allowed by the WTO agreements and US law (which, in essence, results in price levels consistent with a price undertaking), but also the direct transfer of the duties collected.

(iv) Violation of Article X:3(a)

4.444 In the opinion of Korea, the US argues that Article X:3(a) addresses only the *administration* of national laws and not national laws themselves. The CDSOA violates Article X:3(a) because it prevents the US from *uniform, impartial and reasonable* administration of US laws concerning standing threshold determinations and the acceptance of undertakings.

(b) Conclusion

4.445 Korea requests the Panel to recommend that the United States bring its laws into conformity with its obligations under the relevant WTO provisions and to suggest that the United States repeal the Byrd Amendment.

10. Mexico

(a) Introduction

4.446 In its oral statement, Mexico concentrates on the key features of Mexico's claims under Article 5 of the SCM Agreement. The other claims made by Mexico have been dealt with in its first written submission and in the other claimants' first written submissions. Mexico agrees with the oral statements of the other complaining parties with respect to those claims and incorporates them into its arguments.

4.447 Mexico will be providing a detailed elaboration on all of its claims in its written rebuttal submission.

(b) The negative economic impact of the Act

4.448 Before addressing its claims regarding Article 5, Mexico wishes to comment on the negative economic impact of the *Continued Dumping and Subsidy Offset Act*, which Mexico refers to as the "Act".

4.449 Mexico argues that when anti-dumping and/or countervailing duties are imposed, the relative competitive relationship between the affected exports and competing US products is modified. WTO Members have agreed to this modification. It requires exporters who remain competitive in the US

market to adjust their pricing practices to either avoid the duties or to enable continued sales in situations where the duties are applied In such circumstances, any additional modifications in the relative competitive relationship will reduce the ability of the exporter to compete and, therefore, its ability to sell into the US market.

4.450 Mexico is of the view that the subsidies conferred by the Act as so destructive because the modify further the relative competitive relationship in an adverse and direct manner which was not agreed to by the WTO Members. The subsidies are generated by the duties collected and are then granted to the direct competitors of the Mexican exporters. They are used exclusively to subsidize the production of the like US products. Finally, only those direct competitors that filed or support the petition for the original investigation receive the subsidies. This is why the subsidies conferred by the Act are so destructive.

4.451 In this way, Mexico submits, the subsidies fundamentally and systematically alter the relative conditions of competition between Mexican exporters and producers of like US products in a manner that goes beyond the maximum protection permitted under GATT Articles II and VI.

4.452 According to Mexico, since the date of entry into force of the Act, its adverse effects were manifest because the granting of the subsidies was explicitly mandated and the subsidies would be granted with respect to qualifying expenditures that were made by the recipients on or after the date of issuance of the order or finding in question.

(c) The legal dimensions of Mexico's Article 5 claim

4.453 Mexico believes its claim under Article 5 of the SCM Agreement is straight forward. In order for it to prevail, Mexico must demonstrate that, through the use of a subsidy, the Act causes adverse effects in the form of nullification or impairment of benefits accruing directly or indirectly to Mexico under the GATT 1994.

4.454 Mexico asserts that it has established all the elements of this claim:

- The offsets distributed under the Act constitute financial contributions that confer benefits and, therefore, amount to subsidies within the meaning of Article 1 of the SCM Agreement.

- The Act explicitly limits access to the subsidies to certain enterprises and, therefore, the subsidies are specific within the meaning of paragraph (a) of Article 2.1 of the SCM Agreement. Consequently, the subsidies are actionable under Part III of the SCM Agreement which includes Article 5.

- By virtue of the fact that Article 7 of the SCM Agreement entitles a WTO Member to invoke Article 5 where a subsidy is granted or maintained, the meaning of "use of" any subsidy in Article 5 includes the granting or maintaining of a subsidy in the circumstances of this dispute.

- Through the use of the subsidies, the Act causes adverse effects in the form of nullification or impairment of benefits accruing directly or indirectly to Mexico under the GATT 1994:

- Nullification or impairment under paragraph (b) of Article 5 can take the form of "violation" nullification or impairment and "non-violation" nullification or impairment. Mexico is pleading both forms of nullification or impairment.

- With respect to violation nullification or impairment, to the extent that the Act violates provisions of the GATT 1994 and the violation is caused by the "use of" a subsidy, violation nullification or impairment will occur.

- Mexico's non-violation nullification or impairment claim consists of two elements:

  - By mandating the granting of actionable subsidies in the circumstances of this dispute, the Act will necessarily cause nullification or impairment. Upon granting, the subsidies will upset the competitive relationship between Mexican and like US products that is legitimately expected by Mexico under GATT Articles II and VI when its products face anti-dumping or countervailing duties. The competitive relationship in such circumstances should be modified by an amount, at most, equal to the maximum anti-dumping and countervailing duties allowable under the Articles. The subsidies alter the competitive relationship in excess of that amount.

  - By maintaining actionable subsidies in the circumstances of this dispute, the Act also causes nullification or impairment. The Act impairs the predictability needed to plan for future trade that is legitimately expected by Mexico under GATT Articles II and VI in situations when its products face anti-dumping or countervailing duties. The benefits accruing to Mexico under these Articles apply to actual trade and to the predictability needed to plan future trade. It is that predictability that is being impaired.

4.455 Mexico argues that the United States acknowledges that the offsets distributed under the Act are subsidies. However, the United States raises several arguments to attempt to rebut Mexico's claim under Article 5(b) of the SCM Agreement. I will address each argument in turn.

(i) Specificity

4.456 The US argues that the Act does not confer specific subsidies because the Act does not limit the subsidies to certain enterprises and that there is no evidence that the subsidies are specific "in fact".

4.457 In Mexico's view, the US mischaracterizes Mexico's arguments regarding specificity. Mexico's position is simple – "in law", the subsidies conferred under the Act are specific. There is no need for this Panel to examine whether the subsidies are specific "in fact". All of the arguments of the United States that are based on paragraphs (b) and (c) of Article 2.1 of the SCM Agreement – which concern specificity "in fact" – are legally irrelevant to this proceeding.

4.458 Mexico submits that the test under paragraph (a) of Article 2.1 of the SCM Agreement is plain – does "the legislation pursuant to which the granting authority operates, explicitly limit access to a subsidy to certain enterprises"?

4.459 The answer, according to Mexico, is clearly "yes".

4.460 The funds that form the "financial contribution" element of each subsidy are deposited and maintained in separate special accounts that are, themselves, limited to the products that are the subject of each order or finding. Thus, the subsidies are inherently specific from the outset. Moreover, access to each subsidy is explicitly limited to certain enterprises that produce a like product

or worker representatives. Finally, access is further restricted to those enterprises that were petitioners in the original investigation that led to the duties or those enterprises that supported the petition.

4.461 Thus, Mexico asserts, by legal requirement, the Act explicitly limits access to the subsidies it confers to certain enterprises.

(ii) Adverse effects

4.462 The United States argues that Mexico has failed to demonstrate "adverse effects" within the meaning of Article 5.

4.463 It seems that the central argument that the US is making in this regard is that that the Act must be applied before there can be a violation under Article 5 which, in its view, means that subsidies must be granted under the Act. This is manifestly incorrect.

4.464 Mexico is raising two types of nullification or impairment claims under its Article 5 challenge: (i) "violation" nullification or impairment; and (ii) "non-violation" nullification or impairment.

4.465 Since "violation" nullification or impairment presumes that the Panel finds a violation of a provision of the GATT 1994 in one of the other claims before it and therefore does not give rise to an independent ground for challenge, Mexico decides to focus on Mexico's "non-violation" nullification or impairment claims.

4.466 With respect to non-violation nullification or impairment and the US claims that the Act must be "applied", Mexico is presenting two arguments.

Granting of actionable subsidies

4.467 The US argues that the Act must be applied—i.e., that subsidies must be granted under the Act— before a non-violation nullification or impairment claim can made under paragraph (b) of Article 5. This entire line of argument is based on GATT and WTO jurisprudence related to claims brought under GATT Article XXIII:1(b).

4.468 Mexico is of the view that, in making this argument, the US ignores the substantive nature of Article 5. It also misconstrues the "legislation as such" element of Mexico's Article 5 claim. Finally, it confuses a procedural matter with a substantive one.

4.469 The US argues that footnote 12 to the SCM Agreement prevents Mexico from challenging the Act on the basis that the existence of nullification or impairment is to be established in accordance with the practice of application of Article XXIII:1(b). Mexico argues that, as is clear from the text of the footnote, it relates to the determination of the existence of nullification or impairment, not the question of when a challenge can be brought under Article 5.

4.470 Mexico asserts that what is really at issue is the procedural question of when Mexico can challenge the Act under Article 5. Does Mexico have to wait until a subsidy has been granted? Clearly, the answer to this question, according to Mexico, is "No".

4.471 Mexico argues that Article 5, like any other substantive provision of the WTO Agreements, is subject to the doctrine governing a legislation as such challenge. If legislation mandates action that will necessarily violate a WTO provision, that legislation can be challenged. There is no legal or

logical reason to conclude otherwise. By focusing on GATT Article XXIII:1(b) and excluding any consideration of the substantive nature of Article 5, the US has failed to recognize this.

4.472 Mexico is of the view that under the legislation as such element of Mexico's Article 5 claim, Mexico is simply arguing that the Act mandates the granting of actionable subsidies and that, when granted, such subsidies will cause nullification or impairment. In other words, when the subsidies are granted—an action that even the US acknowledges as amounting to "application"—a violation will occur.

4.473 Thus, under Article 5, Mexico can challenge the actionable subsidies conferred by the Act prior to those subsidies being granted.

Maintaining of actionable subsidies

4.474 Mexico is also arguing that the Act is maintaining actionable subsidies and that the maintenance of those subsidies in the circumstances is nullifying or impairing benefits that accrue to Mexico under the GATT 1994.

4.475 Subsidies can be challenged under Article 7 of the SCM Agreement (the remedy provision for Article 5), when a Member maintains a subsidy. A violation of Article 5 can be found where the maintenance of a subsidy amounts to the "use of" that subsidy and it causes one of the specified adverse effects.

4.476 Mexico asserts that in the circumstances of this dispute, the Act "maintains" subsidies in that it provides the means for the creation and conferral of those subsidies. The meaning of "use of" includes maintaining a subsidy in the circumstances of this dispute where other actions related to the subsidies have been taken. These actions include mandating the granting of the subsidies, creating the special accounts and depositing funds into them, and establishing a list of eligible recipients.

4.477 In the opinion of Mexico, even before subsidies are granted under the Act, the maintenance of subsidies under the Act nullified or impaired benefits accruing to Mexico under GATT Articles II and VI that concerned the creation of predictability needed to plan future trade. Given the certainty that any anti-dumping and countervailing duties that will be collected will be re-distributed to the producers of directly competitive products and the uncertainty as to the magnitude of the subsidies, it is impossible for Mexican exporters to predict the relative conditions of competition between their products and like US products. This is particularly problematic with respect to products that require significant lead time between order and delivery.

(iii) Competitive relationship

4.478 The US argues that Mexico has failed to demonstrate that the competitive relationship between US products and Mexican products has been upset by a subsidy.

4.479 Mexico is of the view that a great part of the US argument on this point is based on its mistaken belief that subsidies must be granted under the Act before Mexico can bring an Article 5(b) challenge.

4.480 Mexico posits that it seems that the US is also arguing that Mexico must prove adverse trade effects in order to establish nullification or impairment, which according to Mexico is not the case. As was made clear at paragraph 150 of the report of the Panel in *Oilseeds I*, the focus is on whether there has been an adverse change in conditions of competition legitimately expected by Mexico and not on trade flows or volumes of trade.

4.481 The United States argues the Panel in *Oilseeds I* "carefully analyzed" the evidence presented in making its finding and that, in this dispute, no such evidence has been presented by Mexico. Mexico argues that this is incorrect.

4.482 In assessing whether there was an adverse change in conditions of competition that led to a finding of nullification or impairment, the Panels in *Oilseeds I* and *Oilseeds II* examined the framework, mechanisms, essential features, characteristics and operations of the schemes in question. That was the evidence "carefully analyzed" by the panels. In other words, the panels made their findings based on the structure and architecture of the schemes.

4.483 This is exactly what Mexico has done in this dispute. By virtue of the structure and architecture of the Act:

- upon granting, the subsidies conferred by the Act will adversely change the relative conditions of competition that Mexico legitimately expected; and

- prior to the granting of subsidies, the Act *per se* interferes with the predictability related to those relative conditions of competition that was legitimately expected by Mexico.

(iv) "Floodgates" argument

4.484 The US argues that acceptance of Mexico's argument would "automatically" convert any specific domestic subsidy programme which is related to a product on which there is a tariff concession into a non-violation nullification or impairment (para. 68, US First Submission).

4.485 According to Mexico, this argument is incorrect. At paragraph 81 of the Panel report in *Oilseeds II*, the Panel stated that GATT contracting parties must "be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concession will not be systematically offset". Thus, the mere fact that a subsidy may offset the effect of a tariff binding or any other benefit accruing under the GATT is not enough to amount to nullification or impairment. The upsetting of the benefit must be systematic, as it is in this dispute.

4.486 Moreover, Mexico asserts, at paragraph 10.82 of the Panel report in *Film*, it is stated that a "clear correlation" between the measure at issue and the adverse effect on the relevant competitive relationship must be shown. In order for this to occur, there must be "specific linkages" between the subsidy and the nullification or impairment of the benefit in question. This will occur only in exceptional circumstances.

4.487 Mexico argues that the facts of this dispute are exceptional. The benefits accruing to Mexico under the GATT 1994 are being systematically upset by the subsidies and a clear correlation and linkages exist. This is exemplified by the fact that the amount of the offsets equals the amount of the duties collected and the beneficiaries of the offsets are the same as the petitioners and supporters who initiated the investigation that led to those duties.

(v) Reasonable expectations

4.488 Finally, the US argues that Mexico could have reasonably expected the Act on the basis that compensation proposals had been suggested in the past.

4.489 Mexico is of the view that the evidence cited by the US supports Mexico's position that it could not have reasonably anticipated the introduction of the Act. In every case where such a measure

has been proposed in the past, it has been adamantly opposed by the US administration and it has not been passed into law. In fact, the US administration opposed the introduction of the Act. In this context, Mexico could have assumed and did assume that any attempt to introduce a similar legislative scheme would, once again, fail.

(d) Conclusion

4.490 For the foregoing reasons, Mexico believes that the US has failed to rebut the *prima facie* case presented by Mexico with respect to its Article 5 claim.

11. Thailand

(a) Introduction

4.491 Thailand notes that the following arguments contained in its oral statement are complementary and supplementary to the arguments made by other complaining parties.

(b) Rebuttal to the Legal Arguments Challenged by the United States

4.492 According to Thailand, it is crystal clear that Members shall have sovereign rights to appropriate lawfully assessed and collected duties within the purview of international law. However, the United States has made an argument from paras. 18 to 35 which concludes that "this panel proceeding is not the appropriate forum to address these issues ex aequo et bono."

4.493 In Thailand's view, this argument has no role to play in this dispute because of the following reasons:

- 1. Nothing is said in Thailand's request about requesting the Panel to make any rulings on the basis of the notion of ex aequo et bono ;

- 2. The complaining parties merely request the Panel to make rulings and recommendations that the "Continued Dumping and Subsidy Offset Act of 2000"(hereinafter referred to as "CDSOA") is inconsistent with US obligations under the WTO Agreement by clarifying the existing provisions of the WTO Agreement and any other covered agreement in accordance with customary rules of interpretation of public international law, as stipulated in Article 3.2 of the DSU.

4.494 Thailand argues that the United States argues in bullet 2 of paragraph 33 of the first submission, if read a contrario, that the legislation "may" violate WTO obligations. In fact, Article XVI.4 of the WTO Agreement or the Marrakesh Agreement as well as Article 18.4 of the Anti-dumping Agreement and Article 32.5 of the Subsidies and Countervailing Measures Agreement (hereinafter referred to as "SCM") clearly requires Members to ensure the conformity of their laws, regulations and administrative procedures with their obligations. In this light, the CDSOA may be subjected to interpretation and brought to dispute settlement mechanisms if its application is found to be in violation of the WTO Agreement. Moreover, the language used in Article 5 of the SCM that "[n]o member should cause … adverse effects…" should be construed to mean that any action, be it legislative or administrative, which "may" cause adverse effects to the interests of other Members falls within the scope of Article 5 of the SCM.

4.495 In Thailand's view, paragraph 37 of the US first submission implies, if not indicates, that the CDSOA is somewhat a subsidy, but argues further that it may or may not be prohibited under the

SCM. Thailand argues that this line of argument made by the United States should be dismissed as contended by other complaining parties. More important than that, the US Customs Service in its news release on 30 January 2002 states that "[t]his legislation, also known as the Byrd Amendment, required US customs to disburse anti-dumping and countervailing (AD/CV) duties to domestic producers injured by foreign dumping and subsidies. The claimants have received more than $200 million to date."

4.496 Thailand is of the view that paragraphs 77 to 89 of the US first submission underscores the nature of the CDSOA that it is not based upon the constituent elements of dumping or a subsidy. In Thailand's view, domestic producers will be affected if there are importations of products which are priced at prices lower than normal value. If so, the test for the constituent elements are satisfied.

4.497 Thailand asserts that the argument in paragraph 86 that any qualified applicant will be granted an amount of the distributions which is not the recovery of damages is *arguendo in absurdum* because it goes without saying that when a domestic producer is "affected" , he or she is then considered as having "adverse" effects referred to in Article 5 of the SCM.

4.498 According to Thailand, even though paragraphs 90 to 100 of the US first submission attempt to convince the Panel that the CDSOA is not meant to become a specific action "against" dumping or a subsidy within the scope of Article 18 of the Anti-dumping Agreement and Article 32 of the SCM , it is up to the Panel to rule, based on GATT/WTO jurisprudence, whether the term "against" has its broad or narrow meaning, taking into account the object and purpose of such covered agreements, in accordance with the general rule of interpretation under international law, and whether any action attributable to discouragement of dumping or a subsidy is an action against dumping or a subsidy.

(c) Political consideration

4.499 Thailand fully shares the concern expressed by Indonesia that if this kind of legislation is permitted it would not only set debate-provoking precedent, but also huge burdens for developing countries to bear when their products are subject to both competition policy and other measures imposed by the importing Member in question.

(d) Conclusion

4.500 Thailand submits that the arguments appearing in the US first submissions may be valid in other cases. Yet, they have failed to respond to many issues raised in the complaining parties' submission.

D. FIRST ORAL STATEMENT OF THE UNITED STATES

(a) Introduction

4.501 The United States considers that at issue in this case is a law entitled the "Continued Dumping and Subsidy Offset Act of 2000" or, in short, the CDSOA. The CDSOA is a government payment programme. Like all governments, the US federal government makes payments to individuals or groups for all sorts of purposes such as health care, public welfare, agriculture, etc. Other WTO Members, including the complaining parties, maintain similar programmes for their nationals.

4.502 According to the United States, The CDSOA has nothing to do with the administration of the anti-dumping and countervailing duty laws. The CDSOA instructs the US Customs Service to distribute funds in an amount not to exceed the duties collected pursuant to anti-dumping and

countervailing duty orders to eligible domestic producers. The amount of the distributions have nothing to do with the injury to the domestic producer or the recovery of "damages" by the domestic producer. Rather, the amount depends upon the applicant's qualifying expenditures and whether other applicants also had qualifying expenditures.

4.503 The United States argues that as a subsidy programme, one would expect that the issues in this case would center on Article 3 or Article 5 of the SCM Agreement. While the United States has heard today general assertions of supposed harm that CDSOA will cause to the complaining parties' companies that compete with US producers, none of the complaining parties have backed up their allegations by pursuing an Article 5(c) claim. In the view of the United States, this is tantamount to an admission by the complaining parties that they cannot show the harm they complain of.

4.504 Except for Mexico, the complaining parties' primary argument is that because the source of the funds for the distributions under CDSOA are AD/CVD duties, the CDSOA is, on its face, inconsistent with the Antidumping and SCM Agreements. The reality is that, because money is fungible, the only real connection between the funds distributed under CDSOA and the orders is that the duties collected serve to cap or limit the amount of the annual distributions.

4.505 According to the United States, there is simply no WTO obligation with respect to the uses to which AD/CVD duties might be put, or to distinguish the use of these funds from any other source of government revenue. Other than considering whether the CDSOA is an impermissible subsidy, a panel proceeding is simply not the appropriate forum to address the complaining parties' concern about the use of duties as a source of funds for domestic expenditures.

(i) The CDSOA is not an actionable subsidy

4.506 In the view of the United States, it is elementary that the granting of a subsidy is not, in and of itself, restricted under the SCM Agreement. The Appellate Body recently recalled this point in its report in *United States – FSC*. To be actionable, as claimed by Mexico, the complaining party must demonstrate that the subsidy is "specific" within the meaning of Article 2 of the SCM Agreement. Mexico, however, has failed to show that the CDSOA is a specific subsidy. There is no question that CDSOA is not *de jure* specific under Article 2.1(a) as its text does not expressly limit access to certain enterprises, industries, or groups. Mexico does not even claim *de facto* specificity.

4.507 The United States argues that even if Mexico passed the specificity hurdle, Mexico has failed to establish that the CDSOA has caused 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). Mexico, however, has not established that there is a presumption in Article 5(b) that a subsidy that violates another WTO provision is an actionable subsidy without showing adverse effects. Regardless, the CDSOA is not inconsistent with any other WTO provision.

4.508 The United States is of the opinion that Mexico does not satisfy the following requirements to establish a claim of non-violation nullification or impairment either: 1) the application of a measure; 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. According to the United States, Mexico has failed to establish the first and third elements at least.

4.509 First, the United States argues, Mexico's claim is insufficient on its face as Mexico does not challenge the application of the CDSOA. Second, Mexico has failed to demonstrate that the competitive relationship between any US products and Mexican imports has been upset by a subsidy. Mexico has presented no evidence that US producers of products that compete with Mexican products

have actually received a distribution under the CDSOA, let alone a "clear correlation" between the distributions and any disruption of a competitive relationship. Indeed, Mexico cannot present such evidence as it has challenged the CDSOA on its face, not the actual distributions under the CDSOA. Finally, the United States has shown that Mexico could have reasonably anticipated that AD/CVD duties would be distributed to the domestic industry given proposed legislation in the US Congress in 1988, 1990, 1991, and 1994.

4.510 According to the United States, Mexico's argument that CDSOA will per se nullify or impair benefits under GATT Articles II and VI flies in the face of the notion that a non-violation claim is an exceptional remedy, renders the causation requirement meaningless, and automatically converts any specific domestic subsidy programme with any connection to a product on which there is a tariff concession into a non-violation nullification or impairment of benefit. In sum, Mexico has failed to sustain its burden of demonstrating that the CDSOA is a "specific" subsidy that is causing adverse effects within the meaning of Articles 2 and 5 of the SCM Agreement.

(ii) CDSOA is not specific action against dumping or a subsidy

4.511 The United States submits that the CDSOA cannot be inconsistent with US obligations under the Antidumping and SCM Agreements, when read with Article VI of GATT 1994, because the statute is not within the scope of those agreements. The CDSOA does not impose any type of measure on imports or importers. The CDSOA is a statute authorizing government *payments.* The United States notes that the it is not challenging the conclusion of the Appellate Body in the *US - 1916 Act* dispute that duties, provisional measures and undertakings are the exclusive remedies for dumping. Thus, the United States is not contradicting the US statements in the *Norwegian - Salmon* dispute cited by some of the complaining parties today. The question is whether the CDSOA is a specific action against dumping and a subsidy.

4.512 The United States is of the view that the complaining parties' entire argument in this regard is built upon the Appellate Body's reasoning in *United States – Antidumping Act of 1916.* The United States notes that most, if not all, of the complaining parties offer only a cursory analysis of whether the reasoning of the Appellate Body in *US – 1916 Act* is applicable to the SCM Agreement. For the complaining parties to prevail on their claims under GATT Article VI:3 and the SCM Agreement, however, this Panel must find that it does. For the reasons explained in footnote 64 of the US' written submission, it does not. Even assuming *arguendo* that it does, the CDSOA is not inconsistent with the SCM Agreement for the same reason that it is not inconsistent with the Antidumping Agreement – it does not constitute a specific action against dumping or a subsidy.

4.513 In *US – 1916 Act*, the Appellate Body concluded that Article 18.1 of the Antidumping Agreement applies to actions based upon the constituent elements of dumping. The constituent elements of dumping are: (1) products imported and cleared through customs, which are (2) priced lower than their normal value.

4.514 In the opinion of the United States, the CDSOA, however, simply fails to satisfy the test articulated in the 1916 Act. Without question, the CDSOA distributions are not based upon the constituent elements of dumping or a subsidy. As explained in the US' written submission, the distributions are based upon the applicant's qualification as an "affected domestic producer" who has incurred "qualifying expenditures." The Appellate Body's conclusion that the 1916 Act was a specific action against dumping was very clearly based upon the fact that the "constituent elements of dumping were built into the essential elements of civil and criminal liability under the 1916 Act."

4.515 The United States argues that the statute at issue in this dispute, the CDSOA, is completely different from the 1916 Act. The CDSOA is a government payment programme based upon the

definition of "affected domestic producer" and "qualifying expenditures." The Act has nothing to do with measuring the extent to which a US producer has been injured or "damaged" by dumping or subsidization of imports. In contrast, the 1916 Act is a statute imposing criminal and civil liability upon importers for practices that specifically include the constituent elements of dumping.

4.516 The US is perplexed by the complaining parties' repeated statements that disbursements under the CDSOA require the existence of a AD/CVD order. The complaining parties are simply restating the obvious. There is no question that this is the case - of course AD/CVD duties will not be collected without an order and presumably the complaining parties would not want it any other way. Thus, the action against dumping or a subsidy has already been taken.

4.517 According to the United States, the question in this case is whether the Antidumping Agreement or the SCM Agreement limit what a government can do with these revenues once collected. Nothing in these agreements speaks to this, nor is there any ban on spending this revenue. Spending this money cannot *per se* be action against dumping or a subsidy - otherwise duties once collected could never be spent. The complaining parties' reliance on the existence of AD/CVD orders is thus misplaced.

4.518 The United States asserts that in addition to not being based upon the constituent elements of dumping or a subsidy, the CDSOA is not "against" dumping or subsidies. This Panel must consider the proper interpretation of the term "against" as a matter of first impression. The ordinary meaning of the word "against" suggests that the specific action must be in hostile opposition to and in contact with dumping or a subsidy. Here, the CDSOA imposes no additional liability or burden on imported goods or importers and, therefore, cannot be considered an action "against" dumping or a subsidy.

4.519 The United States notes that some of the complaining parties have criticized the use of the New Shorter Oxford English Dictionary's definition of the term "against." They take issue with the United States' position that to be considered "against" dumping or a subsidy, the action must impose or apply a burden or liability on the importer or imported good. They are amused by the example of the government flags flying at half-mast. Yet, according to the United States, the reality is that under their test, which is action taken in response to dumping, the fictitious flag law would constitute a specific action against dumping and a subsidy.

4.520 According to the United States, the sole basis of the complaining parties' argument that the CDSOA is "against" dumping and subsidies is the supposed intent or purpose of the law. Many complaining parties refer to statements by various members of the US Congress and the title of the law itself. However, this Panel must look to the actual operation of the law. As emphasized by the panel in the 1916 Act dispute, the purpose of a measure is not relevant to determining whether it falls within the scope of GATT Article VI and the Antidumping Agreement. A panel must look at what the measure actually does. The complaining parties rely heavily on the reasoning in 1916 Act. They should not be permitted to do so in a self-serving selective manner.

4.521 The United States posits that, as explained in paragraphs 101-111 of its written submission, in the event that the Panel concludes that the CDSOA is an action against dumping or a subsidy, footnotes 24 and 56 to the Antidumping and SCM Agreements, respectively, operate to allow the CDSOA as an "action" otherwise permitted. In sum, the complaining parties have failed to establish that the CDSOA is even within the scope of, let alone violates, Articles 1 and 18 of the Antidumping Agreement; Articles 4.10, 7.9, 10, and 32 of the SCM Agreement; or Article VI:2 and 3 of the GATT 1994.

(iii) The CDSOA is not inconsistent with any obligations related to standing, undertakings or GATT Article X:3

4.522 In the view of the United States, the complaining parties choose to ignore the fact that the standing provisions of the Antidumping and SCM Agreements do not include any requirement that the investigating authorities examine a statement of support to determine the *subjective motivation or reason* that the domestic industry supported the initiation of an anti-dumping or countervailing duty investigation. Articles 5.4 and 11.4 simply require authorities to follow certain quantitative benchmarks in determining whether an investigation should be initiated. There is no allegation in this dispute that the US investigating authority is failing to follow those numerical benchmarks.

4.523 Likewise, the United States argues, the undertaking provisions of the Antidumping and SCM Agreements do not require investigating authorities to accept a proposed undertaking in the first place. Nor do those provisions limit the types of reasons that may cause the administering authority to decline a proposed undertaking. The decision to accept or reject a proposed undertaking is within the complete discretion of the investigating authorities. Thus, even if the CDSOA could be viewed as distorting the consideration of undertakings, the decision to reject a proposed undertaking cannot form the basis of a violation of Articles 8 and 18.

4.524 In any event, the United States asserts that, as explained in paragraphs 123-125 of its written submission, the complaining parties have offered no empirical support for their contention that the CDSOA has a distorting effect on standing determinations and the consideration of undertakings. The complaining parties' allegations are based on nothing more than mere speculation.

4.525 The United States argues that with regard to GATT Article X:3, the complaining parties have offered no arguments or evidence concerning the actual administration of the CDSOA, which is the measure at issue in this dispute. 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. Here, the complaining parties do not even argue that the CDSOA is being administered in an unreasonable, impartial or non-uniform manner. Nor did they identify the provisions of US law relating to standing determinations and price undertakings as measures in their panel requests. Thus, even if it were concluded that the CDSOA does somehow affect the administration of US laws relating to standing and price undertakings, this could not conceivably form the basis of an Article X:3(a) finding against the CDSOA, which is the only measure at issue in this dispute.

(b) Conclusion

4.526 In closing, the United States submits that there cannot be a breach of an obligation that does not exist – and such an obligation is not created by virtue of the number of complaining parties. The CDSOA simply distributes government revenue. Contrary to Mexico's contention, the CDSOA does not meet the requirements of an actionable subsidy under Article 5(b). Unlike the 1916 Act, the CDSOA imposes no liability or burden on imported goods or importers. Furthermore, it is not based upon the constituent elements of dumping or a subsidy. In other words, it does not address dumping or subsidies *as such*. Accordingly, it is not a "specific action against" dumping or subsidies. Likewise, the CDSOA has nothing to do with standing determinations or the consideration of price undertakings. As a legal matter, the complaining parties have not identified any inconsistency with the obligations contained in the standing and undertaking provisions. As a factual matter, the complaining parties would have this Panel engage in sheer speculation.

E. ANSWERS OF COMPLAINANTS TO QUESTIONS FROM THE PANEL

1. Australia

(a) Questions to complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.527 Australia considers that the statement by the United States is unsustainable[95]:

- it ignores that the Appellate Body's finding on the meaning of the phrase 'specific action against dumping' gave meaning to the word 'against', and did so in a way that encompasses other ordinary meanings of the word in context;

- it ignores also that, consistent with the requirement of Article 3.2 of the DSU, the Appellate Body's finding on the meaning of 'specific action against dumping' gave meaning to the phrase, as well as the word 'against', in their context and in light of the object and purpose of the broader framework of rules governing the imposition of anti-dumping and countervailing measures provided by Article VI of GATT 1994 as interpreted by the Anti-Dumping and SCM Agreements in accordance with the customary rules of interpretation of public international law. (See also reply to Question 35 below);

- it is premised on a misquotation of the Appellate Body finding in *US – 1916 AD Act*. The US statement at issue is preceded by numerous references to the Appellate Body having said that 'specific action against dumping' is 'action that is taken in response to the constituent elements of dumping'.[96] In fact, the Appellate Body said that 'specific action against dumping' is 'action that is taken in response to <u>situations presenting</u> the constituent elements of dumping'.[97] The two statements are not equivalent;

- it is based on selective quotations of the meaning of 'against'.[98] However, the word 'against' has other, equally valid, ordinary meanings, including 'in competition with', 'to the disadvantage of', 'in resistance to' and 'as protection from'[99];

- it presupposes a meaning of 'dumping' (and 'a subsidy') that has no basis in the relevant texts.[100] Article 18.1 proscribes 'specific action against <u>dumping of exports</u> from another Member' not in accordance with GATT 1994. It does not proscribe

[95] See also Second Submission of Australia, paragraphs 12-21.
[96] See, for example, First Submission of the United States, paragraphs 81, 84, 86, 87 and 89.
[97] *US – 1916 AD Act*, AB Report, paragraph 122.
[98] First Submission of the United States, paragraph 92.
[99] *The New Shorter Oxford English Dictionary*, 1993, pp.38-39, (L. Brown ed).
[100] See, for example, First Submission of United States, paragraph 92.

specific action 'against dumped exports' or specific action 'against the importers of dumped exports' that is not in accordance with the GATT 1994.

4.528 It follows that Australia does not agree that the Appellate Body's finding suggests that 'specific action against dumping' is necessarily a subset of action 'in response to' dumping. In Australia's view, the Appellate Body's finding equated the meaning of the two expressions.

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.529 For offset payments to be made pursuant to the Act:

- a domestic producer must have supported an application for an anti-dumping (or countervailing) duty investigation; and

- there must have been a finding of dumping (or subsidisation), as well as injury and a causal link, for an anti-dumping (or countervailing) duty order to have been issued;[101] and

- a domestic producer must have incurred qualifying expenditure after the issue of the anti-dumping duty finding or order (or countervailing duty order).

4.530 In other words, the existence of a situation presenting the 'constituent elements of dumping' (or a subsidy) is integral to a domestic producer's potential entitlement under the Act. Contrary to US assertions,[102] Australia has not argued that the offset payments under the Act constitute 'specific action against dumping/a subsidy' because they are paid directly from anti-dumping or countervailing duties: offset payments under the Act are 'specific action against dumping/a subsidy' because they constitute action that may be taken only when the constituent elements of dumping or a subsidy are present.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was in lieu of anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.531 To the extent that entitlement to the subsidies as described is conditional on the existence of situations presenting the constituent elements of dumping of subsidisation, such subsidies would be inconsistent with Articles 18.1 and 32.1.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/ countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of

[101] As set out in paragraphs 32-41 of the First Submission of Australia, an anti-dumping duty order or finding under the Antidumping Act of 1921 within the meaning of the Act are the administrative instruments by which the US has formally determined that there exists a situation presenting the constituent elements of dumping. (Similarly, a countervailing duty order is the administrative instrument by which the US has formally determined that there exists a situation presenting the constituent elements of a subsidy.)

[102] See, for example, First Submission of the US, paragraph 19.

offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.532 It is not possible to provide a clear answer to this hypothetical question. The key issue in determining whether such a measure would be 'specific action against dumping/a subsidy' within the meaning of Articles 18.1 and 32.1 would be whether entitlement is conditional on the existence of situations presenting the constituent elements of dumping or subsidisation, in other words, whether the presence of dumping or subsidisation is a necessary condition.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.533 With respect, Australia questions the relevance of this scenario to the matter at issue in this dispute.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.534 See reply to Question 4.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.535 See reply to Question 4.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.536 See reply to Question 4.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.537 Yes, because offset payments as described would still make it easier for the needed levels of industry support to be reached. The offset payments as described would continue to provide an

incentive to domestic producers to support a petition until such time as the standing thresholds for initiation of an investigation have been met, thereby distorting, or threatening to distort, the requirement that the application be made 'by or on behalf of the domestic industry'.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.538 While it may be possible in some circumstances for a Member to act in good faith while providing incentives for the use of a WTO-consistent remedy, the question is incorrectly premised in the context of the present dispute. A remedy cannot be WTO-consistent if a Member takes action that distorts the application of one of the necessary conditions for the availability of that remedy: in this case, that an application be made 'by or on behalf of the domestic industry'.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.539 The negotiating history of Article 5.4 confirms that its intent was to ensure that an application was being made 'by or on behalf of the domestic industry'.[103] Moreover, Article 5.4, read in the context of Article 5 as a whole, provides that support for an anti-dumping investigation be expressed by the domestic industry on the basis of evidence of dumping, injury and a causal link between the dumping and injury. (In that context, Australia notes that the premise of the question, "i.e., based on the actuality or expectation of injury", is misleading.) A variety of factors may of course influence a domestic producer's decision whether or not to support a petition. The basis of Australia's claim in this dispute, however, is that a Member government may not take action that distorts that decision in ways not permitted by GATT Article VI and the Anti-Dumping and SCM Agreements.

4.540 Absent evidence to the contrary, an investigating authority must presume that the views expressed by domestic producers are genuine. If, however, an investigating authority has evidence to indicate that the expression of views by domestic producers may not be genuine, the investigating authority may not ignore that evidence. By its very existence and nature, the financial incentive provided by the Act to 'affected domestic producers' must be presumed to affect, at least to some degree, the genuine expression of views by domestic producers in ways not contemplated by the Anti-Dumping Agreement. In such circumstances, the investigating authority must either suspend or nullify the examination of domestic industry views pending further investigation of the possible effect of the extraneous influence or, if the investigating authority is not empowered to take such action, to bring the matter to the attention of those authorities who are so empowered.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.541 See reply to question 11.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.542 See reply to question 11.

[103] See, for example, First Submission of Japan and Chile, paragraphs 4.51-4.55.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.543 Australia is not pursuing a claim concerning voluntary undertakings under Article 8.1 of the Anti-Dumping Agreement.

(b) Question to Canada

30. At para. 44 of its oral submission, Canada states that the Offset Act is a "specific action against dumping" because inter alia "payments are made only to those producers 'affected' by dumping". Does Canada consider that the Offset Act would be a "specific action against dumping" if payments were made to all domestic producers, and not only those that had supported the petition? Please explain.

4.544 Even if eligibility for the offset payments were extended to all domestic producers, including those who did not support an investigation, they would still be a 'specific action against dumping' (or 'a subsidy') because the payment would still be conditional on the existence of a finding of dumping (or subsidisation).

(c) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.545 Footnotes 24 and 56 clarify the scope of Articles 18.1 and 32.1: they do not create exceptions to the scope of those provisions. In the same way that a subsidy may be consistent with GATT Article XVI but inconsistent with, for example, GATT Article III:2, for so long as the Act constitutes 'specific action against dumping/a subsidy' within the meaning of Articles 18.1 and 32.1, that is, action that may be taken only when the constituent elements of dumping are present, it will be inconsistent with those provisions.

4.546 Moreover, GATT Article XVI is one of the provisions of GATT 1994 interpreted by the SCM Agreement, in particular in Part III, within the meaning of Article 32.1 of the SCM Agreement. It cannot also be an 'other relevant provision of GATT 1994' within the meaning of footnote 56 to the SCM Agreement.[104]

33. Please provide an example of a "non-specific" action against dumping.

4.547 Australia considers it is unclear what the Panel means by 'non-specific' action in the context of the present dispute. As indicated in response to Question 1 above, the Appellate Body has clarified the meaning of the entire phrase 'specific action against dumping'. If the Panel means action that may be taken in a situation where there may or may not be dumping or subsidisation, then such action could be a tariff or safeguard action, subject to that action being consistent with other relevant WTO provisions.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

[104] See also Second Submission of Australia, paragraphs 22-26.

4.548 Australia is not pursuing a claim concerning voluntary undertakings under Article 8.1 of the Anti-Dumping Agreement.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.549 Pursuant to Article 3.2 of the DSU,[105] the provisions of the covered agreements are to be clarified in accordance with customary rules of interpretation of public international law, which the Appellate Body has found are expressed in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[106]. Article 31.1 provides:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

4.550 Accordingly, Article 3.2 of the DSU requires that the provisions of the covered agreements, including the Anti-Dumping and the SCM Agreements, are to be interpreted in good faith.

4.551 Moreover, 'the principle of good faith, which is, at once, a general principle of law and a principle of general international law, … informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements'.[107]

4.552 Thus, while there is no specific provision dealing with the principle of good faith, the covered agreements must be interpreted by Members and in the dispute settlement system in accordance with that principle.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.553 Australia notes that the Appellate Body, at paragraph 81 of its Report, expressly stated that 'specific action against dumping could take a wide variety of forms'. Australia notes, too, that the Appellate Body continued to be mindful of the possible variety of possible actions in its subsequent examination of the scope of GATT Article VI at paragraphs 109-126. In particular, footnote 66 to paragraph 122 would seem to indicate that the Appellate Body was concerned that its finding in relation to the meaning of the phrase "specific action against dumping" might in fact be too limiting.

4.554 However, Australia is not in a position to speculate on what other forms the Appellate Body may have actually considered that specific action against dumping could take when making its finding.

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[105] Article 17.6(ii) of the Anti-Dumping Agreement imposes a similar obligation in respect of that Agreement.

[106] *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, page 10.

[107] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, paragraph 101.

2. Brazil

(a) Questions to complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.555 A "response" is defined as an "answer or reply" in the *New Shorter Oxford English Dictionary*. As an alternative, it defines response as "an action or feeling caused by a stimulus or influence; a reaction." There is a link between the stimulus (i.e. the question or the action) and the response (i.e. the reply or reaction). The two are necessarily related.

4.556 The Appellate Body in paragraph 122 of *US - 1916 Act* describes "specific action against dumping" as being "action taken in response to situations presenting the constituent elements of dumping." There may, of course, be actions taken in "response" to dumping which are not necessarily "against" dumping. As such, "specific action against dumping" is a subset of actions which may be taken in response to the constituent elements of dumping. Indeed, "specific action against dumping" read in the context of Article VI:2 of the GATT 1994 means action "to offset or prevent dumping." An action "in response to the constituent elements of dumping" is an action which is in reaction to dumping, but not necessarily an action which is "against" dumping. For example, the flying of flags at half-mast after the issuance of anti-dumping duty order is arguably "in response" to dumping. It is a symbolic response. It is not, however, an action "against" dumping because it neither offsets nor prevents the dumping.

4.557 Brazil would also distinguish between actions "in response" to dumping and actions which are "contingent" on dumping. Here Brazil would refer to the US example of giving anti-dumping duty revenues to charity. While providing revenues to charity is "contingent" on the collection of anti-dumping duties because these are the source of revenues for the charitable giving, this action is not "in response" to dumping. Providing the revenues to charity may be "in response" to a high poverty level in the country or to lack of funding from other sources, but it is not "in response" to the constituent elements of dumping. Brazil would concede that this is nothing more than a payment programme which is contingent on the collection of anti-dumping duties.

4.558 Unlike the two examples provided by the United States – flying the flag at half-mast and giving dumping revenues to charity – the Byrd Amendment is clearly not only "in response" to the constituent elements of dumping, it is "against" dumping in that it seeks to "offset or prevent dumping" which are precisely the objectives of anti-dumping measures specified in Article VI:2 of the GATT 1994.

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.559 The text of the CDSOA itself indicates the linkage between the statute and the constituent elements of dumping when it states: "duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis…to the affected domestic producers for qualifying expenditures." The events which trigger payments under the CDSOA are identical to the events that trigger anti-dumping measures. As such,

there is no question that the constituent are incorporated in the CDSOA. This is evident from the following:

- CDSOA payments are directly linked to a determination of dumping and injury and the subsequent imposition of anti-dumping measures. Similarly, they are also directly linked to determination of subsidization and injury. Thus, without the existence of the constituent elements of dumping (or subsidization) and injury, the statute provides for no action by the US Government.

- Payments under the CDSOA are further linked to the determination of dumping (or subsidization) and injury because they are provided only to those parties that have requested the imposition of anti-dumping (or countervailing) measures and have been determined to have been injured by the dumping (or subsidization).

- Payments under the CDSOA are further linked to the determination of dumping (or subsidization) and injury because the payments are directed at "qualifying expenses" related to the product which has been found to be dumped (or subsidized).

4.560 There is a total overlap between the CDSOA and the constituent elements of dumping (or subsidization). This includes not only the criteria under which payments become available, but also eligibility in terms of parties and products. If the CDSOA does not represent a situation where the constituent elements of dumping are present, it is difficult to conceive of a situation where they would be present other than in legislation implementing the terms of the relevant agreements.

4.561 Brazil cautions against confusing the "constituent elements of dumping" with the questions of whether the subsequent action is "specific action" and is "in response" to or "against" dumping (or subsidization). The constituent elements of dumping (or subsidization) are present whenever an action is based on determinations of dumping (or subsidization) and injury, as is the case with the CDSOA. It then remains to be determined whether the action is "specific" and whether it is "against" dumping. All three criteria are met in the case of the CDSOA.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.562 Articles 18.1 and 32.1 are not equivocal. They clearly specify "no action" except action "in accordance" with the GATT 1994 and the respective agreements may be taken against dumping and subsidization. The GATT 1994 and the respective agreements do not authorize any actions *in lieu of* the measures specified in those agreement. These Articles do not state that, should a member decide not to impose measures under these agreements, it may impose other measures in lieu of these measures. Under Articles 18.1 and 32.1, the question then is a very restricted question: are subsidies provided in lieu of anti-dumping or countervailing measures specific actions against dumping or subsidization. If they are, then these subsidies are inconsistent with the terms of the GATT 1994, the AD Agreement and the SCM Agreement.

4.563 Article VI:2 of the GATT 1994 informs the meaning of "against" by use of the words "offset or prevent." Thus, measures that offset or prevent dumping are measures against dumping. Subsidies are clearly measures which offset dumping. In essence, all or a portion of the price advantage gained by the exporter as a result of the dumping is offset by the subsidy to the industry in the importing country. Rather than forcing the import price upward as is the mechanism of anti-dumping duties to offset or prevent dumping, subsidizing the domestic industry simply provides the domestic industry with the ability to offset the dumping by lowering its own price and, thereby, becoming more competitive with the imported dumped (or subsidized) product. As such, subsidies provided in situations where the constituent elements of dumping are present (i.e. where there is dumping and injury) are measures against dumping.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.564 Yes. This situation simply compounds the inconsistencies of the action taken. In addition to taking specific action against dumping or subsidization not provided in the GATT 1994, the AD Agreement or the SCM Agreement, the Member has not followed the procedures for determining dumping, subsidization, and injury required under the relevant Articles of the agreements. Consequently, the Member is not only taking action against dumping or subsidization not in accordance with the action permitted by the agreements, it is also taking action inconsistent with the procedural and substantive rules of the agreements. For example, the action being taken is not in accordance with the required determinations of injury under Article 2 of the AD Agreement and Article 15 of the SCM Agreement.

4.565 Brazil notes that the fact that a Member has no legal framework for addressing dumping and subsidization of imports does not alter that Member's obligations under the AD and SCM Agreements or under Article XVI of the Marrakesh Agreement. Simply put, a Member cannot use the absence of a legal framework for anti-dumping and countervailing measures as an escape from the disciplines of the agreements.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.566 This question cannot be answered in the abstract. For example, murder is a very different situation than, say, insurance fraud or accounting fraud. Brazil would note, however, that the remedies at issue in the 1916 Act proceeding potentially involved both criminal fines and damages to the victims. Both seek to "prevent" a violation. The latter, damages, also seeks to offset the effects of the violation.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action

against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.567 While such legislation might be challenged on other grounds, it is not apparent that it would constitute specific action against dumping. Specifically, the payment is not dependent on establishing the constituent elements of dumping.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.568 No. As explained in response to question 1, such a payment is neither in response to or against dumping. Rather, such a payment is simply contingent on the collection of anti-dumping duties, since these duties are established as the source of the funding.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.569 It is not clear how this situation is different from the *in lieu of* situation in question 3. Members cannot take specific action either in lieu of or in addition to the measures provided in the relevant agreements. This would appear to be a measure against dumping in lieu of those measures set forth in the AD Agreement.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.570 Yes. It would still be impossible to determine the extent to which support of the petition was motivated by the prospect of anti-dumping measures rather than the prospect of receiving offset payments. The prospect of receiving offset payments would still be a factor, perhaps the only factor, influencing supporters of the petition.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.571 The issue before the panel is not whether Members are acting in good faith if they provide incentives for the use of WTO consistent remedies. The issue is whether the provision of the CDSOA payments frustrates the objectives of Article 5.4, namely the requirement of determining the level of support for a request for the imposition of anti-dumping measures. The CDSOA monetary incentive for requesting the imposition of anti-dumping measures makes it impossible for the requisite determination to be made under Article 5.4.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.572 It is not clear what is meant by "genuine" support. The issue before the panel is not whether the support is or is not genuine, but whether the US authorities can distinguish between the support contemplated by the AD Agreement, namely support based on the prospects for imposition of anti-dumping measures, and support not contemplated by the AD Agreement, namely support based on the prospects of monetary reward. Brazil is not asking the panel to decide the broader question of whether support must be "genuine" and under what circumstances support may be deemed genuine. This is a more complex issue and one likely to be resolved by the facts of a particular case. For example, if one requesting party bribes other potential requesting parties to support the request for anti-dumping measures, does that support qualify under Article 5.4? This issue is not before the panel. The only issue before the panel is whether the US authorities can distinguish between support for a petition conditioned on the receipt of CDSOA payments and support that would exist independent of the prospects for CDSOA payments.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.573 As indicated in the response to Question 11 above, this issue is not before the panel.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.574 Again, the issue is being misconstrued. The question is really a "but for" question. That is, would there be sufficient support for the request for the imposition of anti-dumping measures "but for" the prospect of receiving payments under the CDSOA. If there is insufficient support absent the prospect of receiving payments under the CDSOA, then a determination that support is sufficient under Article 5.4 is not in accordance with Article 5.4. Brazil's position is that the prospect of CDSOA payments makes it impossible for US authorities to determine the level of support that would exist absent the prospect for CDSOA payments. As a result, the authorities cannot meet their obligations under Article 5.4.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.575 Yes. While Article 8 provides authorities with broad discretion in accepting or rejecting price undertakings, it does impose an obligation on the authorities to allow undertakings to be offered and to provide a rationale for rejecting such offers. Brazil contrasts the language in Article 8 with the language in Article 9:1 which states that whether to impose anti-dumping duties and whether to impose duties at or below the margin of dumping "are decisions to be made by the authorities." Although minimal, there are conditions associated with the Article 8 decision on whether or not to accept an undertaking. In contrast, in Article 9, there are no conditions.

(b) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.576 Footnote 24 of the AD Agreement and 56 of the SCM Agreement are straight forward clarifications of the limitations of Articles 18.1 and 32.1 respectively. In essence, they clarify that while specific actions against dumping of exports or subsidies by members are limited to the actions

permitted under the Agreements, this does not preclude actions taken based on other provisions of the GATT 1994. This provision is necessary so as not to preclude actions which are independently authorized under other provisions of the GATT, such as Articles XIX, XII, or XVIII, which may impact the same products or the same Members as are impacted by anti-dumping or countervailing measures. These footnotes, for example, permit the imposition of anti-dumping and countervailing measures on the same products, or safeguards and anti-dumping measures on the same products. They do not, however, provide the basis for broadening the scope of action against dumping beyond those specific actions authorized under the AD and SCM Agreements.

33. Please provide an example of a "non-specific" action against dumping.

4.577 Non-specific action against dumping is action which may have an effect on the competitive dynamics in situations in which dumping is involved but which are not specifically targeted at offsetting or preventing dumping. For example, a country may have a programme which provides assistance to industries or workers, as does the US, which have been adversely impacted by imports, irrespective of whether the imports are dumped. The programme is to facilitate adjustment to imports. It may incidentally impact the competitive dynamics between products which have been found to be dumped and the domestic like product, but the action is not specific to these products or to this situation.

4.578 Another example would be the process of restructuring under the US bankruptcy laws. Many US steel mills, for example, are now in the process of such restructuring. These are the same steel mills that have filed many anti-dumping and countervailing duty petitions and are currently seeking safeguards protection. While they attribute their bankruptcies in large part to dumped and subsidized imports, this does not mean that the US cannot act to assist these companies through normal legal processes to restructure and emerge from bankruptcy as competitive entities. While the restructured companies will be stronger competitors and the restructuring will have altered the competitive dynamics, the action of encouraging the restructuring is not specifically a response to dumping.

4.579 Similarly, there has recently been a proposal that a tax be levied on all sales of steel in the United States and that the revenues from the tax be used to reduce unfunded obligations of US steel mills to retired workers. Many believe that these so-called “legacy” costs make the industry vulnerable to import competition, including competition from dumped imports. However, neither the proposed tax nor the distribution of revenues is specific to dumping. Obviously, US competitors will be in an improved position to compete against imports, including dumped imports, if the programme is implemented. However, it is not specific to dumping.

34. Please give examples of the sort of “other reasons, including reasons of general policy” that Members might invoke under Article 8.3 of the AD Agreement.

4.580 As a general matter, the US is reluctant to enter into undertakings for two reasons. First, they are viewed as being more difficult to administer than anti-dumping duties. Second, they are viewed as being less beneficial to the importing industry in terms of protection than are anti-dumping duties. In fact, the US has rejected consideration of undertakings offered for these reasons in the past.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.581 The obligation of “good faith” arises out of Article 31(1) of the *Vienna Convention on the Law of Treaties* which sets forth the rules of treaty interpretation. With respect to the *Vienna*

Convention, the Appellate Body stated in *United States - Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*:

> We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines on treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned. *Appellate Body Report at para. 60.*

4.582 As such, the obligation of "good faith" is an obligation related to the interpretation of substantive obligations contained in a treaty. It requires that the relevant treaty be interpreted and the obligations be observed in "good faith." It does not create new or additional obligations beyond the underlying obligations in the treaty. Rather, it serves to inform those obligations.

4.583 The WTO agreements, including the AD and SCM Agreements, do not impose any independent "good faith" obligation on Members. However, as indicated by the Appellate Body in the language quoted above, the rules of treaty interpretation impose common disciplines on all such instruments. Furthermore, Article 3:2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) specifically refers to the clarification of obligations in the WTO Agreements "in accordance with customary rules of interpretation of public international law." Thus, the "good faith" obligation is applicable to the interpretation of obligations under the WTO Agreements.

4.584 A "good faith" obligation in interpreting a treaty provision would be meaningless unless it carried over into the implementation of the substantive obligations of the treaty. Whether the interpretation of a provision is in "good faith" only becomes an issue in the context of actions implementing the interpretation. Thus, for example, the obligation to determine the extent of industry support under Article 5.4 must be interpreted and implemented in "good faith."

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.585 The pure subsidy hypothetical does not appear to have been addressed by the Panel or the Appellate Body in the 1916 Act.

3. Canada

(a) Questions to complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.586 The Appellate Body interpreted the phrase "specific action against dumping" to mean "action taken in response to situations presenting the constituent elements of dumping." The interpretation of

the Appellate Body is not treaty language, but an elaboration of it. Therefore, the issue of one being a subset of another does not arise.

4.587 The Appellate Body in fact found that "specific action" was action that operated against, or in response to, *a situation presenting* the presence of those constituent elements. In this case, the Byrd Amendment subsidies are paid out to "condemn" dumping and "neutralise" subsidies.[108] "Condemn", "neutralise" and "offset" denote acting *against* something. These subsidies are paid out *only* where dumping and/or a subsidy is present and not otherwise. In this way the *Act* is a specific action *against* dumping or a subsidy.

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.588 Article 18.1 and 32.1 of the Agreements has been interpreted by the Appellate Body as referring to actions that are taken in response to situations presenting the constituent elements of dumping. This is true of the Byrd Amendment.

4.589 The panels in the *United States – 1916 Act* challenge clarified that these elements require that goods enter into the commerce of the United States and are priced below normal value. The Byrd Amendment is triggered by an order – a finding of injurious dumping or subsidisation – and the collection of duties when under-priced goods actually enter into the commerce of the United States. Where the dumped goods do not enter the United States, no *offset* payments will be available for distribution.

4.590 Moreover, special accounts segregate funds on the basis of specific situations of the constituent elements of dumping (represented by the imposition of an order); recipients are those "affected" by the presence of constituent elements of dumping who participate in investigations. Qualifying expenditures are those incurred by "affected domestic producers" during the time an order is in place for costs related to the production of a domestic product that competes with an import that has been the subject of an order.

4.591 The Byrd Amendment is part and parcel of the US anti-dumping and countervailing duty regime and is not severable from it. It is a specific action against *dumping* or *subsidisation* as required by the specific terms of Articles 18.1 and 32.1 because it is an action that could not, and would not, be triggered unless a finding of dumping or a subsidy is made, and it is an action that seeks to "condemn" dumping and "neutralise" subsidies.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.592 Yes. The obligation contained in Articles 18.1 and 32.1 of the Agreements is that any action taken against situations presenting the constituent elements of dumping or subsidies must be in an authorized form. These are limited to anti-dumping or countervailing duties, undertakings and

[108] *Continued Dumping and Subsidy Offset Act of 2000*, § 1002 (Title X (Sections 1001 – 1003) of the *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001*, Pub. L. No. 106-387; 114 Stat. 1549, 1549A-72 (2000)) (Common Exhibit-1).

provisional duties (or countermeasures) in very specific circumstances. Subsidisation is not an authorised form of response. Therefore, such a response is inconsistent with Articles 18.1 and 32.1.

4.593 "Specific action against dumping" and/or a subsidy was thoroughly dealt with in both Agreements. Articles 18.1 and 32.1 represent the express intention of the Members of the WTO that only certain types of anti-dumping and countervailing measures were to be permitted under the Agreements, and such actions were to be governed by detailed rules. In this context, Canada underlines the importance of maintaining the integrity of the Anti-dumping and SCM Agreements. There are detailed rules governing the initiation of investigations, imposition of provisional measures, determination of the level of permissible duties, duration of duties and so on. To suggest that Members may use subsidies as "specific action against dumping" or a subsidy, is to say that Members may counteract dumping or subsidies by measures not subject to the disciplines set out in the Anti-dumping or SCM Agreements.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/ countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

4.594 Yes. Specific action against dumping or subsidies may be taken by a Member only in accordance with its obligations under the Anti-dumping and SCM Agreements. Articles 18.1 and 32.1 of the Agreements have been interpreted by the Appellate Body to limit those responses to duties, provisional measures and undertakings. A domestic subsidy programme is, therefore, not a permissible response.

4.595 As noted above, Members agreed at the time of the conclusion of the WTO Agreement that such specific action may be taken only in accordance with detailed anti-dumping and countervailing duty rules. If Members had considered counter-subsidies an appropriate "specific action", they could have included this in the SCM Agreement – and negotiated rules for the proper amount and duration of such counter-subsidies. They did not do so. They limited "specific action" to only those measures for which they had negotiated detailed rules. Any other interpretation of Articles 18.1 and 32.1 of the Agreements would mean that the substantive rules negotiated to govern those "specific actions" are rendered meaningless where a Member decides to counter-subsidise, rather than impose anti-dumping or countervailing duties.

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.596 Not applicable.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.597 The answer to the first part of the question is no.

4.598 Under normal circumstances, a victim compensation scheme funded from the general treasury is not a specific action *against* crime. Such compensation schemes are not intended to reduce crime, nor do they in fact do so. Such schemes are generally not devised to "condemn" or "neutralise"

crime; they *compensate* the victim. In this respect, victim compensation funds may be compared to general adjustment policies or programmes.

4.599 The answer would be yes in respect of the second part of the question. A scheme funded by penalties imposed on criminals would, by contrast, constitute a "specific action against crime." "Restitution" is a generally accepted part of the criminal justice system *as a measure against crime*. By making payments to the victim, the criminal is reminded of the harm he or she has done and is required to make good the damage caused. Indeed, in some jurisdictions, monetary penalties are a perfectly acceptable "punishment" for most crimes, especially crimes against property and the person. In these circumstances, it should be noted, the "compensation" in question is imposed *in lieu of* rather than *in addition to* incarceration or other punishment.

4.600 In this respect, such a scheme is to be contrasted with the Byrd Amendment. The United States first "punishes" the importer by imposing countervailing or anti-dumping duties on its goods. In doing this, the United States *also*, by definition, readjusts the competitive balance between imported goods and domestic like products. The Byrd Amendment is a "punishment" in addition to the duties imposed and collected, to the extent that it subsidises the domestic competitors of the importer.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.601 This payment does not appear to be triggered by or depend on a finding of dumping. Therefore, it would not be "specific action against dumping of exports" within the meaning of Article 18.1 as articulated by the Appellate Body.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.602 No. For a measure to fall within Article 18.1, it must be a "specific action against dumping". Specific action against dumping is action triggered by situations presenting the constituent elements of dumping or subsidies and action that is in "response to" such practices. Payments to retirement homes do not "respond" to the practice of dumping of exports. Therefore, the payment of anti-dumping duties to retirement homes is not an action *against* dumping or a subsidy. Nothing in such payment intrinsically offsets, counteracts, "condemns" or "neutralises" dumping or a subsidy.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.603 Yes. Article 18.1 of the AD Agreement limits responses to situations presenting the constituent elements of dumping to duties, provisional measures and undertakings. Offset payments

are not a permitted response. This is regardless of their amount or whether or not they follow an order.

4.604 **First**, a finding that the Byrd Amendment is a specific action against dumping does not depend on whether anti-dumping duties are otherwise imposed. As noted above, Members negotiated and agreed on an extensive and detailed set of rules governing the imposition of those "specific actions" expressly provided for in the Anti-dumping and SCM Agreements. They did not contemplate, and accordingly did not negotiate, rules governing the use of *other* measures such as subsidies as "anti-dumping" or "countervailing" measures. In this respect, the question of the Panel contains its own answer: if subsidies were permitted as "anti-dumping" measures, other WTO Members must depend on the good will of the subsidising Member not to exceed the level of dumping found to exist, not to grant subsidies retroactively, not to grant them for more than five years, etc. Therefore, it is irrelevant that the United States would not be imposing anti-dumping duties. If the measure it does impose is not a contemplated "specific action", it is not permitted.

4.605 **Second**, a finding that the Byrd Amendment is a specific action against dumping or a subsidy does not depend on these subsidies being funded by anti-dumping or countervailing duties. That they are so funded establishes even more clearly the logical and inescapable conclusion that the Byrd Amendment subsidies are "specific action", but the source of the funds is not a *necessary* condition for the purposes of Articles 18.1 and 32.1.

4.606 (One can speculate that the Byrd Amendment would never have succeeded legislatively had the American taxpayer been asked to *directly* subsidise US industries to the tune of billions of dollars a year. One can further speculate that the special accounts for the duties collected were necessary not to *limit* the amount of the subsidies, as the United States alleges, but to ensure that the duties collected never show up on the General Accounts of the United States, thus hiding from the American taxpayer the opportunity costs of the Byrd Amendment. But such speculations would not be relevant for the purposes of the Panel's legal analysis.)

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.607 Yes. Such payments would continue to provide incentives to bring or support petitions in anticipation of a potential *cash* payout *in addition to* the duties imposed. This incentive distorts the determination of threshold levels. Accordingly, it violates Article 5.4. This issue is that the payments distort/undermine the obligation by obscuring the meaning of threshold determinations under Article 5.4 and making it more likely that positive determinations will result.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.608 Article X:(3)(a) of GATT 1994 requires that Members administer their laws, regulations, decisions and rulings in a "uniform, impartial and reasonable manner". The Appellate Body has stated that this obligation creates minimum standards of procedural fairness in the administration of trade regulations. It would follow that incentives for any form of remedy against imports could potentially not result in a fair, neutral administration of laws.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.609 The question at issue in this dispute – indeed, in any dispute before a WTO Panel – is the conduct of the *Member* in respect of *its* obligations. A good faith implementation of an obligation requires, at the very least, that the implementing Member does not actively undermine the obligation it purports to implement. Where a Member is required to *determine* a level of support, it may not *set* that level by, for example, legally requiring support. Nor may it distort a level of support by providing for cash payment incentives. If the thresholds in Articles 5.4 and 11.4 are to mean anything, they must not be subject to overt or covert manipulation by the Member required to determine whether they have been met.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.610 The question before the Panel is the obligations of the United States under Articles 5.4 and 11.4. The United States has an obligation to determine the level of support in accordance with thresholds set out in those Articles. Where the United States provides a cash incentive for the industry to support a petition, it moves to distort its own determination under Article 5.4 and 11.4.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.611 The question before the Panel is the obligations of the United States under Articles 5.4 and 11.4. The United States has an obligation to determine the level of support in accordance with thresholds set out in those Articles. Where the United States provides a cash incentive for the industry to support a petition, it moves to distort its own determination under Article 5.4 and 11.4.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.612 Yes. An interpretation that permitted such a course of action would render the Article 8.3 obligation meaningless. Members undertook to give their investigating authorities the ability to enter into undertakings. An ability to do something must necessarily imply both the legal authority *and* the discretion to do so. To provide for a legal authority and then foreclose the discretion would constitute a breach of the obligation under Article 8.3.

(b) Questions to Canada

30. At para. 44 of its oral submission, Canada states that the Offset Act is a "specific action against dumping" because *inter alia* "payments are made *only* to those producers 'affected' by dumping". Does Canada consider that the Offset Act would be a "specific action against dumping" if payments were made to all domestic producers, and not only those that had supported the petition? Please explain.

4.613 Yes. The elements set out in paragraph 44 collectively support the conclusion that subsidies under the Byrd Amendment constitute a specific action against dumping or a subsidy. Each establishes a nexus between the Act and dumping or a subsidy. None is a *necessary* condition for a finding that Byrd Amendment subsidies are a specific action prohibited by Articles 18.1 and 32.1; though each, in context, could constitute sufficient evidence to establish Canada's claim. The Byrd Amendment would constitute "specific action" whether all producers under the order received payments under it or only those that support the petition. Even if all producers were qualified, no payments could be made unless the practice of dumping or subsidisation existed and claims were

limited to qualifying expenditures taken to offset dumping and subsidisation. Producers would therefore still be "affected" by dumping or subsidisation.

(c) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.614 Under footnote 56, the answer is straightforward. Subsidisation cannot be "action under" Article XVI of GATT 1994 that falls within the scope of that footnote because it is not action under "other relevant provisions of GATT 1994". The Appellate Body said "GATT 1994 as interpreted by the Agreement" with the meaning of Article 18.1 of the AD Agreement (and therefore Article 32.1 of the SCM Agreement) meant the specific provisions of GATT 1994 that the Agreement interprets. Under Article 32.1, the SCM Agreement interprets both GATT Articles VI and XVI.

4.615 Under footnote 24 of the AD Agreement subsidisation cannot be considered "action" if it responds to dumping or subsidies as such. Therefore, whether it is a subsidy permitted under Article XVI is irrelevant if it is a response as such. Then the test becomes whether that action accords with Articles 18.1 and 32.1. It can only constitute action under Article XVI if it responds to something other than dumping or subsidisation as such.

4.616 Moreover, a subsidy that is in compliance with Article XVI of GATT 1994 is not action *per se*. Article XVI does not provide a right to grant subsidies but merely deals with reporting requirements and procedural requirements where Members provide subsidies.

33. Please provide an example of a "non-specific" action against dumping.

4.617 An action "against" dumping that would fall within the scope of footnote 24 is action that does not respond to dumping as such. For example, safeguards measures and countervailing measures can constitute action, that is "non-specific action" within the meaning of footnote 24. If a safeguard measure under Article XIX of GATT is applied in the context of a situation where there is an increase in imports which causes injury, where dumping is in part the cause of the increase, it can be considered an action in part against dumping because it applies to dumped imports. It is not specific action against dumping because the safeguard action is not dependent on a finding of dumping. Rather, it is contingent on a finding of an increase in imports that cause injury. The trigger for the imposition of the measure is therefore not the dumping itself but the increase in imports.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

4.618 A Member may decide not to accept any undertakings where authorities consider the undertaking impracticable to administer. They may also reject undertakings where monitoring is too difficult or there is reason to believe that exporters or foreign governments will not respect the terms and conditions of the undertaking agreements.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.619 Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the DSU) states that:

> … The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. …

4.620 The *Vienna Convention on the Law of Treaties* forms part of the rules of public international law that bears on the interpretation of the WTO Agreements. Article 31(1) requires that

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

4.621 Article 26 requires

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

4.622 Therefore, while there is no express and independent obligation of good faith in the WTO Agreements, DSU Article 3.2 and the provisions of the Vienna Convention require that provisions are interpreted and performed in good faith. The Appellate Body has stated that the principle of good faith is "at once, a general principle of law and a principle of general international law, that informs the provisions of the Anti-dumping Agreement, as well as the other covered agreements."[109] It has further stated:

> This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say reasonably. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.

4.623 In the accompanying footnote, the Appellate Body cited B. Cheng, stating:

> B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Stevens and Sons, Ltd., 1953), Chapter 4, in particular, p. 125 elaborates: "… A reasonable and bona fide exercise of a right in such a case is one which is appropriate and necessary for the purpose of the right (*i.e.*, in furtherance of the interests which the right is intended to protect) …"[110]

4.624 Therefore, while there is no claim for an independent violation of the principle of good faith at issue here, it is clear that an obligation of good faith pervades over the manner in which Members must conduct their affairs. Obligations cannot be fulfilled where the principle of good faith is violated.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1

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[109] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, WT/DS184/AB/R, adopted 23 August 2001, para. 101.

[110] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R, adopted 6 November 1998, para. 158 and footnote 156.

of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.625 That issue was not before the *United States – 1916 Act* panel or the Appellate Body. The question before *this* Panel is whether the facts as presented – most of which are not contested by the United States – establish that Byrd Amendment subsidies are "specific actions against dumping" or a subsidy. In Canada's submission, Byrd Amendment subsidies are intended to, and in fact do, "condemn", "neutralise" and "offset" dumping or a subsidy. As such subsidies are not one of the three responses to dumping or subsidies provided for, and governed by, the Agreements, the Byrd Amendment is not permitted by Articles 18.1 and 32.1.

4. Chile

(a) Questions to the complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.626 In paragraph 122 of its report in *United States – Anti-Dumping Act of 1916*, the Appellate Body clearly states that "specific action against dumping" … is action that is taken in response to situations presenting the constituent elements of "dumping". There is nothing in the report to indicate that an action in response to dumping (or a subsidy) is not an action against dumping (subsidy). Moreover, the Anti-Dumping Agreement (AD Agreement) does not mention the concept of "response to." It follows that the Appellate Body is plainly using the concept of "in response to" as a way to explain what "action against" should be understood to mean.

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.627 As Chile noted in its first joint written submission with Japan, the constituent elements of dumping are not expressly identified in any WTO Agreement. However, both Article VI of the GATT 1994 and Article 2.1 of the AD Agreement tell us when there is dumping:

(a) When products from one country are introduced into the commerce of another country; and

(b) When these products are introduced at less than their normal value.

A third element should be added here:

(c) When these developments produce injury or the threat of injury.

4.628 The CDSOA provides for the distribution of anti-dumping or countervailing duties assessed to the "affected domestic producers" for "qualifying expenditures." Both concepts are defined in the CDSOA, and Chile considers they need not be repeated here. Accordingly,

(a) The duties distributed under the CDSOA will only be collected pursuant to a petition, an investigation, and a finding of dumping made by the US authorities. Without a finding of dumping (or subsidy), there are no duties to be distributed; and in order for there to be a finding, the authority must establish (on the basis of credible evidence) the existence of the constituent elements of dumping. It is worth noting that a number of panel and the Appellate Body reports concluded that not all the constituent elements of dumping were present in some findings.

(b) Duties will only be distributed to the affected domestic producers, i.e., to those producers who filed or supported a petition for an anti-dumping investigation. The duties are distributed neither to those firms which opposed the investigation, nor to those producers of goods that are not "like products."

(c) The duties are distributed to offset qualifying expenditures. These, under the CDSOA, are expenses incurred after the issuance of an anti-dumping (or subsidy) finding. Here again, in the absence of the constituent elements of dumping – i.e., if no dumping were found – there would be no expenditures incurred after the imposition of an anti-dumping or countervailing duty.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.629 The findings of the Appellate Body in *United States – Anti-Dumping Act of 1916* are clear and unequivocal. Actions against dumping (and by analogy against subsidy) are limited. Any other action that is not an anti-dumping duty, provisional measure or price undertaking (and by extension, a countervailing duty or countermeasure authorized by the DSB) is prohibited. However, footnote 24 indicates that Article 18.1 is not intended to preclude action under other relevant provisions of the GATT 1994 (footnote 56 of the SCM Agreement says the same thing). In Chile's opinion, a Member may take actions other than those specified, when the existence of dumping coincides with the specific circumstances and limitations that allow for the adoption of another action under the pertinent WTO Agreement. For example: if there are unforeseen developments and if imports are taking place in such increased quantities and under such conditions as to cause, or to threaten to cause serious injury to the domestic industry, the authority may adopt a safeguard measure – provided that the strict and specific requirements of Article XIX of the GATT 1994 and the Agreement on Safeguards are met – even when such imports may also be dumped, i.e., the authority may decide not to make a finding and thus refrain from imposing anti-dumping or countervailing duties.

4.630 However, in the case of the CDSOA this situation does not arise, because at issue is not simply a prohibited action against dumping, but an action that is being taken over and above the anti-dumping or countervailing action. In other words, a twofold remedy is involved; and when a subsidy is granted subject to an anti-dumping or countervailing finding on top of the anti-dumping duty or countervailing duty, that subsidy has the effect of removing the injury in full or in part. In that case, retention of the anti-dumping or countervailing duties is contrary to the AD Agreement and the SCM Agreement.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and

design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.631 Yes, this would be a "specific action against dumping" as defined by the Appellate Body. This is because, in contrast to one of the examples given in reply to question 33, the authority has first made a dumping or subsidy finding, and has accordingly found that the constituent elements of dumping are present. But because this is not an anti-dumping duty, provisional measure, or price undertaking, the said domestic subsidy programme would be a prohibited action.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.632 The concept of "specific action against crime" is not in any WTO Agreement – and therefore it has not been defined by the Appellate Body. The meaning of this phrase is thus hard to establish. Furthermore, if one were to apply (by analogy, and for the sake of argument) the conclusions in *United States Anti-Dumping Act of 1916*, one would first have to define the constituent elements of crime, and this would fall well beyond the purview of the case before the panel.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.633 No. As the Appellate Body pointed out, "a specific action against dumping" is action that is taken in response to situations presenting the constituent elements of dumping. These elements were individually specified in Chile's reply to question 2. None of these elements is present in the example postulated in this question, since although the law might establish an incentive for petitioning for anti-dumping investigations (albeit not as clear and perverse as in the CDSOA), the payment of US$5,000 is not conditional upon a finding (negative or affirmative) of dumping. Accordingly, in this particular example, the payment of US$5,000 is made automatically, irrespective of whether or not the constituent elements of dumping are found.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.634 No. In the example given, the law does not constitute a response to situations presenting the constituent elements of dumping. Contrary to what the United States asserts in its first written submission, Chile – in common with the other complaining parties – does not question a Member's sovereign right to distribute the proceeds from assessed anti-dumping or countervailing duties. Chile is specifically questioning the distribution of anti-dumping and countervailing duties in the manner provided for under the CDSOA.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.635 Leaving aside the fact that the postulated example is a hypothetical one, since it is impossible to make a rigorous projection of the amount that would have been collected had anti-dumping measures been imposed, given that the imposition of such measures generates distortions in trade flows – distortions which in many cases are significant, and which in some cases impede exports altogether – such payments would constitute a specific action against dumping. Indeed, the case described is a response to situations presenting the constituent elements of dumping – i.e., the introduction of products into the commerce of another country at less than their normal value, as well as the attendant injury or threat of injury (see reply to question 2). The offset payments in the example given here are not one of the measures which the Appellate Body defined as the only permissible actions against dumping, and accordingly, such payments would be contrary to Article 18.1 of the AD Agreement. Moreover, as was indicated in Chile's reply to question 3, this situation would not be covered by other relevant provisions of the GATT 1994 within the meaning of footnote 24.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.636 To answer this question, Chile believes it must first ascertain whether there is an additional obligation to be met over and above the quantitative requirements established in AD Article 5.4. Chile believes that there is, indeed, such an obligation. The representativeness of the domestic industry is not based purely on quantitative criteria (whether or not a particular quorum is met); qualitative criteria are also involved: i.e. the quorum must be confined to those producers that favour and support an application presenting the three basic and essential requirements prescribed in AD Article 5.2, namely, dumping, injury, and causal link. These are the requirements that must be respected in an application for an investigation, which must be based on evidence. The authorities must examine the accuracy and adequacy of that evidence to determine whether there are sufficient grounds to justify the initiation of an investigation. To these considerations Chile wishes to add a fourth factor associated with the object and purpose of Article VI of GATT 1994 and the AD Agreement: to obtain protection from the government to prevent or remedy the injury and to offset unfair trading practices. In other words, quorums must be achieved on the basis of factors inherent in the AD Agreement, and not on the basis of other factors constituting economic incentives, which would unquestionably distort the analysis that producers must perform when deciding whether or not to support an anti-dumping and/or countervailing petition.

4.637 Thus, both the CDSOA and the example postulated in the question constitute a factor which in various ways distorts the analysis which each producer must perform when deciding whether or not to support a petition. If the producer decides to support the petition under these circumstances, the (qualitative) representativeness of the domestic industry would no longer be based on the factors required by the AD Agreement for the initiation of an investigation, even if the quantitative requirements were met. It follows that the spirit and scope of Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement would be violated in both cases.

4.638 At all events, the question is not a purely hypothetical one inasmuch as the incentive provided by the CDSOA on condition that an anti-dumping duty is applied, would lead all producers to pursue and support the initiation of an investigation in light of the possible benefit to be derived.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.639 As Chile indicated in its reply to the previous question, the domestic industry's applications for anti-dumping or countervailing investigations must be based on factors spelled out in Article VI of the GATT 1994 and the AD Agreement or the SCM Agreement (in other words there must be dumping and/or subsidy, injury, and a causal link); furthermore, petitioners must seek the government's protection to prevent or remedy this injury and offset unfair trading practices. Taking these factors into consideration, the domestic industry must carry out its own examination of the costs and benefits involved in submitting an application. If the government provides incentives as well, this will distort the examination which the domestic industry has to perform.

4.640 If one pursues to its logical conclusion the argument put forward in reply to question 10, each Member would have an underlying obligation to refrain from introducing any decision-making factors extraneous to the AD Agreement and SCM Agreement, or to Article VI of the GATT, if such factors were to promote and encourage "false" support for the petition and, by the same token, inevitably distort the meaning and scope of the concepts "degree of support" and "opposition" under Articles 5.4 and 11.4.

4.641 Besides, the Member in the example given above would be acting in a manner inconsistent with Article X.3(a) of the GATT 1994, irrespective of whether there were good or bad faith in said Member's intentions.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.642 As Chile indicated in its reply to question 10, prior to initiating an investigation, the investigating authority is obliged to review the evidence submitted by the domestic industry of dumping, injury, and a causal link. An anti-dumping application based on these elements, duly verified by the investigating authority, would accordingly be justified. It follows that the producers that support this application are those that are able to produce evidence of the existence of these three elements, including the existence or expectation of injury. If such elements were not present, (i) the application would fail to meet the requirements specified in Article 5.2, and (ii) the authority would be unable to fulfil its obligation to review the relevant evidence to determine whether there were grounds for initiating an investigation. If the producers' support were based on other factors – such as the incentive generated by the CDSOA – the application would not be genuine, and the authority would be unable to fulfil its obligation under Article 5.3 of the AD Agreement in an unbiased, objective, and reasonable manner.

4.643 For this reason, the AD Agreement establishes two mechanisms that enable the investigating authority to ensure that the support is genuine. First, the authority is required to examine the accuracy and adequacy of the evidence of dumping, injury, and causal link, submitted with the application (Chile describes this as "qualitative support"). Second, the authority is obliged to determine the degree of support or opposition using the quantitative parameters established in Article 5.4 (this Chile might refer to as "quantitative support").

4.644 Finally, the investigating authority must ensure that the relevant legislation and the WTO Agreements have been used appropriately. Here, the authority may not interfere in private parties' decisions to petition for an investigation.

4.645 Having said that, Chile believes that the investigating authority's assessment of whether support for the application is genuine should go no further than the requirements stated in Article 5; accordingly, the authority should not attempt to gauge the intentions of the parties involved. What Chile is questioning in this dispute are the incentives afforded by the CDSOA, which will generate an increased number of anti-dumping and subsidy investigations, with their attendant impact on global trade flows.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.646 A domestic producer will support an anti-dumping application when there is dumping, when the dumping produces injury or the threat of injury, and when there is a causal link between the dumped imports and the injury. Such support is accordingly motivated by the producer's desire for this situation to be remedied by means of an anti-dumping measure. The authority must ensure that the support is genuinely given on the basis of the three elements referred to above. Now, if there are other motives attributable to government incentives or pressure, and if the support is provided solely because these incentives are available – in other words, if there would be no support without the incentives – then unquestionably the requirements of Article 5 of the AD Agreement would not be met.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.647 If the domestic producer, in the absence of a desire to be eligible for CDSOA offset payments, would not have supported a petition, then there would be no support within the meaning of Article 5.4.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.648 Yes it would, because in so doing the Member would be turning this particular provision into a dead letter. Article 8.3 establishes certain circumstances under which the investigating authority may exceptionally reject undertakings, including a procedure for notifying the exporter and giving the latter an opportunity to make comments thereon. If the hypothetical case stated in your question were to materialize, this exception would become the only rule preventing the use of an instrument that is explicitly provided for and regulated by the AD Agreement.

4.649 In developing countries, this scenario would prevent the authority from making use of one of the few constructive remedies specified in AD Agreement, as provided for in Article 15.

(b) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.650 Although Chile is not sure exactly what the Panel means by this question, it would appear to be focusing on the scope of footnote 24. In fact, footnote 56 cannot make reference to Article XVI since that Article is one of the provisions of the GATT 1994 as interpreted in the SCM Agreement, under Article 32.1 of the SCM Agreement. Now, Articles XVI and VI (where relevant) of the GATT 1994, as interpreted in the SCM Agreement, form an architecture which regulates subsidies. Under this architecture, there are subsidies which Members may grant and other subsidies which are prohibited. In addition to its procedural rules, Article XVI contains prohibitions on using particular subsidies; conversely, however, it permits subsidies that are not prohibited (whether under that Article or under the SCM Agreement). Accordingly, it may well be possible to adopt actions "under" Article XVI, if the latter is considered part of an architecture.

4.651 Nevertheless, Chile would welcome clarification from the Panel so that it can provide a more specific answer to the question.

33. Please provide an example of a "non-specific" action against dumping.

4.652 Assuming that a product is believed to be a dumped product, and if – by virtue of the fact that it is a *commodity* or *commodity-like* – such dumping is very widespread, the investigating authority (*in lieu* of an anti-dumping action or investigation) may take other steps that counteract the injury more effectively and facilitate the adjustment process. For example:

(a) A safeguard;

(b) Raise the MFN duty up to the bound level;

(c) Renegotiate the tariff under Article XXVIII of GATT 1994;

(d) Subsidize the production of the affected industry;

(e) Subsidize the consumer.

4.653 None of these actions is contingent upon a finding of all the constituent elements of dumping. Note that in the case of border measures, they are on a MFN basis. In general, these are economic policy options which may, in certain instances, prove more effective than an anti-dumping action under the AD Agreement.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

- When the undertaking offered is incompatible with the laws on competition in the market in question.

- When the market structure would render them ineffective as undertakings. For example, if there were many importer firms connected with the exporters.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.654 It is understood that Members in their dealings with other Members, as well as in observing the treaties which they have entered into, must perform their obligations in good faith (Article 26 of the Vienna Convention). Accordingly, if a Member fails to perform its obligations under these treaties

– in other words, violates the treaties – then that Member is acting in bad faith. However, even if there is no independent obligation to act in good faith, no such obligation would be necessary inasmuch as the principle is fully applicable to the WTO Agreements. For example, in *US – Hot-Rolled Steel*, the Appellate Body held that good faith is a general principle of law and a principle of general international law, that informs the provisions of the AD Agreement as well as the other covered agreements. Furthermore, to the extent that WTO Members are meeting their obligations and undertakings, they are also meeting the "obligation" to act in good faith that is incumbent upon them under international law.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.655 Chile was not a party to the *US - 1916 Act* proceedings; thus it had no access to the documents submitted by the Parties, nor did it take part in oral hearings. Accordingly, aside from the matters discussed in the pertinent reports, Chile would be unable to determine the intent of the Panel or Appellate Body. Furthermore, question 3 has been posed by the current Panel which is examining the particular case before us here; thus it is hard to say whether a panel or Appellate Body in a different case, that took place a while ago, might have shared the same concerns.

5. European Communities, India, Indonesia, Thailand

(a) Questions to the complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.656 The Appellate Body has interpreted the notion of "specific action against dumping" as "action taken in response to situations presenting the constituent elements of 'dumping'". That interpretation leaves no scope for arguing that "specific action against dumping or subsidisation" is a "subset" of "action in response to dumping". For the Appellate Body, the two expressions have the same meaning: "specific action against dumping" is "action in response to dumping".

4.657 The US contention that the above passage "provides no guidance as to the meaning of the term against" is untenable. By interpreting the notion of "specific action against dumping" as "action taken in response to the constituent elements of dumping", the Appellate Body was giving meaning also to the term "against".

4.658 In support of its assertion that "it is clearly possible for action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy" the United States relies exclusively on two examples: the distribution of anti-dumping or countervailing duties to a charity; and the flying of flags at half-mast following the issuance of an anti-dumping or countervailing duty order. Both examples are purely hypothetical, can be readily distinguished from the offset payments and, in any event, fail to prove the US point.

4.659 As discussed below (Reply to Question 7), contrary to the assumption made by the United States, the distribution of anti-dumping or countervailing duties to a charity is not an action "in response to" dumping or subsidisation. As regards the second example, flying the flag at half-mast, the possibility that a Member will ever take such action is remote. Moreover, in the even remoter case that another Member would bother to bring a complaint against such action, the defendant would stand a good chance to become the first Member to ever succeed in rebutting the presumption of nullification or impairment attached to all the violations of the WTO Agreement. The Complainants submit that the Panel need not disturb the interpretation made by the Appellate Body in *U.S - 1916 Act* in order to make room for the use of flag flying as a trade remedy.

4.660 For the above reasons, the Panel should reject the US attempts to re-interpret the term "against". That term has already been interpreted by the Appellate Body in 1916 Act as part of its interpretation of the notion of "specific action against dumping". By arguing now that it is necessary to give meaning to the term "against", the United States is in reality seeking to replace the Appellate Body's interpretation of "specific action against dumping" by a narrower, self-serving interpretation of that notion.

4.661 However, should the Panel agree with the US view that the Appellate Body's interpretation of "specific action against dumping" needs to be qualified by re-interpreting the term "against", the Complainants submit that the reading of that term made by the United States is unduly restrictive. In accordance with its ordinary meaning, the term "against" may encompass not only action that "applies" directly to imports or importers, but more generally any action which is objectively capable of offsetting or preventing dumping or subsidisation, whether by imposing a direct burden on the importers, or by providing an advantage to the domestic producers (see the Complainants' Second Submission, at Section IV.B).

2. Please explain exactly how you see that the "constituent elements of dumping" have ¨ been incorporated into the CDSOA.

4.662 The offset payments constitute "action which may be taken only when the constituent elements of dumping or subsidisation are present" and, therefore, "specific action against dumping or subsidisation", for at least three different reasons:

- first, the offset payments are not made to all US enterprises, or even to all US producers "affected" by imports, but only and exclusively to the US producers "affected" by an instance of dumping or subsidisation which has been previously the subject of an anti-dumping or a countervailing duty order, respectively;

- second, the offset payments are paid for "qualifying expenses" incurred by the affected domestic producers "after" the issuance of an anti-dumping or a countervailing duty order; and

- third, the "qualifying expenses" must be related to the production of a product that has been the subject of an anti-dumping or countervailing duty order.

4.663 The fact that the offset payments distributed to the "affected" producers of a given product are paid from the duties collected on imports of the like product provides further evidence of the remedial purpose of the CDSOA. But it is neither a sufficient nor a necessary condition for establishing that the offset payments constitute "specific action against dumping or subsidisation".

4.664 Contrary to the US assertions, the Complainants do not claim that the offset payments constitute "specific action against dumping or subsidisation" merely because they are paid from anti-dumping or countervailing duties. If the offset payments were financed directly from the US Treasury, and in an amount unrelated to the amount of collected anti-dumping or countervailing duties, they would still be "specific action against dumping" for the above mentioned three reasons.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.665 Yes. Article 18.1 of the Anti-dumping Agreement and Article 32.1 of the SCM Agreement do not distinguish between "specific action against dumping or subsidisation" which is taken in lieu of anti-dumping or countervailing measures and that which is taken in addition to those measures. They prohibit all specific actions against dumping and subsidisation which are not in accordance with those Agreements. The Complainants have shown that the offset payments provide a double remedy to the "affected domestic producers". But the offset payments would still be prohibited by Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement even if they did not provide such double protection.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.666 Yes, in so far as the grant of the subsidies was conditional upon a finding of dumping or subsidisation.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.667 The Complainants see little merit in the suggested analogy, since there is a fundamental difference between the situation described in the question and the situation at issue in this case: victims and criminals do not compete with each other to sell goods in the same market. At any rate, making compensatory payments to the victims could indeed constitute an effective "action against crime" if tied to "qualifying expenses" in items such as body-guards, alarm mechanisms or electrified fences.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.668 As described in the question, the payment would seem not to be dependent upon a positive finding of dumping and, therefore, would not constitute "specific action against dumping" according to the test set forth at paragraph 122 of the Appellate Body's report in *US - 1916 Act*. The EC would recall, nevertheless, that in footnote 66 of that report the Appellate Body left open the possibility that the notion of "specific action against dumping" might be broader. However, like the Appellate Body in *US - 1916 Act*, the Panel need not reach that issue in this case, because the CDSOA meets clearly the test of paragraph 122.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.669 Making payments to state retirement homes is not a "response" to dumping and, therefore, does not constitute "specific action against dumping". The mere fact that an action is funded with anti-dumping or countervailing duties does not turn such action into a "response" to dumping. Money is fungible. It would be absurd if one and the same action had to be characterised as an "action against dumping" if it were funded with anti-dumping duties, as an "action against sales" if it were financed from a value added tax, or as an "action against profits" if it were funded with the proceeds of an income tax.

4.670 The test laid down by the Appellate Body in *US - 1916 Act* ("action that may be taken only when the constituent elements of dumping are present") must be satisfied by the "action" itself, and not by the funds used to finance such action. In the proposed example, the relevant "action" is making payments to a state retirement home. That "action" is not, as such, dependent upon the constituent elements of dumping, but only upon the existence of a qualifying recipient institution. It is only the funding of such action which is dependent upon a finding of dumping.

4.671 As explained above, the Complainants do not claim that the offset payments are "specific action against dumping or subsidisation" simply because they are paid from anti-dumping or countervailing duties. The offset payments are a "response" to dumping or subsidisation because they are made exclusively to domestic producers affected by dumping or subsidisation for qualifying expenses incurred after the issuance of an anti-dumping or countervailing duty order with respect to the production of the same product which is the subject of such orders. The offset payments would still be dependent upon a finding of dumping or subsidisation and, consequently, "specific action against dumping or subsidisation" if they were paid from the US Treasury or from any other source of Government revenue.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.672 The payments described in the question would constitute an action that "may be taken only when the constituent elements of dumping are present" and, consequently, would be "specific action against dumping". The fact that the United States refrains from imposing an anti-dumping order would not exclude a violation of Article 18.1, for the reasons already explained in the reply to question 3. The payments described in the question would not constitute "action under other relevant

provisions of GATT 1994" for the same reasons that they constitute "specific action against dumping". Moreover, they would not be made "under" any other "relevant" GATT provision (see below the reply to Question 32).

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.673 Yes. In the situation described in the question, the offset payments would still provide an incentive to file or support applications, because each domestic producer could not be sure that the other domestic producers would file or support an application. The incentive to file an application would remain until an application is lodged by another producer, while the incentive to support the application would subsist until the moment when the thresholds for initiating an investigation are reached.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.674 The proposition advanced in the question is like saying that, because the Constitution of the United States allows the re-election of President Bush, his supporters act in good faith if they buy the necessary votes to ensure that he is re-elected.

4.675 The question misses the crucial point that anti-dumping and countervailing measures are not "a WTO consistent remedy" unless they have been imposed pursuant to an investigation initiated on the basis of an application made "by or on behalf of the domestic industry". The purpose of that requirement is to limit the initiation of investigations (and consequently the imposition of measures) to those cases where the domestic industry (rather than the Government or a minority of domestic producers) is interested in the imposition of measures. The CDSOA seeks to avoid the limitations on the initiation of investigations imposed by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement by providing a financial incentive to file or support applications.

4.676 The obligation to perform a treaty obligation in good faith means that such obligations "must not be evaded by a merely literal interpretation". It means also that the parties "must abstain from acts that are calculated to frustrate the object and purpose of the treaty". As explained in the Complainants' submission, the CDSOA frustrates the object and purpose of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement because it encourages the opening of investigations and the imposition of measures in cases where the domestic industry is not interested in such measures. For that reason, the CDSOA is incompatible with the obligation of the United States to comply in good faith with the requirements of those articles.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.677 Yes. If the domestic producers declare their support for the application in order to escape a sanction imposed by the law (or a harm threatened by the Government or by another party) such declaration cannot be considered as "support" for the purposes of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. Likewise, if the domestic producers declare their support for the application in order to qualify for an advantage, such as the offset payments, that declaration does not constitute "support" for the application. Rather, it is "support" for the offset payments.

4.678 If, as argued by the United States, it did not matter whether the support is "genuine", a Member's authorities would be entitled to take any action within their reach in order to make sure that the thresholds are attained: not only bribing the domestic producers to file or support applications, as in the present case, but also denying them advantages (e.g. tax credits or government contracts), or even imposing upon them sanctions (e.g. fines or, why not, imprisonment) if they failed to do so. In those Members where the respect of human rights is of less concern than the protection of the domestic industries, the authorities could go even further. For example, they could subject any reluctant domestic producers to torture with the assurance that the "subjective motivations" of those producers for signing the declarations of support would be deemed irrelevant for WTO purposes. These examples evidence that the US formalistic interpretation of the term "support" would lead to absurd results and cannot be correct.

4.679 In the absence of evidence to the contrary, the authorities must presume that, if a domestic producer has declared formally its support for the application, such support is "genuine", just like the electoral authorities of all countries presume that, in the absence of any evidence to the contrary, the ballots cast by the voters are the genuine expression of their political choices. However, if the authorities are presented with evidence that a declaration of support is not "genuine", for example, because the petitioner has threatened or bribed the producer concerned, they cannot disregard such evidence. To do so would be a violation of their duty to conduct an objective examination of the existence of support.

4.680 By its very existence, the CDSOA destroys the presumption that a formal declaration of support is evidence of genuine support. The CDSOA provides a strong incentive to file "non-genuine" applications and to make "non-genuine" declarations of support. As a result, it renders suspect all applications and declarations of support made by the US producers. If the authorities could read the minds of the US producers, they could disregard the "non-genuine" declarations of support and make a proper determination of support, notwithstanding the incentives provided by the CDSOA. Since this is impossible, the CDSOA has the necessary consequence that the US authorities are prevented from reaching a proper determination of support, whether positive or negative, before initiating an investigation, thereby violating Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

4.681 The United States concedes, indeed stresses, the obvious point that the US authorities cannot tell the genuine applications/declarations of support from those induced by the CDSOA, but fails to draw the appropriate consequence from this. According to the United States, since the U.S authorities cannot ascertain whether support is genuine or induced by the CDSOA, it would follow that the whole issue is entirely irrelevant. This argument puts logic on its head. It is like saying that the buying of votes should be permitted because the authorities cannot exclude that those voters who have been bribed by a candidate would have voted for that candidate anyway. It is precisely because the motivations of voters cannot be ascertained that all democracies ban the buying of votes per se, regardless of its actual impact on the outcome of the election.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.682 A domestic producer "supports" an application if it declares its support because it supports the measures as such, and not because it has been coerced or induced to make a declaration of support by the Government (or by the petitioner). In the case at hand, this means that a domestic producer cannot be considered to "support" an application unless it would have declared its support also in the absence of the offset payments.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.683 As explained above, there is no "support" when the domestic producer would not have supported the application but for the offset payments.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.684 Yes. The interpretation suggested in the question would render superfluous Article 8.3 Anti-Dumping Agreement.

4.685 The reference to "reasons of general policy" in Article 8.3 means that a Member may reject undertakings not only for "reasons" related to the specific terms and circumstances of each undertaking offered, but also for more general considerations which do not require a case-by-case examination of each undertaking. For example, a Member may decide not to accept any undertakings in a certain product sector where monitoring is too difficult, or where there is a history of evasion of undertakings, or where undertakings raise anti-trust concerns.

(b) Question to Canada

30. At para. 44 of its oral submission, Canada states that the Offset Act is a "specific action against dumping" because *inter alia* "payments are made *only* to those producers 'affected' by dumping". Does Canada consider that the Offset Act would be a "specific action against dumping" if payments were made to all domestic producers, and not only those that had supported the petition? Please explain.

4.686 The CDSOA defines the notion of "affected domestic producer" as including only those producers who have filed or supported an application leading to the imposition of anti-dumping or countervailing duties. However, even if that definition were amended to cover all the US producers of the like product (i.e. including those who did not support the application), the offset payments would still be "specific action against dumping or subsidisation", because it would remain that no offset payments would be paid to the US producers of other products which are not "affected" by dumping or subsidisation.

(c) Questions to the European Communities

31. With reference to the last sentence of para. 33 of the EC oral statement, does the European Communities consider that price undertakings may only be rejected if the acceptance of an undertaking is not "practicable"? Please explain.

4.687 The EC would suggest that this question should have been addressed to the United States. Indeed, at paragraph 132 of its First Submission, the United States stated that

> […] [Articles 8 and 18] state that an undertaking "need not be accepted if the authorities of the importing member consider the acceptance impractical" because the number of exporters is too great, or "for other reasons, including reasons of general policy". The ordinary meaning of "impractical" is that which is "not practical" or "not available or useful in practice", or "not inclined or suited to action". These articles do not limit or define the reasons that an administering authority may find an undertaking to be "impractical".

4.688 At paragraph 134, the Unites States added that

> […] As explained above, the articles provide that the authorities need not accept an undertaking if it is "impractical". They do not limit the reasons that may lead the authorities to conclude that acceptance is "impractical."

4.689 Finally, at paragraph 136 the United States stated that

> […] The logical reading of the two sentences is that, once an administering authority has concluded that an undertaking is impractical for whatever reason, the undertaking is also considered to be "inappropriate".

4.690 The above quoted passages suggest that the United States takes the view that an undertaking may be rejected only if it is "impractical". The passage of the EC's oral statement cited in the question addressed that argument. An alternative reading of Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement would be that undertakings may be rejected if they are "impractical" or for "other reasons, including reasons of general policy". In support of this reading, it could be argued that the second sentence of those two Articles does not use the term "impractical" but the term "inappropriate", presumably with the intention to capture the two categories of "reasons" mentioned in the first sentence (i.e. "impracticability" and "other reasons"). The argument made by the Complainants at paragraph 96 of their First Submission is based on this reading.

4.691 Regardless of the interpretation, it remains that, contrary to the US assertions, the rejection of undertakings is not within the authority's "complete discretion", but must be based on "reasons".

(d) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.692 Footnotes 24 and 56 allude to action taken "under other relevant provisions" of the GATT. This is not the same as saying "action which is not prohibited by some other GATT provision". The "other relevant provisions" referred to in footnotes 24 and 56 are those GATT provisions which confer and regulate positively the right to take a certain type of remedial action, such as Article VI, Article XIX, or Articles XII and XVIII. Article XVI is not one of such "relevant provisions".

4.693 Article XVI, as interpreted and elaborated in Parts II and III of the SCM Agreement, lays down certain disciplines governing the use of subsidies, but does not provide for a positive right to grant subsidies as a trade remedy. A measure which is neither prohibited by Part II nor actionable under Part III may still be prohibited, on different grounds, by another WTO provision (e.g. Article III:2 of the GATT). One can say of a subsidy that it is not prohibited by Part II or not actionable under Part III of the SCM Agreement, but not that it is "action" taken "under" Article 3 or "under" Article 5 of the SCM Agreement.

4.694 As far as footnote 56 of the SCM Agreement is concerned, the Complainants would recall that the SCM Agreement does not interpret only the subsidies provisions of Article VI of the GATT. The SCM Agreement is also an interpretation of Article XVI of the GATT. Therefore, Article XVI cannot be one of the "other relevant provisions of GATT 1994" mentioned in footnote 56. Instead, it is one of the "interpreted" provisions of the GATT alluded in Article 32.1

33. Please provide an example of a "non-specific" action against dumping.

4.695 Assume that a Member imposes a safeguard measure under Article XIX of GATT against an injurious increase in imports which is caused, at least in part, by dumping. That action may be characterised as an action "against dumping" in so far as it applies, *inter alia*, to dumped imports, but is not "specific action against dumping" because it is not dependent upon a finding of dumping. It is dependent upon a finding of an injurious increase in imports.

4.696 Or assume that a Member grants a subsidy which allows its exporters to engage in dumping. If another Member imposes countervailing duties on those exports, such action would be "action against dumping" because it applies to dumped imports. But it would not be "specific action against dumping", because it would not be conditional upon a finding of dumping, but instead upon a finding of subsidisation.

4.697 To mention but one more example, assume that a Member grants subsidies to any industry in difficulties which agrees to a restructuring plan, regardless of the causes of the difficulties (and, therefore, including the situation where the difficulties are caused by dumped imports). That action would be "action against dumping" in so far as the difficulties are caused by dumped imports. But they would not be "specific action against dumping" because the granting of the subsidies is not dependent upon a finding of dumping.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

4.698 See above the reply to Question 14.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.699 The Complainants have not invoked the violation of an "independent", self-standing obligation to act in good faith. Rather, the claim made by the Complainants is that, by failing to perform in good faith the obligations imposed by the provisions at issue of the Anti-Dumping Agreement and the SCM Agreement, the United States has violated those provisions.

4.700 The principle of good faith is an "integral part" of the rule *pacta sunt servanda*, i.e. of the rule that treaties are binding. This is reflected in Article 26 of the Vienna Convention on the Law of Treaties which, under the title "*pacta sunt servanda*", provides that

> Every treaty in force is binding upon the parties of it and must be performed by them in good faith.

4.701 Thus, by failing to perform in good faith a treaty obligation, a party violates that treaty obligation. The same is true of the obligations imposed by the WTO Agreement.

4.702 The WTO Agreement does not contain any express provision to the effect that the obligations which it imposes must be performed in good faith. Nevertheless, Article 3.2 of the DSU stipulates that the provisions of the covered agreements must be interpreted in accordance with the customary rules of interpretation of public international law. Similarly, Article 17.6 (ii) of the Anti-Dumping Agreement provides that "the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of public international law". By now it is well established that the rules alluded in those two provisions include those codified in the Vienna Convention on the Law of Treaties.

4.703 Article 31(1) of the Vienna Convention states the general rule of interpretation of treaty obligations as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in their light of its object and purpose.

4.704 Unlike the Vienna Convention, the WTO Agreement does not state expressly an obligation to "perform" in good faith the obligations imposed by the WTO Agreement. But such obligation is implicit in the requirement to "interpret" those obligations in good faith. Surely, if the WTO provisions must be interpreted in good faith it is because they must be observed in good faith.

4.705 The Appellate Body has recognised the relevance of the principle of good faith in the context of the WTO Agreement. According to the Appellate Body, the principle of good faith is "at once a general principle of law and a principle of general international law that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements".

4.706 More specifically, the Appellate Body has explained that the requirement to conduct an "objective examination" of the existence of injury set forth in Article 3.1 of the Anti-Dumping Agreement means that such examination must conform "to the dictates of the basic principles of good faith and fundamental fairness" and is "yet another expression of the general principle of good faith".

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.707 As far as the EC can recall, the "subsidy hypothetical" set forth in Question 3 was not discussed before the panels or the Appellate Body.

4.708 The Complainants do not wish to speculate on what the panels or the Appellate Body "had in mind". They would recall, nevertheless, that at paragraph 81 of its report, the Appellate Body noted that "specific action against dumping could take a wide variety of forms". Further, in footnote 66 the Appellate Body cautioned that "it did not consider it necessary, in the present cases, to decide whether the 'concept of specific action against dumping' may be broader". This suggests that, when defining the notion of "specific action against dumping", the Appellate Body "had in mind" a "wide variety of actions" and was concerned that the definition set forth at paragraph 122 of the report might be, if anything, too restrictive.

6. Japan

(a) Questions to the complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.709 Japan disagrees with the United States' allegation that it is possible for an action to be "in response to" dumping but not be "against" dumping. The Appellate Body states that "the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'."[111] It further states "Article VI is applicable to any 'specific action against dumping' of exports, i.e., action that is taken in response to situations presenting the constituent elements of 'dumping'."[112] These statements clarify that "specific action 'against' dumping" is equivalent to "action that is taken 'in response to' situations presenting the constituent elements of dumping." The "specific action against dumping" is not a subset of action "in response to" dumping.

4.710 The Appellate Body's expression in the 1916 Act of an action "in response to" dumping would be properly understood when separated it into two elements. First, an action can be taken "in response to" dumping only when the constituent elements of dumping exist before the action is taken. The presence of the dumping is thus a precondition to take an action. Second, the Appellate Body uses expression of "in response to" in the context of Article VI,[113] and accordingly, the expression must be understood in that context. In this respect, the Appellate Body uses the term "in response to dumping" interchangeably with "counteract dumping" to discuss the scope of Article VI and the AD Agreement[114]. The EC Panel in 1916 Act also found that Article VI:2 provides that *only* measures in the form of anti-dumping duties may be applied to *counteract* dumping as such.[115] These statements clarify that the Appellate Body's expression of an action "in response to" dumping would properly be understood to mean an action "to counteract" dumping.

4.711 Therefore, An action is specific against dumping when it satisfies the following conditions:

(i) The action is conditioned upon situations presenting the constituent elements of dumping; and,

(ii) The action is taken to counteract dumping.

4.712 Examples presented in the US first written submission, such as contributions to charity and flying a flag at half-mast, are not specific actions against dumping because these examples are not actions to counteract dumping, and thus fail to satisfy the second condition above. In contrast, the distribution, which the CDSOA mandates, satisfies both conditions, and therefore is "specific action against dumping."

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

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[111] Appellate Body Report, *United States – Anti-Dumping Act of 1916* (WT/DS 136,162/AB/R) ("1916 Appellate Body"), para. 122. (emphasis added.)

[112] 1916 Appellate Body, para.126 (emphasis added).

[113] 1916 Appellate Body, para. 126 ("[w]e have found that Article 18.1 of the Anti-Dumping Agreement requires that any 'specific action against dumping' be in accordance with the provisions of Article VI of the GATT 1994 concerning dumping".) *See also* other quotations from the 1916 Appellate Body, *supra*.

[114] 1916 Appellate Body, para. 109. *See also* para. 116, and 117.

[115] *See* WT/DS136/R para.6.204. The EC Panel and Japan Panel also uses the term "address" to paraphrase the term "counteract." ("We have reached the conclusion that rules and declines of that article [Article VI] apply to laws that *address* 'dumping' as defined in Article VI:1 of GATT 1994") (WT/DS136/R para. 6.163. *See also* WT/DS162, para. 6.182).

4.713 As discussed in Japan's first written submission in para. 4.13, the "constituent elements of dumping" include the introduction by a country of a product into the commerce of another country at less than its normal value.

4.714 The CDSOA has incorporated the constituent elements of dumping because the CDSOA mandates the distribution only when the United States Government ("USG") issues an order to impose anti-dumping duties on imported products and only as long as the USG maintains the order. *See* Section 754 (a) of Tariff Act of 1930, as amended by Section 1003 of CDSOA. The USG issues an anti-dumping order only when it finds an export price of a product into the United States is less than its normal value. Further, the order would be able to remain in force "only so long as and to the extent necessary to counteract dumping which is causing injury." *See* Article 11.1 of AD Agreement. The distribution under the CDSOA is conditioned upon the situations presenting constituent elements of dumping. The distributions of collected duties under the CDSOA become a practical and theoretical impossibility in the absence of the constituent elements of dumping (or subsidization). As such, the "constituent elements of dumping" have been incorporated into the CDSOA.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.715 Assuming that the subsidy is provided to "affected domestic producers," as is the CDSOA, this hypothesis would be inconsistent with these Articles.

4.716 The Appellate Body stated in the 1916 Act case, "Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."[116] As the Appellate Body found, these Articles and provisions prohibit Members from taking any other actions in response to dumping except for these three measures. Subsidies in response to a finding of dumping in this hypothesis are not one of the three types of permissible measures.

4.717 As discussed in Japan's first written submission in paragraphs 4.36 through 4.46, Article 10, footnote 35, and 32.1 of the SCM Agreement limit specific actions against subsidy that a Member may take to countervailing duties, provisional measures, price undertakings, or countermeasures under Article 4 and 7. The provision of subsidies in response to a finding of subsidisation is not among of these permissible measures.

4.718 A Member, therefore, may not provide subsidies in response to dumping or subsidisation. This conclusion does not differ even if the subsidisation is in lieu of anti-dumping or countervailing measures permitted under the AD Agreement or the SCM Agreement. Indeed, it is within a Member's discretion whether to impose either or none of the permitted measures. No provisions in the AD Agreement, the SCM Agreement or other WTO Agreements, however, permit any alternative measures. Thus, the hypothesized subsidies are inconsistent with the AD and the SCM agreements irrespective of the fact that the Member refrains from taking permissible measures in response to dumping or a subsidy.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing

[116] 1916 Appellate Body, para 137.

measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.719 Japan assumes that the subsidy programme is to offset the injury caused by "*dumping*" or "*subsidy*" as defined in Article VI of GATT 1994, the AD Agreement or the SCM Agreement. Japan also assumes that the subsidy is not a countermeasure permitted under Article 4 or 7 of the SCM Agreement. Upon these assumptions, this hypothetical programme would be inconsistent with the AD Agreement and the SCM Agreement.

4.720 The subsidy would satisfy the first condition as discussed in Japan's answer to Question 1 above. The subsidy would be granted only when the Member finds dumping or a subsidy within the meaning of Article VI of GATT 1994, the AD Agreement or the SCM Agreement. The execution of the subsidy programme is therefore conditioned upon situations presenting the constituent elements of dumping or subsidization.

4.721 The subsidy would also satisfy the second condition in Japan's answer to Question 1 above. In this hypothesis, a Member would provide a subsidy to domestic producers, which are injured because of dumping or subsidy. This subsidy is intended and designed to resume the competitive power of domestic producers against dumping or subsidy. In other words, the subsidy is intended and designed to counteract dumping or subsidy. The subsidy is therefore a measure to counteract dumping or subsidy.

4.722 The subsidy programme thus would satisfy both of the two conditions discussed in Japan's answer to Question 1 above. The programme therefore constitutes a specific action against dumping or subsidy under Article 18.1 of the AD Agreement or Article 32.1 of the SCM Agreement.

4.723 It should be noted that a Member must act in a manner consistent with Articles 18.1 and 32.1 of the AD and SCM Agreements, even if the Member chooses not to have any legal framework for anti-dumping or countervailing duty investigations, as discussed in Japan's answer to the Question 3 above.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.724 Because of differences in nature among various crimes, it is a difficult task to discuss what constitutes a "specific action against" crime in general. A victim compensation scheme, however, may be viewed as a "specific action against" some crimes, such as fraudulent interference with a victim's business. If Japan may consider that monetary loss by the interference to the victim is a situation presenting the constituent elements of the crime, compensation to the victim then would counteract the crime. It therefore would be a specific action against crime.

4.725 Japan's answer would not change due to the source of the fund. When the funding to victims is considered to be a specific action against crime as analysed above, the source of the funding is irrelevant to the analysis. Imposition of a penalty on a criminal would constitute another specific action against crime separately from this hypothetical funding.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.726 Assuming that a Member would make the payment, upon a finding of dumping, for preparation of a petition and participation into an investigation under the AD Agreement, such payment would constitute a "specific action against dumping of exports." In this case, a valid petition must contain positive evidence of the constituent elements of dumping. See Article 5.2 of AD Agreement. The payment for the petition, therefore, is a specific action taken where the first condition as discussed in Japan's answer to the Question 1 above is satisfied.

4.727 The preparation of the petition is also an action to counteract dumping. The action of preparing a petition is required of any petitioner, and is therefore an action necessary to counteract dumping. A Member's payment for the preparation of a petition is equivalent to the action of the preparation itself, and thus is also a specific action to counteract dumping. The payment therefore also satisfies the second condition to be a "specific action against dumping." As the payment would satisfy both conditions to be a "specific action against dumping," the payment would be an action prohibited under the Article 18.1 of the AD Agreement.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.728 The payment to state retirement homes would not constitute a "specific action against dumping" because the payment would not be an action to counteract dumping, and therefore does not satisfy the second condition as discussed in the answer to the Question 1 above.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.729 This offset payment would constitute a "specific action against dumping of exports" because the offset payment would be made in situations presenting the constituent elements of dumping, and would counteract dumping or subsidy. The USG's decision not to impose an anti-dumping duty on imports is irrelevant. Even if the offset payment would not be funded from the collected anti-dumping or countervailing duties, it does not alter the payment's status as a "specific action against dumping." Please see Japan's answers to Questions 1, 3 and 4 above for further discussions in this connection.

4.730 The offset payment in this hypothesis is not an "action under other relevant provisions of GATT 1994" because the offset payment is a "specific action against dumping." The Appellate Body in the 1916 Act case found that " 'Action' within the meaning of footnote 24 is to be distinguished from 'specific action against dumping' of exports, which is governed by Article 18.1 itself."[117] It

[117] 1916 Appellate Body, para 123.

further found that "Article 18.1 should be read as requiring that any 'specific action against dumping' of exports from another Member be in accordance with the relevant provisions of Article VI of the GATT 1994, as interpreted by the Anti-Dumping Agreement." These statements clarify that footnote 24 exclude no "specific action against dumping" from the application of Article 18.1.

4.731 The United States erred in arguing that the CDSOA is exempted from the application of Article 18.1 of AD Agreement because of footnote 24. As Japan demonstrated in its first written submission, oral statement, second submission and above, the CDSOA mandates a "specific action against dumping" within the meaning of Article 18.1 of AD Agreement that is not permitted by Article VI and the AD Agreement. As the Appellate Body instructs, footnote 24 does not exclude the CDSOA from the application of Article 18.1.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.732 Yes. The payment still provides a financial incentive to support a petition because the offset payment will never be made unless an anti-dumping or countervailing duty investigation is initiated. An anti-dumping or countervailing investigation may be initiated only when a petition attracts 25 per cent support among the entire domestic production, and 50 per cent support among domestic production expressing either support or opposition. The offset payments thus still provide a strong incentive to domestic producers to support the petition.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.733 Japan understands that the incentive questioned in this dispute is not incentive for the use of a WTO consistent remedy, but incentive for creation of an appearance clearing the legal requirements superficially for the use of WTO consistent remedy. Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement require a minimum expression of support by domestic producers *before* a Member legally may initiate an investigation. In other words, the expression of a sufficient degree of industry support is the predicate of a Member's very right to initiate. A Member may not, in good faith compliance with its obligations under those articles, "purchase" that legal right by offering payments to domestic producers so as to induce them to express support they might not otherwise express.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.734 The determination of the support under Article 5.4 of the AD Agreement must be based on the examination of true or genuine support to a claim that the domestic industry is injured by dumping. In ordinary situations, the investigation authorities may presume that expressions of

support from domestic producers are true or genuine without further scrutiny unless circumstances or other evidence indicates that their expressions would be tainted by other interests.

4.735 The question in this dispute, however, is NOT whether the USG is obliged to scrutinize motives of domestic industries under Article 5.4 at the time of any polling of support. The question is whether a WTO Member may promise to provide financial benefits to domestic producers upon the condition that they support a petition at the time of the polling.

4.736 As discussed in Japan's first written statement, oral statement, and answer to Question 10 above, the USG has an obligation to perform the determination required by Article 5.4 in good faith. Further, Article 4.1 of AD Agreement informs Article 5.4, and makes clear the duty of care required of the investigating authorities to ensure that other interests do not distort expression by domestic producers of their support or opposition to a petition. Japan refers to its first written submission, paragraphs 4.47 through 4.75 for further discussion on this issue. The CDSOA explicitly supplies "other interests" to domestic producers in a manner inconsistent with USG's obligations under Article 5.4.

4.737 The only way for the USG to perform its obligations under Article 5.4 in good faith and determine the degree of support properly is simply to remove the financial incentives that the CDSOA mandates.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.738 While Article 8.3 of the AD Agreement does not require the acceptance of undertakings, a good faith application of its terms would require acceptance in those situations in which it is practical or appropriate to do so. Members have an obligation to consider offered undertakings in good faith and must have a proper reason if they are rejected.

4.739 Article 8.3 of the AD Agreement does not justify a Member's rejection of an offered price undertaking only based on its policy never to accept price undertakings. The Member still would have an obligation to review an offered undertaking and may reject it only when it would have a proper reason to reject the individual offer in all cases. A mere statement that the Member has such a policy is not sufficient for the purpose of Article 8.3. This hypothesis, however, does not apply to the USG because the USG has never taken, or does not claim in its rebuttals, that it will take, such a position.

(b) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.740 A subsidy granted without taking any procedures set forth in Article XVI of the GATT is not an action "under other relevant provisions of the GATT" within the meaning of footnotes 24 and 56. Article XVI does not provide a right to grant subsidies in general, it merely deals with reporting requirements and other procedural issues. Therefore, a Member that simply grants a subsidy is not taking action "under" Article XVI.

4.741 Subsidization further cannot be considered an action "under other relevant provisions of the GATT", within the meaning of footnote 56 of the SCM Agreement because Article XVI is "the provisions of GATT" under Article 32.1. Article 32.1 prohibits Members from taking specific action

against a subsidy of another Member "except in accordance with the provisions of GATT, *as interpreted by this Agreement.*" (emphasis added.) The SCM Agreement interprets not only Article VI:3 of GATT but also Article XVI. The reference in footnote 56 to "*other* relevant provisions of GATT" is meant to encompass only those provisions that are *not* covered by Article 32.1, i.e., provisions that are not interpreted by the SCM Agreement. Therefore, neither Article VI:3 *nor Article XVI* can be considered "*other* provisions of the GATT under footnote 56.

4.742 It also bears noting that the distributions under the CDSOA do not fall in the scope of footnotes 24 and 56 because, as Japan and other complainants have demonstrated, they are *specific* actions against dumping or subsidy covered by Articles 18.1 and 32.1. The Appellate Body in the 1916 Antidumping Act case found that "action" within the meaning of footnote 24 is to be distinguished from "specific action against dumping" within the meaning of Article 18.1.[118] A measure that is considered "specific action against dumping" is "governed by Article 18.1 itself."[119] Likewise, a measure that is considered "specific action against a subsidy" is governed by Article 32.1. Also, the Panel in the 1916 Antidumping Act case specified that footnote 24 does not affect the conclusion that "when dealing with dumping as such, Members must comply with Article VI of the GATT 1994 and the Anti-Dumping Agreement."[120] Therefore, the distributions under the CDSOA, which are *specific* actions against dumping or subsidy covered by Articles 18.1 and 32.1, would not fall within the scope of footnotes 24 or 56. The United States cannot justify the distribution under the CDSOA based on footnotes 24 and 56.

33. Please provide an example of a "non-specific" action against dumping.

4.743 A safeguard measure in accordance with Article XIX of GATT 1994 and the Agreement of Safeguard is an example of a non-specific action against dumping. A safeguard measure normally is taken in response to situations in which an unforeseen increase of imports causes serious injury or threat of serious injury to domestic industry. If Japan supposes a case in which dumping is one of the elements causing the serious injury or threat thereof, taking a safeguard measure may, as a result, have effects to address dumping. It is, however, not an action which is specifically addressed to dumping, because a safeguard measure is an action taken in response to the increase of imports that causes serious injury or threat of serious injury, and not in response to dumping.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

4.744 As discussed in Japan's answer to Question 14, a Member has an obligation to review an offered undertaking, and may reject it only when it has a proper reason to reject it in all cases. A mere statement that the Member has a policy not to accept price undertakings is not sufficient to justify the rejection for the purpose of Article 8.3.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.745 The answer is "yes" to both questions. The international law principle of good faith is a basis to consider whether a Member performs its obligations in compliance with specific provisions of the AD Agreement and the SCM Agreement. The Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU") provides that this dispute settlement system serves to clarify the

[118] 1916 Appellate Body, para. 123.
[119] 1916 Appellate Body, para. 123.
[120] 1916 Panel report, WT/DS136/R, footnote 374.

existing provisions of WTO agreements covered by DSU[121] "in accordance with customary rules of interpretation of public international law."[122] Article 17.6(ii) of the AD Agreement also provides that the provisions of the AD Agreement shall be interpreted in accordance with customary rules of interpretation of public international law.

4.746 Article 26 of the Vienna Convention on the Law of Treaties, which requires that parties perform every treaty in good faith, has been recognized by the Appellate Body as "a general principle of law and a principle of general international law, that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements."[123]

4.747 Further, Article 31 of the Convention requires that the treaty, such as the AD Agreement and the SCM Agreement, must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in the context of the treaty, and in the light of its object and purposes.

4.748 While the good faith performance is not an independent obligation explicitly provided in the WTO Agreement, the administration of national trade laws and regulations in a uniform, impartial and reasonable manner is a Member's obligation explicitly provided in Article X:3(a) of GATT 1994. Not only must a Member's anti-dumping laws and regulations conform with the AD Agreement, that Member must also perform its obligations under the AD Agreement in a uniform, impartial and reasonable manner. For example, 732(c)(4)(A) of the Tariff Act of 1930 of the United States, codified at 19 USC. § 1673a(c)(4)(A), provides the same 50 per cent and 25 per cent for industrial support tests as provided in Article 5.4 of the AD Agreement and Article 11.4 of SCM Agreement. The USG thus has an obligation to perform these tests in a uniform, impartial and reasonable manner.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.749 In addition to Appellate Body's findings quoted above, Japan wishes the Panel to take note of the following findings by Appellate Body and the Panel. The Appellate Body found that: Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. (para. 137).

4.750 These findings clarify that no other measures, including the hypothetical subsidy set forth in Question 3 above, are permissible response to dumping. The negotiation history of Article VI strengthens these findings, as the EC Panel Report notes in paragraphs 6.201 and 6.202. [124]

36*bis*. ADDRESSED ONLY TO THOSE PARTIES THAT WERE PARTIES OR THIRD PARTIES IN THE 1916 ACT PROCEEDINGS: Was there anything in your submissions to the panel or Appellate Body in the 1916 Act proceedings that would have caused the panel or Appellate Body to address the meaning of Article 18.1 of the AD Agreement in the context of the pure subsidy hypothetical set forth in question 3 above?

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[121] WTO agreements covered by DSU include the AD Agreement and the SCM Agreement. See Article 1 and Appendix I of the DSU.

[122] The DSU Article 3.2.

[123] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 101 and footnote 56. See also *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R para. 6.14, (25 November 1997, adopted as *modified)*

[124] WT/DS136/R, 31 March 2000.

4.751 Japan does not find any arguments specifically addressing the hypothetical set forth in question 3. Nevertheless, Japan draws the Panel's attention to the following paragraphs of Japan's written submission to the Panel and to the Appellate Body in the *1916 Antidumping Act* case, regarding Article 18.1 of the AD Agreement:

- First Written Submission of Japan before the Panel (20 September 1999) (WT/DS 162), paragraphs 62-71.
- Second Written Submission of Japan before the Panel (24 November 1999) (WT/DS 162), paragraph 52.
- Written Submission of Japan before the Appellate Body (30 June 2000) (WT/DS 136/162), paragraphs 54, 59-63, 66, 67, 71.

7. Korea

(a) Questions to the complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.752 No, due to the finding of the Appellate Body in *US-1916 Act*, it is not possible.

4.753 No, the Appellate Body's finding does not suggest this. This is because, as a matter of logic (given the Appellate Body's interpretation in *US-1916 Act* (para. 122)), if an action is "in response to" dumping it is "against" dumping. The Appellate Body has interpreted "against" dumping to be "in response to situations presenting the constituent elements of 'dumping'."

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.754 The Byrd Amendment does not operate, *i.e.*, it has no effect whatsoever, absent a finding by the US authorities that the constituent elements of dumping have been met. This finding is a necessary condition precedent for operation of the Byrd Amendment and, therefore, the "constituent elements of dumping" have been incorporated into the Byrd Amendment.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.755 Yes, it would be inconsistent. In response to a finding that dumping or subsidization has occurred in the context of an anti-dumping or countervailing duty investigation, a Member is permitted only to apply the remedies set forth within the relevant agreement, *i.e.*, offsetting duties not to exceed the amount of dumping or subsidy. In general, a Member may, of course, grant a subsidy if

it wishes, so long as the subsidy is not inconsistent with the relevant provisions of GATT 1994 and the SCM Agreement.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.756 Insofar as the domestic subsidy programme would be "in response to situations presenting the constituent elements of 'dumping'" or subsidy, the programme would not be permissible.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.757 With all due respect, the question is irrelevant because criminals are not in a competitive market with their victims. The relationship between a criminal and its victim is completely different from that which exists between imported and domestic goods, which compete in a marketplace day in and day out. Thus, a grant to a victim (or a fine or penalty against a criminal) does not have a similar effect – the two parties are not competing in a marketplace.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.758 The situation set out in the question is, perhaps, even worse, because the payment would precede an actual finding that the constituent elements exist. (In essence, it would be a specific action against alleged dumping.) It also would act to advantage the petitioners *vis-à-vis* the allegedly dumped imports. In addition, it certainly would improperly bias the process in favor of petitioners, possibly violating Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement. This said, if one were to strictly apply the Appellate Body's analysis set forth at paragraph 122 of the *US - 1916 Act* report, because the measure would not follow a positive finding of dumping, it would not be a "specific action against dumping."

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.759 No, the payments would not constitute specific action against dumping of exports, because they would have no impact whatsoever on the conditions of competition.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-

dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.760 The payments would be a specific action against dumping under Article 18.1 insofar as the payments would be conditioned on affirmative findings of dumping, injury and causation.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.761 Yes. In that case (which does not exist here), Article 5.4 would be violated, because US companies still would be spurred by the legislation to file and support petitions, which, absent the legislation, they would not support. The incentive would exist because each US company could not be certain that other US companies would file and support a petition.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.762 A Member is not acting in good faith when it alters the economic climate so as to encourage trade remedy proceedings. The provisions (e.g., standing) were negotiated with a view toward existing economic incentives (merits of the case), not with a view toward the existing economic incentives, biased by a cash reward. In other words, had the negotiators considered cash rewards permissible, the thresholds likely would be much higher. Moreover, anti-dumping and countervailing measures are not "a WTO-consistent remedy" unless they have been imposed pursuant to an investigation initiated on the basis of an application made "by or on behalf of the domestic industry." This requirement limits the investigations (and consequently the imposition of measures) to cases where the <u>domestic</u> <u>industry</u> – not a small subset of it – is interested in the imposition of WTO-consistent measures, not cash rewards. Note, also, that in this case, the Byrd Amendment acts to encourage proceedings under a regime (the US anti-dumping regime) which has been found to violate WTO obligations and has yet to be brought into conformance.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.763 At best, yes. However, Article 5.4 obligates Members, not industries. Nonetheless, when a Member acts to encourage spurious petitions, the Member must also act to ensure that the support is for reasons of the investigation itself rather than the cash reward.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.764 Yes, the producer's interest in starting an investigation should arise from market considerations.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.765 Where a producer would not support a petition absent the possibility of a cash reward, the producer cannot be said to "support" the petition under Article 5.4.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.766 Yes. A Member has the authority to reject undertakings that are "impractical." Whether an undertaking is impractical should be decided on a case-by-case basis, considering the context and relevant circumstances.

(b) Questions to all parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.767 The provisions are not related. A Member has the authority to grant a subsidy, as long as the subsidy complies with the relevant WTO provisions. This is true regardless of whether the conditions for imposing anti-dumping duties, countervailing duties or a safeguard measure exist.

33. Please provide an example of a "non-specific" action against dumping.

4.768 In a situation in which the requirements for imposing either an anti-dumping duty or a safeguard measure are met, a Member might decide to impose a safeguard measure, complying with the relevant WTO provisions.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

4.769 A Member might establish a general policy of not accepting undertakings with regard to imports from a country that does not accept undertakings under the same conditions.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.770 Yes, absent the requirement of "good faith," the WTO agreements are meaningless. "Good faith" is required for <u>any</u> agreement to have meaning. This has been confirmed by the Appellate Body in *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), para. 101.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.771 The panels and Appellate Body were focusing on whether <u>any</u> <u>type</u> of remedy, other than permitted duties, was acceptable. They concluded "no."

8. Mexico

(a) Questions to the complaining parties

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "'specific action against dumping' … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

4.772 The Appellate Body's finding in *United States - Anti-Dumping Act of 1916* does not suggest that "specific action against dumping" is a subset of action "in response to" dumping. The Appellate Body carefully examined the meaning of the phrase "specific action against" and explicitly determined that a "specific action against dumping" is an action taken in response to situations presenting the constituent elements of dumping. In the light of the above finding, there is no basis and, therefore, it is not necessary to create a distinction between "against" and "in response to".. Applying the test established by the Appellate Body, the Continued Dumping and Subsidy Offset Act of 2000 ("the Act") and its offsets are "in response to situations presenting the constituent elements of dumping". As such, they constitute "specific action against" dumping or subsidization.

4.773 In this dispute, it is not necessary for the Panel to determine definitively the universe of measures that could constitute "specific action against dumping" within the meaning of Articles 18.1 and 32.1. Mexico submits that, at a minimum, the phrase "specific action against" encompasses actions such as the Act and the offsets it distributes.

4.774 As regards paragraph 91 of the United States' first written submission, even if one were to accept that it is possible for an action to be "in response to" dumping or a subsidy, but not "against" dumping or a subsidy, the action at issue in this dispute is undoubtedly "against" dumping or a subsidy, even using the United States' narrow interpretation of the term "against".

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

4.775 In Mexico's view, Article 18.1 of the Anti-Dumping Agreement encompasses action that is taken in response to situations presenting the constituent elements of dumping. The Act and the offsets distributed under it are clearly "in response to situations presenting the constituent elements of dumping" or subsidization, because the distribution of offsets is an action that may be taken only when the constituent elements of dumping or subsidization are present.

4.776 Since no funds would be collected and distributed in the absence of an order based on findings of dumping or of subsidization, because the magnitude of the subsidies is linked to the magnitude of the anti-dumping and countervailing duties, the Act is an action in response to situations presenting the constituent elements of dumping (or a subsidy), and therefore constitutes a "specific action against" dumping (or a subsidy).

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was *in lieu of* anti-dumping or countervailing measures? If not, please explain in light of your view that

these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

4.777 Yes. As described, such an action appears to be inconsistent with Articles 18.1 and 32.1 especially if the subsidies equal in magnitude the duties that would otherwise be payable. Irrespective of whether subsidization is in lieu of anti-dumping or countervailing measures or in addition to such measures, it is not a form of action that is authorized under Article VI of the GATT 1994 (as interpreted by the Anti-Dumping Agreement and the SCM Agreement) to respond to situations presenting the constituent elements of dumping or subsidization.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping/countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

4.778 For the reasons explained in Mexico's reply to question 3 and in Mexico's other submissions with respect to the meaning of the expression "specific action against", the hypothetical programme and the subsidies granted under it could constitute a "specific action against dumping" or a subsidy.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

4.779 In the case of the *United States – Anti-Dumping Act of 1916*, the Appellate Body found that the phrase "specific action against dumping of exports" meant an action that is taken "in response to situations presenting the constituent elements of dumping". It is difficult to apply this finding to the analogy suggested by the Panel. However, Mexico notes that a victim compensation scheme differs from the CDSOA and its offsets in many respects. For example, any payment under such a scheme does not directly and systematically "offset" the crime committed. The payments and their amount (irrespective of the source of the funds) may not be generated by crime in and of itself.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.780 The hypothetical measure described in this question is distinguishable from the Act and its offsets in that the payment of $5,000 to petitioners does not appear caused by and linked to the existence of a finding or order of injurious dumping, nor is it linked to the magnitude of the anti-dumping or countervailing duties collected. As such, in the absence of other elements demonstrating that the payment can only be made where the constituent elements of dumping exist, it appears that the measure would not constitute a "specific action against" dumping.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific

action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

4.781 In this hypothetical case, the linkages between the action and the dumping and subsidization are not defined. Accordingly, it is difficult to analyze whether it would amount to a specific action against dumping of exports without making further assumption.

4.782 Under the narrow interpretation of "against" proposed by the United States, arguably such an action would not be against dumped imports or the importers.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

4.783 Based on the facts described in the question, the payments appear to constitute an action which may be taken only in response to situations presenting the constituent elements of dumping, and therefore would be "specific action against dumping".

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

4.784 Yes. It appears that under the hypothetical scenario raised by the Panel, an incentive distorting the functioning of the thresholds regarding standing and, therefore, the examination that the investigating authority is required to make in order to determine whether the application has been made "by or on behalf of the domestic industry" would still exist. The distorting incentive would remain, because it would be in the interest of producers to increase the likelihood that an investigation will take place (and therefore the likelihood that subsidies will be granted) by filing or supporting a petition.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.

4.785 The issue in this dispute is not whether the United States is providing an incentive for the use of a WTO-consistent remedy., Rather, it is whether the incentives that are being provided undermine the requirements of the Anti-Dumping and SCM Agreements. A Member cannot be characterized as acting "in good faith" if its actions undermine the agreements.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

4.786 In this dispute the legal issue to be decided under Article 5.4 is not whether the support for an anti-dumping petition is "genuine" or whether the investigating authorities must examine what motivated domestic producers to support a petition. Rather, it is whether the United States has undermined its ability to make determinations in an objective manner when it rewards domestic producers that support the petition and, consequently, penalize those that do not. Distorting expression of support by the domestic industry by providing a new incentive to petition or support a

petition is not compatible with the United States obligation to make determinations under Article 5.4 in an objective manner.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

4.787 See the reply to question 11.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

4.788 See the reply to question 11. In such a situation, a domestic producer's expression of support is tainted. At the risk of placing their competitors in a more advantageous competitive position, domestic producers must indicate support for the petition.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

4.789 Yes. Such a measure appears to violate Article 8.3 of the Anti-Dumping Agreement because it would make it impossible for the investigating authorities of the Member in question to conduct an objective investigation into whether price undertakings would be appropriate in any given case. Therefore, it would render Article 8.3 of the Anti-Dumping Agreement inutile.

(b) Questions for Mexico

25. Please comment on the meaning of the phrase "in particular" in Article 5(b) of the SCM Agreement, in light of Mexico's claim that the Byrd Amendment nullifies or impairs benefits accruing to Mexico under Article VI of GATT 1994.

4.790 The context of the phrase "in particular" makes it clear that the reference to "benefits of concessions bound under Article II of GATT 1994" can be interpreted as the chief type of "benefits accruing directly or indirectly to other Members under GATT 1994" that are referenced in paragraph (b). Under this interpretation, benefits under Article II would be relevant to a paragraph (b) analysis "much more than in other cases" (i.e. much more than the benefits accruing under other provisions of GATT 1994). However, the nullification or impairment of benefits accruing under other articles of GATT 1994 could still be subject to scrutiny under paragraph (b). The phrase "in particular the benefits of concessions bound under Article II of GATT 1994" simply presents the chief type of such nullification or impairment.

26. If a subsidy contained eligibility criteria or conditions that were not "objective" within the meaning of footnote 2 to the SCM Agreement, would it *ipso facto* be specific within the meaning of Article 2?

4.791 No. In contrast to paragraph (a) of Article 2.1, paragraph (b) does not establish requirements for determining when specificity exists. Rather, it elaborates on a situation where an allegation of specificity is based on criteria or conditions established by the granting authority or by the legislation pursuant to which the granting authority operates. In such a situation, the defending Member can counter the allegation of specificity by demonstrating that the requirements of paragraph (b) and footnote 2 have been met.

27. Please explain further the basis for your view that, when examining the issue of specificity, each offset should be treated as a "separate and distinct subsidy".

4.792 The United States argues that the Act, in itself, is not specific. The appropriate question is not whether the Act is specific; rather, it is whether the subsidies conferred under the Act are specific.

4.793 Factually, the subsidies conferred by the Act can be distinguished from those conferred under a typical subsidy programme. In the case of the subsidies conferred by the CDSOA, there is no common pool of funds. Rather, discrete "special accounts" are established to fund each offset, which is linked to a specific anti-dumping or countervailing order or finding. Each of the special accounts is funded separately through the assessment and collection of anti-dumping and countervailing duties and the amount of the funds for each account is dependent on the magnitude of the duties assessed and collected under its respective finding or order. Finally, recipients eligible for offsets paid from one special account are not eligible for offsets paid from another special account unless they meet the eligibility requirements for that account. Consequently, the structure and architecture of the Act creates a series of separate and distinct subsidies.

4.794 Legally, this means that the "financial contribution" and the "benefit" associated with each special account (i.e. with each offset) are separate and distinct. In other words, each special account or offset constitutes a separate and distinct subsidy within the meaning of Article 1.1.

28. Mexico advances a number of arguments in support of its claim that the CDSOA causes non-violation nullification or impairment. Would Mexico rely on the same arguments to demonstrate non-violation nullification or impairment in respect of a programme under which the grant of a subsidy is not contingent on a demonstration of the constituent elements of dumping or subsidization?

4.795 The basic approach to providing non-violation nullification or impairment would also be applicable generally to nullification or impairment claims pertaining to subsidies. That is, nullification or impairment can be proven based on the design, structure and architecture of the subsidy in question.

4.796 What could differ in the case of non-violation nullification or impairment claims relating to a subsidy that is not linked to the existence of dumping or subsidization is the benefits accruing directly or indirectly under the GATT 1994 which are claimed to have been nullified or impaired.

4.797 In this dispute, the systematic and direct linkage between dumping and subsidization, the collection of anti-dumping and countervailing duties and the conferral of subsidies to eligible recipients creates the nullification or impairment of the benefits accruing to Mexico under Articles II and VI of the GATT 1994. The arguments underpinning this nullification or impairment may not be relevant to the challenge of another type of subsidy.

29. The Oilseeds Panel asserted that countries "must … be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset". That Panel further asserted that "[a]t issue in the case before it are product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having <u>any</u> impact on the competitive relationship between domestic and imported oilseeds" (underline supplied). To what extent, if any, does the CDSOA "systematically offset" the price effects of tariff concessions granted by the US to Mexico? Please explain. To what extent, if any, does the CDSOA provide for "product-specific subsidies that … prevent tariff concessions from having <u>any</u> impact on the

competitive relationship between domestic and imported" (underline supplied) products? Please explain.

4.798 This question raises two issues: (i) whether the nullification or impairment of a benefit or concession must be 100 per cent (i.e. prevent tariff concessions from having any impact); (ii) the nature of the nullification or impairment caused by the Act.

4.799 Regarding the first of these issues, in the Follow-up on the Panel Report in the case *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (BISD 39S/91) *(Oilseeds II)*, it was established that non-violation nullification or impairment can occur in situations where the impairment of the benefit is less than 100 per cent. The key consideration is a "systemic offsetting" of a legitimately expected competitive relationship.

4.800 Regarding the second issue, Mexico is not arguing that the legitimately expected competitive relationship solely accrues from or is being defined by the tariff concessions under Article II of the GATT 1994 (as was the case in *Oilseeds I and II*). Factually, the competitive relationship at issue is that which is legitimately expected by Mexico when anti-dumping or countervailing duties have been imposed against exports of Mexican products. Legally, the benefits defining this relationship accrue to Mexico from Articles II and VI of the GATT. This is explained in paragraphs 80 to 83 of Mexico's first written submission.

4.801 The systematic nature of the nullification or impairment of the competitive relationship legitimately expected by Mexico arises from the methodical and regular way the subsidies conferred under the CDSOA upset that competitive relationship. As a result of those subsidies, Articles II and VI of the GATT 1994 no longer limit the adverse impact on the expected competitive relationship arising from the application of the anti-dumping and countervailing duties. The benefits accruing from these provisions are manifestly impaired.

(c) Questions to All Parties

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

4.802 Article XVI does not refer to the positive act of subsidization. In other words, there is no textual basis for the position that the subsidy could occur "under" Article XVI.

33. Please provide an example of a "non-specific" action against dumping.

4.803 The provision of restructuring support to an industry that is facing difficulties and that is being adversely affected by dumped exports where that support is not contingent upon a finding of dumping. In such a situation, the restructuring support is not a specific action against dumping because it is not an action that may be taken only when the constituent elements of dumping are present.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

4.804 Two examples would be anti-trust concerns and circumvention concerns related to the undertakings.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

4.805 No. The two mentioned Agreements do not impose an independent obligation on WTO Members to act in good faith. However, this does not mean that the principle of good faith is irrelevant. Pursuant to Article 3.2 of the DSU, this principle applies to the interpretation of WTO Agreements, and consequently, to the interpretation, implementation and application of the Agreements by WTO Members.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

4.806 Mexico takes the view that there is nothing in the reports of the Panel or the Appellate Body in the *US - 1916 Act* to suggest that the Panel or the Appellate Body considered the "pure subsidy hypothetical" set forth in question 3.

36*bis*. ADDRESSED ONLY TO THOSE PARTIES THAT WERE PARTIES OR THIRD PARTIES IN THE *US – 1916 ACT* PROCEEDINGS: Was there anything in your submissions to the Panel or Appellate Body in the 1916 Act proceedings that would have caused the Panel or Appellate Body to address the meaning of Article 18.1 of the AD Agreement in the context of the pure subsidy hypothetical set forth in question 3 above?

4.807 No. The "subsidy hypothetical" established in question 3 was not discussed in the submissions made by Mexico during these proceedings.

F. ANSWERS OF THE UNITED STATES TO QUESTIONS FROM THE PANEL, CHILE AND THE EUROPEAN COMMUNITIES

1. Answers of the United States to questions from the Panel

4.808 With respect to the Panel's question concerning whether specific action is "against" dumping or subsidization if it is applied to the exporter and is burdensome, the answer of the United States is yes. Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively, concern the type of action taken against dumping or subsidization. As a practical matter, imported goods are produced, exported, and imported by foreign producers, exporters, and importers. Therefore, specific action could be applied to an exporter of a dumped or subsidized import. CDSOA cannot be specific action against dumping or subsidization because it does not (1) authorize action in response to the constituent elements of dumping or subsidization, or (2) apply to and burden imports or their importers, foreign producers, or exporters.

4.809 With respect to the Panel's question of whether undertakings are specific action "against" dumping or subsidization, the United States recalls that the Appellate Body in *United States – Anti-Dumping Act of 1916* explained that the permissible responses to dumping to definitive anti-dumping duties, provisional measures, and price undertakings. The three forms of action are, by definition, specific action against dumping or subsidization. Moreover, undertakings fall within the definition of specific action "against" dumping or subsidization because they (1) are action in response to the constituent elements of dumping or subsidization which can only be entered into with respect to conduct producing a preliminary affirmative determination of dumping or subsidization, and (2) apply to the exporter to limit its ability to export dumped or subsidized products to the importer, or apply to

the government of the exporting Member to eliminate or limit the subsidy available to the exporter or take other measures concerning its effects.

4.810 With respect to the Panel's question of whether severance of diplomatic relations would constitute action "against" dumping or subsidization, such action would not be action "against" dumping or subsidization because it would not apply to imports, or their importers, foreign producers, or exporters.

4.811 With respect to the Panel's question on the meaning of the phrase "in particular" in Article 5(b) of the SCM Agreement, the phrase "in particular" is a transitional expression used throughout GATT 1994 and the SCM Agreement. The Oxford English Dictionary defines "in particular" as "as one of a number distinguished from the rest; especially" and "one by one, individually." When used in Article 5(b), the phrase illustrates the meaning of the main phrase it modifies and suggests that tariff concessions under Article II are not the only negotiated benefit which can be nullified or impaired under GATT 1994. Regardless, Mexico has not proved any nullification or impairment of benefits accruing to it under any article of GATT 1994.

4.812 With respect to the Panel's question concerning whether a subsidy would be *ipso facto* specific if it contained eligibility criteria or conditions that were not "objective," Article 2 of the SCM Agreement contains progressive guidelines for the determination of whether a programme is specific or non-specific. Article 2.1(b) describes subsidies that are not specific under Article 2. The fact that a subsidy does not meet the description in Article 2.1(b), however, does not mean that it is therefore deemed specific.

4.813 With respect to the Panel's question concerning how the criteria for CDSOA eligibility are economic in nature, the term "economic" is defined by the New Shorter Oxford Dictionary as "relating to monetary consideration, financial" and "relating to the management of private, domestic, etc., finances." This definition provides support for a broad interpretation of the term "economic" that encompasses the inclusion of any government or private action related to monetary or financial concerns (*e.g.* production, consumption, distribution or other such factors). The plain language of footnote 2 and the negotiating history support a broad interpretation of criteria that are "economic in nature." The criteria for receiving CDSOA distributions are within the rubric of the term "economic." First, in supporting a petition, domestic producers act to protect monetary and financial concerns in a market where they are experiencing unfair competition. Second, the requirement that the producer remain in operation is also based on monetary and financial considerations because by remaining in business, a company deals with those monetary and financial concerns of maintaining profitability and viability in the market. Third, the qualifying expenditures are economic in nature as they relate to operating and production costs.

4.814 With respect to the Panel's question concerning whether a subsidy would be *de jure* or *de facto* specific if it were rendered specific because of eligibility requirements that were not objective, the United States points out that a subsidy is not necessarily specific by virtue of the presence of non-objective criteria. A showing of specificity must still be made under Article 2.1(a) or 2.1(c). Assuming *argendo* that presence of non-objective criteria makes a subsidy specific, it would not be possible to determine whether it would be *de jure* or *de facto* specific without more information about the law. If the law explicitly limited the availability of the subsidy, it would be *de jure* specific. If it, in practice, limited the subsidy to certain enterprises, it would be *de facto* specific.

4.815 Concerning the Panel's request to consider the Appellate Body's statement in *Canada-Autos* at para. 100, the request pre-supposes that the discussion in *Canada – Autos* has relevance to the issue of specificity. The *Canada – Autos* discussion, however, is not instructive because there is a crucial difference between the specificity provisions of Article 2.1 and the export contingency provisions of

Article 3. Article 2.1(a), the "de jure" provision of specificity, states that a subsidy is specific if it "explicitly" limits access to a subsidy. "Explicitly," even under the most relaxed definition, must mean at least that the limitation to certain enterprises must be evident on the face of the legislation. Article 3.1(a), however, does not use the term "explicitly," and, as interpreted by *Canada – Autos*, could include situations where the underlying legal instrument does not provide *expressis verbis*, but implicitly, that the subsidy is contingent upon exportation. The use of word "explicitly" in Article 2.1(a) precludes identification of a subsidy as being specific based upon the hypothetical operation of the law rather than the actual words of the law.

4.816 With respect to the Panel's question of whether imposing sanctions for failure to support a petition would violate AD Agreement Article 5.4, it is difficult to answer this hypothetical question without complete facts, but do not see why it would violate Article 5.4.

4.817 With respect to the Panel's question of whether the United States has changed the manner in which it performs its assessment of standing as a result of the CDSOA, the answer is no.

4.818 With respect to the Panel's question concerning the meaning of the Statement of Administration Policy issued on 11 October 2000 referring to "significant concerns regarding the ... consistency with [US] trade policy objectives" of the CDSOA, the US Administration has changed since issuance of the statement. The current Administration cannot detail the "significant concerns" of the prior Administration as that Administration did not memorialize them.

4.819 Concerning the Panel's request for comment on the EC's statement that it would be important to know how many undertakings were rejected or not offered in the first place because of industry opposition, the US government could not possibly know how many undertakings were not offered in the first place because of opposition by the domestic industry and does not regularly maintain information concerning the number of undertakings rejected. The United States notes that it provided information concerning suspension agreements effective August 2001 (based on information available on the Department of Commerce website and in its public files) in Exhibit 7 of its First Written Submission. It is the complaining parties who assert that the CDSOA has a particular effect on undertakings and therefore it is their burden to demonstrate that effect.

4.820 Concerning the Panel's request for comment on concerns raised by Indonesia and other complaining parties about the impact of the CDSOA on developing countries, the United States notes that Article 15 of the Antidumping Agreement is not within this Panel's terms of reference, as it was not identified in any of the panel requests, and therefore cannot be entertained by the Panel. In any case, the United States continues to fulfill its Article 15 "best efforts" commitment. Article 15 only necessitates only that the developed countries "explore" constructive remedies before applying anti-dumping duties. Indonesia's argument is a misplaced effort to rewrite other Antidumping Agreement provisions, or to insert substantive rules never accepted by negotiators. Moreover, the complaining parties have provided no evidence that the CDSOA will affect the administration of US laws governing undertakings; thus concerns that the CDSOA will somehow affect commitments under Article 15 are similarly unfounded.

4.821 With respect to the Panel's question about the extent to which subsidization can be considered an action "under" Article XVI of GATT 1994, subsidies provided to a Member's domestic producer for any reason must be consistent with or, in other words, in accordance with GATT Article XVI.

4.822 With respect to the Panel's request for an example of a "non-specific" action against dumping, non-specific action against dumping is an action covered by the terms of footnote 24 of the Antidumping Agreement. Non-specific action does not include action against dumping, as such, but

would include action against the causes or effects of dumping. It is action, however, that does apply to dumped imports or the importer/exporter/foreign producer. One such example is a safeguard.

4.823 With respect to the Panel's request for examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement, a Member might conclude that it already has enough undertakings in place and lacks the resources (or does not want to devote the resources) to properly monitor and administer additional undertakings. Or, a Member might consider that negotiating price commitments represents bad policy and that the only desirable form of anti-dumping measure is a duty equal to the full calculated margin of dumping.

4.824 With respect to the Panel's question of whether a violation of the international law principle of good faith necessarily constitutes a violation of the WTO Agreement, a violation of the good faith *principle* cannot constitute a violation of the WTO Agreement without a violation of a particular obligation in the agreement. Appendix 1 to the DSU, which defines the covered agreements for purposes of the DSU, does not list an international law principle of good faith. Nor does the WTO distinguish between a breach of an agreement in good faith and a breach in bad faith – in either case it would be a breach of the agreement and would have the consequences provided in the WTO Agreement. Nor is it clear what is meant by a violation of the international law principle of good faith.

4.825 With respect to the Panel's question of whether the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith, neither agreement nor any other provision of the WTO Agreement imposes an independent obligation on Members to act in good faith. Concerning the present case, there is no WTO provision requiring Members to judge the subjective motivations of domestic producers in supporting an anti-dumping or countervailing duty petition or opposing an undertaking. According to AD Article 5.4 and SCM Article 11.4, the United States is only obligated to meet certain numerical thresholds of domestic industry support before initiating an investigation. According to AD Article 8 and SCM Article 18, undertakings need not be accepted at all. Thus, even if the CDSOA did provide some motivation for domestic producers to support a petition or oppose an undertaking, it would not "threaten" action inconsistent with WTO obligations, or impede the United States from upholding its obligations in good faith under AD Articles 5.4 and 8 and SCM Articles 11.4 and 18.

4.826 With respect to the Panel's question of whether there is anything in 1916 Act reports to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above, there is nothing in the reports to suggest that they considered a subsidy hypothetical. The panels and Appellate Body in that case were concerned with the issue of whether or not civil and criminal penalties imposed on importers were specific action against dumping within the meaning of Article 18.1 of the Antidumping Agreement.

4.827 With respect to the Panel's question about whether there was anything in the US submissions to the panel or Appellate Body in the 1916 Act proceedings that would have caused the panel or the Appellate Body to address the meaning of Article 18.1 of the AD Agreement in the context of the pure subsidy hypothetical set forth in question 3 above, the answer is no.

2. Answers of the United States to questions from Chile

4.828 With respect to Chile's question about the tax and accounting treatment given the money distributed under the CDSOA, the money distributed under the CDSOA is taxable income and should be reflected in the accounting books of the recipients as such.

4.829 With respect to what happens to the funds collected as a result of investigations initiated ex officio by the investigating authority, the US Customs Service has not specifically addressed this issue. The statute, however, states that the Commission shall forward to Customs a list of "petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response." Even if there is no "petitioner," Customs will still receive a list of supporters identified by letters or through their questionnaire responses. The relevant letters and questionnaire responses are those filed in the "Commission's record" or, in select cases, entries of appearances in administrative reviews conduced by the Commerce Department.

4.830 With respect to Chile's question concerning how the "situation" of the industry investigated differs when in one "scenario" an order is imposed and in the second "scenario" an order is imposed, plus the domestic industry receives money collected on dumped or subsidized imports, it is not clear what is meant by "situation." If the question intends to ask how the exporting industry is affected by the subsidy to the domestic industry, the answer will depend on the facts. In other words, the exporting industry may or may not be affected.

4.831 With respect to Chile's question concerning how the "situation" of the domestic industry differs in the two "scenarios," in the second, the domestic industry receives a subsidy.

4.832 With respect to Chile's question concerning how the competitive relationship between the two industries differs in the two "scenarios," the answer will depend on the facts of the case.

4.833 With respect to Chile's question concerning the difference between the burden or liability to which the investigated industry is subject in the two "scenarios," in the first scenario, the duty is imposed on the good being produced (or sold) by the exporting industry/foreign producer. Thus, a duty is an additional financial burden to the exporting industry. However, whether the exporting industry is financially burdened by a subsidy to the domestic industry (scenario two above) will depend on the facts. It may or may not be affected.

4.834 With respect to Chile's question as to whether the CDSOA is an incentive for domestic producers to file or support anti-dumping petitions in order to have access to the "funds," the CDSOA does not serve as a real incentive to file or support petitions. The costs of participating in an investigation for an industry, already materially injured or threatened with material injury, could be far greater than the disbursements received years later. Moreover, that a petition will result in an order is far from guaranteed and even if an order does result, payments, if any, received are contingent on a number of factors and remote in nature. The "promise" of a remote, uncertain and unknown payment is not an incentive to spend a million plus dollars without knowing whether an order will be issued, the amount of duties that may be collected, or the share of those duties to be received by the company.

4.835 With respect to Chile's question concerning whether it would be irrational for a company to abstain from stating its position or to express opposition to an investigation, it may or may not be irrational, from an economic point of view, for a domestic producer to abstain from stating a position or expressing opposition in the remote chance of receiving distributions.

4.836 With respect to Chile's question concerning how many price undertakings were rejected, the United States references its response to Question 23 from the Panel where it indicates that it does not keep information on undertakings that have been rejected.

3. Answers of the United States to questions from the European Communities

4.837 With respect to the EC's question about whether CDSOA offsets have the purpose described in the section of the CDSOA entitled "Findings," the answer is no. The "findings" are not part of the law and, in any event, do not identify a purpose. If a purpose is not specifically identified in a law, the purpose of the law is reflected in the language of the law itself. Here, the CDSOA is intended to distribute funds to recipients that meet the criteria set forth in the Act.

4.838 With respect to the EC's hypothetical concerning a monetary fine on domestic producers who do not support an application, this hypothetical is not before the Panel, and the United States believes it is more useful to focus on the measure at issue. Having said that, depending on the actual facts and application of such a measure, it might give rise to a claim of non-violation nullification or impairment. The United States does not see why it would breach Articles ADA 5.4 and SCM 11.4.

4.839 With respect to the EC's question concerning whether Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement apply to dumping and subsidisation which do not involve imports into the territory of the Member taking the action, first, the premise of this question is incorrect. Articles 18.1 and 32.1 apply to specific action taken against dumping or a subsidy (not to "dumping or subsidization"). Second, Members do not take specific action against dumping or a subsidy which do not involve imports into their territory.

G. SECOND WRITTEN SUBMISSIONS OF THE COMPLAINING PARTIES

1. Australia

(a) Introduction

4.840 In its First Submission, Australia demonstrated that the *Continued Dumping and Subsidy Offset Act of 2000* ("the Act") is mandatory legislation that is inconsistent with provisions of the Anti-Dumping Agreement, the SCM Agreement, the GATT 1994 and the WTO Agreement.

4.841 Australia is of the view that the United States has not countered or refuted the *prima facie* case made by Australia in respect of any of its claims. In it second submission, Australia addresses the defensive arguments put forward by the United States. Australia will show that, contrary to the assertion by the United States that Australia has misunderstood the structure of the Act and the operation of United States trade laws,[125] it is the United States which has misunderstood and/or ignored the essential elements of Australia's case.

(b) A Member's sovereign right to appropriate lawfully assessed and collected anti-dumping and countervailing duties must accord with its WTO obligations

4.842 According to the United States:

- Australia has essentially argued 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";[126] and

- Australia has called on the Panel "to adopt arguments that go well beyond the clarification of existing provisions and preservation of rights and obligations

[125] First Submission of the United States, paragraph 2.
[126] First Submission of the United States, paragraph 19.

that DSU Article 3.2 envisions" and "would have the Panel create new rights and obligations for the Members or, in other words, act *ex aequo et bono*".[127]

4.843 In fact, what Australia has done is to ask the Panel to find that the Act is a specific action against dumping or a subsidy otherwise than in accordance with GATT 1994 as interpreted by the Anti-Dumping Agreement and/or the SCM Agreement, contrary to the obligations already accepted by the United States under those Agreements. The assertions by the United States are a clear misrepresentation of Australia's case. Australia is not arguing that Members can't distribute anti-dumping or countervailing duties otherwise than to the national treasury. There is nothing in the First Submission of Australia – or any other complainant – to suggest otherwise. Neither is Australia, nor any other complainant, asking the Panel to act *ex aequo et bono*. The United States has put forward voluminous material to refute arguments that have not been made. That material is not pertinent to this dispute.

4.844 Moreover, the United States recognises that "WTO Members have agreed to exercise their sovereignty according to their WTO Agreement commitments" [128], and "Members are free to pursue their own domestic goals through spending so long as they do not do so in a way that violate commitments made in the WTO Agreement" [129]. Australia endorses these statements wholeheartedly. It is the precise nature of Members' existing commitments under the WTO Agreement in relation to "specific action against dumping/a subsidy" that is at issue in this dispute.

4.845 The issue of restricting a Member's sovereign right to appropriate lawful revenues *ex aequo et bono* simply does not arise in this dispute. Rather, this dispute concerns whether the United States is acting in a manner that violates commitments already made in the WTO Agreement.

(c) The inconsistency of the Act with Article 18.1 of the Anti-Dumping Agreement, in conjunction with Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement, and with Article 32.1 of the SCM Agreement, in conjunction with Article VI:3 of the GATT 1994 and Article 10 of the SCM Agreement

4.846 Australia asserts that the United States argues that "because it does not mandate the imposition of anti-dumping or countervailing measures, or any other type of specific action against dumping or subsidies, on imports or their importers, the [Act] is not within the scope of GATT Article VI, or the various provisions of the Antidumping and SCM Agreements cited by the complaining parties".[130] The United States further argues that the Act "is simply a statute authorizing governmental *payments*"[131] (emphasis in original). The United States then purports to apply the reasoning of the Appellate Body in *US – 1916 AD Act* to show that, because the offset payments under the Act are "not based upon" the constituent elements of dumping or a subsidy and because the Act is not an action "against" dumping or a subsidy, the Act does not constitute "specific action against dumping/a subsidy".[132] However, the United States' arguments are unsustainable.

[127] First Submission of the United States, paragraph 28.
[128] First Submission of the United States, paragraph 20.
[129] First Submission of the United States, paragraph 25.
[130] First Submission of the United States, paragraph 77.
[131] First Submission of the United States, paragraph 77.
[132] First Submission of the United States, paragraph 83.

(i) The Act is action taken in response to situations presenting the constituent elements of dumping and a subsidy

4.847 According to the United States, "Article VI and the Antidumping and SCM Agreements do not apply to the [Act] because it is not based upon the constituent elements of dumping or a subsidy"[133] (emphasis added). It is not clear to Australia what the United States means by the phrase "not based upon", or indeed the authority to which it refers for its interpretation of GATT Article VI and the Anti-Dumping and SCM Agreements.

4.848 In *US – 1916 AD Act*, the Appellate Body found that the phrase "specific action against dumping" is "action that is taken in response to situations presenting the constituent elements of dumping"[134] (emphasis added). The Appellate Body did not say "that the phrase 'specific action against dumping' … meant 'action that is taken in response to the constituent elements of dumping' ", notwithstanding the United States' repeated assertions otherwise. [135] The Appellate Body's finding clearly recognised that specific action against dumping is not limited to action against the constituent elements of dumping, but that it "encompass[es] action that may be taken *only* when the constituent elements of 'dumping' are present[…]"[136] (emphasis in original). It was in this context that the Appellate Body then found that "the constituent elements of 'dumping' are built into the essential elements of civil and criminal liability under the 1916 Act".[137] The Appellate Body's findings in *US – 1916 AD Act* do not provide any support for the contention that Article VI and the Anti-Dumping and SCM Agreements are not applicable because the Act "is not based upon the constituent elements of dumping or a subsidy".

4.849 Further, Australia argues, the United States contends that footnote 373 to the Panel Report in the EC complaint in *US – 1916 AD Act* confirms that "the scope of Article VI and the Antidumping Agreement extends to measures which address dumping *as such*" and that "dumping *as such* refers to action based upon the constituent elements of dumping"[138] (emphases in original). However, it is clearly evident from the text of footnote 373 that the Panel was distinguishing "dumping as such" from "the effects of dumping" in considering the meaning of footnote 24 to Article 18.1 of the Anti-Dumping Agreement. Again, according to Australia, the United States' contention is not in fact supported by the Panel's findings.

4.850 The United States concludes that, because the Act is not based upon a test that includes the constituent elements of dumping or a subsidy, the Act does not address dumping or subsidisation as such and is not within the scope of Article VI and the Anti-Dumping and SCM Agreements.[139] However, Australia asserts, this conclusion ignores the fundamental fact that there must have existed a finding of dumping or subsidisation (as well as injury and a causal link) for an anti-dumping or countervailing duty order to have been issued. (Moreover, the United States' argument also ignores that the availability of funds for disbursement as offset payments under the Act is conditional on continued dumping and subsidisation: if no anti-dumping or countervailing duties are collected, no payments are made.) In other words, a prerequisite for an offset payment under the Act is the existence of a situation presenting the constituent elements of dumping or a subsidy: an offset

[133] First Submission of the United States, paragraph 86.
[134] *US – 1916 AD Act*, Report of the Appellate Body, paragraph 122.
[135] First Submission of the United States, paragraphs 81 and 84, referring to paragraph 122 of the Appellate Body Report in *US – 1916 AD Act*, and repeated in paragraphs 86, 87 and 89.
[136] *US – 1916 AD Act*, Report of the Appellate Body, paragraph 122.
[137] First Submission of the United States, paragraph 87, referring to paragraph 130 of the Appellate Body Report in *US – 1916 AD Act.*
[138] First Submission of the United States, paragraph 88.
[139] First Submission of the United States, paragraph 89.

payment under the Act may be made only when the constituent elements of dumping or a subsidy are present.

(ii) The Act is a "specific action against dumping/a subsidy"

4.851 According to the United States, "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy".[140] The United States also contends that "to consider a specific action as 'against' dumping or subsidization, the action must apply to the imported good or the importer, and it must be burdensome".[141] Again, however, these arguments are not sustainable in a number of respects.

4.852 Firstly, Australia argues that the United States ignores that the Appellate Body's finding on the meaning of the phrase "specific action against dumping" gave meaning to the word "against", and did so in a way that encompasses other ordinary meanings of the word in context.

4.853 Secondly, in the view of Australia, the United States ignores that, consistent with the requirement of Article 3.2 of the DSU, the Appellate Body's finding on the meaning of "specific action against dumping" gave meaning to the phrase, as well as to the word "against", in their context and in light of the object and purpose of the broader framework of rules governing the imposition of anti-dumping and countervailing measures provided by GATT Article VI as interpreted by the Anti-Dumping and SCM Agreements in accordance with the customary rules of interpretation of public international law.

4.854 Thirdly, Australia submits, the United States' arguments are premised on the repeated misquotation of the Appellate Body's findings in *US – 1916 AD Act* that "specific action against dumping" is 'action that is taken in response to the constituent elements of dumping'.[142]

4.855 Fourthly, according to Australia , the United States bases this argument on selective dictionary meanings of the word "against": it asserts that "the ordinary meaning suggests that the specific action therefore must be in 'hostile opposition to' dumping/subsidization, and must 'come into contact with' dumping/subsidization".[143] However, the word "against" has other, equally valid, ordinary meanings, including "in competition with", "to the disadvantage of", "in resistance to" and "as protection from".[144] Moreover, none of these meanings, including those put forward by the United States, compel the conclusion that a specific action "against" dumping or subsidisation must apply exclusively to the imported good or to the importer, and must be burdensome to those goods or importers.

4.856 Fifthly, Australia posits that the United States' argument is premised on meanings of "dumping" and "a subsidy" that have no basis in the relevant texts. Article 18.1 of the Anti-Dumping Agreement proscribes "specific action against dumping of exports from another Member" not in accordance with GATT 1994. It does not proscribe specific action "against dumped exports", "against the dumpers of exports" or "against the importers of dumped goods" not in accordance with GATT 1994. Similarly, Article 32.1 of the SCM Agreement proscribes specific action "against a subsidy" not in accordance with GATT 1994. It does not proscribe specific action "against subsidised exports" or "against importers of subsidised goods" not in accordance with GATT 1994. The United States is in effect arguing that the Panel should create new rights and obligations under

[140] First Submission of the United States, paragraph 91.
[141] First Submission of the United States, paragraph 92.
[142] See paragraph 9 above.
[143] First Submission of the United States, paragraph 92.
[144] *The New Shorter Oxford English Dictionary*, 1993, pp. 38-39, (L. Brown ed).

GATT 1994, the Anti-Dumping Agreement and the SCM Agreement or, in other words, act *ex aequo et bono*. To read the distinctions requested by the United States into the words of Articles 18.1 and 32.1 would not give the words their ordinary meaning in their context and in light of the object and purpose of the Anti-Dumping Agreement, the SCM Agreement and the GATT,[145] and would be contrary to the Panel's obligation to clarify the provisions in accordance with the customary rules of interpretation of public international law as required by Article 3.2 of the DSU.

4.857 Finally, it is the opinion of Australia that the United States ignores that the offset payments are likely to precipitate changed behaviour on the part of the producers and importers of dumped or subsidised goods, as well on the part of domestic producers, thereby altering the competitive relationship between imported goods and the domestic like products in ways not contemplated by GATT 1994 or the Anti-Dumping or SCM Agreements. (Moreover, the competitive relationship with goods that have not been found to be dumped or subsidised is also likely to be altered.) Thus, it cannot be said that the Act imposes no burden or liability on imported dumped or subsidised goods.

4.858 Contrary to assertions by the United States,[146] Australia has not argued that the offset payments under the Act constitute a specific action against dumping or subsidisation because they are paid directly from anti-dumping or countervailing duties. Rather, Australia has argued that the offset payments constitute specific action against dumping or subsidisation because they are conditional on the existence of situations presenting the constituent elements of dumping: they are payments that may be made only when the constituent elements of dumping or a subsidy are present.

4.859 The United States further argues that the "intent" of the law is the sole basis for Australia's claim that the Act is a specific action against dumping and subsidisation.[147] Australia argues that once again, however, the United States has ignored the essential element of Australia's argument: that the Title of the Act and the accompanying *Findings of Congress* confirm that the Act is, and was intended to be, specific action against dumping/a subsidy.[148] The Act is a "specific action against dumping/a subsidy" on the basis of the substantive provisions of the Act: payments under the Act may be made only when the constituent elements of dumping and subsidisation are present.

4.860 Australia considers that the United States has presented an argument that has no basis in either the texts of GATT 1994, the Anti-Dumping or SCM Agreements or in the clarifications of the relevant provisions provided by previous WTO jurisprudence.

(iii) Footnotes 24 and 56 cannot exclude the Act from the scope of Article VI of the GATT 1994 and the Anti-Dumping and SCM Agreements

4.861 The United States argues that, even if the Act is determined by the Panel to be "an action against dumping or a subsidy, footnotes 24 and 56 to Articles 18.1 and 32, respectively, operate to permit the [Act]"[149] as action under another relevant GATT provision (GATT Article XVI).[150] According to Australia, this argument, however, is unsustainable.

4.862 Australia argues that the footnotes to Articles 18.1 and 32.1 clarify the scope of those provisions: they do not create exceptions to that scope. As the Panel in *US – 1916 AD Act* found in response to the argument by the United States that footnote 24 does not lock a Member into levying

[145] *United States – Standards for Reformulated and Conventional Gasoline*, AB-1996-1, Report of the Appellate Body, WT/DS2/AB/R, page 17.
[146] See, for example, First Submission of the United States, paragraph 19.
[147] First Submission of the United States, paragraph 95.
[148] First Submission of Australia, paragraphs 43-45 and 53.
[149] First Submission of the United States, paragraph 101.
[150] First Submission of the United States, paragraph 111.

anti-dumping duties when faced with a factual situation constituting injurious dumping and leaves the option of taking other measures that are in accordance with the GATT 1994:

> "if the interpretation suggested by the United States were to be followed, Members could address "dumping" without having to respect the provisions of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Such an interpretation would deprive Article VI of the GATT 1994 and the Anti-Dumping Agreement of their useful effect within the framework of rules and disciplines imposed by the WTO Agreement."[151]

4.863 The Panel's reasoning is equally applicable in the present case. To accept the United States' argument that offset payments under the Act are permitted by footnotes 24 and 56 would be to reduce the prohibition in Articles 18.1 and 32.1 on "specific action against dumping/a subsidy" otherwise than in accordance with GATT 1994 to inutility and redundancy. This of course the Panel may not do.[152]

4.864 Moreover, Australia submits, GATT Article XVI cannot be an "other relevant provision of GATT 1994" within the meaning of footnote 56, as GATT Article XVI is one of the provisions of GATT 1994 interpreted by the SCM Agreement, in particular in Part III, within the meaning of Article 32.1 of the SCM Agreement. In *US – 1916 AD Act*, the Appellate Body found that the provisions of the GATT 1994 "interpreted" by the Anti-Dumping Agreement were those provisions of GATT Article VI concerning dumping, and that the "other relevant provisions of GATT 1994" in footnote 24 "can only refer to provisions other than the provisions of Article VI concerning dumping".[153] By the same rationale, the other relevant provisions of GATT 1994 in footnote 56 can only refer to provisions other than the provisions of Article VI concerning countervailing duties and Article XVI.

4.865 The United States itself said: "In sum, the ordinary meaning of the phrase 'not intended to preclude action under other relevant provisions of GATT 1994' in footnotes 24 and 56 is to permit action involving dumping or subsidies (but not specifically against) that is consistent with GATT provisions other than GATT Article VI"[154] (emphasis added). Australia agrees. It is the scope of "specific action against dumping/a subsidy" that is the issue and this has already been clarified by the Appellate Body.

4.866 The fact that the offset payments under the Act might not be inconsistent with GATT Article XVI – an issue which need not be addressed here – is irrelevant. For so long as the Act constitutes "specific action against dumping/a subsidy", that is, action that may be taken only when the constituent elements of dumping are present, it will be inconsistent with Articles 18.1 and 32.1.

(iv) The obligations of Articles 4.10 and 7.9 of the SCM Agreement

4.867 Australia does not intend to pursue further arguments in relation to Articles 4.10 and 7.9 of the SCM Agreement.

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[151] *US – AD 1916 Act*, Report of the Panel (Complaint by the EC), paragraph 6.199.

[152] In *United States – Standards for Reformulated and Conventional Gasoline*, page 23, the Appellate Body said: "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

[153] *US – AD 1916 Act*, Report of the Appellate Body, paragraph 124-5.

[154] First Submission of the United States, paragraph 108.

(v) Conclusion

4.868 Australia is of the view that the arguments of the United States that the Act is not within the scope of GATT Article VI or the provisions of the Anti-Dumping and SCM Agreements at issue in this dispute and that the Act is simply a government payment programme are without merit. The Act is a clear and systematic extension of the United States' statutory framework for the imposition of anti-dumping and countervailing duties. Offset payments under the Act are conditional, *inter alia*, on findings that there exist situations presenting the constituent elements of dumping or a subsidy. The Act is a "specific action against dumping/a subsidy" within the meaning of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement respectively that is not in accordance with the provisions of the GATT 1994 as interpreted by the Anti-Dumping/SCM Agreements.

(d) The inconsistency of the act with Article 5.4 of the anti-dumping agreement and Article 11.4 of the SCM Agreement

4.869 In its First Submission, Australia argued that:

- the Act creates a systemic bias in favour of domestic producers of a like product who support an application for an investigation, making it easier for the needed levels of industry support to be reached;
- the Act contravenes the fundamental principle that the legal framework of a rules-based system must be impartial and objective;
- Articles 5.4 and 11.4, read in their respective contexts, require that domestic industry express its support for, or opposition to, an application for an anti-dumping or countervailing duty investigation on the basis of evidence of: dumping or subsidisation; injury, threat of injury, or retardation; and a causal link between the dumping or subsidisation and injury;
- the Act distorts, or threatens to distort, the requirement that an application be made "by or on behalf of the domestic industry"; and
- by so doing, the Act frustrates the intent of Articles 5.4 and 11.4 to establish whether an application is truly being made by or on behalf of the domestic industry.

4.870 The United States has offered little to refute Australia's argument. The United States says: "It is highly unlikely that the complaining parties could ever summon credible evidence that the [Act] has distorted the decisions of companies in supporting petitions … To establish such distortion, the complaining parties would have to show 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".[155]

4.871 Australia asserts that the United States' view of what is necessary to establish distortion of domestic producer decisions cannot be correct. If it were, it would mean that the United States could enact legislation – to the opposite effect of what it has done – imposing substantial monetary penalties on domestic producers who do not support an investigation. Yet in such circumstances it would never be possible to "summon credible evidence" – as defined by the United States – to demonstrate that such legislation has distorted the decisions of companies.

[155] First Submission of the United States, paragraph 123.

4.872 The United States also argues that it is generally irrational for domestic producers to oppose relief.[156] However, Australia is of the view that there could well be occasions when it will be perfectly rational that at least some domestic producers will not support, or will oppose, relief, for example, if a domestic producer considered that a domestic competitor would be likely to receive a higher offset payment and thus gain a financial advantage.

4.873 The United States further argues "it is rare for domestic producers in the United States not to have sufficient industry support in filing anti-dumping or countervailing duty petitions. … Thus, if there is sufficient support anyway, it cannot be said that the [Act] 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"[157] (emphasis added).

4.874 However, according to Australia, the mere possibility that the Act could distort the requirement that an application be made "by or on behalf of the domestic industry" in any circumstances must be a breach of those Articles, notwithstanding that the incidence of insufficient industry support for an investigation is rare.

4.875 In *US – Section 301*, the Panel found that "the good faith requirement in the Vienna Convention suggests, thus, that a promise to have recourse to and abide by the rules and procedures of the DSU, also in one's legislation, includes the undertaking to refrain from adopting national laws which threaten prohibited conduct".[158] Australia is of the view that this finding is equally applicable to the current dispute. The principle of good faith "that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements"[159] suggests that a promise to apply anti-dumping measures "only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[…] and conducted in accordance with the provisions of"[160] the Anti-Dumping Agreement includes the undertaking to refrain from adopting national laws which threaten prohibited conduct.

4.876 Australia considers that also pertinent to this dispute is the Appellate Body's statement in *US – Hot-Rolled Steel*, in relation to Article 3.1 of the Anti-Dumping Agreement, that "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured".[161] It is Australia's view that the situation in the current dispute is analogous: the United States cannot be entitled to enact legislation that makes it more likely that the needed levels of domestic industry support will be reached in any investigation.

(e) Conclusion

4.877 For the reasons presented in its submission, Australia respectfully maintains its request that the Panel make the findings and recommendations set out at paragraphs 124-125 of its First Submission.

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[156] First Submission of the United States, paragraph 124.

[157] First Submission of the United States, paragraph 125.

[158] *United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R, paragraph 7.68.

[159] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, AB-2001-02, Report of the Appellate Body, WT/DS184/AB/R, 24 July 2001, adopted 23 August 2001, paragraph 101.

[160] Anti-Dumping Agreement, Article 1.

[161] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, Report of the Appellate Body, paragraph 196.

2. Brazil

(a) Introduction

4.878 Brazil asserts that in the Oral Statement of the United States at the First Meeting of the Panel in *United States - Continued Dumping and Subsidy Offset Act of 2000*, the United States was unable to rebut any of the claims made by the complaining parties in this proceeding. The United States relies principally on the argument that the *Continuing Dumping and Subsidy Offset Act of 2000*[162] (hereinafter the Byrd Amendment) is nothing more than a payment programme and, in the absence of specific WTO obligations with respect to the uses of the revenues from anti-dumping and countervailing duties, it should be viewed as any other payment programme of a government.[163] Under this standard, the United States argues, "the disciplines relevant to government payment programmes are contained in the subsidies provisions of the SCM Agreement" and that the "relevant legal question is whether the CDSOA is a prohibited subsidy."[164]

4.879 In fact, Brazil is of the view that the relevant legal question is whether the Byrd Amendment payments constitute "specific action against dumping" under Article 18.1 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 (hereinafter "AD Agreement") which is not "in accordance with the provisions of GATT 1994" as interpreted by the AD Agreement. The kind of payments under the Byrd Amendment clearly are not among the actions specified in the AD and SCM Agreements – anti-dumping or countervailing duties, provisional measures, or undertakings. Consequently, if these payments are specific action against dumping they are not in accordance with the GATT 1994, as interpreted by these Agreements.

4.880 Brazil asserts that the United States can only prevail in this proceeding if it convinces the panel to ignore the direct relationship between the Byrd Amendment payments and the dumping and subsidization against which the United States is permitted to take specific measures under the AD and SCM Agreements. The linkages, however, are abundantly clear and include the following:

(a) The official title of the Byrd Amendment states its purpose as being to "offset" dumping and subsidies.

(b) The sponsors and supporters of the Byrd Amendment have stated that the purpose of the payments under the law are to discourage dumping and subsidization and to offset the effects of dumping and subsidization, the same purposes as the anti-dumping and countervailing measures permitted under the relevant Agreements.

(c) Byrd Amendment payments are only made if anti-dumping or countervailing duties are collected pursuant to the determinations required under the AD and SCM Agreements – i.e. the existence of injurious dumping or injurious subsidization.

(d) Byrd Amendment payments are only made to parties that supported the request for the imposition of anti-dumping or countervailing duties.

(e) Byrd Amendment payments end when an anti-dumping or countervailing duty order is terminated.

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[162] 19 USC. 1675 c.

[163] Oral Statement of the United States at the First Meeting of the Panel, *United States – Continued Dumping and Subsidy Offset Act of 2000* (DS217 & 234), 5 February 2002 (hereinafter US Statement) at paras. 3 and 8.

[164] Id. at paras. 8 and 9.

(f) Byrd Amendment payments are linked to expenditures by the recipients benefiting the product subject to anti-dumping or countervailing duties.

4.881 Brazil argues that the Byrd Amendment provides that companies which successfully petition for the imposition of anti-dumping or countervailing duties will receive not only the protection that the imposition of these duties affords but also the revenues collected as a result of these duties.

4.882 Brazil's submission will not seek to review the arguments already made by Brazil or to address each and every argument relied upon by the United States. Rather, the submission will be limited to addressing the deficiencies in the principal US arguments as presented in its oral statement on 5 February.

(i) The complaining parties are not asking the panel to add to or diminish the rights and obligations provided in the covered agreements, but only to determine whether the Byrd Amendment *payments are specific actions against dumping and subsidization not in accordance with the covered agreements*

4.883 Brazil asserts that the United States argues that the complaining parties are seeking to expand existing obligations under the covered agreements contrary to Article 19.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU). This argument is based on the assertion by the United States that there is "no WTO obligation with respect to the uses to which anti-dumping and countervailing duties might be put, or to distinguish the use of these funds from any other source of government revenue."[165] As with most of the US argumentation, this argument misses the point.

4.884 According to Brazil, while the AD Agreement does not restrict the uses to which anti-dumping duties can be applied once collected, the AD Agreement does contain very specific language in Article 18.1 that prohibits specific action against dumping except in accordance with the GATT 1994 and the AD Agreement. By rewarding the parties requesting the anti-dumping duties with the disbursement of the revenues from those duties under Byrd Amendment, the United States is contravening its WTO obligations. They are contravening these obligations not because the AD Agreement or the GATT 1994 place limitations on how the revenues from anti-dumping duties may be spent, but because the AD Agreement and GATT 1994 place limitations on the actions which may be taken against dumping.

4.885 Thus, Brazil argues, the complaining parties in this proceeding are not seeking to impose any new or additional obligations on Members, rather they are simply seeking to enforce the existing obligations under Article 18.1 of the AD Agreement consistent with the findings of the panel and Appellate Body in *United States - Antidumping* Act *of 1916.*[166] (hereinafter the "1916 Act") The obligations at issue are the restrictions on actions against dumping. Whether and how the United States uses the revenues collected from anti-dumping duties is only relevant in the context of whether they are being used for actions against dumping.

(ii) The Byrd Amendment *payments do not have to be prohibited or actionable subsidies under the* SCM Agreement *in order to be found inconsistent with Article 18.1 of the* AD Agreement *and Article 32.1 of the* SCM Agreement

[165] US Statement at para. 9.

[166] *United States – Antidumping Act of 1916,* Report of the Appellate Body, WT/DS/136/AB/R, WT/DS162/AB/R, adopted 26 September 2000 and Report of the Panel, WT/DS136/R, 31 March 2000 and WT/DS163/R, 29 May 2000.

4.886 The United States makes much of the fact that no party has claimed that the payments under the Byrd Amendment constitute prohibited subsidies under the SCM Agreement and that only Mexico has made a claim that these payments are actionable subsidies.[167] The US rationale is that the disciplines governing payment programmes are contained in the subsidies provisions of the SCM Agreement.[168] Brazil asserts that again, the US argument misses the point and should be dismissed as irrelevant.

4.887 According to Brazil, the complaining parties, with the exception of Mexico, did not base their complaint on the issue of whether the Byrd Amendment payments constitute actionable subsidies for a very simple reason: the panel does not need to reach this issue to find the US in violation of its WTO obligations. Again, the US tries to confuse the issue. The issue is not whether there are constraints on how the US spends the revenues from anti-dumping and countervailing duties, but whether rewarding US parties that have supported the imposition of these duties by disbursing the revenues from the duties to these parties is a specific action against dumping or subsidization not authorized under the relevant agreements.

4.888 Thus, Brazil argues, the US discussion of whether the Byrd Amendment payments are actionable subsidies under Article 5 of the SCM Agreement is simply not relevant to the claims under Articles 18.1 and 32.1 of the AD and SCM Agreements respectively. While these payments may be actionable subsidies and may cause adverse effects, this question is wholly independent of the question of whether they constitute specific action against dumping and subsidization.

(iii) The Byrd Amendment mandates specific action against dumping and subsidization not authorized by the relevant agreements.

Contrary to the United States arguments, the relevant question is not whether the Byrd Amendment payments are imposed on imports or importers, but whether they are specific actions against dumping and subsidization, namely actions to "offset or prevent" dumping

4.889 The US claims that the Byrd Amendment payments are not specific actions against dumping and subsidization because they do not "impose any type of measure on imports or importers."[169] The primary basis of this argument is an obscure definition of the word "against" which the US claims indicates that the specific action must be "in hostile opposition to and in contact with dumping or subsidy."[170] To support its position, the United States attempts to read into the relevant agreements, language and definitions that are without merit.

4.890 Brazil asserts that according to Article VI:2 of the GATT 1994, anti-dumping duties are intended to "offset or prevent" dumping. The specific actions permitted to "offset or prevent" dumping are provided for in Articles 7, 8 and 9 of the AD Agreement, specifically provisional measures, anti-dumping duties and price undertakings. Other actions to "offset or prevent" dumping are not permitted under Article 18.1 of the AD Agreement. Thus, the relevant question is not whether the Byrd Amendment constitutes action against imports or importers or even whether the action is in hostile opposition to or in contact with the dumping and subsidy. The relevant question is whether the Byrd Amendment payments constitute specific action to offset or prevent dumping and subsidization.

4.891 Brazil is of the view that the US attempt to read into the language "specific action against dumping" a limitation which defines specific action as action against imports or importers is

[167] US Statement at para. 9.
[168] Id.
[169] US Statement at para 24.
[170] Id. at para. 29

specifically contradicted by the text, which places no such limitation on actions against dumping, and confirmed by prior panel and Appellate Body decisions. Specifically, the panel report in 1916 Act defined the relevant measures as "measures to counteract dumping."[171] The Appellate Body referenced "any action…against dumping of exports."[172] Neither imposed any limitation in terms of actions imposed upon imports or importers. Rather, according to the Appellate Body, "specific actions against dumping" include "any…action that is taken in response to situations presenting the constituent elements of 'dumping'."[173]

The Byrd Amendment payments are specific action against dumping

4.892 The United States argues, "the sole basis of the complaining parties' argument that the CDSOA is 'against' dumping and subsidies is the supposed intent or purpose of the law."[174] The United States then argues that "the Panel must look at what the law does, not what its policy purpose is" and urges the panel to reject any consideration of the purpose of the Byrd Amendment.[175] The US then makes its most sweeping characterization, stating that the "CDSOA has nothing to do with imported goods or importers."[176]

4.893 Brazil asserts that in fact, the relevant inquiry as articulated by the Appellate Body in 1916 Act is whether the action is taken in response to situations presenting the constituent elements of dumping.[177] There is no question that the Byrd Amendment mandates an action, specifically the distribution of anti-dumping and countervailing duty revenues to domestic parties that supported the request for the imposition of those duties.

4.894 Is this action "in response to situations presenting the constituent elements of dumping", Brazil asks? Since the Byrd Amendment payments are only available when an anti-dumping or countervailing duty order is in place, are only available to parties that supported the request for the imposition of those duties; and are only available when specific products are dumped or subsidized and imported into the United States, Brazil finds it is difficult to see how these payments are not in response to a situation presenting the constituent elements of dumping. Indeed, the existence of the constituent elements of dumping is a condition precedent to any payments.

4.895 Brazil asserts that it is true that one could have a situation where payments were triggered by the collection of an anti-dumping or countervailing duty, but the payments are neither "in response to" or "against" dumping. The US flag example is one such situation. Thus, the limitation does not apply to actions that are not against dumping or in response to dumping, but only conditioned on there being revenues from dumping duties. As is clear from Article VI:2, actions against dumping or in response to dumping are actions which seek to "offset or prevent" dumping. Thus, the question is whether the payments under the Byrd Amendment are actions which "offset or prevent" dumping.

4.896 According to Brazil, while the plain language in a statute as to its purpose and the statements of its sponsors as to its purpose may not always be conclusive as to the actual purpose, they certainly are relevant in any evaluation. The United States would have the panel believe that the purpose, both intended and actual, of the Byrd Amendment is a great mystery. However, the purpose is articulated in the title of the legislation itself – the *Continued Dumping and Subsidy Offset Act.* Thus, the title

[171] Panel Report, *1916 Act*, at para.6.230
[172] Appellate Body Report, *1916 Act*, at para126.
[173] Id.
[174] US Statement at para. 30
[175] Id.
[176] Id. at para 31.
[177] Appellate Body Report, *1916 Act*, at para. 126.

clearly would lead one to believe that the purpose of the legislation is to "offset" continued dumping and subsidization.

4.897 Similarly, the legislation's sponsors supported its passage because it would allow parties adversely affected by dumping and subsidization "to recover monetarily", to be compensated for "damages" and to receive assistance at the expense of their competitors.[178] Rather than arguing that the Byrd Amendment has no such purpose and showing that it does not "offset or prevent" dumping, the United States has simply stonewalled the panel: the purpose is a mystery and the programme is simply a payment programme with no apparent purpose, objective or effect.

4.898 Brazil asserts that, in fact, even the most superficial analysis of the Byrd Amendment payments leads one to the conclusion that it is an action to offset or prevent dumping. The dumping duties themselves increase the importer's costs, while the Byrd Amendment payments decrease the costs of the domestic competitor for the same product. Thus, there is a double offset – duties increase import prices and payments decrease domestic producer costs. There is also a double incentive to prevent dumping – every time a dumping duty is paid it directly benefits a competing domestic producer. Rather than addressing the obvious – that the Byrd Amendment payments offset and prevent dumping – the United States has chosen to obfuscate.

4.899 Finally, although Brazil does not believe it is legally relevant, the United States has asserted that the Byrd Amendment payments "must apply to the imported good or the importer, and it must be burdensome."[179] In fact, Brazil considers that this condition is met. The competitive effect of the payments are felt by the imported product and the importer in the form of competing with a domestic supplier who has lower costs as a result of the payments received or to be received. A new competitive element burdens the conditions of competition in the US market. The competitive effect is identical to the effect of increasing the anti-dumping duties by a comparable amount. You can either increase the importer's costs or decrease the domestic industry's costs, the effect is the same. The importer has an added competitive burden.

(b) Systemic issues

4.900 Brazil submits that the AD and SCM Agreements represent a negotiated balancing of the interests of Members reflected in rights and obligations under those agreements. By acting unilaterally to provide additional remedies to offset and prevent dumping and subsidization, the US has fundamentally altered the balance of rights and obligations under the agreements. It has provided additional incentives for domestic parties to request anti-dumping and countervailing duties be imposed on imports and that they be maintained even after their remedial purposes are achieved. It has introduced a new form of remedy into the WTO system, monetary rewards or damages, which, if endorsed by this panel, could fundamentally change the nature of the WTO system. Finally, it has created a situation in which use of the "cumulation" provisions of the agreements (Articles 3.3 and 15.3 of the AD and SCM Agreements respectively) will increase to the detriment of marginal suppliers, primarily suppliers in developing countries.

4.901 In the opinion of Brazil, there are reasons that the agreements limit the actions that can be taken against dumping and subsidization. The most obvious is the desire to impose disciplines on the extent to which Members can take measures to offset or prevent dumping or subsidization. The systemic issues illustrate further reasons for these disciplines in that a departure from these disciplines

[178] 146 Cong. Rec. S10697 (daily e. 18 October 2000) (statement of Senator Robert Byrd); 144 Cong. Rec. S7883-7884 (daily ed. 9 July 1998) (statement of Senator DeWine).

[179] First Written Submission of the United States of America, *United States – Continued Dumping and Subsidy Offset Act of 2000, (DS217&234),* 14 January 2002 at para. 92.

by allowing additional remedies will also create a new, different, and unintended balance between the rights and obligations of Members under these agreements. Industries in importing countries will not only obtain more relief than was intended by the agreements, there will also be more incentive to file cases, more incentive to maintain anti-dumping and countervailing duties in effect, more use of the cumulation provisions, and, ultimately, a greater change in the competitive conditions in the importing market than would be the case if the disciplines of the agreement are enforced.

(c) Conclusion

4.902 Brazil reiterates its requests that the panel find the US in violation of its WTO obligations and findings and recommendations as set forth in paragraphs 43 and 44 of the First Written Submission of Brazil.

3. Canada

(a) Introduction

4.903 Canada's submission responds to the first Oral Statement of the United States as well as its First Written Submission. According to Canada, none of the arguments raised in those submissions persuasively addresses the legal basis of the challenge against the *Continued Dumping and Subsidy Offset Act* (the Act or the Byrd Amendment).

4.904 Canada asserts that though not legally relevant for the purposes of this challenge, the harm caused by this Act is significant. For Canada, in one sector alone, over US$490 million is currently held in bonds in clearing accounts.

(b) Arguments of the United States

4.905 According to Canada, the United States argues that:

- the Act is a mere government “payment” programme;
- such programmes fall within the purview of a state’s sovereign right to spend;
- there is no limit on the manner in which anti-dumping and countervailing duties can be appropriated;
- the Act does not incorporate the constituent elements of dumping;
- the *offset* payments in question do not “come into contact with” importers and imported goods and therefore do not constitute a specific action “against” dumping or a subsidy;
- the Act cannot be said to have an effect on the actions of domestic industry or the administration of domestic dumping or subsidies laws; and
- the complainants raise the wrong claims and that the real question is whether *offset* payments constitute prohibited or actionable subsidies.

(c) Specific action against dumping or a subsidy

(i) Articles 18.1 and 32.1 of the Agreements

4.906 Canada is of the view that the Appellate Body has found that Article 18.1 provides a clear prohibition on forms of action against dumping that are not in accordance with Article VI of GATT 1994 as interpreted by the Anti-dumping Agreement. Three forms of action are permitted: definitive anti-dumping duties, provisional duties and price undertakings. Specific action against dumping could take a wide variety of forms. It is action taken in response to, and at minimum *only* when, the constituent elements of 'dumping' are present." The concept of "specific action against dumping" however could be broader.

4.907 The constituent elements of "dumping" are defined in Article VI:1. There must be products imported and cleared through customs and those imported products must be priced at a price lower than their normal value. Article VI defines conditions under which counteracting dumping *as such* is allowed. It applies where the practice that triggers the imposition of a measures is "dumping" within the meaning of Article VI:1. Where a Member addresses a practice that meets that definition, it has to abide by WTO rules governing anti-dumping.

4.908 Footnote 24 to Article 18.1 permits action that is allowed under other provisions of GATT 1994 as long as the measure does not address dumping *as such.*

4.909 According to Canada, the analysis of the Appellate Body in the *United States – 1916 Act* challenge can be applied to interpret Article 32.1 of the SCM Agreement. Article 32.1 mirrors Article 18.1 of the Anti-dumping Agreement. Therefore, Article 32.1 prohibits all actions that are not in accordance with GATT 1994 as interpreted by the SCM Agreement. The SCM Agreement interprets two relevant provisions of GATT 1994: Articles VI and XVI. Therefore, specific actions against subsidies must accord with these provisions as interpreted by the SCM Agreement. Permissible actions that can be taken against subsidies are limited to one of two recourses: countervailing measures under Part V of the SCM Agreement or countermeasures under Parts II or III of the SCM Agreement. The Act only raises issues in the context of Part V of the SCM Agreement and Article VI:3 of GATT 1994. Those provisions limit remedies to duties, price undertakings and provisional duties.

4.910 Canada argues that "specific action against a subsidy" is any action taken when the constituent elements of subsidisation are present. The constituent elements of a subsidy are defined in Article 1 of the SCM Agreement. Footnote 56 to Article 32.1 does not preclude action against a subsidy as long as the measure taken is not a response to subsidies *as such* and such action accords with other relevant provisions of GATT 1994 (*e.g*., action under Article III of GATT 1994).

(ii) The Act constitutes "specific action" against dumping or a subsidy that is not in accordance with the provisions of GATT 1994

4.911 According to Canada, the design, architecture and structure of the Act establish that the Act is a direct response to dumping and subsidisation. The Act is now an integral part of the anti-dumping and countervailing duty regime of the United States. Petitioners now receive two remedies when definitive duties are imposed on dumped or subsidised goods: (1) the imposition of the duties with the ensuing beneficial economic impact (i.e. increased sales and higher profits); and (2) a portion of the collected duties in respect of the dumped imports or subsidised imports.

4.912 Canada asserts that the offset payments under the Act act against dumping or subsidies. They operate to offset costs incurred by domestic goods that compete with imports found dumped or

subsidised. Moreover, they impose a burden on imports of allegedly dumped or subsidised goods into the United States in addition to anti-dumping and countervailing duties, by changing the competitive relationship between imports and competing domestic products.

4.913 According to Canada, the constituent elements of dumping are incorporated into the operation of the Act. To trigger offset payments under the Act, an Order must be imposed on dumped or subsidised products and duties must be collected. *Offset* payments are not paid from just any "pot of money". They originate from a charge on specific imports. *Offset* payments are funded entirely by anti-dumping and countervailing duties. They are paid out to offset dumping or subsidisation of imports into the United States. Funds collected under Orders are strictly segregated. Expenditures must have been incurred for the production of competing domestic products during the time an Order is in place. Only "affected domestic producers" – those injured by imports who participate in investigations – can make claims pursuant to specific Orders.

4.914 Canada asserts that an *offset* payment under the Act is not a definitive anti-dumping or countervailing duty, price undertaking or provisional measure. It is a subsidy meant to offset injurious dumping and subsidies. Accordingly, it is not in a form authorized by Article VI of GATT 1994 as interpreted by the Agreements, and violates Articles 18.1 and 32.1 of the Agreements.

(iii) US Arguments do not address the complaint and are incorrect

Constituent elements

4.915 The United States submits that the Act is not a response to the "constituent elements" of dumping or subsidies because it has two requirements: that the producers making the claim have standing as an "affected domestic producer" and that the claim is for a "qualifying expenditure". It also alleges a measure can only respond to "constituent elements", if the elements are "built into" it and that the Act fails this test as well.

4.916 Canada submits that the US arguments are incorrect. The Act is a direct response to situations presenting the constituent elements of dumping and subsidies for the following reasons.

4.917 First, in the view of Canada, there are more than two requirements for the operation of the Act. Most important, to trigger the Act and for it to operate, an Order must be imposed and duties must be collected. This means the eligibility criteria for the distribution of offset payments under the Act are directly and wholly contingent upon imported goods being dumped or subsidised into the United States so that definitive duties are imposed. Without such products and the practice of dumping or subsidies, it does not matter that there are affected domestic producers or qualifying expenditures.

4.918 Moreover, Canada argues, the two requirements under the Act cited by the United States are further evidence that the Act is a direct response to situations presenting the constituent elements of dumping or subsidisation. Neither requirement exists without the presence of those elements. "Affected domestic producers" can only qualify to make claims if the investigations in which they participate result in final determinations. "Qualifying expenditures" are those incurred for the production of domestic goods that compete with imports subject to an Order.

4.919 Second, Canada submits, in the *United States – 1916 Act* appeal, the Appellate Body determined that while there were additional requirements to those required by Article VI to impose penalties under the 1916 Act, this did not alter the fact that the 1916 Act applied only where constituent elements of dumping were present. Members' practices could not escape discipline by

simply characterizing a practice as something other than dumping or subsidisation. This is *a fortiori* true of the Act.

4.920 In this instance, Canada asserts, there is no question that the conduct targeted by the measure in question – the Act – is dumping or a subsidy; the Act by its very design does not operate otherwise. Rather, the United States appears to argue that Articles 18.1 and 32.1 do not apply to subsidies when they are used as specific action against dumping or a subsidy. *Specific action*, under those provisions, however is limited to three recourses. It is not permitted if there *other* requirements that must be met; and it is not permitted if the *means* chosen is a subsidy.

4.921 Third, the US implication that the "constituent elements" must be built into a measure for it to be inconsistent is incorrect. First, the Act by definition incorporates such "constituent elements". It does not operate unless there is a dumping or a countervailing duty Order, which is proof of the existence of such constituent elements under US law.

4.922 Moreover, the US interpretation of the *United States – 1916 Act* Appellate Body report is wrong. There the Appellate Body found that the 1916 Act required the presence of the constituent elements of dumping. It further determined that "[t]he constituent elements of 'dumping' are built into the essential elements of civil and criminal liability under the 1916 Act." However, nowhere did the Appellate Body suggest that a measure is a "specific action against dumping" or subsidies only if the requirements are built into the measure in question.

4.923 Further, other factors also support Canada's position that the Act constitutes a response to situations presenting the constituent elements of dumping. While not decisive, they are indicative. These factors include the express words of the Act including its title, reference to payments as offsets, and the Findings of Congress stated in Section 1002. They also include the legislative history of the Act.

4.924 According to Canada, the Act, therefore, is not just a "mere government payment programme" nor is it a simple distribution of duties. It is a subsidy designed as a direct response to situations presenting the constituent elements of dumping or subsidies. Accordingly, the only relevant question for the Panel is not, as the United States submits, whether the Act constitutes a prohibited or actionable subsidy. Canada submits that the Act constitutes a specific action that is prohibited under Articles 18.1 and 32.1 of the Agreements.

Against

4.925 The United States argues that the Act is not subject to Articles 18.1 and 32.1 because it is not a measure "against" dumping or subsidies. It submits that the "only logical way" for a measure to be against dumping or subsidies is through "com[ing] into contact with" the imported good or importer and imposing a burden. It asserts that the Act does neither.

4.926 The United States also argues that the only evidence the complainants give to prove the measure is "against" dumping or subsidies is the intent, purpose and objective of the measure and that that is irrelevant to prove the claim. Canada argues that the arguments of the United States are incorrect.

4.927 First, Canada asserts that the Act does, in fact, constitute a measure against imported goods and importers. The Act provides for the grant of subsidies funded by anti-dumping or countervailing duties to petitioners in anti-dumping and countervailing actions. An importer must therefore not only pay the duties in question, but also witness the same duties subsidise its direct competitors. An

imported good subject to these duties will not only have its price raised by the amount of the duties, but must compete in the market against subsidised domestic goods.

4.928 Indeed, in the *Canada - Periodicals* case, the Appellate Body found that the grant of indirect subsidies exclusively to domestic goods altered the competitive relationship between those goods and imported like products and, accordingly, acted against imported goods. And the SCM Agreement is structured on the premise that certain subsidies act against imported goods. Byrd Amendment subsidies do act against imported goods and importers.

4.929 Moreover, the United States seems to suggest that the only logical way to come into contact with dumping and subsidies for purposes of these provisions is through direct impact on imports and importers in the sense of a fine, tax, imprisonment or a court judgement. According to Canada, that is incorrect.

4.930 The words of Article 18.1 and 32.1 state that there must be action against the practice of dumping and subsidies rather than a good or an importer. The provisions of GATT Article VI provide guidance regarding the manner in which action can be taken against dumping or subsidies. To take action against dumping or subsidies is to "offset or prevent" the dumping or subsidy. In other words, action taken against dumping or subsidies is action taken to counteract or discourage the practice. Moreover, in this context, the ordinary meaning of "against" and one that is more logically applicable is "in opposition to". The Act meets these requirements.

4.931 Further, in the view of Canada, the Appellate Body found "specific action" was action taken "in response to" situations presenting the constituent elements of dumping. Read in context, "in response to" is equivalent to "against." However, nowhere does the Appellate Body limit this to measures against imports and importers.

4.932 In the most ordinary sense of the term, subsidies paid out under the Act constitute specific action "against" dumping or subsidies. The United States asserts that it does not know why it hands out billions of dollars in subsidies to companies already benefiting from the protection of anti-dumping or countervailing duties. According to Canada, the purpose and effect of the Act are evident from its structure.

4.933 Subsidies are paid from charges on imports found dumped or subsidised. They are paid directly to domestic producers for expenditures incurred to produce competing domestic products during the term of an Order. Categories for "qualifying expenditures" relate to capital expenditures for producing domestic goods that compete with imports. Duties are segregated into special accounts to ensure payments target specific imports. Recipients are restricted to those who participate in investigations and are "injured" by the imports. The Act constitutes a second response to counteract dumping and subsidisation in the US trade remedy system. In addition to duties that raises prices to restore conditions of competition, foreign exporters and importers now also see their money go directly to increase the competitiveness of their competitors.

4.934 According to Canada, the United States, therefore, misconstrues the facts in alleging that the complainants rely solely on the intent of the Act to establish that the Act constitutes action "against" dumping or subsidies. The purpose or intent of the Act only confirms what its operation and structure already establish: that the Act is a direct response to dumping or subsidies.

4.935 Finally, Canada argues that there is no logic in the US position that the intent of the Act, as reflected in its clear terms, is completely irrelevant to this dispute. Section 1002 expressly states the intent of Congress in passing this law: to strengthen US trade remedy laws to neutralize continued dumping and subsidies.

4.936 This, Canada asserts, is also supported by the Act's legislative history. Various statements by the drafters of the legislation are equally explicit in stating this intent of the Act. Indeed, the words of Senator Byrd, the author of the Byrd Amendment, establish the case of the complainants.

4.937 Even under the test proposed by the United States, the Act constitutes action "against" imports and importers that imposes a burden. The Act must therefore meet the restrictions in Articles 18.1 and 32.1 of the Agreements.

Footnotes

4.938 The United States submits that footnotes 24 and 56 to Articles 18.1 and 32.1 of the Agreements permit action against dumping or subsidies that is consistent with GATT provisions other than GATT Article VI. In its view, if the Act is found to be an "action", it is action that addresses the causes and effects of dumping and subsidies within the scope of the footnotes. Since GATT Article XVI permits subsidies, the United States submits "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."

4.939 According to Canada, if the US position were correct, the prohibition of Articles 18.1 and 32.1 would reach only those measures that are already inconsistent with GATT 1994. This makes no sense. Footnotes 24 and 56 cannot be interpreted to mean that if a measure were consistent with other provisions under GATT 1994, Article 18.1 would be irrelevant or inapplicable. Rather, Article 18.1 (and 32.1) targets "actions" that might otherwise be consistent with GATT 1994 – that is action that may not already be caught by other provisions – to the extent that such action is specifically against dumping or subsidies.

4.940 The *United States – 1916 Act* panels clarified the distinction between "action" within the meaning of the footnotes and "specific action" within the meaning of Article 18.1 (and 32.1) of the Agreements. "Specific action" is triggered by the practice of dumping (or subsidies) while "action" is triggered primarily by some other occurrence. This is regardless of whether it also affects the practice of dumping (or subsidies).

4.941 Therefore, Canada argues, where a measure is a specific action against dumping, it does not escape the requirements of Article 18.1 of the Anti-dumping Agreement because it might be otherwise consistent with GATT 1994. The analysis is equally applicable to Article 32.1 of the SCM Agreement. The panels in the *United States – 1916 Act* challenge confirm this in the context of reviewing the negotiating history of Article VI.

4.942 The Act does not merely address the causes or effects of dumping or subsidies. According to Canada, the Act is a direct response triggered by the presence of the constituent elements of dumping and subsidies. The basis for its imposition is objectively the presence of dumping or subsidies. Accordingly, it is "specific action" against dumping or subsidies within the meaning of Articles 18.1 and 32.1 and it must meet the requirements of those provisions.

4.943 The Act constitutes a measure taken against dumping or subsidies *as such*. Accordingly, it is irrelevant that Byrd Amendment subsidies might otherwise be permitted under Article XVI. In any event, with footnote 56, as it has already been observed, Article XVI cannot be an "other relevant provision of GATT 1994". Article 32.1 requires that action must accord with the "provisions of GATT 1994 as interpreted by" the SCM Agreement. Since Article XVI constitutes a provision interpreted by the SCM Agreement within the meaning of that provision, it cannot constitute an "other relevant provision" of GATT 1994 within the meaning of footnote 56.

The SCM Agreement

4.944 The United States submits that the reasoning in the *United States – 1916 Act* Appellate Body report is not applicable to the interpretation of GATT Article VI:3 and the SCM Agreement and that GATT Article VI:3 read in conjunction with Article 10 does not limit the permissible remedies for subsidies to duties.

4.945 Canada submits that the US argument is incorrect. Article 32.1 of the SCM Agreement mirrors Article 18.1 of the Anti-dumping Agreement in text, context, and object and purpose. Accordingly, the findings of the Appellate Body in the *United States – 1916 Act* case are particularly pertinent in the interpretation and application of Article 32.1.

4.946 According to Canada, Article 32.1 prohibits specific action against a subsidy that does not accord with GATT 1994 as interpreted by the SCM Agreement. In this context, the SCM Agreement interprets two provisions of GATT 1994 that are relevant to the issue at hand, Articles VI and XVI. Specific action against a subsidy must therefore accord with Articles VI and XVI as interpreted by the SCM Agreement. These provisions restrict Members' actions against subsidies as such to two sets of recourses. Members may apply countermeasures under Parts II and III of the SCM Agreement. Or they may impose measures under Part V (countervailing duties, provisional measures and price undertakings). Footnote 35 to Article 10 of Part V expressly states that Members may do one or the other to address the effects of a particular subsidy in the domestic market but not both.

4.947 The provisions of Part V elaborate on the countervailing duty provisions contained in Article VI:3 of GATT 1994. Read together, Part V of the SCM Agreement and Article VI:3 restrict the permissible remedies (other than countermeasures) against subsidies to countervailing duties, undertakings and provisional measures.

4.948 The Act operates in the context of the issuance of countervailing duty orders and the assessment and distribution of countervailing duties. As a result, for purposes of this challenge, the Act only raises issues in the context of Part V of the SCM Agreement and Article VI:3 of GATT. Having chosen this avenue, the United States is restricted in its applicable remedies for specific action against a subsidy to duties, undertakings and provisional measures.

4.949 According to Canada, this restriction is confirmed by the negotiating history of Article VI. The *United States – 1916 Act* panels reviewed this negotiating history in the context of anti-dumping duties. It shows that while the express limitation on actions against subsidies (and dumping) to duties was removed, that did not alter the fact "measures other than compensatory anti-dumping and countervailing duties may not be applied to counteract dumping or subsidization except in so far as such other measures are permitted under other provisions of the General Agreement."

4.950 This position did not change with the adoption of the SCM Agreement, which elaborated on the countervailing duty provisions of Article VI of GATT 1994. Accordingly, Article VI:3 and Part V of the SCM Agreement limit applicable remedies to duties, provisional measures and undertakings.

(iv) Conclusions concerning "specific action against …"

4.951 Canada asserts that the issue is not whether there are *specific* rules in the WTO Agreements dealing with the appropriation of anti-dumping or countervailing duties. Or whether Canada should more appropriately have brought a case under Article 5(c) of the SCM Agreement. A subsidy that is a specific action against dumping or a subsidy within the meaning of Articles 18.1 and 32.1 of the Agreements is not permitted by the Agreements. The source of funds for the subsidies establishes more clearly that they constitute a "specific action", but *where* the money comes from is only one

element among many that prove the subsidies as "specific action" and as such in violation of Articles 18.1 and 32.1.

(d) Determination of industry threshold levels

4.952 Canada argues that Articles 5.4 and 11.4 of the Agreements set out the thresholds for level of domestic industry support required for a dumping or countervailing duty investigation to be initiated. These Articles require a positive determination based on an examination of the degree of support that the application is "by or on behalf of the domestic industry." They reflect an agreement by the Members that only applications supported by the majority of industry were intended to be the basis of investigations. Numerical thresholds were introduced to establish greater certainty and predictability. Accordingly, the examination of thresholds must not be *pro forma*.

4.953 It is the view of Canada that the US position that the thresholds are only quantitative renders the obligation to establish industry support levels meaningless. The threshold in Articles 5.4 and 11.4 is not a simple number: it is, rather, a threshold as to the *level of support* a particular petition enjoys in the industry. A law that provides incentives for the industry to decide one way or another – monetary rewards for support and the threat of subsidised competition if no support is forthcoming – distorts that support and prevents a proper and accurate determination of support. The Act makes it impossible to determine if industry petitions or support for petitions reflect real injury or the prospect of subsidisation under the Act. It is contrary to the object and purpose of these provisions to remove uncertainty and lack of predictability for imports. According to Canada, it therefore violates Articles 5.4 and 11.4.

4.954 Finally, Canada submits that the Act results in a *per se* violation of the Agreements. For this reason, Canada considers it is not necessary for Canada to adduce evidence of actual bias. Indeed, as another complainant pointed out, by the very operation of the Act it is now impossible to adduce such evidence.

(e) Undertaking agreements

4.955 Articles 8.1 and 18.1 of the Agreements require that a Member provide administering authorities the *ability* to enter into "price undertakings" to facilitate the early termination of investigations. Ability must be construed as including not only the legal authority but also the discretion to enter into such agreements: legal authority that is impossible to exercise does not amount to ability. Articles 18 and 26 of the Vienna Convention on the Law of Treaties support this interpretation.

4.956 According to Canada, the United States argues that the obligations contained in Articles 8.1 and 18.1 are formalistic only. The US also argues that domestic industry has little influence in the decisions of the US Department of Commerce (the DOC) to enter into agreements.

4.957 While domestic authorities have discretion to accept or reject undertaking agreements, a Member may not pass a law that undermines and circumvents that discretion. The Act in effect does so. It creates incentives that target and encourage interested parties to thwart proposed undertakings.

4.958 Moreover, the US position that the DOC has "complete discretion" to ignore the domestic industry, does not accord with the pronouncement of the US Court of International Trade (the CIT). The CIT exhaustively examined the legislative history of suspension agreements and ruled that DOC may not dismiss the views of the industry. The United States never addresses these rulings.

4.959 Finally, based on the value of potential *offsets* payments, Canada submits that it defies common sense to argue, as the United States does, that the prospect of hundreds of millions of dollars in subsidies does not affect the decision of the domestic industry in respect of undertakings. The Byrd Amendment would keep prices, raised by duties, high and divert millions of dollars to the industry. The Act, therefore, procures the dissent of industry from support of undertakings and so fatally compromises the discretion of the investigating authorities to enter into such undertakings.

(f) Fair, reasonable and impartial administration of US laws

4.960 Article X:3(a) requires that Members administer their laws in a fair, reasonable, neutral and impartial manner. It establishes minimum standards of procedural fairness.

4.961 The measure at issue is the Act. It causes the unfair, inequitable and unreasonable administration of US anti-dumping and countervailing duty laws, particularly with respect to standing and undertakings. This was in fact stated in Canada's Panel Request. According to Canada, the United States, in its arguments, makes an improper distinction between the administered measure and the administrative measure at issue.

4.962 Canada argues that the Act alters the manner in which anti-dumping and countervailing duty laws are applied. It is the administrative measure at issue. In Argentina - Leather, the measure at issue was a resolution that permitted domestic industry to become involved with the custom clearance process of the goods of its domestic suppliers. The issue examined by the panel was the effect the administrative measure had on the administration of Customs laws. The administrative measure here is the Act. The Panel must examine whether its impact leads to a fair, reasonable and neutral administration of anti-dumping and countervailing duty laws.

4.963 The Act introduces financial incentives into the US system that are available only where investigations are brought and end with the imposition of a duty. According to Canada, the Act influences the decisions of parties of the industry to bring or support petitions and thwart undertakings by creating a potentially sizeable financial reward. The Act, therefore, creates an inherent danger that imports will face unnecessary anti-dumping and countervailing duty investigations in the US domestic market. This undermines the security that imports can face in the US market. This is neither a fair, reasonable nor neutral administration of laws. Accordingly, the Act violates GATT Article X:3(a).

4.964 Canada is of the view that the Act results in a violation of Article X:3(a) *as such*; the complainants need not prove actual harm. The Act influences the behaviour of actors in the US anti-dumping and countervailing duty regime. The United States cannot claim that that influence has nothing to do with how the US Customs Service administers US laws.

(g) Conformity of laws with WTO agreements

4.965 Article XVI:4 of the WTO Agreement and Articles 18.4 and 32.5 of the Agreements oblige Members to bring their domestic law into conformity with their obligations under the WTO Agreements. According to Canada, the Act violates Articles 18.1 and 32.1 of the Agreements in conjunction with GATT 1994, Articles 5.4 and 11.4 of the Agreements, Articles 8.1 and 18.1 of the Agreements and Article X:(3)(a) of GATT 1994. Accordingly, it violates Article XVI:4 of the WTO Agreement and Articles 18.4 and 32.5 of the Agreements.

(h) Conclusion

4.966 Canada requests that the Panel find that the Act is inconsistent with the Anti-dumping Agreement, SCM Agreement, GATT 1994 and the WTO Agreement as stated. It requests that the Panel recommend that the United States bring its measure into conformity with those Agreements.

4. Chile and Japan

(a) Introduction

4.967 Japan and Chile assert that they have demonstrated that the Continued Dumping and Subsidy Offset Act of 2000 (hereinafter referred to as the "CDSOA") is inconsistent with and violates the General Agreement on Tariffs and Trade 1994 ("GATT"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and the Agreement Establishing the WTO ("the WTO Agreement").

(b) Rebuttal of United States' arguments

(i) General

Mischaracterization of the CDSOA by the United States

4.968 Japan and Chile argue that to say, as the United States does, that the CDSOA is a "payment programme" is to say nothing of its conformity with WTO rules. Even if characterized as a "payment programme" it still violates the United States' obligations under the cited Agreements.

The cited provisions of the AD Agreement and the SCM Agreement limit the sovereign power of Members

4.969 According to Japan and Chile, the United States' argument that there is nothing in the WTO Agreements that expressly prohibits the distribution of anti-dumping or countervailing duties to domestic producers is similar to that made by the United States, and rejected by the Panel, in the *United States - Antidumping Act of 1916* case (the "1916 Act case"). Specifically, the Panel in that case rejected the United States' argument that "if the measure is of a nature that is simply not regulated by the GATT 1994 (…) the measure is a fortiori consistent with the GATT 1994."

4.970 The distribution of collected anti-dumping and countervailing duties to domestic producers who (as a condition of eligibility under the CDSOA) supported a petition, is a specific action against dumping or subsidization that violates the AD Agreement, the SCM Agreement and the GATT. Contrary to what the United States alleges, Japan and Chile are not 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."

4.971 GATT and WTO jurisprudence, including recent cases, confirm that Members have consented to limit their sovereign right to distribute and allocate revenues. Members agreed to limit that sovereign power when they consented to, inter alia, Articles 18.1 of the AD Agreement, 32.1 of the SCM Agreement and VI of GATT. They undertook an obligation to conform their legislation, past and future, to the provisions of those Agreements.

Relevance of the 1916 Act case

4.972 Japan and Chile assert that the interpretation of Article 18.1 of the AD Agreement, 32.1 of the SCM Agreement and Article VI of the GATT in the 1916 Act case confirm that the CDSOA is inconsistent with those provisions. The United States admits that the reasoning in the 1916 Act case applies to the examination of the claims under the AD Agreement, when it argues, albeit incorrectly, that the CDSOA "does not satisfy the test articulated in the 1916 Act."

4.973 Japan and Chile argue that the Appellate Body's interpretation of the phrase "specific action against" of Article 18.1 applies to the parallel and identical phrase in Article 32.1. Article 32.1 prohibits Members from taking specific action in response to a situation that presents the constituent elements of subsidization, unless that action is in accordance with Article VI:3, as interpreted by the SCM Agreement. However, the United States objects to the application of the reasoning of the Panel and the Appellate Body in the *US - 1916 Act* case to the examination of the complainants' claims under the SCM Agreement, based on the incorrect and unsupported arguments contained in footnote 64 of its first written submission.

4.974 Japan and Chile are of the view that the United States misinterprets and misrepresents Article 10 of the SCM Agreement. Footnote 35 of Article 10 states that only *one* form of relief shall be available to a Member to protect against the effects of a particular subsidy in its domestic market, and specifies that the *only* possible form of relief is either a countervailing duty or a countermeasure authorized by the DSB, pursuant to Articles 4.10 and 7.9 of the SCM Agreement. Thus, footnote 35 limits the permissible remedies to the effects of subsidies to a countervailing measure or a countermeasure authorized by the DSB. The United States expressly admits that the CDSOA "is not a 'countermeasure' within the meaning of Articles 4.10 and 7.9" and concedes that the CDSOA does not mandate the imposition of countervailing duties. Therefore, it must be concluded that the CDSOA is a specific action against subsidy that is not in accordance with Article VI:3.

Purpose of the CDSOA

4.975 Japan and Chile believe that the purpose of the CDSOA is relevant for the examination of the measure's conformity with the WTO Agreements. The purpose of the CDSOA is further evidence of what the CDSOA does: it addresses dumping and subsidization; it mandates specific actions against dumping or a subsidy (i.e., action taken in response to a situation presenting the constituent elements of dumping or subsidization).

4.976 According to Japan and Chile, the purpose of the CDSOA is expressed, in part, in its Section 1002. That Section makes clear that "dumping" and "subsidization" are the target of the distributions. Subparagraph 1 of Section 1002 finds that "injurious dumping is to be condemned and actionable subsidies which cause injury to the domestic industries must be effectively neutralized." A measure that "neutralizes" injurious dumping and actionable subsidies is a measure "against" that dumping and those subsidies. Section 1002 concludes by proclaiming that Congress, in promulgating the CDSOA, finds that "the United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." The purpose of the CDSOA is also reflected and evidenced in its legislative history, including the statements made by the sponsors of the CDSOA, as well as its opponents.

4.977 In its appellant's submission in the United States—Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of the DSU by the European Communities, the United States asked the Appellate Body to rely on the purpose of the law, evidenced in its legislative history. Citing to reports of the United States' House of Representatives, the United States stated that the "legislative history [of the Extraterritorial Income Exclusion Act of 2000] makes clear that it was purposefully drafted to provide tax relief based on export-neutral criteria." The United States also pointed to the

legislative history of the ETI Act to support its argument that the Act fell within the scope of footnote 59 of the SCM Agreement. Citing the legislative history of the Act contained in US Senate reports, the United States argued that "[t]he legislative history accompanying the Act makes the point [that the Act relies on the exemption method to avoid double taxation of foreign-source income]." The Appellate Body referred to and considered the citations by the United States to the legislative history of the Act in reaching its determination. It specifically stated that it took "particular note" of the statements concerning the legislative history of the ETI Act.

4.978 US courts, including the Supreme Court, regularly examine legislative history and other congressional sources of legislative intent (including findings by the US Congress, reports prepared by the legislature, and statements made by members of Congress on the floor of the House of Representatives or the Senate), to assist them in interpreting the meaning of particular words and phrases. For instance, in *Crosby v. National Foreign Trade Council* (involving a law that was also the object of a formal complaint in the WTO) the United States Supreme Court based its decision, in part, on an examination of the Congress' purpose in passing the law, as expressed, in part, by statements of its sponsors. In *FDA v. Brown & Williamson Tobacco Corp.* the US Supreme Court stated that the intent of Congress and the legislators was "certainly relevant." In *Olmstead v. Zimring* the US Supreme Court arrived at its decision, in part, by reviewing congressional findings contained in the statute at issue.

4.979 Therefore, Japan and Chile submit, the text of the CDSOA that appears at Section 1003 can and should be interpreted by examining the congressional findings in Section 1002 of CDSOA, and by examining the legislative history, which includes statements made by members of the US Congress. The findings by Congress and the statements made by the sponsors and by the opponents of the CDSOA are evidence that the CDSOA mandates specific action that is a violation of the AD Agreement, the SCM Agreement, the GATT and the WTO Agreement.

Amount of the distributions under the CDSOA

4.980 According to Japan and Chile, the distributions of the anti-dumping and countervailing duties to domestic producers, regardless of the amount or whether they correspond to the actual amount of the injurious effect of the dumping or subsidization, is a specific action against dumping or a subsidy that violates the AD Agreement, the SCM Agreement and the GATT.

(ii) Action against dumping and subsidization

4.981 The CDSOA mandates action that is "taken in response to situations presenting the constituent elements of 'dumping'" or subsidization and is thus a specific action against dumping or a subsidy. The CDSOA, therefore, falls within the scope of Article VI, the AD Agreement and the SCM Agreement.

4.982 The United States' definition and interpretation of the word "against" is not only contrary to the Appellate Body and the Panels in 1916 Act case; it is also not supported by the plain dictionary meaning of that word, in any of the three official languages of the WTO, nor is it in accordance with the customary rules of interpretation of public international law.

Linkage between the constituent elements of dumping and the distribution of duties under the CDSOA

4.983 Japan and Chile argue that there is an intimate and dependent connection between the CDSOA and dumping or subsidization. This connection, recognized by the United States in its oral

statement, further demonstrates that the CDSOA indeed addresses and counteracts dumping and subsidization. It is therefore within the purview of the cited Agreements.

4.984 Japan and Chile assert that the basis for the payments (i.e., the finding of dumping or subsidies), and the eligibility criteria (who the recipients of the distributions are, i.e., "affected" domestic producers that support a petition) are evidence that the distributions are specific action against dumping or a subsidy. They demonstrate that the linkage between dumping or subsidization and the distribution is two-fold: i) the distribution is conditioned upon the constituent elements of dumping or subsidization; and ii) the distribution counteracts dumping or subsidization --in the words of the CDSOA, it "neutralizes" injurious dumping or actionable subsidies.

4.985 The funding of the payments to the domestic producers (i.e., dumping and countervailing duties, which is collected pursuant to finding of dumping and subsidy) is relevant, for it reveals that the distribution is specific action against dumping or subsidization.

4.986 Japan and Chile consider that the close connection is also evidenced by the actual language of the CDSOA, including Section 1002. That Section contains *inter alia* the following language: "the United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved"; "dumping is to be condemned and actionable subsidies (…) must be effectively neutralized." Also noteworthy is the fact that the distributions of the collected duties are identified throughout the CDSOA as continued dumping or subsidies "*offsets,*" meaning that the payments to domestic producers "counterbalance" or "compensate" for dumping and subsidization.

Interpretation of the phrase "specific action against dumping [a subsidy]"

4.987 Japan and Chile submit that there is no reason why the Panel should depart from the interpretation of that exact same phrase given by the Panel and the Appellate Body in the case concerning the 1916 Antidumping Act. In that case, the Panel and the Appellate Body correctly interpreted the AD Agreement in accordance with the ordinary meaning of the terms of Article 18.1, in its context and in the light of its object and purpose. It interpreted the phrase "specific action against dumping" to mean action taken "in response to a situation presenting the constituent elements of dumping." That interpretation applies to the parallel provision in Article 32.1 of the SCM Agreement, as both contain the exact same phrase.

4.988 The dictionary definition of the word "against" is "in opposition to", in "resistance to", "counter to." The distributions under the CDSOA oppose and neutralize dumping and subsidization. The sponsors of the CDSOA expressly described the distributions as a way to "counter…foreign dumping and subsidization."

4.989 Japan and Chile argue that the word "against" must also be interpreted in the other two authentic languages of the WTO. There is nothing in the Spanish definition of the word "against" (*i.e.*, contra in the Diccionario de la Real Academia Española) that even remotely suggests that for an action to be considered "against" it must impose a burden or liability on, or be in contact with, the imported good or the importer. Similarly, there is nothing in the French version of the AD Agreement or the SCM Agreement that supports the interpretation offered by the United States of Articles 18.1 and 32.1.

4.990 The United States definition of "against" is unjustified and is not in accordance with the customary rules of interpretation of public international law. It disregards the ordinary meaning of the word "against" in its context and in light of the object and purpose of the AD Agreement and the SCM Agreement. There is nothing in the AD Agreement or the SCM Agreement, or in the dictionary definition of the word "against", that suggests that, in order for an action to be specifically "against"

dumping or subsidization, it must impose a burden or liability on the imported good or the importer. Thus, the primary defense of the United States in this case rests on a fabricated definition and interpretation of the word "against".

4.991 According to Japan and Chile, nothing requires that the constituent elements of dumping or subsidization be "built into" the CDSOA in order for a violation to occur. Notwithstanding the above, Japan and Chile have demonstrated that the constituent elements of dumping and subsidization are indeed built into or incorporated the CDSOA.

Article 32.1 and VI:3 must be read in conjunction with Articles 10, 4.10 and 7.9 of the SCM Agreement

4.992 Japan and Chile argue that Articles 10, 4.10 and 7.9 of the SCM Agreement, which *inter alia* limit the permissible remedies that a Member may take in response to subsidization, support the claim that the distribution of collected duties mandated by the CDSOA are specific action against a subsidy that is not in accordance with Article VI:3.

4.993 According to Article 32.1, any specific action a Member decides to take against a subsidy must be in conformity with Article VI:3. Article VI:3 is interpreted and elaborated inter alia by Articles 10, 4 and 7 of the SCM Agreement. Footnote 35 to Article 10 specifies that the only possible form of relief available to a Member to protect against the effect of a subsidy in its domestic market is either a countervailing duty or a countermeasure authorized by the DSB. Articles 4.10 and 7.9 explain what countermeasures are authorized by the DSB and under what circumstances. The specific action against a subsidy that is mandated by the CDSOA is, as the United States admits, neither a countervailing duty nor a countermeasure authorized by the DSB. Such specific action, therefore, is not in accordance with Article VI:3 of the GATT and is therefore a violation of Article 32.1.

Footnote 24 of the AD Agreement and footnote 56 of the SCM Agreement do not exclude the CDSOA from the scope of Article VI, Article 18.1 of the AD Agreement or Article 32.1 of the SCM Agreement

4.994 Japan and Chile submit that the United States argues, incorrectly, that footnote 24 of the AD Agreement and footnote 56 exclude the CDSOA from the scope of Articles VI, 18.1 and 32.1.

4.995 The Panel in the 1916 Act case found that the meaning of footnote 24 (and, therefore, mutatis mutandis footnote 56) is that a Member "cannot choose to address 'dumping' as such with instruments or in ways that are different from those allowed in the WTO Agreement for that purpose." Also, the Appellate Body in the 1916 Act case found that "action" within the meaning of footnote 24 is to be distinguished from "specific action against dumping" within the meaning of Article 18.1. A measure that is considered "specific action against dumping" is "governed by Article 18.1 itself." Likewise, a measure that is considered "specific action against a subsidy" is governed by Article 32.1.

4.996 In the view of Japan and Chile, the CDSOA is not excluded from the scope of Articles 18.1 and 32.1 by footnotes 24 and 56, for it is not "action" in the general sense, but rather specific action against dumping or subsidy.

4.997 Moreover, Japan and Chile argue, Article 32.1 requires the specific action to be in accordance with Article VI:3 and XVI (since the SCM Agreement also interprets Article XVI of the GATT). Article XVI, therefore, does not fall within the category of "other relevant provisions of GATT 1994" referred to by footnote 56 of the SCM Agreement. Thus, the United States cannot claim that the CDSOA is excluded from the scope of Article 32.1 based on footnote 56.

4.998 Also, granting a subsidy is not an action that is taken "under" Article XVI, but merely one that has to be *in conformity with* that provision once it has been granted. Consequently, the fact that the CDSOA grants a subsidy to domestic producers does not mean that the CDSOA falls within the scope of footnote 24 or 56.

4.999 Finally, even if the distribution under the CDSOA is *arguendo* in conformity with Article XVI, it is still a specific action against dumping or a subsidy that is not in accordance with Article VI:2 or VI:3 and is therefore a violation of Articles 18.1 and 32.1.

(iii) The CDSOA violates standing to initiate requirements of Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement

4.1000 Japan and Chile posit that the United States' interpretation that the numerical benchmarks in Articles 5.4 and 11.4 impose only a nominal obligation on Members to count heads, while no objective or purpose is to be served by the counting, is incorrect. The benchmarks are a mechanism, a tool to attain the objective of the provisions: to guard against the initiation of unjustified and unwarranted anti-dumping and countervailing investigations. The CDSOA negates and undermines those guarantees.

4.1001 The general principle of pacta sunt servanda imposes the obligation on Members to perform the WTO agreements in good faith. It is an obligation on Members, not on private actors. The United States is simply eluding the real issue when it says that it is not obliged to question the subjective motivation of the domestic producers. The issue is not the subjective motivation of the producers, but the action taken by the United States to affect that motivation by providing a financial inducement for them to support petitions they might not otherwise support.

(iv) The CDSOA is inconsistent with Articles 8.1 of the AD Agreement and 18.1 of the SCM Agreement, concerning voluntary undertakings

4.1002 According to Japan and Chile, in light of the Agreements' object and purpose, it is impossible to conclude that the United States is applying Articles 8.1 and 18.1 in a good faith manner when it gives a financial incentive to domestic produces to object to the acceptance of a proposed undertaking, thus making its acceptance more difficult by the competent authority. Even if the Commerce Department retains the formal legal authority to reject or accept undertakings, the voice of the domestic producers will have an effect on the ultimate decision of the Commerce Department.

4.1003 Japan and Chile argue that it is not true that Articles 8.3 and 18.3 do not require the administering authority to determine that the undertaking is "inappropriate" before rejecting it. Articles 8.3 and 18.3 implicitly require Members to accept undertakings if they are *practical* and *appropriate*.

(v) The CDSOA is an unreasonable, not impartial and not uniform administration of the United States' trade laws, and is thus inconsistent with Article X:3(a) of the GATT

4.1004 Japan and Chile posit that the CDSOA is inconsistent with Article X:3(a) in the way it administers the United States' anti-dumping and countervailing duty laws. Therefore, it is not the administration of the CDSOA that the complainants must demonstrate was inconsistent with Article X:3(a), as the United States alleges.

4.1005 According to Japan and Chile, the United States did not address the totality of the claims brought by Japan and Chile against the CDSOA for its failure to administer the United States' trade laws in an reasonable, impartial and uniform manner.

4.1006 Japan and Chile are of the view that there was no need to identify the provisions of US law relating to standing determinations and price undertakings in the request for the establishment of this Panel, because Japan and Chile are not challenging those aspects of the United States legislation. It is the CDSOA that administers those laws that is being challenged and which was sufficiently identified.

(vi) The United States is violating its general obligation to ensure that its laws are in conformity with the WTO Agreements, including the GATT, the AD Agreement and the SCM Agreement

4.1007 Japan and Chile argue that the United States has not contested the fact that a finding by this Panel that the CDSOA violates Articles 18.1, 5.4 and 8 of the AD Agreement, Articles 32.1, 11.4 and 18 of the SCM Agreement, and Article X:3(a) of the GATT by the United States, necessarily and inevitably entails a finding that the United States is violating its general obligation under Article XVI of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement, to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.

(c) Conclusion

4.1008 Japan and Chile respectfully request the Panel to find that the CDSOA:

- Mandates specific action against dumping that is not in accordance with Article VI:2 of the GATT, as interpreted by the AD Agreement, and is therefore a violation of Article 18.1 of the AD Agreement.

- Mandates specific action against a subsidy of another Member that is not in accordance with Article VI of the GATT, read in conjunction with Articles 10, 4.10 and 7.9 of the SCM Agreement, and is therefore a violation of Article 32.1 of the SCM Agreement.

- Is inconsistent with the standing to initiate requirements of Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement.

- Is inconsistent with Articles 8.1 of the AD Agreement and 18.1 of the SCM Agreement.

- Prevents the United States from administering its anti-dumping and countervailing duty laws in a reasonable, impartial and uniform manner, and the United States therefore acts inconsistently with Article X:3(a) of the GATT.

- Violates the United States' general obligation under Article XVI of the WTO Agreement, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement, to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.

4.1009 Japan and Chile urge the Panel to find, pursuant to Article 3.8 of the DSU, that as a consequence of the infringement of the above cited provisions, the United States has nullified and impaired the benefits accruing to Japan and Chile under these Agreements. Japan and Chile further request the Panel to recommend that the United States withdraw the CDSOA as the only possible way for the United States to implement the recommendations and bring the CDSOA into conformity with the corresponding covered agreements

5. European Communities, India, Indonesia and Thailand

(a) A Member's right to appropriate anti-dumping and countervailing duties must be exercised in conformity with its WTO obligations

4.1010 The European Communities, India, Indonesia and Thailand argue that the WTO Agreement contains no provision regulating specifically how anti-dumping and countervailing duties should be spent by Members. But from this it does not follow that any Government action financed from such funds must be necessarily in conformity with the WTO Agreement. In this respect, anti-dumping or countervailing duties are not different from any other sources of Government revenue. The United States is making again the same mistake as in the *US - 1916 Act* case, where it argued unsuccessfully that since the remedies provided by the 1916 Antidumping Act were not expressly regulated by Article VI of the GATT they were consistent with that provision.

4.1011 Contrary to the US assertions, the Complainants have not argued 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". Rather, the Complainants' claim is that the CDSOA is incompatible with the US obligations under the WTO Agreement because such revenue is distributed to the domestic producers "affected" by dumping or subsidisation. The Complainants would not have brought this case if that revenue were donated to a charity, as suggested elsewhere by the United States, or contributed to an "adjustment assistance" programme available to any domestic producer in difficulties.

4.1012 The European Communities, India, Indonesia and Thailand argue that the Complainants' case is not dependent upon the fact that the offset payments are made from the revenue collected pursuant to anti-dumping and countervailing duty orders. Even if the offsets were paid directly from the general US Treasury, and in an amount unrelated to the amount of collected duties, they would still be incompatible with the same WTO provisions.

4.1013 Finally, the Complainants agree that, of course, this Panel may not decide this dispute *ex aequo et bono*. However, since no complainant has requested the Panel to do so, the arguments to that effect made by the United States are pointless.

(b) The fact that the offset payments are subsidies within the meaning of the SCM Agreement does not exclude the application of the provisions cited by the complainants

4.1014 The United States suggests that any measure that happens to fall within the scope of the definition of "subsidy" in Article 1 of the SCM Agreement is subject exclusively to the disciplines contained in Parts II and III of the SCM Agreement, to the exclusion of any other provisions of the SCM Agreement and of the other covered agreements. The European Communities, India, Indonesia and Thailand assert that this argument is similar to an argument rejected by the panel in Indonesia – Autos, according to which the SCM Agreement would be lex specialis with respect to subsidies and exclude the application of Article III:2 of the GATT. The United States argued at length against that proposition.

(c) The CDSOA is inconsistent with Articles 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement

(i) The offset payments are "based upon" the constituent elements of dumping

4.1015 The European Communities, India, Indonesia and Thailand consider that it is far from clear what the United States means by "based upon". As concluded by the Appellate Body in *United States*

- *1916 Act*, the relevant test for establishing whether a measure constitutes specific action against dumping or subsidisation is whether such measure can be taken only when the constituent elements of dumping are present. If the "based upon" test now put forward by the United States is different from the Appellate Body's test, the Complainants reject its pertinence. If it is the same test, then the Complainants submit that they have shown beyond doubt that the offset payments can be made only when the constituent elements of dumping or subsidisation are present and, therefore, constitute specific action against dumping or subsidisation.

4.1016 As noted by the United States, the offset payments are made only to the "affected domestic producers". However, the European Communities, India, Indonesia and Thailand assert that the relevant legal analysis cannot stop at that point. The CDSOA defines the term "affected domestic producers" as referring to the producers which have filed or supported an application leading to the imposition of anti-dumping or countervailing duty measures. Thus, an "affected" domestic producer is a producer "affected" by dumping or subsidisation. A domestic producer "affected" by a surge in fair imports, or by a recession, or by bad weather, to mention but a few examples of the multiple circumstances that may cause injuries to the domestic producers, is not an "affected domestic producer" within the meaning of the CDSOA and is not entitled to the offset payments.

4.1017 In turn, the European Communities, India, Indonesia and Thailand note that the term "qualifying expenses" is defined by the CDSOA as referring to certain categories of expenses incurred by the "affected domestic producers" after the issuance of an anti-dumping or countervailing duty order. Moreover, such expenses must be related to the production of a product that has been the subject of an anti-dumping or countervailing duty order.

(ii) The offset payments are action "against" dumping or subsidisation

The US interpretation cannot be reconciled with the report of the Appellate Body in *US - 1916 Act*

4.1018 The European Communities, India, Indonesia and Thailand argue that the US interpretation cannot be reconciled with the report of the Appellate Body in 1916 Act. Paragraph 122 of that report leaves no scope for arguing that "specific action against dumping or subsidisation" is a subset of "action in response to dumping". For the Appellate Body, the two expressions have the same meaning: "specific action against dumping" is "action in response to dumping".

4.1019 The US contention that the report of the Appellate Body "provides no guidance as to the meaning of the term against" is untenable in the opinion of the European Communities, India, Indonesia and Thailand. By interpreting the notion of "specific action against dumping" as "action taken in response to the constituent elements of dumping", the Appellate Body was giving meaning also to the term "against".

4.1020 According to the European Communities, India, Indonesia and Thailand, the US position is based on nothing more than two hypothetical examples. As shown by the Complainants, both examples can be readily distinguished from the offset payments and, in any event, fail to prove the US point.

4.1021 For the above reasons, the European Communities, India, Indonesia and Thailand submit that the Panel should reject the US attempts to re-interpret the term "against". By arguing now that it is necessary to give meaning to the term "against", the United States is in reality seeking to replace the Appellate Body's interpretation of "specific action against dumping" by a narrower, self-serving interpretation of that notion.

The US interpretation is not in accordance with the ordinary meaning of "against"

4.1022 At any rate, the European Communities, India, Indonesia and Thailand are of the view that, should the Panel see merit in the US contention that the Appellate Body's interpretation of "specific action against dumping" needs to be qualified by re-interpreting the term "against", the Complainants submit that the reading of that term made by the United States is not in accordance with its ordinary meaning, either alone or in its context.

4.1023 According to the European Communities, India, Indonesia and Thailand, the United States cites no authority in support of its reading of the term "against" other than a dictionary definition, according to which one of the ordinary meanings of that term is "into contact with". The same dictionary used by the United States gives other meanings of the term "against" which are far more pertinent in this context, but have been conveniently omitted from the US submission. These include, for example, "in competition with", "to the disadvantage of", "in resistance to" and "as protection from". These meanings indicate that the notion of action "against" dumping or subsidisation may include not only actions that impose a direct "liability" on dumped imports (or importers), but also actions that afford protection to the domestic producers by giving them an advantage over the dumped or subsidised imports with which they compete.

4.1024 The European Communities, India, Indonesia and Thailand posit that this interpretation is borne out by the relevant context. Article VI:2 of the GATT allows the imposition of anti-dumping duties "in order to prevent or offset dumping". Similarly, the last sentence of Article VI:3 of the GATT defines the term 'countervailing duty' as "a special duty levied for the purpose of offsetting any bounty or subsidy". This indicates that the notion of action "against" dumping or subsidisation must include, at a minimum, any actions which, like the levying of anti-dumping or countervailing duties, are taken "in order to" or "with the purpose" of "offsetting" (or "preventing") dumping or subsidisation. In turn, "to offset" means to "set off as an equivalent against; cancel out by something on the other side or of contrary nature; counterbalance, compensate". This shows that dumping and subsidisation may be "offset" not only directly, by imposing a liability on the dumped or subsidised imports, but also indirectly, by granting an advantage to the domestic producers which cancels out the price advantage enjoyed by the imports as a result of dumping or subsidisation.

4.1025 Unlike distributing anti-dumping duties to a charity or flying the flag at half mast, the European Communities, India, Indonesia and Thailand urge the offset payments are objectively apt to "offset" (or even "prevent") dumping or subsidisation even if they do not "apply" directly to dumped or subsidised imports. Whether or not they achieve that result in specific instances is irrelevant for the purposes of Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement, because those provisions are not subject to an "actual effects" test or to a de minimis requirement. Thus, in *US - 1916 Act*, neither the panels nor the Appellate Body considered it necessary to examine whether the liabilities imposed by the 1916 Antidumping Act had actually had the effect of preventing or offsetting dumping in specific cases.

The stated purpose of the CDSOA confirms that the offset payments are action "against" dumping or subsidisation

4.1026 The European Communities, India, Indonesia and Thailand argue that contrary to the assertions made by the United States at the first meeting with the Panel, the purpose of the offset payments is clearly described in Section 1002 of the CDSOA which contains the "findings" of Congress providing the justification for the enactment of the CDSOA. That section is an integral part of the CDSOA.

4.1027 According to the US Congress, the European Communities, India, Indonesia and Thailand observe the purpose of the offset payments is to "neutralize effectively" dumping and subsidisation by ensuring that prices "return to fair levels". In other words, the purpose of the CDSOA is to "offset" dumping and subsidisation. The names given by the US Congress to the act ("Continued Dumping and Subsidy Offset Act") and to the payments made under the act ("offsets") provide further confirmation of such purpose.

4.1028 The European Communities, India, Indonesia and Thailand assert that the panel reports in *US - 1916 Act* did not say that the purpose of the measure is "legally irrelevant", but rather that a measure which is objectively a "specific action against dumping" cannot escape condemnation simply because it has a different stated purpose. The panels in *US - 1916 Act* were concerned that if the legal characterisation of a measure as "specific action against dumping" were dependent upon its stated purpose, it would be extremely easy for Members to evade the prohibition contained in Article 18.1 of the Anti-Dumping Agreement simply by stating some spurious purpose in the legislation at issue. That concern, however, does not arise in the present case.

4.1029 The Complainants agree that the purpose of the CDSOA is that stated by the CDSOA itself. The US submission refers repeatedly to the CDSOA as a "payment programme". However, it is obvious that making payments is not an objective in itself, but rather an instrument to achieve some purpose. The United States has not argued that the "findings" made by the US Congress in Section 1002 of the CDSOA are incorrect or false. Nor has the United States argued that the CDSOA is inapt to achieve the purpose reflected in those "findings". Indeed, had the US submission argued that, it would be tantamount to saying that the US legislators were either incompetent or insincere. In the view of the European Communities, India, Indonesia and Thailand, given that it is not disputed that the purpose of the CDSOA is that stated by the US Congress in the CDSOA, there is no reason why that purpose should be disregarded by the Panel.

<u>The US interpretation does not account for dumping and subsidisation which do not involve imports into the territory of the Member taking the action</u>

4.1030 Furthermore, according to the European Communities, India, Indonesia and Thailand, the US interpretation of the term "against" overlooks that Article 32.1 of the SCM Agreement and Article 18.1 of the Anti-Dumping Agreement do not prohibit only specific action against "subsidised imports" or "dumped imports", but more generally specific action against "a subsidy of another Member" and "dumping of exports from another Member", respectively, neither of which involves necessarily imports into the territory of the Member taking the action.

(iii) The CDSOA is not "permitted" by footnotes 24 and 56

4.1031 The United States argue that the offset payments are "permitted" by footnotes 24 and 56 because they are subsidies allowed by Article XVI of the GATT. As explained below, the European Communities, India, Indonesia and Thailand argue that this defence is wrong on several counts.

4.1032 First, the United States appears to have misunderstood the relationship between Articles 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement and their respective footnotes. Footnotes 24 and 56 are not exceptions to Articles 18.1 and 32.1. Rather, they serve to clarify the scope of those provisions.

4.1033 Second, the United States disregards that the SCM Agreement does not interpret only the subsidies provisions of Article VI of the GATT. The SCM Agreement is also an interpretation of Article XVI of the GATT.

4.1034 Third, footnotes 24 and 56 allude to action taken "under other relevant provisions" of the GATT. This is not the same as saying action which is "not prohibited by some other GATT provision". The "other relevant provisions" referred to in footnotes 24 and 56 are those GATT provisions which confer and regulate the right to take a certain type of remedial action, such as Article VI, Article XIX, or Articles XII and XVIII. Article XVI is not one of such "relevant provisions".

4.1035 Fourth, the United States disregards that a measure may be compatible with Parts II and III of the SCM Agreement and still be prohibited, on different grounds, by another WTO provision.

4.1036 Finally, according to the European Communities, India, Indonesia and Thailand, the United States misreads the interpretation of footnote 24 made by the two panels in *United States - 1916 Act*. Those panels have explained that the purpose of footnote 24 is to clarify that Article 18.1 does not prevent Members from taking action against practices that involve dumping, where the existence of dumping is not the "practice that triggers the imposition of the measures".

(d) The CDSOA is inconsistent with Articles 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

(i) The CDSOA is incompatible with the obligation to conduct an objective examination of whether an application is made "by or on behalf of the domestic industry"

4.1037 According to the European Communities, India, Indonesia and Thailand, the United States takes an extremely narrow and formalistic view of what is required by the obligation to conduct an objective examination. In essence, the United States is arguing that the administering authorities should be allowed to manipulate the outcome of the determination by inducing, or even coercing the domestic producers to make declarations of support, provided that they make no arithmetical errors when adding up the declarations in order to calculate the level of support.

4.1038 The Appellate Body takes a very different view in the opinion of the European Communities, India, Indonesia and Thailand. The Appellate Body has said in a recent case that in order to be "objective" an examination must conform to "the dictates of the basic principles of good faith and fundamental fairness". More precisely, according to the Appellate Body, the obligation to conduct an "objective" examination requires that the relevant facts "… be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties in the investigation".

4.1039 In the view of the European Communities, India, Indonesia and Thailand, the US submission does not address anywhere the Complainants' claim that the CDSOA is incompatible with the obligation to conduct an objective examination of whether an application is made "by or on behalf of the domestic industry" because it fails to conform to the "dictates of the basic principles of good faith and fundamental fairness" as those dictates have been interpreted by the Appellate Body.

(ii) The CDSOA prevents the US authorities from reaching a proper determination of whether an application has been made "by or on behalf of" the domestic industry

4.1040 The European Communities, India, Indonesia and Thailand submit that the Complainants' claim is firmly grounded on the wording of Articles 5.4 and 11.4. A formal declaration of support is not always evidence of "support" within the meaning of those provisions. If the domestic producers declare their support for the application in order to qualify for an unrelated advantage, such as the offset payments, that declaration cannot be considered as "support" for the application within the meaning of Articles 5.4 and 11.4. Rather, it is "support" for the offset payments.

4.1041 In the view of the European Communities, India, Indonesia and Thailand, the formalistic interpretation of the term "support" made by the United States would lead to absurd and unacceptable results and cannot be correct. If, as argued by the United States, it did not matter whether support is "genuine", the authorities (or the petitioners) could take any action within their reach in order to coerce or induce the domestic producers to make or support applications, so as to ensure that the quantitative thresholds of Articles 5.4 and 11.4 are reached. For example, a Member could enact a legal provision to the effect that, once a domestic producer has made a petition, all the other domestic producers must support such petition.

4.1042 The Complainants are not suggesting that the authorities must ascertain the "subjective motivations" behind each and every declaration of support. In the absence of evidence to the contrary, the authorities must assume that, if a domestic producer has declared formally its support for the application, such support is "genuine", just like the electoral authorities of all countries assume that, in the absence of any evidence to the contrary, the ballots cast by the voters are the genuine expression of their political choices. However, if the authorities are presented with evidence that a declaration of support is not "genuine" they cannot disregard such evidence. To do so would be a violation of their duty to conduct an objective examination of the existence of support.

4.1043 The European Communities, India, Indonesia and Thailand assert that by its very existence, the CDSOA destroys the presumption that a formal declaration of support is evidence of genuine support. The CDSOA provides a strong incentive to file "non-genuine" applications and to make "non-genuine" declarations of support. As a result, it renders suspect all applications and declarations of support made by the US producers. If the authorities could read the minds of the US producers, they could disregard the "non-genuine" declarations of support and make a proper determination of support, notwithstanding the incentives provided by the CDSOA. Since this is impossible, the CDSOA has the necessary consequence that the US authorities are prevented from reaching a proper determination of support, whether positive or negative.

4.1044 In the opinion of the European Communities, India, Indonesia and Thailand, the United States concedes that the US authorities cannot tell the genuine applications/declarations of support from those induced by the CDSOA, but fails to draw the appropriate consequence from this. According to the United States, since the U.S authorities cannot ascertain whether the support is genuine or induced by the CDSOA, it would follow that the whole issue is irrelevant. This argument puts logic on its head. It is like saying that the buying of votes should be permitted because the authorities cannot exclude that those voters who have been bribed by a candidate would have voted for that candidate anyway. It is precisely because the motivations of voters cannot be ascertained that all democracies ban the buying of votes per se, regardless of its actual impact on the outcome of the election.

4.1045 Contrary to the US assertions, the European Communities, India, Indonesia and Thailand argue it may be perfectly rational for a domestic producer to oppose (or at least not to support) a petition, for example in order to avoid retaliation in its export markets, or because it reckons that the anti-dumping or countervailing measures will provide an advantage to a domestic rival, which is more exposed to dumped or subsidised imports. Indeed, if it were irrational to oppose an application, Articles 5.4 and 11.4 would be superfluous. The European Communities, India, Indonesia and Thailand submit that the interpretation of those two provisions cannot start from the premise that they are useless.

4.1046 In the view of the European Communities, India, Indonesia and Thailand, the fact that all the petitions filed in the year preceding the enactment of the CDSOA met the legal thresholds for support does not prove the point made by the United States, because the very existence of legal thresholds for support may, of itself, discourage the filing of applications in those cases where the petitioners have reasons to believe that they will not obtain the necessary support.

4.1047 The European Communities, India, Indonesia and Thailand assert that the indisputable fact is that the CDSOA provides a strong financial incentive to file or support applications. It may well be that in some cases such incentive will be inconsequential because, as argued by the United States, the domestic producers would in any event have filed or supported an application. However, in an indefinite number of other cases, the financial incentive provided by the CDSOA may have a decisive effect. That possibility is enough to find that the CDSOA is inconsistent with Articles 5.4 and 11.4.

(iii) The CDSOA defeats the object and purpose of Articles 5.4 and 11.4

4.1048 The European Communities, India, Indonesia and Thailand are of the view that it is implicit in the obligation to perform a treaty provision in good faith that the parties "must abstain from acts that are calculated to frustrate the object and purpose of the treaty". As explained in the Complainants' submission, the CDSOA frustrates the object and purpose of Articles 5.4 and 11.4 because it encourages the opening of investigations and the imposition of measures in cases where the domestic industry is not interested in such measures. For that reason, the CDSOA is incompatible with the obligation of the United States to comply in good faith with the requirements of those articles. The US submission does not address this argument.

(e) The CDSOA is inconsistent with Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement

4.1049 The European Communities, India, Indonesia and Thailand argue that while the administering authority enjoys certainly a wide degree of discretion, such discretion is not unlimited. The first sentence of Article 8.3 and Article 18.3 makes it clear that the administering authority must have a "reason" for rejecting an undertaking and, therefore, that the decision to reject an undertaking is not within the authority's "complete discretion".

4.1050 Articles 8.3 and 18.3 do not limit a priori the types of reasons which may be invoked by the authority. But this does not mean that the authority can invoke all sorts of motives. For example, it would be contrary to Articles 8.3 and 18.3 to reject an undertaking on the ground that the name of the exporter begins with the letter 'A', or that it was raining when the undertaking was offered. Those grounds are not proper "reasons" within the meaning of Articles 8.3 and 18.3 because they are not pertinent for deciding whether the acceptance of an undertaking is "appropriate".

4.1051 The European Communities, India, Indonesia and Thailand note that the petitioners' opposition may be a pertinent "reason" for rejecting an undertaking where it reflects the legitimate concern that the undertaking will not provide equivalent protection. On the other hand, the pecuniary interest of the petitioners in securing the windfall of the offset payments is a totally extraneous consideration which cannot be regarded as a pertinent "reason" for rejecting an undertaking.

4.1052 The Complainants have argued that the CDSOA is not in conformity with the obligation to make an objective assessment of whether the acceptance of an undertaking would be appropriate because, under the CDSOA, the US authorities provide a financial incentive to the petitioners for opposing the undertakings and then rely upon such opposition in order to reject the undertaking. The US submission does not address this argument. Likewise, the US submission fails to address the Complainants' argument that the CDSOA frustrates the object and purpose of Articles 8 and 18.

4.1053 The European Communities, India, Indonesia and Thailand observe that the stated policy of the US authorities is to accord a "considerable weight" to the petitioners' opposition. The United States does not dispute that this is in fact the established policy of its authorities. That policy goes clearly beyond granting merely procedural rights.

4.1054 According to the European Communities, India, Indonesia and Thailand, in order to have a complete picture of the US practice, it would be indispensable to know, in addition, how many undertakings were rejected, or simply were not offered in the first place, because of the opposition expressed, formally or informally, by the domestic industry.

4.1055 The European Communities, India, Indonesia and Thailand submit that the CDSOA provides an almost irresistible financial incentive to oppose the acceptance of any undertakings offered by the exporters. It may well be that, as argued by the United States, the petitioners' primary concern is "a return to the conditions of fair trade". But that objective may be achieved as well through the imposition of duties. The CDSOA allows the petitioners to have it both ways: they can have a "return to conditions of fair trade" and, in addition, the windfall of the offset payments.

4.1056 Finally, the Complainants note that the US submission fails to address their argument that the CDSOA is particularly detrimental to developing country Members because it effectively deprives them of the "constructive remedy" par excellence envisaged in Article 15 of the Anti-Dumping Agreement.

(f) The CDSOA is inconsistent with Article X:3 (a) of the GATT

4.1057 According to the European Communities, India, Indonesia and Thailand, this claim is not concerned with the administration of the CDSOA. Instead, the claim submitted by the Complainants is that the CDSOA results in an unreasonable and partial administration of the provisions of the US anti-dumping and countervailing duty laws and regulations governing the initiation of investigations and the acceptance of undertakings. Thus the "administrative" measure at issue is the CDSOA, whereas the "administered" measures are the US anti-dumping laws and regulations.

4.1058 The European Communities, India, Indonesia and Thailand consider that this claim was clearly stated in the request for the establishment of a panel. Therefore, the United States' suggestion to the effect that it is outside the terms of reference of the Panel is groundless.

4.1059 As explained by the panel in Argentina – Hides and Skins, Article X.3 (a) is not concerned only with individual acts of enforcement or with "unwritten" administrative practices. It may apply as well with respect to generally applicable measures of an administrative nature. Thus, the fact that CDSOA is a generally applicable measure does not bring it outside the scope of Article X.3 (a).

4.1060 According to the European Communities, India, Indonesia and Thailand, the same panel found that the administrative measure at issue was incompatible with Article X:3 (a) because it gave rise to an "inherent danger" that the administered customs laws, regulations and rules would be applied in a partial manner. The Panel did not consider it necessary to consider whether, in practice, the administrative measure at issue had actually resulted in an impartial application of the administered laws, regulations and rules in specific instances.

4.1061 The European Communities, India, Indonesia and Thailand argue that they have demonstrated that the CDSOA creates an "inherent danger" that the provisions of the US anti-dumping and countervailing duty laws and regulations concerning determinations of support and the acceptance of undertakings will be applied by the US authorities in a partial and unreasonable manner. Such "inherent danger" is sufficient to find that the CDSOA is inconsistent with Article X:3 (a) of the GATT.

6. Korea

(a) Introduction

4.1062 Korea submits that the United States has failed to rebut the *prima facie* case advanced by the complainants in this dispute settlement proceeding. Before turning to each of Korea's claims, Korea wishes to address some general, systemic issues. First, regarding the "power of the purse," Members do have the power of the purse, but when they joined the WTO, they agreed to limit that power where exercising it would conflict with WTO provisions.[180] Second, a Member may not avoid its WTO obligations by altering the incentive structure that served as the basis of the negotiations leading to the WTO agreements. Here, the United States offers a cash reward that profoundly affects the decision-making of domestic industries regarding whether to pursue or support a petition and whether to accept an undertaking. The end result is that the relevant WTO provisions are reduced to inutility. Finally, the provision of cash rewards to domestic industries that successfully pursue trade remedy actions improperly distorts trade and, thus, should be condemned.

4.1063 Korea asks the Panel to find that, by maintaining the Byrd Amendment[181], the United States is in violation of Articles VI and X:3(a) of GATT 1994; Articles 5.4, 8 and 18.1 of the AD Agreement; and Articles 11.4, 18 and 32.1 of the SCM Agreement. Korea requests the Panel both to recommend that the United States bring its laws into conformity with its obligations under these WTO provisions and to suggest that, to meet its WTO obligations, the United States should repeal the Byrd Amendment.

(b) The Byrd Amendment is an impermissible specific action against dumping and subsidization

4.1064 Before responding to the various points raised by the United States, Korea wishes to set out the points which the United States has not contested in its first written submission.

(a) The Byrd Amendment is mandatory legislation. The authorities have no discretion; they must distribute anti-dumping and countervailing duties collected to the domestic companies that qualify under a specific order.

(b) Absent a finding that the constituent elements of dumping (or impermissible subsidy) are met and imposition of an order and collection of duties, no funds are distributed under the Byrd Amendment. A finding of the constituent elements is a condition precedent to distribution of the duties.

(c) All of the duties collected under a specific order must be distributed to qualifying producers and, until distribution, are kept in separate, order-specific accounts.

(d) The duties are not distributed to all injured producers, but only to those that brought or supported the petition.

(e) Payments are tied directly to qualifying expenses for producing the like product.

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[180] *See United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (24 February 2000), para. 177 (US measures regarding foreign sales corporations held inconsistent with the SCM Agreement).

[181] Public Law 106-387 (28 October 2000), 114 Stat. 1549, Title X – Continued Dumping and Subsidy Offset (Byrd Amendment or CDSOA), Section 754(a).

(f) As indicated by the title of the Byrd Amendment, the duties are distributed specifically in order to "offset" "continued dumping or subsidy", *i.e.*, to counter harm suffered due to dumping or subsidization.

4.1065 Korea argues that, as this list shows, the United States has conceded all of the facts necessary for the Panel to conclude that the Byrd Amendment is an impermissible specific action against dumping and subsidization.

(i) The Byrd Amendment is a specific action against dumping and subsidization

4.1066 Korea argues that the US interpretation is not based on the ordinary meaning of the words. The US relies on the least appropriate definition of "against" – "into contact with". This particular definition is not relevant to the interpretation of "against" in Article 18.1 of the AD or Article 32.1 of the SCM Agreement. "Into contact with" is used to describe physical contact: "[b]reakers crashed against the wall of the promenade."[182] This cannot be the ordinary meaning of "against" as it is used in the WTO provisions at issue and, therefore, the US interpretation must be rejected.

4.1067 According to Korea, the US argument is not supported by other text in the relevant provisions. Article 18.1 refers to "specific action against *dumping*." But, to fit this text to its distorted interpretation of "against," the United States is forced to argue that "dumping" refers to "specific action against (dumped) imported *goods or importers*." As noted by the Appellate Body in *US-1916 Act*, "dumping" is a situation or process, not an object,[183] and, thus, it is not a candidate for physical contact.

4.1068 In the view of Korea, contrary to the US argument, the available ordinary meaning of "against" shows that the Byrd Amendment is a specific action "against" dumping (or subsidization). The first entry in the definition of "against" is "[o]f motion or action in opposition".[184] This is the most appropriate definition for "against". When "against" is used in the context of action "against" a situation or other non-physical process, "against" must be interpreted as meaning "in opposition".

4.1069 Korea asserts that the relationship between the specific action and the dumping (or subsidization) must, as a matter of logic, be one of the following three: (i) "in opposition to"; (ii) "in support of"; or (iii) neutral (neither "in opposition to" nor "in support of"). The constituent elements of dumping include: (i) introduction into commerce of imported products; and (ii) the gap between the import price and the normal value (where import price is less than normal value).[185] One of the measures the authorities can take "in opposition to" dumping is to impose anti-dumping duties on the imports. Another measure they can take is to provide support to the *affected* domestic industries, which *compete* with the imports. Both of these actions are "in opposition to" the introduction into commerce of unfairly traded imports. The Byrd Amendment acts "in opposition to" dumping through the second modality, since it provides support to the *affected*[186] domestic industry, *competing* with the

[182] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

[183] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000) (*US-1916 Act*), paras. 122 and 126 (finding "dumping" to be a situation in which two constituent elements are satisfied – (i) introduction into commerce of imported products (ii) where the import prices is less than normal value).

[184] *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993).

[185] *US – 1916 Act*, WT/DS136/R (31 March 2000) (*EC Panel Report*), para. 6.104; WT/DS162/R (29 May 2000) (*Japan Panel Report*), para. 6.117.

[186] Byrd Amendment, Section 754(b)(1). The use of the word "affected" inextricably ties the payments to the underlying investigation and order. An "*affected*" domestic producer is a producer that has been affected by the dumping or subsidization in question.

imports. Thus, the Byrd Amendment acts "in *opposition* to" dumping (or subsidy), and is a "specific action *against* dumping".

4.1070 In *US – 1916 Act*, Korea asserts, the Appellate Body interpreted this language as "action that is taken *in response to* situations presenting the constituent elements of 'dumping'."[187] The US argument misstates and, ultimately, ignores this holding. Contrary to the US assertion, there, the Appellate Body interpreted "against" and its context, holding that "'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping.'"[188] But, when the United States quotes this passage, Korea argues that it omits two key words: "situations presenting".[189] The United States does this, presumably, to narrow the Appellate Body's holding and avoid its application to this case. But, the situation faced in the *US – 1916 Act* proceeding was much less clear than that presented by the Byrd Amendment here. Thus, the US examples[190] are irrelevant because, unlike the Byrd Amendment, they do not affect competition in the marketplace.

4.1071 In addition, the United States argues that constituent elements of dumping are not built into the Byrd Amendment.[191] Again, Korea submits, the United States is incorrect. The operation of the Byrd Amendment demonstrates conclusively that it is a specific action against dumping or subsidization:

- one, the Byrd Amendment does not operate unless the US authorities have found that the constituent elements of dumping or subsidization exist and have imposed an order;

- two, the only parties that can collect the cash reward are the "affected domestic producers," *i.e.*, the US producers that brought or supported the petition and were part of the underlying investigation that led to imposition of the order[192]; and

- three, the funds are distributed only for "qualifying expenditures", which are limited to certain expenses for producing a product covered by the order.[193]

4.1072 In Korea's view, the United States further argues that, because the Byrd Amendment imposes two requirements in addition to the constituent elements of dumping,[194] under the holding of the Appellate Body in *US - 1916 Act*, the Byrd Amendment cannot be a specific action against dumping or subsidization. This argument is completely contrary to the Appellate Body's interpretation. In its appeal of the 1916 Act panel reports, the United States argued that the measure targeted predatory pricing, not dumping, and that the additional tests in the measure (for intent and injurious effects) removed the measure from the scope of Article 18.1, *i.e.*, given the additional tests, the measure could not be a specific action against dumping.[195] The Appellate Body rejected this argument, finding that

[187] *US – 1916 Act*, para. 126 (emphasis added).
[188] *US – 1916 Act*, para. 122.
[189] *See* First Written Submission of the United States, *United States – Continued Dumping-Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (14 January 2002) (US First Submission), para. 84.
[190] *See id.*, para. 91.
[191] *Id.*, para. 83.
[192] Byrd Amendment, Section 754(b)(1).
[193] *Id.*, Sections 754(a) and 754(b)(4).
[194] These are the "affected domestic producer" and "qualifying expenditure" requirements.
[195] *US – 1916 Act*, paras. 104 and 107.

the addition of requirements did not alter the fact that the measure applied only where the constituent elements of dumping were found to exist.[196]

4.1073 Korea asserts that the fallacy of the US argument is also demonstrated by the US statement that "[t]he amount of the distributions under the CDSOA have nothing to do with measuring the extent to which a US producer has been affected by dumping or subsidization of imports."[197] But, under the Byrd Amendment, the amount of distributions is decided by the amount of duties collected, which is determined by the measurement of the dumping (or subsidization) found to exist.

4.1074 Finally, Korea is of the view that the above analysis is confirmed by the purpose of the Byrd Amendment. The United States argues that the "purpose" of the Byrd Amendment is "not relevant."[198] This is incorrect. In the *US-1916 Act* proceeding, the panel held merely that the stated purpose of a measure is not always dispositive. The purpose, therefore, is relevant, even though it is the effect of the measure that is key.[199] Finally, the statements quoted in Korea's First Submission serve not merely as statements of purpose, but also as evidence of the operation and impact of the Byrd Amendment.[200] They are evidence not merely of the fact that the Byrd Amendment was intended to provide a specific remedy against dumping and subsidization, but also of the fact that this is precisely what the Byrd Amendment actually does.

(ii) The Byrd Amendment is not protected by footnotes 24 and 56

4.1075 In the opinion of Korea, contrary to the US argument,[201] if a measure is a specific action against dumping or subsidization, the measure is prohibited by Articles 18.1 and 32.1 and is not "saved" by Footnotes 24 and 56. This reading is supported by the very jurisprudence cited by the United States. As the *US-1916 Act* panel found, "reading footnote 24 as permitting actions other than anti-dumping actions allowed under other provisions, *as long as the measure does not address dumping as such,* is fully consistent with the principle of useful interpretation."[202] In other words, Footnote 24 works *only as long as the measure does not address dumping as such.* Thus, when this Panel determines that the Byrd Amendment is an action against dumping or a subsidy, Footnotes 24 and 56 cannot save the Byrd Amendment, contrary to the US assertion.

4.1076 Korea asserts that the United States should also heed the fact that "action", as it appears in Footnotes 24 and 56, refers to actions addressing causes or effects of dumping (or subsidization), rather than the dumping (or the subsidy) itself. As the 1916 Act panel found, Footnote 24 allows a Member to "address the effects of dumping, *e.g.* increased imports, or its causes (*e.g.*, subsidization) through other legitimate means under the WTO Agreement, such as countervailing or safeguard measures."[203] But, the Byrd Amendment does not address simply the cause or the effects of dumping (or subsidization). The measure addresses dumping (or subsidization) as such.

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[196] *Id.*, para. 122.

[197] US First Submission, para. 86.

[198] Oral Statement of the United States at the First Meeting of the Panel, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (5 February 2002), para. 30.

[199] *See, e.g.*, *Japan Panel Report*, para. 6.150 (noting that legislative history, including statements regarding purpose, confirm prior analysis of effect of 1916 Act).

[200] *See* First Submission of the Republic of Korea, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (6 December 2001) (Korea's First Submission), paras. 16, 17, 34-36 and 44.

[201] US First Submission, para. 101.

[202] *Japan Panel Report*, para. 6.132 (emphasis added).

[203] *EC Panel Report*, n.373.

(c) The Byrd Amendment violates Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement

4.1077 Korea argues that if one were to accept the US argument,[204] then a Member planning to impose an anti-dumping measure could do anything – including imposing mandatory legislation as in the instant case – to encourage domestic companies to support the petition and still meet the obligation arising under Articles 5.4 and 11.4 where a sufficient number of companies "supported" the petition. This shows that the US position does not rest on good faith implementation of its treaty obligations. Good faith implementation is a general principle of law and a principle of good international law, which is reflected, *inter alia*, in Article 26 of the Vienna Convention on the Law of Treaties and Article X:3(a) of GATT.[205]

4.1078 By arguing that Complainants should have provided "empirical support",[206] the United States seems to suggest that Complainants are required to demonstrate the actual effect of the Byrd Amendment. This, Korea submits, is incorrect. As the Appellate Body repeatedly has stated, an effects test is irrelevant where, as here, a measure violates the provisions of the WTO.[207]

4.1079 Finally, according to Korea, even if one assumes, as the United States does, that it is "generally" irrational for domestic companies to "oppose" relief,[208] the assumption confirms Korea's position – in some cases, the Byrd Amendment will lead US companies to support petitions they "generally" would not support. Thus, the cash reward affects the initiation of investigations under Articles 5.4 and 11.4 in the cases which do not fall under the "general" category of the US argument.

(d) The Byrd Amendment violates Article 8 of the AD Agreement and Article 18 of the SCM Agreement

4.1080 The United States criticizes Complainants for failing to provide "evidence that the CDSOA has had or will have any actual effect on the Commerce Department's consideration of proposed undertakings."[209] Korea is of the view that this criticism is ill-founded. First, as discussed in detail at paragraph 4.1078, above, because this is an "on its face" claim, such proof is not required.[210] Second, the Byrd Amendment obviously creates a very strong incentive for all petitioners to oppose all undertakings because, if the Commerce Department does accept an undertaking, the Department will not impose an order and duties will not be collected and distributed to petitioners via the Byrd Amendment.

4.1081 Moreover, according to the United States, a Member is free to reject any and all undertakings, for any and all reasons. Korea submits that this interpretation would read out of the Agreements the first sentence of Articles 8.1 and 18.1, and the third sentence of Articles 8.3 and 18.3, giving authorities complete and utter authority to reject even the most reasonable, practical and appropriate

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[204] US First Submission, para. 120.

[205] *See United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001) (*US – Hot-Rolled Steel*), para. 101. *See also United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R (15 February 2002), para. 110.

[206] US First Submission, para. 122.

[207] *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 December 1996), pages 15-16; *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (18 January 1999), paras. 128-133.

[208] US First Submission, para. 124.

[209] US First Submission, para. 138.

[210] *See also US – 1916 Act*, paras. 60-61 (noting right of a Member to bring claim against "legislation as such" and finding violation not based on trade effects).

undertakings. Moreover, this obligation of Articles 8.3 and 18.3 is subject to the "good faith" requirement set out by the Appellate Body.[211] Therefore, the US interpretation must be rejected.

(e) The Byrd Amendment results in unreasonable and biased administration of US law, in contravention of Article X:3(a) of GATT 1994

4.1082 Korea asserts that the US argument that Article X:3(a) addresses only the *administration* of national laws and not national laws themselves[212] is flawed. The Byrd Amendment itself prevents the United States from uniform, impartial and reasonable administration of US laws concerning the threshold investigation and the acceptance of undertakings. As did the measure at issue in *Argentina – Hides and Leather*, the Byrd Amendment creates an "inherent danger" that the United States will apply its anti-dumping and countervailing duty laws in a partial and unreasonable manner.[213] The Byrd Amendment thus is inconsistent with Article X:3(a) of GATT 1994.

7. Mexico

(a) Introduction

4.1083 Mexico argues that in its first written submission to and oral statement at the first substantive meeting with the Panel, Mexico established *prima facie* that the *Continued Dumping and Subsidy Offset Act of 2000* (the "CDSOA") is inconsistent with certain provisions of the WTO Agreements.

4.1084 In its rebuttal submission, Mexico elaborates upon its arguments and responds to the arguments raised by the United States. Accordingly, Mexico requests that the Panel grant the relief requested at paragraphs 123 and 124 of Mexico's first submission.

(b) The Characterization Of The CDSOA

4.1085 Mexico submits that the CDSOA is not "simply a statute authorizing government payments", as the United States contends.

4.1086 The subsidy programmes referred to by the United States to justify the existence of the CDSOA are clearly distinguishable from the CDSOA and its offsets.

4.1087 From the time of their creation to the time of their disbursement, the structure and architecture of the subsidies conferred by the CDSOA is unique. For example, the financial contributions are not pooled in a general account for the CDSOA as a whole and then disbursed to any eligible recipient from that general account.

(c) Ex aequo et bono

4.1088 According to Mexico, no *ex æquo et bono* issues arise in this dispute. The measure at issue – the CDSOA – is disciplined by the provisions cited in the claims brought by Mexico and the other complaining Members. Mexico is simply asking the Panel to interpret and apply the disciplines negotiated by the WTO Members and incorporated in the relevant agreements. Indeed, correctly interpreted and applied, the provisions encompass the measure at issue.

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[211] *US – Hot-Rolled Steel*, para. 101.
[212] US First Submission, para. 151.
[213] *See Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R (19 December 2000), paras. 11.71 and 11.100.

(d) Article 18.1 of the Anti-dumping Agreement and Article 32.1 of the SCM Agreement

4.1089 Contrary to the arguments of the United States, Mexico argues that the CDSOA and the distribution of offsets under the CDSOA is a specific action "against" the dumping of exports from another Member within the meaning of Article 18.1 and a specific action against a subsidy of another Member within the meaning of Article 32.1 of the SCM Agreement.

(i) "Situations Presenting" The Constituent Elements Of Dumping

4.1090 Mexico notes that the Appellate Body did not state that "specific action against dumping" refers to "action that is taken in response to the constituent elements of dumping". The Appellate Body stated that specific action against dumping of exports within the meaning of Article 18.1 is "action that is taken in response to situations presenting the constituent elements of dumping". The omission of the words "to situations presenting" is significant because it contradicts the US argument that the CDSOA must be based upon a test that includes the constituent elements of dumping or subsidy.

4.1091 Clearly, Mexico argues, the CDSOA and the offsets distributed under it are "in response to situations presenting the constituent elements of dumping [and subsidization]" and such action "may be taken *only* when the constituent elements of dumping [and subsidization] are present". If there was no dumping or subsidization, there would be no offsets because there would be no funds to distribute.

(ii) Specific Action "Against" Dumping And Subsidization

4.1092 Mexico posits that, contrary to the arguments of the United States, there is no requirement that, in order to constitute a specific action "against" dumping or subsidization, the action must: (i) apply to the imported good or the importer; and (ii) it must be burdensome.

4.1093 In Mexico's view, there is no legal basis for the interpretation proposed by the US. The Appellate Body directly put its mind to the meaning of the phrase "specific action against dumping of exports" and established that an action "against" dumping of exports is an "action that is taken in response to situations presenting the constituent elements of dumping". There is no requirement that punitive action must be taken against imports or the importer.

4.1094 Furthermore, in the opinion of Mexico, the US argument is contradicted by the wording of Article 18.1 of the Anti-dumping Agreement and Article 32.1 of the SCM Agreement. Article 18.1 refers to specific action "against dumping of exports" not "against dumped exports" (i.e., the physical exports themselves) and not "against importers of dumped exports".

4.1095 Mexico argues that the fact that the focus is not on imports or importers is even clearer in the context of Article 32.1 of the Anti-dumping Agreement. The Article refers to specific action "against a subsidy of another Member", not "against the subsidization of exports" or "against subsidized exports" or “against importers of subsidized exports”.

4.1096 Even if the US argument had legal merit, Mexico notes, the facts in this dispute do not support it. The distribution of offsets under the CDSOA does have a "burdensome" effect on "imports" because it systematically upsets the relative conditions of competition between imports and like domestic products.

(iii) Footnotes 24 And 56

4.1097 According to Mexico, footnote 24 to the Anti-dumping Agreement and footnote 56 to the SCM Agreement do not, as suggested by the US, create an exception to Articles 18.1 and 32.1. The footnotes simply clarify the scope of their associated provisions.

4.1098 Moreover, Mexico is of the view that the footnotes refer only to action taken "under other relevant provisions of GATT 1994". The Appellate Body interpreted this phrase in *Anti-Dumping Act of 1916*. It reasoned that those provisions did not include action taken under Article VI of GATT 1994.

4.1099 In Mexico's opinion, applying this reasoning to the SCM Agreement, it is clear that the phrase "provisions of GATT 1994, as interpreted by this Agreement" in Article 32.1 refers to Articles VI and XVI of GATT 1994. Accordingly, the "other relevant provisions" referred to in footnote 56 of the SCM Agreement do not include Articles VI and XVI. Thus, even if the US is correct that its action has been brought under GATT Article XVI, action under that provision is not encompassed by footnote 56.

4.1100 Finally, Mexico argues that the CDSOA is not an "appropriate" action within the meaning of footnotes 24 and 56, because it amounts to an actionable subsidy that is inconsistent with Article 5(b) of the SCM Agreement, by virtue of the fact that it nullifies or impairs benefits accruing to Mexico under the GATT 1994. Moreover, it is inconsistent with Articles 5.4, 8 and 18.4 of the Anti-Dumping Agreement, Articles 11.4, 18 and 32.5 of the SCM Agreement, Article X:3(a) of the GATT 1994 and Article XVI:4 of the WTO Agreement.

(e) Article 5(b) Of The SCM Agreement

4.1101 Mexico considers that the issue to be decided under Article 5(b) of the SCM Agreement is whether, through the use of a subsidy, the CDSOA causes adverse effects in the form of nullification or impairment of benefits accruing directly or indirectly to Mexico under the GATT 1994. In this regard, it is not disputed that the offsets distributed under the Act constitute financial contributions that confer benefits and, therefore, amount to subsidies within the meaning of Article 1 of the SCM Agreement.

(i) The Granting Of Subsidies Is Mandated

4.1102 In the view of Mexico, the US has not contested that the CDSOA mandates the granting of subsidies. Indeed, the US acknowledges that the "CDSOA <u>instructs</u> the United States Customs Service to distribute funds in an amount not to exceed the duties collected pursuant to anti-dumping and countervailing duty orders to eligible domestic producers".[214]

(ii) Specificity

<u>The appropriate focus is on the subsidies not the act</u>

4.1103 Mexico asserts that by focusing on Mexico's alleged failure to "show that the CDSOA is a specific subsidy", the United States misses the point. Under Article 2 of the SCM Agreement, Mexico does not have to show that the CDSOA, itself, is a specific subsidy. Rather, it has to establish that subsidies exist and that such subsidies are specific within the meaning of Article 2.1 of the SCM Agreement.

[214] Oral Statement of the United States at the First Meeting with the Panel, para. 4 (emphasis added).

4.1104 In Mexico's view, pursuant to paragraph 1 of Article 1, a subsidy shall be deemed to exist if there is a financial contribution by a government that confers a benefit. In the circumstances of this dispute, in and of itself, the CDSOA is not a subsidy as defined by the SCM Agreement. Rather, it is the offsets distributed under the CDSOA that constitute financial contributions conferring benefits that amount to subsidies. Thus, in accordance with Article 2, the Panel must determine whether the offsets (i.e., the subsidy), not the CDSOA, are specific to "certain enterprises".

The subsidies are specific

4.1105 It is Mexico's position that the subsidies conferred under the CDSOA are specific within the meaning of Article 2.1(a) of the SCM Agreement on the basis that the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to certain enterprises.

4.1106 An important characteristic of the CDSOA is that it governs the administration of a series of separate and distinct subsidies. By design and legal requirement, each offset is a separate and distinct subsidy. The funds that form the "financial contribution" element of each subsidy are deposited and maintained in separate special accounts that are, themselves, linked to the products that are the subject of each order or finding.

4.1107 Another important characteristic of the CDSOA is that access to each distinct subsidy is explicitly limited to certain enterprises who are producers of products that are like the product subject to the order or finding in question or worker representatives of those producers. Finally, access is further restricted to those enterprises that were petitioners in the original investigation that led to the duties or those enterprises that supported the petition. In Mexico's view, that, in law, an enterprise will not be eligible to receive offsets collected with respect to a product it does not produce, even if there are funds in the special account for that offset, is positive evidence of specificity within the meaning of Article 2.1(a) of the SCM Agreement.

4.1108 Mexico submits that the subsidies are, therefore, actionable under Part III of the SCM Agreement. The fact that the CDSOA governs a series of separate and distinct subsidies, each of which is specific, does not mean that the subsidies are non-actionable. Such a determination would mean that a WTO Member could avoid the disciplines governing actionable subsidies simply by administering otherwise specific subsidies through "different special accounts" provided for under a single piece of legislation.

Specificity under Article 2.1(b) and (c)

4.1109 Mexico argues that the US arguments regarding specificity under Article 2.1(b) and (c) are not relevant to this dispute because the subsidies are specific under Article 2.1(a).

4.1110 According to Mexico, even if Article 2.1(c) was relevant to this dispute, any criteria or conditions established by the CDSOA are not "objective criteria or conditions" as defined in footnote 2 to the SCM Agreement. Such criteria or conditions are not neutral, they favour certain enterprises over others, they are not economic in nature and they are not horizontal in application. Accordingly, they do not fall within the definition set out in footnote 2 of the SCM Agreement.

(iii) Adverse Effects

4.1111 Mexico is raising two types of nullification or impairment claim under its Article 5 challenge: (a) "violation" nullification or impairment; and (b) "non-violation" nullification or impairment.

"Violation" nullification or impairment

4.1112 It is Mexico's position that "violation" nullification or impairment presumes that the Panel finds a violation of a provision of the GATT 1994 in one of the other claims before it. Therefore, this type of nullification or impairment does not give rise to an independent ground for challenge.

4.1113 Contrary to what is suggested by the United States, Mexico asserts that its position on "violation" nullification or impairment under Article 5(b) will not create a new class of prohibited subsidies. Mexico's position is that where a subsidy violates a provision of the GATT 1994, nullification or impairment is automatic under paragraph (a) of Article XXIII:1 because a WTO Member has failed to carry out its obligations under the GATT 1994. Therefore, where the violation in question occurs as a result of the "use of" a subsidy within the meaning of Article 5(b) of the SCM Agreement, a violation of that provision will also occur. The implication of a violation of Article 5(b) in such circumstances is that the SCM Agreement provides for a specific remedy.

"Non-violation" nullification or impairment

4.1114 With respect to "non-violation" nullification or impairment and the US argument that the CDSOA must be "applied", Mexico is presenting two arguments: (i) The granting of actionable subsidies under the CDSOA nullifies or impairs benefits accruing to Mexico under the GATT 1994; and (ii) the maintaining of the subsidies through the CDSOA also nullifies or impairs benefits accruing to Mexico under the GATT 1994.

Granting of actionable subsidies

4.1115 Mexico is arguing that the CDSOA mandates the granting of actionable subsidies and that such subsidies *per se* will cause adverse effects when they are granted.

4.1116 Mexico's position is that the phrase "through the use of a subsidy" encompasses the action of granting a subsidy. The US argues that in order to demonstrate nullification or impairment under Article 5(b), Mexico must present evidence of actual disbursements under the CDSOA. This argument is flawed because, in the circumstances of this dispute, subsidies under the CDSOA can be challenged under Article 5(b) prior to their actual granting.

4.1117 Mexico argues that by virtue of Article 5, a limited subset of "non-violation" nullification or impairment (i.e., that caused through the use of an actionable subsidy) can give rise to a violation of a provision of the SCM Agreement – namely, Article 5. Such a violation gives rise to the remedies in Article 7.4 of the SCM Agreement.

4.1118 Mexico is of the view that this difference between "non-violation" nullification or impairment under Article 5 and under Article XXIII:1(b) has important implications on when a measure can be challenged. The US position that Article XXIII:1(b) requires the application of a measure is not relevant to when a challenge can be brought under a substantive article in a WTO Agreement, such as Article 5. The issue of when a measure can be challenged under a substantive article of a WTO Agreement is governed by the "mandatory/discretionary" doctrine which allows a Member to challenge legislation on an "as such" basis. The doctrine allows parties to challenge measures "that will necessarily result in action inconsistent with GATT/WTO obligations, before such action is actually taken".

4.1119 In its challenge of the granting of actionable subsidies under the CDSOA, Mexico's position is that the Act mandates the granting of actionable subsidies and that, when granted, such subsidies

will cause nullification or impairment. In other words, when the subsidies are granted, an action that even the US acknowledges as amounting to application, a violation will occur.

4.1120 Thus, Mexico considers that it is clear that Mexico can challenge the CDSOA prior to the granting of subsidies under the Act. The only question is whether the Act will "necessarily result in action" that is inconsistent with Article 5(b) – i.e., will nullification or impairment automatically be caused or automatically "exist" when subsidies are granted under the Act. The issue of how the distribution of offsets will necessarily upset the relative conditions of competition between Mexican and like US products is discussed below.

Maintaining of actionable subsidies

4.1121 Mexico is also arguing that the CDSOA maintains actionable subsidies and that the maintenance of those subsidies in the circumstances is currently nullifying or impairing benefits that accrue to Mexico under the GATT 1994.

4.1122 In Mexico's view, the CDSOA "maintains" subsidies because it provides the means for a subsidy, i.e., it establishes a framework for its conferral. Furthermore, the CDSOA does not simply maintain subsidies in that sense. It establishes special accounts, provides for the deposit of funds in such accounts, provides for the identification of eligible recipients and the issuance of a list thereof, and mandates the distribution of the funds.

4.1123 Thus, Mexico asserts that it can challenge the CDSOA prior to the granting of subsidies under the Act on the basis that the Act is maintaining subsidies in a manner that amounts to the "use of a subsidy" within the meaning of Article 5 and in a manner that causes nullification or impairment. The nature of the nullification or impairment caused by the maintenance of the subsidies is addressed below.

The nullification or impairment caused by the subsidies under the CDSOA

(i) Nullification or impairment that will be caused by the granting of the subsidies

4.1124 By virtue of the design, structure and architecture of the CDSOA, Mexico argues that it has demonstrated that the offsets will systematically upset the competitive relationship between Mexican products and like United States products legitimately expected by Mexico. As discussed at paragraphs 101 and 102 of Mexico's first submission, Mexico asserts that the nullification or impairment caused by the subsidies is systematic.

4.1125 As discussed at paragraphs 89-91 of Mexico's first submission, Mexico is of the view that it is well established in GATT 1947 jurisprudence that the introduction or increase of a subsidy will have an adverse effect on negotiated concessions. This principle goes as far back as the 1955 decision of the GATT CONTRACTING PARTIES.[215] The GATT Panel in *EEC - Oilseeds I* characterized the 1955 decision as creating an "assumption".[216] Thus, in presenting its case, Mexico considers it is

[215] First Written Submission of Mexico, para. 89.

[216] *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("EEC - Oilseeds I"), adopted on 25 January 1990, BISD 37S/86, at para. 148. The Panel stated that "the case before it does not require the Panel to address the question of whether the assumption created by the 1955 decision of the CONTRACTING PARTIES applies to all production subsidies…" [emphasis added]. The Panel also stated at para. 154 of its Report that "the CONTRACTING PARTIES considered in 1960 that 'it is fair to assume that a subsidy which provides an incentive to increased production will, in the absence of offsetting measures, e.g. a consumption subsidy, either increase exports or reduce imports'".

entitled to rely on the assumption that the introduction of a subsidy by the CDSOA will have an adverse effect on negotiated concessions.

4.1126 In *EEC – Oilseeds I* and *EEC – Oilseeds II*, the GATT Panels carefully analysed the mechanisms, framework, essential features, characteristics and operations of the schemes in question in order to determine whether the subsidies systematically upset the expected competitive relationship. Their findings of nullification or impairment were not based on evidence of specific trade effects of subsidies on imported products, but on evidence pertaining to the design and operation of the measures at issue. In assessing whether the competitive relationship was impaired, the Panel focused on the systematic relationship between the subsidies and the tariff bindings in question. It found that the tariff bindings were systematically undermined by the subsidy.

4.1127 Mexico asserts that in this dispute, the benefits accruing to Mexico under Articles II and VI of the GATT are likewise being systematically undermined. This is clearly illustrated by the fact that the maximum duties that are permitted to be collected are being passed on to the prime beneficiaries of the duties, systematically and automatically enhancing the relative competitive position of US products compared to like Mexican products.

4.1128 Moreover, in Mexico's opinion, by virtue of the design, structure and architecture of the CDSOA, there is a clear correlation between the offsets and the adverse effect on the expected competitive relationship. The subsidies are created by the existence of dumping and subsidization and the assessment of resulting duties. The duties are passed on to the prime beneficiaries of the duties, who are also direct competitors of Mexican exporters facing the anti-dumping and countervailing duties.

4.1129 Thus, according to Mexico, there is a clear and systematic linkage between the granting of actionable subsidies and the nullification or impairment of benefits at issue in this dispute.

(ii) Nullification or impairment caused by the maintenance of the subsidies

4.1130 Mexico argues that even before subsidies are granted under the CDSOA, the maintenance of subsidies under the Act nullifies or impairs benefits accruing to Mexico under GATT Articles II and VI that concern the creation of predictability needed to plan future trade. Given the certainty that any anti-dumping or countervailing duties that will be collected will be re-distributed to the producers of directly competitive products and the uncertainty as to the magnitude of the subsidies, it is impossible for efficient Mexican exporters who can still sell into the US market when facing duties to predict the relative conditions of competition between their products and like US products. This is particularly problematic in the view of Mexico with respect to products that require significant lead time between order and delivery.

4.1131 Mexico submits that through the introduction of this new factor, the predictability needed to plan future trade that is legitimately expected by Mexico under Articles II:2(b) and VI of the GATT 1994 is nullified or impaired by the maintenance of actionable subsidies by the CDSOA.

(iii) Reasonable expectations

4.1132 Contrary to the US argument, Mexico argues that it could not have reasonably expected the CDSOA and the basis that compensation proposals had been suggested in the past.

4.1133 In the view of Mexico, the evidence cited by the US supports Mexico’s position that it could not have reasonably anticipated the introduction of the CDSOA. In every case where such a measure

has been proposed in the past, it has been adamantly opposed by the US administration and it has not been passed into law. In fact, the US administration opposed the introduction of the CDSOA.

4.1134 According to Mexico, the evidence actually demonstrates that the US administration itself could not have reasonably anticipated the introduction of the CDSOA.

(f) Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.1135 Mexico posits that the United States is clearly under an obligation to make its determinations under Articles 5.4 and 11.4 in an "objective manner". The CDSOA directly interferes with this obligation by rewarding domestic producers who support the petition and penalizing those who do not (by denying them subsidies that their domestic competitors will receive).

4.1136 According to Mexico, the CDSOA has manifestly changed the ability of the United States to make its determinations in an objective manner. It has "tilted the balance" away from opposition or neutrality towards petitioning or supporting a petition.

(g) Article 8 of the Anti-Dumping Agreement and Article 18 of the SCM Agreement

4.1137 Mexico is of the view that the United States is under an obligation to make its determinations under Articles 8 and 18 in an "objective manner". The CDSOA directly interferes with this obligation by rewarding domestic producers who oppose undertakings.

4.1138 Again, Mexico argues, the CDSOA has fundamentally transformed the nature of the decision that must be made by the individual members of a domestic industry. In order to maximize the economic effect of the imposition of anti-dumping and countervailing duties and thereby act in the best interests of their owners or shareholders, domestic producers will have to oppose undertakings.

4.1139 Mexico asserts that in this way, the CDSOA has "tilted the balance" away towards the opposition of undertakings. Thus, contrary to the position of the United States, the CDSOA clearly affects the operation of the domestic law provisions implementing Articles 8 and 18.

(h) Article X:3(a) of the GATT 1994

4.1140 According to Mexico, the CDSOA interferes with the reasonable and impartial administration of United States' laws and regulations implementing the provisions of the Anti-Dumping Agreement and SCM Agreement. Therefore, it is inconsistent with Article X:3(a) of the GATT 1994.

(i) Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement

4.1141 Mexico submits that as a consequence of being inconsistent with the above-noted provisions of the Anti-Dumping Agreement, the SCM Agreement and the GATT 1994, the CDSOA is inconsistent with Article XVI:4 of the WTO Agreement, Article 18.4 of the Anti-dumping Agreement and Article 32.5 of the SCM Agreement.

H. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(a) Introduction

4.1142 In this submission, the United States responds to arguments raised in their oral statements during the first meeting of the Panel. The United States submits that despite their insistence that the

Continued Dumping and Subsidy Offset Act ("CDSOA"), as a subsidy programme, will cause or has caused substantial adverse effects, none of the complaining parties have challenged the Act as an actionable subsidy under Article 5(c) of the SCM Agreement, for which even a showing of threat of harm is sufficient. According to the United States, this fact alone casts serious doubt on the credibility of the complaining parties' claims of harm. Instead of pursuing the most relevant legal claim given the allegations in this dispute, the complaining parties argue that the CDSOA constitutes a "specific action against" dumping or a subsidy.

4.1143 In the view of the United States, like their allegations of harmful effects, the complaining parties' argument that the CDSOA distorts the administration of standing and undertaking provisions is without any supporting evidence. More importantly, their argument would require this Panel to rewrite the WTO obligations regarding standing determinations and the acceptance of price undertakings. In short, the complaining parties have failed to satisfy their burden of establishing a *prima facie* case of a WTO violation. A WTO violation cannot be created out of unwritten obligations and pure speculation. For these and the reasons explained more fully below, the United States respectfully requests that the Panel reject the complaining parties' claims.

(i) The CDSOA is not an actionable subsidy

4.1144 Under Article 2.1 of the SCM Agreement, the determination of specificity turns on whether the subsidy is limited "to an enterprise or industry or group of enterprises or industries." The phrase "certain enterprises" is defined for purposes of Article 2.1 as "an enterprise or industry or group of enterprises or industries." Thus, Article 2.1(a) covers subsidies that are *explicitly* limited to *an* enterprise or industry or *group* of enterprises or industries.

4.1145 The United States argues that, for obvious reasons, Mexico does not claim that the CDSOA is limited to a single enterprise or industry. Thus, for the Panel to find that the CDSOA is a *de jure* specific subsidy, it would have to conclude that the universe of industries and enterprises which could *in principle* receive CDSOA payments can be considered a "group of enterprises or industries" under Article 2.1.

4.1146 Although there is no WTO precedent providing interpretative guidance regarding how small and homogenous a group of beneficiaries must be in order to qualify as "a group of enterprises or industries" in the context of Article 2.1, the CDSOA does not present a close case. The United States asserts that CDSOA benefits are not limited to an enterprise, industry, or group thereof. Any producer that meets the objective and neutral criteria is eligible for distributions. As illustrated by the language of the statute, CDSOA benefits are available in principle to any producer of any product on which anti-dumping or countervailing duty duties could be collected. Narrower groups than this, such as "all manufacturing" and "all agriculture," are too broad to qualify as a "group of enterprises or industries" for specificity purposes. CDSOA payments are available to all agricultural producers and manufacturers, creating a universe of potential recipients far too large and varied to be considered a "group" in this context.

4.1147 Mexico argues that each CDSOA distribution is a *de jure* specific subsidy because the money is kept in separate accounts, is capped by the duties collected under a particular AD/CVD order, and is only distributed to enterprises that produce the domestic like product and were among the petitioners in the original proceeding. The United States argues specificity analysis, however, must be carried out for the challenged subsidy programme (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 programme may be, each disbursement would be considered a specific subsidy – a result that would render Article 2 of the SCM Agreement a nullity and one that Mexico

cannot really mean to endorse. Mexico certainly provides no legal support or precedent for its unusual "one-outlay-at-a-time" analysis.

4.1148 Mexico also implicitly argues that the CDSOA cannot meet the "objective criteria" standard of Article 2.1(b) and, for that reason, can be found *de jure* specific under Article 2.1(a). The United States is of the view that, contrary to Mexico's assertion, CDSOA distributions are based on objective criteria, and eligibility is automatic if the criteria are met. An affected domestic producer is eligible to receive a distribution for qualifying expenditures if (1) it was a petitioner or interested party in support of the petition, and (2) it remains in operation. The enterprises eligible for distributions will vary from year to year as new cases are brought; as entries are liquidated and duties are, or are not, assessed; and as orders are revoked. The list of qualifying expenditures is also neutral, objective, and applies across-the-board for all domestic industries.

4.1149 The United States argues that 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 positive evidence that the CDSOA constitutes a *de jure* specific subsidy, which it has not done.

4.1150 In the view of the United States, the Panel need not reach the question of adverse effects in this dispute. Nevertheless, the United States submits, Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits. Pursuant to footnote 12 in Article 5(b), the existence of nullification or impairment under Article 5 of the SCM Agreement is to be established in accordance with the practice of application of GATT Article XXIII. Under GATT and WTO practice, the non-violation provisions of GATT Article XXIII:1(b) have offered an exceptional remedy that panels have approached with caution. There are three requirements of a non-violation nullification or impairment claim under Article XXIII:1(b): (1) the application of a measure; (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.

4.1151 According to the panel in *Japan – Film*, the first requirement means that Article XXIII:1(b) limits non-violation claims to measures that are currently being applied. Furthermore, this interpretation is supported by DSU Article 26.1 which also states that a non-violation finding must be based on "application" of the measure.

4.1152 According to the United States, Mexico argues that footnote 12 does not prevent it from challenging the CDSOA as such under a non-violation nullification or impairment theory because Mexico has brought the claim under Article 5(b). A simple review of the text of footnote 12 confirms that it does not distinguish between "procedural" issues and "substantive" issues, as asserted by Mexico. The practice in determining the existence of non-violation nullification or impairment under GATT Article XXIII:1(b) includes the requirement that the measure be currently applied. In this sense, Mexico's argument is circular because the determination of the existence of nullification or impairment is based upon the application of the measure, not the measure itself.

4.1153 The United States argues that with respect to this third requirement, Mexico has simply speculated that the distributions will reduce the ability of the Mexican exporter to compete and sell in the US market. Yet, Mexico does not even identify the affected Mexican imports. Indeed, Mexico cannot identify such imports as it chose to challenge the law as such.

4.1154 In the view of the United States, the nullification or impairment of benefits cannot be presumed in a non-violation claim. In its oral statement, Mexico cites the *EEC – Oilseeds* case for the proposition that it need not produce any evidence demonstrating the nullification or impairment because it is allegedly "systematic," and can instead "focus" on "whether there has been an adverse

change in conditions of competition legitimately *expected* by Mexico." The United States argues that this argument misreads *EEC – Oilseeds*, where the Panel sustained the non-violation claim on the basis that the complainant had *shown* that the competitive relationship was *actually* upset. The Panel did not simply accept the proposition that the EEC subsidy upset that relationship *per se*. Nor did the Panel state that nullification or impairment may be presumed if it is "systematic" in nature. In fact, the United States submitted voluminous data detailing the operations and mechanisms of the subsidy programmes and adverse effects to show that its exporters of the particular goods in question suffered from the change in the competitive relationship. In the end, the Panel sustained the claim, having "carefully analyzed" the data. Mexico has submitted no such detailed data and, in fact, as explained above, has not even managed to identify any particular products for which the competitive relationship has been or will of necessity be upset.

4.1155 The United States posits that Mexico's expectations with respect to US tariff concessions are only reasonable with respect to the products covered by those tariff concessions. Here, the CDSOA is not a product-specific subsidy and Mexico, having challenged the law *as such*, did not (indeed, cannot) identify any products to which benefits accrue. The CDSOA itself does not identify any specific product but can apply to any product subject to an anti-dumping or countervailing duty order. The amount of money received under the CDSOA is not linked to the level of production or sale of that product or designed to supplement those levels. As the CDSOA is not a product-specific subsidy, Mexico's claims that CDSOA *per se* nullifies or impairs benefits under GATT Articles II and VI should be rejected.

4.1156 The United States submits that there is no reason to believe that the CDSOA will cause "more than a de minimis contribution" to any nullification or impairment either. Mexico provides no justification for its assumption that offsets will be used to lower domestic prices or have any effect on the domestic market. Under the CDSOA, domestic producers may use their offset for any purpose, including making gifts to charity, compensating workers, developing non-subject products, or paying creditors. How any of these activities could affect Mexican producers of the products subject to orders has not been established.

4.1157 The United States is of the view that Mexico has also failed to establish the third requirement when it claims that it could not have reasonably anticipated the introduction of the CDSOA because previous legislative proposals had not been enacted into law. The question is whether Mexico was on notice that the United States could pass such a measure. The answer to that question is "yes." Discussions in Congress concerning measures similar to the CDSOA took place prior to and during the Uruguay Round negotiations. Thus, Mexico could have reasonably anticipated that such a measure could become law in the United States.

(ii) The CDSOA is not a specific action against dumping or a subsidy

4.1158 Based on the ordinary meaning of the text and the limited guidance provided by the 1916 Act reports, the United States submits that the test to determine whether a measure is "specific action against" dumping or subsidization is whether a measures authorizes: (1) **specific action:** a measure based upon the constituent elements of dumping or a subsidy, i.e., action based upon imported products being sold at less than normal value, or a financial contribution and a benefit is granted; (2) against: which burdens (*e.g.* imposes a liability); (3) dumping or subsidization: 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.

4.1159 The United States argues that the complaining parties all avoid the important distinction noted by the Appellate Body between the words "specific action" in the main provision and "action" in the footnote. The absence of the word "specific" in footnotes 24 and 56 means that the modifier

"specific" has meaning which must be given effect. This distinction was also recognized by the panels in 1916 Act. The panels repeatedly stated that "specific action" is action based upon "dumping *as such*." In the view of the United States, the panels meant what they said, meaning, that the action must be based directly upon the constituent elements.

4.1160 The United States asserts that, unlike the 1916 Act, the CDSOA is not based upon the constituent elements of dumping or a subsidy. The plain language of the CDSOA does not instruct Customs to take action in the form of disbursements in response to situations or conduct presenting the constituent elements of dumping or subsidization.

4.1161 It is the view of the United States that the complaining parties ignore these important distinctions and argue that the CDSOA is "specific action" because distributions are linked, however remotely, to anti-dumping and countervailing duty orders. Not only do the complaining parties' arguments broaden the definition of "specific action" beyond that established in the 1916 Act case, they broaden the definition to such a degree that it would impose a whole host of new obligations on Members, including the requirement that all legal subsidies provided from the general revenue should not be derived from AD/CVD duties, especially if the recipients of those legal subsidies are industries who competed with products subject to AD/CVD orders.

4.1162 Nor is the fact that CDSOA distributions are funded by AD/CVD duties legally relevant. The text of Articles 18.1 and 32.1 does not refer to duties or the uses to which the duties collected may be put. There was no linkage between duties and the civil and criminal actions in the 1916 Act case. It is not clear why CDSOA would be acceptable if only the payments were made through the general Treasury accounts rather than the special accounts.

4.1163 According to the United States, 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 importer. 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. In other words, the action must be against imported products.

4.1164 Indeed, in the United States' view, the complaining parties agree that the impact of the specific action must be on the imported good or an entity responsible for the dumping or subsidized good such as the importer, exporter or foreign producer. They would, however, have this Panel rewrite Articles 18.1 and 32.1 to read "no specific action with a presumed negative effect on import goods or foreign producers..." in contravention of DSU Article 3.2. Further, such a test is overly broad and unworkable by including any type of domestic legislation which improves the position of the domestic industry.

4.1165 The United States argues that if the complaining parties could show the harmful effects from the CDSOA that they allege, they would have brought a claim under SCM Agreement Article 5(c). Reading a presumed effects test into Articles 18.1 and 32.1 is not only not supported by the text of those provisions but would convert an actionable subsidy claim into a prohibited subsidy, thereby allowing the complaining parties to circumvent the requirements of Articles 3 and 5 of the SCM Agreement.

4.1166 Finally, some complaining parties claim that the CDSOA is a specific action against dumping or a subsidy because the recipient is a domestic producer that is "affected" by dumping or

subsidization. The United States argues that the statute, however, does not require producers to show they are injured by dumped or subsidized imports to receive distributions.

4.1167 The United States agrees that Footnotes 24 and 56 serve to clarify the scope of obligations under Articles 18.1 and 32.1 of the Antidumping and SCM Agreements, respectively. Actions against dumping and subsidies *as such* must proceed under the Antidumping or SCM Agreement; other actions, however, such as actions under GATT Article XVI to address the effects of dumping and/or subsidies, are explicitly permitted by footnotes 24 and 56. The CDSOA, to the extent that the Panel were to find it to be an action against dumping and/or subsidies, is nevertheless clearly an action under GATT Article XVI to address the effects of such practices.

4.1168 According to the EC, action under GATT Article XVI is not covered by the footnotes because the SCM Agreement interprets Article XVI. Yet, the EC does not allege that GATT Article XVI limits the form of specific action that can be taken against dumping or subsidization within the meaning of Articles 18.1 and 32.1. Nor is the EC correct that the SCM Agreement necessarily *interprets* GATT Article XVI. The United States argues that even if such "interpretation" were a valid ground to exclude GATT Article XVI under footnote 56, the EC offers absolutely no reason why action under GATT Article XVI should not be permitted under *footnote 24* in the Antidumping Agreement.

4.1169 The United States asserts that the EC argues that the term “under” actually means “confer and regulate positively the right” to take action. Yet, according to the United States, the ordinary meaning of the term “under” suggests that action “in accordance with” other GATT provisions is permissible. This is also consistent with both panel reports in the 1916 Act case which interpreted the word “under” in footnote 24 to mean “compatible with.”

4.1170 The EC further states that footnote 24 clarifies that Article 18.1 "does not prevent Members from taking action in response to situations that involve dumping, where the existence of dumping is not the event that triggers such action." The panels in the 1916 Act case and *Indonesia – Auto Industry*, however, recognized that action could be taken to address dumping and subsidization (including its effects or causes) as long as it did not address dumping and subsidization, as such. Thus, in the view of the United States, footnotes 24 and 56 address actions against dumping and subsidies. If the Panel were to conclude that the CDSOA is action against dumping or a subsidy, footnotes 24 and 56 would operate to permit the CDSOA.

(iii) The CDSOA does not violate WTO standing obligations

4.1171 With respect to WTO obligations on standing, the complaining parties’ theories are not grounded in the language of Articles 5.4 and 11.4. The United States argues that to express “support” for something means to “[u]phold or maintain the validity or authority of (a thing)”; “give assistance in (a course of action)”; “[s]trengthen the position of (a person or community) by one’s assistance or backing”; “uphold the rights, opinion, or status of”; “stand by, back up”; “[p]rovide authority for or corroboration of (a statement etc.)”; “bear out, substantiate”; “speak in favor of (a proposition or proponent).” The word “support” as used in Articles 5.4 and 11.4 does not require an inquiry into the reasons for that support. Even if relevant, however, the complaining parties again fail to submit any evidence to support their claims. Speculation about what a statute may do or not do is not sufficient to support a claim of inconsistency.

4.1172 The United States is of the view that Articles 5.4 and 11.4 contain identical standing requirements for initiating investigations which are expressed as numerical benchmarks. Articles 5.4 and 11.4 are implemented in US law in sections 702(c)(4) and 732(c)(4) of the Tariff Act of 1930, as amended. These provisions were not modified in any way by the CDSOA. *On its face*, the CDSOA

does not make it any more likely that any investigation will be initiated by the Commerce Department. In addition, it is undisputed that the Commerce Department continues to apply the numerical industry support benchmarks set forth in the Antidumping and SCM Agreements and that the CDSOA has not had any impact on the *manner* in which the Commerce Department applies those benchmarks.

4.1173 According to the United States, there is no requirement for administering authorities to determine the reasons for the positions taken by members of the domestic industry. Arguments from the complaining parties that the "object and purpose" of the standing provisions or their Uruguay Round negotiating history support reading a qualitative assessment requirement into the standing provisions are similarly unavailing. There is no stated purpose of the standing provisions. Moreover, the negotiating history reflects the objection of certain countries to (1) initiations by the government, (2) petitions from a single producer or Congressman, or (3) presumptions of support. The concern was about whether assertions of support made by one party (or a government) were representative of the domestic industry as a whole. The underlying reasons for that support was not an issue during the negotiations and is not relevant under Articles 5.4 and 11.4.

4.1174 The United States does not deny that WTO Members must uphold their obligations under the covered agreements in good faith. The United States argues that it has done so both pre- and post-CDSOA enactment. The complaining parties, however, provide 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." The complaining parties 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' expression of support are "true." This is an unworkable requirement and one that would render it impossible for any Member to exercise its standing obligations in "good faith."

4.1175 Even assuming, *arguendo*, that the CDSOA provides some inducement to file or support petitions, the United States submits that the mere provision of such an inducement is not contrary to the Antidumping Agreement or the SCM Agreement. The very existence of the Antidumping and SCM Agreements gives domestic interests a strong financial inducement to file, and support, petitions. If the mere provision of an inducement to file or support petitions is found to violate Articles 5.4 and 11.4, however, Members will lose control over the implementation of their own AD and CVD laws. Simply stated, *any* change in methodology that favours the domestic industry may induce a domestic party to file or support a petition. Such a one-sided interpretation is unreasonable.

4.1176 Finally, the United States notes that the CDSOA conditions eligibility for disbursements on whether the domestic party indicated such support to the *International Trade Commission.* The information submitted by domestic parties to the International Trade Commission on this issue has no bearing whatsoever on the Commerce Department's standing determination.

4.1177 The United States argues that, as a practical matter, it is highly improbable that CDSOA is a factor at all in a domestic company's or union's consideration of whether to support a petition. Payments received under the CDSOA are not a consequence or *quid pro quo* of an expression of support for an anti-dumping or countervailing duty petition. 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 per cent of the petitions filed resulted in affirmative determinations by both the US Department of Commerce (dumping or subsidization) and the US 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, (2) the level of the margins, (3) the number producers

supporting the petition, (4) the number of producers filing certifications, and (5) the amount of qualifying expenditures.

4.1178 The United States asserts that 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 US Court of International Trade and then to the US Court of Appeals for the Federal Circuit; and (3) whether there are remands to the agency for further consideration of particular issues and re-examination 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" anti-dumping or countervailing duty case as complaining parties suggest.

(iv) The CDSOA does not violate WTO undertaking obligations

4.1179 The United States argues that the Antidumping and SCM Agreements do not create an obligation for administering authorities to enter into undertakings. Moreover, when a Member chooses to consider a proposed undertaking, the agreements are quite clear that the undertaking may be rejected because it is "impractical" or for any other "policy reason." Indeed, the complaining parties are well aware of this gap in their argument.

4.1180 Further, according to the United States, the complaining parties' argument misrepresents the significance under US law of domestic industry views regarding proposed undertakings. US law merely requires that the Commerce Department, *to the extent practicable*, consult the consuming and domestic industries before determining whether an undertaking is in the "public interest." Moreover, the law stipulates that, in analyzing the public interest, the Commerce Department is to take into account the following factors: US international economic interests, the impact on consumer prices and supplies of merchandise, and the impact on the competitiveness of the domestic industry. 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. Indeed, the domestic industry has opposed more than 75 per cent of the undertakings which the United States has *accepted* since 1996.

4.1181 Finally, the oral statements of Indonesia, India, and Argentina focus on the impact on developing countries of the alleged "disincentives" created by the CDSOA with respect to undertakings. The United States argues that none of these statements refers to any *evidence* that the CDSOA creates "disincentives" for the United States to enter into undertakings with developing country Members. US law stipulates that a key factor in the decision to accept an undertaking is the international economic interests of the United States. It is without question that the advancement of the economies of developing countries is an important international economic interest of the United States. Moreover, Argentina's claims regarding Article 15 of the Antidumping Agreement are simply not within the Panel's terms of reference and therefore cannot be considered.

(v) *The CDSOA does not violate GATT Article X:3*

4.1182 The United States argues that the complaining parties have made it perfectly clear that the allegedly offending measure with respect to Article X:3(a) is US implementation of its AD and CVD laws, not US implementation of CDSOA. The complaining parties' panel requests allege WTO breaches by means of CDSOA, not by means of the provisions of US law under which US authorities

determine the adequacy of industry support for petitions or consider whether to accept price undertakings. Because US implementation of its AD and CVD laws is not within the terms of reference of this dispute, the Panel should reject the Article X:3(a) claims.

4.1183 In the view of the United States, the complaining parties have not produced any evidence that any particular AD or CVD investigation has been handled by the United States in a non-uniform, partial, or unreasonable manner as a result of the CDSOA. The complaining parties' entire Article X:3(a) argument rests on their belief that the CDSOA will influence domestic producers to bring or support an investigation, or oppose an undertaking, they otherwise would not. They have, however, not even provided evidence that, "but for" the CDSOA, domestic producers 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. The United States argues that there is no requirement in those agreements that the administering authorities (1) examine the reasons behind industry support for petitions or (2) accede to domestic industry opposition to an undertaking.

4.1184 The complaining parties rely on *Bovine Hides* to support their claim that a law can be inconsistent with Article X:3(a) if it gives rise to the "inherent danger" of partial administration. Yet, The United States argues, in that case, the Argentine law concerned access to confidential information and the law had been applied. In this case, the complaining parties have attempted to use Article X:3(a) to challenge the CDSOA as such. Unlike the Argentine law, the CDSOA will hardly give rise to an "inherent danger" of partial administration because it does not affect Commerce's administration of US standing and undertaking provisions.

4.1185 Finally, in regard to the claim that the CDSOA-type laws will proliferate, the United States notes that, even if this were true, it would have no bearing on Article X:3(a). Moreover, to the extent that the complaining parties maintain that such proliferation will cause more AD or CVD cases to be pursued, complaining parties are simply reiterating their unsubstantiated claims about the impact of the CDSOA on standing inquiries and undertaking decisions.

I. SECOND ORAL STATEMENTS OF THE COMPLAINING PARTIES

1. Australia

4.1186 The central claim made by Australia is that the *Continued Dumping and Subsidy Offset Act of 2000* is a specific action against dumping and a subsidy otherwise than in accordance with the provisions of GATT 1994 as interpreted by the Anti-Dumping and SCM Agreements.

4.1187 In its Second Written Submission, the United States asserts that findings in the *United States – Antidumping Act of 1916* case provide only limited guidance in this dispute. The United States submits that the test to determine whether a measure is "specific action against" dumping or a subsidy is whether the measure authorises (1) action based upon the constituent elements of dumping or a subsidy (2) which burdens (3) the dumped or subsidised goods of an entity connected to the dumped or subsidised goods. The United States then argues that the Byrd Amendment is not based upon the constituent elements of dumping or a subsidy and does not burden dumped or subsidised goods or entities responsible for those goods.

4.1188 Australia submits that the United States' proposed test ignores that the Appellate Body's findings on the meaning of the phrase "specific action against dumping" in the 1916 Act case gave meaning to the full phrase, as well as to the word "against". The Appellate Body's findings did so in the context, and in light of the object and purpose, of the broader framework of rules governing the

imposition of anti-dumping measures provided by GATT Article VI as interpreted by the Anti-Dumping Agreement.

4.1189 According to Australia, the United States' proposed test is based on selective dictionary meanings of the word "against". It ignores other, equally valid, ordinary meanings. Moreover, none of the meanings, including those put forward by the United States, compel the conclusion that a specific action "against" dumping or a subsidy must apply exclusively to the imported good or to an entity connected to those goods, and must be burdensome to those goods or to that entity.

4.1190 The United States' proposed test is premised on meanings of "dumping" and "a subsidy" that have no basis in the relevant texts. Article 18.1 of the Anti-Dumping Agreement governs specific action against "dumping of exports" from another Member. It does not govern specific action against "dumped exports" or "the dumpers of exports". Neither does the definition of dumping in GATT Article VI:1 – "by which products of one country are introduced into the commerce of another country at less than the normal value of the products" – compel such a conclusion.

4.1191 Similarly, Australia submits, Article 32.1 of the SCM Agreement governs specific action against "a subsidy" of another member. It does not govern specific action against "subsidised exports" or "the importers of subsidised exports". Moreover, "a subsidy" is expressly defined in Article 1 of the SCM Agreement: a financial contribution by a government, or any form of income or price support in the sense of GATT Article XVI, that confers a benefit. The meaning of "a subsidy" within the context of Article 32.1 put forward by the United States is incompatible with the definition of a subsidy in Article 1.

4.1192 The United States argues that the Byrd Amendment is not based upon the constituent elements of dumping or a subsidy and does not burden dumped or subsidised goods or entities responsible for those goods.

4.1193 Australia is of the view that the United States' argument is premised on a new misquotation of the Appellate Body's findings in the 1916 Act case. The United States substitutes "based upon" for the words "in response to" used by the Appellate Body. These two phrases are not equivalent in meaning.

4.1194 According to Australia, the United States' argument continues to ignore that the existence of the constituent elements of dumping or a subsidy is a necessary condition to a domestic producer's potential entitlements under the Byrd Amendment. Yet, the United States says at paragraph 90 of its Second Written Submission: "For distributions … to be possible, the petition must prove (1) dumping or subsidisation … Whether the producer will then receive payments under the [Byrd Amendment] is then further contingent on (1) the level of imports, (2) the level of the margins ...". In the context of this statement, margins means the anti-dumping or countervailing duties to be applied. Thus, according to the United States itself, offset payments under the Byrd Amendment are in fact twice conditional on the existence of the constituent elements of dumping or a subsidy.

4.1195 The United States argues that specific action against dumping and a subsidy must be burdensome. Australia does not consider that this argument is correct. The Byrd Amendment is of course the measure at issue in this dispute. It is in that context that Australia has said that offset payments under the Byrd Amendment alter the competitive relationship between dumped or subsidised goods and domestically-produced like products in ways not contemplated by GATT 1994 and the Anti-Dumping and SCM Agreements. That does not mean, however, that Australia agrees that the impact of specific action against dumping or a subsidy must necessarily be on the imported good or an entity responsible for the imported good as the United States asserts. Australia argues that

once again, the United States is misrepresenting Australia's arguments and refuting arguments that Australia has not made.

4.1196 The United States also argues that, even if the Byrd Amendment is an action against dumping or a subsidy, footnotes 24 and 56 would operate to permit the Byrd Amendment. However, as detailed in Australia's First and Second Written Submissions, Australia is of the view that footnotes 24 and 56 do not create exceptions to the scope of Articles 18.1 and 32.1. For so long as the Byrd Amendment constitutes specific action against dumping and a subsidy, it is governed exclusively by Articles 18.1 and 32.1.

4.1197 Concerning the "Findings of Congress", even deferring to the United States on the status in domestic law of the "findings" section, the second sentence of section 754(a) of the Byrd Amendment states: "Such distribution shall be known as the 'continued dumping and subsidy offset'." In the words of the United States in answer to the question from the European Communities, the purpose of the Byrd Amendment is specifically identified in the law, and reflected in the language of the law itself. As set out in Australia's First Written Submission, the purpose of the Byrd Amendment – as specifically identified in the Act and reflected in the language of the law itself – is to counterbalance, act against and remedy continued dumping and subsidisation.

4.1198 Australia argues the Byrd Amendment is a specific action against dumping and a subsidy other than in accordance with the provisions of GATT 1994 as interpreted by the Anti-Dumping and SCM Agreements. It is thus inconsistent with Article 18.1 of the Anti-Dumping Agreement, in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement, and with Article 32.1 of the SCM Agreement, in conjunction with GATT Article VI:3 and Article 10 of the SCM Agreement.

4.1199 Australia has also claimed that the Byrd Amendment in inconsistent with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

4.1200 The United States seems to be asserting that Australia's argument would mean that any change in methodology that might benefit the domestic industry in any particular case could provide an incentive for domestic industry to support a petition in that case and thus violate Articles 5.4 and 11.4. Australia observes that implementation of anti-dumping and countervailing duty laws by the United States is not before the Panel in this dispute. Whether a change in methodology might provide an incentive for domestic industry to support a petition would need to be assessed in the circumstances of a particular case. As a general observation, however, Australia recalls the Appellate Body's statement in *United States – Hot-Rolled Steel* that "investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured". Australia considers this statement to be applicable to any action by a Member to implement anti-dumping and countervailing duty laws.

4.1201 The United States argues at length that the process leading to the imposition of anti-dumping or countervailing duties is in any case so difficult, time-consuming and expensive that the Byrd Amendment is unlikely to affect the determination of standing. According to Australia, even if that were so, the mere possibility that the Byrd Amendment could affect the standing requirement in any circumstances must be a violation of Articles 5.4 and 11.4.

4.1202 In the opinion of Australia, the United States has not rebutted the *prima facie* case made by Australia that the Byrd Amendment constitutes specific action against dumping and a subsidy not permitted by GATT 1994 as interpreted by the Anti-Dumping and SCM Agreements. Neither has the United States rebutted the *prima facie* case made by Australia that the Byrd Amendment frustrates the

intent of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement to establish whether an application for an anti-dumping or countervailing duty investigation is truly being made by or on behalf of the domestic industry.

2. Brazil

(a) Introduction

4.1203 The systemic concerns raised by Brazil in this case are: first, the introduction of the notion of monetary compensation to aggrieved parties into the remedial structure of the specific agreements at issue and, more generally, into the WTO structure. Brazil submits that the endorsement of this practice would create an entirely new remedial structure to address dumping and subsidization not contemplated by either the agreements at issue in this proceeding or in any of the WTO agreements. The US cannot point to a single word, phrase, or provision that authorizes the use of such remedies and ignores the very specific language in the agreements limiting the remedies available to address dumping and subsidization. Second, Brazil believes that the CDSOA will substantially increase both the burden on developing country companies and the incidence of anti-dumping and countervailing measures applied to these companies.

(i) CDSOA: Payment programme, subsidy or specific action against dumping and subsidies?

4.1204 At paragraph 2 of its second submission, the US makes the claim that "the complaining parties do not dispute" that the CDSOA is a payment programme. To the extent that a payment programme is defined as any programme that transfers money from the government to a private party, then the CDSOA would fall within this definition. Similarly, the CDSOA might be characterized as a subsidy programme in that it makes a "financial contribution" which "benefits" the recipient company. However, these are not the issues before the panel. Brazil asserts that no one is asking the panel to define a payment programme and determine whether the CDSOA is a payment programme. Indeed, Brazil can find no relevance to such a determination under the GATT 1994, the AD Agreement or the SCM Agreement.

4.1205 Brazil asserts that in the 1916 Act case, both the panel and Appellate Body found that specific actions against dumping and subsidization other than those specifically authorized in the AD and SCM Agreements are inconsistent with the obligations of the United States under these agreements. The sole question is one of interpretation of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

(ii) A determination that the CDSOA is specific action against dumping does not involve a "presumed negative effects test."

4.1206 The US also asserts in paragraph 5 of its second submission that the complaining parties are relying on a "presumed negative effects test" for which there is no authority under Article 18 of the AD Agreement or Article 32 of the SCM Agreement. In fact, Brazil argues, it is the US that has suggested this test, not the complaining parties. In paragraph 92 of the first submission of the United States, the US affirms that "to consider a specific action as 'against' dumping or subsidization, the action must apply to the imported good or the importer, and it must be burdensome". Brazil's arguments proved that even under the US test – which finds no support whatsoever in the relevant Agreements – the CDSOA payments must be considered to be "against" dumping or subsidization.

4.1207 According to Brazil, the US position, as summarized in paragraph 5 of its second submission, is that the purpose, intent, objective, operation, and effect of the CDSOA is irrelevant. This position inevitably leads to one of two possible conclusions in interpreting Articles 18.1 and 32.1. If one is not

permitted under the agreements to determine the purpose of specific actions taken when the constituent elements of dumping and subsidization are present in order to determine whether these actions are "against" dumping and subsidization, then all actions taken when the constituent elements of dumping and subsidization are present must be considered "against" dumping. Or, if to establish whether the actions are "against" dumping, one is not permitted to determine the purpose of specific actions taken when the constituent elements of dumping and subsidization are present, then Articles 18.1 and 32.1 provide limitations which can never be evaluated and are, therefore, meaningless. Thus, in Brazil's view, the US is suggesting a limitation on interpretation of the agreements that prevents any meaningful evaluation of the action at issue, namely the CDSOA.

4.1208 Brazil argues that Article VI:2 of the GATT 1994 specifically permits the use of anti-dumping measures "in order to offset or prevent dumping". Articles 7, 8 and 9 of the AD Agreement permit the use of provisional measures, undertakings and anti-dumping duties respectively to offset or prevent dumping. Article 18.1 of the AD Agreement specifically limits measures against dumping to those specified in Article 7, 8 and 9. In combination, these articles restrict measures to offset or prevent dumping to provisional measures, undertakings and anti-dumping duties. Brazil wonders how one determines whether or not actions are to offset or prevent dumping, if one cannot, as the US suggests, look at the purpose, intent, operation or effects of such actions taken when the constituent elements of dumping are present ? Brazil submits that, in essence, the US is requesting the panel to read the limitations of Articles 18.1 and 32.1 out of the agreements.

(iii) The CDSOA payments are not "remotely" linked, but directly linked, to the constituent elements of dumping and subsidization

4.1209 In paragraph 43 of its second submission, the US argues that the complaining parties are suggesting that any linkage between actions and dumping or subsidization, no matter how remote, satisfy the requirement that the action be "specific action". The US then goes on to characterize the position of the complaining parties as including within the definition of "specific action against dumping" all actions where an AD or CVD order are a 'necessary prerequisite' or a 'condition' or 'contingency' for action". Brazil argues that this characterization is simply false.

4.1210 According to Brazil, the US has attempted to use examples where either the levying of anti-dumping and countervailing duties are a "necessary prerequisite" to an action or where an action is "contingent" on the collection of such duties as the basis to assert that the complaining parties are attempting to broaden the limitations of Articles 18.1 and 32.1. In fact, the opposite is true. Distributing revenues from anti-dumping and countervailing duties to charities is clearly contingent on the collection of such duties. However, such action is in response to a stimulus other than dumping or subsidization – for example, the need of the society for the activities performed by the charity. The distribution is irrelevant in terms of remedying dumping or subsidization. The action is neither against nor in response to dumping or subsidization. Similarly, flying the flag at half-mast after determinations of dumping and subsidization is an action that is contingent on or conditioned on such determinations. However, it is irrelevant to the purposes of offsetting or preventing dumping or subsidization and, therefore, not against dumping or subsidization. Thus, contrary to the assertion by the United States, Brazil is not seeking to proscribe all payments contingent on or conditioned on the constituent elements of dumping or subsidization. It is simply seeking to proscribe, as do Articles 18.1 and 32.1, actions which are "against" dumping and subsidization, including payments which offset or prevent dumping but which are not authorized measures under either the AD or SCM Agreements.

4.1211 Finally, Brazil refers the panel to the language of Articles 18.1 and 32.1. In the view of Brazil, the language does not, as the US would have the panel believe, state that no specific action may be taken against the imported product, the importer or the exporter to prevent or offset dumping

or subsidization. There is no such qualification. Rather, these provisions state that "no specific action" at all is authorized against dumping or subsidization except the actions specified in the agreements. The only limitations are that the action must be "specific" and it must be "against" dumping and subsidization. Thus, the relevant inquiry is not whether the action is imposed on the product, the importer or the exporter, but rather whether the action is "specific" and "against" dumping and subsidization.

(iv) Are actions against dumping and subsidization proscribed by Articles 18.1 and 32.1 limited to actions that are related to the revenues from anti-dumping and countervailing duties?

4.1212 In paragraph 45 of its second submission, the United States asserts that: "Brazil claims not to challenge the right of the United States to choose how its revenues are disbursed in general, but just its right to disburse anti-dumping and countervailing duties". Brazil asserts that it has never taken the position that CDSOA payments are "specific action against dumping and subsidization" solely because these payments are derived from the revenues of anti-dumping and countervailing duties. Rather, Brazil has stated that one of the factors linking the CDSOA payments to the constituent elements of dumping is the fact that no such payments would be available absent anti-dumping and/or countervailing duty orders.

4.1213 Brazil notes, however, that while the source of the funds is a factor in evaluating the CDSOA, Brazil has not represented this as either the primary factor or the exclusive factor linking the CDSOA payments to the constituent elements of dumping. Indeed, the linkage emphasized by Brazil is between the "entitlement" to such payments and the anti-dumping and countervailing duty orders, not the source of the funding for such payments. Brazil argues that the fact that both the entitlement to payment and the source of revenues for the payment under the CDSOA are dependent on anti-dumping and countervailing duty orders simply strengthens the linkage. Entitlement to CDSOA payments are based on the existence of anti-dumping and countervailing duty orders. Similarly, the CDSOA payments themselves are only available if there are anti-dumping and countervailing duty orders in place because, otherwise, there would be no revenues to distribute. Whether or not entitlement to payments from revenues other than anti-dumping and countervailing duties would represent a "specific action against dumping or subsidization" would depend on the facts in such a case.

(v) CDSOA payments are totally dependent on the constituent elements of dumping and subsidization

4.1214 Brazil asserts that in paragraph 42 of its second submission, the US again argues that distributions under the CDSOA "have nothing to do with the constituent elements of dumping" because they are "based on certifications from an 'affected domestic producer' regarding its 'qualifying expenditures'". According to Brazil, the US argument begs the question of what is "affecting" the producer. If the answer to this question is the dumping or the subsidization, then the text of the CDSOA makes abundantly clear what the intent of the measure is. The US ignores the fact that whether the recipient is an "affected domestic producer" or has a "qualifying expenditure" is irrelevant if there is no anti-dumping or countervailing duty order against a product produced by that "affected domestic producer". Similarly, the existence of a "qualifying expenditure" is irrelevant unless there is an anti-dumping or countervailing duty order on the product to which that "qualifying expenditure" applies. These are simply additional conditions that must be satisfied in order to receive the CDSOA payments. However, without the existence of anti-dumping or countervailing duty orders, these conditions become irrelevant.

4.1215 In the view of Brazil, the existence of additional criteria to qualify for the CDSOA payments is similar to the additional criteria at issue in the 1916 Act dispute. There, an additional requirement

to demonstrate "antitrust intent" was required beyond demonstration of dumping and injury to qualify for the treble damages provided under the law or to be subject to the criminal penalties. Notwithstanding these additional requirements beyond demonstration of dumping and injury, the panel and Appellate Body found these remedial actions to be specific actions against dumping not authorized under the AD Agreement and, therefore, inconsistent with Article 18.1. Similarly, the fact that entitlement to remedial actions under the CDSOA are dependent on demonstrating more than the existence of dumping and injury do not make these actions any less actions against dumping or subsidization.

(vi) Balance of concessions negotiated in the Uruguay Round

4.1216 It is the view of Brazil that the AD and SCM Agreements represent a balance of concessions negotiated by WTO Members. Changes in any of the material terms of the agreements can upset this balance of concessions. The remedies permitted under the agreements are among the most important terms of the agreements. Specifically, the position of Members on the appropriate thresholds for determinations of injury, causation, dumping, subsidization, and the duration of measures will vary depending on the nature of the remedy being imposed. From the perspective of Members with concerns about the adverse effects of anti-dumping and countervailing measures on exports, if more severe measures are permitted, higher thresholds for application of those measures should be required. Conversely, Members with concerns about the adverse effects of dumping and subsidization on domestic industries will likely seek more severe measures and will want lower thresholds for application of those measures as the protection afforded by these measures for domestic industries decline.

4.1217 Brazil argues that Articles 18.1 and 32.1 clearly demonstrate that Members did not agree to open-ended remedies when negotiating the AD and SCM Agreements. Members agreed to specific remedies. Had Brazil understood that in addition to the application of anti-dumping and countervailing duties, Members were permitted to provide CDSOA type payments to industries in the importing country, Brazil's position on "sunset" of anti-dumping and countervailing duty measures or on undertakings might have been different. After all, injury might be eliminated more quickly if industries are receiving monetary awards in addition to the protection of the measures agreed to in the agreements. In addition, exporters might have a greater interest in undertakings and want such undertakings to be mandatory if they understood that the revenues from anti-dumping duties would benefit their competitors in the export market.

4.1218 Brazil submits that as part of the balance of concessions made in negotiating the AD and SCM Agreements, Members put limits on the remedies available to authorities in importing countries to address dumping and subsidization. Brazil is of the view that the United States should not be permitted to unilaterally upset this balance of concessions.

(b) Conclusion

4.1219 According to Brazil, a finding by the panel that the CDSOA is not action against dumping and subsidization would render Articles 18.1 and 32.1 of the AD and SCM Agreements respectively meaningless. In so doing, it would permit Members to take remedial measures against dumping and subsidization, which are not provided for in the GATT 1994, the AD Agreement, and the SCM Agreement. This, in turn, would eliminate the core disciplines imposed by these agreements contrary to the specific terms of Articles 18.1 and 32.1. Resolution of whether the CDSOA is an impermissible specific action against dumping and subsidization does not require the panel to draw a line between permissible and impermissible actions to be applied to the many possible claims based on alternative factual scenarios. Rather, the panel needs only to address the specific facts at issue in this proceeding and evaluate those facts in light of the limitation imposed on remedial measures in

Articles 18.1 and 32.1 of the AD and SCM Agreements respectively. The CDSOA payments are specific action to offset or prevent dumping and are not authorized by the relevant agreements.

3. Canada

(a) Introduction

4.1220 Canada argues that none of the arguments advanced by the United States has persuasively responded to the submissions made by the complainants. Canada considers that the US attempts to divert the Panel's attention from the issues by, in effect, arguing past the complainants.

(b) Specific action against dumping or a subsidy

(i) "Subsidy" or not, the Byrd Amendment as a "specific action" is subject to the disciplines of Articles 18.1 and 32.1

4.1221 Canada believes that as a first step, it is important to recall again what this case is about. The measure at issue, the Byrd Amendment, provides for the distribution of subsidies. Indeed, the defence of the United States seems to rest entirely on this point. But, Canada argues, subsidies are subject to a range of disciplines under the WTO Agreement. These disciplines include Article 3 of the SCM Agreement, Article III of GATT 1994, and so on. And the United States agreed with this proposition in response to a direct question at the First Hearing. Finally, the source of funding of a subsidy does not shield it from scrutiny by a panel. That is, whether a subsidy is funded out of special taxes, duties or general revenue does not render an otherwise illegal subsidy consistent with the WTO Agreement. The United States expressly admitted as much when it forcefully stated, also at the First Hearing, that there is nothing special about anti-dumping or countervailing duties as sources of funds.

4.1222 And so, according to Canada, the "sovereign right" to appropriate anti-dumping or countervailing duties is not absolute. That right is subject to obligations negotiated and undertaken by the Members of the WTO. Canada submits that US protestations concerning its "sovereign rights" are, therefore, irrelevant in this context.

4.1223 The issue before this Panel is whether these subsidies – these offset payments – granted under the Byrd Amendment constitute "specific action against dumping" or a subsidy.

(ii) US arguments on "specific action …"

4.1224 The United States dismissed the Appellate Body's findings in the 1916 Act case as being of "limited guidance". The United States then proposes its own three-part test for determining compliance with Articles 18.1 and 32.1.

(iii) US arguments are incorrect

4.1225 Articles 18.1 and 32.1 prohibit "specific action against dumping" or a subsidy except those in accordance with the provisions of GATT 1994.

4.1226 In Canada's view, nothing in the treaty language requires that the measure at issue – the "specific action" – itself contain the "constituent elements of dumping". Nothing in Articles 18.1 and 32.1 limits the scope of that Article to measures that "operate directly on the imported good or the importer." [emphasis added] And Articles 18.1 and 32.1 address dumping and a subsidy as practices; there is no mention in either article of dumped goods, or "an entity connected" to those goods. In other words, the test proposed by the United States has no basis in the text of the Articles.

4.1227 Canada asserts that the interpretation of the Appellate Body in the 1916 Act case of Article 18.1 is fully faithful to the words of the treaty. "Specific action against dumping", it said, refers to "action in response to situations presenting the constituent elements of dumping." That the *Act* might have had *other* purposes or *other* requirements did not change its basic operation. That the United States might have called the practice something other than *dumping* – predatory pricing, for example – did not alter the thrust of that measure. The *1916 Anti-Dumping Act* was an action in response to (against, countering, condemning, offsetting) a *practice*, and that practice presented the constituent elements of dumping.

4.1228 In the opinion of Canada, the language of the treaty is clear; and there is nothing "limited" in the "guidance" of the Appellate Body. If anything, the Byrd Amendment falls more squarely within Articles 18.1 and 32.1 of the Agreements as interpreted by the Appellate Body than the *1916 Anti-Dumping Act*:

- the full title of the Act is the Continuing Dumping and Subsidies Offset Act;

- the Byrd Amendment is designed with the purpose of condemning dumping and neutralising subsidies;

- it is part and parcel of the US trade remedy regime – its provisions do not come into operation unless there has been an anti-dumping or countervailing order determining the existence of "constituent elements of dumping" or a subsidy; and

- every aspect of the Byrd Amendment operates to *offset* (counteract, respond to, act against) dumped or subsidised goods that enter into the United States.

4.1229 Contrary to what the United States argues in paragraph 43 of its Second Submission, the link between the Byrd Amendment and dumping or a subsidy is not "remote"; it is not *other* requirements that trigger the distributions under the Byrd Amendment. The relationship between the Byrd Amendment and "dumping" or "a subsidy" is direct and substantial; the impact on imported goods is incontrovertible.

4.1230 Canada now turns to the arguments of the United States with respect to footnotes 24 and 56.

4.1231 According to Canada, the United States argues that *any* "action" consistent with GATT 1994 is excluded from the scope of Articles 18.1 and 32.1. This necessarily implies that Articles 18.1 and 32.1 prohibit *only* those actions that are already inconsistent with GATT 1994. To state the proposition is to underline its absurdity.

4.1232 Canada submits that the better view is that Articles 18.1 and 32.1 prohibit actions in response to dumping or subsidies *as such* that are not set out in Article VI (as interpreted by the Agreements) and this includes subsidies.

4.1233 In this respect – and to close off the argument in this section – Canada recalls the context and object and purpose of Articles 18.1 and 32.1. Each article is a "final provision" at the end of agreements setting out *detailed* rules for the *permitted* "specific actions." The Anti-dumping Agreement contains no less than eleven articles governing the initiation of investigations, consideration of evidence, imposition of provisional measures, acceptance of undertakings, collection of duties, duration and review of anti-dumping measures, and so on. The SCM Agreement has similarly detailed rules on the imposition of countervailing measures.

4.1234 Canada asserts that the *scheme* of the Agreements is therefore not open to doubt. In drafting the Anti-dumping and SCM Agreements, the Members considered the range of "specific actions" possible against dumping or a subsidy, agreed upon three of those, negotiated rules governing those "specific actions", and *prohibited the rest*. Footnotes 24 and 56 should not be interpreted so as to undermine the basic structure of the Agreements. If a measure falls within Articles 18.1 and 32.1, it is not exempted by virtue of those footnotes.

4.1235 Accordingly, WTO Members must not imprison or fine importers that dump, *for that reason*, even though such action would be "consistent with GATT 1994". They must not impose additional domestic levies on dumped or subsidies goods. They must not prohibit retailers from selling dumped or subsidised goods. And they must not grant subsidies to "condemn", "neutralise" and offset dumping or subsidisation.

(c) Standing

4.1236 Canada argues that, in its second submission, the United States repeats that its obligation under Articles 5.4 and 11.4 is simply to calculate a number. It adds that inducements to file or support petitions are not contrary to the Agreements. It also adds that offset payments cannot really be inducements because they rest on many contingencies.

4.1237 First, Canada submits that the United States misinterprets Articles 5.4 and 11.4. The application of basic principles of treaty interpretation, set out in Article 31 of the *Vienna Convention*, shows that thresholds are more than a simple number. They set out the *level* of support needed from domestic industry that is affected by imports. And that level of support must not be artificially inflated, through either inducements or penalties, to meet those thresholds.

4.1238 According to Canada, the ordinary meaning of the terms of Articles 5.4 and 11.4 is that authorities may not initiate investigations unless they determine requisite thresholds have been met. They form part of the essential procedural requirements for initiation in Articles 5 and 11 of the Agreements. Their object and purpose are to create certainty and predictability. The negotiating history set out in Canada's First Submission clarifies this. The United States itself acknowledges that Articles 5.4 and 11.4 were drafted to establish industry support through numerical and objective thresholds. Threshold levels reflect the careful balance in the Agreements between the right of foreign importers to access a market and the domestic industry to be safe from unfair trade practices. Together, this means that the standing obligation in Articles 5.4 and 11.4 should not be reduced to a meaningless number.

4.1239 In Canada's view, the issue here is not whether the US must inquire into reasons for industry support. Rather, the issue is whether the US can meet its obligations to examine support where it has enacted a law that undermines the validity of thresholds. The Byrd Amendment actively encourages domestic industry support. And it interferes with a basic assumption for industry support - that that support reflects harm caused. This necessarily results in the US being unable to fulfill its obligation. This violates Articles 5.4 and 11.4.

4.1240 Second, Canada argues that, contrary to US assertions, inducements that actively encourage support for petitions violate a Member's obligations. These inducements influence the judgement of participants in investigations. This prevents a fair and neutral administration of laws contrary to GATT Article X:3(a). It also distorts industry support levels under Articles 5.4 and 11.4. The United States claims that payments under the Amendment offer the same inducement as providing information on dumping and countervail laws. But, getting information is not the same as getting money.

4.1241 Third, Canada is of the opinion that *offset* payments are not a remote possibility for industry. For simply filing a certification under an Order, two companies in one industry received almost half of the entire US$206 million given out so far.

4.1242 Finally, Canada considers that the contingencies cited by the United States only further prove that the Byrd Amendment is specific action against dumping and subsidies. As indeed the United States notes in its Second Written Submission, for distributions even to be possible, the petition must prove dumping and subsidisation and an Order must be imposed.

(d) Undertakings

4.1243 The United States, in its Second Submission, also repeats its arguments regarding its obligations under Articles 8 and 18. It reiterates that it has no obligation to enter into undertakings, that it has complete discretion to reject undertakings, and that the complainants have provided no evidence that the Amendment influences US producers.

4.1244 Canada argues that the question at issue is whether the United States can meet its obligations under Articles 8 and 18 where it introduces a law that undermines its real discretion to enter into undertakings. The requirement under Articles 8 and 18 is that Members provide for their authorities the ability to enter into undertaking agreements to terminate investigations early. The purpose of these provisions is to restore the competitive relationship between imports and domestic products with minimal disruption to trade, including that caused by imposing duties. To fulfill this obligation, a Member may not undermine the real discretion of its authorities to complete agreements. That would render Articles 8 and 18 meaningless.

4.1245 Canada submits that the Byrd Amendment creates a monetary interest for domestic industry to thwart undertakings. This interest has been reinforced by the distributions by US Customs. As Canada demonstrated in its First Submission, domestic industry approval is necessary to complete undertakings. Under US law, the Court of International Trade has ruled that US investigating authorities may not dismiss the opposition of its domestic industry to enter into undertakings. The United States has not disputed these findings.

4.1246 Accordingly, in the Amendment, the United States has introduced a law that undermines the ability of its authorities to enter into undertaking agreements. As such, Canada submits, it violates Articles 8 and 18.

(e) Administration of laws

4.1247 Finally, Canada is of the view that, in its second submission, the United States again misunderstands the claim under Article X:3(a) of GATT 1994. Following its jurisdictional arguments, the United States asserts that the complainants fail to provide evidence of the administration of the Byrd Amendment or its effect on domestic producers. The United States also argues that the complainants must show that producers would not have supported a petition or opposed an undertaking “but for" the Amendment. The US cites no authority for this proposition.

4.1248 Canada argues that Article X:3(a) requires a fair, neutral and reasonable administration of laws. It requires an examination of the effect of an administrative measure on the administration of laws. The Panel in *Argentina-Hides* noted that this may involve an examination of whether there is a possible impact on the competitive situation for traders but it does not require evidence of trade damage. It found that a measure that creates an inherent danger that laws will be administered in a partial or unreasonable manner gives rise to a violation. These findings are applicable here.

4.1249 Canada posits that the Byrd Amendment creates a strong monetary inducement for domestic industry. The Amendment encourages domestic industry to file petitions and thwart undertakings to receive payments. This is an influence on participants in domestic anti-dumping and countervailing duty proceedings that is contrary to a neutral and impartial administration of laws. It affects the access that imports have to the US markets - access that was duly negotiated. It also creates the potential for the proliferation of investigations. This undermines the security that imports face in the US market. Accordingly, the Amendment leads to an administration of laws that is not fair, reasonable or neutral in violation of GATT Article X:3(a).

(f) Conclusion

4.1250 Canada recalls that its request for findings has been set out in its submissions.

4. Chile

(a) Introduction

4.1251 Chile will not repeat arguments that it has stated in its two written submissions with Japan and during the first hearing. Instead Chile will respond to some arguments of the second submission of the United States.

(ii) The CDSOA is indeed a specific action against dumping or a subsidy

4.1252 Chile argues that contrary to the US assertion, Chile, in its second submission with Japan provided evidence of the importance in US and International Law of the intention of the legislator. Even though the US may claim the contrary, the intention of the proponents of the CDSOA, as expressly stated in the findings of the Act and the statement of purposes of US Congressmen either, as supporters or detractors, is to provide for an additional remedy to anti-dumping and countervailing duties, in situations were the constituent elements of dumping or subsidisation are present. In support, Chile quotes from the findings of the Act: "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved"

4.1253 Chile submits that for most if not all legal systems the objectives of statute as well as the records of legislative discussion are a fundamental source for the interpretation of laws when they are at issue and their legal nature and effects are questioned.

4.1254 Furthermore, Chile is of the view that the achievements and effects of the CDSOA simply confirms the intention and purpose of the Act. The objective is being fulfilled, or Chile wonders, was it not the intention of the proponents of the Byrd Amendment to give million of dollars to "affected" domestic producers, as the US Customs Service began to do last month in order to strengthen the trade remedy laws and further offset dumping and or subsidies?

4.1255 Chile asserts that the US continues to interpret the concept "against" in a manner that not only is doubtful in English but certainly inconsistent with the Spanish and French versions of the ADA. In its second submission the US only repeats its very tortuous understanding of the word "against" without even mentioning the arguments of Chile and Korea regarding the Spanish and French versions of the Agreements. The three texts must be read harmoniously. And the French and Spanish support one clear reading and meaning of the English version. It seems that the US would instead like to use an unreasonable interpretation which, in addition, is in contradiction with the other two authentic texts.

4.1256 In Chile's view, the US's understanding of the word "against" is not supported by the Spanish meaning of "en contra de". Chile argues that that concept cannot be understood as meaning that the action must operate directly on the imported good or the importer. As Chile stated in the first hearing, "en contra de" in Spanish means in opposition to or contrary to. Chile considers it is as simple as that, no need to look for twisted meanings. In that sense, and as Chile asserts it explained in its response to the Panel's second question the CDSOA is a specific action in opposition to dumping and subsidisation since it provides for the distribution of duties assessed among the "affected producers" and for "qualified expenditures". If there is no request, investigation and determination of dumping or subsidy the CDSOA would not operate. And for an authority to reach a determination of existence of the constituent elements of dumping (subsidy) it has to find and base it on evidence.

4.1257 In addition, Chile argues, the CDSOA provides that the distribution will cover "qualifying expenditures". Not any expenditure but those incurred after the issuance of the AD duty finding or order or CVD order.

4.1258 According to Chile, even the US recognises that the link is much stronger than the mere fact that the AD Duties or CVD constitute a cap to the funds distributed. Indeed, in its answer to Chile's question number 4, the US indicates that the payments under the CDSOA are contingent on (2) the level of the margins. That assertion is in Chile's view in contradiction with the statement that injury is neither a requirement nor a consideration under the CDSOA. Certainly the latter.

4.1259 Moreover, in paragraph 58 of its second submission, the US insists that "distributions are not related to domestic producers' injury from dumped and subsidised imports". Chile asserts that this is not true. It if was, it simply means that the ITC would have recommended anti-dumping measures or countervailing duties without the existence of injury. Chile would be grateful to know details.

4.1260 Finally, regarding this issue, Chile brings to the Panel's attention that contrary to what the US states in par. 46 of its second submission, the CDSOA would still be an action against dumping or subsidies and hence unacceptable if the payments were made through the general Treasury. It is not the fact that the money comes from AD Duties or CVD what makes the CDSOA inconsistent with WTO. It is the provision of specific action against dumping and subsidy which makes the CDSOA inconsistent with Articles 18.1 and 32.1. Precisely, what Chile would like to clarify is that the CDSOA will never be WTO consistent by changing the source of funds.

4.1261 Regarding the arguments on footnote 24 and 56, Chile will let other co complainants elaborate on this issue. Chile would only like to remind the Panel that the issue here is not if the measure could be authorised by those footnotes but the fact that even if it is concluded that the CDSOA is permitted under them, none of those footnotes authorises a Member to adopt at the same time two measures or remedies to repair or prevent the same injury.

4.1262 Chile argues that the US is trying to confuse the Panel arguing that the CDSOA is authorised by footnotes 24 or 56. The real point is that the CDSOA provides for double remedy against dumping and/or subsidisation. And in that sense, if the authority decided to remedy or prevent the injury though one measure, in this case an AD Duty and or a CVD, it can not apply a second measure under other relevant provision of the WTO. Chile considers that it is one or the other, but not both. As Chile clearly stated in its responses, it could be an internal political decision that even though the authority can make a dumping determination, it is preferable to use another trade defence measure. Notwithstanding that the requirements to apply that other measure as provided in the respective WTO provisions are complied with.

(iii) The CDSOA alters standing requirements

4.1263 Chile posits that the United States misses the point again. Chile has not questioned that the CDSOA changes the standing requirements in US Trade Laws. Chile's contention is much simpler. The CDSOA does not allow the US authorities to comply with the standing requirements in Article 5.4 of the ADA and 11.4 of the SCM.

4.1264 Chile thinks that Articles 5.4 of the ADA and 11.4 of the SCM not only provide for a numerical representation of the industry but also for qualitative criteria. Article 5.2 of the ADA indicates that an application by or on behalf the domestic industry to initiate an investigation shall include evidence of a) dumping, b) injury and c) a causal link. It adds that a simple assertion is not enough. The ADA goes on and in the following paragraph mandates the investigating authority to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the investigation. In other words, a requirement to determine if the application is well founded and the petitioner has the reasons to request an investigation that that article specifies. Article 11 of the SCM has similar provisions.

4.1265 According to Chile, this implies that the expression of support established in paragraph 4 must be reached by factors inherent to the ADA (SCM) and not by external factors such as economic incentives. Even worse if those factors are consequence of a governmental decision or programme. These external factors without question introduce a bias to the analysis that each producer will make when deciding to support or not an application. But also, if the support is based on other factors, such as the incentive provided by the CDSOA the request would not be authentic under Article 5.2 and the investigating authority would not comply in an impartial, objective and reasonable way with the obligation under Article 5.3.

4.1266 In the case of the CDSOA, Chile can agree with the US that it does not change the numerical requirements of US Trade Laws regarding standing. Chile argues that unquestionably the US government by means of the economic incentives provided by the CDSOA, is introducing external factors in a decision that under Article 5 has to be taken on the merits of each case and based on the three essential requirements stipulated in paragraph 2 of that Article: dumping, injury and causality. In that sense, the CDSOA is inconsistent with Articles 5 and 11 and the US is acting inconsistently with Article X:3(a) of GATT 1994 since it is not administering its laws and regulations in the way provided for in that provision by introducing an element of distortion in the decision process that private citizens make before deciding to support or not an investigation.

4.1267 Chile is of the view that the US in this section of its second submission misses the point again and tries to divert the Panel away from the real issue. In paragraph 72 the US may have a point since there is no evidence yet that the CDSOA has caused domestic producers to file or support petitions. But first, the CDSOA indeed provides a significant incentive for producers to file or support petitions in order to have access to the "subsidy". And second, and most important, if a producer decides to request an investigation – for any motivation that may have, even if he wishes to stop imports and not receive the "subsidy" – the support of the rest of the domestic industry is almost automatically assured. Not supporting the petition means loosing competitive advantage not with foreign producers – since the AD Duties or CVD will "affect" them as well even if they oppose the investigation – but *vis à vis* their own domestic competitors that will receive the "subsidy". Or putting it in other terms, nobody wants to be left outside. And everybody wants to earn more. Chile considers that this is a point that the US cleverly avoided to touch.

(iv) Violation of Article X:3 of GATT 94

4.1268 Article X:3 reads, "each contracting party shall administer in a uniform, impartial and reasonable manner its laws, regulations, decisions and rulings". Chile is not claiming that the implementation of the CDSOA is inconsistent with that provision nor that the measure in question is the implementation of the US AD and CVD laws. Chile considers that the US is trying to confuse the Panel again.

4.1269 According to Chile, the measure challenged is the CDSOA. And it is challenged because it provides for the administration of the US laws, regulations, decision and rulings in a way that it is not uniform, impartial and reasonable. And in that sense the US is in breach of its obligation under Article X:3. Chile simply cannot understand the logic behind the US argument. Chile or other complainants could not have challenged the implementation of US Trade Laws as such without a measure or without an act that is a function of a political State in exercising its governmental duty[217]. The CDSOA is just such an act of the US exercising its governmental duty and in that sense it is the way that that Member is administering its Laws and regulations. Chile asserts that as it has explained, the US is doing so in a way that is unreasonable, partial and not uniform.

(b) Conclusion

4.1270 Chile submits that the US has tried by all means to avoid getting to the points raised by the complainants deviating the Panel's attention to secondary issues. It uses tortuous interpretation of concepts contrary to the spirit of the provisions and the text of the other authentic versions of WTO Agreements. It ignores the fact that the CDSOA calls for an additional remedy to dumping and subsidy and it claims that the complainants are challenging US Laws on standing as well as the implementation of such Laws. In Chile's view, the CDSOA provides not only for additional remedy to AD measures or CVD but for specific action against dumping and subsidy. In that sense it is inconsistent with Articles VI of GATT 94, 18.1 of ADA and 32.1 of SCM. The CDSOA by providing an incentive to file or support AD or CVD investigations is against the requirements of Articles 5.4 and 11.4, as it introduces an external factor to a decision that should be solely based on elements mentioned in Article 5 and 11. Finally, according to Chile, the US through the CDSOA is not administering it laws, regulations, decisions and rulings in an uniform, impartial and reasonable manner as prescribed by Article X:3 of GATT 1994.

5. European Communities

(a) Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement

4.1271 According to the European Communities, the United States asserts that the interpretation of "specific action against dumping" made by the Appellate Body in 1916 Act offers only "limited guidance" and then puts forward a new test which is plainly at odds with the Appellate Body's own test. The EC notes that the relevance of the interpretation made by the Appellate Body in 1916 Act is not limited to the type of measures at issue in that case. It would be presumptuous to assume that the Appellate Body failed to consider the implications of that interpretation in other situations. In fact, the report in 1916 Act suggests that, if anything, the Appellate Body was concerned that its interpretation might be too narrow.

[217] Definition of administration in the Webster's Encyclopedic Unabridged Dictionary.

(i) Articles 18.1 and 32.1 do not require that the action be "based directly upon" dumping or a subsidy

4.1272 The European Communities considers that the first element of the US' test is that the "action must be based *directly* upon the constituent elements" of dumping or a subsidy. According to the European Communities, this requirement has no basis in the wording of Articles 18.1 and 32.1 and is inconsistent with the interpretation made by the Appellate Body in 1916 Act. According to the Appellate Body, the relevant test is whether the action at issue "may be taken only when the constituent elements of dumping are present". The European Communities asserts that the complainants have shown beyond doubt that the offset payments meet that test.

4.1273 The European Communities posits that, contrary to the US assertion, the EC does not argue that the offset payments are a specific action against dumping or subsidisation simply because they are funded with anti-dumping or countervailing duties. The *offset* payments are a specific action against dumping or subsidisation because they are made exclusively to domestic producers which have filed or supported a petition leading to the imposition of an anti-dumping or a countervailing measure for "qualifying expenses" incurred after the imposition of such anti-dumping or countervailing measure with respect to the production of the same product which is the subject of the anti-dumping or countervailing measure in question.

(ii) The meaning of "against"

4.1274 The second element of the US test, which the United States derives from the term "against", is that the action must "apply directly" to the dumped or subsidised goods (or to the importer or the exporter) and must be "burdensome". In the EC's view, by interpreting the notion of "specific action against dumping" as "action taken in response to a situation presenting the constituent elements of dumping", the Appellate Body gave meaning also to the term "against".

4.1275 The European Communities argues that the reading of the term "against" made by the United States is not supported by its ordinary meaning, either on its own or in its context. The notion of action "against" dumping or subsidisation may encompass any action, which is objectively capable of offsetting or preventing dumping or subsidisation, whether by imposing a direct burden on the importer or by giving an advantage to the domestic producers of like products.

4.1276 According to the European Communities, the United States accuses the EC and other complainants of reading into Article 18.1 and 32.1 a "presumed effects test". The same is true of the United States' own test because the action must be "burdensome". Yet, whether or not an action is "burdensome" will depend on its "effects" ("actual" or "assumed"). The only difference between the US test and the interpretation made by the EC is that the United States assumes *a priori* that only those actions which apply directly to the importers are capable of being "burdensome", whereas the EC submits that giving an advantage to the domestic producers can be as effective, if not more, in order to offset or prevent dumping or subsidisation.

4.1277 The United States' argument that if the complainants "could show the harmful effects from the CDSOA that they allege, they would have brought a claim under Article 5 (c)" , in the view of the European Communities, misrepresents the EC's claim. The EC does not allege that the *offset* payments are causing harm to the EC exporters. Rather, the EC claims that the type of action provided for in the Byrd Amendment is objectively capable of offsetting or preventing dumping or subsidisation. Whether or not the *offset* payments achieve that objective in specific instances is irrelevant for the purposes of establishing a violation of Articles 18.1 and 32.1. Those two provisions do not require showing that the action at issue has actually had any "harmful effects".

4.1278 The United States argues that the complainants' interpretation would "convert an actionable subsidy claim into a prohibited subsidy, thereby allowing the complaining parties to circumvent the requirements of Articles 3 and 5 of the SCM Agreement". The European Communities asserts that this argument is based upon the erroneous premise that Parts II and III of the SCM Agreement are *lex specialis* with respect to subsidies. Parts II and III do not exclude the application of other WTO provisions to any measures, which happen to fall within the definition of subsidy. A measure, which is neither prohibited under Part II nor actionable under Part III may still be prohibited by a different provision of the WTO Agreements on different grounds. The *offset* payments are not prohibited by Articles 18.1 and 32.1 because they are subsidies, but because they are specific action against dumping or subsidisation.

(iii) Footnotes 24 and 56

4.1279 The United States alleges that, what it calls "the EC's trigger test", is inconsistent with the panel reports in *US - 1916 Act*. The EC recalls that it has not invented the "trigger test" but rather the panels established that test in *US –1916 Act.* This was confirmed by the Appellate Body at paragraph 122 of its report in the same case. The reason why the offset payments are not "permitted" by the footnotes is the same as the reason why they constitute specific action against dumping or subsidisation, i.e. because they can be made only when the elements of dumping or subsidisation are present.

4.1280 The EC considers that it has explained that Article XVI of the GATT is one of the provisions "interpreted" by the SCM Agreement and, consequently, cannot be one of the "other provisions" cited in footnote 56. While the EC would agree that Parts II and III of the SCM Agreement "do not *strictly* interpret Article XVI", the EC notes that the term "interpreted" is not used "strictly" in Article 32.1. Indeed, if it were, Article 32.1 would become inapplicable because, "strictly" speaking, the SCM Agreement does not "interpret" any *GATT* provision.

4.1281 The SCM Agreement contains no express language similar to Article 10 with regard to Article XVI. But the same was true also under the Tokyo Round Subsidies Code which, nevertheless, was called "Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the GATT". Moreover, the SCM Agreement makes no less than eight express references to Article XVI. No similar references are made to any other substantive provision of the GATT, with the only exception of Article VI.

4.1282 The European Communities asserts that the United States' argument that the EC "does not allege that GATT Article XVI limits the form of specific action that can be taken against dumping or subsidisation" is incorrect. The EC and other complainants have claimed that Article XVI, as interpreted by Parts II and III of the SCM Agreement, allows Members to take only two types of action against subsidisation: countermeasures under Article 4 or countermeasures under Article 7.

4.1283 The EC notes that "action under other relevant provisions of GATT 1994", the phrase used in footnotes 24 and 56, is not the same as "action which is not prohibited by some other provision of the GATT 1994" and that the "relevant provisions" cited in footnotes 24 and 56 are those that confer a positive right to take action, such as Articles VI or XIX. Article XVI is not one of such "relevant provisions".

4.1284 According to the European Communities, the United States' argument that the term "under" means "compatible with" cannot be correct because it would have the consequence that footnote 56 would allow action which is "compatible" with Article XVI even where such action is not "compatible" with Parts II and III of the SCM Agreement. Furthermore, on the US interpretation,

Articles 18.1 and 32.1 would become wholly redundant, as they would prohibit only action, which is already inconsistent with some other *GATT* provision.

4.1285 In the European Communities' view, the other linguistic versions of the agreement confirm that the US reading of the term "under" as "compatible with" is incorrect. Both the French term "au titre de" and the Spanish term "al amparo de" indicate clearly that the "action" alluded in the footnotes must be taken on the basis of a positive right conferred by the "other relevant GATT provision" in question, rather than being merely "compatible" with such provision.

(b) Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement

4.1286 The European Communities argues that the United States seems to concede that the administering authorities must conduct an objective examination. Nevertheless, it takes an extremely narrow view of what is involved in such obligation. In essence, the United States is arguing that the authorities should be allowed to manipulate the outcome of the examination by inducing, or even coercing the domestic producers to make declarations of support, provided that they make no arithmetical errors when adding up the declarations in order to calculate the level of support.

4.1287 In the view of the European Communities, the Appellate Body takes a very different view. According to the Appellate Body, in order to be "objective" an examination must conform to "the dictates of the basic principles of good faith and fundamental fairness". The relevant facts must be investigated "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties in the investigation".

4.1288 The European Communities asserts that the United States does not address anywhere the argument that the Byrd Amendment makes it impossible for the US authorities to conform to the "dictates of the basic principles of good faith and fundamental fairness", as such "dictates" have been interpreted by the Appellate Body.

4.1289 According to the European Communities, the very existence of the Byrd Amendment renders suspect any applications and expressions of support made by the US producers and, as a result, makes it impossible for the US authorities to reach a proper determination of support, whether positive or negative, before initiating an investigation.

4.1290 The US response to this is that Articles 5.4 and 11.4 do not require assessing the "subjective motivations" of the producers. In this regard the EC notes a contradiction between the US second submission and its reply to one of the Panel's questions. On the one hand, the United States considers that a measure by which sanctions would be imposed on the domestic producers, which failed to support a petition, might give rise to a non-violation claim of nullification or impairment. On the other hand, the United States concedes that legislation, which made it mandatory for the domestic producers to support an application, would breach Articles 5.4 and 11.4.

4.1291 The European Communities submits that this admission undermines the US argument that it is irrelevant whether or not a declaration of support is "genuine". Contrary to the US submission, the measure described in the EC's example does not "preclude" an "examination" of the degree of support, because the domestic producers may still decide not to support the application and bear the sanctions imposed by the law. The reason why that measure breaches Articles 5.4 and 11.4 is the same that makes the Byrd Amendment inconsistent with those provisions: a declaration of support extracted with the threat of legal sanctions, like a declaration of support induced by the promise of the *offset* payments, does not constitute "support" for the purposes of Articles 5.4 and 11.4.

4.1292 The United States alleges that "WTO Members routinely encourage their industries to file anti-dumping petitions" and that, for that reason, the "mere provision of an inducement to file or support petitions" cannot be considered contrary to Articles 5.4 and 11.4. According to the European Communities, it is obvious, however, that one thing is to inform the domestic producers about how to make an application, another thing is to "encourage" them to do so, and yet another thing is to pay them for filing or supporting applications.

4.1293 The United States argues that "any change in methodology that favours the domestic industry may induce a domestic party to file or support a petition". The European Communities asserts that this argument relies upon the erroneous assumption that a domestic producer will always be interested in the imposition of duties, at least provided that the duties are high enough. Yet, it may be perfectly rational for a domestic producer to oppose an application. If a domestic producer is against the initiation of an investigation, a "change in methodology" which leads to a higher margin of dumping or subsidisation will not make him change his mind and support the application. To the contrary, it will reinforce his opposition.

4.1294 Finally, as regards the argument that the payments under the Byrd Amendment are "remote, uncertain and unknown", the EC recalls that on 30 January 2002 the US Customs announced the distribution of *offset* payments totalling 206 millions USD.

(c) Article 8.3 of the Anti-Dumping Agreement and Article 18.3 of the SCM Agreement

4.1295 The EC considers that, in order to have a complete picture of the US practice regarding the acceptance of undertakings, it is necessary to know not only how many undertakings have been accepted since 1996 despite the petitioners' opposition, but also how many undertakings have been rejected because of such opposition. The Panel requested the United States to comment on this, which the US did only in a limited way. Although the information requested was pertinent, available to the US authorities, even if its is not "regularly maintained", and not confidential. The European Communities invites the Panel to draw appropriate inferences from the US reply.

(d) Article X.3 (a) of the GATT

4.1296 The EC claims that the "administrative" measure (i.e. the Byrd Amendment) and not the "administered" measure (i.e. the US anti-dumping and countervailing duty laws) violates Article X.3(a). The "measure at issue" within the meaning of Article 6.2 of the *DSU* is the Byrd Amendment. This measure as well as the "administered" measure was clearly identified in the panel request.

4.1297 According to the European Communities, the United States misreads the findings of the Panel in Argentina – Hides and Skins. The "administration" measure at issue in that case was Resolución 2,235 of the Administración Nacional de Aduanas. The EC claimed that Resolution 2,235 resulted in a partial administration of Argentina' s customs laws. The EC did not provide, and the panel did not consider, any evidence regarding the actual administration of Resolution 2,235. Nor did the panel consider any evidence that the "administered" measures (the customs laws) had actually been applied partially. The panel found that Resolution 2,235 as such, and not its administration, violated Article X.3 (a) because, by its very existence, it created an inherent risk that the "administered" customs laws would be applied in a partial manner. In the EC's view, likewise, in the case at hand, the very existence of the Byrd Amendment gives rise to an inherent risk that the US anti-dumping and countervailing duty laws will be applied unreasonably and partially and is, therefore, inconsistent *per se* with Article X.3 (a).

6. India

4.1298 In its submissions India along with certain other complainants, EC, Indonesia, and Thailand has offered a comprehensive factual framework and legal arguments establishing why the Continued Dumping and Subsidy Offset Act 2000 (CDSOA or Byrd Amendment) violates the obligations of US under WTO Agreements. India's statement will be confined to certain crucial issues in the dispute.

4.1299 The United States asserts that the CDSOA is not an action against dumping or subsidization. In India's view the offset payments are a specific action against dumping or subsidisation because they are made exclusively to domestic producers that have filed or supported a petition leading to the imposition of an anti-dumping or a countervailing measure for "qualifying expenses" incurred after the imposition of such anti-dumping or countervailing measure with respect to the production of the same product which is the subject of the anti-dumping or countervailing measure in question. The offset payments would still be dependent upon a finding of dumping or subsidisation and, consequently, "specific action against dumping or subsidisation" even if they were paid from the US Treasury or from any other source of Government revenue.

4.1300 According to India, the United States has also argued that Article 5.4 of the Anti-dumping Agreement and Article 11.4 of the Subsidies and Countervailing Measures Agreement do not require the administering authorities to assess the subjective motivation of the producers' expression of support for the petition seeking initiation of an investigation. According to the United States the only obligation of the administering authorities is to determine whether the quantitative benchmarks have been met.

4.1301 In India's view the authorities may presume that if a domestic producer has formally declared its support for the application, such support would normally be genuine. The CDSOA however calls into question such a presumption. The CDSOA provides a strong incentive to file "non-genuine" applications and to make "non-genuine" declarations of support. As a result, it may render suspect all applications and declarations of support made by the US producers. The CDSOA has the necessary consequence that the US authorities are prevented from reaching a proper determination of support, whether positive or negative, before initiating an investigation, thereby violating Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

4.1302 India recalls that the complainants have submitted that the availability of offsets have an adverse impact on acceptability of price undertakings. The United States has asserted that Articles 8 and 18 allow the administering authorities to reject an undertaking for any reason. While Articles 8.3 of the ADA and 18.3 of the SCM Agreement do not limit a priori the types of reasons which may be invoked by the authority, it is India's contention that the authority cannot invoke all sorts of motives for rejecting an undertaking. For example, it would be contrary to Articles 8.3 and 18.3 to reject an undertaking on the ground that the name of the exporter begins with the letter 'A' Such grounds are not proper "reasons" within the meaning of Articles 8.3 and 18.3 because they are not pertinent to consider the 'acceptance of an undertaking as inappropriate'.

4.1303 India argues that the petitioners' opposition may be a pertinent "reason" for rejecting an undertaking where it reflects the legitimate concern that the undertaking will not provide equivalent protection. On the other hand, according to India, the pecuniary interest of the petitioners in securing the windfall of the offset payments is a totally extraneous consideration, which cannot be regarded as a pertinent "reason" for rejecting an undertaking.

4.1304 The Complainants have argued that the CDSOA is not in conformity with the obligation to make an objective assessment of whether the acceptance of an undertaking would be appropriate

because, under the CDSOA, the US authorities provide a financial incentive to the petitioners for opposing the undertakings and then rely upon such opposition in order to reject the undertaking.

4.1305 India is of the view that its joint submissions have highlighted the pernicious consequences of the offsets for developing countries. The Marrakesh Agreement has recognized the need for positive efforts designed to ensure that developing countries secure a share in the growth in international trade. By enabling the authorities to violate obligations under the Anti-dumping Agreement and the SCM Agreement, the CDSOA would adversely affect exports from developing countries and hence would be contrary to the letter and spirit of the preamble of the Marrakesh Agreement.

7. Indonesia

4.1306 Indonesia associates itself with the statement made by the distinguished Delegate of the EC on various legal arguments in further rebutting arguments made by United States in the second submission and its oral statement. Indonesia will restrict this statement to specific issues especially relating to developing countries' interests as a follow-up to Indonesia's first oral statement.

4.1307 The United States argues in its written answer to the panel's question no.24 and paragraph 102 of its second submission that Article 15 of the Anti Dumping Agreement is not within the Panel's terms of reference as it was not identified in the Panel requests. Although Indonesia recognizes that Article 15 of the Anti Dumping Agreement is not within the Panel's term of reference, nevertheless, Indonesia recalls that Article 12.11 of the Dispute Settlement Understanding regarding the panel procedure states that: "Where one of the parties is a developing country member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country members that form part of the covered agreements which have been raised by the developing country members in the course of the dispute settlement procedures."

4.1308 In Indonesia's view it contains an obligation to the Panel to give consideration to the special and differential treatment provision in the covered agreement raised by a developing country, even though this provision is not specifically indicated in the Panel's terms of reference. The mere fact that a developing country does not raise the special and differential treatment provision is irrelevant to make Panel not to make its judgment to this specific issue.

4.1309 Indonesia and other complainants in this dispute have already raised the Anti Dumping Agreement as a covered agreement. Article 15 of the Anti Dumping Agreement is already identified as "relevant provisions on differential and more-favourable treatment". For that reason, Indonesia considers that the Panel should take into account Article 15 of the Anti Dumping Agreement in its report.

4.1310 Indonesia asserts that the CDSOA will provide a financial incentive for petitioners to reject the proposed undertakings because the petitioners would expect to receive money from the distribution of duties. Indonesia recalls that it has been recognized in the previous Panel proceeding that undertakings are a constructive remedy par excellence. Consequently, by introducing CDSOA, it will frustrate the object and purpose of Article 15 of the Anti Dumping agreement.

4.1311 Indonesia argues that Article 15 of the Anti Dumping Agreement is part of general rules of special and differential treatment that carry an obligation for all members, especially the developed ones, to fulfil it. Article 15 of the Anti Dumping Agreement is not a specific provision in the context of the whole WTO agreement. Similar provisions exist in all WTO Agreements as part of the balance of rights and obligations of all WTO members. Thus, it contains no exclusion for the United States from performing this specific obligation.

4.1312 The United States also argues that Article 15 of the Anti Dumping Agreement is a "best effort" commitment. Indonesia disagrees with the United States interpretation as it has been stated by the "Doha Decision on Implementation-related issues and concerns" that Article 15 of the Anti Dumping Agreement is a mandatory provision. As a mandatory provision, the United States, as a developed country member, is not exempted from carrying out this specific obligation. By implementing the CDSOA, the United States is not in a position to fulfil its obligation under Article 15 of the Anti Dumping Agreement as the domestic industry will be inclined to oppose undertakings as they anticipate receiving distribution of duties.

8. Japan

(a) The purpose of the CDSOA is legally relevant

4.1313 Japan submits that the purpose of the CDSOA and its legislative history are legally relevant and should be considered by the Panel. Contrary to the assertion made by the United States, US courts do rely on legislative history or consider the intended purpose of the legislation.

4.1314 The actual language of the CDSOA states that dumping and subsidies are to be "condemned" and "effectively neutralized" and that "United States trade laws should be strengthened", since the "continued dumping or subsidization can frustrate the remedial purpose" of those laws. The distributions, according to the CDSOA, "offset" continued dumping and subsidization. The principal sponsors of the CDSOA described the distributions as a way to "*counter* (…) foreign dumping and subsidization." Japan considers that these statements are relevant for the Panel's examination of the CDSOA.

4.1315 Japan asserts that, contrary to the United States' assertion, Japan and the EC did not argue in the 1916 Act case that a purpose of a law is irrelevant. A purpose of a law is significant evidence of what a law actually does. However, when the WTO inconsistency is established by the text alone, a stated purpose of a law does not cure the inconsistency. In this dispute, the purpose of the CDSOA is provided by the complainants as additional evidence that the CDSOA violates Articles 18.1 and 32.1 and the other cited provisions.

(b) The United States' interpretation of "specific actions against dumping or a subsidy" is not in accordance with customary rules of interpretation

4.1316 Japan argues that the United States' interpretation of Articles 18.1 and 32.1 is out of context, disregards the ordinary meaning of those terms, and is not in accordance with other customary rules of interpretation of public international law. The Appellate Body in the 1916 Act case correctly interpreted the language of Articles 18.1 and 32.1 and explained that "specific actions against dumping" means "specific actions taken in response to situations presenting the constituent elements of dumping."

4.1317 In the view of Japan, there is no mention in the Appellate Body's interpretation or in the AD Agreement of "action based directly upon" the constituent elements of dumping. The Appellate Body's interpretation clearly states that the action is in response to "*situations*" presenting the constituent elements of dumping, and not to the "constituent elements" of dumping.

4.1318 The United States interprets the word "against" as requiring imposition of a burden or liability on the imported good or the importer. Japan submits that the United States' interpretation: a) is not supported by the ordinary meaning of the word "against"; b) is not in accordance with the customary rules of interpretation of public international law because it ignores, among other things, the context of Article VI, the AD Agreement and the SCM Agreement; and c) disregards the interpretation

developed by the Panel and the Appellate Body in the 1916 Act case. The Appellate Body in the 1916 Act case correctly interpreted the word "against" in its proper context.

4.1319 The United States defines "dumping or subsidization" as the "dumped or subsidized imported *goods*." According to Japan, the US states, incorrectly, that Article VI of GATT defines dumping as "*products* of one country being introduced into the commerce of another country at less than normal value." This interpretation is incorrect. As the Appellate Body in the 1916 Act case notes, Article VI:1 defines "dumping" as a *conduct*, by which products of one country are introduced into the commerce of another country at less than normal value. It makes abundantly clear that dumped or subsidized goods or products are to be distinguished and cannot be equated to "dumping" and "subsidization."

4.1320 Japan submits that the United States revision of its interpretation to add "exporters or foreign producers" shows only that the US definition of specific action against dumping is arbitrary and not based on treaty text.

(c) The CDSOA mandates specific actions against dumping and a subsidy

4.1321 In Japan's view, the United States erroneously argues that the CDSOA's "criteria upon which the distributions are made *have nothing to do* with the constituent elements of dumping or subsidization" and alleges that the distributions are only "remotely" linked to the anti-dumping and countervailing duty orders. This, Japan argues, is factually incorrect. The distributions under the CDSOA necessitate a finding of dumping or subsidization. That finding, in turn, positively requires that the constituent elements of dumping or a subsidy be present. Thus, the distributions are, as a matter of fact, undeniably taken in response to situations presenting the constituent elements of dumping and subsidization.

4.1322 Contrary to the United States allegations, Japan has not argued for a so-called "presumed negative effects" test. Rather, the claims are based *inter alia* on the actual effects of the CDSOA. The evidence on file is enough to establish a *prima facie* case of non-conformity. The arguments made by the United States regarding the alleged and "presumed negative effects" test are simply another attempt to misrepresent and distort the arguments and claims presented by the complainants against the CDSOA.

4.1323 Japan submits that the distributions of duties under the CDSOA are a specific action against dumping or a subsidy in violation of Article 18.1 and 32.1, even if the amount of the distributions does not correspond to the amount of the damage or injurious effect of dumping or a subsidy. Also, the relation between the distributions and the injury is already present and implicit in the intimate connection between the distributions and the anti-dumping and countervailing measures.

(d) Footnotes 24 and 56 do not exclude the CDSOA from the coverage of Articles 18.1 and 32.1

4.1324 Japan considers that the Appellate Body in the 1916 Act case found that "action" within the meaning of footnote 24 is to be distinguished from "specific action against dumping" within the meaning of Article 18.1. It added that a measure that is considered "specific action against dumping" is "governed by Article 18.1 itself." Since the CDSOA is specific action against dumping and a subsidy, it cannot possibly fall within the coverage of footnotes 24 and 56, and is thus not excluded from the prohibition of Articles 18.1 and 32.1.

4.1325 According to Japan, footnote 35 explicitly provides that the *only* relief that shall be available to protect from the effects of a particular subsidy are either countervailing duties or countermeasures

under Articles 4 or 7 of the SCM Agreement. According to this footnote, no other action may be taken to provide a relief from the effects of continuous subsidization in the US market.

4.1326 Japan argues that the interpretation by the United States of the word "under" within footnotes 24 and 56 (e.g. "compatible" with) is not in accordance with the ordinary meaning of that word in its context. In footnotes 24 and 56, "under" is preceded by the word "action" and followed by reference to identifiable provisions. In the WTO Agreements, the same phrase of "action under" followed by particular provisions appears in Article 5.7 of Agricultural Agreement and Article 6.11 of the Textiles and Clothing Agreement. In these examples, the phrase "action under" alludes to a right positively conferred by the cited provision.

4.1327 Japan recalls that the United States also argues that the SCM Agreement does not interpret Article XVI. Various provisions of the SCM Agreement, including Article 1, which defines a subsidy, refer to Article XVI. Article XVI sets forth procedures and certain disciplines with respect to subsidies and nothing more.

(e) The CDSOA is inconsistent with Articles 5.4 and 11.4 concerning the standing to initiate requirement

4.1328 In Japan's view, the CDSOA itself, independently from its application, is evidence of the violation on the part of the United States of Articles 5.4 and 11.4. Actual application of the CDSOA will only confirm what the measure, on its face, already demonstrates.

4.1329 According to Japan, the fact that the CDSOA does not modify the US trade laws regarding standing requirements or voluntary undertakings is irrelevant and does not alter the fact that the CDSOA violates the cited provisions.

4.1330 Japan notes that the United States argues that there is no requirement in Articles 5.4 and 11.4 of inquiry into the motivations of the support of domestic producers. Japan considers that there is a requirement, however, of performance of treaty obligations in good faith. To increase the likelihood of "disingenuous" support by domestic producers to petitions, or opposition to undertakings, cannot, by any standard of public international law, be considered a good faith application of the provisions concerning standing requirements and voluntary undertakings.

4.1331 Japan argues that the United States did not present any rebuttals to the arguments pertaining to Articles 4.1 and 16.1, which inform and confirm the object and purpose of Articles 5.4 and 11.4. The object and purpose of those provisions, of which the numerical benchmarks are but a tool, are frustrated by the CDSOA. As a consequence, even if the numerical benchmarks remain unaltered and the investigating authority goes through the charade of counting heads, the CDSOA makes it unavoidably impossible for the United States to perform its obligations under Articles 5.4 and 11.4 in good faith.

4.1332 Japan asserts that by pretending that the promise of a distribution of collected duties will not induce a domestic producer to file or support a petition or oppose an undertaking, the United States is wilfully ignoring the economic reality of competitive markets.

4.1333 Assuming *arguendo* that anti-dumping and countervailing duty laws provide an incentive to support a petition, Japan submits that they would still not be comparable to the CDSOA. To the extent that these laws correctly implement the AD Agreement and the SCM Agreement, they would not constitute a violation of the WTO Agreements. In stark contrast, the CDSOA's additional financial incentives are inconsistent with Articles 5.4 and 11.4.

4.1334 Japan notes that a decision by the United States to make distributions available to all of the domestic producers, and not only those that supported a petition, would not cure the CDSOA of its inconsistencies with the WTO Agreements. The CDSOA would, even under those circumstances, still induce domestic producers to support a petition or oppose an undertaking. Producers would still want to assure themselves that the level of support meets the minimum numerical benchmark so that they can obtain the windfall of the distributions under the CDSOA. Consequently, they would support the petition, lest no other domestic producer does.

(f) By enacting and maintaining the CDSOA, the United States violates Article X:3(a) of GATT 1994.

4.1335 Japan's claim under Article X:3(a) is simple and straightforward: the CDSOA, which is the measure under examination in this disputes, *administers* the United States' trade laws in a manner that is unreasonable, not uniform and not impartial. The CDSOA has been sufficiently and adequately identified and is within the terms of reference of the Panel.

9. Korea

(a) Introduction

4.1336 Korea notes that it has already set out its position in the First and Second Submissions.

(b) The Byrd Amendment is an impermissible specific action against dumping and subsidies

4.1337 Korea recalls that the United States criticizes the complainants for offering an interpretation "not supported" by the text of Articles 18.1 and 32.1 and the 1916 Act Appellate Body and panel reports. At the same time, Korea argues, the US advances an interpretation that is self-serving and that disregards the text. Moreover, the US ignores the fact that the Appellate Body already has interpreted "against."[218] As Korea demonstrated at paragraph 19 of its Second Submission, in the 1916 Act proceeding at paragraph 122, the Appellate Body defined "against" as "in response to."

4.1338 Korea further asserts that, regarding "constituent elements of dumping," if an action (in this case, giving cash rewards) cannot, as a matter of law, be taken absent a finding that the constituent elements of dumping have been met, then the requirement set out in 1916 Act reports is met. This "but for" interpretation is reasonable, and the US attempt to mischaracterize it should be rejected.

4.1339 Korea notes further that, in this case, the issue is even more clearly presented than in the 1916 Act proceeding. There, the measure set out its own prerequisites that differed in some respects from the primary US anti-dumping law. So, the panels and Appellate Body were forced to parse the text of the 1916 Act to determine if the Act sets out the constituent elements of dumping. Here, in stark contrast, there is no similar dispute. The action of granting cash rewards cannot be taken absent a pre-existing finding by the authorities that the constituent elements of dumping or subsidy, as they are defined by the US anti-dumping and countervailing duty laws, have been met.

4.1340 Korea notes that the United States tries to derail the debate by pretending that the required order and the cash reward are "remotely" linked.[219] Further, the US posits that the only two

[218] First Written Submission of the United States, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (14 January 2002) (US First Submission), para. 90.

[219] Second Written Submission of the United States, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, WT/DS234 (27 February 2002) (US Second Submission), para. 43.

requirements for receiving the cash reward are, one, that the recipient be an "affected domestic producer" that, two, has submitted "qualifying expenditures."[220]

4.1341 Korea submits that again, the United States is incorrect. The link is quite strong – indeed, the existence of an anti-dumping or countervailing duty order is a pre-condition to the cash reward. The additional requirements are irrelevant absent a finding that the constituent elements are met, followed by imposition and collection of duties. Thus, they are additional factors similar to the intent and injurious effects requirements in the 1916 Act. In the 1916 Act proceeding, the Appellate Body rejected the US assertion that the presence of additional elements meant that the 1916 Act could not be a specific action against dumping.[221] The Panel should do the same here.

4.1342 Korea asserts that, regarding the word "against", the United States continues to ignore the plain meaning of "against dumping" and "against a subsidy," claiming that Complainants' interpretations are not supported by the text.[222] The US interpretation is based on a definition of "against" that requires physical contact, which cannot occur as a matter of physics with a non-physical process or noun such as "dumping" or "a subsidy." To make matters worse, the United States ignores the actual text, which is "against dumping" and substitutes a self-serving re-writing: "against imported products."[223] It is forced to do so in order to support its flawed definition of "against", which requires a physical object, as opposed to a process, such as dumping.

4.1343 Korea is of the view that, because the text does not support its flawed interpretation, the United States is forced to attack Complainants' position by mis-characterizing it as "presuming" a negative effect on imported goods or foreign producers.[224] In so doing, the United States would have the Panel and US trading partners ignore not only the statements by the US officials that supported the legislation, but also basic economic principles: if two companies, foreign company X and domestic company Y, are competing in the marketplace, one can act against – or disadvantage – foreign company X in the market by imposing costs on foreign company X or by giving money to domestic company Y. Not satisfied with either the former or, even, the latter, alone, the United States has decided to do both, using the Byrd Amendment to accomplish the latter.

4.1344 In short, Korea argues that the effects of the Byrd Amendment are not presumed, they are known. The Byrd Amendment indisputably alters the conditions of competition. Moreover, as Korea's analysis shows, the US flag-flying and other examples, which are presented to frighten the Panel into accepting the US view, are irrelevant.[225] Here, the action by the United States directly disadvantages imports in the US market.

4.1345 Finally, the United States asserts that the cash rewards are not related in any way to domestic producers' injury.[226] Korea submits that this is incorrect. According to Korea, the cash rewards cannot exceed the anti-dumping or countervailing duties collected. Moreover, before the US authorities can grant the cash rewards, they must find that the constituent elements of dumping or subsidy are met and that the dumping or subsidy is causing injury to the US industry. Only then may they impose the duties. The duties are specifically designed to offset the dumping or subsidy and, thus, to prevent continuing injury from the dumping or subsidy. So, the ceiling of the cash reward

[220] *Id.*, para. 42.
[221] *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R (28 August 2000), paras. 104, 107 and 122.
[222] US Second Submission, paras. 47-59.
[223] *Id.*, para. 48.
[224] *Id.*, para. 52.
[225] *Id.*, para. 53.
[226] *Id.*, para. 58.

amount is defined by the total duties collected to offset and prevent future injury. The US statement to the contrary, therefore, is incorrect.

(c) Footnotes 24 and 56 do not save the Byrd Amendment

4.1346 Korea asserts that footnotes 24 and 56 are not relevant to this proceeding. Because the Byrd Amendment is a specific action against dumping and subsidization, it does not fall within the scope of these Footnotes. Korea argues that, as Complainants have demonstrated, in the 1916 Act report the Appellate Body concluded at paragraphs 122-126 that Footnotes 24 and 56 clarify that a Member may select a WTO-consistent remedy other than applying duties pursuant to the Anti-Dumping Agreement and the Subsidies Agreement even where the conditions for applying duties exist. Korea presents the following example: considering Country X subsidizes an industry and, due to the subsidy, its industry is able to dump products in Country Y, resulting in increased imports to Country Y. In this example, depending upon the precise facts, Country Y might be able to apply an anti-dumping duty or a countervailing duty or a safeguard measure, as long as the application of the measure by Country Y complies with the relevant WTO provisions.

4.1347 The United States also claims that the Byrd Amendment is justified as an action under Article XVI of GATT 1994. According to the United States, even if the Panel were to find the Byrd Amendment "to be an action against dumping and/or subsidies," the Amendment "is nevertheless clearly an action under GATT Article XVI to address the effects of such practices."[227] Korea posits that this is nothing more than a claim that, in response to dumping or a subsidy as such, a Member may grant a subsidy. This position is directly contrary to the holding of the Appellate Body in the 1916 Act proceeding. Therefore, Korea believes the Panel should reject this US assertion as well.

4.1348 In short, concerning the US argument regarding Footnotes 24 and 56, Korea considers it suffices to point out that the actions envisaged in these Footnotes are limited to actions that are <u>not</u> actions in response to dumping or subsidization, as such. Therefore, it is clear that the Byrd Amendment is not saved by these Footnotes.

(d) The Byrd Amendment violates the provisions of the Anti-Dumping Agreement and the Subsidies Agreement regarding standing and undertaking determinations

4.1349 According to Korea, the United States bases its rebuttal on whether or not the Byrd Amendment alters the US administration of US laws regarding standing and undertaking determinations.[228] In doing so, the United States ignores the thrust of Korea's argument.

4.1350 According to Korea, a Member can undo or disregard the results of WTO negotiations in at least two ways. First, it can pass a law that is directly contrary to the text of a WTO provision. This is what the United States has done regarding Article 18.1 and Article 32.1. Second, it can pass a law that so alters the incentive structure in which private actors make decisions that the negotiated text has been distorted and reduced to inutility - it no longer can perform as the negotiators intended it to. This is precisely what the United States has done with respect to the WTO provisions regarding standing and undertaking determinations. This is why, in this case, the fact that the law actually used to administer a WTO provision has not changed is irrelevant.

4.1351 In short, Korea considers that the United States urges this Panel to adopt an interpretation that would permit all Members to pass laws that would undermine and reduce to inutility any WTO

[227] *Id.*, para. 61.
[228] *Id.*, paras. 70-75.

provision which regulates or is dependent on private conduct (by altering the incentives that determine that conduct). Korea argues that this should not be permitted.

4.1352 Korea notes that the United States claims that Complainants have not introduced evidence that the Byrd Amendment affects determinations regarding standing[229] and undertakings.[230] Korea submits that this claim is both irrelevant and inaccurate. It is irrelevant because, where, as here, a measure is inconsistent with a WTO provision, the complaining party is not required to meet an effects test.[231] It is inaccurate because Complainants have shown beyond doubt that the Byrd Amendment definitely does affect decision-making. Korea considers it has demonstrated that US government officials proposed and passed it to give US companies a second, additional remedy to help them combat allegedly unfair trade. The United States cannot credibly argue that the provision of a second remedy in the form of a cash reward does not encourage both filing and support of petitions and opposition to undertakings.

4.1353 Moreover, Korea considers that the United States concedes its case by agreeing that incentives – such as duties – do operate to encourage petitions. In the words of the United States:

> the very existence of the Antidumping and SCM Agreements gives domestic interests a strong financial inducement to file, and support, petitions.[232]

4.1354 In Korea's view, that statement is 100 per cent correct. Like a cash reward, potential duties do create an incentive to bring and support cases. The flaw in the US presentation is that the United States pretends that, as opposed to potential duties, cash rewards for some reason do not create an incentive to bring and support cases. Obviously, the cash reward does exactly this. It also functions as an incentive for the domestic industry to oppose undertakings.

4.1355 Korea asserts that this analysis also shows the weakness of the US argument that the Byrd Amendment does nothing more than to encourage the use of a permissible remedy.[233] According to Korea, it does not; instead, it creates a new, impermissible remedy. Moreover, by creating an impermissible remedy in the form of a cash reward, it improperly encourages additional use of US anti-dumping and countervailing duty laws.

4.1356 The United States further asserts that, in any case, the imposition of duties (and receipt of cash rewards) is too speculative to support Complainants' argument.[234] Again, according to Korea, the United States has conceded its case. At the very least, even accepting the US position, the provision of cash rewards will have an effect on marginal cases where a US company otherwise would not file or support a petition or oppose an undertaking. Of course, in the view of Korea, the Byrd Amendment affects cases in general, not merely marginal cases.

4.1357 Finally, regarding the US argument on undertakings, Korea contends that the United States continues to assert that the provisions on undertakings are merely hortatory. Korea argues that this interpretation is flawed and must be rejected. Articles 8 and 18 each comprise six separate paragraphs setting out a host of requirements that apply specifically to producers regarding undertakings. They therefore most assuredly are not hortatory, as they impose requirements. Most relevant are those set

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[229] *Id.*, paras. 88-95.
[230] *Id.*, para. 100.
[231] *See, e.g., Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (4 December 1996), pp. 15-16; *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R (18 January 1999), paras. 128-133.
[232] US Second Submission, para. 85.
[233] *Id.*, paras. 84-87.
[234] *Id.*, paras. 88-95.

out in paragraphs 1 and 3 of the Articles. As Complainants have demonstrated, read together, these provisions allow a Member to reject a proposed undertaking only where it would be "impractical" or for a reason that otherwise is relevant. And, of course, this obligation of Articles 8.3 and 18.3 is subject to the general "good faith" obligation.[235]

(e) The Byrd Amendment violates Article X:3 of GATT 1994

4.1358 Korea submits that the Complainants have established that the Byrd Amendment so alters the incentives that previously determined whether a US company would file or support a petition or oppose an undertaking that it constitutes a violation of relevant WTO provisions. There is a secondary effect as well. The Byrd Amendment precludes the United States from applying its laws regarding standing and undertaking determinations in a "reasonable, impartial and uniform manner."

4.1359 According to Korea, and contrary to US claims,[236] this violation is within this Panel's terms of reference. The violation here is not created by the US laws regarding standing and undertakings but by the Byrd Amendment. The Panel should reject this US attempt to limit the Panel's authority.

(f) The Byrd Amendment undermines the Multilateral Trading System

4.1360 Korea, before concluding, comments on the implications of this case for the multilateral trading system. The system has never suffered from a lack of protectionist forces. In fact, the multilateral trading system, in large part, developed in response to challenges from protective forces. Given the evolution of the multilateral trading system, beginning with the GATT and followed by the WTO, obviously the multilateral trading system has succeeded to a large extent in overcoming protectionism. But, even so, the system is still beset by protectionist forces, which can be pretty creative at times. Korea asserts that the Byrd Amendment is a perfect example of protectionist forces trying to nullify the purpose of the WTO agreements on Anti-Dumping and Subsidies through the back door. If this Panel does not check the Byrd Amendment, then protectionist forces may be emboldened to develop additional creative initiatives aimed at weakening the free trade system that WTO Members for years have been working so hard to create and, now, to protect. Korea considers that to guard against this possibility, a clear ruling on this case is required.

(g) Conclusion

4.1361 In conclusion, Korea respectfully asks the Panel to find that the US is in violation of Article VI and X:3(a) of GATT 1994; Articles 5.4, 8 and 18.1 of the AD Agreement; and Articles 11.4, 18 and 32.1 of the SCM Agreement. Korea requests the Panel both to recommend that the United States bring its laws into conformity with its obligations under these WTO provisions and to suggest that, to meet its WTO obligations, the United States should repeal the Byrd Amendment.

10. Mexico

(a) Introduction

4.1362 In this oral statement, Mexico will respond to the main arguments that are invoked by the United States in its rebuttal submission against Mexico's claims under Article 5 of the SCM Agreement. Mexico will also briefly address certain issues that are raised by the United States

[235] *See, e.g., United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R (24 July 2001), para. 101.
[236] US Second Submission, paras. 104-111.

regarding the claims under Article 18.1 of the Anti-Dumping Agreement and the analogous provisions in Article 32.1 of the SCM Agreement.

4.1363 As for the other claims made by Mexico, they have been dealt with in its prior submissions and in the other claimants' written and oral submissions. Mexico agrees with the submissions of the other complaining parties with respect to those claims and incorporates them in its arguments.

(b) Preliminary Remarks

4.1364 First, Mexico emphasizes the importance of Mexico's Article 5(b) claim. The remedies available to Mexico in the case of an Article 5(b) violation differ from those available in the case of its other claims in this dispute. Where a violation of Article 5(b) is found, under Article 7.9 of the SCM Agreement the United States will at most have six months to withdraw the subsidy or remove its adverse effects. This goes beyond the requirement in Article 19 of the DSU that the US "bring the measure into conformity" with its WTO obligations.

4.1365 Second, Mexico notes that the United States argues that Article 5(b) of the SCM Agreement should be interpreted in a manner that is identical to Article XXIII:1(b) of the GATT 1994. Mexico is of the view that such an interpretation cannot be accepted by this Panel because it would render Article 5(b) inutile. As explained in Mexico's previous submissions, Article 5(b) differs from Article XXIII:1(b) in important respects.

(c) Claim Under Article 5(b) of the SCM Agreement

(i) Specificity

Subsidy versus programme

4.1366 Mexico notes that at paragraphs 10-20 of its written rebuttal submission, the US argues that the CDSOA, as a programme, is not a specific subsidy.

4.1367 Mexico asserts , as discussed at paragraphs 37-41 of Mexico's written rebuttal submission, that it is legally incorrect for the US to focus the specificity analysis on the CDSOA as a programme without regard to the nature of the subsidies that are conferred under the Act.

4.1368 Mexico is of the view that a careful reading of Article 2.1(a) demonstrates that it supports Mexico's arguments. The Article refers to situations in which legislation explicitly limits access to a subsidy. The "legislation" in this dispute is the Continued Dumping and Subsidy Offset Act of 2000 ("the Act") and the subsidies are the offsets distributed under it. Since specificity arises as a result of the provisions of the Act, it can only be said that the subsidies conferred under the Act are specific, not the Act in itself. Accordingly, it is inappropriate for the US to argue that the Act is or is not specific. The legal question is whether the subsidies conferred under the Act are or are not specific.

4.1369 If Mexico's approach is not accepted, a WTO Member could shield otherwise-specific subsidies from challenge by conferring those subsidies under a single legislative instrument or programme. In order to prevent the disciplines in the SCM Agreement from being undermined in this way, the nature of the subsidies conferred under a programme (i.e., separate and independent subsidies) must be taken into account in the specificity analysis.

4.1370 Thus, it is Mexico's position that the CDSOA explicitly limits access to the subsidies to certain enterprises, within the meaning of Article 2.1(a) of the SCM Agreement. Specificity is

manifest in the actual words of the law. In particular, Mexico refers to the following subsections of the CDSOA: 754(a), 754(b)(1) and (4), and 754(c).

Disbursements and outlays

4.1371 At paragraph 16 of its written rebuttal submission, the US argues that the specificity analysis must be carried out for the challenged subsidy programme as a whole rather than by "focusing on individual disbursements".

4.1372 Mexico is not arguing that the test for assessing specificity should be applied to each "disbursement" under the CDSOA. Mexico's position is that the test for assessing specificity must be applied to each "subsidy" conferred under the programme.

4.1373 Mexico asserts that the Panel must determine whether Separate and independent subsidies are being conferred under the CDSOA. If it determines that this is the case, it must then apply the specificity test to each subsidy. This approach to specificity must be applied in all instances where a programme confers separate subsidies. Otherwise, a WTO Member will be able to insulate from challenge otherwise-specific subsidies simply by administering them under a single programme. From the outset, the financial contributions are targeted to specific products and, therefore, specific industries

4.1374 In the view of Mexico, from the outset, the financial contributions are targeted. The targeting begins even before a financial contribution exists, because there must be an underlying anti-dumping or countervailing duty order or finding with respect to which a special account is established. Moreover, the funding mechanism for each subsidy is completely independent of the funding mechanism for the other subsidies. This is because the funding mechanism – i.e., the collection of anti-dumping and countervailing duties – is, itself, tied to the specific products that are subject to the anti-dumping or countervailing duty order or finding in question.

4.1375 Thus, according to Mexico, the amount of funding for a particular subsidy does not in any way affect the amount of funding for a subsidy that is linked to another order or finding.

4.1376 This, in Mexico's view, fundamentally distinguishes the subsidies conferred under the CDSOA from subsidies that are conferred under a typical subsidy programme where the nature of the financial contribution is horizontal (i.e., the same for all recipients) and the funding of that financial contribution is horizontal (i.e., a common budget). Under a normal subsidy programme, the disbursements or outlays may give the appearance of specificity; however, those disbursements or outlays do not amount to discrete subsidies, nor are they the result of discrete subsidies. Under the CDSOA, the unique nature of the "financial contribution" element of the subsidies creates a separate and distinct subsidy that inherently results in limiting eligibility to each subsidy to a specific industry.

Other arguments

4.1377 Mexico notes that, in addressing the "objective criteria" issue, the US does not refer to the fact that such criteria must be "horizontal in application" and to the fundamental criterion for eligibility for a subsidy conferred under the CDSOA, which is that the recipient must be a petitioner in the investigation that led to the order or finding that forms the foundation of the subsidy in question, or that the recipient support that petition.

4.1378 It is Mexico's position that this fundamental criterion of the CDSOA is not "horizontal", nor is it "economic", even within the broad meaning proposed by the US in its response to Question 18 from the Panel.

4.1379 Finally, the US argues that Mexico has not presented "positive evidence" that the CDSOA is specific. Mexico submits that the positive evidence that Mexico relies upon to demonstrate specificity is the design, structure, and architecture of the CDSOA, which has been fully documented in the evidence before this Panel.

(ii) Adverse Effects

Circular argument

4.1380 At paragraph 26 of its written rebuttal submission, the US argues that "Mexico's argument is circular because the determination of the existence of nullification or impairment is based upon the application of the measure, not the measure itself".

4.1381 Mexico considers that the US argument on this point is unclear. With respect to Mexico's challenge regarding the "granting" of subsidies under the CDSOA, it is Mexico's position that when subsidies are granted (i.e., "applied" even under the restrictive US interpretation) nullification or impairment will exist. Thus, Mexico's position faithfully follows the wording of footnote 12 to the SCM Agreement.

4.1382 In Mexico's view, what is really at issue in these paragraphs of the US rebuttal submission is "when" Mexico can challenge the CDSOA under Article 5(b). To answer this issue, this Panel must determine whether the well established doctrine governing legislation as such challenges applies to Article 5(b).

Evidence of the upsetting of the expected competitive relationship

4.1383 As noted in Mexico's prior submissions, with respect to its challenge of the "granting" of subsidies under the CDSOA, Mexico posits that the subsidies conferred by the CDSOA will automatically upset the expected competitive relationship when they are granted. As discussed at paragraphs 78-92 of Mexico's rebuttal submission, the upsetting of the expected competitive relationship is demonstrated by the design, structure and architecture of the CDSOA, which is well documented in the evidence before this Panel. On this issue, Mexico refers to paragraphs 81-89 of its rebuttal submission.

Affected Mexican imports

4.1384 At paragraph 28 of its rebuttal submission, the US argues that Mexico "does not even identify the affected Mexican imports". Mexico asserts that although it is not necessary for Mexico to identify such exports with respect to its legislation as such challenge of the "granting of subsidies" under the CDSOA, Mexico is also arguing that, through the maintenance of subsidies, the CDSOA is currently nullifying or impairing benefits accruing to Mexico related to the predictability of conditions for future trade (Mexico's rebuttal submission, paragraphs 93-98). Mexico has also identified products of Mexico which are currently subject to anti-dumping and countervailing duty orders and findings (Exhibit Mexico-5) and with respect to which predictability has been nullified or impaired. At paragraph 32 of its written rebuttal submission, the US makes a related argument with respect to tariff concessions that the CDSOA "is not a product-specific subsidy". As noted in Mexico's submissions on specificity, the subsidies conferred by the CDSOA are inherently "product-specific" and, therefore, industry-specific.

Interpretation of the Panel reports in *Oilseeds I* and *II*

4.1385 At paragraph 30 of its written rebuttal submission, the US interprets the Panel report in *EEC – Oilseeds* as turning on the fact that the "complainant has shown that the competitive relationship was actually upset". While Mexico does not take issue with the fact that the complainant in that dispute may have put forward considerable evidence regarding the effect that the EEC programme had on its products, Mexico considers that a review of paragraphs 147, 148, 152 and 154 of the Panel Report indicates that the Panel was concerned with the "price mechanism" in the challenged measure and the operation of the "scheme" that was established. In other words, notwithstanding the possible other evidence before it, the Panel focused on the design, structure and architecture of the subsidies before it. The Panel Report in *EEC – Oilseeds II* supports this focus.

Other arguments

4.1386 Mexico notes that at paragraph 33 of its written rebuttal submission, the US argues that Mexico must demonstrate that the CDSOA will cause more than a de minimis contribution to any nullification or impairment. It cites paragraph 10.84 of the Panel Report in *Japan – Film* for this proposition. Paragraph 10.84 addressed the issue of the causal linkage between the measure and the alleged nullification or impairment. According to Mexico, that causal linkage is clearly established in this dispute, therefore, the passage from *Japan – Film* has no application to the facts of this dispute.

4.1387 The US also argues at paragraph 33 of its written rebuttal submission that, "[u]nder the CDSOA, domestic producers may use their offset for any purpose, including making gifts to charity, compensating workers, developing non-subject products, or paying creditors". Mexico argues that this argument ignores the terms of the CDSOA and its implementing regulations. Under the definition of "qualifying expenditure" in the Act and regulations, the subsidy is granted after the expense is incurred. According to section 159.61(c) of the Regulations, the qualifying expenditures "must be related to the production of the same product that is the subject of the related order or finding".

4.1388 At paragraph 35 of its written rebuttal submission, the US submits that "Mexico was on notice that the United States could pass such a measure". Mexico is of the view that the mere fact that a WTO Member "could" take action is not enough to demonstrate that another WTO Member could reasonably have anticipated that action. The legal question is not whether the US could implement the CDSOA, because the US "could" conceivably do anything. The proper legal question is whether Mexico could reasonably have anticipated the CDSOA. On this issue, Mexico simply repeats paragraph 106 of its written rebuttal submission.

(d) Claims Under Articles 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement

4.1389 At paragraphs 40-69 of its written rebuttal submission, the United States raises three arguments to support its position that the CDSOA is not a specific action against dumping or a subsidy.

4.1390 Mexico considers that it has already demonstrated at paragraphs 9-32 of its rebuttal submission that the three general arguments raised by the United States are incorrect and must, therefore, be rejected. Mexico agrees with the arguments of the other complaining parties as they further demonstrate the legal flaws in the US interpretation of the relevant provisions.

(e) Conclusion

4.1391 For the foregoing reasons and those espoused in Mexico's previous submissions, Mexico requests that the Panel find that the CDSOA is inconsistent with the provisions of the Anti-Dumping

Agreement, the SCM Agreement, the GATT 1994 and the WTO Agreement at issue in this dispute. Mexico also requests that the Panel grant the relief described at paragraph 124 of Mexico's first written submission.

11. Thailand

4.1392 At this juncture, Thailand reiterates its common views as previously expressed by other complaining parties in their oral statements made today.

4.1393 Thailand notes that the United States has argued in paragraph 2 of its Second Submission that "none of the complaining parties have challenged the Act as an actionable subsidy under Article 5(c) of the SCM Agreement, for which even a showing of threat of harm is sufficient." However, Thailand argues that it is crystal clear as claimed in paragraphs 23-29 of the First Written Submission of the European Communities, India, Indonesia and Thailand that the Byrd Amendment constitutes a specific action against dumping and subsidization which is not in accordance with the GATT. In Thailand's view, there is no requirement to argue further, should it prove necessary need to institute proceedings, that adverse effects take place as stipulated in Article 5 of the SCM.

4.1394 Thailand argues that, pertaining to paragraph 5 of the US Second Submission, one could claim that there is no distinction regarding the use of AD/CVD duties and also the source of government revenue. This is, Thailand submits, a misled point of argument made by the U. S. and is not the point made by the complaining parties.

4.1395 Another point raised in paragraph 5, Thailand further argues, is the identity of the recipient which, in the U. S. perspective, is tied up with the words "presumed negative effects" In fact, the terms "identity" and "presumed negative effects" would have certain bearing if the action in question is considered as specific action against dumping or subsidization in accordance with Articles 18 and 32 of the AD and CVD Agreements, respectively.

4.1396 Thailand notes that in European Communities – Regime for the Importation, Sale and Distribution of Bananas, the Panel pronounced that the infringement of obligations is a *prima facie* case of nullification or impairment of benefits, which as a result, has shifted the burden of proof to the alleged party. Thailand is of the view that the statement made by the U. S. in paragraph 7 of its Second Submission should therefor be rejected.

4.1397 Thailand then turns to paragraph 57 of the U. S. Second Submission which presumably underlines that Thailand is mistaken when interpreting the word " affected" to convey the same meaning as "adversely affected". In response, Thailand would have been easily convinced if any measure taken under the CDSOA had been given effect as a result of a stand-alone legislation having no links whatsoever with dumping or subsidization in nature. Moreover, Thailand finds it is relatively difficult to understand why any domestic producer who is "affected" in a positive manner would be good enough to issue a certification so that the Customs Authority may take action in accordance with the CDSOA, while those who are "affected" in a negative manner may not get any action as a response, as explained in paragraph 42 of the US Second Submission. To put it in another way, the question is whether those who had got payment so far under the CDSOA which amounts to more than 200 million dollars falls within which category.

4.1398 Thailand submits that another invalid point is raised in paragraphs 89 and 92 of the US Second Submission that "it is highly improbable that CDSOA is a factor at all in a domestic company's or union's consideration of whether to support a petition" when time has lapsed before payment is made. In fact, when payment is made is not a factor recognized at all under the AD and SCM Agreements.

4.1399 For the reasons given, Thailand respectfully requests that the Panel consider this case based on GATT/WTO jurisprudence and thereby make findings and recommendations in favor of the complaining parties.

J. SECOND ORAL STATEMENT OF THE UNITED STATES

(a) Article 5(b) of the SCM Agreement

4.1400 The United States argues that 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. According to Mexico, the CDSOA is de jure specific because each offset is a "separate and distinct subsidy." Specificity analysis, however, must be carried out for the challenged subsidy programme (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 programme may be, each disbursement would be considered a specific subsidy – a result that would render Article 2 a nullity.

4.1401 The United States submits that a textual analysis of Articles 1 and 2 does not support Mexico's interpretation either. 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 programme.

4.1402 Although the Panel need not reach the question of adverse effects in this dispute, the United States asserts that Mexico has failed to meet its burden of proving adverse effects in the form of nullification or impairment of benefits under Article 5(b) of the SCM Agreement. Mexico's theory that an "actionable" subsidy can be established without any showing of adverse effects is inconsistent with the structure and design of the SCM Agreement and would eliminate the primary distinction between Articles 3 and 5 of the SCM Agreement. In any event, because the CDSOA does not violate any WTO Agreement provision, this point is moot.

4.1403 According to the United States, Mexico's theory of a non-violation nullification or impairment claim should also be rejected. Mexico fails to understand 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, that *doctrine* does not allow Mexico to bypass the required elements of a non-violation nullification or impairment claim.

4.1404 The United States is of the view that Mexico has also failed to demonstrate that the competitive relationship in the US market between domestic and Mexican products has been upset by a subsidy which was not reasonably anticipated. Mexico's argument is squarely contradicted by the relevant provisions and jurisprudence. First, GATT Article XXIII:1(b) requires that a benefit "is being nullified or impaired," not that it will be in the future. Second, Mexico mis-cites the *EEC – Oilseeds* case.

4.1405 The United States considers that 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. 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. Yet, "predictability" in planning future sales has never been recognized as a benefit accruing under GATT Articles II and VI.

4.1406 The United States notes that 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, in the United States' view, there is simply no basis in Article 5(b) for limiting non-violation nullification or impairment claims in this way.

(b) Specific action against dumping or subsidies

4.1407 The United States asserts that under the subsidies provisions of SCM Agreement and GATT Article XVI, 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.

4.1408 According to the United States, 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. 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.

4.1409 The United States notes that 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. However, according to the United States, 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. What makes "specific action" in the main provisions of Articles 18.1 and 32.1 different from "action" in the footnotes 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.

4.1410 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 United States asserts that the statute, however, does not require producers to show they are injured by dumped or subsidized imports to receive distributions and the amount of the distribution has nothing to do with measuring or recovering damages. In any event, is it not clear to the United States why that fact, if true, would even be relevant to whether distributions are "specific action" under Articles 18.1 and 32.1.

4.1411 According to the United States, 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 which defines dumping as products of one country being introduced into the commerce of another country at less than normal value. 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 the 1916 Act case.

4.1412 The United States is of the view that the complaining parties' alternative definitions of the word "against" are not informed by its context in Articles 18.1 and 32.1. In that context, there are already four examples of measures that are "specific action 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. 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. None of the measures apply indirectly in ways unrelated to the imported dumped or subsidized good.

4.1413 The United States notes that 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. In the view of the United States, there is no basis in the text of Articles 18.1 and 32.1 for a conditions of competition test. 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. A presumed negative effects test or a conditions of competition test is overly broad as it would cover any other type of domestic legislation that improved the position of the domestic industry.

4.1414 To support their "effects" argument, the complaining parties urge this Panel to rely on the CDSOA's legislative history. The United States is of the view that 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. 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.

4.1415 In conclusion, the United States argues that under the complaining parties' argument that a Member cannot grant domestic subsidies in response to another Member's subsidies, the first Member to subsidize can prevent, other Members from granting subsidies just by virtue of the fact that they were first. The United States submits that this reading cannot reasonably be a proper construction of Article 32.1 and would lead to perverse results. It is also 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.

4.1416 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 as action under GATT Article XVI to address the effects dumping and/or subsidies. No party disputes that the CDSOA authorizes "action" in the form of a subsidy, and no party disputes that the CDSOA is consistent with GATT Article XVI. The complaining parties have themselves argued that the CDSOA is intended to offset the effects of continued dumping or subsidies. Therefore, if the Panel finds that the CDSOA authorizes action against dumping and/or subsidies, it is nevertheless action under GATT Article XVI to address the effects of such practices.

(c) Standing

4.1417 The United States asserts that the text of Articles 5.4 and 11.4 do not contain a requirement that "support" for a petition must be "genuine" or "true," but rather establish objective, numerical benchmarks. The United States has implemented these benchmarks which have not been modified in any way by the CDSOA.

4.1418 According to the United States, the complaining parties have provided no support for their claim that the CDSOA precludes a good faith examination of industry support under Articles 5.4 and 11.4. Complaining parties 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 not required by the agreements and is an unworkable requirement.

4.1419 The United States is of the view that it is highly improbable that CDSOA is a factor in a domestic company's or union's consideration of whether to support a petition. CDSOA distributions, if any, are contingent on a number of factors and made at some unknown, future date. The "promise" of a remote, uncertain and unknown payment is hardly worth gambling a million plus dollars on a "frivolous" anti-dumping or countervailing duty case. Moreover, petitioners who file frivolous anti-dumping and countervailing duty cases subject themselves to potential antitrust scrutiny.

4.1420 The United States argues that, 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. 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.

(d) Undertakings

4.1421 The United States asserts that US law merely requires that the Commerce Department, to the extent practicable, consult with the domestic industry before determining whether an undertaking is in the "public interest." Views of the domestic industry do not in any way dictate the outcome and, for this reason, they do not determine the decision to accept or reject a proposed undertaking. The Bethlehem Steel cases do not hold otherwise. Indeed, the only evidence presented to this Panel establishes that the domestic industry has opposed more than 75 per cent of the undertakings which the United States has accepted since 1996.

4.1422 The United States submits that the complaining parties do not seem to understand why petitioners would ever support undertakings after the CDSOA. Given that only 36.1 per cent of the petitions filed result in affirmative final determinations by Commerce and the Commission, a petitioner has ample incentive to support a suspension agreement which is likely to provide relief than take its chances on affirmative final determinations. 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.

(e) GATT Article X:3(a)

4.1423 In the view of the United States, the complaining parties made it perfectly clear that the allegedly offending measure with respect to Article X:3(a) is US implementation of its anti-dumping and countervailing duty laws, not US 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. Complaining parties' Article X:3(a) claims are thus, not within this Panel's terms of reference and must be rejected.

4.1424 Some complaining parties assert that the CDSOA "administers" the trade laws. The United States administers its trade laws, not the CDSOA. In fact, the Department of Commerce, which handles standing and undertakings determinations, does not administer the CDSOA, the Customs Service does. Argentina - Hides provides no guidance on this issue.

4.1425 The United States argues that even if the complaining parties can overcome the jurisdictional defect, their arguments rest entirely on the unsupported belief that the CDSOA will influence domestic interests to bring or support an investigation, or oppose an undertaking. Moreover, 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. In

contrast to US-301, in the instant case the complaining parties have been unable to demonstrate that the CDSOA requires, or permits a Member to engage in, any prohibited conduct.

K. COMPLAINING PARTIES' ANSWERS TO QUESTIONS FROM THE PANEL AFTER THE SECOND MEETING

1. Australia

(a) Questions to all 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 <u>dumped</u> imports in particular? Why?

(a) Yes.

(b) As described, subsidy B payments are conditional on the existence of the constituent elements of dumping.

(c) The "impact" of a subsidy is immaterial to the determination of whether that subsidy is a specific action against dumping. If subsidy B constitutes action that may be taken only when the constituent elements of dumping are present, it is a specific action against dumping.

(d) If subsidy B is action taken in conjunction with the imposition of anti-dumping duties, as is the case with offset payments under the CDSOA, it provides a double remedy in relation to dumped imports, as well as a remedy in relation to imports which have not been found to be dumped in any case.

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?

4.1426 According to Australia, offset payments under CDSOA change the competitive relationship between the recipients of those payments and all other producers (including foreign producers), while providing a double remedy in respect of dumped (or subsidised) goods.

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)?

4.1427 It is unclear to Australia what is meant by this question. Australia has not argued that the CDSOA is a specific action against dumping because the offset payments must be "used" by affected domestic producers exclusively to bolster their competitive position *vis-à-vis* imports subject to the relevant anti-dumping order. Indeed, offset payments under the CDSOA are reimbursements of qualifying expenditures incurred in relation to production of the like product. However, just as for example an export subsidy paid by reimbursement of expenses after actual export still constitutes an export subsidy, the payment of a subsidy conditional on the existence of the constituent elements of dumping by reimbursement of expenses at a later date still constitutes specific action against dumping.

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.

4.1428 With respect, Australia submits that the premise of this question is incorrect. Offset payments under the CDSOA are not untied subsidies. They are reimbursements of qualifying expenditures: that is, expenditure incurred after the anti-dumping duty order or finding was issued for specified categories of expenditure related to the production of the like product.[237] Domestic producers must continue to produce the like product to qualify for further payments under the CDSOA. While the CDSOA does not have a direct impact on dumped products or entities connected with those products, it nevertheless affects those products through the double remedy it provides, that is, subsidy payments in addition to anti-dumping (or countervailing) duties.

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

4.1429 Australia is of the view that the arguments at paragraphs 44-46 of the United States' oral statement at the second meeting of the Panel are fundamentally flawed.

4.1430 Members do not have a right to engage in "counter-subsidisation" under either GATT Article XVI or the SCM Agreement, notwithstanding that Members might grant subsidies for that reason. The fact that "counter subsidies" are not included in footnote 35 to the SCM Agreement, or provided for elsewhere in the SCM Agreement, confirms that they are not a permissible form of relief.

4.1431 A dispute settlement proceeding is not something that may be undertaken only when the constituent elements of a subsidy (or dumping) are present. It is not a "specific action against a subsidy" within the meaning of Article 32.1 of the SCM Agreement. Moreover, Articles 4, 7 and 30 of the SCM Agreement confer a positive right on Members to take dispute settlement action. The fact that dispute settlement action is not mentioned in footnote 35 to the SCM Agreement is irrelevant.

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, how?

[237] First Written Submission of Australia, paragraphs 17-18.

4.1432 As previously explained by Australia[238], the word "against" has many ordinary meanings, including "in competition with", "to the disadvantage of", "in resistance to" and "as protection from". Australia would agree that a measure "against" dumping within the meaning of Article 18.1 of the Anti-Dumping Agreement would need to have an "adverse bearing" in relation to dumped products, or to an entity connected with those products. However, even the necessity of an "adverse bearing" does not compel the conclusion that a measure "against" dumping must apply exclusively to the dumped products, or to an entity connected with those products, or be burdensome to those products or entities. The CDSOA, the measure at issue in this dispute, is just such a case. While it does not apply directly to dumped products or to an entity connected with those products, and is not directly burdensome to those products or entities, the CDSOA nevertheless provides a double remedy – that is, it has an "adverse bearing" – in respect of those products.

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?

4.1433 See answer to Question 8.

2. Brazil

(a) Questions to all 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 <u>dumped</u> imports in particular? Why?

4.1434 Brazil replies as follows:

(a) Yes, subsidy B should be treated as a specific action against dumping.

(b) Subsidy B is only paid when the constituent elements of dumping are present. That is, the subsidy is not paid unless and until there has been a determination of dumping and injury by the authorities in the importing country. In addition, the beneficiaries of subsidy B are the same as the beneficiaries of the anti-dumping measures. Thus, this is an additional action to offset or prevent dumping. By rewarding domestic producers of a dumped product with a subsidy payment subsidy B addresses the same situation being addressed by anti-dumping measures.

[238] Second Written Submission of Australia, paragraph 16.

Brazil is of the view that the panel should not lose sight of the fact that anti-dumping measures are intended to confer a benefit on the domestic producers by either preventing dumping and forcing the prices of the imported product up or by imposing duties which are intended to have a comparable effect. The adverse effects of anti-dumping measures on foreign producers have an equivalent beneficial effect on domestic producers. If foreign producers, as a result of anti-dumping duties, raise prices and, therefore, become less competitive in the importing market, the domestic producers benefit by this change in the competitive position of the foreign producers. A measure against dumping, however, can also be a measure that changes the competitive positions of foreign and domestic producers by other actions which affect the relative conditions of competition between domestic and foreign producers. For example, providing a financial benefit to domestic producers has the same effect as providing a financial penalty to foreign producers. Where an action is based on the constituent elements of dumping and has the effect, either by imposing a burden on the party engaged in dumping or providing a benefit to the industry in the importing country, of offsetting or preventing dumping, it is a measure against dumping. Actions which affect the relative competitive positions of the foreign producers and a domestic industry are not limited to actions imposing additional burdens on the foreign producers, importers or the imported product; the relative positions can also be changed by actions which directly confer a benefit to the importing industry (i.e. a subsidy).

Brazil reminds the panel of the language in Article 18.1. The limitation is expressed in absolute terms, using the phrase "no specific action against dumping." It does not say "no specific action against exporters of dumped products". It does not say "no specific action against importers of dumped products". And, it does not say "no specific action against dumped products". Thus, the assumption that actions must impose a burden on the exporter, importer or the dumped product in order to be actions against dumping is simply not supported by the language of Article 18.1. Providing a benefit to the industry in the importing country has no less effect in terms of competition between the imported and domestic product than does the imposition of a financial burden on the exporter or importer.

(c) Subsidy A is not based on the constituent elements of dumping. There may be many actions which a government can take which affect the competitive relationships between domestic and foreign producers or products. Indeed, the SCM Agreement is an effort to limit these actions. However, the AD Agreement is not concerned with all such actions or even with all such actions which may affect products which have been found to be dumped. The AD Agreement places disciplines on what actions authorities may take against dumping, not all actions which may affect the competitive relationship between products.

(d) The fact that subsidy B may have effects on the conditions of competition between domestic producers and producers other than those that have been found to be dumping is irrelevant. Indeed, dumping duties have an effect beyond the impact on the competitive conditions between the domestic producers and the foreign producers subject to the anti-dumping measures. Foreign producers not subject to anti-dumping duties also benefit from the change in competitive conditions resulting from anti-dumping measures. The fact that subsidy B has an effect on competitive conditions other than those between the foreign producers found to be dumping and the domestic producers does not make the action any less an action against dumping.

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?

4.1435 According to Brazil, obviously, companies receiving subsidies improve their competitive position against companies not receiving subsidies, whether these are domestic competitors or foreign competitors. This, however, in Brazil's opinion, begs the question. The effects of the measures authorized by the AD Agreement are not limited to adverse effects on the dumping parties and beneficial effects on the domestic industry. Foreign producers not subject to anti-dumping measures may also benefit. Article 18.1 does not in any way justify defining measures against dumping based on whether parties other than the domestic industry in the importing country, the members of the domestic industry requesting the relief, or other producers in the world are the beneficiaries of such measures. Nor does it define such measures in relation to whether parties other than those found to be dumping may be adversely affected by the measure.

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)?

4.1436 The central issue is not the specifics of how the CDSOA payments are used. Money, once received, is fungible. If a company takes the CDSOA payments and uses them to improve its competitive position in the market for the product found to have been dumped, it obviously has an effect on the conditions of competition. It may also, however, allow it to take the resources it intended to devote to improving competitiveness in the dumped product and reallocate them to other products. In either case, the company has realized a competitive benefit.

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.

4.1437 Brazil argues that this is not the standard of Article 18.1. A penalty imposed on one party, in the form of anti-dumping duties, may have the same effect as a benefit provided to the opposing party, in the form of a subsidy payment. Article 18.1 does not distinguish between actions on the basis of whether the exporting producers are penalized or disciplined or the domestic producers are benefited.

4.1438 Let us assume that a country decides not to impose anti-dumping measures where the constituent elements of dumping are present, but rather to provide its domestic producers with a subsidy equal to the margin of dumping of the foreign producers. Specifically, the remedy for dumping is an equalization payment to allow domestic producers to compete with the dumped foreign product. Is this a specific action against dumping? It would be difficult to say that it is not. It is clearly an action to offset or prevent dumping. Yet, damages are not assessed against the foreign producers, the domestic producers don’t have to use the payments to price more competitively, and the impact on the foreign producers is limited to the extent that the payments are actually used by the domestic producers to lower prices. The action is an intrusion into the marketplace to offset or prevent dumping. The AD Agreement limits such intrusions, regardless of the consequences, to the anti-dumping measures specified in the agreement.

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

4.1439 According to Brazil, footnotes 24 and 56 do not permit action against dumping other than measures provided for in the AD and SCM Agreements respectively. The purpose of the footnotes is not to preclude action authorized under other provisions of the GATT 1994 which might incidentally also affect dumped or subsidized imports. The clearest example is the imposition of safeguards measures under Article XIX of the GATT 1994. Without footnotes 24 and 56, safeguard measures could not be imposed on products already subject to anti-dumping or countervailing measures. While safeguards measures cannot be imposed as a remedy for dumping or subsidization (i.e. to offset or prevent subsidization), authorities are not precluded from application of safeguard measures where anti-dumping and countervailing measures are already in place. This is the only reasonable reading of these footnotes and, indeed, is the only possible rationale for their inclusion in the agreements. Thus, the limitations in Article 18.1 and 32.1 do not prevent imposition of remedies authorized in other provisions of the GATT 1994, where the conditions for applying such measures are met, just because there are already anti-dumping or countervailing measures on the same products. The footnotes do not, however, authorize independent measures other than those specified in the agreements against dumping or subsidization.

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, how?

4.1440 Brazil considers that imposition of anti-dumping measures authorized in the AD Agreement have effects on both the export side of the equation (i.e. the foreign producer, exporter, importer and the products exported or imported) and on the import side of the equation (i.e the domestic producers). Adverse effects on one side are mirrored by beneficial effects on the other. Thus, anti-dumping measures have an adverse bearing on the export side of the equation by affecting price or making it more difficult to import a product while benefiting the import side because its competitive position is improved by the imposition of the anti-dumping measures on its competitors and its competitors products. However, a subsidy to the producers in the importing industry also has an adverse bearing on the foreign producer, exporter, importer and the products exported or imported. The subsidy provides a benefit to the domestic producers which, like anti-dumping measures, improves the competitive position of those producers relative to the foreign producers, exporters, importers and their competing product. As a result, the subsidy granted to domestic producers has an adverse bearing on the foreign competitors.

4.1441 Put simply, the actions at issue are actions which affect the competitive conditions in the market, whether they are directed at the import side or the domestic side. A subsidy to the domestic producers can have an equally adverse bearing on the parties engaged in the dumping as can an anti-dumping measure authorized by the AD Agreement.

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?

4.1442 According to Brazil, the Appellate Body used the phrase “in response to” dumping as part of its explanation of “against” dumping. In this context, “in response to” clearly means to counteract or, in the language of Article VI to “offset or prevent” dumping. It is difficult to see how one could insert an interpretation which essentially means to “encourage” or “support” dumping, which would be the case if the action taken is of benefit to dumping, dumped imports, or those engaged in dumping.

Ultimately, the meaning of measures "against" dumping is informed by Article VI and the statement therein that the actions are to offset or prevent dumping.

3. Canada

(a) Questions to the European Communities

1. The EC asserts that CDSOA offset payments would still constitute "specific action against dumping" even if they were "financed directly from the US Treasury, and in an amount unrelated to the amount of collected anti-dumping … duties" (replies to Panel questions, para. 11). Does this mean that the CDSOA offset payments would still constitute "specific action against dumping" even if they were unrelated to the imposition of an anti-dumping order?

4.1443 Canada argues that Articles 18.1 and 32.1 of the Agreements prohibit "specific actions against dumping" or a subsidy other than those set out in Article VI of GATT 1994. Article 18.1 has been interpreted by the Appellate Body as prohibiting actions "in response to *situations presenting the constituent elements of 'dumping'*."[239] Such situations may exist in a variety of circumstances: where, for example, the constituent elements are set out in a law (such as in the *United States – 1916 Act* case), or where the action in question cannot take place unless the "constituent elements" were present.

4.1444 In the case at hand, Byrd Amendment offset payments would not be made without an "order". The Byrd Amendment operates to offset the effects of the continued entry of dumped goods after a duty order is in place. It reimburses costs that are incurred for the production of like-domestic goods on the assumption that those costs arise from continued dumping despite the order. Statements by the drafters of the Amendment further clarify and support this; Canada refers in particular to the statements of Senators Byrd and DeWine set out in paragraphs 28 - 30 of the First Written Submission of Canada. Given that the object and purpose of the Byrd Amendment is to "condemn dumping" and "neutralise" subsidies, the imposition of an anti-dumping (or countervailing) order is central to the operation of the Byrd Amendment.

4.1445 Accordingly, if the Byrd Amendment were not related to such orders, it would be a different measure entirely: it would have a different purpose, and a different impact, than the measure before the Panel. Whether that *other* measure would constitute a "specific action", would depend on a constellation of alternative facts that are not at issue in this dispute.

2. The EC asserts that CDSOA offset payments constitute "specific action against dumping" because "they are paid only to producers affected by dumping and subsidization" (replies to Panel questions, para. 5). How does the nature of the recipient determine whether or not offset payments are "against" dumping?

4.1446 According to Canada, the nature of a recipient of a subsidy can have a significant impact on the legal consequences flowing from, and the legal characterisation of, that subsidy. *Indirect* subsidies paid *only* to domestic producers may come within the scope of Article III of GATT 1994, as indeed the Appellate Body found in *Canada - Periodicals*. Subsidies paid to a purely export-driven enterprise or industrial sector may well constitute subsidies *contingent upon export performance* regardless of the legal requirements for the payment of that subsidy (*Australia – Leather* and *Canada – Aircraft*).

[239] *United States – Anti-Dumping Act of 1916*, Report of the Appellate Body, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 122. [emphasis added]

4.1447 In the case of dumping, "specific action against" dumping – that is, action to deter or counter the *practice* of dumping – may involve action "against" any number of actors: the importer, the exporter, the domestic producer, or indeed consumers of "dumped" goods, to name but a few. Such action may also include the imposition of a measure not against a specific entity, but "against" the imported good, either directly or indirectly. For example, a specific consumption tax on dumped goods would fit within the definition of "specific action against dumping." Similarly, a specific subsidy to consumers of domestic like products may also constitute a "specific action against dumping."

4.1448 In this instance, the *recipients* of the Byrd Amendment subsidy are direct competitors of importers of dumped (and subsidised) goods. The Byrd Amendment requires the reimbursement of certain costs related to the production of the domestic like product, which competes directly against the dumped or subsidised goods. Such a subsidy, paid in respect of the domestic like product, has the same impact on dumped goods as does an anti-dumping duty: it makes the competing domestic like product more competitive.* Accordingly, the *nature* of the recipient of a subsidy is highly germane to the question of whether that subsidy constitutes a "specific action" within the meaning of Articles 18.1 and 32.1.

> * An anti-dumping duty is *presumed* to affect the price of an imported dumped good in the domestic market. A Member may not impose a duty higher than the margin of dumping simply because, for example, the importer absorbs the full impact of the duties and continues to sell the goods at the same price. In the same vein, paying subsidies to producers of domestic like goods must be presumed to affect the conditions of competition between the domestic like good and the dumped good, whether or not the subsidies are *in fact* used to reduce the price of domestic like goods.

(b) All 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 <u>dumped</u> imports in particular? Why?

(a) The answer is a qualified "yes", although the fact situation presented by the panel is not complete.

(b) According to the Appellate Body in the *United States - 1916 Act* case, specific action against dumping is action taken in response to situations presenting the constituent elements of dumping. Based on the limited scenario set out in the question, Subsidy B appears to be a specific action against dumping as it would not exist other than in the presence of the constituent elements of dumping and against or in response to dumping. This appears to be a payment made to "offset" dumping other than in ways permitted by Article VI of

GATT 1994. Therefore, it is a specific action against dumping that does not accord with the restrictions stated in Articles 18.1 and 32.1 of the Agreements.

(c) A difference in form may, and in most cases does, indicate a difference in function and, especially, legal consequence. For example, a subsidy paid to the producers of an exported product is not necessarily a prohibited export subsidy; the same subsidy, paid to the same producer in respect of the same export product would be illegal if it were made legally *contingent upon* export performance.

In this instance, Subsidy A is not related to dumping; it is a simple grant of money subject to the general disciplines of the SCM Agreement. Subsidy B is, however, contingent upon a finding of dumping. There would be a strong presumption that subsidy B has the effect of countering or offsetting dumping *as such*, in the sense that it would make it more difficult for goods found to have been dumped to compete against domestic like products. However, the Anti-dumping Agreement permits only *three* actions to "counter" dumping – that is, to make it more difficult for the dumped goods to compete in the domestic market by *presumably* raising the price of the dumped good. Subsidy B, which presumably lowers the price of the domestic like product, is not a permitted action.

(d) Where dumped imports are also subject to an anti-dumping duty, then those import products would face two actions against them. This would place them at a particular competitive disadvantage to domestic goods that receive subsidy B. This is especially true if the producers of dumped imports are funding subsidy B.

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?

4.1449 There are two parts to Canada's answer.

4.1450 First, as Canada noted in its First Written Submission and its First Oral Statement, the payment has the potential to change the competitive relationship between eligible domestic producers and all other domestic producers, particularly those that are not eligible for offset payments. This is why Canada has also raised a claim under Articles 5.4 and 11.4 of the Agreements. The competitive disadvantage of not receiving a payment creates incentives for companies to indicate support for petitions for investigations and during investigations or face subsidised competition from other producers who are eligible. Those competitors will be eligible to receive subsidies every year the Order is in place. Therefore, the impact continues for years.

4.1451 Second, it is also correct that foreign producers not subject to the relevant anti-dumping order would be affected by the Byrd Amendment offset payments. Canada has not denied that the Byrd Amendment is a subsidy or that WTO Members have an independent right of action under Parts II, III, and V of the SCM Agreement. Nevertheless, whatever be the collateral impact of Byrd Amendment offset payments, they operate to, and have the principal impact of, "condemning" dumping and "neutralising" subsidies. They were devised for these purposes. They operate against dumping and subsidies, and as these offset payments are not permitted actions under Article VI of GATT 1994, they are prohibited under Articles 18.1 and 32.1 of the Agreements.

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)?

4.1452 At issue in this dispute is not what the producers do with Byrd Amendment offset payments, but what the obligations of the United States are in respect of actions it may take against dumping or a subsidy.

4.1453 Accordingly, what a producer actually does with the payments it receives is not relevant to whether the United States has structured the payments in such a way that they constitute "specific action against dumping."

4.1454 Article VI:2 of GATT 1994 indicates that an action is "against" dumping where it offsets, counteracts, or prevents dumping. Therefore, if money is paid to domestic producers for costs incurred related to a product under an order, during the time the order is in place – that is, costs that arise because dumping continues and dumped goods are entering into the commerce of the United States – then the fact those costs are being reimbursed (*i.e.* offset) to those specific domestic producers is all that is necessary to constitute action "against" dumping. The reimbursement of the costs and the subsidy to domestic producers is in addition to the payment of duties and threaten imports with decreased competitive position.

4.1455 In this respect Canada recalls the disciplines of the SCM Agreement generally and, especially, the *presumptions* underlying those disciplines. For example, under Part V of the SCM Agreement, countervailing measures may be imposed on "subsidised" goods where the subsidies are specific and where "material injury" is caused by the goods in question. Article 15.1, in particular, provides that a determination of injury must be made based on an "objective examination" of the volume of the subsidised imports and the consequent impact on domestic producers. In other words, Article 15 *presumes* that a subsidised good enjoys a competitive advantage, regardless of what the recipients of the subsidy might *actually* have done with the subsidy in question. More important, this presumption is not rebuttable: a subsidised producer does not escape discipline under Part V if it proves that it spent the subsidies in question on holidays for its employees, rather than on bolstering the competitiveness of its exported product.

4.1456 Therefore, subsidies paid to a domestic industry must be presumed to increase the competitiveness of the domestic like product; and to the extent that this is done with the object and effect of "condemning" dumping and "neutralising" subsidies, it is a specific action not permitted by Articles 18.1 and 32.1 of the Agreements.

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.

4.1457 Canada is of the view that nothing in the text of Articles 18.1 and 32.1 provides for such a distinction; nothing in the context or object and purpose of these Articles would direct the Panel to read into the Articles words and concepts that are not there.

4.1458 In any event, as a matter of fact the CDSOA is not an "untied" subsidy. The Byrd Amendment requires the payment of "tied" subsidies in two ways. First, the subsidies are paid only where there are dumped or subsidised goods in the market. The offset payments are therefore "tied" to the presence in the market of such goods, to an amount equal to the duties imposed on, *collected* from, the importation of such goods. Second, the offset payments *reimburse* certain costs directly tied to the production of the domestic like product to domestic producers who participated in an investigation. In Canada's respectful submission, the distinction between future accounting for subsidies paid, and reimbursement of specific actual expenditure is one without a difference.

4.1459 As well, Byrd Amendment offset payments do indeed have a direct, automatic and negative impact on "entities engaged in dumping." Payments must be made where duties have been collected and a domestic producer meets the criteria set in the Byrd Amendment. This action has a direct impact on importers of dumped goods in that money is given directly to competitors for expenses related to the production of the domestic like product.

4.1460 Finally, the panels in the *United States – 1916 Act* case noted that a relevant question to determine whether an action is specific action against dumping under Article 18.1 is whether the objective reason for the imposition of a measure is dumping or something else, such as an increase in imports for a safeguard action. In noting that certain actions such as safeguards are not "specific action" the Japan Panel stated that, "even though those measures may be legally applied to address dumping, the basis for their imposition would not objectively be 'dumping', but its causes or effects.… [D]umping could not be considered as the objective reason for the imposition of the measures …".[240]

4.1461 The Byrd Amendment does not operate but for the continued existence of dumped or subsidised products within the US after an order is imposed. The continued existence of dumping and subsidisation are the "objective reason for the imposition of the measure." That "affected domestic producers" and "qualifying expenditures" exist to receive a payment only reinforce the conclusion that there is continued existence of dumping and subsidies that must be offset.

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

4.1462 The United States argues that the SCM Agreement does not limit the right of a Member to use subsidies as measures to counteract dumping and subsidisation. Canada disagrees.

4.1463 The WTO Agreement restricts a Member's right to counter-subsidise. Where a counter-subsidy amounts to an export contingent or an import substitution subsidy, it is prohibited by Article 3. Where such a subsidy falls within the terms of Articles III:2 or III:4 of GATT 1994 and but not of Article III:8, it is prohibited by that Article. And where a counter-subsidy is action taken in respect to the constituent elements of dumping or a subsidy, it is subject to the prohibition set out in Article 18.1 and 32.1 of the Agreements. A Member may not avoid that prohibition by taking an action in the form of a counter-subsidy, where a counter-subsidy meets the requirements of these Articles. Footnote 35 to Article 10 of the SCM Agreement specifically limits actions that may be taken against subsidies to countermeasures authorised under that Agreement, duties, provisional duties and undertaking agreements.

[240] *United States – Anti-Dumping Act of 1916 (Complaint by Japan)*, Report of the Panel, WT/DS162/R, adopted 26 September 2000, para. 6.228.

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, how?

4.1464 Canada asserts that a measure is "against dumping" if it counters the *practice* of dumping.

4.1465 Article 18.1 refers to "specific action against dumping." In context, and in the light of the findings of the Appellate Body in respect of Article 18.1, this is action that in some way *counters* or "condemns" dumping – action that does or is capable of adversely affecting the *practice* of dumping *as such* so that either the practice is discontinued, or its effects in the market are neutralised. In other words, such specific actions are, in a market context, measures that make dumping a costly activity or practice.

4.1466 Anti-dumping duties have the potential of raising the price of a dumped good in the domestic market and therefore making it less competitive. Price undertakings simply raise the price of a dumped good and "equalise" the conditions of competition of that good in the domestic market. The Anti-dumping Agreement permits both of these "specific actions" (and provisional measures). It prohibits all other measures that make dumping a costly activity or practice. These may include (the list is not exhaustive):

- fines or imprisonment for the importer;
- product sales prohibitions or labelling requirements aimed at dumped goods ("This is a dumped product");
- internal taxes aimed at dumped goods;
- internal sales or marketing regulations governing dumped goods ("We sell dumped goods" signs posted in shop windows);
- fines or imprisonment for *consumers* of dumped goods; or
- other measures that make the dumped good less competitive in the domestic market, such as subsidies to competitors specifically tied to dumping or the dumped good in question.

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?

4.1467 Canada considers that Articles 18.1 and 32.1 of the Agreements provide that specific action against dumping or a subsidy must be in accordance with GATT 1994. The Appellate Body interpreted the phrase "specific action against" as "action taken in response to situations presenting the constituent elements of dumping". It interpreted "against" to mean "in response to"; the Appellate Body used these terms as synonyms.

4.1468 The Vienna Convention requires that a treaty is interpreted in good faith, in accordance with the ordinary meaning of its terms *in the light of its context and object and purpose*. Accordingly, the Appellate Body could not have intended its interpretation of the word "against" to mean "*beneficially* in response to." The Appellate Body's interpretation makes no sense if it were to be divorced from the specific treaty language it was interpreting in the context in which that treaty language was found.

4.1469 Accordingly, action that benefits dumping or imports or those engaged in dumping is not specific action "against" dumping.

(c) Questions to Canada

10. At para. 11 of its second oral statement, Canada states that the 1916 Act was an action "in response to (against, countering, condemning, offsetting)" a practice. What is the basis for equating the term "in response to" with the terms "countering", "condemning", and "offsetting"?

4.1470 In Canada's view, Article 18.1 of the Anti-dumping Agreement provides that specific action *against* dumping must be in accordance with GATT 1994. The Appellate Body, as noted in the previous question, found that specific action against dumping is action taken "in response to" situations presenting the constituent elements of dumping. This is the basis for equating "in response to" to "against".

4.1471 Further, Article VI of GATT 1994 indicates that action that offsets or prevents dumping is action against the practice of dumping. Article VI:2 indicates that Members may apply a duty to offset or prevent dumping. To offset something is to counteract it. The dictionary defines "offset" as "[a] counterbalance to or compensation for something else; a consideration or amount diminishing or neutralizing the effect of a contrary one; a set-off."[241] Further, GATT Article VI:1 provides that Members recognize that dumping is to be "condemned" if it causes or threatens injury.

(d) 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?

4.1472 According to Canada, at issue here is whether the Act and the payments under it fall within the scope of Articles 18.1 and 32.1 of the Agreements. This is determined by whether the Act calls for action in response to (or "against") situations presenting the constituent elements of dumping or subsidies. What producers do with the payments once they receive them does not bear upon that issue.

4.1473 The Act provides for payments to reimburse costs incurred because of a continued presence of dumped and subsidised imports in the US market after a duty is imposed. This money is paid to domestic producers to offset the costs they incurred for the production of the like-domestic product that is injured because of dumping or subsidisation. This makes it action against dumping or subsidies. Money is fungible; it can be used for any purpose. Producers are being reimbursed for costs already incurred due to dumping and subsidisation; this critical point establishes that the payments amount to "specific action against dumping" or a subsidy.

4.1474 The restrictions on the costs that may be reimbursed further support this conclusion. A certification for reimbursement must enumerate the category under which an expense falls and the amount claimed. The expense must relate to the production of the like-domestic good to that subject to the order and be incurred after the order is imposed and before it terminates. The relevant categories of "qualifying expenditures" are capital operational expenditures:

(a) manufacturing facilities

[241] *The New Shorter Oxford English Dictionary*, Vol. 2 (Oxford: Clarendon Press, 1993), p. 1985. (Exhibit CDA-7)

(b) equipment
(c) research and development
(d) personnel training
(e) acquisition and technology
(f) health care benefits to employees paid for by the employer
(g) pension benefits to employees paid for by the employer
(h) environmental equipment, training or technology
(i) acquisition of raw materials and other inputs
(j) working capital or other funds needed to maintain production

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?

4.1475 Canada submits that the reimbursement must relate to the dumped product; and the payment is only in the amount of the duties collected.

4. Chile

(a) Questions to all 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?

4.1476 Chile does not understand the usefulness of this question since it does not address the issue raised by Chile and the complainants. The hypothesis presented by the Panel is not even related to the characteristics of the CDSOA since the question is based in a programme that benefits all domestic producers, a substantial difference with the CDSOA. Having said that and for the purpose of the hypothesis, Subsidy B should be treated as a specific action "against" dumping because the condition that triggers the payment of the subsidy is the finding of dumping, i.e., a situation that has the constituent elements of dumping. Hence, the subsidy is an action taken specifically against dumping.

(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?

4.1477 Chile is of the view that the term "impact" is very broad and ambiguous. Nevertheless an action against dumping is *per se* a specific action not because of its impact but because it is taken in response to a situation that presents the constituents elements of dumping. The potential or actual impact of an action or measure is not within the legal elements that have to be considered in order to qualify it as a specific action against dumping. Neither GATT Article VI as interpreted by ADA Article neither 18.1 nor the 1916 Act case incorporate the notion of impact of a subsidy as part of the definition of “specific action against dumping”.

(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?

4.1478 Again, Chile does not understand the scope and meaning of this question and how it is related with the question raised by the complainants in this dispute, since it is based on the hypothetical case not even closely similar to the CDSOA, given that one of the distinguishable elements in the latter is not present in the hypothesis presented by the Panel, i.e. that offsets are distributed only to "affected" producers

4.1479 But for academic purposes Chile will answer the Panel's question with a no, not particularly. The competitive advantages between domestic producers and dumped imports could be affected or influenced by a great number of factors. For example, the amount of the subsidy, the presence of other subsidies, the cost of production, the social—economic conditions, the eligibility requirements of domestic producers to benefit from the subsidy, the qualifying expenditures covered by the subsidy, etc. In other words, this impact has to be analysed on a case-by-case basis and having all the relevant factors at hand.

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?

4.1480 Assuming that the question refers to producers of the same product, and as Chile said in its second oral statement[242] the offset payment will obviously change the competitive relationship between the domestic producer that receives the payment and all other producers, both domestics and foreigners (subject or not to the relevant anti-dumping order).

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)?

4.1481 Chile considers that whether or not the affected producers are restricted to use the offset payments exclusively to bolster their competitive position *vis-à-vis* imports subject to the relevant anti-dumping order, what constitutes the CDSOA a “specific action against dumping” is that it is an action taken in response to a situation that presents the constituent elements of dumping.

4.1482 The main element to consider if the CDSOA is a “specific action against dumping” is not the use the affected producers may give to the offset payments. If it weren't only restricted "to bolster their competitive position..." it would still be a "specific action against dumping". The WTO commitments are made by governments and not by their private sectors. The question that must be raised is why those producers are eligible for these payments. As Chile stated in February, *"It is not the spending of the money, in and of itself,(…) It is the manner in which the United States spends that*

[242] Para. 21, Second Oral Statement by Chile, 12 March 2002

money that constitutes a violation of the various provisions cited by the complainants."[243] It is the fact that only with a positive finding in a dumping investigation (i.e., when dumping, injury and causality have been proved) the offset payments are triggered. Whether domestic producers use this money to go on holidays or to bolster their competitive position is not an issue for purposes of considering the CDSOA a "specific action against dumping".

4.1483 Moreover, as Chile has stated earlier, money is fungible, so whether the beneficiaries use the money for what is provided or intended to, is something very difficult to prove escaping from the scope of the investigating authorities. If it were, it means that for future investigations, complaining parties will be in an obligation to present evidence that payments made by governments were in fact used in alleviating or improving the competitive position of domestic industry, otherwise, it would not be neither a subsidy nor a "specific action against dumping".

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.

4.1484 Before answering the question, Chile would like to point out that as stated by the Panel, these questions do not prejudge the Panel's findings. In that sense, Chile understands that in this question in particular the Panel is not making a finding that action under the CDSOA has not an automatic, direct, negative impact on entities engaged in dumping. If that were the case, Chile certainly does not agree with that conclusion.

4.1485 For the purpose of Article 18.1 of the AD Agreement, both measures are specific actions against dumping because both are an "action that is taken in response to situations presenting the constituent elements of "dumping" "[244]. The Appellate Body in the 1916 Act case did not incorporate adjectives as "automatic" or "direct" for a measure to be considered a "specific action". The only requisite was - at a minimum - that the action is taken when the constituent elements of "dumping" are present.

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

4.1486 Chile would like to point out that there seems to be an error with the numbering of the paragraphs between the oral statement the US rendered at the Second Substantive Meeting with the Panel and the electronic version the US sent to the Secretary and the parties. Therefore, Chile would like to know which version of the US submission the Panel is making reference to in its question, before commenting on it.

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, how?

4.1487 Chile is of the view that the question about the qualification of a measure as a "specific action against dumping" should be analysed on a normative or prescriptive basis rather than a descriptive one. If a measure is taken in response to a situation that has the constituent elements of dumping, this measure shall comply with the obligations and legal standards set forth in Article VI of GATT 1994 as interpreted by the ADA. Hence, the measure must only consist in one relief adopting one of the

[243] Para. 4, Second Written Submission of Japan and Chile, 27 February 2002.
[244] Para. 122 Appellate Body, WT/DS136/AB/R, WT/DS162AB/R.

three forms of relieves allowed by this normative frame. Under this normative frame, the adverse bearing of a measure taken in response to dumping is a factual issue not part of what has to be assessed in order to consider the measure a specific action against dumping.

4.1488 In addition, there seems to be confusion between the expected results from an action and their effects. Country A may design a measure against dumping (or whatever) and expect some results. Whether these results are finally reached is other problem. In the case under consideration by the Panel, CDSOA stands as a second specific response to dumping, because, besides the anti-dumping measure adopted, the domestic producers will receive an offset payment given the same reason. This means that dumping is being tackled by two ways.

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?

4.1489 Chile sees no logic in this question for purposes of what is at stake in this dispute. Furthermore, Chile sees no logic in an action in response to dumping intended to benefit dumping, dumped imports or those engaged in dumping.

4.1490 In its answers to the questions raised by the Panel on 26 February, Chile addressed this point. In that opportunity, and on the basis of paragraph 122 of the Appellate Body report on 1916 Act, Chile stated that "nothing in that report allows to conclude that a measure in response to dumping (or subsidy) it is not a measure against dumping." Chile added that its interpretation was that the Appellate Body was plainly using the concept of "in response to" as a way to explain what "action against" should be understood to mean. So in that sense the finding suggests that "specific action against dumping" is not a subset of action "in response to" dumping. Thus, even if the response could have positive effects, it will be an action against dumping.

4.1491 The key issue here is that an action is specific against dumping because it is adopted in response to a situation that has the constituent element of dumping, whether or not it is finally "of benefit to dumping, dumped imports, or those engaged in dumping".

4.1492 Article 18.1 of the ADA, the ADA in itself and Article VI of GATT 1994 represent the express and written intention of all WTO Members to address and regulate the treatment of dumping by measures taken against it ("in opposition to"). This means that even though dumping is not in itself prohibited under the WTO, under some circumstances, under certain conditions and following certain procedures, Members are allowed to adopt some trade remedies against it. That is why the Panel or the Appellate Body in the 1916 Act case never were in a position nor intended to consider if a measure taken in response to dumping was a specific measure against it when it benefited dumping, dumped imports, or those engaged in dumping.

5. European Communities, India, Indonesia and Thailand

(a) Questions to the European Communities

1. The EC asserts that CDSOA offset payments would still constitute "specific action against dumping" even if they were "financed directly from the US Treasury, and in an amount unrelated to the amount of collected anti-dumping … duties" (replies to Panel questions, para. 11). Does this mean that the CDSOA offset payments would still constitute "specific action against dumping" even if they were unrelated to the imposition of an anti-dumping order?

4.1493 The *offset* payments would constitute "specific action against dumping" as long as they were made in response to a finding of dumping, regardless of whether, in addition to the *offset* payments, the US authorities imposed anti-dumping duties on the basis of that finding.

2. The EC asserts that CDSOA offset payments constitute "specific action against dumping" because "they are paid only to producers affected by dumping and subsidization" (replies to Panel questions, para. 5). How does the nature of the recipient determine whether or not offset payments are "against" dumping?

4.1494 The remark cited by the Panel does not address the meaning of the term "against" as such. The point made by the EC was that the *offset* payments constitute action taken "in response to a situation presenting the constituent elements of dumping" (and, therefore, "specific action against dumping") because they are paid exclusively to the "affected domestic producers", the existence of which presupposes a finding of dumping. This was explained in further detail in the EC's Reply to Question 2.

(b) Questions to all 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 <u>dumped</u> imports in particular? Why?

4.1495 The EC, India, Indonesia and Thailand agree that Subsidy A is not "specific action against dumping" because it is not taken "in response to a situation presenting the constituent elements of dumping". The EC, India, Indonesia and Thailand further agree that Subsidy B should be treated as a specific action "against" dumping, because it is a "response to a situation presenting the constituent elements of dumping".

4.1496 The difference between the impact of Subsidies A and B is the following: While both can have an adverse "impact" on dumped imports, Subsidy A, unlike Subsidy B, does nothing to prevent or stop dumping as such. Because Subsidy A is not a response to dumping, foreign producers cannot prevent its granting by refraining from dumping. Thus, Subsidy A has no dissuasive effect against dumping. To the contrary, Subsidy A may encourage foreign exporters to engage in dumping in order to match the subsidised prices of the domestic producers.

4.1497 In contrast, Subsidy B, like the *offset* payments, is a "penalty" for dumping, which may, as such, dissuade foreign producers from engaging in dumping or induce them to stop dumping. This effect of Subsidy B is not addressed under Part III of the SCM Agreement, because it does not result from the subsidy as such, but from the condition for its granting.

4.1498 The following example illustrates further the difference between Subsidy A and Subsidy B. If an importer of dumped goods is sentenced to prison for customs fraud committed in connection with the importation of those goods the penalty has the same "impact" upon that importer, and

consequently upon the imported goods, as one of the actions at issue in 1916 Act. Yet, it is not "specific action against dumping" because, being a response to customs fraud and not to dumping, it does nothing to prevent or stop dumping as such.

4.1499 This example evidences that what distinguishes a "specific action against dumping" from other actions with an adverse "impact" upon dumped imports (or upon "entities engaged in dumping") is the fact that it is taken in response to dumping, rather than the nature or the extent of such "impact" or the precise way in which it is brought about.

4.1500 Finally, as will be explained in its reply to question 4, the EC agrees that Subsidy B would provide domestic producers of product X with a greater competitive advantage over dumped imports in particular.

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?

4.1501 As a "collateral" effect, the CDSOA may change also the competitive relationship between the "affected" producers and non-dumped imports/"non-affected" producers. However, because the CDSOA is a response to "dumping", rather than to "imports" or to "domestic competition", its effects upon dumped imports are qualitatively different.

4.1502 First, the very existence of the CDSOA has a deterring effect on dumping. The mere possibility that the *offsets* payments will harm their exports may dissuade foreign exporters from engaging in dumping. This dissuasive effect is additional to that of the ordinary US anti-dumping laws. In contrast, the CDSOA has no dissuasive effect with respect to non-dumped imports or with respect to sales by the domestic producers because it is not a response to those practices. The exporters of non-dumped goods and the non-affected domestic producers can do nothing and, therefore, will do nothing to prevent the payment of the *offsets*.

4.1503 Second, once the *offset* payments have been made, an exporter of non-dumped products, or a non-affected domestic producer, may respond by lowering their prices, thereby cancelling the effects of the *offset* payments. In contrast, if the exporters of dumped goods did the same, that would increase their dumping margin, which would lead to higher anti-dumping duties and, consequently, to bigger *offset* payments, thereby increasing, rather than reducing the price advantage of the "affected" domestic producers.

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)?

4.1504 As explained below in the reply to Question 11, the *offset* payments are tied to the production of products subject to anti-dumping orders and, therefore, must be assumed to benefit only those

products in accordance with standard principles for the attribution of subsidies. Indeed, the CDSOA itself is premised on that assumption.

4.1505 On the other hand, the EC, India, Indonesia and Thailand doubt that, in practice, the affected producers may "bolster their competitive position" vis-à-vis dumped imports of the subject products without, at the same time, bolstering also their competitive position vis-à-vis non-dumped imports and other domestic sales of like products. At any rate, that would not preclude the *offset* payments from being "specific action against dumping". The Panel's question assumes that "specific action against dumping" means "action that can have an adverse impact on dumped imports exclusively". For the reasons explained below, the EC, India, Indonesia and Thailand do not agree with that proposition.

4.1506 As made clear by the Appellate Body, a "specific action against dumping" is an action taken in response to dumping. Of course, if such action is to be effective in order to prevent or *offset* dumping (unlike, for example, flying the flag at half mast), it must be capable of having some sort of adverse impact on the dumped imports (or on the "entities engaged in dumping"). But, as explained above, what distinguishes a "specific action against dumping" is the fact that it is taken in response to dumping, rather than the extent of such adverse impact.

4.1507 The *offset* payments are not paid in response to domestic competition or in response to non-dumped imports, but only and exclusively in response to dumping. For that reason, they constitute "specific action against dumping".

4.1508 Furthermore, the fact that the *offset* payments can have a "collateral" adverse impact on other imports or on non-affected domestic producers does not detract from the fact that, at the same time, they have also an adverse impact on dumped imports. Thus, the CDSOA is not just a "specific action against dumping", but also one which can be effective in order to prevent or offset dumping.

4.1509 At any rate, as shown above, the effects of the CDSOA with respect to dumping are qualitatively different from its effects with respect to non-dumped imports/sales by "non-affected" domestic producers. Thus, even if it were correct that "specific action against dumping" means "action that can have an adverse impact exclusively on dumped imports", the CDSOA would still be "specific action against dumping" to the extent of that difference.

4.1510 In particular, the CDSOA has a dissuasive effect "exclusively" against dumping. The fact that the *offset* payments may have also an incidental adverse impact on non-dumped imports/non-affected domestic producers does not negate such "exclusive" effect. Nor, even less, does the theoretical possibility that, against the US Congress' own expectations, the *offsets* may be used to cross-subsidise other products.

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.

4.1511 The EC, India, Indonesia and Thailand argue that it is obvious that the "actions" provided under the *1916 Anti-dumping Act* do not operate "against" dumping in the same way as the *offset* payments do. But this does not preclude the *offset* payments from being also "specific action against dumping".

4.1512 The *offset* payments can have also a "negative impact" on "entities engaged in dumping". The only difference between the *offset* payments and the actions at issue in the 1916 Act is that the latter applied "directly" to the importers.

4.1513 However, there is nothing in the 1916 Act panel reports or in the Appellate Body report which suggests that the notion of "specific action against dumping" should be restricted to those types of measures which apply "directly" to "entities engaged in dumping".

4.1514 To the contrary, the panels in 1916 Act concluded that "the type of measures imposed under the 1916 Act is not relevant to determining whether the 1916 Act falls within the scope of Article VI" and that "whether or not Article VI applies does not depend on whether a Member addresses dumping through the imposition of duties or through the imposition of other remedies … [T]he application of Article VI depends on whether the practice that triggers the imposition of the measures is dumping."

4.1515 The Appellate Body agreed with the panels and ruled that "specific action against dumping" means "action that is taken in response to a situation presenting the constituent elements of dumping". Furthermore, the Appellate Body observed that "specific action against dumping could take a wide variety of forms".

4.1516 In sum, what distinguishes a "specific action against dumping" from other actions with an "adverse impact" on dumped imports is that it is taken in response to dumping, rather than the nature or extent of such impact or the precise way in which it is brought about.

4.1517 Furthermore, in the context of the SCM Agreement, the view that "specific action against a subsidy" includes only action that applies "directly" to subsidised imports (or entities engaged in subsidization) would lead to manifestly absurd results. The "countermeasures" provided for in Articles 4 and 7 of the SCM Agreement may take a wide variety of forms, including both measures which would qualify as "specific action against a subsidy" according to the US interpretation (e.g. a duty on imports which benefit from export subsidies or which cause "adverse effects" of the type described in Article 5.1 a)) and measures which have only an indirect impact on the subsidising Government (e.g. a duty on imports of a different product). Thus, on the US interpretation, Article 32.1 would have to be read as providing that some "countermeasures" (those which apply directly to imports of subsidised goods) have to be taken "in accordance" with Parts II or III of the SCM Agreement, while other countermeasures (those which do not apply "directly" to imports of subsidised goods) would not. Clearly, such distinction would make no sense.

4.1518 Presumably, the US response to the above would be that the provisions of the GATT 1994 referred to in Article 32.1 are exclusively those of Article VI. As explained elsewhere, that view is incorrect: the SCM Agreement is also an interpretation of Article XVI. But, assuming *arguendo* that it were not, the US interpretation of "specific action against a subsidy" as action that applies "directly" to subsidised imports would lead to an even more absurd result. It would mean, for example, that if a Member wanted to take countermeasures against a prohibited export subsidy in the form of import duties on the subsidised products it would have to comply first with the substantive and procedural requirements of Part V of the SCM Agreement.

4.1519 The only logical interpretation of Article 32.1 is that "countermeasures" are always "specific action against a subsidy" and must be taken "in accordance with" Article XVI, as interpreted by Parts II and III.

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

4.1520 The EC, India, Indonesia and Thailand consider that the US concerns are exaggerated. The mere fact of granting a subsidy to a company that competes with a foreign producer, which happens to have received a subsidy first would not constitute a "specific action against a subsidy". For that, it would be necessary that the subsidy could be characterised as action that "may be taken only when the

constituent elements of a subsidy are present". In other words, it would have to be shown that the granting of the subsidy was contingent upon a previous finding of foreign subsidization. The Complainants are not aware that other WTO Members "engage regularly" in such kind of "conditional" counter-subsidization.

4.1521 Footnote 35 of the SCM Agreement does not refer to dispute settlement action under Article 32.1 as a permitted form of relief because such action is not "specific action against a subsidy". Rather, it is an action against a "specific action against a subsidy" prohibited by Article 32.1, which prohibited action may take "a wide variety of forms", including that of a subsidy.

4.1522 The action taken by the EC, India, Indonesia and Thailand against the CDSOA is not a response to a subsidy *qua* subsidy. The EC, India, Indonesia and Thailand do not claim that the CDSOA is prohibited by Article 32.1 because it is a subsidy, but because it is a specific action against a subsidy. Indeed, the Complainants have not even claimed that the CDSOA is a subsidy. A finding that the CDSOA violates Article 32.1 is not dependent upon a finding that it constitutes a "subsidy" within the meaning of Article 1 of the SCM Agreement. In sum, the relief, which the EC, India, Indonesia and Thailand seek to obtain in this case is not relief from a subsidy but rather from a violation of Article 32.1.

4.1523 It may be added that, by the same token, footnote 35 does not mention dispute settlement action based upon Article III:2 of the GATT as a permitted form of relief. And yet it is well established that the fact that a discriminatory tax constitutes a subsidy for the purposes of the SCM Agreement does not exclude the application of Article III:2.

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, how?

4.1524 As mentioned above, the EC, India, Indonesia and Thailand would agree that, to be effective, a "specific action against dumping" must be capable of having some adverse impact upon the dumped imports (or upon the "entities engaged in dumping"). The *offset* payments can have such an adverse impact upon dumped imports.

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?

4.1525 The EC, India, Indonesia and Thailand refer to their reply to Question 8.

(c) 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?

4.1526 The CDSOA does not say what the affected producers must do with the *offset* payments, because the conditions for receiving the *offset* payments are already sufficient to ensure that they achieve their stated purpose (i.e. to offset continued dumping or subsidization).

1.1527 Contrary to what is stated in Question 6, the *offset* payments are not "untied" subsidies. They are clearly tied to the production of the products, which are the subject of an anti-dumping or a countervailing duty order:

- first, the *offset* payments are paid exclusively to the producers of subject products. A company which does not manufacture the product covered by the order concerned during a fiscal year is not entitled to the distribution of the duties collected during that year pursuant to that order.

- second, the *offset* payments are paid for, and in proportion to, certain types of "qualifying expenses" incurred after the issuance of the anti-dumping or countervailing duty order with respect to the production of the same product which is the subject of the order in question.

4.1528 Thus, the *offset* payments operate as a reimbursement of certain expenses incurred by the affected producers with respect to the production of subject products. As such, the *offset* payments lower the production cost of the subject products and must be assumed to be passed through into lower prices for those products.

4.1529 This is not just the EC, India, Indonesia and Thailand's assumption. The CDSOA is premised upon the same assumption. If the *offset* payment were not used for the benefit of the subject products, the CDSOA could not achieve its stated purpose to offset continued dumping and subsidization.

4.1530 Furthermore, the assumption that the subsidies that are tied to the production of a given product are used for the benefit of that product is a sound and generally accepted one. The same assumption is made in paragraph 3 of Annex IV of the SCM Agreement as well as by most, if not all the countervailing-duty authorities around the world.

4.1531 For instance, the countervailing duty regulations of the United States provide that "if a subsidy is tied to the production or sale of a particular product, the Secretary will attribute the subsidy only to that product."

4.1532 In the view of the US authorities, whether a subsidy is tied to a given product requires a case-by-case judgement. Nevertheless, those authorities have indicated that, because money is fungible, in deciding whether a subsidy is "tied" they will take into account the purpose of the subsidy at the time when it is granted, rather than how it is actually used.

4.1533 In the case at hand, both the stated purpose of the CDSOA and the purpose revealed by its design and structure (and in particular by the two above mentioned conditions) is to benefit the subject products.

4.1534 Of course, since money is fungible, there is a theoretical possibility that the *offset* payments may be used to cross-subsidise a different product. But that risk is inherent in any product-tied production subsidy. There are no "conditions" which can exclude completely such possibility, short of controlling the price of the subsidised products.

4.1535 That theoretical possibility, nevertheless, does not detract from the indisputable fact that the granting of the *offset* payments is tied to the anticipation that they will be used for the benefit of the subject products. Quite simply, the US Congress would not have passed the CDSOA if it had expected that the *offset* payments would not be used for offsetting dumping or subsidization.

4.1536 Nor does the theoretical possibility that the *offsets* may be diverted to other uses deprive the CDSOA from its dissuading effects *vis-à-vis* foreign exporters of the subject products, which are based on their rational expectations as to how the affected domestic producers are likely to use the *offsets*. Indeed, if the US Congress expects that the *offset* payments will be used to offset dumping and subsidization, it is questionable whether it would be wise for the foreign exporters to take a different view.

6. Japan

(a) Questions to the European Communities

1. The EC asserts that CDSOA offset payments would still constitute "specific action against dumping" even if they were "financed directly from the US Treasury, and in an amount unrelated to the amount of collected anti-dumping … duties" (replies to Panel questions, para. 11). Does this mean that the CDSOA offset payments would still constitute "specific action against dumping" even if they were unrelated to the imposition of an anti-dumping order?

4.1537 Japan shares the position of the EC. The source of the funds, in and of itself, is not the determinative factor of whether the CDSOA offset payments constitute "specific action against dumping." Regardless of the source of the funds, the payments constitute "specific action against dumping" because they are made only when the constituent elements of dumping have been established and are made to counteract dumping. The CDSOA offset payments would still constitute "specific action against dumping" if they were conditioned on the presence of the constituent elements of dumping and taken in response to situations presenting those constituent elements, even if the source of funds for the offset payments were unrelated to the imposition of an anti-dumping order. (See Japan's second submission and Question 3 below for further discussion of the issue of "specific action against dumping").

2. The EC asserts that CDSOA offset payments constitute "specific action against dumping" because "they are paid only to producers affected by dumping and subsidization" (replies to Panel questions, para. 5). How does the nature of the recipient determine whether or not offset payments are "against" dumping?

4.1538 Japan shares the position of the EC. The recipient of the CDSOA offset payments is one of the crucial factors when determining whether the offset payment constitutes a "specific action against dumping."

4.1539 The CDSOA offset payment is a countermeasure against dumping. The offset payment is made only when the investigating authority determines that US domestic producers are injured by dumped imports. The CDSOA offset payments are made for the "qualifying expenditure", *i.e.*, production costs of like products, to compensate these costs. The CDSOA offset payments thus operate to counteract dumping. The payment under the CDSOA therefore is a specific action against dumping.

4.1540 The Panel should not be confused by the misleading explanations of the United States that the CDSOA sets forth no condition on how recipients use the payment so it would be used for whatever they want.

(b) Questions to all 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 <u>dumped</u> imports in particular? Why?

4.1541 Japan understands that "product X" in subsidy A is not considered as being dumped, since the granting of subsidy A is *not tied in any way* to the determination of dumping.

(a) Yes.

(b) Because subsidy B is made: (i) "*subject to a finding of dumping"* of imported product X; and, (ii) to domestic producers of product X. A subsidy that is "subject to a finding of dumping" is conditioned and premised on the presence of the constituent elements of dumping. Thus, subsidy B is a "specific action against dumping."

The Appellate Body found in the 1916 Act case that "specific actions against dumping" are those actions "taken in response to situations presenting the constituent elements of dumping."[245] The interpretation of "specific action against dumping", i.e., actions "taken in response to situations presenting the constituent elements of dumping" encompasses two elements: (i) the action is conditioned upon situations presenting the constituent elements of dumping; and, (ii) the action is taken to counteract[246] dumping.

Subsidy B satisfies these two elements. In comparison, subsidy A would not constitute a specific action against dumping because the grant of subsidy A is not conditioned on the presence of "constituent elements of dumping."

(c) The fact that subsidy A is not a specific action against dumping, whereas subsidy B is such an action, does not depend on impact, if by impact is meant the effect on the recipient. The difference is not in the effect but in the criteria for eligibility, i.e. whether an action is conditioned upon the situations presenting constituent elements of dumping. To receive subsidy A, a recipient does not have to establish the constituent elements of dumping; to receive subsidy B, it must do so.

(d) Subsidy B is an action against dumping beyond those actions permitted by the Agreement (provisional measures, final measures, and undertakings) to counteract dumping. The question is whether subsidy B counteracts dumping. Whether subsidy B confers an advantage to domestic producers over non-dumped imports, if any, in addition to an advantage over dumped imports, does not affect the conclusion that subsidy B addresses and counteracts dumping.

[245] 1916 Act, para. 122.

[246] According to the Shorter Oxford Dictionary, "counteract" means to "neutralize the action or effect of".

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?

4.1542 While CDSOA payments are made to compensate for "qualifying expenditures", the financial advantage they grant may affect all imports, not just dumped imports. Of course, the payment is conditioned on the presence of dumping, and it is explicitly aimed at dumping. The fact that the CDSOA's offset payments may have an impact on non-dumped imports, however, does not negate the fact that the offset payments counteract dumping and are therefore a specific action against dumping.

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)?

4.1543 The offset payment under CDSOA is a specific action against dumping, regardless and independently of how the domestic producer chooses to use the proceeds of the offset payment. How an affected domestic producer happens to use the proceeds of an offset payment is no more relevant than how a recipient uses the proceeds of a subsidy conditioned on export. A finding of prohibited export subsidy is not conditioned on how the recipient chooses to use the subsidy. Since money is fungible, both could use the proceeds for anything – advertising expenditures, for example. In each instance, the legally relevant facts are the criteria established by a Member government to establish eligibility for the payment, not what a private party does with the payment after it is received.

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.

4.1544 No. Japan considers that in both instances, specific action, beyond that permitted by the Agreement, is being taken against dumping. If the specific action is not permitted, it does not matter what form it takes or on which element a Member takes the action.

4.1545 The CDSOA operates to counteract dumping by giving advantages to domestic producers. There is no basis in the text of relevant agreements or in the reports of the Appellate Body or the Panel to limit "specific action against dumping" to direct burden on importers or exporters.

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

4.1546 In paragraphs 44, 45 and 46 the United States argues that, in making CDSOA payments in response to subsidies, it is merely engaged in permitted "counter-subsidization". The United States failed to substantiate its claim that "Members regularly engage in counter-subsidization."[247] Japan is

[247] Oral Statement of the Untied States, 12 March 2002, para. 44.

not aware of any Member taking counter-subsidization against another Member's subsidy, except for the CDSOA. The United States alleges that Canada's subsidy last year would be "in response to and on exactly the same subsidized terms as those given by Brazil."[248] The United States, however, produced no evidence or a citation of the allegedly quoted case to support its claim.

4.1547 Nothing in the WTO covered agreements or any Panel or Appellate Body report indicates that WTO Members may or do "regularly engage in counter-subsidization" when faced with a subsidy from another Member, as the United States claims. The United States asserts, incorrectly, that the CDSOA offset payment is "a specific action taken in response to a subsidy" which is permissible under the SCM Agreement. There are no provisions that permit Members to take a counter-subsidy in response to a subsidy by another Member. Further, footnote 35 to Article 10 and Article 32.1 of ASCM Agreement limits a "specific action against subsidy" within the meaning of the SCM Agreement. There is a world of difference between a Member pursuing its legal rights to challenge other Members' violation to WTO agreements and a Member taking an action prohibited by the SCM Agreement. In fact, by the United States' logic, no Member would ever be able to challenge the legality of a subsidy.

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, how?

4.1548 Yes. In Japan's view, a measure is "against" dumping when it counteracts dumping. The payments authorized by the CDSOA are explicitly directed against dumping and are made only when the constituent elements of dumping are present. Please see also Japan's replies to Questions 2, 3 and 6 above for further discussions.

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?

4.1549 The Appellate Body's interpretation was made in the context of Article VI of GATT 1994. It states, "'[a]n anti-dumping measure' must, according to Article 1 of the Anti-Dumping Agreement, be consistent with Article VI of the GATT 1994 and the provisions of the Anti-Dumping Agreement."[249] The term "in response to" must be understood in this context.

4.1550 Whether an action is taken "in response to" situations presenting the constituent elements of dumping (i.e., a "specific action against dumping") depends on two factors: the action is conditioned upon situations presenting the constituent elements of dumping; and, the action is taken to counteract dumping. The EC Panel in the 1916 Act case also found that Article VI:2 provides that *only* measures in the form of anti-dumping duties may be applied to *counteract* dumping as such. In interpreting these provisions, the Appellate Body also used the term "counteract."

(c) Questions to Canada

10. At para. 11 of its second oral statement, Canada states that the 1916 Act was an action "in response to (against, countering, condemning, offsetting)" a practice. What is the basis for equating the term "in response to" with the terms "countering", "condemning", and "offsetting"?

[248] *Id*.
[249] 1916 Act Para. 129.

4.1551 Article VI:1 of the GATT 1994 provides that dumping may be "condemned." Article VI:2 provides that to "offset" or prevent dumping, anti-dumping duties may be levied. In interpreting these provisions, the Appellate Body used the term "counteract." Canada's use of "countering," "condemning," and "offsetting" is a reasonable attempt to verbalize the relevant concept.

(d) 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?

4.1552 As discussed in Question 5 above, how the proceeds of the CDSOA offset payment are used by the domestic producer is irrelevant to the determination of whether the offset payments are specific actions against dumping or a subsidy. What matters is the fact that the payments are made only when the constituent elements of dumping have been established.

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?

4.1553 The CDSOA offset payments are made:

(i) upon imposition of an anti-dumping or countervailing duty on the imported like products;

(ii) to domestic producers of like products; and

(iii) for "qualified expenditures" of like products.

4.1554 As discussed in Question 2 above, the CDSOA offset payment can be made only where the investigating authority has determined that domestic producers are injured by dumped imports. The CDSOA requires domestic producers to remain in production of the like product adversely affected by dumping, in order to receive the payment. These circumstances are evidence that the CDSOA offset payments are designed and in fact counteract dumping. It is irrelevant whether the domestic like products compete, in addition, with non-dumped imports.

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?

4.1555 The United States Department of Commerce publishes its annual numbers of initiations, affirmative preliminary determinations, affirmative final determinations, and anti-dumping and countervailing duty order at http://ia.ita.doc.gov/stats/iastats1.html. Japan provides a summary of such data for the Panel's consideration (anti-dumping and countervailing investigations combined).

	1995	1996	1997	1998	1999	2000	2001	1995-2000 Total	1996-2001 Total
Initiations	16	22	21	47	56	52	95	214	293
Prelims	26	16	19	35	43	22	76	161	211
Finals	44	14	15	19	52	42	45	186	187
Duty Orders	26	11	7	10	25	26	36	105	115

	Cases	Over Initiation	Over Prelim
Initiations (1995 to 2000)[250]	214	100%	N/A
Affirmative DOC Prelim (1996 to 2001)	211	98.6%	100%
Affirmative DOC Final (1996 to 2001)	187	87.4%	88.6%
Duty Orders (1996 to 2001)	115	53.7%	54.5%

4.1556 The above data indicates that 11.2 per cent of investigations ended up with price undertaking (i.e., suspension agreements in US statutory parlance). In total, 64.9 per cent of investigations resulted in either anti-dumping/countervailing duty orders or price undertakings.

7. Korea

(a) Questions to all 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?

4.1557 Korea replies as follows:

(a) Yes, Subsidy B should be treated as a specific action "against" dumping.

(b) The Appellate Body stated in *US – Anti-Dumping Act of 1916* that "specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present. (emphasis in the original, AB report on *US – Anti-Dumping Act of 1916*, para 122) The fact that Subsidy B is provided 'subject to a finding of dumping' suggests that Subsidy B is an action that may be taken *only* when the constituent elements of "dumping" are present, and thus is a specific action against dumping.

[250] Percentages of affirmative preliminary/final determinations and duty orders in 1996-2001 over initiations in 1995-2000 are provided, since initiations usually take at least one year from its initiation until the final stage of investigations.

Furthermore, the allocation of funds provided under the CDSOA acts against (in opposition to) dumping, because it further strengthens the competitive position of domestic producers on top of the remedy that has been already provided in the form of anti-dumping duties.

(c) It is not because of the 'difference in impact' that Subsidy B is a specific action against dumping, while Subsidy A is not. In contrast to Subsidy B, Subsidy A does not depend upon a finding of the constituent elements of dumping. Therefore, it is not "in response to" dumping as required by the Appellate Body at paragraph 122 of the report in *United States—Anti-Dumping Act of 1916.*.

(d) It is possible to make a distinction between the impact of allocated duties upon dumped imports and their impact on non-dumped products. In case of dumped products, the terms of competition have been disturbed due to dumping. Thus, the impact of allocated duties is to *restore* the disturbed terms of competition in addition to the remedy provided in the form of anti-dumping duties. In case of non-dumped products, the impact is to *disrupt* the terms of competition that existed between domestic and non-dumped imports before the allocation of duties.

4.1558 Korea submits that the above distinction, however, is not pertinent, if the issue at hand is the definition of 'specific action against dumping'. What is pertinent is that allocation of duties to petitioning domestic producers acts against (in opposition to) dumping, by strengthening their competitive position vis-à-vis dumping exporters, in addition to the anti-dumping duties imposed upon those exporters. The impact of the same Subsidy B upon non-subject exporters is simply incidental.

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?

4.1559 Korea is of the view that it would change the competitive relationship with all producers, including foreign producers not subject to the order (if any) and domestic producers that failed to support the petition (if any). Indeed, the latter aspect – the change *vis-à-vis* other domestic producers – is the basis of Complainants' demonstration that the Byrd Amendment violates AD Agreement and SCM Agreement provisions on standing determinations. This is because the Byrd Amendment compels all domestic producers to support petitions so as not to suffer a competitive disadvantage.

4.1560 Having said that, it should be pointed out once again that the impact upon non-subject foreign producers and non-supporting domestic producers is not pertinent, if the issue at hand is the definition of 'specific action against dumping'. What is pertinent is that allocation of duties to petitioning domestic producers acts against (in opposition to) dumping, by strengthening their competitive position *vis-à-vis* dumping exporters, in addition to the anti-dumping duties imposed upon those exporters.

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)?

4.1561 Korea considers that the CDSOA duties can be disbursed only on the basis of 'qualifying expenditures' that have been identified by petitioning domestic industries. Thus, the CDSOA operates to compensate the petitioning domestic industries to the extent of 'qualifying expenditures'. "Qualifying expenditures' are costs for the industries, and having the costs met with the CDSOA disbursed fund strengthens the competitive position of petitioning industries.

4.1562 If industries use the disbursed duties for purposes other than the 'qualifying expenditures', it does not detract from the fact that the duties were disbursed and contributed to strengthening the conditions of competition, because funds are fungible and it is not relevant if the specific funds allocated were used in defraying costs falling under the qualifying expenses or not.

4.1563 The lack of restrictions on how the Byrd Amendment payments are used is thus irrelevant to this proceeding. It is the provision of offset payments itself that is a specific action against dumping.

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.

4.1564 Korea believes one can draw this distinction, but it is irrelevant. The rule to be applied is "against," which, at paragraph 122 of 1916 Act, was interpreted by the Appellate Body as "in response to." Moreover, the language of Article 18.1 is "against dumping," not "against entities engaged in dumping." Thus, an analysis of the text of the relevant provisions and prior Appellate Body statements demonstrates that this is a "distinction without a difference."

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

4.1565 Korea posits that the US argument at paragraphs 44-46 is absurd and does nothing other than to highlight the weakness of the US position in general. The US refuses, again, to focus on the fact that Complainants' interpretation of "specific action against" presumes – because such is the case here with the Byrd Amendment – that a finding that the constituent elements of subsidization (or dumping) has been made before the action is taken. Moreover, the US mischaracterizes Korea's complaint. Korea is arguing not that the Byrd Amendment is an impermissible subsidy (which it likely is), but that the Byrd Amendment is an impermissible specific action against dumping or a subsidy. Thus, the outrageous US statement at paragraph 46 that Complainants' own argument condemns this case – which, in any case, is designed simply to insulate the Byrd Amendment from WTO disciplines – is without merit.

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, how?

4.1566 In its first submission to the Panel, the US argued that the ordinary meaning of "against' is 'in contact with' and argued, on the basis of such a flawed meaning of 'against' that only the actions applying to imported goods or importers are specific actions against dumping. (US First Submission, para 94) As Korea has argued in the first substantive meeting with the Panel, 'in contact with' is not an ordinary meaning of 'against'(Korea's Oral Statement, para 6), and any assertion of the US based upon such a meaning cannot hold.

4.1567 Secondly, the relevant provision reads 'action against dumping' , not 'action against imports or exporters'. This is another reason, why, in Korea's view, the US is wrong to assert that specific action against dumping should be limited to action affecting imports or importers per se.

4.1568 Having said that, in Korea's view, the Byrd Amendment does not fall within the hypothetical – it does have an "adverse bearing" or "adverse impact" on the "importer, exporter or foreign producer." It impacts them adversely by strengthening their primary competitors in the US market: the "affected" domestic US producers.

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?

4.1569 The Appellate Body's ruling, as contained in para 122 of its report in *US -Anti-Dumping Act of 1916* , provides a good guidance to assess the meaning of 'action against dumping'. During the panel proceedings, Korea, and other complaining parties, complemented the guideline with another argument, based upon the ordinary meaning of 'against' as it appears in Article 18.1 of the ADA and Article 32.1 of the SCMA.

4.1570 The ordinary meaning of 'against' is 'in opposition to'. From the two elements of dumping as identified by the panels in *US -1916 Act*, dumping is the introduction into commerce of products at less than the normal value. When the authorities find such dumping, there are several different measures they can take 'in opposition to' such dumping. One is to impose extra burden upon the imports. Another is to provide support to the affected domestic industry, which compete with the imports. Both measures act 'in opposition to' dumping.

4.1571 With respect to the Panel's question, action beneficial to dumping is not an action in opposition to dumping, from the explanation in the above paragraph, and thus is not action against dumping.

4.1572 A further comment in this connection is that the interpretation of 'against' as 'in opposition to', argued by the complaining parties on the basis of the ordinary meaning of 'against', is closely in line with the interpretation of 'against' as 'in response to', an interpretation provided by the Appellate Body in *US-1916 Act.* It is because it is not realistic to think that any government would take action beneficial to dumping. Thus, it was not necessary on the part of the Appellate Body to elaborate that 'against' should be interpreted as 'in opposition to' as well as 'in response to'.

8. Mexico

(a) Questions to all 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?

4.1573 Yes.

(b) Why?

4.1574 It should constitute a specific action "against" dumping to the extent that it is an action that is taken in response to situations presenting the constituent elements of dumping. In Anti-dumping Act of 1916, the Appellate Body determined that "specific action against dumping of exports must, at a minimum, encompass action that may be taken only when the constituent elements of dumping are present. The conferral of Subsidy B appears to be an action that is directly caused by a finding of the existence of dumping and that can only be taken in circumstances where there is a finding of dumping. As such, it should be treated as a specific action "against" dumping.

(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?

4.1575 As discussed at paragraphs 16 to 23 of Mexico's written rebuttal submission, there is no requirement to analyze the "impact" of a measure in order to determine whether it constitutes a "specific action against" dumping within the meaning of Article 18.1 of the Anti-dumping Agreement

4.1576 In the hypothetical described in the question, it is unclear whether the "impact" of subsidies A and B would be different. The two subsidies differ in that one is linked to dumping while the other is not. However, there is no indication of the nature of the linkages between subsidy B and the dumping. These linkages are essential to assessing the impact of subsidy B compared to subsidy A.

4.1577 Although there is a linkage between subsidy B and dumping, that linkage is not well defined as it is in the case of the subsidies conferred under the CDSOA. For example, there is no indication that the amount of the subsidy exactly matches the amount of anti-dumping duties collected, that eligibility would be restricted to petitioners and supporters in an anti-dumping investigation (i.e., direct competitors with importers and exporters of dumped products), and that the eligible expenses that are offset by the subsidies must relate to the production of the subject products.

4.1578 Accordingly, in contrast to the subsidies provided under the CDSOA, there is not enough evidence to determine whether subsidy B would <u>systematically</u> result in a greater competitive burden on imported products (and on the importer or exporters of such products) relative to like US products that benefit from the subsidies. In the absence of such clear linkages, the impact that subsidy B may have cannot be compared to the impact of subsidy A. Nor can it be compared to the situation before this Panel.

(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 <u>dumped</u> imports in particular? Why?

4.1579 In the hypothetical the specific linkages between Subsidy B and dumped imports are undefined. Accordingly, it is difficult to assess the degree of competitive advantage for domestic producers over dumped imports in particular.

4.1580 In the case of the subsidies conferred by the CDSOA, there are clearer and more direct linkages between the subsidies, the recipients of the subsidies and the dumped imports. Dumped imports are systematically placed at a competitive disadvantage vis-à-vis the products of the recipients because: the funds that are distributed are created by the existence of dumping, the amount of the funds is equal to the amount of such dumping (i.e., anti-dumping duties); the funds are distributed to petitioners or those in support of the petition that led to the duties (i.e., to those producers who benefit

most from the imposition of the duties); the industry was determined to have been materially injured as a result of the dumped imports; and the funds are distributed as offsets to expenses related to the production of products that are "like" those to be found dumped.

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?

4.1581 Mexico is of the view that the payments under the CDSOA could also change the competitive relationship between the domestic producer that receives the offset payments and all other competing producers, foreign or domestic. The competitive relationship is "tilted" in favour of the products produced by the recipients of the CDSOA.

4.1582 The fact that the relative competitive relationship could also be affected vis-à-vis undumped imports and domestic products does not mean that the CDSOA is not a specific action against dumping or subsidies. The CDSOA and the subsidies it confers amounts to a specific action against dumping or subsidies because of the clear linkages between the subsidies and the dumped/ subsidised imports as described in Mexico's response to Question 3(d), above. The fact that the subsidies may also have an effect on relative competitive relationships with other products does not change this fact. It is well recognized that measures may have multiple attributes or effects. One or more of these may violate WTO disciplines while others may not. The fact that certain attributes or effects may not give rise to WTO inconsistencies does not remedy WTO inconsistencies created by the others.

4.1583 In the case of the CDSOA and the subsidies it confers, its primary attributes and effects amount to an impermissible action against dumping and subsidies under Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement. It also nullifies or impairs benefits accruing to Mexico under Articles II and VI of the GATT 1994 and, thereby, violates Article 5(b) of the SCM Agreement.

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)?

4.1584 According to Mexico, all relevant facts and circumstances, whether relating to the creation and provision of the subsidies or eligibility to the subsidies, must be assessed in determining whether the CDSOA and its subsidies amount to a "specific action against dumping".

4.1585 The fact that the eligible expenses that are offset by the CDSOA payments must be related to the production of products that are "like" those subject to the relevant order or finding is an important factual element. This element explicitly links the payments to products that directly compete with those subject to the order or finding.

4.1586 However, it is not the sole factual element. Other relevant facts relate to the creation of the funds that are distributed (e.g. the creation of special accounts that are specific to each order or finding), the funding of the special accounts by the collection of anti-dumping and countervailing

duties, and the restriction of eligible recipients to petitioners to the investigation that led to the order or finding and those in support of those petitioners. Together, these facts establish that, regardless of how the eligible recipients use the funds that they receive, the CDSOA and the offset payments amount to a specific action against dumping.

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.

4.1587 Mexico argues that although the nature and characteristics of the CDSOA and the 1916 Act differ, for the purpose of Article 18.1 of the AD Agreement, both have an automatic direct, negative impact on entities engaged in dumping. In the case of the CDSOA, the anti-dumping duties that are collected when an entity engaged in dumping sells into the US market are passed on to the direct beneficiaries of the anti-dumping duties (i.e., the petitioners and those in support of the petition). In other words, the act of dumping results in the automatic conferral of a financial reward to a direct competitor. The circumstances in which the subsidies are conferred are relevant to understanding their direct effect. In all instances, the subsidies are being conferred to recipients that have been found to be injured or threatened by injury by reason of the subject dumped imports. The duties that fund the subsidies would not exist but for that injury or threat of injury. Moreover, the duties remain in place only so long as is necessary to counteract the effects of the dumping which is causing such injury. Thus, during the entire period over which the CDSOA subsidies are granted, the domestic industry will legally be in need of anti-dumping duty protection from the dumped imports. In such circumstances, the granting of subsidies generated by the payment of anti-dumping duties will necessarily enhance the competitive position of the recipients vis-à-vis the dumped imports.

4.1588 Mexico disagrees with the statement that actions under the CDSOA are "untied subsidies". By law, the subsidies are contingent upon expenses being incurred in the production of the goods that are like those subject to the anti-dumping order or finding in question. Thus, they are legally tied to the production of like domestic products. It is irrelevant that the funds that are ultimately disbursed could be applied to other expenses. For example, the fact that funds conferred in the form of subsidies that are contingent upon export performance (Article 3.1 of the SCM Agreement) are ultimately expended on uses unrelated to the exports does not mean that the subsidies are no longer "export" subsidies. Cash (i.e., the funds) is fungible. What is relevant is the legal criteria for eligibility for the subsidy in question (i.e., contingency upon export performance or contingency upon incurring expenditures in the production of like domestic products).

4.1589 The nature of the direct negative impact is illustrated in the context of the nullification or impairment of benefits. As discussed at paragraphs 78 to 98 of Mexico's rebuttal submission and in its response to question 29 from the Panel, the subsidies at issue in this dispute have a negative impact on imports because, upon granting, they automatically, consistently and repeatedly upset the relative conditions of competition legitimately expected by Mexico under GATT Articles II and VI. When anti-dumping and countervailing duties are in place, the conditions of competition between Mexican products and like United States products will no longer be defined, at most, by the relevant US tariff binding plus the maximum allowable anti-dumping or countervailing duties permitted under Article VI:2 and 3 of the GATT 1994. Rather, the conditions of competition will be further defined by the amount of the CDSOA subsidies. It is this additional upsetting of the expected competitive relationship that amounts to the direct negative impact.

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

4.1590 At paragraph 44 of its second oral statement, the United States argues that WTO Members regularly engage in counter-subsidization. In Mexico's view, this argument is irrelevant to this dispute. Whether "counter-subsidization" is consistent with WTO obligations would have to be assessed on a case by case basis, in the light of facts and circumstances surrounding the conferral of the subsidies in question.

4.1591 At paragraphs 44 and 45, the United States appears to argue that this WTO dispute "constitutes a specific action taken in response to a subsidy, the CDSOA". It appears to further argue that, if accepted by this Panel, the complainants' interpretation of Article 32.1 and footnote 35 of the SCM Agreement would prevent this WTO dispute from being brought forward.

4.1592 In Mexico's view, the type of action referred to in Article 32.1 is action taken by a WTO Member in the context of a domestic measure. It is not meant to encompass action that is taken under the WTO dispute settlement procedures. Accordingly, whether this WTO dispute was initiated "in response to" a subsidy is irrelevant this Panel's interpretation of Article 32.1.

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, how?

4.1593 The Appellate Body in *Anti-dumping Act of 1916* found that an action "against" dumping of exports is an action that is "taken in response to situations presenting the constituent elements of dumping". It did not rule that a measure can only be "against" dumping if it has an adverse bearing on either the imported product *per se*, or the importer, the exporter or foreign producer of that product. Thus, there is no requirement that punitive action must be taken against the imported product, the importer, the exporter, or foreign producer.

4.1594 In any event, Mexico believes that it is not necessary for the Panel to answer this question to resolve this dispute. As noted above in response to the previous questions and in Mexico's written and oral submissions, the CDSOA and the subsidies it confers has a direct adverse effect on the imported product and the exporter of that product.

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?

4.1595 According to Mexico, given the clear negative effect the CDSOA and its subsidies have on imports, it is not necessary to answer this question to resolve this dispute.

(b) 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?

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?

1.1596 With respect to Questions 11 and 12 to the United States, Mexico re-iterates and elaborates upon the responses it gave at the second meeting with the Panel to related oral questions from the Panel:

- It does not matter what the cash disbursements are ultimately used for. They are legally contingent upon production expenses being incurred and, therefore, are "production subsidies". As outlined at paragraph 81 of Mexico's written rebuttal submission, such subsidies are assumed to have an adverse effect on negotiated concessions.

- The subsidies conferred under the CDSOA must be distinguished from a subsidy that is granted to a recipient without any conditions attached to it. In the case of the CDSOA, clear conditions—related to the incurring of expenses related to the production of the good subject to the order or finding upon which the subsidy is based—are attached to the subsidy. As noted in Mexico's response to Question 6 of the Panel (above), it is irrelevant that the funds that are ultimately disbursed could be applied to other expenses. For example, the fact that funds conferred in the form of subsidies that are contingent upon export performance (Article 3.1 of the SCM Agreement) are ultimately expended on uses unrelated to the exports does not mean that the subsidies are no longer "export" subsidies. Cash (i.e., the funds) is fungible. What is relevant is the legal criteria for eligibility for the subsidy in question (i.e., contingency upon export performance or contingency upon incurring expenditures in the production of like domestic products).

- Money is fungible. It either directly or indirectly enhances competitiveness.

- A distinguishing characteristic of the CDSOA subsidies is that they are granted in the context of applied anti-dumping (or countervailing) duties. This context distinguishes the CDSOA subsidies from the type of subsidy illustrated in "Subsidy A" (Question 3 from the Panel) and must be taken into account in assessing the effect of the subsidies on the competitive position of the recipients. In all instances, the subsidies are being conferred to recipients that have been found to be injured or threatened by injury by reason of the subject dumped imports. The duties that fund the subsidies would not exist but for the dumping and the injury. Moreover, the duties remain in place only so long as is necessary to counteract the effects of the dumping and injury. Thus, during the entire period over which the CDSOA subsidies are granted, the domestic industry will legally be in need of anti-dumping duty protection from the dumped imports. In such circumstances, the granting of subsidies generated by the payment of anti-dumping duties will necessarily enhance the competitive position of the recipients vis-à-vis the dumped imports.

- Finally, in order for a recipient to continue to receive CDSOA subsidies, that recipient must continue to incur expenses related to the production of the good subject to the order or finding upon which the subsidy is based.

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.

4.1597 Mexico considers that this question raises two issues. The first relates to whether a measure must be applied before nullification or impairment can be caused. The second relates to what is required to prove the existence of the nullification or impairment.

4.1598 As outlined in Mexico's prior submissions, it agrees that a measure must be applied before nullification or impairment can be caused. With respect to Mexico's challenge of the "granting" of subsidies under the CDSOA, the measure is "applied" when the subsidies are "granted". Mexico is entitled to challenge the measure prior to its application by virtue of the doctrine governing legislation as such challenges. With respect to Mexico's challenge of the "maintaining" of subsidies under the CDSOA, the maintenance of subsidies in the circumstances of this dispute amounts to the application of a measure.

4.1599 The US and Mexico appear to have divergent views on what is needed to prove that a measure causes nullification or impairment. Mexico's view is that the GATT Panels in *EEC – Oilseeds I & II* examined the design, structure and architecture of the EEC oilseeds regime in order to conclude that the regime nullified or impaired the expected competitive relationship. The US seems to argue that additional evidence is required. Mexico disagrees. Nullification or impairment caused by a measure, particularly in the case of the CDSOA, can be demonstrated on the basis of the design, structure and architecture of a measure. By virtue of the design, structure and architecture of the CDSOA, upon granting the subsidies will *per se* cause nullification or impairment as described in Mexico's prior written and oral submissions. In other words, such nullification or impairment is a certainty.

L. UNITED STATES' ANSWERS TO QUESTIONS FROM THE PANEL AFTER THE SECOND MEETING

(a) 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?

4.1600 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.[251]

4.1601 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 anti-dumping 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?

4.1602 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.

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[251] 19 CFR Parts 159 and 178, 66 Fed. Reg. 48,546, 48,549 (Dep't Comm. 2001) (Final Rule), Common Exhibit 3.

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?

4.1603 In the United States, there are two agencies charged with conducting anti-dumping and countervailing duty investigations. The US Department of Commerce investigates whether imports are being dumped or subsidized, and the US International Trade Commission investigates whether those imports are causing material injury or threat thereof to the domestic industry or the establishment of a domestic industry is being materially retarded.

4.1604 After an investigation is initiated, both agencies make preliminary and final determinations in the following order: (1) Commission preliminary determination, (2) Commerce preliminary determination, (3) Commerce final determination, (4) Commission final determination. If the Commission's preliminary determination is negative, the investigation ends. If Commerce's preliminary determination is negative, however, the investigation proceeds to the final phase. If Commerce's final determination is negative, the investigation ends. If the Commission's final determination is negative, the investigation ends[252]

4.1605 As the United States explained in its initial answer to this question, the United States does not regularly maintain information concerning all preliminary and final determinations in every anti-dumping 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 has reviewed statistics posted on the US Department of Commerce's website as updated by *Federal Register* notices and estimates that, for investigations initiated between 1980 and 1999, which were not suspended or otherwise terminated (prior to a final determination), approximately 37 per cent of affirmative Commission preliminary determinations became negative final Commerce or Commission determinations.

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.

4.1606 Yes. The United States considers that 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 US 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."[253] 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 US oilseed imports.[254] 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

[252] *See* 19 C.F.R. §§ 207.21, 351.205(a), 351.210(a).

[253] *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).

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

from having any impact on the competitive relationship between domestic and imported oilseeds." Paras. 147-148.

4.1607 The United States would also like to offer the following comments in response to the questions posed to the complaining parties:

(b) Questions to all 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?

4.1608 (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) 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 <u>dumped</u> imports in particular? Why?

4.1609 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 anti-dumping 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?

4.1610 According to the United States, there is no reason to believe that 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 anti-dumping 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)?

4.1611 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-à-vis imports subject to the relevant anti-dumping order." Recipients can use the money for any purpose and are not limited to using the funds on the domestic like product.

4.1612 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.

4.1613 Yes. The United States is of the view that 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.[255] 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.

4.1614 The US 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, how?

4.1615 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?

4.1616 No. According to the United States, 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 programme which does not apply "against" the imported product or the entity responsible for it.

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties, Argentina, Costa Rica, Hong Kong, China, Israel and Norway are set out in their submissions to the Panel and are attached to this Report as Annexes (see

[255] 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.

List of Annexes, page (v)). We note that Costa Rica did not make any submission to the Panel. Israel did not make an oral statement at the meeting of the Panel with the third parties.

VI. INTERIM REVIEW

6.1 On 31 July 2002, a number of parties submitted written requests for review by the Panel of particular aspects of the interim report issued on 17 July 2002. On 7 August 2002, Japan submitted written comments on the US request for review. None of the parties requested an additional meeting with the Panel. The interim review issues raised by the parties are addressed below.

A. UNITED STATES

6.2 The United States takes issue with paragraphs 7.3 – 7.6 of the interim report, where the Panel denies the US request under DSU Article 9.2 for issuance of a separate final panel report in the dispute brought by Mexico. The United States asserts that the use of the word "shall" in the text of DSU Article 9.2 imposes an "unequivocal obligation" on panels to issue separate reports when so requested by one of the parties to a dispute. According to the United states, this was the "basis" for the panel's treatment of DSU Article 9.2 in *EC – Bananas III (US)*.[256]

6.3 We are not persuaded by the arguments advanced by the United States. In our view, the second sentence of DSU Article 9.2 cannot reasonably be interpreted to grant Members an unconditional right to separate panel reports in all circumstances. Such an unconditional right would allow a respondent to delay issuance of the final report by making its request for a separate report very late in the panel proceedings. While the United States refers to the approach of the panel in *EC – Bananas III (US)*, we would note that the request of the European Communities for separate reports in that case was made at the meeting at which the DSB established the panel.[257] The fact that that panel considered itself bound to issue separate reports therefore provides no support for the argument that Members have an unconditional right to request separate reports at any time in the panel proceedings.

6.4 We are of course aware of the use of the word "shall" in the second sentence of DSU Article 9.2. In our view, the primary concern of DSU Article 9.2 is that, as set out in the first sentence of that provision, panels shall organise their work "in such a manner that the rights which the parties to the dispute would have enjoyed had separate panels examined the complains are in no way impaired". We read the second sentence of DSU Article 9.2 in light of the first sentence. The United States made its request for a separate report very late in these proceedings, without indicating how rights which it would have enjoyed had separate panels examined the complaints would be impaired if we were to fail to issue a separate report for the dispute brought by Mexico. Since there is nothing on the record to suggest that the approach we are taking would impair any rights that the US would have enjoyed had separate panels been established, we do not consider ourselves bound to issue a separate report in respect of the dispute brought by Mexico.

6.5 By contrast, rights accruing to Mexico would have been impaired had we granted the US request. Since the United States only requested a separate final report,[258] Mexico would have been denied its right to comment on a separate interim report in respect of its dispute. Although the United

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[256] *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Complaint by the United States* ("*EC – Bananas III (US)*"), WT/DS27/R/USA, adopted 25 September 1997.

[257] See *EC – Bananas III (US)*, para. II.42.

[258] The United States suggests that the Panel would have had time to prepare a separate interim report. If the Panel had considered this possible, without further delaying issuance of the interim report, the Panel would have done so. The United States itself was aware that there was not sufficient time to prepare a separate interim report, since it expressly only requested a separate final report "[I]n order to avoid causing a delay in the issuance of the interim report".

States asserts that there is no need for separate final reports to be preceded by separate interim reports, we consider that the right to a separate interim report in such circumstances is enshrined in DSU Article 15.2. If there is to be a separate final report in the circumstances envisaged by DSU Article 9.2, due process requires that there must also be a separate interim report. It is not enough that a complaining party sees an interim report combining its arguments and claims with those made by other complaining parties, and setting forth the panel's findings and conclusions in respect of those arguments and claims, with an indication from the panel that its own arguments and claims, and the relevant panel findings and conclusions, will subsequently be distilled out into a separate final report. A party is entitled to see what its final report will look like, to satisfy itself that all of its arguments and claims have been included and addressed by the panel. This will not necessarily be the case when a separate final report is created on the basis of a combined interim report, since certain arguments and/or claims may inadvertantly be overlooked or mis-attributed when preparing the separate final report.[259]

B. MEXICO

6.6 Mexico requested the Panel to include in paragraph 4.197 a specific reference to duties applicable to products of Mexico on the list of qualifying domestic producers who may be eligible to receive disbursements under the CDSOA in relation with imported products from Mexico. Mexico indicates that it had made a similar request in its comments on the descriptive part of the Panel report released on 12 April 2002. We note, however, that this list of products may have appeared in Mexico's first written submission to the Panel, but was not included in the executive summary of that submission prepared by Mexico, and submitted to the Panel on 13 December 2001. In accordance with the Panel's working procedures, the parties were requested to prepare executive summaries of their own submission to assist the Secretariat in drafting a concise arguments section of the Panel report so as to facilitate timely translation and circulation of the Panel report to the Members. The working procedures further determined that the summaries of the first written submission and rebuttal written submission shall be limited to 10 pages. In our view the purpose of such an executive summary, limited to 10 pages, would be undermined if the parties would be allowed to come back with further additions to their summaries at the time of reviewing the descriptive part/interim report. We therefore reject Mexico's request for inclusion of the list of products in paragraph 4.197.

6.7 Mexico requested changes to the Panel's summary of Mexico's arguments at paragraphs 7.106, 7.111, 7.121 and 7.126 of the interim report. We have made changes to these paragraphs as we consider appropriate.

6.8 Mexico claims that paragraphs 7.113 – 7.116 of the interim report do not take account of and respond to an important part of Mexico's specificity argument. In doing so, Mexico distinguishes between "disbursements or outlays" under the CDSOA, and "subsidies conferred under the CDSOA". We are unable to accept this distinction, since "subsidies conferred under the CDSOA" and "disbursements or outlays" under the CDSOA are necessarily one and the same thing.

6.9 Mexico takes issue with the Panel's analysis in para. 7.128 of the interim report. Mexico appears to argue that benefits accruing under GATT Articles II and VI are systematically offset

[259] If an argument is attributed to "complainants" in the combined interim report, a panel would need to determine whether or not it should be attributed to a particular complaining party if a separate final report is to be prepared in respect of the dispute brought by that party. This is not necessarily a straightforward process, and errors may occur. Such errors cannot be remedied by the panel once the final report has been issued. Mexico itself was conscious of the need to ensure that any separate final report included findings and conclusions regarding all its claims, including those claims which are common with those of other complainants (see Mexico's 18 June 2002 reaction to the US request for separate final reports).

simply because CDSOA offset subsidies will affect the competitive relationship that would otherwise exist from the result of the imposition of tariffs and the maximum permitted anti-dumping/countervailing duties on imports. However, the fact that a subsidy to domestic producers will affect the competitive relationship with imported products is not sufficient to demonstrate nullification or impairment, in the sense of benefits being systematically offset. We addressed this issue in note 334 of the interim report, and therefore see no reason to amend our report.

C. CANADA

6.10 Canada requested changes to paragraphs 7.7, 7.21, 7.22, 7.45, 7.61, 7.81 and 7.89 of the interim report. We have made changes to these paragraphs as we consider appropriate.

6.11 Canada proposed that the Panel include a reference to GATT Article VI:2 and 3 in para. 7.46 of the interim report. We do not consider this change appropriate. The appropriate place to refer to GATT Article VI:2 and 3 is para. 7.51, where it is already addressed.

6.12 Canada also suggested that the Panel further elaborate on its findings concerning paragraphs 7.59 to 7.66 of the interim report, and paragraph 7.64 in particular. We consider that the findings sufficiently set forth the Panel's reasoning and that there is therefore no need for such further elaboration as suggested by Canada.

D. AUSTRALIA

6.13 Australia requested a change to the presentation of its arguments in paragraph 4.862. We changed this paragraph as suggested by Australia.

6.14 Australia requested the Panel to consider replacing paragraphs 7.136 - 7.139 of the interim report, and not to rule on Australia's claim addressed in these paragraphs as Australia had indicated in its second written submission that it did not intend to pursue further arguments in relation to Articles 4.10 and 7.9 SCM Agreement. We decided to accept this suggestion by Australia and have amended these paragraphs accordingly.

6.15 Australia commented that paragraph 8.3 of the interim report was in some ways contradictory to paragraph 7.52 and suggested that it be replaced by a repetition of paragraph 7.52. We do not consider that there is any contradiction between what we stated in paragraph 8.3 and what we said in paragraph 7.52. We therefore reject Australia's suggestion in this respect.

E. JAPAN

6.16 Japan requested changes to paragraphs 7.1, 7.3, and 7.46 to 7.50 of the interim report. We have made changes to these paragraphs as we consider appropriate.

6.17 Japan requested that the last sentence of paragraph 8.3 be deleted as it seemed unnecessary in view of the Panel's finding in paragraph 7.52. We do not consider that the last sentence of paragraph 8.3 is unnecessary merely because it repeats part of the Panel's finding. We therefore reject Japan's request.

F. EUROPEAN COMMUNITIES

6.18 The European Communities requested a minor change in paragraph 7.61 of the interim report, which we have made.

6.19 The European Communities suggested to delete paragraph 8.3 of the interim report, or at least the last sentence thereof, as it considers that this paragraph is difficult to reconcile with paragraph 7.52. As stated above, we do not consider that there is any contradiction between what we stated in paragraph 8.3 and what we said in paragraph 7.52. We therefore reject the EC's suggestion in this respect.

6.20 The European Communities requested that paragraph 8.6 be rephrased to clarify that the Panels' recommendations can only be implemented by the United States by repealing the CDSOA. We consider that paragraph 8.3 is clear and we do not consider it necessary therefore to rephrase this paragraph in the way suggested by the EC.

G. KOREA

6.21 Korea requested changes to paragraph 4.1349 and footnote 337 of the interim report, which we have made.

VII. FINDINGS

7.1 This case raises issues regarding the conformity of the CDSOA with AD Articles 5.4, 8.3, 15, 18.1 and 18.4, SCM Articles 4.10, 5(b), 7.9, 11.4, 18.3, 32.1 and 32.5, GATT Articles VI:2, VI:3, and X:3(a), and Article XVI:4 of the WTO Agreement. After addressing two procedural issues, we shall begin our substantive work by examining the claims raised by the complaining parties under AD Article 18.4, SCM Article 32.1, and paragraphs 2 and 3 of GATT Article VI.

A. PROCEDURAL ISSUES

1. Submission of new evidence

7.2 On 27 March 2002, Canada requested permission from the Panel to submit a letter filed with the US International Trade Commission ("USITC") by a US producer in the context of a US countervailing duty investigation. The United States asked the Panel to decline Canada's request. On 3 May 2002, the Panel sent the following letter to the parties regarding this matter:

> On 27 March 2002, Canada requested permission from the Panel to submit a letter filed with the US International Trade Commission ("USITC") by a US producer in the context of a US countervailing duty investigation. According to Canada, the letter "provides highly relevant evidence in response to arguments of the United States in these proceedings that the [CDSOA] has no effect or influence on whether domestic industry will support petitions to receive offset payment". Canada asserted that it was not in a position to submit the letter within the timelines provided in paragraph 14 of the Panel's Working Procedures, because the letter was filed with the USITC on 22 March 2002, and brought to the attention of the Government of Canada two business days later.
>
> The United States submits that Canada's request should be denied as Canada has not shown the requisite "good cause" under paragraph 14 of the Panel's Working Procedures, which provides that "[p]arties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for the purposes of rebuttal submissions or answers to questions. Exceptions to this procedure will be granted upon a showing of good cause." According to the United States, although Canada argues that it was not in a position to submit this evidence because it was not brought to its attention until

> 24 March 2002, in fact Canada was in a position to bring this information to the Panel's attention much earlier. This is because, on 11 February 2002, the relevant US producer filed a letter with the USITC indicating its support for the relevant petitions in order to qualify for benefits under the CDSOA. The United States asserts that this letter is dated on the USITC website as 14 February 2002, and was mailed directly to the Canadian government itself on 13 February 2002. The United States further asserts that this letter contains the exact same information that Canada now wishes to bring before the Panel, and is referenced specifically on page 2 of the document submitted by Canada. The United States submits that because Canada was in a position to bring this information to the Panel's attention much earlier, it cannot be said that Canada has shown "good cause" for its delay in presenting this information to the Panel until after both the second panel meeting and the deadline for answering the Panel's second set of questions.
>
> The Panel notes that the letter at issue did not come into the possession of Canada until 24 March 2002, i.e., after the first substantive meeting held on 5/6 February 2002. The fact that some of the information in the letter may have been available to Canada earlier in time does not change the fact that the letter did not come into Canada's possession until 24 March 2002. Furthermore, even if Canada had submitted the information contained in the letter when (according to the United States) it was first able to do so (13 February 2002), the submission of that information would still have been after the first substantive meeting. The Panel also notes that the information contained in the letter is in the public domain, and that the information is pertinent to these proceedings since it relates to an issue which we have been asked to consider, i.e., whether or not the CDSOA will cause domestic producers to support petitions for the purpose of receiving CDSOA offset payments. For these reasons, the Panel considers that there is "good cause" for it to accept Canada's submission of this letter under paragraph 14 of our Working Procedures. The Panel therefore invites the United States to comment on the substance of the letter. Other complaining parties may also comment on the substance of the letter, if they so choose. All comments should be submitted to the Secretariat by close of business on Monday, 13 May 2002.[260]

2. Issuance of separate reports

7.3 In a letter dated 10 June 2002, the United States asked the Panel to issue a separate final report on the dispute brought by Mexico (WT/DS234).[261] The United States based its request on the fact that Mexico's panel request included a claim under SCM Article 5(b), in addition to the claims common to all complaining parties. The United States made its request pursuant to Article 9.2 of the DSU, which provides in relevant part:

> If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned.

[260] Comments were received from Japan and the United States.

[261] In a letter dated 12 June 2002, the Panel invited the parties to comment on the US request. Comments were received from the European Communities, Japan and Mexico. The European Communities expressed surprise at the timing of the US request. Japan expressed systemic concerns regarding the timing of the US request. Mexico did not oppose the US request, provided that the Panel made findings and conclusions regarding all Mexico's claims, including those claims made in common with other complaining parties.

7.4 Although Article 9.2 of the DSU provides that the United States may request a separate report on the dispute brought by Mexico, we consider that requests made under that provision should be made in a timely manner, since any need to prepare separate reports may affect the manner in which a panel organises its proceedings. In particular, such requests should be made at an early juncture in the panel process, preferably at the time that a panel is established. In the present case, the US request was received on 10 June 2002, approximately two months after issuance of the descriptive part of the Panel's report. Nevertheless, the United States provides no explanation of why it was unable to submit its request at an earlier date. Nor does the United States describe any prejudice that it will suffer if the Panel were to fail to issue a separate report on the dispute brought by Mexico. It is not incumbent on us to assume that a failure to issue separate reports will prejudice the United States, especially as Mexico's SCM Article 5(b) claim is handled separately and discreetly in the present report.

7.5 Upon considering the US request, we formed the view that the preparation of a separate report on the dispute brought by Mexico would delay issuance of the Panel's interim report. Although the United States only requested a separate final report, we are not prepared to issue a separate final report without also issuing a separate interim report. This is because we are not entitled to issue a final report on the dispute brought by Mexico without first having issued an interim report on that dispute. Otherwise Mexico would be denied its right to request a review of precise aspects of its interim report (DSU Article 15.2).

7.6 For these reasons, we reject the US request for a separate final report on the dispute brought by Mexico.

B. AD ARTICLE 18.1 AND SCM ARTICLE 32.1, AND PARAGRAPHS 2 AND 3 OF GATT ARTICLE VI – SPECIFIC ACTION AGAINST DUMPING/SUBSIDY

1. Introduction

7.7 The complaining parties assert that the CDSOA constitutes "specific action against dumping"/subsidisation, contrary to Article 18.1 of the AD Agreement, Article 32.1 of the SCM Agreement, and paragraphs 2 and 3 of Article VI of the GATT 1994. The following evaluation and findings focus primarily on the AD Article 18.1 claim. However, they apply equally in respect of the claims made under SCM Article 32.1 and GATT Article VI:2 and 3. The United States suggests that the reasoning of the Appellate Body in *US – 1916 Act (AB)*[262] regarding AD Article 18.1 should not apply equivalently to GATT Article VI:3 and the SCM Agreement. In particular, the United States notes that, although AD Article 18.1 and SCM Article 32.1 contain essentially identical language, GATT Article VI:3 is not the same as Article VI:2. In addition, SCM Article 10 is significantly different from AD Article 1 in that SCM Article 10 refers to "countervailing duties" while Article 1 refers to "anti-dumping measures." According to the United States, the Appellate Body found that AD Article 1 encompasses all measures taken against dumping since that provision contains no limitation on the particular types of measures. SCM Article 10, in contrast, refers to "countervailing duties," not "measures" taken against subsidies. In the United States' view, GATT Article VI:3 read in conjunction with Article 10 does not limit the permissible remedies for subsidies to duties. The United States submits that, instead, those provisions operate to impose the requirements of Part V of the SCM Agreement only when the measure taken is countervailing duties. The Panel does not accept the US argument. The Appellate Body found in *US – 1916 Act* that "Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings". The

[262] *United States – Anti-Dumping Act of 1916* ("*US – 1916 Act (AB)*"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000.

Appellate Body's analysis was not based on any particular AD provision in isolation, but on the AD Agreement as a whole. Since the Appellate Body's analysis was not based exclusively on AD Article 1, we fail to see why a different approach should apply in respect of the permissible responses to subsidization, simply because of a difference between the text of AD Article 1 and SCM Article 10. In identifying the permissible responses to subsidization, we consider it important to have regard to the type of remedies foreseen by the SCM Agreement. (We note that the panel in *US – 1916 Act (Japan)*[263] took a similar approach for the purpose of identifying the permissible remedies against dumping). Part V of the SCM Agreement foresees definitive countervailing duties, provisional measures and undertakings, whereas Part III foresees countermeasures. These, therefore, are the permissible responses to subsidization. To the extent that the CDSOA may be regarded as a "specific action against a subsidy" but not one of these permissible responses to subsidization, it would be inconsistent with SCM Article 32.1.

7.8 As noted above, the Appellate Body has confirmed that there are three "permissible responses to dumping" available to WTO Members.[264] A Member may have recourse to definitive anti-dumping duties, provisional measures, and price undertakings. Such "permissible responses to dumping" constitute "specific action against dumping" within the meaning of AD Article 18.1, which provides that:

> No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.*
>
> * This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

7.9 By virtue of AD Article 18.1, other types of "specific action against dumping" are not permitted. Thus, if the CDSOA is a "specific action against dumping", but not one of the three "permissible responses to dumping", it will violate AD Article 18.1. The issue before the Panel is whether or not the CDSOA is a "specific action against dumping".

7.10 The complaining parties submit that the CDSOA constitutes "specific action against dumping" because CDSOA offset payments are dependent on a finding of dumping. In this regard, the complaining parties rely on the following statement by the Appellate Body at para. 122 of its report on *US – 1916 Act*:

> In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present.[66]
>
> 66. We do not find it necessary, in the present cases, to decide whether the concept of "specific action against dumping" may be broader.

7.11 The United States adopts a two-tier approach to this issue. First, the United States relies on the above Appellate Body statement to argue that AD Article 18.1 only applies in respect of actions that address dumping "as such". The United States submits that CDSOA offset payments are not made "in response to situations presenting the constituent elements of dumping", and that the CDSOA

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[263] *United States – Anti-Dumping Act of 1916 – Complaint by Japan* ("*US – 1916 Act (Japan)*"), WT/DS162/R and Add.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, para. 6.216.

[264] *US – 1916 Act (AB)*, para. 137.

is therefore not based on a test that includes the constituent elements of dumping. Accordingly, the United States submits that the CDSOA does not address dumping "as such".

7.12 Second, the United States emphasises that AD Article 18.1 is restricted to specific actions "against" dumping. The United States asserts that the Appellate Body had no need to interpret this specific term in the *1916 Act*, and argues that the Appellate Body should not be understood to have found that AD Article 18.1 applies to all "action that is taken in response to situations presenting the constituent elements of dumping". According to the United States, certain action may be "in response to" dumping, but not "against" dumping. The United States submits that, in order for action to be "against" dumping, and thereby fall within the scope of AD Article 18.1, such action must (1) apply to the imported good or importer, and (2) be burdensome (as was the case in the *1916 Act*).

7.13 The issues raised by the parties require us to determine whether or not the CDSOA constitutes a "specific action against dumping" within the meaning of Article 18.1 of the AD Agreement. In identifying the appropriate standard for resolving this issue, we have had regard to the Appellate Body's treatment of this provision in *US – 1916 Act*.[265] We note that there is disagreement between the parties as to whether or not the test applied by the Appellate Body in *US – 1916 Act* for the purpose of determining whether or not the measure at issue in that case was a "specific action against dumping" is conclusive of the issue before us. If the test set forth in para. 122 of the Appellate Body report in *US – 1916 Act* were conclusive, a measure would constitute "specific action against dumping" if it were "taken in response to situations presenting the constituent elements of dumping". This would be the case if the measure could be taken only when the constituent elements of dumping were present. We therefore begin our analysis by considering the relevance of the test applied by the Appellate Body in *US – 1916 Act* to these proceedings. Thus, we shall consider whether any "action that may be taken *only* when the constituent elements of 'dumping' are present" necessarily constitutes "specific action against dumping"? In particular, is an action necessarily "against" dumping simply because it is taken "in response to" dumping", or is it necessary to further determine that a measure taken "in response to" dumping is also "against" dumping? We then identify the appropriate standard for determining whether or not a measure constitutes "specific action against dumping" and apply it to the CDSOA. Finally, we examine the US argument that the CDSOA is permitted by footnotes 24 and 56 of the AD and SCM Agreements respectively.

2. The standard for determining whether or not a measure constitutes a "specific action against dumping"

7.14 For the reasons set forth below, we do not consider that the test applied by the Appellate Body in *US – 1916 Act* is conclusive of whether or not a measure constitutes "specific action against dumping". In our view, a measure is not "specific action against dumping" simply or only because it is taken in response to situations presenting the constituent elements of dumping, or because it may be taken only when the constituent elements of dumping are present. Such a measure will be "specific action" related to dumping, in the sense that it acts specifically in response to dumping, but it will not necessarily be "specific action" against dumping.

7.15 First, we note that, at para. 122 of its *US – 1916 Act* report, the Appellate Body was referring to Article 18.1 of the AD Agreement in order to clarify the scope of application of Article VI of GATT 1994. In other words, the Appellate Body was referring to Article 18.1 as context for the purpose of interpreting Article VI, which was the provision at issue in that case. The Appellate Body was not interpreting AD Article 18.1 *per se*.

[265] We shall also have regard to the general rule of treaty interpretation set forth in Article 31 of the Vienna Convention, whereby a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

7.16 Second, we do not consider that the circumstances of the *US – 1916 Act* proceedings were such that the Appellate Body was required to consider the meaning of the word "against" in AD Article 18.1. This is because there was no disagreement between the parties in that case that the measure at issue, which imposed criminal and civil liabilities on importers engaged in dumping, constituted action "against" dumping.[266]

7.17 Third, we do not consider that action "in response to" dumping will always necessarily be "against" dumping. In our view, the category of action "in response to" dumping is broader than the category of action "against" dumping. In this regard, the parties provided us with many definitions of the term "against". According to the United States, the ordinary meaning of "against" is "of motion or action in opposition", "in hostility or active opposition to", and "into contact with".[267] Australia, the European Communities, India, Indonesia and Thailand note that the same dictionary also defines "against" as "in competition with", "to the disadvantage of", "in resistance to", and "as protection from".[268] According to Canada, "[t]o take action against dumping or subsidies is to 'offset or prevent' the dumping or subsidy. In other words, action taken against dumping or subsidies is action taken to counteract or discourage the practice".[269] Without necessarily providing a definitive statement of the meaning of the term "against", we conclude that action "against" dumping must have some adverse bearing[270] on dumping. Thus, action "in response to" dumping will only constitute action "against" dumping to the extent that it has an adverse bearing on dumping.[271] Action which is in response to dumping, but also beneficial to dumping (or neutral in effect on dumping), is not "against" dumping.[272]

7.18 For these reasons, we do not consider that the test applied by the Appellate Body in *US – 1916 Act* is conclusive of the issue of whether or not a measure constitutes a "specific action against dumping". A measure is not a "specific action against dumping" simply because it "may be taken *only* when the constituent elements of 'dumping' are present", or because it is taken "in response to" dumping. A measure that may be taken only in situations presenting the constituent elements of dumping is clearly "specific action" in response to dumping. However, in order for that measure to

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[266] At the risk of over-simplification, the relevant disagreement between the parties was more a question of whether the measure acted against dumping *per se*, as opposed to predatory pricing.

[267] US first written submission, para. 92, citing the new Shorter Oxford English Dictionary, 38-39 (L. Brown ed., 1993).

[268] Australia, second written submission, para. 16. EC, India, Indonesia and Thailand, second written submission, para. 28.

[269] Canada, second written submission, para. 45.

[270] The Oxford English Dictionary Online (www.oed.com) refers to "against" as "expressing the adverse bearing of many verbs and nouns of action".

[271] We consider that this approach is entirely consistent with basic definitions of the term "against" proposed by the parties. The complaining parties have asserted that the ordinary meaning of "against" is "in competition with", "to the disadvantage of", "in resistance to", "in opposition to" and "as protection from". The United States has asserted that "against" means "burdensome". All of these definitions, in our view, express some form of adverse bearing.

[272] Certain complaining parties themselves accept that action will not be "against" dumping if it does not have any adverse bearing on dumping. For example, the EC, India, Indonesia and Thailand assert that: "to be effective, a 'specific action against dumping' must be capable of having some adverse impact upon the dumped imports (or upon the 'entities engaged in dumping')" (reply to Question 5 from the Panel after the second substantive meeting). Furthermore, Australia asserts "that a measure 'against' dumping … would need to have an 'adverse bearing' in relation to dumped products, or to an entity connected with those products" (reply to question 8 from the Panel after the second substantive meeting). Brazil states that "[t]here may, of course, be actions taken in 'response' to dumping which are not necessarily 'against' dumping. As such, 'specific action against dumping' is a subset of actions which may be taken in response to the constituent elements of dumping. Indeed, 'specific action against dumping' read in the context of Article VI.2 of the GATT 1994 means action 'to offset or prevent dumping.'" (Brazil's reply to Question 1 from the Panel at the first substantive meeting).

constitute "specific action against dumping", something more is needed: the measure must also act "against" – and therefore have an adverse bearing on - dumping. In other words, a measure will only constitute "specific action against dumping" if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping,[273] and (2) it acts "against" dumping, in the sense that it has an adverse bearing on dumping. We shall now examine whether the CDSOA meets these two conditions.

3. Does the CDSOA act specifically in response to dumping, in the sense that CDSOA payments may be made only in situations presenting the constituent elements of dumping?

(a) Arguments of the parties

7.19 The complaining parties[274] assert that CDSOA payments may be made only in situations presenting the constituent elements of dumping because:

- CDSOA offset payments are made only and exclusively to US producers that supported an application for an anti-dumping investigation:
- CDSOA offset payments are made only and exclusively to US producers "affected" by an instance of dumping which is the subject of an anti-dumping order;
- CDSOA offset payments are paid for "qualifying expenses" incurred by the affected domestic producers "after" the issuance of anti-dumping order; and
- the "qualifying expenses" must be related to the production of a product that is the subject of an anti-dumping order.

7.20 The United States denies that CDSOA payments may be made only in situations presenting the constituent elements of dumping. According to the United States, the CDSOA does not instruct US Customs to take action in response to situations or conduct presenting the constituent elements of dumping, and is therefore not directly based on the constituent elements of dumping. On the contrary, the CDSOA instructs US Customs to take action based on certifications from an "affected domestic producer" regarding its "qualifying expenditures". The United States asserts that the fact that an anti-dumping order is a necessary prerequisite, or condition, for CDSOA payments is not sufficient to make the CDSOA a "specific action against dumping". Nor is the fact that CDSOA distributions are funded by anti-dumping duties.

(b) Evaluation by the Panel

7.21 We note that, at first sight, the CDSOA contains no reference to the constituent elements of dumping. Nor are the constituent elements of dumping explicitly built into the essential elements of

[273] According to our understanding of the Appellate Body, action that may be taken only when the constituent elements of dumping are present is taken "in response to" dumping. Although the category of action "in response to" dumping may be broader than the category of action that may be taken only when the constituent elements of dumping are present, for present purposes we shall confine ourselves to considering whether or not the CDSOA is in response to dumping, in the sense of operating only when the constituent elements of dumping are present. In this regard, we note that the Appellate Body did not "find it necessary … to decide whether the concept of 'specific action against dumping' may be broader" (*US – 1916 Act (AB)*, note 66).

[274] Not all complaining parties rely on each of these factors to support their argument that the CDSOA offset payments may be made only when the constituent elements of dumping are present.

eligibility for offset payment subsidies. Nevertheless it is clear that CDSOA payments may only be made in situations where the constituent elements of dumping are present. Specifically, CDSOA offset payments follow automatically from the collection of anti-dumping duties, which in turn may only be collected following the imposition of anti-dumping orders, which may only be imposed following a determination of dumping (injury and causation). Thus there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments. For domestic producers who have qualified for CDSOA payments by having supported the petition for an anti-dumping investigation, and having incurred qualifying expenses in the production of like products, the CDSOA offset payments flow as automatically from the presence of the constituent elements of dumping as do the anti-dumping duties themselves. For this reason, we find that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping. Indeed, this conclusion is even suggested by the reference to "dumping" in the title of the CDSOA.

7.22 In order to avoid any misunderstanding, we wish to emphasise that our finding that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping is in no way based on the fact that offset payments are funded from collected anti-dumping duties. Even if CDSOA offset payments were funded directly from the US Treasury, and in an amount unrelated to collected anti-dumping duties, we would still be required to reach the conclusion – for the reasons set forth in the preceding paragraph - that offset payments may be made only in situations presenting the constituent elements of dumping.

7.23 To conclude, therefore, we find that CDSOA offset payments act specifically in response to dumping, since they may be made only in situations presenting the constituent elements of dumping. For this reason, we find that the CDSOA is a "specific action" related to dumping. We must now consider whether or not the CDSOA is a specific action against dumping.

4. Is the CDSOA a specific action against dumping?

(a) Arguments of the parties

7.24 The complaining parties assert that the CDSOA acts against dumping because it upsets the competitive relationship between (imported) dumped and domestic products. According to the complaining parties, "specific action against dumping" need not necessarily impact directly on the entity connected to, in the sense of being responsible for, the dumped product. For example, Australia asserts that "the necessity of an 'adverse bearing' does not compel the conclusion that a measure 'against' dumping must apply exclusively to the dumped products, or to an entity connected with those products, or be burdensome to those products or entities".[275] The EC, India, Indonesia and Thailand assert that "to be effective, a 'specific action against dumping' must be capable of having some adverse impact upon the dumped imports (or upon the 'entities engaged in dumping')", although "there is nothing in the *US - 1916 Act* panel reports or in the Appellate Body report which suggests that the notion of 'specific action against dumping' should be restricted to those types of measures which apply 'directly' to 'entities engaged in dumping'".[276]

7.25 The United States asserts that, in order to be "against" dumping, action "must apply to the imported good or the importer, and it must be burdensome".[277] In particular, according to the United States, "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

[275] Australia's response to Question 8 from the Panel after the second substantive meeting.
[276] Replies to Questions 6 and 8 from the Panel after the second substantive meeting.
[277] US first written submission, para. 92.

to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer."[278]

7.26 The complaining parties assert that the US approach to the phrase "against dumping" is overly restrictive. The complaining parties assert that the ordinary meaning of "against" is "in competition with", "to the disadvantage of", "in resistance to", "in opposition to" and "as protection from". They therefore argue that the notion of action "against" dumping may include not only actions that impose a direct liability on dumped imports, but also actions that afford protection to domestic producers by giving them an advantage over the dumped imports with which they compete. As contextual support the complaining parties refer to Articles VI:2 and VI:3 of GATT 1994, which refer respectively to the imposition of anti-dumping duties "in order to prevent or offset dumping", and countervailing duties "for the purpose of offsetting any bounty or subsidy". The complaining parties argue that the notion of "against" dumping must include, at a minimum, any actions which, like the levying of anti-dumping or countervailing duties, are taken "in order to" or "with the purpose of" "offsetting" (or "preventing") dumping or subsidization. They note that dumping and subsidization may be "offset" not only directly, but also indirectly, by granting an advantage to domestic producers which cancels out the price advantage enjoyed by imports as a result of dumping or subsidization. The complaining parties assert that CDSOA offset payments are therefore likely to precipitate changed behaviour on the part of the producers and importers of dumped or subsidised goods, as well as on the part of domestic producers, thereby altering the competitive relationship between imported goods and the domestic like products in ways not contemplated by GATT 1994 or the AD or SCM Agreements. CDSOA offset payments further strengthen the competitive position of domestic producers on top of the remedy that has already been provided in the form of anti-dumping/countervailing measures.

7.27 The complaining parties assert that the stated purpose of the CDSOA confirms that CDSOA offset payments constitute action "against" dumping/subsidization. They submit that the purpose of the offset payments is clearly described in Section 1002 of the CDSOA, which contains the “findings” of Congress providing the justification for the enactment of the CDSOA. The complaining parties assert that Section 1002 is an integral part of the CDSOA. They note that paragraph 1 of Section 1002 states that dumping and subsidisation “must be effectively neutralized”, that paragraph 3 contains the “finding” that the “remedial purpose” of the existing US anti-dumping and countervailing duty laws is “frustrated” because continued dumping and subsidisation “prevents markets prices from returning to fair levels”, and that paragraph 5 concludes that “United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved”. According to the complaining parties, US Congress therefore asserted that the purpose of the *offset payments* is to “neutralize effectively” dumping and subsidisation by ensuring that prices “return to fair levels”. In other words, the purpose of the CDSOA is to “offset” dumping and subsidisation. The complaining parties assert that the name given by the US Congress to the act (“*Continued Dumping and Subsidy Offset Act*”) and to the payments made under the act (“*offsets*”) provides further confirmation of such purpose.

7.28 The United States asserts that the complaining parties have failed to demonstrate that the CDSOA acts "against" dumping. Instead, the complaining parties presume that the CDSOA will have negative effects on imported goods. The United States submits that the complaining parties would have the Panel rewrite AD Article 18.1 and SCM Article 32.1 to read "no specific action with a presumed negative effect on import goods or foreign producers …". The United States also asserts that the complaining parties' test is overly broad and unworkable, since any type of domestic legislation which improves the position of the domestic industry could be presumed to have a negative effect on imported goods. Nor does the United States agree that the CDSOA acts "against" dumping because of its supposed effect on the competitive relationship or the conditions of competition

[278] US oral statement at the second substantive meeting, para. 32.

between domestic goods and imported – including dumped or subsidized – goods. According to the United States, a measure only acts "against" dumping or subsidy if it 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.

7.29 According to the United States, the purpose or intent of the CDSOA is legally irrelevant. The United States submits that the resolution of this dispute does not depend upon what the CDSOA is intended to do but what it actually *does*. The United States relies on the following statement by the panel in *US - 1916 Act* to reject the argument that the intent or purpose of a measure is relevant in determining whether it constitutes a "specific action against dumping":

> While we agree that Article VI applies when Members have recourse to a given trade policy instrument, i.e. anti-dumping action, we do not agree that application of Article VI is dependent on the objective pursued by the Member concerned… Article VI is based on an objective premise. If a Member's legislation is based on a test that meets the definition of Article VI:1 {dumping}, Article VI applies. The stated purpose of the law cannot affect this conclusion.[279]

7.30 The United States submits that the *US – 1916 Act* panel cited *EC - Parts and Components*, where the panel also rejected the argument that the policy purpose of a measure could determine whether it fell within the scope of the provisions in question.[280] According to the United States, in that case the panel explained that "[o]nly at the expense of creating substantial legal uncertainty could the policy purpose of a charge be considered to be relevant in determining whether the charge falls under Article II:1(b) or Article III:2."[281] According to the United States, despite US arguments that the 1916 Act was intended to remedy the antitrust problem of predatory pricing, the panel, which was affirmed by the Appellate Body, found that the purpose or intention of the law could not exclude it from the scope of Article VI.[282] According to the United States, it therefore must also be true that the stated purpose of a measure cannot bring it within the scope of Article VI and the Antidumping and SCM Agreements if the actual elements of the measure do not satisfy the test for the scope of those articles. The United States submits that the legislative history of the CDSOA 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. In this regard, the present case differs from the *US – 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.

7.31 The complaining parties assert that the *US – 1916 Act* panels did not say that the purpose of the measure is "legally irrelevant", but rather that a measure which is objectively a "specific action against dumping" cannot escape condemnation simply because it has a different stated purpose.[283] The panels in *US - 1916 Act* were concerned that if the legal characterisation of a measure as "specific action against dumping" were dependent upon its stated purpose, it would be extremely easy for Members to evade the prohibition contained in Article 18.1 of the *Anti-Dumping Agreement* simply by stating some spurious purpose in the legislation at issue. According to the complaining parties, that concern does not arise in the present case.

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[279] *US – 1916 Act (EC)*, para. 6.116.
[280] *US – 1916 Act (EC)*, note 376.
[281] *EC – Parts and Components*, BISD 37/132, para. 5.7
[282] *US – 1916 Act (EC)*, para. 6.117; *US - 1916 Act (Japan)*, para. 6.135.
[283] *US – 1916 Act (EC)*, para. 6.116.

7.32 The complaining parties assert that even if the CDSOA is merely a "payment programme",[284] making payments is not an objective in itself, but rather an instrument to achieve some purpose. According to the complaining parties, the United States has not argued that the "findings" made by the US Congress in Section 1002 of the CDSOA are incorrect or false. Nor has the United States argued that the CDSOA is inapt to achieve the purpose reflected in those "findings". Indeed, had the US submission argued that, it would be tantamount to saying that the US legislators were either incompetent or insincere. The complaining parties submit that since the United States has not disputed that the purpose of the CDSOA is that stated by the US Congress in the CDSOA, there is no reason why that purpose should be disregarded by the Panel.[285] At any rate, even assuming that, as argued by the United States, the stated purpose of the CDSOA were "legally irrelevant" for the characterisation of the CDSOA, that would not prevent the Panel from taking into account the unquestionably informed views of the US legislators in assessing the factual issue of whether or not the *offset payments* are objectively capable of offsetting or preventing dumping or subsidisation and, therefore, constitute action "against" dumping or subsidisation.

(b) Evaluation by the Panel

7.33 In considering whether the CDSOA constitutes specific action "against" dumping, we note that AD Article 18.1 refers only to measures that act against "dumping" as a practice. There is no express requirement that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good such as the importer, exporter, or foreign producer.[286] Nor do we consider that action may only be considered to be "against" dumping if its acts directly against dumping. As noted above, we consider that a measure will only act "against" dumping if it has an adverse bearing on the practice of dumping.[287] In our view, the ordinary meaning of the term "against", which is not qualified in any way in AD Article 18.1, encompasses any form of adverse bearing, be it direct or indirect.[288] Thus, AD Article 18.1 applies to measures that specifically act either directly or indirectly against the practice of dumping. Indeed, were it otherwise, we do not see how the Appellate Body could have concluded in *US – 1916 Act* that "[s]pecific action against dumping could take a wide variety of forms".[289]

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[284] See US first written submission at para. 19.

[285] According to the complaining parties, the stated purpose of a measure has been deemed relevant for its legal characterisation in some cases where it was both undisputed and supportive of a finding of violation. See e.g. the report of the Appellate Body on *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, pp. 30-31. Commenting upon that report, the panel report on *Chile – Taxes on Alcoholic Beverages*, WT/DS87/R, WT/DS110/R, noted the following (at para. 7.118):

Also, it is worth noting the nature of the quotations used in Canada – Periodicals. The statements were supportive of a finding of a protective objective and structure of the provision. Statements by a government against WTO interests (e.g., indicating a protective purpose or design) are most probative. Correspondingly, it is less likely that self-serving comments by a government attempting to justify its measure would be particularly probative.

[286] Similarly, SCM Article 32.1 merely refers to specific action against a "subsidy". It does not refer to action against the imported subsidized product, or entities connected to, or responsible for, the subsidized good such as the importer, exporter, or foreign producer.

[287] We consider that this approach is entirely consistent with basic definitions of the term "against" proposed by the parties. The complaining parties have asserted that the ordinary meaning of "against" is "in competition with", "to the disadvantage of", "in resistance to", "in opposition to" and "as protection from". The United States has asserted that "against" means "burdensome". All of these definitions, in our view, express some form of adverse bearing.

[288] In a hypothetical election campaign, Candidate A could seek to adversely impact Candidate B both directly, by having Candidate B removed from the list of electoral candidates, or indirectly, by paying voters to vote for Candidate A. Either type of action, be it direct or indirect, would in our view be "against" Candidate B.

[289] *US – 1916 Act (AB)*, para. 81.

7.34 In our view, the CDSOA has an adverse bearing on dumping. This conclusion is based on the following considerations which, taken together, demonstrate that the CDSOA operates "against" dumping.

(i) Distortion of competition between dumped and domestic products

7.35 The CDSOA has an adverse impact on the competitive relationship between dumped/subsidized imports and goods produced by "affected domestic producers". In particular, the structure of the CDSOA (which combines offset subsidies with the collection of anti-dumping duties) is such that it will act against dumping by conferring on "affected domestic producers" incurring "qualifying expenses" an offset payment subsidy which would allow them to establish a competitive advantage over dumped imports. Although the United States has argued that there is no basis to include a "conditions of competition" test under AD Article 18.1/SCM Article 32.1, we note that the United States itself argued that conformity with those provisions should be determined *inter alia* on the basis of whether the measure at issue is "burdensome" for imported goods/entities responsible for their importation. In our view, a primary test of whether or not a measure is "burdensome" on imports is to determine whether the measure has had an adverse impact on the conditions under which the imported goods compete with like domestic goods. In other words, we consider that the US "burdensome" test requires rather than disallows a conditions of competition test.

7.36 "Qualifying expenses" are capital or operational expenditures that must relate to the production of the like domestic good to that subject to an order, and that must be incurred after the order is imposed and before it terminates. In other words, "qualifying expenses" are costs incurred by domestic producers in competing with dumped imports subject to an order. The amount of the offset subsidy is determined by the amount of duties collected, and therefore by the margin of dumping involved. The United States asserted that "dumping over time is evidence of a competitive advantage. The imposition of an anti-dumping duty levels the playing field; it does not place the dumped product at a disadvantage."[290] We agree that dumping over time may be evidence of a competitive advantage. However, the combination of anti-dumping duties and offset subsidies is not merely to level the playing field, but to transfer that competitive advantage to "affected domestic producers".[291] To the extent that the competitive advantage enjoyed by dumped imports is transferred to "affected domestic producers", those imports, and the entities responsible for their commercialization, suffer a competitive disadvantage. This competitive disadvantage acts (albeit indirectly) against dumping and subsidization.

7.37 We note the US argument that there is no reason to believe that the CDSOA payments will necessarily change the competitive relationship between producers. According to the United States, 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. The United States submits that CDSOA payments will not necessarily be used by domestic producers to improve their competitive position with respect to the product subject to relevant anti-dumping or countervailing duty orders. While we accept that the CDSOA does not require "affected domestic producers" to use offset payments for any specific purpose, we would also note that offset payments will have been made to domestic producers because of a finding of dumping causing injury, and that it may be expected that most or many will use the payments, and the improvement in their competitive position these will allow, to address the injury caused by dumped imports in one way or another. It is not necessary to specify how this will be done.

[290] US response to question 3(d) from the Panel after the second substantive meeting.

[291] The competitive advantage enjoyed by subsidised imports is likewise transferred to "affected domestic producers" through the combination of countervailing duties and offset subsidies.

Moreover, since money is fungible, what the recipient actually does with the cash received is irrelevant.[292]

7.38 We also note that the CDSOA confers an advantage on "affected domestic producers" in respect of competition from all sources, not only that from dumped/subsidised imports subject to an order. However, we do not consider that a measure will only constitute "specific action against dumping" if it only acts exclusively against dumping. AD Article 18.1 does not refer to "specific action exclusively against dumping". Nor is the word "against" qualified by the word "specific", which instead dictates the type of action at issue (i.e., a measure may be caught by AD Article 18.1 if it is specific in nature, rather than specific in effect).[293]

7.39 We conclude however, that the CDSOA has a specific adverse impact on the competitive relationship between domestic products and dumped imports which does not apply to other products. While non-"affected domestic producers" and foreign producers/exporters not subject to orders are able to lower their prices in order to meet the improved competitive position of the "affected domestic producers" resulting from the offset payments, the fact that the offset subsidies are combined with anti-dumping orders means that foreign producers/exporters subject to orders are unable to do so. This is because any reduction in their prices will be nullified under United States law by the imposition by the United States of correspondingly increased anti-dumping duties. Since the CDSOA transfers the competitive advantage of dumped goods to "affected domestic producers", and prevents foreign producers/exporters from responding by lowering their prices, the CDSOA effectively penalises those entities if they continue to export dumped products (subject to orders) to the United States. It imposes a penalty on dumped imports by rendering them less competitive vis-à-vis the like products of "affected domestic producers". We are in no doubt that the imposition of a penalty on entities engaged in dumping acts against dumping. Furthermore, since the CDSOA combines the imposition of an anti-dumping order with the imposition of a penalty, the CDSOA operates such as to impose a double remedy on dumped imports. Such "double jeopardy" will doubtless dissuade foreign producers/exporters from continuing to dump following the imposition of an anti-dumping order. Exporters/foreign producers know that if they dump products in the United States, and if those products are subject to an anti-dumping order, not only will anti-dumping duties be levied, but those duties will be transferred to at least some of their US competitors in the form of CDSOA offset payments. These payments benefit the recipient companies, and therefore disadvantage the exporters/foreign producers engaged in dumping. Under the CDSOA, exporters/foreign producers determine by their own conduct whether US producers obtain offset payments. In order to eliminate the competitive disadvantage they suffer from offset payments to "affected domestic producers", exporters/foreign producers will clearly be dissuaded from

[292] Under the SCM Agreement, countervailing duties may be imposed if the subsidy is specific, and causes in injury to a domestic industry in the importing Member. In the case of subsidies taking the form of cash reimbursements of certain expenses incurred in respect of a given product, the imposition of countervailing duties is not subject to an additional obligation to demonstrate that the cash reimbursements were used by the recipient to bolster its competitive position in respect of that product. The fact that the subsidy was product-specific leads to a presumption that it benefited the recipient in respect of that product. Nor is it necessary to establish that a subsidy is actually used to export in order to demonstrate that a subsidy is contingent on export performance.

[293] As noted above at para. 7.18, a measure constitutes "specific action" within the meaning of AD Article 18.1 if it acts specifically in response to dumping.

dumping.[294] Such dissuasive effect means that the CDSOA bears adversely on dumping, and therefore acts against dumping.[295]

7.40 Finally, we note that the consequences outlined above seem to be consistent with the intent of the US legislature in adopting the CDSOA – i.e., that it would act primarily against dumping or subsidisation, as opposed to import competition more generally. We refer in particular to the "Findings of Congress" set forth in Section 1002 of the CDSOA. Section 1002 provides in relevant part that "continued dumping or subsidization of imported products after issuance of anti-dumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels". According to Congress, the US trade laws "should be strengthened to see that the remedial purpose of those laws is achieved". In our view, therefore, Congress intended that the CDSOA should discourage the "frustrat[ion]" of the "remedial purpose" of US trade laws by "continued dumping or subsidization". We therefore understand that Congress intended that the CDSOA should act "against" continued dumping or subsidization (in order to safeguard the "remedial purpose" of US trade laws). Since the CDSOA was intended to act against dumping, and since it has been shown to act against dumping, we consider that it would be inappropriate for us to find that it does not do so simply because the CDSOA also has an effect on competition more generally. In particular, we do not consider that a Member is entitled to introduce a measure with the intent of acting against dumping, and then deny that the measure constitutes a "specific action against dumping" because the measure does not act exclusively against dumped imports.

7.41 We note the US argument that "the stated purpose of a measure cannot bring it within the scope of Article VI and the Antidumping and SCM Agreements if the actual elements of the measure do not satisfy the test for the scope of those articles".[296] In this case, however, we are not relying on the stated purpose of the CDSOA as a basis for concluding that the CDSOA constitutes a "specific action against dumping". We consider that this conclusion can be securely based on other considerations to which we refer. That being said, the stated purpose of the CDSOA confirms our conclusion based on these other considerations, and we are therefore of the view that the stated purpose of the CDSOA should not be overlooked. In effect, acceptance of the US argument that the CDSOA is not a "specific action against dumping" would mean that the CDSOA does not do what the US Congress clearly intended it would do, namely to act against (continued) dumping. On the basis of the various factors we have considered, we do not accept that the CDSOA does not do what the US Congress clearly intended it should do. In any event, we note that the United States has not disputed the EC statement that "[a]t any rate, even assuming that, as argued by the United States, the stated purpose of the CDSOA were 'legally irrelevant' for the characterization of the CDSOA, that would not prevent the Panel from taking into account the unquestionably informed views of the US legislators in assessing the factual issue of whether or not the *offset payments* are objectively capable of offsetting or preventing dumping or subsidisation and, therefore, constitute action 'against' dumping or subsidisation".[297]

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[294] Exporters/foreign producers will similarly be dissuaded from accepting subsidies, or from selling into the United States at subsidized prices.

[295] Non-dumping exporters/foreign producers (not subject to an anti-dumping order) can do nothing and, therefore, will do nothing to prevent CDSOA offset payments. The CDSOA therefore does not penalize (non-dumping) exporters/foreign producers not subject to an anti-dumping order in the same way that it penalizes exporters/foreign producers subject to an anti-dumping.

[296] US first written submission, para. 99.

[297] Second written submission of the European Communities, India, Indonesia and Thailand, para. 38.

(ii) Financial incentive to file/support applications

7.42 The adverse bearing on dumping created by the offset payments is compounded by the additional consequence of the CDSOA that it will have the effect of providing a financial incentive for domestic producers to file anti-dumping/countervail applications, or at least to support such applications in order to establish their eligibility for offset payments. This will in all probability result in a greater number of anti-dumping/countervail applications and investigations than would have been the case without CDSOA, both because additional applications will be filed, and because the AD Article 5.4/SCM Article 11.4 standing requirements will likely be met in cases where there would not have been sufficient "support" absent the CDSOA.[298] A greater number of anti-dumping/countervail investigations will likely result in a greater number of anti-dumping/countervail orders (since some of those additional investigations will on the balance of probability result in orders).[299] The prospect of an increased number of investigations will disrupt the trading environment for foreign producers/exporters that may be engaged in dumping.[300]

7.43 The United States argues that since there is uncertainty at the time a petition is filed as to the quantum of duties, if any, which will be distributed under CDSOA, and since many years are likely to pass before any such distribution will take place, it is highly improbable that the CDSOA is a factor at all in a domestic company's or union's consideration of whether to support a petition. According to the United States, considered against the million plus US dollars it costs to bring an anti-dumping or countervailing duty case before the Department of Commerce and the International Trade Commission, and then to defend it against any possible court challenges, it would be irrational for domestic producers to bring a "frivolous" or "disingenuous" anti-dumping or countervailing duty case for a sum certain with the hope of a contingent and uncertain "payoff."

7.44 We acknowledge that the filing of an anti-dumping application is costly, and we have no reason to doubt the US estimate of the costs of an application.[301] We also acknowledge that, in certain cases, a significant period of time may elapse between the imposition of an order and the payment of offset subsidies to "affected domestic producers", and that, depending on a number of variables, the offset payments may not be significant. That being said, however, the potential "rewards" involved are significant. According to evidence submitted by certain complaining parties (not challenged by the United States), offset payments to "affected domestic producers" made as of December 2001 totalled over US$206,000,000. One "affected domestic producer" received US$60,000,000. Another received US$30,000,000. While not all "affected domestic producers" will receive offset payments of such magnitude, in some cases the US$1,000,000 plus cost of filing an application will clearly be immaterial. Furthermore, even though offset payments may not be made immediately after imposition of an order, in many cases such sums would be worth waiting for. Viewed in this light, we

[298] See also paras 7.59- 7.66 below.

[299] We do not consider it necessary to establish that the CDSOA will always result in additional applications being filed, or additional support for applications, or additional orders. The fact that it is likely to have this effect in an indefinite number of cases provides sufficient basis for our findings. In this regard, we note the Appellate Body's finding in *US - FSC* that the fact that the fair market value rule would not bear upon the input choices manufacturers make in all cases did not upset its conclusion that "the fair market value rule treats imported products less favourably than like domestic products" since "the fact remains that in an indefinite number of other cases, the fair market value rule operates, by its terms, as a significant constraint upon the use of imported input products" (*United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 221).

[300] Increased applications and/or orders will likely create a repressive trading environment even if the substantive requirements of the AD and SCM Agreements for the imposition of anti-dumping and countervailing measures are fully respected.

[301] We note that the cost of filing an application could of course be spread across a number of applicants.

conclude that the CDSOA will provide a clear incentive to domestic producers to file anti-dumping/countervail applications. This is confirmed by concerns expressed by US Administration officials regarding the potential for "frivolous" applications resulting from an earlier bill on which the CDSOA was based. Thus, in 1999, US Secretary of Commerce William M. Daley stated "as to the compensation being given to the private sector, I think there is a question … of potential frivolous suits". US Trade representative Charlene Barshefsky stated that she "agree[d] fully with what Secretary Daley … said".[302]

7.45 We consider that the CDSOA creates an even greater incentive for domestic producers to support applications filed by others. This is because the cost of supporting an application is minimal, while "affected domestic producers" would be eligible for the same amount of offset payment whether they file or merely support an application. In other words, the "return" on supporting an application is greater than the return on filing an application. Even producers not necessarily interested in the "return" from CDSOA offset payments will in certain instances choose to support an application, so as not to be at a competitive disadvantage to other domestic producers (of the like product) by not sharing in the offset payment subsidies. While domestic producers may be expected to support petitions, even without the prospect of offset payment subsidies, there would be cases where they would not normally do so. We note, for example, Korea's argument that vertically-integrated producers often also import the product. We also note that producers may import particular model-types in order to plug a gap in their sales inventories. The imposition of an anti-dumping or countervail order would not necessarily be of economic benefit for such producers. Indeed, if support for applications were quasi-automatic, there would be no need for the standing provisions set forth in AD Article 5.4 and SCM Article 11.4. Overall we conclude that producers that might not normally have supported an application may well be induced to as a result of the CDSOA, given the potential for offset payment subsidies, especially since they would otherwise render themselves less competitive vis-à-vis other domestic producers that do receive offset payment subsidies.[303] Finally, we note that, in support of this conclusion, the potential for the CDSOA to encourage domestic producers to support applications is illustrated by two letters submitted by Canada. In the first letter, a US producer seeks support from other producers for a proposed countervail application. In requesting support, the letter explains the operation of the CDSOA, and states that "if the [CDSOA] is … applicable here, the total amount available to US lumber producers could be very large – easily running into hundreds of millions of dollars a year."[304] In the second letter, a US producer which initially filed a Prehearing Brief alleging lack of injury to US producers subsequently withdrew that Brief and expressed support for the petition "for purposes of qualification for consideration for benefits under the" CDSOA.[305] In other words, the producer "changed its mind" (and expressed support for the application) in order to be eligible for offset payment subsidies.

7.46 In light of the above considerations, taken together, we find that the CDSOA has an adverse bearing on dumping, and therefore acts "against" dumping. Since the CDSOA is in response to

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[302] Transcript of US Senate Committee on Financing hearing on steel imports, 23 March 1999, copyright 1999 Federal Document Clearing-house, Inc. Political Transcripts.

[303] The United States submits that domestic producers may continue to oppose an application if they believe that a domestic competitor would be likely to receive a higher offset subsidy. We consider this unlikely, however, since offset subsidies are based on "qualifying expenses" actually incurred. To the extent that two domestic competitors are both compensated for their "qualifying expenses" *pro rata* to the same extent (100 per cent, 90 per cent, or 80 per cent, for example, of total "qualifying expenses"), the fact that one receives more offset subsidy than another simply means that the first incurred more "qualifying expenses" than the second. It does not mean that the first obtains a greater degree of subsidy benefit than the second.

[304] Letter from J. Ragosta, Dewey Ballantine, dated 8 January 2001, p. 2, attached to a letter from R. Wood, Chairman of the Coalition for Fair Lumber Imports, regarding an Important Legal Request on Subsidized Canadian Lumber Imports, dated 8 January 2001.

[305] Brief of Fred Tebb & Sons, Inc., dated 22 March 2002.

dumping, in the sense that CDSOA offset payments may be made only in situations presenting the constituent elements of dumping, and since the CDSOA acts "against" dumping, the CDSOA constitutes "specific action against dumping" within the meaning of AD Article 18.1 (and "specific action against subsidy" within the meaning of SCM Article 32.1). We now turn to the US argument that the CDSOA is permitted by footnote 24 of the AD Agreement (and footnote 56 of the SCM Agreement).

5. Is the CDSOA permitted by footnotes 24 and 56 of the AD and SCM Agreements respectively?

(a) Arguments of the parties

7.47 The United States asserts that, even if the Panel were to find that the CDSOA is an action – but not specific action - against dumping/subsidization, footnotes 24 and 56 to Articles 18.1 and 32, respectively, operate to permit the CDSOA.

7.48 The complaining parties submit that the scope of Articles 18.1 and 32.1, on the one hand, and footnotes 24 and 56, on the other hand, is mutually exclusive. Thus, a measure prohibited by Articles 18.1 or 32.1 cannot be permitted by footnotes 24 or 56.

7.49 The United States submits that it is not seeking to rely on footnotes 24 and 56 as exceptions to Articles 18.1 and 32.1. The United States submits that Articles 18.1 and 32.1 do not cover all types of action against dumping or a subsidy, just "specific" action against dumping or a subsidy, since footnotes 24 and 56 cover "action" against dumping or subsidization under other relevant provisions of GATT 1994. According to the United States, the combination of (1) Articles 18.1 and 32.1 and (2) footnotes 24 and 56 creates an integrated scheme proscribing only certain actions against dumping and subsidization. Under that scheme, actions against dumping and subsidies *as such* must proceed under the Antidumping or SCM Agreement; other actions, however, such as actions under GATT Article XVI to address the effects of dumping and/or subsidies, are explicitly permitted by footnotes 24 and 56. The CDSOA, to the extent that the Panel were to find it to be an action against dumping and/or subsidies, is nevertheless clearly an action under GATT Article XVI to address the effects of such practices.

(b) Evaluation by the Panel

7.50 We do not understand the United States to argue that a measure prohibited by Articles 18.1 of the AD Agreement or 32.1 of the SCM Agreement may nevertheless be permitted by footnotes 24 or 56.[306] Indeed, the United States has expressly asserted that footnotes 24 and 56 are not exceptions to Articles 18.1 or 32.1.[307] Thus, the basis for the US reliance on footnotes 24 and 56 appears to be that the CDSOA is not a "specific" action against dumping or subsidy.[308] In other words, the US arguments concern measures that constitute "action against dumping" or subsidy, rather than "specific action against dumping" or subsidy. However, insofar as we have already found that the CDSOA is a "specific action against dumping" or subsidy, in the meaning of AD Article 18.1 and SCM

[306] In this regard, the parties have essentially been arguing past one another. The complaining parties have responded as if the United States were arguing that footnotes 24 or 56 were exceptions to AD Article 18.1 and SCM Article 32.1, whereas the United States has expressly stated that this is not the case (see note 307 below).

[307] US second written submission, note 48 ("[t]he United States does not argue that footnotes 24 and 56 provide exemptions for violations of Articles 18.1 and 32.1".)

[308] The United States merely asserts that footnotes 24 and 56 cover action against dumping or subsidization. The United States has not asserted that those footnotes cover specific action against dumping or subsidization.

Article 32.1, arguments regarding the application of the abovementioned footnotes to non-specific action against dumping or subsidy are not relevant. Since the US does not argue that a measure inconsistent with Articles 18.1 and 32.1 could somehow be "saved" by footnotes 24 and 56, it is not necessary to address the parties' arguments regarding the import of those footnotes.

6. Conclusion

7.51 In light of the above, we conclude that the CDSOA constitutes a specific action taken in response to situations presenting the constituent elements of dumping, and that the action taken pursuant to the CDSOA has an adverse bearing on dumping. We therefore conclude that the CDSOA is a non-permissible "specific action against dumping", contrary to AD Article 18.1. We also conclude that the CDSOA is a non-permissible "specific action against a subsidy", contrary to SCM Article 32.1. Since the CDSOA is inconsistent with AD Article 18.1 and SCM Article 32.1, the CDSOA is also in violation of paragraphs 2 and 3 of Article VI of the GATT 1994.[309]

7.52 We wish to emphasise that our findings and conclusions relate exclusively to the CDSOA, which combines the imposition of anti-dumping/countervail orders with the bestowal of offset payment subsidies in very particular circumstances, such as to constitute "specific action against dumping"/subsidisation. Though we consider that subsidization should not generally be used as a surrogate contingent trade remedy, our conclusion (that the CDSOA constitutes "specific action against dumping") is not based on a finding that subsidization in and of itself necessarily constitutes "specific action against dumping"/subsidisation.

C. AD ARTICLE 5.4/SCM ARTICLE 11.4 - STANDING

1. Arguments of the parties

7.53 The complaining parties argue that the CDSOA is inconsistent with AD Article 5.4 and SCM Article 11.4. AD Article 5.4 provides as follows[310]:

> 5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the

[309] The Appellate Body confirmed in *US – 1916 Act* that a non-permissible response to dumping violates GATT Article VI:2. (The Appellate Body asserted in *US – 1916 Act* that "Article VI of the GATT 1994 and the *Anti-Dumping Agreement* apply to 'specific action against dumping'. Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the *Anti-Dumping Agreement* to the extent that it provides for "specific action against dumping" in the form of civil and criminal proceedings and penalties" (para. 137)). We see no reason why a violation of SCM Article 32.1 would not similarly result in a violation of GATT Article VI:3.

[310] SCM Article 11.4 similarly provides that :

> "11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry." (footnotes omitted)

> application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.
>
> [13]In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.
>
> [14]Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

7.54 According to the complainants, the CDSOA provides a financial inducement to domestic producers to file applications or to express support for a petition since the payments are only made to those producers that support the petition. According to the complainants, AD Article 5.4 and SCM Article 11.4 require a Member to conduct an objective and good faith examination of the level of support for the application. Through the promise of offset payments, the complaining parties argue, the US government is unduly influencing the very facts which the authorities are required to examine in an objective manner. The complaining parties argue that Members must observe the general principle of good faith, recognized by the Appellate Body as a pervasive principle that informs the covered agreements, in the application and interpretation of the AD and SCM Agreements. According to the complainants, when a treaty provision specifies that actions of private parties are necessary to establish a Member's right to take action, government provision of a financial incentive for those private parties to act one way rather than another is inconsistent with the requirement that Members perform their treaty obligations in good faith. Therefore, the complaining parties are of the view that the CDSOA prevents the authorities from ascertaining, in an objective and good faith manner, whether an application is effectively made by or on behalf of the domestic industry as required by AD Article 5.4 and SCM Article 11.4.

7.55 The complainants submit that the CDSOA frustrates the object and purpose of AD Article 5.4 and SCM Article 11.4, which is to limit the initiation of investigations to those instances where the domestic industry has a genuine interest in the adoption of anti-dumping/countervail measures.[311] According to the complainants, when the support of a domestic producer is bought with the promise of a financial reward, such support cannot be regarded as genuine and cannot be taken into account for the purposes of the determination required by AD Article 5.4 and SCM Article 11.4. The complaining parties submit that the formalistic position of the United States which reduces the standing provision to mere arithmetic leads to an absurd and unreasonable result. The complaining parties argue that they do not suggest that an investigating authority is to ascertain actively in each

[311] The complaining parties refer in this respect to the negotiating history of this provision as documented in T. Stewart (Ed.), The Gatt Uruguay Round, A Negotiating History (1986 – 1992), Vol. II: Commentary (Kluwer 1993) at p.1517. Stewart writes that the thresholds were established to address "concerns with the possibility that unwarranted complaints would be filed and unwarranted investigations commenced". See, for example, Korea's first written submission, note 35.

case the subjective motivations of a producer in expressing support for an application, but argue that if there is evidence calling into question the credibility of a declaration of support, the administrative authorities cannot ignore such evidence without violating AD Article 5.4 and SCM Article 11.4.

7.56 The complaining parties therefore request the Panel to find that by providing a financial incentive to support an application for the initiation of an anti-dumping/countervail investigation, the CDSOA is inconsistent with AD Article 5.4 and SCM Article 11.4.

7.57 The United States argues that AD Article 5.4 and SCM Article 11.4 contain objective numerical benchmarks for determining whether an application was made by or on behalf of the domestic industry. The United States asserts that the statutory provisions which have implemented these numerical benchmarks in the United States are not affected by the CDSOA. The United States further submits that there is no requirement in AD Article 5.4 or SCM Article 11.4 that administering authorities determine the reason why domestic producers support an application. Rather, the United States is of the view that the only obligation incumbent upon the authority is to determine in an unbiased and objective manner whether the quantitative benchmarks have been met. The United States notes that the complaining parties are not arguing that the United States is failing to abide by those benchmarks.

7.58 Finally, the United States argues that in any case the complaining parties have not presented any evidence that the CDSOA actually distorts the application of the standing requirements and that producers who would otherwise have opposed the application in the absence of the CDSOA are now supporting investigations and that their support was necessary to initiate the investigation. The United States therefore requests that the complaining parties' argument of violation of AD Article 5.4 and SCM Article 11.4 be rejected.

2. Evaluation by the Panel

7.59 The complaining parties claim that the CDSOA violates AD Article 5.4 and SCM Article 11.4. The text of these provisions stipulates that there must be sufficient support for the application before a Member may initiate an investigation. The CDSOA deals with the distribution of duties collected and the conditions for eligibility for receiving such distributions. As such, the CDSOA does not amend the United States' statutory provisions concerning standing which implement the United States' obligations under Article 5.4 AD and 11.4 SCM Agreement in United States law in sections 702(c)(4) and 732(c)(4) of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1671a(c)(4), 1673a(c)(4)).

7.60 The issues before us however, are whether the CDSOA operates in such a manner that the US investigating authorities will be unable to conduct an objective and impartial examination of the level of support for the application; and whether in consequence the CDSOA has undermined the value of the provisions of AD Article 5.4 and SCM Article 11.4.

7.61 We note the argument advanced by the European Communities that "those two provisions [AD Article 5.4 and SCM Article 11.4] were introduced in response to the controversial practice of the United States authorities of presuming that an application was made by or on behalf of the domestic industry unless a major proportion of the domestic industry expressed active opposition to the petition".[312] In consequence the investigating authorities of a Member are obliged to have regard to two tests in determining the degree of support for a petition- i.e., the quantitative thresholds in AD Article 5.4/SCM Article 11.4; and the requirements under AD Article 5.2/SCM Article 11.2 that there be sufficient evidence concerning dumping/subsidization, injury and the causal link in order to ensure

[312] First written submission of the European Communities, India, Indonesia and Thailand, footnote 49.

that investigations are not initiated on the basis of frivolous or unfounded suits. Specifically, in consequence of these provisions it may be presumed that investigations will not proceed in circumstances where there may be a small proportion of the domestic industry which is affected by dumped/subsidized imports, but they do not have the support of at least 50 per cent of the industry. This is the significance of the tests in AD Article 5.4 and SCM Article 11.4.

7.62 We conclude that in consequence of the CDSOA providing that offset payments will be made only to domestic producers who have supported dumping/subsidy petitions, there is a financial incentive for domestic producers of like products to initiate and, more importantly to support petitions for dumping investigations. This incentive will result in more petitions having the required level of support from domestic industry than would have been the case without the CDSOA. Indeed, given the low costs of supporting a petition, and the strong likelihood that all producers will feel obliged to keep open their eligibility for offset payments for reasons of competitive parity, we could conclude that the majority of petitions will achieve the levels of support required under AD Article 5.4/ SCM Article 11.4. In this respect we again refer to the evidence referred to at paragraph 7.45 above, and especially the letter of a US company which after initiation of the investigation changed its position concerning the application and decided to express support for the application in order to remain eligible for possible offset payment subsidies. In our view, these letters are evidence of the inevitable impact of the CDSOA on the position of the domestic industry vis-à-vis anti-dumping/countervail applications.

7.63 The consequences are several. We first note however, the United States argument that AD Article 5.4 requires only that the statistical thresholds be met, and imposes no requirement that the investigating authorities inquire into the motives or intent of a domestic producer in electing to support a petition. This in itself is correct but in our view does not address the matter at issue. The first consequence of the operation of the CDSOA on AD Article 5.4/ SCM Article 11.4 is that it renders the quantitative tests included in the Article irrelevant, and leaves the investigating authority to make its decision on whether or not to pursue an investigation solely in terms of the requirements set out in AD Article 5.2 and 5.3/SCM Article 11.2 and 11.3, thus denying parties potentially subject to the investigation a meaningful test of whether the petition has the required support of the industry. It recreates the spectre of an investigation being pursued where only a few domestic producers have been affected by the alleged dumping, but industry support is forthcoming because of the prospect of offset payments being distributed if dumping is found in consequence of the investigation and anti-dumping duties imposed. In consequence the CDSOA may be regarded as having undermined the value of AD Article 5.4/ SCM Article 11.4 to the countries with whom the United States trades, and the United States may be regarded as not having acted in good faith in promoting this outcome.

7.64 The importance of the principle of good faith as a general rule of conduct in international relations is well established.[313] Good faith requires a party to a treaty to refrain from acting in a manner which would defeat the object and purpose of the treaty as a whole or the treaty provision in question.[314] In our view, AD Article 5.4 and SCM Article 11.4 have as their object and purpose to require the authority to examine the degree of support which exists for an application and to

[313] Also see: V.D. Degan, Sources of International Law, Martinus Nijhoff, 1997, p.401

[314] One prominent scholar states that Article 18 of the Vienna Convention on the Law of Treaties, "while not explicitly referring to the principle of good faith, summarizes its substance by providing that a signatory "is obliged to refrain from acts which would defeat the object and purpose" of the treaty"" A. D'Amato, "Good Faith", in "Encyclopaedia of International Law", p. 599. The International Law Commission commenting on the principle of good faith stated that "[s]ome members felt that there would be an advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission however considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible" (Yearbook International Law Commission, 1966, Vol.II, p. 211).

determine whether the application was thus filed by or on behalf of the domestic industry. In this case the question is whether the CDSOA defeats this object and purpose of AD Article 5.4 and SCM Article 11.4.

7.65 We consider that the CDSOA in fact implies a return to the situation which existed before the Uruguay Round Agreement and which led to the introduction of AD Article 5.4 and SCM Article 11.4 in their current form. As we discussed above, AD Article 5.4 was introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports.

3. Conclusion

7.66 In sum, by requiring support for the petition as a prerequisite for receiving offset payments, the CDSOA in effect mandates domestic producers to support the application and renders the threshold test of AD Article 5.4 and SCM Article 11.4 completely meaningless. We are therefore of the view that the United States has failed to comply with its obligations under AD Article 5.4 Agreement and SCM Article 11.4. Therefore, we find that the CDSOA is inconsistent with AD Article 5.4 and SCM Article 11.4.

D. AD ARTICLE 8.3/SCM ARTICLE 18.3 - UNDERTAKINGS

1. Arguments of the parties

7.67 The complaining parties[315] argue that AD Article 8.3 and SCM Article 18.3 require the authority to objectively examine the appropriateness of accepting a price undertaking and to reject an undertaking offered only for a pertinent reason.

7.68 The complaining parties assert that, in the United States, domestic producers have an effective veto right when it comes to the acceptance of price undertakings by the investigating authority.[316] According to the complainants, because offset payment subsidies will only be distributed if duties are collected, the CDSOA will inevitably cause domestic producers to oppose the acceptance of price undertakings. Thus, the complainants submit that through the CDSOA, the United States is unduly influencing the outcome of the examination of the "appropriateness" of accepting an undertaking in a way which favours the interests of the petitioners over those of the exporters. The United States is therefore violating its obligation to have its authority undertake an objective examination of whether accepting an undertaking would be appropriate in the circumstances. According to the complainants, the CDSOA will also lead to the rejection of undertakings without a pertinent reason, since the domestic producers will oppose the acceptance of an undertaking for pecuniary reasons which have no bearing on whether an undertaking is an "appropriate" alternative remedy. The complainants argue that the CDSOA thus frustrates the object and purpose of AD Article 8 and SCM Article 18, namely to provide an alternative remedy to dumping which, while giving equivalent protection to the domestic producers, is more beneficial to the exporters.

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[315] Australia did not develop this claim in its first submission, and confirmed in its answers to questions from the Panel that it was not pursuing a claim under AD Article 8 (SCM Article 18) (see Australia's Response to question 34 from the Panel).

[316] Canada states that recent US case law makes clear that the United States Department of Commerce can effectively only enter into suspension agreements with the consent of the petitioner. Exhibit CDA-13, p 4 (Canada's first written submission, paras 86 –88). The complaining parties assert that the United States authorities have explicitly admitted that the petitioners' opposition is something to which they accord "considerable weight" when deciding whether to accept an undertaking (19 CFR 351 et al., "Explanation of the Final Rule", at p. 27312 (Common Exhibit - 12)).

7.69 The United States argues that the CDSOA does not introduce any changes to the United States statutory provisions relating to price undertakings. In the United States' view, the complaining parties have not demonstrated that the CDSOA requires United States administering authorities to breach AD Article 8 and SCM Article 18 in any way. The United States submits that there is no obligation under the AD or SCM Agreements for an authority to accept an undertaking. Moreover, the United States argues, neither Article circumscribes the reasons that may cause an administering authority to decline to accept a proposed undertaking. The United States is of the view that the only obligations contained in AD Article 8 and SCM Article 18 are certain procedural steps that are to be followed under certain circumstances if an undertaking is offered. According to the United States, since there are no limits on the reasons why the authority may believe the acceptance of an undertaking to be impractical, it is within the complete discretion of the authority to accept or reject that undertaking.

7.70 The United States concludes that, in any case, the complaining parties have not provided any evidence that the CDSOA had or will have any actual effect on the consideration of proposed undertakings by the USDOC. The United States further stresses that domestic producers do not have an effective veto right over proposed undertakings, as the rights afforded to domestic producers in the context of proposed undertakings are procedural in nature, not substantive.

2. Evaluation by the Panel

7.71 The complaining parties argue that the CDSOA is inconsistent with AD Article 8.3 and SCM Article 18.3. AD Article 8.3 provides as follows:[317]

> 8.3 Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

7.72 AD Article 8.3 thus provides that if an undertaking is offered, such an undertaking may be rejected for a number of reasons, including reasons of general policy. We note that the complaining parties have challenged the CDSOA as such. We recall that we may find that the CDSOA as such is inconsistent with Articles 8 AD and 18 SCM Agreement only when it mandates a violation of these provisions. We believe this would be the case if the CDSOA either explicitly amends the statutory provisions relating to price undertakings in a manner inconsistent with the AD or SCM Agreement, or if its effect is such that the authority cannot possibly comply with its obligations in respect of price undertakings under the AD and SCM Agreement.

7.73 The CDSOA does not contain any provisions which amend the United States statutory provisions on price undertakings which are set forth in sections 704 and 734 of the United States Tariff Act of 1930, as amended (19 U.S.C. §§ 1671c, 1673c). The complainants argue however that

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[317] SCM Article 18.3 similarly provides that:

> 18.3 Undertakings offered need not be accepted if the authorities of the importing Member consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Should the case arise and where practicable, the authorities shall provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and shall, to the extent possible, give the exporter an opportunity to make comments thereon.

the CDSOA provides an obvious monetary incentive for the domestic industry to object to the acceptance of an undertaking, which in light of the important weight of the domestic industry's opinion on this matter, effectively makes it impossible for an undertaking to be accepted. The complainants argue that AD Article 8.3 and SCM Article 18.3 provide that an undertaking offered need not be accepted if it is impractical to do so or for other pertinent reasons. However, it is argued, a Member may not outright refuse to accept an undertaking for completely unrelated reasons like the objection by the petitioners for pecuniary reasons.

7.74 We are of the view that the complainants' argument centers around the role of the domestic industry in the United States AD/CVD system when it comes to the acceptance of price undertakings. Indeed, it appears that in the complainants' view, it is through the effect of the CDSOA on domestic producers and their role in the process of accepting or rejecting an undertaking that the CDSOA violates AD Article 8.3 and SCM Article 18.3. We will therefore first determine the role of the domestic industry in the United States with regard to the acceptance or rejection of price undertakings.

7.75 The US statutory provisions concerning price undertakings provide that an undertaking shall not be accepted unless the authority is satisfied that suspension of the investigation is (a) in the public interest and (b) effective monitoring of the suspension agreement by the US is practicable. Section 704 2 (B) of the United States Tariff Act of 1930 sets forth what the administering authority is to examine when deciding whether it is in the public interest to accept an undertaking.

7.76 It appears therefore that the United States does not as a matter of general policy always reject an undertaking offered. Nor can it be said that the reasons set forth in the relevant US statutory provisions for accepting or rejecting an undertaking (i.e., public interest and monitoring capacity) are not pertinent. In light of this analysis, we need not consider whether an authority may refuse to accept undertakings as a matter of general policy. Nor need we consider whether undertakings may be rejected for non-pertinent reasons.

7.77 In addition to these substantive requirements, the authority is to consult with the domestic producers and potentially affected domestic consuming industries before deciding whether to accept an undertaking. In particular, United States law provides that the investigating authority must notify the petitioner of its intention to suspend the investigation;[318] must provide a copy of the proposed suspension agreement to the petitioner at the time of the notification, together with an explanation of how the agreement will be carried out and enforced, and of how the agreement will meet the requirements laid down in US law;[319] and must "consult" with the petitioner concerning its intention to suspend the investigation.[320]

7.78 We note that the USDOC "Regulations on anti-dumping and countervailing duty proceedings" (the "Regulations") to which the complaining parties refer in support of their argument clarifies that although the position of the petitioners is an important consideration,

[318] Sections 704(e)(1) and 734(e)(1) of the *Tariff Act of 1930* (Common Exhibit- 15).

[319] Ibid., Sections 704(e)(2) and 734(e)(2).

[320] Ibid., Sections 704(e)(1) and 734(e)(1). The complaining parties add that other interested parties are notified (cf. Sections 704(e)(1) and 734(e)(1) of the *Tariff Act of 1930*) and allowed to submit information and comments for the record (Ibid., Sections 704(e)(3) and 734 (e)(3)), but they are not "consulted" (19 CFR 351 et al., "Explanation of the Final Rule", at p. 27312, Common Exhibit - 12).

> "the Department must assess the public interest based on all the facts, and we do not believe it appropriate to issue a regulation that singles out one factor [position of the petitioners] to the exclusion of others"[321].

With this statement, the USDOC rejected the suggestion that it should be required to consider domestic industry opposition to a suspension agreement as a strong indicator that the agreement is not in the public interest.

7.79 In both the statutory provisions and the Regulations, therefore, the objection of the petitioners to the acceptance of an undertaking is only one, be it important, factor in the authority's assessment of whether it is in the public interest to accept an undertaking. In our view, the investigating authority thus remains free to accept an undertaking even if there is domestic industry opposition to such acceptance. We consider that the complaining parties have not been able to demonstrate either that the objection by the petitioners to the acceptance of an undertaking *de facto* always results in the rejection thereof. In fact, it seems that almost all suspension agreements have been entered into by the authority over the opposition of the domestic industry.[322]

7.80 Therefore, leaving aside the question whether a Member would be allowed to reject an undertaking simply because the domestic industry opposes its acceptance, we find that the CDSOA does not mandate a violation of AD Article 8.3 and SCM Article18.3 in light of the fact that the objection of the petitioners does not in any case impede the acceptance of an undertaking by the US authority in accordance with these provisions. AD Article 8 and SCM 18 provide that when offered, the investigating authority need not accept the undertaking if it considers it impractical or if for other reasons it does not want to accept the undertaking. The decision to accept an undertaking or not under the Agreements is one the investigating authority is to take, and it may reject an undertaking for various reasons, including reasons of general policy. The fact that domestic producers may or may not be influenced by the CDSOA to suggest to the authority not to accept the undertaking, does not affect the possibility for interested parties concerned to offer an undertaking or for that undertaking to be accepted, in light of the non-decisive role of the domestic industry in this process.

7.81 In addition we note that the text of AD Article 8.3 and SCM Article 18.3 does not require the authority to examine objectively any undertaking offered. Rather, it stresses that undertakings offered need not be accepted and that the reasons for rejecting an undertaking may be manifold and include reasons of general policy. In our view, the CDSOA cannot be found to impede the objective examination of the appropriateness of accepting an undertaking, in the absence of any such obligation under AD Article 8 and SCM 18.

7.82 In sum, whatever the impact the CDSOA may have on the position of the domestic industry with regard to undertakings, it does not lead to the conclusion that the CDSOA mandates a violation of AD Article 8.3 and SCM Article 18.3. We therefore find that the CDSOA is not inconsistent with AD Article 8.3 and SCM Article 18.3.

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[321] 19 CFR 351 et al., "Explanation of the Final Rule", at p. 27312 (Common Exhibit - 12).

[322] According to the United States, of the 13 undertakings accepted since 1996, 12 were entered into over the opposition of the domestic producers. These data have not been challenged by the complaining parties. Although Canada submitted certain data in Exhibit CDA-13 (see note 316 above), this evidence does not demonstrate that undertakings can only be accepted with the consent of the petitioners. It merely confirms that the domestic producers will be consulted with regard to the acceptance of a price undertaking.

E. DEVELOPING COUNTRY ISSUE – AD ARTICLE 15

1. Arguments of the parties

7.83 India and Indonesia submit that the CDSOA undermines AD Article 15 on special and differential treatment for developing countries. In particular, Indonesia considers that the CDSOA undermines price undertakings as a constructive remedy, since it encourages domestic producers to oppose the acceptance of price undertakings.

7.84 The United States submits that AD Article 15 is not within this Panel's terms of reference as it was not identified in any of the complaining parties' requests for establishment of a panel. Therefore, the concerns raised by Indonesia and other developing countries should not be entertained. In any case, the United States submits that it fulfils its AD Article 15 "best efforts" commitment in all cases and will continue to do so. To the extent that AD Article 15 is a substantive requirement, it necessitates only that the developed countries "explore" constructive remedies before applying anti-dumping duties. Moreover, the complaining parties have provided no evidence that the CDSOA will affect the administration of US laws governing undertakings. Therefore, the concerns of developing parties that the CDSOA will somehow affect commitments under AD Article 15 are similarly unfounded.

7.85 Indonesia submits that AD Article 15 does not have to be included in the Panel's terms of reference through express incorporation in the complaining parties' requests for establishment, since DSU Article 12.11 provides that:

> Where one or more of the parties is a developing country Member, the panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.86 According to Indonesia, DSU Article 12.11 requires the Panel to give consideration to the special and differential treatment provision in the covered agreement raised by a developing country, even though this provision is not specifically indicated in the Panel's term of reference.

2. Evaluation by the Panel

7.87 We note that there is no reference to AD Article 15 in the various requests for establishment of this Panel. Generally, therefore, AD Article 15 would not fall within our terms of reference.[323] However, we note that DSU Article 12.11 requires panels to "explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures". Since we consider AD Article 15 to be relevant, and since that provision has been raised by developing country Members in the present proceedings, we are bound to consider that provision, even though it was not referred to in the various requests for establishment. In doing so, we note that certain developing country Members attach importance to price undertakings as a "constructive" alternative to anti-dumping duties.

7.88 That being said, we note that the concern expressed by India and Indonesia regarding Article 15 of the AD Agreement rests on those parties' understanding that the CDSOA will cause the

[323] See, for example, *EC – Bananas III*, para. 142 (WT/DS27/AB/R).

domestic industry to oppose the acceptance of price undertakings, and therefore lead the USDOC to reject such price undertakings. In other words, the concern expressed by the relevant complaining parties is based on the premise that, under US law, the domestic industry is able to veto the acceptance of price undertakings by the USDOC. As stated in the preceding section, there is no factual basis for this premise, since the USDOC remains free to accept an undertaking, even if there is domestic industry opposition to such acceptance. Thus, even if the CDSOA were to lead domestic producers to oppose the acceptance of a proposed price undertakings, this would not necessarily cause the USDOC to reject such undertakings. Since the relevant complaining parties' reliance on AD Article 15 is based on a premise which has not been substantiated, we see no need to give any further consideration to AD Article 15 in these proceedings.

F. AD ARTICLE 18.4/SCM ARTICLE 32.5 & WTO ARTICLE XVI:4 - NECESSARY STEPS TO ENSURE CONFORMITY

1. Arguments of the parties

7.89 The complaining parties claim that, by being inconsistent with Articles 18.1, 5.4 and 8.3 of the AD Agreement, Articles 32.1, 11.4 and 18.3 of the SCM Agreement,[324] and Article VI:2 and 3 of the GATT 1994, the CDSOA is necessarily inconsistent with AD Article 18.4 and SCM Article 32.5, and Article XVI:4 of the WTO Agreement.

7.90 The United States submits that the CDSOA is not inconsistent with AD Article 18.4, SCM Article 32.5, or WTO Article XVI:4, because it is not inconsistent with Articles 18.1, 5.4 and 8.3 of the AD Agreement, or Articles 32.1, 11.4 and 18.3 of the SCM Agreement.

2. Evaluation by the Panel

7.91 AD Article 18.4 and SCM Article 32.5 (both with identical wording) provide that

> Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement, as they may apply to the Member in question.

7.92 Article XVI:4 of the *WTO Agreement* provides that

> Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

7.93 There is no disagreement between the parties that a violation of AD Articles 18.1, 5.4 or 8.3, or a violation of SCM 32.1, 11.4 and 18.3, would also constitute a violation of AD Article 18.4, SCM Article 32.5, and WTO Article XVI:4. Since we have found that the CDSOA is inconsistent with AD Articles 5.4 and 18.1, and SCM Articles 11.4 and 32.1, we also find that the CDSOA is inconsistent with AD Article 18.4, SCM Article 32.5, and therefore WTO Article XVI:4.

[324] Mexico also relies on the alleged violation of SCM Article 5(b) as a basis for alleging violation of SCM Article 32.5 and WTO Article XVI:4.

G. ADVERSE EFFECTS – SCM ARTICLE 5

1. Arguments of the parties

7.94 Mexico claims that the CDSOA is inconsistent with Article 5(b) of the SCM Agreement because (1) it mandates the granting of specific subsidies in a manner and in circumstances that will necessarily nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994, and (2) it maintains subsidies in a manner and in circumstances that nullify or impair benefits accruing to Mexico under Articles II and VI of the GATT 1994.

7.95 Mexico submits that offset payments distributed under the CDSOA are specific subsidies within the meaning of SCM Article 2.1(a). Mexico asserts that the CDSOA and the operation of the granting authority explicitly limit access to the offset payments to certain enterprises and, on that basis, the subsidies are specific. According to Mexico, there are two elements in particular which clearly show that access to the subsidies under the Act is limited to certain enterprises: (a) that the subsidies are distributed through Special Accounts which are linked only to the respective order or finding; and (b) that the funds in those Special Accounts are only available to the manufacturers or producers of domestic like products who supported the application at the origin of the respective order or finding.

7.96 Mexico asserts that both the granting of subsidies under the CDSOA, and the maintenance of the CDSOA programme, *per se* cause adverse effects in the form of nullification or impairment of benefits accruing to Mexico under Articles II and VI of GATT 1994. Mexico asserts that both "violation" and "non-violation" nullification or impairment has been caused. With regard to "violation" nullification, Mexico relies on Article 3.8 of the DSU, whereby

> [i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

Mexico asserts that, in view of DSU Article 3.8, nullification or impairment results from the fact that the CDSOA violates Articles VI:2 and X:3(a) of the GATT 1994.

7.97 Mexico asserts that, for the purpose of SCM Article 5(b), "non-violation" nullification or impairment shall be established "in accordance with the practice of application of" Article XXIII:1(b) of the GATT 1994. According to Mexico, past GATT 1947 and WTO practice indicates that three elements must be established in an Article XXIII:1(b) claim: (i) the application of a measure by a WTO Member; (ii) the existence of a benefit accruing under the applicable agreement; and (iii) the nullification or impairment of a benefit as a result of the application of the measure.[325] Mexico submits that the fact that the CDSOA mandates the granting and maintenance of subsidies is sufficient to satisfy the first condition, i.e., the "application" of a measure, even if subsidies have not actually been granted under the CDSOA.

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[325] *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan – Film*"), WT/DS44/R, adopted 22 April 1998, at para. 10.41; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products ("EC – Asbestos")*, WT/DS135/R, WT/DS135/R/Add.1, adopted 5 April 2001, at para. 8.283.

7.98 Regarding the second condition, which concerns the existence of benefit, Mexico relies on benefits accruing under Articles II and VI of the GATT 1994. With respect to Article II, Mexico refers to its legitimate expectations of improved market access opportunities resulting from the relevant United States' tariff concessions under Article II:1 of the GATT 1994. In the context of the measure at issue, Mexico asserts that its legitimate expectations under Article II:1 must be viewed in the light of the application of anti-dumping and/or countervailing duties. With respect to Mexican exports to the United States that face such duties, Mexico legitimately expects that the competitive relationship between its products and like US products will be defined by, at most, the combined amount of the tariff concession of the United States pursuant to Article II:1, plus the anti-dumping and/or countervailing duties which Mexican exporters can legitimately expect to have to pay in addition to the MFN duty by virtue of Article II:2(b). With respect to Article VI of the GATT 1994, Mexico legitimately expects that the competitive relationship between its products and like US products will be modified by the imposition of the duties by, at most, the maximum anti-dumping and/or countervailing duties specified in Article VI:2 and 3. In Mexico's view, the benefits accruing to Mexico under Articles II and VI with respect to the competitive relationship between Mexican and like US products apply to both current trade and to the creation of predictability needed to plan future trade.

7.99 Concerning the third condition, Mexico asserts that the abovementioned benefits are nullified or impaired by both the granting and maintenance of subsidies under the CDSOA, and that the CDSOA was not reasonably anticipated by Mexico. Mexico submits that the mandatory granting of subsidies under the CDSOA will *per se* cause adverse effects in the form of nullification or impairment of benefits accruing to Mexico under Articles II and VI of the GATT 1994 because the mandatory granting of subsidies under the CDSOA systematically upsets the competitive relationship legitimately expected by Mexico under GATT Articles II and VI. Mexico submits that the maintenance of subsidies under the CDSOA *per se* causes adverse effects in the form of nullification or impairment of benefits that concern the creation of predictability needed to plan future trade in situations where United States' anti-dumping and countervailing duties apply. According to Mexico, the conferral of product-specific subsidies to the qualified domestic producers improves their competitiveness in the United States' market and makes it more difficult for Mexican exporters to sell into that market in a manner that avoids the payment of anti-dumping duties or in a manner that enables sales to be made with the additional payment of anti-dumping and/or countervailing duties. Given the certainty that any anti-dumping or countervailing duties collected will be re-distributed to the producers of the directly competing domestic product and the uncertainty as to the magnitude of the subsidies, it is impossible for Mexican exporters to predict the relative conditions of competition between their products and like United States' products when planning future sales. Mexico asserts that there is a presumption that a complainant should not be considered as having anticipated a measure where it is demonstrated that the measure was introduced after the conclusion of the tariff or other negotiations in question.[326] In this case, the benefits in question accrued to Mexico on 1 January 1995, the date of entry into force of the WTO Agreement, whereas the CDSOA entered into force on 28 October 2000. Since this was considerably later than 1 January 1995, Mexico claims that it is entitled to rely on the presumption that it did not anticipate the introduction of the Act and its consequent upsetting of the expected competitive relationship between Mexican products and like US products.

7.100 The United States asserts that the CDSOA is not an actionable subsidy for the purpose of SCM Article 5(b), because it is not specific, and does not cause adverse effects. The United States submits that the CDSOA is not specific within the meaning of SCM Article 2.1(a) because the CDSOA is potentially applicable to any producer in any industry in the United States. The United States notes Mexico's argument that each CDSOA distribution is a *de jure* specific subsidy

[326] *Japan – Film*, *supra*, at para. 10.79.

because the money is kept in separate accounts, is capped by the duties collected under a particular anti-dumping/countervail order, and is only distributed to enterprises that produce the domestic like product and were among the petitioners in the original proceeding. According to the United States, specificity analysis must be carried out for the challenged subsidy programme (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 programme may be, each disbursement would be considered a specific subsidy. The United States submits that this would render Article 2 of the SCM Agreement a nullity.

7.101 With regard to the existence of adverse effects, the United States expresses doubt whether a claim of "violation" nullification or impairment, based on DSU Article 3.8, was intended to be brought within the terms of SCM Article 5(b), because to do so would automatically create a presumption that a subsidy that violates another WTO provision is an actionable subsidy, without any showing of adverse effects. According to the United States, this eliminates 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. The United States further asserts that, in any event, the CDSOA does not violate any other provision, including GATT 1994 Articles VI:2 and VI:3, which are the basis for Mexico's "violation" nullification or impairment argument.

7.102 Concerning "non-violation" nullification or impairment under GATT Article XXIII:1(b), the United States notes the Appellate Body's statement in *EC – Asbestos* that "the remedy in Article XXIII:1(b) should be approached with caution and should remain an exceptional remedy."[327] The United States submits that, pursuant to footnote 12 in Article 5(b), the existence of nullification or impairment under Article 5 of the SCM Agreement is to be established in accordance with the practice of application of GATT Article XXIII. The United States submits that, under GATT and WTO practice, there are three requirements for a non-violation nullification or impairment claim under Article XXIII:1(b): (1) the application of a measure; (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.

7.103 Regarding the need for the application of a measure, the United States asserts that GATT Article XXIII:1(b) limits non-violation claims to measures that are currently being applied. The United States submits that Mexico fails to satisfy this requirement because it has not challenged actual disbursements under the CDSOA.

7.104 Regarding the third requirement, the United States asserts that Mexico has failed to demonstrate that the competitive relationship between US products and Mexican imports has been upset by a subsidy. The United States submits that past complainants have not succeeded with their non-violation claims because of the lack of evidence on causality. According to the United States, the burden of proof in non-violation cases is high. DSU Article 26.1(a) ("Non-Violation Complaints of the Type Described in Paragraph 1(b) of Article XXIII of GATT 1994") requires that a party making non-violation claims must present a detailed justification in support of its claims: "the complaining party shall present a detailed justification in support of any complaint relating to a measure which does not conflict with the relevant covered agreement. . . ." The United States asserts that Mexico has not presented a detailed justification or even identified any products for which the competitive relationship has been upset. The United States rejects Mexico's argument that the distribution of duties under the CDSOA will *per se* nullify or impair the benefits accruing to Mexico under GATT Articles II and VI, as it renders the third element required for a non-violation claim meaningless and

[327] Appellate Body Report *EC – Asbestos*, WT/DS133/AB/R, adopted 5 April 2001, para. 186.

flies in the face of the notion that a non-violation claim is an exceptional remedy that should be approached with caution. Acceptance of Mexico's argument would automatically convert any specific domestic subsidy programme which is related to a product on which there is a tariff concession into a non-violation nullification or impairment of benefits. According to the United States, such an interpretation is unreasonable and must be rejected. The United States asserts that Mexico has not identified any particular products for which the competitive relationship has been or will of necessity be upset. The United States submits that Mexico's expectations with respect to US tariff concessions are only reasonable with respect to the products covered by those tariff concessions. Indeed, the 1955 Working Party Report cited by Mexico in its first submission specifically states that "a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation, failing evidence to the contrary, that the value of the concession will not be nullified or impaired by the contracting party which granted the concession by the subsequent introduction or increase of a domestic subsidy on the product concerned."[328] The United States submits that the CDSOA is not a product-specific subsidy and Mexico, having challenged the law *as such*, did not (indeed, cannot) identify any products to which benefits accrue. The CDSOA itself does not identify any specific product but can apply to any product subject to an anti-dumping or countervailing duty order. The amount of money received under the CDSOA is not linked to the level of production or sale of that product or designed to supplement those levels. According to the United States, since the CDSOA is not a product-specific subsidy, Mexico's claims that CDSOA *per se* nullifies or impairs benefits under GATT Articles II and VI should be rejected.

7.105 The United States also submits that Mexico could have reasonably anticipated the CDSOA. The United States asserts that Mexico was on notice that the United States could pass such a measure, because discussions in Congress concerning measures similar to the CDSOA took place prior to and during the Uruguay Round negotiations.

2. Evaluation by the Panel

7.106 In order to examine Mexico's claim that the CDSOA is inconsistent with Article 5(b) of the SCM Agreement, we must determine whether or not the CDSOA is an actionable subsidy. A measure constitutes an actionable subsidy if it is a subsidy, if it is "specific", and if its use causes "adverse effects". Since the United States does not deny that the CDSOA is a subsidy,[329] we shall focus on the issues of specificity and adverse effects.

(a) Is the CDSOA a "specific" subsidy?

7.107 Specificity is governed by Article 2 of the SCM Agreement, which provides:

> 2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

[328] See Report of the Working Party on Other Barriers to Trade, BISD 3S/222. at para. 13 (3/3/55).

[329] In its second written submission, Mexico asserted that "in and of itself, the CDSOA is not a subsidy as defined by the SCM Agreement. Rather it is the offsets distributed under the CDSOA … that amount to subsidies." (para. 40). Mexico made this statement in the context of its arguments on the question of specificity. We do not understand Mexico to argue that the CDSOA is not capable of violating Article 5(b) because it is not a subsidy. As a programme that mandates the grant of subsidies, the CDSOA is clearly susceptible of challenge under Article 5(b) of the SCM Agreement.

> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions[2] governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.
>
> 2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.
>
> 2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.
>
> 2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.
>
> [2] Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

7.108 Mexico relies on Article 2.1(a) to claim *de jure* specificity. Mexico has confirmed that it is not claiming de facto specificity. Mexico has also asserted that Article 2.1 "paragraphs (b) and (c) are

not applicable".[330] We shall therefore confine our analysis to specificity within the meaning of Article 2.1(a) of the SCM Agreement.

7.109 Whereas Article 2.1(a) refers to measures that "explicitly limit[] access to a subsidy to certain enterprises", the chapeau to Article 2.1 provides that the phrase "certain enterprises" is shorthand for "enterprise or industry or group of enterprises or industries". Thus, in order to address the issue of specificity under Article 2.1(a), we must determine whether or not the CDSOA explicitly limits access to offset payments to an "enterprise or industry or group of enterprises or industries".

7.110 The United States denies that the CDSOA explicitly limits access to offset payments to an "enterprise or industry or group of enterprises or industries". The US asserts that CDSOA payments are not limited to individual enterprises or industries. Regarding the issue of whether CDSOA payments are limited to a "group" of enterprises or industries, the US asserts that CDSOA payments are available in principle to any producer of any product on which anti-dumping or countervailing duties could be collected, creating a universe of potential recipients far too large and varied to be considered a "group".

7.111 Mexico asserts that it does not have to show that the CDSOA, itself, is a specific subsidy. It argues that the test under SCM Article 2.1(a) is whether access to the offsets (i.e., the subsidies) is explicitly limited to certain enterprises by the granting authority or the legislation pursuant to which the granting authority operates. Mexico submits that, by legal requirement, the CDSOA limits access to each offset to certain enterprises. According to Mexico, the structure and architecture of the CDSOA creates a series of distinct and separate subsidies, because disbursements are not made from a common fund. Instead, there are separate "special accounts" linked to specific anti-dumping or countervailing duty orders. The funds available for each "special account" are limited by the duties collected under the specific order at issue, and domestic producers eligible for payments from one special account are not entitled to payments from another special account. Thus, if each separate subsidy is viewed in isolation, each subsidy is specific because it is limited to the relevant "affected producers" eligible for payments under that account. Mexico asserts that failure to take into account the separate and distinct nature of the subsidies in testing for specificity would allow Members to evade the disciplines regulating actionable subsidies simply by administering specific subsidies according to one and the same law.

7.112 The United States asserts that the specificity analysis must be carried out for the challenged subsidy programme (i.e., 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 programme may be, each disbursement would be considered a specific subsidy – a result that would render Article 2 of the SCM Agreement a nullity.

7.113 The measure at issue in these proceedings is the CDSOA.[331] It is the CDSOA that is alleged to violate Article 5(b) of the SCM Agreement. It is therefore the CDSOA – rather than disbursements made thereunder - that must be found to constitute a subsidy for the purpose of SCM Article 5.[332] In our view, the same approach should be taken for the question of specificity. In other words, it is the subsidy at issue, i.e., the CDSOA, that must be "specific" in order for the provisions of the SCM Agreement, including Article 5(b), to apply.

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[330] Mexico's second written submission, note 18.

[331] At the time that Mexico requested establishment of this Panel, no disbursements under the CDSOA had been made.

[332] The CDSOA constitutes a subsidy for the purpose of SCM Article 5 because it is a programme that mandates the grant of subsidies.

7.114 Mexico has expressed the concern that an analysis of specificity at the level of the CDSOA programme *per se*, rather than disbursements made thereunder, would enable Members to evade subsidy disciplines. We do not share this concern, since even if the CDSOA *per se* were not specific, it would be open to Mexico to challenge actual disbursements made under the CDSOA. On the other hand, we agree with the US argument that Mexico's approach to the question of specificity would render Article 2 of the SCM Agreement a nullity, since any subsidy programme would necessarily be found to be specific merely because subsidies provided under subsidy programmes are necessarily enterprise, industry or region-specific. Mexico attempts to counter this argument by asserting that the CDSOA differs fundamentally from the other examples of subsidy programs raised by the United States in that the latter do not administer a series of separate and distinct subsidies. Mexico submits that the CDSOA must be distinguished from a typical subsidy programme, which involves a common pool of funds which all potential recipients can access, because it has separate accounts for each individual order or finding, and eligibility to subsidies from each discrete account is explicitly restricted to certain recipients. However, even if one were to analyse specificity on the basis of actual disbursements made under a subsidy programme, we do not consider that the source of funding for such disbursements would be relevant. The question would be whether or not disbursements are specific, in the sense that they are reserved for specific enterprises or industries, or groups thereof. The source of the funding would have no bearing on this issue.

7.115 Since Mexico would have the Panel assess specificity on the basis of actual disbursements made under the CDSOA, rather than on the basis of the CDSOA *per se*, Mexico has not argued that the CDSOA *per se* explicitly limits access to offset payments to an "enterprise or industry or group of enterprises or industries". There is therefore no basis for us to find that the CDSOA *per se* is "specific" within the meaning of Article 2.1(a) of the SCM Agreement.

7.116 As a matter of law, pursuant to Article 1.2 of the SCM Agreement, a subsidy that is not "specific" falls outside the scope of the SCM Agreement, and therefore cannot be inconsistent with SCM Article 5(b). In principle, therefore, it is not necessary for us to consider whether or not the use of the CDSOA has caused "adverse effects" within the meaning of that provision. While in principle it is not necessary for us to consider whether or not the use of the CDSOA has caused "adverse effects" within the meaning of that provision, we set out our consideration as follows.

(b) Has the use of the CDSOA caused "adverse effects"?

7.117 Mexico asserts that the use of the CDSOA has caused "adverse effects" within the meaning of Article 5(b) of the SCM Agreement, i.e., "nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994". In particular, Mexico argues that CDSOA offset payments *per se* nullify or impair benefits accruing to Mexico under GATT Articles II and VI. As explained in greater detail below, Mexico claims both "violation" and "non-violation" nullification or impairment.

(i) "Violation" nullification or impairment

7.118 Mexico's claim of "violation" nullification or impairment rests on alleged violations of "the provisions of the GATT 1994, including Articles VI:2 and X:3(a)".[333] Mexico relies on DSU Article 3.8, whereby there is prima facie nullification or impairment whenever there is a violation of a covered agreement:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or

[333] Mexico's first written submission, para. 74.

> impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

7.119 We recall that we have already found that the CDSOA violates AD Articles 5.4 and 18.1, SCM Articles 11.4 and 32.1, and GATT Article VI:2 and 3. In our view, however, the presumption of nullification or impairment resulting from the violation of these provisions under DSU Article 3.8 is not sufficient to demonstrate nullification or impairment for the purpose of SCM Article 5(b). The presumption arising under Article 3.8 DSU relates to nullification or impairment caused by the violation at issue. Thus, if a measure violates Article 18.1 of the AD Agreement and Article VI:2 of the GATT 1994, that violation would be presumed to cause nullification or impairment, by virtue of the non-conformity of that measure with the relevant provision(s) of the AD Agreement. For the purpose of SCM Article 5(b), however, Mexico must show that the use of a subsidy caused nullification or impairment. It is suggested that the fact that the CDSOA is in violation of AD Article 18.1 and GATT Article VI:2 does not address this issue, since our finding of violation of these provisions says nothing of the effects resulting from the use of CDSOA as a subsidy. It merely addresses the status of the CDSOA as a "specific action against dumping" or subsidization.[334] Furthermore, we agree with the United States that reliance on the presumption of nullification or impairment resulting from Article 3.8 DSU in the context of an Article 5 SCM claim 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".

(ii) "Non-violation" nullification or impairment

7.120 As a starting-point for addressing Mexico's claim of "non-violation" nullification or impairment, we see no reason not to adopt the basic schematic approach taken by both Mexico and the United States. Thus, pursuant to footnote 12 to SCM Article 5(b), we note that "[t]he term 'nullification or impairment' is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions". Regarding the practice of application of GATT Article XXIII:1(b), we recall the *Japan – Film* panel's finding that three elements must be established in order to uphold an Article XXIII:1(b) claim: (i) the application of a measure by a WTO Member; (ii) the existence of a benefit accruing under the applicable agreement; and (iii) the nullification or impairment of a benefit as a result of the application of a measure.[335] We shall address each of these elements in turn.

The application of a measure

7.121 The parties disagree on whether or not the present case concerns the "application" of a measure. Mexico asserts that the *Japan – Film* requirement for the "application" of a measure should be modified in the context of an Article 5 claim, since Article 5 provides that the "use" of a subsidy must have caused nullification or impairment. Mexico asserts that, given the reference in SCM Article 7.1 (which addresses the remedies for a violation of Article 5) to "any subsidy … granted or

[334] To avoid any misunderstanding, we would emphasise that our finding that the CDSOA constitutes "specific action against dumping" and subsidy (see para. 7.46 above) is not based on adverse effects resulting from the use of a subsidy. Although our finding that the CDSOA constitutes "specific action against dumping" and subsidy rests on the adverse impact of the CDSOA on exporters/foreign producers engaged in dumping, that adverse impact does not result exclusively from the provision of offset payment subsidies (or the use of a subsidy). The adverse impact results from the combination of anti-dumping duties and offset payment subsidies in the particular circumstances of the CDSOA.

[335] *Japan – Film*, para. 10.41.

maintained … result[ing] in … nullification or impairment", the word "use" in Article 5 should be interpreted to include both the granting and maintaining of a subsidy. Mexico asserts that the CDSOA grants subsidies when offset payments are actually made. Mexico also asserts that a subsidy is maintained by the CDSOA (because the CDSOA provides for a mandatory subsidy regime), even before the granting of subsidies under the CDSOA. For its part, the United States relies on the *Japan – Film* panel and DSU Article 26.1 to assert that, in order for a non-violation nullification or impairment claim to succeed, there must be a measure that is "currently being applied". The US asserts that the CDSOA is not a measure that is "currently being applied", since no offset payments have actually been made.

7.122 In addressing this issue, we note that the *Japan – Film* panel was examining alleged "non-violation" nullification or impairment in the context of a claim under Article XXIII:1(b) of the GATT 1994, and not Article 5 of the SCM Agreement. In examining Mexico's claim under Article 5, we consider that we should be guided by the ordinary meaning of SCM Article 5, read in context. SCM Article 5(b) clearly demonstrates that the drafters of the SCM Agreement envisaged the possibility of nullification or impairment resulting from the "use" of a subsidy. In a dispute regarding SCM Article 5(b), therefore, the *Japan – Film* panel's reference to the "application" of a measure must encompass the "use" of a subsidy. Furthermore, guidance as to the manner in which a subsidy may be "used" may be derived from the relevant context. We consider that SCM Article 7 constitutes particularly relevant context, since it sets forth the remedies available for alleged violations of *inter alia* SCM Article 5(b). In particular, Article 7.1 provides for the initiation of dispute settlement proceedings in respect of nullification or impairment caused by subsidies "granted or maintained" by another Member. This is the same nullification or impairment as that caused by the "use" of subsidies within the meaning of Article 5(b). In the context of Article 7.1, therefore, the "use" of a subsidy is equated with the "grant[]" or "maintain[ing]" of a subsidy. For the purposes of claims of "non-violation" nullification or impairment arising under SCM Article 5(b), therefore, we consider that the "application" of a measure encompasses the "use" of a subsidy, in the sense of the grant or maintaining of a subsidy. We therefore reject the US argument that the CDSOA should not be said to have been "applied" if no actual disbursements have been made thereunder. Even if disbursements have not been granted under the CDSOA, the maintenance of the CDSOA programme constitutes "application" of a measure for the purpose of a "non-violation" nullification or impairment claim under SCM Article 5(b). We therefore find that the first requirement identified by the *Japan – Film* panel has been met.

7.123 Leaving aside the contextual relevance of SCM Article 7.1 to this issue, we consider that our approach to the term "application" is supported by the Appellate Body findings in *US – Line Pipe*, where the Appellate Body asserted that a duty … does not need actually to be enforced and collected to be 'applied' to a product".[336] We understand the Appellate Body to mean that the existence of a duty, and the potential enforcement and collection of that duty, is sufficient for it to "apply" to a product. We likewise consider that the existence of a subsidy programme, and the potential use of that subsidy programme, is sufficient for that programme to "apply".

The existence of a benefit

7.124 Regarding the second element identified by the *Japan – Film* panel, Mexico relies on benefit accruing under Articles II and VI of the GATT 1994. The United States does not dispute that benefits resulting from negotiated tariff concessions accrue to Mexico under these provisions. There is no reason, therefore, why we should not find that this second requirement has been met.

[336] Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ("*US – Line Pipe*"), WT/DS202/AB/R, adopted 8 March 2002, para. 129.

The nullification or impairment of a benefit

7.125 Mexico claims that both the granting of subsidies (i.e., the making of actual disbursements) and the maintaining of subsidies (i.e., the maintaining of the CDSOA programme) under the CDSOA *per se* cause "non-violation" nullification or impairment. In addressing this claim, we take particular note of the Appellate Body's assertion in *EC – Asbestos* that non-violation nullification or impairment is a "rather unusual remedy".[337] We also note that like the panel in *Japan – Film*, the Appellate Body considered that the "non-violation" nullification or impairment remedy "should be approached with caution and should remain an exceptional remedy".[338]

7.126 We recall that, according to footnote 12 to Article 5(b) of the SCM Agreement, "[t]he term 'nullification or impairment' is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions". In our view, this would appear to be a codification of GATT practice regarding non-violation complaints. There is only one adopted GATT case concerning "non-violation" nullification or impairment caused by a subsidy programme, namely *EEC – Oilseeds*.[339] This is one of the cases that Mexico has sought to rely on in support of its claim. In light of footnote 12, we consider it appropriate to be guided by the findings of that panel.

7.127 In *EEC – Oilseeds*, the panel asserted that countries "must … be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset". The panel "examined whether it was reasonable for the United States to expect that the Community would not introduce subsidy schemes systematically counteracting the price effect of the tariff concessions".[340] This would suggest, therefore, that the *EEC – Oilseeds* panel considered that non-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme. This is a reasonable approach, since a standard of "systematic offsetting/counteracting" would preserve the exceptional nature of the "non-violation" nullification or impairment remedy.[341] [342] We shall therefore examine whether or not the CDSOA systematically offsets or counteracts benefits accruing to Mexico.

7.128 Mexico claims that both the grant of subsidies under the CDSOA, and the maintenance of the CDSOA programme *per se*, have caused "non-violation" nullification or impairment. In order to

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[337] *EC – Asbestos*, para. 185.

[338] *EC – Asbestos*, para. 186.

[339] *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC – Oilseeds*"), adopted 25 January 1990, BISD 37S/86.

[340] *EEC – Oilseeds*, para. 147. The panel found that "[a]t issue in the case before it [we]re product-specific subsidies that protect producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds" (para. 148).

[341] In the context of subsidies, there is a tension between the right of a Member to subsidize (except prohibited subsidies), on the one hand, and the legitimate expectations of improved market access resulting from negotiated tariff concessions, on the other. Any subsidy to domestic producers is likely to have some adverse effect on the competitive relationship between domestic and imported products. However, the fact that there will be some impact should not be sufficient to uphold a claim of non-violation nullification or impairment. Otherwise, any specific domestic subsidy programme which is related to a product on which there is a tariff concession could constitute the non-violation nullification or impairment of benefits. This would hardly make non-violation nullification or impairment an "exceptional" or "unusual" remedy, as the Appellate Body has said it should be.

[342] Mexico would appear to agree with such an approach, since it has argued "non-violation" nullification or impairment on the basis that "offset payments will systematically upset the competitive relationship between Mexican products and like United States products legitimately expected by Mexico" (Mexico's second written submission, para. 83).

determine whether or not the grant of subsidies under the CDSOA programme would systematically offset benefits accruing to Mexico under Articles II and VI of the GATT 1994, at a minimum we must assess the amount of subsidy to be provided, relative to the amount of the tariff concession. In the present case, though, because the Panel is examining the CDSOA *per se*, rather than actual disbursements made under the CDSOA, there is no way of knowing whether CDSOA offset payments will systematically offset or counteract tariff concessions. This is because it is not clear what the amount of subsidy will be in a given case, nor what level of tariff concession was made by the US for the product at issue. In other words, because the CDSOA does not provide for product-specific subsides (unlike the subsidy programme at issue in *EEC – Oilseeds*), and because the amount of such subsidies is not directly linked to the level of tariff concession made for the specific product at issue (but rather to the amount of anti-dumping or countervailing duties collected), there is no certainty that the grant of offset payments under the CDSOA will systematically offset or counteract benefits accruing to Mexico under Articles II and VI of the GATT 1994.

7.129 Mexico claims that the maintaining of the CDSOA programme *per se* nullifies or impairs benefits accruing to Mexico related to the predictability of conditions for future trade. Mexico asserts that it is impossible for efficient Mexican exporters who can still sell into the US market when facing anti-dumping or countervailing duties to predict the relative conditions of competition between their products and like US products. In other words, Mexican exporters are unable to predict in advance how much subsidy will be bestowed on "affected domestic producers".

7.130 The United States submits that commitments made under GATT Articles II and VI do not include an express or implied promise of total predictability. We agree, and see no basis for finding to the contrary. In any event, we consider that the unpredictability relied on by Mexico could result from any subsidy programme which does not fix the exact amount of subsidy to domestic producers in advance, or from a Member's decision to bestow *ad hoc*, non-recurring subsidies. Our acceptance of Mexico's argument would have far-reaching consequences, and would run counter to the Appellate Body's statement that "non-violation" nullification or impairment "should be approached with caution and should remain an exceptional remedy". To uphold Mexico's claim would be tantamount to finding that any form of unpredictable subsidization causes "non-violation" nullification or impairment.

7.131 An additional issue arising under the third element is the question of whether or not Mexico could have reasonably anticipated at the conclusion of the Uruguay Round of trade negotiations that the United States would pass the CDSOA into law. In this regard, like the *Japan – Film* panel, we consider that there is a presumption that a Member should not be held to have anticipated a measure introduced subsequent to the trade negotiations at issue. Since the CDSOA was introduced subsequent to the conclusion of the Uruguay Round negotiations, there is therefore a presumption that Mexico could not reasonably have anticipated the introduction of that measure. In seeking to rebut this presumption, the United States asserts that measures similar to the CDSOA were proposed in the US Congress prior to the conclusion of the Uruguay Round. Mexico responds that the fact that similar proposals were not enacted in the past led it to assume that further attempts to introduce such legislation would similarly fail. The United States replies that whether Mexico believed that the CDSOA would or would not become law in the United States is not germane, since the question is whether Mexico was on notice that the United States could pass such a measure. In our view, however, the fact that the United States could pass the CDSOA is not determinative of this issue, since, as a sovereign state, the United States could in principle pass any piece of legislation. The issue is whether or not Mexico could have reasonably anticipated that the United States would pass the CDSOA. We think not, because former proposals for similar legislation were defeated, and such proposals were opposed by the US Administration. Furthermore, the adoption of the CDSOA is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. Given the express prohibition in those provisions regarding specific action against dumping and subsidy, we

do not consider that Mexico should be held to have reasonably anticipated that the United States would pass precisely such specific action against dumping or subsidy.[343] Accordingly, the United States has failed to rebut the presumption that Mexico could not reasonably anticipated the passing of the CDSOA.

(iii) Summary of findings on adverse effects

7.132 For the above reasons, we find that Mexico has failed to establish "violation" nullification or impairment. We further find that Mexico has failed to establish all of the necessary elements for its "non-violation" nullification or impairment claim. Accordingly, we find that Mexico has failed to demonstrate that the CDSOA has caused "adverse effects" within the meaning of Article 5(b) of the SCM Agreement.

(c) Conclusion

7.133 Since Mexico has failed to establish that the CDSOA *per se* is a "specific" subsidy that causes "adverse effects", we reject Mexico's claim that the CDSOA *per se* is inconsistent with Article 5(b) of the SCM Agreement.

H. SCM ARTICLES 4.10 AND 7.9

1. Arguments of the parties

7.134 Australia submits that the CDSOA violates SCM Articles 4.10 and 7.9. In its first submission, Australia submitted that the CDSOA violates SCM Article 4.10 because it mandates the application of countermeasures in the absence of dispute settlement proceedings having established that a wrongful act has been committed. Australia also submitted in its first submission that the CDSOA violates SCM Article 7.9 because it imposes a countermeasure against subsidised imports which have not been found through a dispute settlement proceeding to cause adverse effects on the US domestic industry.

7.135 The United States asserted in its first submission that SCM Articles 4.10 and 7.9 do not contain an obligation or prohibition on Members and therefore cannot form the basis of a violation. The United States submits that even if those provisions do contain an obligation which could form the legal basis of a violation, the CDSOA is not a "countermeasure" within the meaning of SCM Articles 4.10 and 7.9.

2. Evaluation by the Panel

7.136 Australia indicated in its second written submission that it did not intend to pursue further arguments in relation to Articles 4.10 and 7.9 of the SCM Agreement.[344] On this basis, we consider Australia to have withdrawn its claims concerning these provisions and do not make a finding.[345]

[343] This does not mean that the violation of a provision of a covered agreement necessarily forms the basis for a claim of "non-violation" nullification or impairment. It simply means that we see no basis for finding that one Member should be deemed to reasonably anticipate that another Member will violate an express prohibition .

[344] See para. 4.867 above.

[345] The text of this paragraph was proposed by Australia in its comments on the interim report.

I. GATT ARTICLE X:3(A)

1. Arguments of the parties

7.137 The complaining parties[346] assert that the CDSOA is inconsistent with Article X:3(a) of the GATT 1994 because it leads to an unreasonable and partial administration of US laws and regulations regarding the initiation of investigations and the acceptance of undertakings.

7.138 The complaining parties argue that Article X:3 GATT 1994 requires the uniform, impartial and reasonable administration of a Member's laws and regulations, such as the US anti-dumping and countervail laws concerning initiation and the acceptance of undertakings. The complainants argue that the Tariff Act 1930 is itself a law of general application, and because the CDSOA is an amendment to the Tariff Act, the CDSOA is also subject to the requirements of Article X:3(a).[347] According to the complainants, the CDSOA necessarily leads to an unreasonable administration of the anti-dumping/countervail law and regulations because investigations will be initiated and measures will be imposed in cases where the domestic industry has no genuine interest in the adoption of such measures, but is acting on the basis of a strong financial incentive to support the application and to oppose an undertaking. The complainants further submit that the CDSOA also leads to a partial administration of the US anti-dumping law since it artificially increases the level of support for the application and deprives the exporters of a fair consideration for an alternative remedy as the exporters' interests in obtaining such an alternative remedy is subordinated to the pecuniary interests of the domestic producers.

7.139 The United States argues that the complaining parties have failed to present any evidence of the actual administration of the CDSOA as required under Article X:3 GATT 1994. The US asserts that the complaining parties' allegations are no more than speculations concerning the impact of the CDSOA on the number of AD petitions filed or undertakings accepted. In any case, the US argues, decisions by private parties on whether to file or support petitions, or by the USDOC in determining whether to accept or reject undertakings have nothing to do with the administration of the CDSOA by the US Customs service. Whatever effect CDSOA may or may not have on the domestic industry, there is no reason to believe that the Commerce Department will now administer the standing or undertaking provisions any differently.

7.140 The United States also asserts that the US implementation of its obligations under the Antidumping and SCM Agreements is not within the terms of reference of this dispute. Furthermore, the United States submits that the CDSOA is not the sort of administrative measure that can even be challenged under GATT Article X:3(a). The panel in *Argentina – Hides and Leather* carefully explained that, for a measure to be challengeable under GATT Article X:3(a), it must be administrative, as opposed to substantive, in nature.[348] The measure at issue in *Argentina – Hides and Leather* was administrative in nature because it set forth means for the application and enforcement of substantive customs rules.[349] The United States submits that, in contrast to the measure at issue in the

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[346] We note that Australia has not claimed a violation of Article X of the GATT 1994.

[347] Canada refers to the Panel report in *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted 16 February 2001, para. 11.77. Brazil also notes that in *US – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* WT/DS179/R (adopted 1 February 2001, para. 6.49 n.62), the panel confirmed that anti-dumping laws and regulations were laws and regulations within the meaning of Article X:1 and hence within the scope of Article X:3.

[348] *Argentina – Measures Affecting The Export of Bovine Hides and The Import of Finished Leather ("Argentina – Hides and leather")*, WT/DS155/R, adopted on 16 February 2001, para. 11.70.

[349] *Id.*, para. 11.72 (stating the measure at issue "merely provides for a certain manner of applying ... substantive rules" on customs classification and export duties).

Argentina – Hides and Leather case, the CDSOA does not establish any procedures for the administration or enforcement of US laws on determinations of the level of industry support or the acceptance or rejection of undertakings. According to the United States, the CDSOA is rather a substantive measure. It provides statutory authority for the US Customs Service to distribute anti-dumping and countervailing duties collected to affected domestic producers. The United States submits that, as the CDSOA is not administrative in nature, it cannot be challenged under GATT Article X:3(a).

2. Evaluation by the Panel

7.141 GATT Article X provides in relevant part:

> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use …
>
> 3.(a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

7.142 Before addressing the substance of the complaining parties' Article X:3(a) claim, we must first examine whether or not this claim falls within our terms of reference. The United States submits that it does not, because the US trade laws allegedly administered by the CDSOA[350] were not included in the complaining parties' requests for establishment. We do not agree with the United States, since this claim concerns the alleged administration of US trade laws by the CDSOA, rather than the trade laws themselves. Since the CDSOA, the measure which "administer[s]" within the meaning of GATT Article X:3(a), is within our terms of reference, so too is the complaining parties' Article X:3(a) claim regarding the CDSOA.

7.143 In examining the substance of the complaining parties' claim, we consider it appropriate to be guided by the panel in *Argentina – Hides and Leather*. In applying Article X:3(a), that panel stated that "[t]he relevant question is whether the substance of such a measure is administrative in nature or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".[351] In other words, if a measure is substantive in nature, it does not fall within the scope of GATT Article X:3(a). Article X:3(a) applies only in respect of measures that are administrative in nature. That panel found that the relevant measure was administrative in nature because it did not "establish substantive Customs rules for enforcement of export laws", and "merely provide[d] for a certain manner of applying [the relevant] substantive rules".[352]

7.144 In the present case, we do not consider that the CDSOA "merely provides for a certain manner of applying [the relevant] substantive rules". It does not contain rules governing the application or administration of the US Tariff Act of 1930 or applicable US Department of Commerce

[350] These measures are contained in the US Tariff Act of 1930 and applicable US Department of Commerce implementing regulations.

[351] *Argentina – Hides and Leather*, para. 11.70.

[352] *Argentina – Hides and Leather*, para. 11.72.

implementing regulations. The CDSOA does not require the administering authority to administer those laws and implementing regulations in any particular way. In fact, the complaining parties' Article X:3(a) claim focuses on action by US domestic producers in anti-dumping and countervail proceedings (in respect of their support for petitions, and their opposition to price undertakings), rather than action by the administering authority. The alleged impact of the CDSOA on domestic producers' participation in anti-dumping or countervail proceedings only arises because the CDSOA contains substantive rules governing the provision of offset payments (i.e., domestic producers may alter their behaviour in order to meet the substantive eligibility criteria set forth in the CDSOA).

3. Conclusion

7.145 In light of the above, we find that the CDSOA is substantive in nature, and therefore does not constitute an administrative measure. We therefore find that the CDSOA falls outside the scope of Article X:3(a) of the GATT 1994, and we reject the complaining parties' Article X:3(a) claim accordingly.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In the light of our findings, we conclude that the CDSOA is inconsistent with AD Articles 5.4, 18.1 and 18.4, SCM Articles 11.4, 32.1 and 32.5, Articles VI:2 and VI:3 of the GATT 1994, and Article XVI:4 of the WTO Agreement.

8.2 We reject the complaining parties' claims that the CDSOA is inconsistent with AD Articles 8.3 and 15, SCM Articles 4.10, 7.9 and 18.3, and Article X:3(a) of the GATT 1994. We also reject Mexico's claim that the CDSOA violates SCM Article 5(b).

8.3 The CDSOA is a new and complex measure, applied in a complex legal environment. In concluding that the CDSOA is in violation of the abovementioned provisions, we have been confronted by sensitive issues regarding the use of subsidies as trade remedies. If Members are of the view that subsidisation is a permitted response to unfair trade practices, we suggest that they clarify this matter through negotiation.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that the CDSOA is inconsistent with the provisions of the AD Agreement, the SCM Agreement, and the GATT 1994, as described in paragraph 8.1 *supra*, the CDSOA nullifies or impairs benefits accruing to the complaining parties under those agreements.

8.5 Consistent with Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request the United States to bring the CDSOA into conformity with its obligations under the AD Agreement, the SCM Agreement, and the GATT of 1994.

8.6 Certain complaining parties[353] have asked the Panel to suggest that the United States bring the CDSOA into conformity by repealing that measure. The United States did not react to this request. We note that Article 19.1 of the DSU provides us with the authority to suggest ways in which the United States could implement our recommendation that it bring the CDSOA into conformity. Although there could potentially be a number of ways in which the United States could bring the CDSOA into conformity, we find it difficult to conceive of any method which would be more

[353] Brazil, Chile, Japan, Korea and Mexico.

appropriate and/or effective than the repeal of the CDSOA measure. For this reason, we suggest that the United States bring the CDSOA into conformity by repealing the CDSOA.

ANNEX A

Third Party Submissions and Oral Statements

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ANNEX A-1

THIRD PARTY SUBMISSION OF ARGENTINA

(17 January 2002)

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I. INTRODUCTION

1. Argentina thanks the Panel for this opportunity to submit its comments on these proceedings as a third party, and would like to turn to the arguments of the parties concerning the inconsistency of the Continued Dumping and Subsidy Offset Act of 2000 (known as the Byrd Amendment) with Article 5.4 of the Anti-Dumping Agreement (hereinafter the AD Agreement) and Article 11.4 of the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement), Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement, and Article XVI: 4 of the WTO Agreement.

2. Firstly, Argentina submits that the said Act is inconsistent with Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement and can be used to create, artificially, conditions that encourage enterprises to file anti-dumping or anti-subsidy complaints, favouring the initiation of investigations and the application of provisional measures and impacting negatively on trade flows.

3. Secondly, Argentina submits that the distribution of offsets to the affected producers as stipulated in the Act weakens the ability of the United States authorities to determine objectively whether there should be an agreement on price undertakings (Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement), and thus hinders efforts to explore the possibilities of "constructive remedies" (Article 15 of the AD Agreement), impairing the special situation of the developing countries.

4. Thirdly, Argentina submits that the system of incentives created by the Continued Dumping and Subsidy Offset Act of 2000 should be considered inconsistent with the obligations established in the AD and SCM Agreements, and results in the violation of Article XVI: 4 of the WTO Agreement.

II. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLES 5.4 OF THE AD AGREEMENT AND 11.4 OF THE SCM AGREEMENT (INITIATION OF INVESTIGATIONS AND ADOPTION OF PROVISIONAL MEASURES)

5. Argentina submits that the Byrd Amendment breaches the provisions of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement in that it induces United States producers to petition for the initiation of investigations or to support them. Thus, it is inconsistent with the object and purpose of those provisions.

6. Indeed, the provisions are aimed at the due selection of domestic producers that could be interested in an investigation, ensuring an adequate degree of representativeness within the industry concerned. They should not, under any circumstances, be used for the artificial creation of conditions that encourage companies to file anti-dumping petitions or that foster the initiation of investigations.

7. To accept this would be to impair the idea of "selection", under which both articles provide for a procedure involving percentages (50 per cent and 25 per cent) to ensure objective representativeness of those domestic producers that are truly affected.

8. As regards the United States argument that the subjective reason[1] for the domestic industry's support for the initiation of an anti-dumping investigation is irrelevant in that it is not provided for in the AD Agreement, Argentina repeats and stresses that it is not the subjective reason that is at issue, but the change brought about by the incentive offered to the local producers by the Byrd Amendment in enabling offsets to be provided for the so-called "qualifying expenditures". The crux of the problem is not the personal and subjective reason of each of the complainant producers, but specifically, the incentive to file complaints provided by the Act, and the access it gives to a mechanism for the payment of offsets for so-called "qualifying expenditures".

[1] First written submission by the United States, paragraph 119.

9. As regards the industry, being influenced and encouraged by the United States Government, its interest in petitioning for an investigation and supporting it would not be genuine, a factor which, in normal circumstances, an objective and reasonable authority would have to take into account in an investigation for alleged dumping or subsidies.

10. In other words, Members must "take the conditions" that exist at the time of initiation of the investigation for alleged dumping or subsidies, and not create them as could be the case if the Byrd Amendment were accepted.

11. Moreover, the last sentence of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement – "however, no investigation shall be initiated when … account for less than 25 per cent of total production … " – is a sort of "reinsurance" or "*de minimis*", which suggests that the object and purpose of these provisions is to prevent an unjustified proliferation of investigations that could hinder the normal flow of trade between WTO Members. The Byrd Amendment would clash head on with these deterrent provisions because in fact, it favours the initiation of investigations.

12. Finally, it should be borne in mind that the mere initiation of an investigation brings with it the possibility of provisional measures being introduced (Articles 7 of the AD Agreement and 12.12 of the SCM Agreement). Hence, the proliferation of investigations could entail concrete injury to a large number of exporters to the United States market. In other words, the initiation of an investigation for alleged dumping or alleged subsidies itself already authorizes the Member concerned to apply provisional measures under WTO rules, and consequently, the proliferation of investigations could spell the proliferation of provisional measures as well, with their concrete and direct effects on the flow of trade.

III. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLES 8.3 OF THE AD AGREEMENT AND 18.3 OF THE SCM AGREEMENT (PRICE UNDERTAKINGS) FROM THE POINT OF VIEW OF THE DEVELOPING COUNTRIES

13. In Argentina's view, the Byrd Amendment violates the above-mentioned provisions of the AD Agreement and the SCM Agreement in that it detracts from the effectiveness of an alternative remedy, price undertakings, expressly provided for and encouraged by the WTO. Indeed, with a pecuniary incentive to petition for and support investigations of alleged dumping or subsidies, United States producers are unlikely to be interested in any undertakings: they would have a pecuniary interest in the proliferation of investigations and the application of anti-dumping and/or countervailing duties in order to receive their so-called offsets for "qualifying expenditures".

14. Argentina submits that this serious disincentive to price undertakings is detrimental to the normal application of the WTO anti-dumping and countervailing duty rules (measures taken by Member States to protect the normal flow of trade), which always favour the reestablishment of the trade flow or agreement by parties to restore the trade flow to the extent reasonable.

15. It goes without saying that price undertakings are of fundamental importance to the developing countries, for whom it is of the utmost necessity to ensure normal access to developed country markets and for whom it is not easy to overcome barriers to trade, in particular when they are established by a developed country. Acceptance of the Byrd Amendment, with its system of disincentives to price undertakings, would not only increase the barriers to trade that the developing countries have to face in order to find outlets for their products, but would also be a direct obstacle to the creation and establishment of new export-oriented industries in the developing countries. All of this would be in breach of the right to development contained in the preamble to the Marrakesh Agreement, which stipulates that " … there is need for positive efforts designed to ensure that

developing countries, and especially the least developed among them, secure a share in growth in international trade commensurate with the needs of their economic development … ".

16. Argentina would also like to recall that according to Article 15 of the AD Agreement, " … special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members." (emphasis added). Consequently, the Byrd Amendment is inconsistent not only with the favouring of price undertakings, but also with the special situation of the developing countries.

17. It is important to bear in mind that Article 15 of the AD Agreement imposes an obligation on the developed countries to explore the possibilities of making use of the "constructive remedies" provided for and, as stated by the Panel in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*[2], price undertakings must be considered as constituting one of these possible remedies. However, the acceptance of price undertakings as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury and causal link, would not be a sufficiently attractive option for United States producers in view of the possibility offered by the Byrd Amendment, which would ensure them the reimbursement of their so-called "qualifying expenditures".

18. The likelihood of a United States producer accepting a price undertaking is fairly slim: indeed, a producer that has petitioned for the initiation of an anti-dumping investigation on the basis of the prerogative offered by the Byrd Amendment is highly unlikely to be interested in accepting a price undertaking when what can be expected is the imposition of definitive measures following the investigation process.

19. While Article 15 "imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered … ", it does "impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country."[3] Argentina submits that the Byrd Amendment provides the necessary mechanisms and tools for greater private sector participation in the initiation of anti-dumping investigations, discourages any cooperation by the sector "allegedly" affected by the dumped imports in exploring constructive remedies, and at the same time acts as an obstacle to the use of such remedies prior to the imposition of the anti-dumping measures which affect the essential interests of the developing countries. In short, the Byrd Amendment "empties" the constructive remedy alternative offered by Article 15 of the AD Agreement of its content.

20. We add that the Byrd Amendment would not only place the developing countries at a disadvantage *vis-à-vis* the United States producers, but *vis-à-vis* the developed country exporters affected by the Amendment as well. In short, the developing country exporters would suffer injury both with respect to the United States producers who petition for and support the initiation of investigations – the beneficiaries of the Byrd Amendment – and with respect to the other "victims" of the Byrd Amendment, i.e. the developed country exporters.

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[2] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000, paragraph 6.229.

[3] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000, paragraph 6.233 and footnote 92.

IV. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLE XVI:4 OF THE WTO AGREEMENT

21. In view of the above considerations, Argentina contends that the Byrd Amendment, because it establishes a system of incentives to the proliferation of investigations which adversely affects the normal flow of trade and acts as an obstacle to price undertakings, should be found to be inconsistent with the above-mentioned WTO obligations under the AD Agreement and the SCM Agreement, and hence to be in violation of Article XVI:4 of the WTO Agreement.

V. CONCLUSION

22. Argentina does not deny that every WTO Member has a right to spend the money collected in various ways.[4] However, each Member must do so in conformity with the international obligations it has assumed, and in particular, these compensations must not in any way involve a violation of the commitments assumed under the WTO Agreements.

23. In Argentina's view, the United States' application of the Continuing Dumping and Subsidy Offset Act of 2000 – the so-called Byrd Amendment – involves a violation of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement in that it creates a mechanism of incentives to initiate investigations, and hence facilitates the application of provisional measures. The proliferation of such initiations and the adoption of such measures inevitably involves an alteration of the normal flow of trade.

24. We repeat that it is not a matter of investigating the personal and subjective reason of each local producer for filing a complaint, but rather, of analysing the incentive and the access to a mechanism for the reimbursement of the so-called "qualifying expenditures" established by the Byrd Amendment.

25. Argentina considers the Byrd Amendment to be inconsistent with Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement in that it deprives an alternative remedy expressly provided for and encouraged under those Agreements of its effectiveness, namely the "price undertakings".

26. The Byrd Amendment has a particularly damaging impact on the developing countries in that first of all, it provides the necessary mechanisms and tools for greater private sector participation in the initiation of anti-dumping and alleged subsidies investigations; secondly, it discourages any cooperation by this vast sector "allegedly" affected by the importation of the product under investigation in exploring constructive remedies; and finally, it acts as an obstacle to the use of such remedies prior to the imposition of the anti-dumping measures or countervailing duties which affect the essential interests of the developing countries.

27. Argentina concludes that the United States legislation known as the Byrd Amendment, with its system of incentives to the proliferation of investigations affecting the normal flow of trade and the uncertainty involved in reaching price undertakings, should be considered inconsistent with the WTO obligations under the AD Agreement (Articles 5.4 and 8.3) and the SCM Agreement (Articles 11.4 and 18.3), and hence to be in violation of Article XVI:4 of the WTO Agreement.

28. Were the Panel not to find that the Byrd Amendment was inconsistent with the above-mentioned provisions, the same type of measure could be used not only by the United States, but by other countries as well including, in particular, the developing countries. Indeed, in that case, Argentina considers that such a move would be appropriate, particularly in the light of

[4] First written submission by the United States, paragraph 11.

Article XVIII:2 of the GATT 1994, i.e. "in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports …". In this scenario, the payment of the expenses of local producers that took the initiative would entitle them to countervailing duties or anti-dumping measures as "protective measures" "affecting imports" with a view to protecting a particular industry.

29. If the Byrd Amendment were considered by the Panel to be consistent, WTO Members would have to consider the possibility of showing greater flexibility in enabling the developing countries to apply measures of this kind. One alternative might be to limit the distribution of funds resulting from the application of anti-dumping and countervailing duties to xx percent of the total in the case of the developed countries, without any limit of any kind for the developing countries.

ANNEX A-2

THIRD PARTY ORAL STATEMENT OF ARGENTINA

(6 February 2002)

I. INTRODUCTION

1. Argentina is grateful for this possibility of submitting its arguments to the Panel as third party in these proceedings and commenting on the inconsistencies of the Continued Dumping and Subsidy Offset Act of 2000 (hereinafter the "Byrd Amendment") with the obligations of the United States under the Anti-Dumping Agreement (AD Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the WTO Agreement. Specifically, Argentina submits that the said United States Act violates, firstly, the articles relating to the initiation of investigations and the adoption of provisional measures, and secondly, the provisions on price undertakings, including those which provide for special and differential treatment for the developing countries. Finally, Argentina would like to state that these violations of the AD and SCM Agreements also imply non-compliance with the requirements laid down in Article XVI.4 of the WTO Agreement.

II. THE BYRD AMENDMENT

A. VIOLATIONS RELATING TO ARTICLES 5.4 OF THE AD AGREEMENT AND 11.4 OF THE SCM AGREEMENT

1. The Byrd Amendment as an incentive

Argentina considers the Byrd Amendment to be a clear incentive to initiate anti-dumping or alleged subsidy investigations. Leaving aside whatever subjective motivation United States producers may have[1] for requesting or supporting the initiation of such investigations, what is being challenged here is the United States legislation in itself, since the Byrd Amendment acts as an incentive. It clearly alters the preexisting conditions when it comes to deciding whether or not the anti-dumping or alleged subsidy investigation should be initiated. Regardless of whether the implementing authority, acting in an objective and reasonable manner, can determine which are the producers with a genuine interest in requesting an investigation and which of the producers are motivated solely by their interest in receiving an offset for expenses incurred, the fact is that what is being challenged here is the mechanism of the Byrd Amendment, which operates as an incentive to file complaints.

Bearing this in mind, Argentina would like to draw attention to the scope of this incentive: under the Byrd Amendment, the conditions that all WTO Members must take into account when considering whether to initiate an investigation are altered by the introduction, in the legislation of a Member (the United States), of elements that lead to the artificial creation of conditions for a purpose

[1] First written submission by the United States, paragraph 119: "Contrary to the complaining parties' arguments, a simple review of the text confirms that there is no requirement in Article 5.4 and 11.4 that administering authorities determine the *reason for the domestic industry's support*. The obligation is to determine whether the quantitative benchmarks have been met. (…). Rather, the complaining parties argue the reason for support is not appropriate. The complaining parties would have this Panel read into the agreements a requirement that the administering authority must determine that, in addition to the expression of support, the domestic industry support for the investigation is 'true' or 'genuine'".

not provided for in the WTO Agreements, elements which constitute an encouragement to file complaints. In other words, these elements would clearly boost the number of complainants and facilitate the achievement of the minimum thresholds – percentages – required under the AD and SCM Agreements for the initiation of an investigation.

In its turn, this objective framework legally created by the provisions of the Byrd Amendment multiplies the regular impact on trade of the mere filing of an anti-dumping or alleged subsidy complaint, since it is well known that apart from the possible application of provisional measures, the mere filing of a complaint can have a chilling effect on trade; and it is precisely this incentive to file a complaint that the Byrd Amendment generates.

Article 5.4 of the AD Agreement sets up two separate calculations to determine that a minimum level of "support" for the application is shown by domestic producers and a proper determination of standing is made prior to the initiation of the anti-dumping investigation at issue, as confirmed by the findings set forth in the report of the panel on *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*.[2]

The new element which would act as an "encouragement" in the case of the Byrd Amendment is the alteration of the conditions to be considered by the authorities "on the basis of an examination of the degree of support for, or opposition to". Argentina considers that the United States legislation creates conditions which permit the alteration – artificially and by introducing new elements through the reimbursement of "qualifying expenditures" – of the "degree of support for, or opposition to, the application expressed by domestic producers of the like product". While it is correct to use methods of calculation to quantify the examination of the degree of support, the Byrd Amendment acts "a priori", modifying the conditions and thus influencing the "degree of support for" or "opposition to".

2. Unjustified proliferation of investigations. Effect on trade

Argentina would like to repeat that incentives of the Byrd Amendment kind would produce an unjustified and unreasonable proliferation of anti-dumping or alleged subsidy investigations. Indeed, if WTO Members were free to apply such incentives, they themselves could create conditions that would encourage the filing of anti-dumping or alleged subsidy investigations. As already stated, the mere act of filing for the initiation of an investigation would already have a concrete disruptive effect on trade – a chilling effect – as has already been confirmed in WTO practice.

Indeed, Argentina repeats that the provisions of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement, which establish minimum percentages (25%, 50%) for ensuring objective representativeness of the domestic industry, in fact constitute a deterrent to the unjustified proliferation of investigations that could affect the flow of trade. An incentive such as the Byrd Amendment would be in direct violation of these provisions, being inconsistent with their object and purpose.

3. Unjustified proliferation of investigations. Resulting imbalance

The AD and SCM Agreements provide the instruments needed to correct the imbalances caused by goods export practices that involve dumping or subsidization, in other words practices which alter the conditions of competition in the markets. Under these two agreements, measures may legitimately be adopted with a view to re-establishing the mentioned balances through anti-dumping or countervailing duties, while at the same time, instruments are provided to defend the domestic industries against dumping or subsidies. If a WTO Member also had the right to implement additional incentives to increase the number of investigations, the other WTO Members would be unduly

[2] WT/DS141/R, 30 October 2000, paragraphs 6.211 and 6.218.

disadvantaged with respect to that Member. Indeed, an incentive such as that provided by the Byrd Amendment would be detrimental to the results achieved during the negotiation of the WTO Agreements in that it would introduce an element that would disrupt the regulatory balance between the capacity of a Member to protect itself against unfair practices and the rights of the other Members whose market access and enjoyment of negotiated concessions have not been equally restricted.

In other words, the Byrd Amendment is a legal creation which introduces a disruptive element by adding incentives – through the reimbursement of qualified expenditures to petitioners – to the conditions provided for in the text of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement.

B. VIOLATIONS RELATING TO ARTICLES 8.3 OF THE AD AGREEMENT AND 18.3 OF THE SCM AGREEMENT, AND SITUATION OF THE DEVELOPING COUNTRIES

The above-mentioned imbalance is amplified where the country involved is a developing country.

1. Price undertakings

Argentina submits that the provisions of the Byrd Amendment constitute an incentive to the initiation of investigations and, at the same time, a disincentive to price undertakings.

Price undertakings are an alternative remedy, expressly provided for in the WTO rules, by which those who need to apply an anti-dumping measure or a countervailing duty try to smooth their differences with those who wish to be able to continue exporting, in spite of the presumption that by doing so they are engaging in unfair trade practices that could alter the conditions of competition in the markets.

A provision such as the Byrd Amendment would deter domestic market producers from seeking a price undertaking and encourage them to take advantage, instead, of offsets of the kind provided – mandatorily - under that Amendment.

In short, on the one hand the challenged US legislation provides an incentive for something that the WTO seeks to discourage – unjustified anti-dumping and alleged subsidy investigations – while on the other hand it acts as a disincentive to using a legitimate instrument provided for under the WTO rules – price undertakings.

2. Situation of the developing countries

In addition to the above considerations, Argentina would like to stress once again the fundamental importance of price undertakings for the developing countries, which are more vulnerable than the developed countries to any type of measures that affects their chances of exporting and developing export industries. This circumstance is in fact mentioned in the preamble to the Marrakesh Agreement, which recognizes the right of developing countries to sustained development.

Similarly, under Article 15 of the AD Agreement, the situation of the developing countries must be taken into account when introducing a measure that could disrupt the normal flow of trade.

Regardless of whether specific actions such as offering constructive remedies are mandatory or not, the fact is that there does exist an obligation to explore the "possibilities" of using these remedies in the case of the developing countries, stipulated in Article 15 of the AD Agreement. In its report in the case *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed*

Linen from India, the Panel stated: "We recall that Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in the light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must actively be undertaken by the developed country authorities with a willingness to reach a positive outcome."[3]

Argentina believes that the introduction of incentives such as those resulting from the Byrd Amendment would be inconsistent with this provision of Article 15 of the AD Agreement, which requires, at least, that the implications of imposing measures that could affect the developing countries be considered. Through the Byrd Amendment the United States, as a developed country, has created an instrument which is inconsistent with the requirements of Article 15 of the AD Agreement, interpreted in the above-mentioned Panel Report as follows: "the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome." The Byrd Amendment not only is not conducive to, it is in fact a disincentive to, any active effort to explore possibilities; and worse still, it makes the idea of considering a hypothetical price undertaking less attractive in view of an "almost certain" reimbursement of qualified expenditures as the result of the petition for the initiation of an investigation.

Consideration of qualified expenditures to be reimbursed further aggravates the situation from the point of view of the developing countries, since the reimbursement covers a wide range of expenditure categories:[4] (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid for by the employer; (8) environmental equipment, training or technologies; (9) acquisition of raw materials and other imputs; (10) working capital or other funds needed to maintain production. Obviously there is a requirement that these expenditures should be related to the production of the actual product at issue. However, the inclusion of some of these categories, for example research and development expenditures, could be understood, from the point of view of the developing countries, as a disguised subsidy. Likewise, the possibility of including in the claim for expenditures items (6) and (7) relating to health care benefits and pension benefits to employees paid by the employer would appear to be excessive as regards the determination of dumping under the AD Agreement. If the object pursued is to avoid cases in which the product cost does not provide for adequate protection of the rights of the worker and production is ultimately facilitated without respect for social and/or welfare legislation, the Byrd Amendment, by reimbursing expenditures, is not the instrument to modify a circumstance that is not expressly provided for in multilateral regulations.

If the Byrd Amendment as such were declared consistent with WTO obligations, the developing countries would require greater flexibility under other articles of the GATT – for instance Article XVIII – so that a Byrd Amendment type mechanism could be applied more loosely, according to the particular difficulties faced by the developing countries in achieving competitive status on foreign markets.

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[3] WT/DS141/R, 30 October 2000, paragraph 6.233.

[4] Federal Register/Vol.66 N184/Friday, 21 September 2001/Rules and regulations, p. 48552, Subpart F-Continued Dumping and Subsidy Offset #159.61. General (c) Qualifying expenditures.

III. CONCLUSION

In the light of the above considerations, Argentina repeats what it requested in its first written submission, i.e. that the Panel find that the Byrd Amendment is inconsistent with Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement as well as Articles 8.3 and 18.3 of the SCM Agreement, and is therefore also inconsistent with Article XVI.4 of the WTO Agreement.

ANNEX A-3

THIRD PARTY SUBMISSION OF HONG KONG, CHINA

(17 January 2002)

I. INTRODUCTION

1. The dispute at issue concerns the *Continued Dumping and Subsidy Offset Act of 2000* (also known as the "*CDSOA"* or "*Byrd Amendment"*) which was enacted into law by the United States on 28 October 2000. Hong Kong, China decided to participate in the current proceedings as a third party in view of the systemic importance of the dispute.

2. Hong Kong, China does not question the right of WTO Members to enact domestic legislation to protect legitimate trade interests, but such legislation must not detract from their obligations under the WTO. We believe that the *CDSOA* constitutes a violation by the United States of their obligations under the following WTO provisions:

- Article 18.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (hereafter referred to as the "ADA") in conjunction with Article VI:2 of GATT 1994; and

- Article 32.1 of the Agreement on Subsidies and Countervailing Measures (hereafter referred to as the "ASCM") in conjunction with Article VI:3 of GATT 1994.

We also submit that the CDSOA is inconsistent with the object and purpose of the ADA and the ASCM, and violates Article 5 of ASCM.

II. THE LEGISLATION AT ISSUE

3. The *CDSOA* amends the Tariff Act of 1930, which is the principal statute governing the United States anti-dumping and countervailing proceedings, by adding a new Section 754 entitled *Continued Dumping and Subsidy Offset*.

4. Section 754(a) provides that:

> "Duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Anti-dumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the continued dumping and subsidy offset."

5. The term "affected domestic producers" is defined in Section 754(b)(1) as including:

> "Any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that

(A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Anti-dumping Act of 1921, or a countervailing duty order has been entered, and

(B) remains in operation.

Companies, business, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer."

6. As for the term "qualifying expenses", it is defined in Section 754 (b)(4) as follows:

"Expenditure incurred after the issuance of the anti-dumping duty finding or order or countervailing duty order in any of the following categories -

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

(F) Health care benefits to employees paid by the employer.

(G) Pension benefits to employees paid for by the employer.

(H) Environmental equipment, training or technology.

(I) Acquisition of raw materials and other inputs.

(J) Working capital or other funds needed to maintain production."

III. THE ARGUMENTS

A. MANDATORY LEGISLATION

7. According to established GATT and WTO jurisprudence, legislation that mandates action that is inconsistent with WTO rules and leaves no discretion to the executive branch of government can be challenged as such. As summed up in the *United States - Tobacco*[1] case,

> " … panels had consistently ruled that ***legislation which mandated action inconsistent with the General Agreement could be challenged as such***, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such ... " (emphasis added)

[1] Panel report adopted on 4 October 1994, BISD 41S/13.

The Appellate Body has embraced this rationale. See *United States - 1916 Anti-dumping Act*, WT/DS136/AB/R, WT/DS162/AB/R, AB-2000-5, AB-2000-6, paragraphs 88-89.

8. That the *CDSOA* is mandatory legislation is demonstrated by the repeated use of the word "shall" in its provisions. For example, the *CDSOA* provides that,

> "duties assessed pursuant to a countervailing duty order, and anti-dumping duty order … ***shall*** be distributed on an annual basis … to the effected domestic producers …" (emphasis added)
>
> "[t]he Commissioner ***shall*** establish … a special account with respect to each such order or finding." (emphasis added)
>
> "[t]he Commissioner ***shall*** distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers …" (emphasis added)

The above passages demonstrate that the *CDSOA* is mandatory legislation that leaves no discretion to the executive branch of the United States government regarding the distribution of the assessed anti-dumping and countervailing duties to affected domestic producers. Hence, the *CDSOA* as such can be subject to WTO dispute settlement procedures.

B. ARTICLE 18.1 OF THE ADA AND ARTICLE32.1 OF THE ASCM IN CONJUNCTION WITH ARTICLE VI OF GATT 1994

9. By mandating specific action against dumping and subsidization that is not in accordance with Article VI of GATT 1994, as interpreted by the ADA and the ASCM, the *CDSOA* is inconsistent with Article 18.1 of the ADA and Article 32.1 of the ASCM in conjunction with Article VI of GATT 1994.

10. The relevant provisions are quoted below.

> Article 18.1 of the ADA provides that,
>
> "[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."
>
> Article 32.1 of the ASCM provides that,
>
> "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

Specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM

11. In the United *States Anti-dumping Act of 1916* case, the Appellate Body stated that,

> "[i]n our view, the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is ***action that is taken in response to situations presenting the constituent elements of 'dumping'***. 'Specific action against

> dumping' of exports, must, at a minimum, encompass ***action that may be taken only when the constituent elements of 'dumping' are present.***"[2] (emphasis added)

12. By the same logic, the phrase "specific action against a subsidy" in Article 32.1 of the ASCM should also be construed to encompass, at a minimum, action that may be taken *only* when the constituent elements of subsidization are present.

13. Section 1002 of the *CDSOA* illustrates that the Act is taken in response to situations presenting the constituent elements of dumping and subsidization:

> "Congress makes the following findings:
>
> (1) Consistent with the rights of the United States under the World Trade Organization, ***injurious dumping*** is to be condemned and actionable ***subsidies*** which cause injury to domestic industries must be effectively neutralised.
>
> (2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.
>
> (3) The continued ***dumping*** or ***subsidisation*** of imported products after the issuance of antidumping orders or findings or countervailing orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.
>
> (4) Where ***dumping*** or ***subsidisation*** continues, domestic producers will be reluctant to reinvest or rehire and may be unavailable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small business and American farmers and ranchers may be unable to pay down accumulated debt to obtain working capital or to otherwise remain viable…" (emphasis added)

14. In brief, the Act is to remedy the "continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders" by transferring anti-dumping and countervailing duties to the "affected domestic producers". Therefore, the offset payments mandated under the *CDSOA* are clearly in response to situations presenting the constituent elements of dumping and subsidization.

15. The terms of the *CDSOA* demonstrate that the offset payments are possible ***only*** when the constituent elements of dumping and subsidization are present. As seen in paragraph 5 above, offset payments are ***only*** and ***exclusively*** available to those producers "affected" by an instance of anti-dumping or subsidization which has been subject to an anti-dumping duty order, a finding under the Anti-dumping Act of 1921 or a countervailing duty order. Unless there is an anti-dumping order/finding or a countervailing duty order, the United States authorities cannot assess any anti-dumping or countervailing duties and as a result, no offset can be paid. In other words, the constituent elements of dumping and subsidization (leading to an anti-dumping order/finding or a countervailing duty order) are prerequisites to offset payments.

16. The above also means that the CDSOA, being a specific action ***"in response to"*** dumping or subsidy, is no different from an action ***"against"*** dumping or a subsidy. Indeed the very existence of the CDSOA payment hinges upon the existence of the constituent elements of dumping and subsidization. The distribution of the CDSOA payment is again based upon the existence of the

[2] United States – Anti-dumping Act of 1916, AB-2000-5 and 6 at paragraph 122.

constituent elements of dumping and subsidization – the payment will only be distributed to producers affected by an instance of anti-dumping or subsidization. In terms of the effect, the CDSOA provides a subsidy to the affected domestic industries and places them in an advantageous position comparing with the alleged dumped or subsidized imports in the cases concerned, which are by definition competing in the same market. The CDSOA therefore upsets the balance of competitive conditions as established under the ADA and ASCM in the direction of hampering the competitiveness of the imports concerned. This upset of balance against the competitiveness of the imports is particularly serious if the duties imposed and distributed are above what would be adequate to remove the injuries to the domestic industries.

17. With the above analysis, we submit that the mandated distribution of offsets under *CDSOA* constitutes specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM.

Specific action against dumping and subsidization not authorized under Article VI of GATT 1994

18. The Appellate Body's ruling in the *United States - 1916 Anti-dumping Act* is instructive:

> "Article VI, and in particular, Article VI:2, read in conjunction with the Anti-dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."[3]

19. The Appellate Body unequivocally restricted permissible responses to dumping to definitive anti-dumping duties, provisional measures or price undertakings. Therefore, legislation that mandates specific actions against dumping other than these actions constitutes a breach of Article VI of GATT 1994. The distribution of offsets mandated by the *CDSOA* does not fall under any of the above three permissible responses. In line with the Appellate Body's ruling, the *CDSOA*, by mandating the distribution of offsets to domestic producers, is demonstrably inconsistent with Article VI:2 of GATT 1994. We believe that the legal reasoning of the Appellate Body applies equally to similar provisions regarding measures that can be taken in the context of subsidization under the ASCM and Article VI:3 of GATT 1994. By way of the analysis in foregoing paragraphs, we come to a similar conclusion, i.e. the *CDSOA* is a specific action against a subsidy that is not permitted by Article VI:3 of the GATT 1994 as interpreted by the ASCM.

C. OBJECT AND PURPOSE OF THE ADA AND THE ASCM

20. We also submit that the *CDSOA* is inconsistent with the ***object and purpose*** of WTO anti-dumping and countervailing laws.

21. First, it is useful to recall that the aim of anti-dumping and countervailing duties is to restore a level playing field by removing the injury to the relevant domestic industry. Through the imposition of duties, the playing field (which is allegedly tilted against the domestic producers as a result of dumping and subsidization) is leveled. By distributing anti-dumping and countervailing duties to the domestic producers, the *CDSOA* provides them with an additional (and WTO-inconsistent) layer of protection. The level playing field (restored as a result of the imposition of duties) will ironically be tilted again (but this time against the exporters) by having the duties transferred to the domestic producers which have already been given adequate protection through the imposition of anti-dumping and countervailing duties.

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[3] *United States – Anti-dumping Act of 1916*, adopted on 26 September 2000, AB-2000-5 and 6 at paragraph 137

22. Apart from destroying the level playing field, it is also submitted that the *CDSOA* runs counter to the principles of ***restraint*** and ***proportionality*** as evidenced in the following provisions.

> Article 11.1 of the ADA provides that,
>
> "An anti-dumping duty shall remain in force ***only as long as*** and ***to the extent necessary*** to counteract dumping which is causing injury." (emphasis added)
>
> Article 9.1 of the ADA states that,
>
> "It is desirable that … the (anti-dumping) duty be ***less than the margin*** if such lesser duty would be ***adequate*** to remove the injury to the domestic industry." (emphasis added)
>
> Article 21.1 of the ASCM provides that,
>
> "A countervailing duty shall remain in force only ***as long as*** and ***to the extent necessary*** to counteract subsidization which is causing injury." (emphasis added)
>
> Article 19.2 of the ASCM states that,
>
> "It is desirable ... that the (countervailing) duty should be ***less than the total amount of the subsidy*** if such lesser duty would be ***adequate*** to remove the injury to the domestic industry ..." (emphasis added)

23. The above provisions demonstrate that care must be taken to ensure that the amount of duties imposed should not be more than what is necessary to remedy the injury caused by dumping and subsidization. With the imposition of anti-dumping and countervailing duties, any such injury has already been removed. Disregarding the principles of restraint and proportionality, the *CDSOA* goes beyond what is necessary to be done by according additional protection to the domestic producers.

D. ARTICLE 5 OF THE ASCM

CDSOA payments are subsidies in the WTO context

24. For a subsidy to exist within the meaning of the ASCM, there has to be (i) a financial contribution by a government or any public body within the territory of a Member which (ii) confers a benefit and (iii) is specific. We submit that this is indeed the case with respect to the *CDSOA*.

25. We shall first establish that the offsets distributed under the *CDSOA* are subsidies within the meaning of Article 1 of the ASCM. As quoted in paragraph 4 above, Section 754(a) of the *CDSOA* provides for distribution of assessed antidumping and countervailing duties to the affected domestic producers in the United States. By distributing the duties collected, which constitute an entry to the US budget, to eligible domestic producers, the United States makes a financial contribution in the form of a direct transfer of funds referred to in Article 1.1(a)(1)(i) of the ASCM.

CDSOA payments confer a benefit on the recipients

26. We now tackle the question of whether, in a case of a *CDSOA* payment against the background of imposition of duties to counteract a subsidy or dumping, the whole amount paid is a benefit in the sense of Article 1.1(b) of the ASCM. The Appellate Body report on *Canada – Measures Affecting the Export of Civilian Aircraft* provides some useful guidance on what constitutes a benefit under Article 1.1(b) of the ASCM. In that case, the Appellate Body supported the Panel's

ruling that the ordinary meaning of "benefit" clearly encompasses some form of advantage. In order to determine whether a financial contribution confers a "benefit", i.e. an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In other words, a "benefit" to the recipient exists when the financial contribution makes the recipient "better off" than it would otherwise have been, absent that contribution.[4] Given that a *CDSOA* payment would inevitably place the recipients in a more competitive and advantageous position than would have been the case but for the transfer, we submit that such a payment confers a benefit referred to in Article 1.1(b) of the ASCM.

CDSOA payments are specific

27. For the *CDSOA* scheme to be an actionable subsidy, we must further show that the subsidy paid is specific within the meaning of Article 2.1 of the ASCM. Pursuant to Article 2.1(a), a subsidy is specific if the granting authority or legislation limits access to the subsidy to "certain enterprises". Pursuant to Article 2.1(b), if the granting authority or legislation establishes objective criteria or conditions governing the eligibility for and amount of a subsidy, the subsidy is not specific. As explained in footnote 2 of the ASCM, objective criteria or conditions are neutral, do not favor certain enterprises over others, and are economic in nature and horizontal in application. Article 2.1(c) describes other factors that may be considered, including the use of the subsidy for a limited number of enterprises, predominant use by certain enterprises and disproportionately large subsidy amounts for certain enterprises.

28. The *CDSOA* meets the criteria for specificity. It provides specific subsidies as defined under Article 2.1(a) because it explicitly limits access to the subsidy to certain enterprises, that is, the group of manufacturers, producers, farmers, ranchers, or worker representatives that were petitioners in support of an anti-dumping duty order or finding or a countervailing duty order. Those in the same industry, even if they are under the same economic condition, but have chosen, for whatever reasons, not to support such an anti-dumping duty order or countervailing duty order are not similarly subsidized. The subsidy is therefore specific and selective in application as it only applies to a certain group of enterprises within the industries concerned. Nor is Article 2.1(b) a sufficient defense for the United States since the criteria governing eligibility for and the amount of the subsidy are not objective in the sense of footnote 2 of the ASCM. As argued above, the CDSOA favors enterprises that support an antidumping or countervailing duty action over enterprises that choose not to, regardless of the fact that these enterprises may be under the same economic condition and in same industry. The criteria are therefore political rather than economic in nature, nor are they horizontal in application, as required under footnote 2 of Article 2.1(b).

29. In practice, eligibility under the CDSOA also meets the factors indicating specificity in Article 2.1(c) of the ASCM. There is evidence that it is predominantly used by certain industries and that disproportionately large amounts are granted to certain enterprises (e.g. more than one-third of the 350-odd antidumping and countervailing duty orders are for iron and steel goods; one company will receive US$31,000,000 or more than 15% of the US$200,000,000 payable for fiscal year 2001[5]). To conclude, the *CDSOA* payments are specific subsidies as defined in Article 2.1 of the ASCM.

[4] See Appellate Body report on Canada – Measures Affecting the Export of Civilian Aircraft (ref: WT/DS70/AB/R of 2 August 1999) paragraphs 149 – 161

[5] See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, Vol. 66 Federal Register 40782 (3 August 2001) and The eBearing Times (7 December 2001).

Nullification or impairment of benefits to other WTO Members

30. According to Article 5 of the ASCM, no Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1 of the ASCM, adverse effects to the interests of other Members. Adverse effects, in the sense of Article 5, can take the form of either (i) injury to the domestic industry of another Member, or (ii) nullification or impairment of benefits accruing to other Members under GATT 1994, or (iii) serious prejudice to the interests of another Member. We submit that the *CDSOA* causes adverse effects in the form of nullification or impairment of benefits as set forth in Article 5.

31. GATT/WTO case law[6] has clarified that three conditions must be met for a complaint on nullification and impairment to succeed:

(i) a concession in the form of a tariff binding must have been made by a Member;

(ii) a subsequent action that was not reasonably anticipated must have been taken by the Member that has bound its tariff;[7] and

(iii) the subsequent action must have nullified or impaired benefits accruing to other WTO Members in the sense that it has reduced the value of the concession.

All three conditions have been met in the case of the *CDSOA*. On (i), as a result of successive rounds of multilateral trade negotiations, the United States have bound almost all their tariff lines. On (ii), the *CDSOA* was enacted subsequent to the entry into force of the Uruguay Round agreements, and could not have been reasonably anticipated when the Uruguay Round was concluded. It should not be assumed that Members could "reasonably anticipate" the *CDSOA* before the tariff concessions entered into force merely by the fact that similar legislative proposals were being discussed during the Uruguay Round. Legislative proposals have to be distinguished from legislation in effect. If the effect of possible legislative proposals (instead of legislation) has to be taken into account, negotiations will be subject to a very uncertain environment. The fact that the present dispute has been the object of a complaint by no less than eleven WTO Members also supports our argument that the *CDSOA* is not reasonably anticipated. On (iii), payments made under the *CDSOA*, operating as specific subsidies, enable the United States domestic producers to retain a larger market share in the United States market than would have been the case absent the payments, thereby upsetting the balance of competitive conditions established through negotiation of the concession (i.e. tariff binding). The resultant displacement of foreign products from the United States markets amounts to a reduction in value of the concession made by the United States, thereby nullifying the benefits which should otherwise be accruing to other WTO Members. The above analysis demonstrates that the *CDSOA* can nullify or impair benefits which should otherwise be accruing to other WTO Members, and hence is contrary to Article 5 of the ASCM.

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[6] See Panel Report on Japan –Measures Affecting Consumer Photographic Film & Paper (ref: WT/DS44R of 22 April 1998) paragraph 10.41.

[7] Paragraphs 10.79 & 10.80 of WT/DS44R provide a useful device that helps divide the burden of proof with respect to the 'reasonable expectations' requirement. The panel's understanding in this respect is that if an alleged measure pre-dates a concession, the affected Members carry the burden of proof to demonstrate that they could not anticipate the effects of the measure. Conversely, if the measure occurs after negotiations of the concession, the defending Member has the burden of proof to show that the measure should have been reasonably anticipated by the affected Members. The CDSOA came into effect after conclusion of the Uruguay Round tariffs negotiations. The burden of proof should therefore rest with the United States.

IV. CONCLUSION

32. We conclude from the above analysis that *CDSOA* is inconsistent with the following WTO provisions :

- Article 18.1 of the ADA in conjunction with Article VI:2 of GATT 1994;
- Article 32.1 of the ASCM in conjunction with Article VI:3 of GATT 1994;
- the object and purpose of the ADA and the ASCM; and
- Article 5 of the ASCM.

33. We would like to point out that Article VI of GATT 1994, the ADA and the ASCM provide for trade remedy measures which represent exceptions to the GATT/WTO guiding principles of trade liberalization. As such, these measures must be used ***only*** under the specific conditions laid down in the aforesaid Agreements. We are seriously concerned that trade remedy measures are too often used as tools to protect domestic industries from import competition. In this respect, we consider it imperative that the Panel, through its rulings, should confirm the principle of fairness on which the Agreements are based so that there can be a guarantee that the multilaterally agreed principles and rules will be fully respected and, in particular, that the disciplines of the WTO Agreements will be strictly observed. We respectfully request the Panel to carefully consider our comments and to recommend that the US bring the *CDSOA* into compliance with their WTO obligations.

ANNEX A-4

THIRD PARTY ORAL STATEMENT OF HONG KONG, CHINA

(6 February 2002)

1. Hong Kong, China participates in this dispute as a third party in view of its systemic importance. While a WTO Member may distribute anti-dumping or countervailing duties under its domestic legislation, such measure must be consistent with its obligations under the WTO. Like the complaining parties, we believe that the Continued Dumping and Subsidy Offset Act (CDSOA) constitutes a violation by the United States (US) of their obligations under:

- Article 18.1 of the Agreement on Implementation of Article VI of GATT 1994 (ADA) in conjunction with Article VI:2 of GATT 1994; and

- Article 32.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) in conjunction with Article VI:3 of GATT 1994.

2. We also submit that the *CDSOA* is inconsistent with the object and purpose of the ADA and the ASCM and violates Article 5 of the ASCM.

3. First, we submit that the mandated distribution of offsets under the *CDSOA* constitutes specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM, and such action is not authorized under Article VI of GATT 1994.

4. As stated in the ruling of the Appellate Body in the *United States Anti-dumping Act of 1916* case, "the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is ***action that is taken in response to situations presenting the constituent elements of 'dumping'***. 'Specific action against dumping' of exports, must, at a minimum, encompass ***action that may be taken only when the constituent elements of 'dumping' are present***". By the same logic, the phrase "specific action against a subsidy" in Article 32.1 of the ASCM should be similarly construed. It is clear from the provisions of the *CDSOA*, that the Act is to remedy the "continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders". The offsets distributed under the CDSOA are by definition in response to situations presenting the constituent elements of dumping and subsidization.

5. The CDSOA, being a specific action ***"in response to"*** dumping or subsidy, is no different from an action ***"against"*** dumping or a subsidy. In terms of effect, the *CDSOA* provides a subsidy to the affected domestic industries and places them in an advantageous position comparing with the alleged dumped or subsidized imports. Such action was not anticipated during the negotiations of the WTO Agreements.

6. The distribution of offsets mandated by the *CDSOA* does not fall under any of the three permissible responses to dumping, namely, dumping to definitive anti-dumping duties, provisional measures or price undertakings, as provided for in the ruling of the Appellate Body in the *United States Anti-dumping Act of 1916* case. In line with the Appellate Body's ruling, the *CDSOA* is

inconsistent with Article VI:2 of GATT 1994. And, by applying the Appellate Body's legal reasoning in the context of subsidization under the ASCM and Article VI:3 of the GATT 1994, we come to a similar conclusion that the *CDSOA* is a specific action against subsidy that is not permitted by Article VI:3 of the GATT 1994 as interpreted by the ASCM.

7. We also submit that the *CDSOA* is inconsistent with the ***object*** and ***purpose*** of the ADA and ASCM. We all note that the aim of anti-dumping and countervailing duties is to restore a level playing field by removing the injury to the relevant domestic industry. By distributing anti-dumping and countervailing duties to the domestic producers, the *CDSOA* provides them with an additional and WTO-inconsistent layer of protection and therefore destroys the level playing field.

8. The *CDSOA* also runs counter to the principles of ***restraint*** and ***proportionality*** as enshrined in Articles 11.1 and 9.1 of the ADA as well as Articles 21.1 and 19.2 of the ASCM. Disregarding the principles of restraint and proportionality, the *CDSOA* goes beyond what is necessary to be done by according additional protection to the domestic producers.

9. Finally, we submit that the *CDSOA* violates Article 5 of the ASCM. A *CDSOA* payment inevitably places the recipients in a more advantageous position than would have been the case but for the transfer. Following the interpretative guidance provided by the Appellate Body in the *Canada-Measures Affecting the Export of Civilian Aircraft* case, we submit that such a payment confers a benefit referred to in Article 1.1(b) of the ASCM.

10. We submit that the *CDSOA* meets the criteria of a "specific" subsidy under Article 2.1(a) of the ASCM. The offsets to be distributed are explicitly limited to domestic producers who supported an anti-dumping duty order or finding or a countervailing duty order. We also reject Article 2.1(b) as a defence for the US. The *CDSOA* clearly favors enterprises that support an antidumping or countervailing duty action over enterprises that choose not to. Its eligibility criteria are political rather than economic in nature, as required by footnote 2 of Article 2.1(b). The *CDSOA* predominantly benefits certain industries and that disproportionately large amounts are granted to certain enterprises, thereby meeting the de facto 'specificity' factors in Article 2.1(c).

11. The *CDSOA* and the offsets so distributed cause nullification or impairment of benefits to WTO Members. According to GATT/WTO jurisprudence, the CDSAO meets the three conditions for nullification or impairment. The US has bound almost all their tariff lines as a result of successive rounds of multilateral trade negotiations. The *CDSOA* was enacted subsequent to such tariff binding, and could not have been reasonably anticipated when the Uruguay Round was concluded. Finally, *CDSOA* payments upset the balance of competitive conditions established through negotiation of the tariff concession made by the US, thereby nullifying the benefits which should otherwise be accruing to other WTO Members. Such nullification takes place whenever an offset is distributed to a domestic producer when the above conditions are met.

12. We conclude that the *CDSOA* constitutes a violation by the US of their obligations under the relevant WTO provisions. Given the large number of anti-dumping and countervailing duty users, it is of paramount importance that such a WTO-inconsistent measure should be withdrawn expeditiously. Otherwise, there is a danger that other Members may introduce similar legislation, which would cause further upsetting of the balance of rights and obligations provided under the ADA, the ASCM and other WTO Agreements.

13. Thank you.

ANNEX A-5

THIRD PARTY SUBMISSION OF ISRAEL

(17 January 2002)

I. INTRODUCTION

Israel makes this third party submission to provide the Panel with its view that the Continued Dumping and Subsidy Offset Act of 2000 (the Act) is in violation of certain provisions for the General Agreement on Tariffs and Trade 1994 (GATT 1994), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) , and the Subsidies and Countervailing Measures Agreement (SCM Agreement). The Act is a mandatory act that obligates U.S. Authorities to distribute the proceeds of duties assessed pursuant to anti dumping and countervailing duty orders among those domestic producers that applied for and supported the requests for the investigation which led to the imposition and assessment of such duties.

Without prejudice to other issues Israel may wish to raise in the third party meeting, Israel will address the following three issues in this written submission:

1. The Act is inconsistent with Article VI of GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement because it constitutes a "specific action" against imports not prescribed by those provisions.

2. The Act is inconsistent with Articles 5.4 of the AD Agreement and Article 11.4 of the SCM because it distorts and undermines the standing threshold, by providing a financial inducement to domestic producers for making applications for the imposition of anti dumping or countervailing measures or for supporting such applications.

3. The Act is inconsistent with Article 8 of the AD Agreement and Article 18 of the SCM Agreement because it precludes the US Government from performing an objective evaluation whether to accept an undertaking.

II. ARGUMENTS

1. The Act is inconsistent with provisions of GATT 1994, the AD Agreement and the SCM Agreement because it constitutes an impermissible "specific action" against imports.

The Appellate Body in the United States-Antidumping Act of 1916 stated that Article 18.1 of the AD Agreement prohibits a Member from taking specific action against dumping of exports from another Member unless that action is in accordance with Article VI:2 of the GATT. The Appellate Body stated that paragraph VI:2 limits the permissible responses to dumping to definitive anti dumping duties, provisional measures and price undertakings.

Israel is of the opinion that the Act mandates specific action against dumping that is not covered under Article VI and is therefore in violation of Article 18.1 of the AD Agreement. The Act authorizes the dispersement of the assessed anti dumping duties only if and when the United States

determines that the elements of dumping are present and accordingly levies an anti dumping duty on the importation of the product concerned. The Act therefore provides for specific action against dumping, as that phrase has been interpreted by the Appellate Body, which is not a provisional measure in the form of duties or securities, definitive anti dumping duty or a price undertaking and as such is in violation of Article 18.1 of the AD Agreement.

Article 32.1 of the SCM Agreement can be viewed as the parallel to Article 18.1 of the AD Agreement and therefore the same reasoning applying to that Article also applies to Article 32.1 of the SCM Agreement. As such the Act is a violation of 32.1 of the SCM Agreement.

2. The Act is inconsistent with Articles 5.4 of the AD Agreement and Article 11.4 of the SCM because it distorts and undermines the standing threshold by providing a financial inducement to domestic producers for making applications for the imposition of anti dumping or countervailing measures or for supporting such applications.

Under Article X:3 of GATT 1994 there is a requirement that Members "administer in a uniform, impartial and reasonable manner all its laws, regulations decisions and rulings" which is applicable to antidumping and subsidy investigations. The principle of "good faith" has been interpreted by the Appellate Body in United States-Anti Dumping Measures on Certain Hot Rolled Flat Rolled Carbon Quality Steel Products from Japan WT/DS184/AB/R/ paragr. 101 as being incorporated in Article X:3 and "informs the provisions of the Anti Dumping Agreement, as well as other covered agreements." Thus the rules of objectivity, impartiality and good faith apply to the determinations of the Authority throughout the anti dumping investigation. Both Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement require the Authorities to make determinations as regards the level of support for the application for investigations under the AD and SCM Agreements. The question to be determined at this stage is whether there is sufficient industry support for the application. The prospect of a monetary transfer to affected companies induces such companies to bring applications and to express support for petitions that otherwise would be uninterested in the initiation of an investigation. The Authorities have no way of distinguishing support for the application for the imposition of duties as opposed to the desire not to forego the possible financial transfer as a result of the imposition of such duties. This undermines the requirement of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement and renders an "objective" determination to be carried out by the Authorities impossible.

3. The Act is inconsistent with Article 8 of the AD Agreement and Article 18 of the SCM Agreement because it precludes the US Government from performing an objective evaluation whether to accept an undertaking.

The Act forms a clear financial incentive for producers to support the imposition of duties rather than support the alternative remedy of an undertaking since only if a duty is imposed will they receive the transfer of duties collected pursuant to the Act. Since petitioners in the United States have an effective veto over the decision by the Authorities to accept an undertaking as provided under Article 8 of the AD Agreement and Article 18 of the SCM Agreement, the Authorities will not be free to accept an undertaking. Therefore, the Act is incompatible with the obligation of the Authorities to carry out an "objective" and "fair" examination to determine whether to accept an undertaking if "appropriate" under Article 8.3 of the AD Agreement and 18.3 of the SCM Agreement.

III. CONCLUSION

For the reasons stated above, Israel respectfully requests that the Panel find the Continued Dumping and Subsidy Offset Act of 2000 to be inconsistent with the obligations of the United States under Article VI of GATT 1994, Articles 5.4, 8 and 18.1 of the AD Agreement and Articles 11.4, 18 and 32.1 of the SCM Agreement.

ANNEX A-6

THIRD PARTY SUBMISSION OF NORWAY

(17 January 2002)

Introduction

1. The case at hand concerns whether the US Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), also known as the "Byrd Amendment", is consistent with the obligations of the United States under the WTO agreement and annexed agreements.

2. Norway reserved its third party rights in the case during the Dispute Settlement Body meeting on 23 August 2001 (WTO/217/5). Norway's participation reflects both systemic and substantive trade interests.

3. In deciding the case, Norway submits that the Panel should base its arguments on the following:

I. The Byrd Amendment constitutes mandatory, non-discretionary legislation that is actionable under WTO law/rules

4. It is established in GATT and WTO jurisprudence that mandatory, non-discretionary legislation, which is inconsistent with the WTO rules, can be challenged as such, independently from the application of such legislation. The Byrd Amendment is a mandatory, non-discretionary legislation, requiring the US authorities to distribute, on an annual basis, the duties assessed pursuant to a countervailing duty order, an anti-dumping order or a finding under the Anti-Dumping Act of 1921 to the "affected domestic producers" for certain "qualifying expenses" incurred by them after the issuance of such order or finding.

5. Under the mandatory Byrd Amendment no discretion is accorded to the US authorities with regard to their distribution of offsets. Against this background Norway agrees with Japan and Chile that it falls within the authority and mandate of the Panel to review the consistency of the Byrd Amendment as such with the WTO agreements referred to in the requests for the establishment of the Panel.

II. The Byrd Amendment is inconsistent with Article 18.1 of the Anti-Dumping Agreement and with Article 32.1 of the SCM Agreement because the offset payments it mandates constitute specific action against dumping and subsidisation which is not in accordance with the provisions of the GATT, as interpreted by the Anti-Dumping Agreement and the SCM Agreement.

6. Article 18.1 of the Anti-Dumping Agreement provides that:

> "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".

7. In the case United States - Anti-dumping Act of 1916, the Appellate Body analysed how to determine if the measure at issue was a "specific action against dumping" and if so, whether it was one of the permissible actions that are in accordance with GATT 1994 (Article VI) as interpreted by the Anti-Dumping Agreement. The following interpretation was given with regard to the concept "specific action":

> "In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" must at a minimum encompass action that may be taken only when the constituent elements of dumping are present […]".[1]

8. Article 32.1 of the SCM Agreement contains parallel language to Article 18.1 of the Anti-Dumping Agreement, and the phrase "specific action against a subsidy" must be understood similarly to encompass, at a minimum, action that may be taken only when the constituent elements of a subsidy are present.

9. Reference is made to the reasoning by the European Communities, India , Indonesia and Thailand in this respect demonstrating that, as such, the Byrd Amendment mandates a specific action against dumping and subsidisation. In the above mentioned case the Appellate Body found that, in general, specific action could take a wide variety of forms. However, based on its interpretation of Article VI:2 of GATT 1994, in conjunction with the Anti-Dumping Agreement, it concluded that in response to injurious dumping a Member's actions were limited to definitive anti-dumping duties, provisional measures and/or price undertakings.[2]

10. A Member's actions with respect to subsidies are spelled out in Articles VI and XVI of the GATT 1994, as interpreted by the SCM Agreement and similarly limited to one of the following three types of action against subsidisation: "countervailing measures" imposed in accordance with Part V of the SCM Agreement, "countermeasures" against a "prohibited subsidy" imposed in accordance with Part II of the SCM Agreement, or « countermeasures » against subsidies that cause « adverse effects » to the interests of the Member concerned, according to Articles 4 and 7 of the SCM Agreement.

11. The "specific measures" available to (WTO) Members to meet dumping or subsidisation are thus limited to the abovementioned measures. If a Member would like to see new measures added to this exhaustive list, or change the said measures, such proposals for amendments of the WTO provisions will have to be negotiated within the WTO. There is no option for adopting unilateral measures like the US offset at issue.

12. In support of this, the United States itself has argued that limits exist with respect to the actions a Member state may take in response to unfair trade practices. In United States - Anti-Dumping Duties of Salmon from Norway, the United States argued before the panel as follows:

> "Regarding the negotiating history of the General Agreement; the United States also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit tougher

[1] Report of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R at para. 122.

[2] United States - 1916 Act, Appellate Body Report WT/DS136/AB/R, para. 137.

countermeasures than merely offsetting duties. However, in the end Article VI remedy had been limited to such duties »[3]

13. Finally, reference should be made to the legislative history of the Byrd Amendment, which clearly demonstrates that the Byrd Amendment was aimed at creating an additional specific measure as a response to foreign dumping and subsidisation - by hitting twice at foreign exporters and thereby providing double protection to the US domestic industry.

14. Both the substance of the bill and the manner in which it was adopted caused significant concern within the US Congress and Administration. The legislation which constitutes a trade measure was, due to lack of support, attached to the FY 2001 Agricultural Appropriations bill and adopted as part of this. In the October 2000 Statement of Administration policy, the US Administration stated that "there are significant concerns regarding administrative feasibility and consistency with our trade objectives, including the potential for trading partners to adopt similar mechanisms." President Clinton asked Congress to override the Byrd Amendment, taking the position that the offsets would provide select industries with a subsidy beyond the protection level needed to counteract foreign subsidies.

III. The Byrd Amendment prevents the United States from making decisions in accordance with Article 5.4 of the Anti-dumping Agreement and Article 11.4 of the SCM Agreement, on whether the application for an initiation of an anti-dumping or anti-subsidy investigation has been made « by or on behalf of the domestic industry »:

15. The Anti-Dumping Agreement and the SCM Agreement stipulate that, except in "special circumstances", the authorities of the importing Member shall not initiate an anti-dumping or anti-subsidy investigation unless they have received a written application made "by or on behalf of the domestic industry".

16. Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement set out the requisite support required in order for the domestic authorities to initiate a dumping or countervailing duty investigation. These provisions require that such investigations cannot be initiated "unless the authorities have determined, on the basis of an examination of the degree of support...that the application has been made by the domestic industry".

17. The Byrd Amendment, by mandating offset payments to « the affected domestic producers » provides a strong financial incentive to domestic producers to file applications for the imposition of anti-dumping or countervailing measures, or to support such applications made by other domestic producers. This implies encouragement to initiate investigations by the US authorities in cases not necessarily based on a « genuine » interest among the industry concerned. The Byrd Amendment thus creates a powerful incentive for companies to bring or support petitions without merit. In short by offering a « cash reward » the Byrd Amendment encourages abuse of the US AD and CVD legislation.

18. The Byrd Amendment provides that the offset is only to be paid the "affected domestic producers", a category that is defined as including the petitioners and those interested parties who support the petition. Accordingly, producers that oppose or do not support the petition, are not eligible for offsets and risk being put at a financial disadvantage vis-à-vis domestic competitors who support the application.

[3] Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87. Report of the Panel adopted on 27 April 1992, BISD 41S/229, para. 75.

19. A domestic producer cannot be considered to have made an "application", or to "support" it, within the meaning of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, if he does so in order to qualify for the offset payments provided under the Byrd Amendment.

20. Thus, the Byrd Amendment has the effect of stimulating the filing of applications and making it easier for the applicants to obtain the support of other domestic producers, so as to meet the quantitative thresholds laid down in Article 5.4 of the Anti-Dumping Agreement and in Article 11.4 of the SCM Agreement.[4]

21. Members must observe the general principle of good faith when performing their treaty obligations. The Appellate Body has noted that in order to be "objective" an examination must conform to "the dictates of the basic principles of good faith and fundamental fairness".[5]

22. The Byrd Amendment operates in a way which prevents the US authorities from conducting an objective examination of whether an application is made « by or on behalf of the domestic industry » as required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

23. These provisions express two key obligations, both of which are affected by the design of the Act. First, Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement require a positive determination by the authorities, carried out on the basis of an examination of the degree of support or opposition to the application. Second, the examination must show that the application has been made "by or on behalf of the domestic industry". An application is considered to have been made "by or on behalf of the domestic industry", only where the examination shows that an application passes both of the following positive and negative tests. A positive test requires that a majority of those in the industry expressing views, supports an application. A negative test bars initiation of any application that fails to gain the positive support of producers representing at least 25 per cent of domestic production.

24. The Uruguay Round negotiating history of the said provisions confirms this interpretation. The present text of these articles was shaped by the widespread reaction against the pre-WTO practice of the US authorities, simply to rely on an applicant's assertion that it represented the domestic industry, unless the majority of the industry actively opposed the petition. Many delegations sought to require investigating authorities to examine the support for an application before initiation to ensure that the application was properly filed "by or on behalf of" the domestic industry. The investigating

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[4] These effects of the *Byrd Amendment* were anticipated by some US legislators. For example, Representative Kolbe cautioned that:

> The lure of a potential monetary windfall could spur litigation under our AD/CVD laws. In order to be eligible for the potential windfall, US industry would be encouraged to join in the filing of AD/CVD petitions. Otherwise, they would not be eligible for any payments which might be made under this new provision.

Similarly, Senator Nickles warned that:

> [the Byrd Amendment] says if you have a dumping complaint, and if you happen to win, the benefits go back directly to that company, directly to the company involved. So there is a reward and incentive that **if you file a dumping complaint and win, you will receive benefits. This encourages lawsuits on dumping because you can win the "lottery".**

[5] Report of the Appellate Body, *United States - Hot Rolled Steel from Japan*, WT/DS184/AB/R, para. 193.

authorities should be required to verify the standing of petitioners. The Nordic countries expressed their view, i.e.

> "that the investigating authority is obliged to verify that the petitioners satisfy the 'major proportion requirement' … before initiating an investigation. As it seems that the [Anti-dumping] Code is not sufficiently clear on this point, it should be clarified in order to prevent unfounded investigations."[6]

25. The Byrd Amendment, by making possible, and even encouraging, the initiation of investigations in cases where the domestic industry has no genuine interest in the adoption of such measures, also leads to unnecessary burdens for foreign exporters because of such unfounded examinations. If maintained, the Byrd Amendment would thereby alter, in favour of the US the balance of Members rights and obligations under the Anti-Dumping Agreement and the SCM Agreement.

26. For the above reasons, Norway submits that the Byrd Amendment is inconsistent with Article 5.4 of the Anti-Dumping Agreement and with Article 11.4 of the SCM Agreement.

IV. The Byrd Amendment is inconsistent with the undertakings provisions of Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement, by making it more difficult to get acceptance for undertakings by US authorities

27. Articles 8.1 of the Anti-Dumping Agreement and Article 18.1 of the SCM Agreement provide for an alternative to the imposition of anti-dumping and countervailing duties. Every Member State is required to consider proposed undertakings in good faith as an alternative to the imposition of duties. In support of this the provisions of Articles 8.3 of the Anti-Dumping Agreement and 18.3 of the SCM Agreement, require authorities to have a proper reason for rejecting an offered undertaking.

28. Under US law, the petitioners play an active and privileged role in the procedure leading to the decision whether to accept an undertaking. Furthermore, the US authorities have stated that the petitioner's opposition is something to which they accord "considerable weight" when assessing whether to accept an undertaking.

29. Under the Byrd Amendment, the US authorities provide a financial incentive to the petitioners for opposing the acceptance of undertakings. The US authorities then rely upon such opposition in order to decide whether to accept an undertaking.

30. Following the adoption of the Byrd Amendment, the petitioners are likely to object systematically to any undertakings offered by the exporters, not because they consider them less effective than the imposition of duties, but rather because they have a vested financial interest in the imposition of duties.

31. Against this background, the Norwegian Government supports the conclusion of the European Communities and others that the Byrd Amendment is incompatible with the obligation of the US authorities to conduct an objective examination of whether the acceptance of an undertaking would be "appropriate"; and it undermines the object and purpose of those two provisions, which is to provide an alternative remedy to the imposition of duties. As such it is inconsistent with Articles 8.1 and 8.3 of the Anti-Dumping Agreement and with Articles 18.1 and 18.3 of the SCM Agreement.

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[6] "Amendments to the Anti-Dumping Code," Submission by the Nordic Countries, Section V(a), MTN.GNG/NG8/W/64 (22 December 1989)

V. The offsets under Byrd Amendment constitute subsidies which nullify or impair benefits accruing to other WTO Members under the WTO rules.

32. It is clear that the offsets to be distributed under the Byrd Amendment constitute a subsidy as defined in Article 1 of the SCM Agreement, which is "specific" within the meaning of Article 2 of the SCM Agreement, and thus actionable under Article 5 of the same agreement once the conditions of Article 5 are fulfilled. In this respect Norway associates itself with the first written submission of Mexico.

33. Norway, furthermore, supports the arguments made by Mexico that the wording "through the use of" [a subsidy] in Article 5 of the SCM Agreement must encompass all subsidies that are "granted or maintained", meaning that a WTO Member under such conditions is entitled to invoke the remedy mechanism in Article 7 of the SCM Agreement to a violation of Article 5 of the same Agreement.

34. The question under Article 5 is whether such subsidy (the offsets to be distributed under the Byrd Amendment) causes "adverse effects to the interests of other Members" in any of the three ways listed in Article 5, letters (a) through (c). Bearing in mind that the present case is a "legislative complaint", and not directed at a concrete subsidization, Norway, like Mexico, believes that the subsidization should be evaluated against the criteria of Article 5 (b).

35. Article 5 (b) of the SCM Agreement refers to nullification or impairment of benefits accruing directly or indirectly to Members under GATT 1994, in particular benefits of concessions bound under Article II of GATT 1994. The relevant provisions of GATT 1994 include the violation and the non-violation nullification or impairment provisions of Article XXIII.

36. Norway, like Mexico, believes that it is highly likely that the majority of the products affected by the Byrd Amendment will be products subject to customs duties bound by the US WTO tariff concessions. Consequently nullification or impairment of tariff concessions caused by this subsidy, can be presumed. Additionally other GATT obligations, as listed by Mexico, may also be violated.

37. It may be argued that the nullification or impairment of tariff concessions caused by this subsidy is not a concrete violation of Article II of the GATT 1994, but must be evaluated as a "non-violation nullification or impairment" and thus subject to GATT Article XIII(1)(b) and jurisprudence related to this provision. However, to the extent that Article 5(b) of the SCM Agreement incorporates non-violation nullification or impairment under Article XXIII of the GATT 1994, it transforms such non-violation nullification or impairment caused "through the use of any subsidy" into a violation of Article 5(1)(b) of the SCM Agreement. Consequently there is no need to enter into a discussion of non-violation nullification or impairment based on GATT Article XXIII(1)(b) or DSU Article 26.

38. The nullification or impairment caused by the subsidies in question is systematic and direct. The subsidies under the Byrd Amendment must be distributed to producers of like products who compete directly with foreign exports of such products, giving these national producers an added competitive advantage to the detriment of foreign exporters. To the foreign exporters this subsidy will function in a similar way as an extra tariff, aggravating the relative competitiveness of their products over and beyond what could be expected from the tariff concession and possible anti-dumping and countervailing duties.

39. Accordingly, based on the facts of this case, the granting or maintaining of subsidies by the US Government under the Byrd Amendment causes nullification and impairment through the use of subsidies in violation of Article 5(b) of the SCM Agreement.

VI. For the above reasons, the offset payments under the Byrd Amendment result in an "unreasonable" and "partial" administration of the US laws and regulations on the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings, which is inconsistent with Article X:3(a) of the GATT

40. Article X:3(a) of the GATT states that each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

41. The Byrd Amendment leads to an « unreasonable » administration of the US laws and regulations concerning the initiation of investigations of alleged dumping or subsidies, because it provides a strong financial incentive to file or support applications which will increase the number of investigations initiated by the US authorities. The offset payments result in the «partial» administration of the US laws and regulations concerning the initiation of investigations because they increase artificially the level of support for the applications. This favours certain parties (those domestic producers who support the adoption of measures) at the expense of other interested parties (including the foreign exporters, but also the domestic producers who oppose the initiation).

42. The Byrd Amendment also leads to an «unreasonable» administration of the US laws and regulations concerning undertakings as alternative to anti-dumping or countervailing duties. In order to receive the offset payments, the petitioners will oppose systematically any undertakings offered by the foreign exporters, regardless of whether such undertakings provide an appropriate remedy against the injuries caused by dumping or subsidisation. Together with the US policy of according «considerable» weight to the petitioners' opposition, this will render more difficult, if not impossible, the acceptance of undertakings. Thus, foreign exporters will be deprived of an alternative, more beneficial, remedy for no other reason than the interest of the domestic producer in securing a windfall financial gain.

43. The offset payments also lead to a «partial» administration of the US laws and regulations concerning undertakings because, as a result, the exporters' interest in obtaining an alternative remedy in lieu of the imposition of duties is subordinated to the pecuniary interest of the domestic producers.

44. Against this background, the United States acts inconsistently with Article X:3(a) of GATT 1994 because the Byrd Amendment prevents the administration of US anti-dumping and countervailing duty law in a reasonable, impartial and uniform manner.

VII. By enacting the Byrd Amendment, the United States is in breach of the obligation of all Members to ensure that its laws, regulations and administrative procedures are in conformity with the provisions of the General Agreement on Tariffs and Trade 1994 (the "GATT"), the Agreement on Implementation of Article VI of GATT 1994 (the "Anti-Dumping Agreement") the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"), and the Marrakesh Agreement establishing the World Trade Organization (the "WTO Agreement") :

45. Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement (both with identical wording) provide that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

46. Thus, by being inconsistent with Articles 18.1, 5.4, 8.1 and 8.3 of the Anti-Dumping Agreement and with Articles 32.1, 11.4, 18.1 and 18.3 of the SCM Agreement, the Byrd Amendment is also inconsistent with Article 18.4 of the Anti-Dumping Agreement and with Article 32.5 of the SCM Agreement, respectively.

47. Similarly, Article XVI:4 of the WTO Agreement states that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

48. The United States, as a result of its violation of the Anti-Dumping Agreement, the SCM Agreement and the GATT, is also violating its general obligation under Article XVI of the Agreement Establishing the WTO ("the WTO Agreement"), Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.

VIII. Conclusion

For the reasons stated in this submission, Norway respectfully requests the Panel to find that the Continued Dumping and Subsidy Offset Act of 2000, also known as the Byrd Amendment, is inconsistent with the obligations of the United States under

- Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement;
- Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement;
- Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement;
- Article 5(b) of the SCM Agreement
- Article X:3(a) of the GATT;
- Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement; and
- Article XVI:4 of the WTO Agreement.

Finally, Norway respectfully requests the Panel to recommend that the United States bring the Act into conformity with the corresponding covered agreements. Furthermore, and pursuant to Articles 3.7 and 19.1, second sentence, of the DSU, Norway requests that the Panel suggest the withdrawal of the inconsistent Act as the only possible way for the United States to implement the recommendations. It is the main features and the basic rationale of the Byrd Amendment that violate the cited provisions. Therefore, as stated by Japan and Chile, only by actually repealing the Byrd Amendment could the United States bring it into conformity with the covered agreements and comply with the recommendations.

ANNEX A-7

THIRD PARTY ORAL STATEMENT OF NORWAY

(6 February 2002)

Chairman, Members of the Panel,

I would like to thank you for this opportunity to present the Norwegian views in the case at hand. With reference to our written third party submission dated 17 January 2002, I will focus on the following:

I. First: Norway submits that the Byrd Amendment constitutes mandatory, non-discretionary legislation that is actionable under the WTO rules

1. As pointed out in our submission, no discretion is accorded under the Byrd Amendment to the US authorities with regard to their distribution of offsets. Norway thus agrees with Japan and Chile that it falls within the authority and mandate of the Panel to review the consistency of the Byrd Amendment as such with the WTO agreements referred to in the requests for the establishment of the Panel.

II. Second: Norway submits that the Byrd Amendment is inconsistent with Article 18.1 of the Anti-Dumping Agreement and with Article 32.1 of the SCM Agreement because the offset payments it mandates, constitute specific action against dumping and subsidisation which is not in accordance with the provisions of the GATT (as interpreted by the Anti-Dumping Agreement and the SCM Agreement).

2. Reference is made to the reasoning by the European Communities, India, Indonesia and Thailand demonstrating that, as such, the Byrd Amendment mandates a specific action against dumping and subsidisation.

3. In the case the United States – Anti-dumping Act of 1916 the Appellate Body concluded that in response to injurious dumping a Member's actions were limited to definitive anti-dumping duties, provisional measures and/or price undertakings.[1]

4. A Member's actions with respect to subsidies as spelled out in Articles VI and XVI of the GATT 1994, are similarly limited to(1) "countervailing measures" imposed in accordance with Part V of the SCM Agreement, (2) "countermeasures" against a "prohibited subsidy" imposed in accordance with Part II of the SCM Agreement, or (3) «countermeasures» against subsidies that cause «adverse effects» to the interests of the Member concerned, according to Articles 4 and 7 of the SCM Agreement.

5. The "specific measures" available to Members to meet dumping or subsidisation are thus limited to the abovementioned measures. If a Member would like to see new measures added, or change the said measures, such proposals for amendments of the WTO provisions will have to be negotiated within the WTO.

[1] United States - 1916 Act, Appellate Body Report WT/DS136/AB/R, para. 137.

6. In support of this, the United States itself has argued that limits exist with respect to the actions a Member may take in response to unfair trade practices. And I quote form the report of the panel in the case the United States - Anti-Dumping Duties of Salmon from Norway:

> "Regarding the negotiating history of the General Agreement; the United States also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit tougher countermeasures than merely offsetting duties. However, in the end Article VI remedy had been limited to such duties»[2]

7. Reference should also be made to the legislative history of the Byrd Amendment, which clearly demonstrates that the Byrd Amendment was aimed at creating an additional specific measure as a response to foreign dumping and subsidisation - by hitting twice at foreign exporters and thereby providing double protection to the US domestic industry.

8. In this respect, reference is made to paragraph 14 of Norway's written submission as well as to parallel descriptions in the submissions of Canada, Japan, Mexico, the European Communities and others.

III. Third: Norway submits that the Byrd Amendment prevents the United States from making decisions in accordance with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, on whether the application for an initiation of an anti-dumping or anti-subsidy investigation has been made «by or on behalf of the domestic industry»:

9. The Anti-Dumping Agreement as well as the SCM Agreement stipulate that, except in "special circumstances", the authorities of the importing Member shall not initiate an anti-dumping or countervailing duty investigation unless they have received a written application made "by or on behalf of the domestic industry".

10. According to the abovementioned articles such investigations cannot be initiated "unless the authorities have determined, on the basis of an examination of the degree of support... that the application has been made by the domestic industry".

11. The Byrd Amendment, by mandating offset payments to «the affected domestic producers» provides a strong financial incentive to domestic producers to file applications for the imposition of anti-dumping or countervailing measures, or to support such applications made by other domestic producers. The Byrd Amendment thus creates a powerful incentive for companies to bring or support petitions without merit.

12. Producers that oppose or do not support the petition, are not eligible for offsets and risk being put at a financial disadvantage vis-à-vis domestic competitors supporting the application.

13. A domestic producer cannot be considered to have made an "application", or to "support" it, within the meaning of Article 5.4 of the Anti-Dumping Agreement or Article 11.4 of the SCM Agreement, if he does so in order to qualify for the offset payments provided under the Byrd Amendment.

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[2] Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87. Report of the Panel adopted on 27 April 1992, BISD 41S/229, para. 75.

14. The Byrd Amendment prevents the US authorities from conducting an objective examination of whether an application is made «by or on behalf of the domestic industry» as required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

15. During the Uruguay Round negotiating history of the said provisions many delegations, including the Nordic countries, expressed their view:

> «that the investigating authority is obliged to verify that the petitioners satisfy the 'major proportion requirement' … before initiating an investigation..... in order to prevent unfounded investigations.»[3]

16. The Byrd Amendment, by making possible, and even encouraging, the initiation of investigations in cases where the domestic industry has no genuine interest in the adoption of such measures, also leads to unnecessary burdens for foreign exporters because of such unfounded examinations. If maintained, the Byrd Amendment would thereby alter, in favour of the US, the balance of Members rights and obligations under the Anti-Dumping Agreement and the SCM Agreement.

IV. Fourth: It is Norway's view that the Byrd Amendment is inconsistent with the undertakings provisions of Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement, by making it more difficult to get the US authorities to accept undertakings

17. As pointed out by Norway and other Members, under US law, the petitioners play an active and privileged role in the procedure leading up to the decision whether to accept an undertaking. Furthermore, the US authorities have stated that the petitioner's opposition is something to which they accord "considerable weight" when assessing whether to accept an undertaking.

18. Under the Byrd Amendment, the US authorities provide a financial incentive to the petitioners for opposing the acceptance of undertakings. The US authorities then rely upon such opposition in order to decide whether to accept an undertaking.

19. Following the adoption of the Byrd Amendment, the petitioners are likely to object systematically to any undertakings offered by the exporters, not because they consider them less effective than the imposition of duties, but rather because they have a vested financial interest in the imposition of duties.

20. Against this background, the Norwegian Government supports the conclusion of the European Communities and others that the Byrd Amendment is incompatible with the obligation of the US authorities to conduct an objective examination of whether the acceptance of an undertaking would be "appropriate". And it undermines the object and purpose of Article 8.1 of the Anti-dumping Agreement and Article 18.1 of the SCM Agreement, which is to provide an alternative remedy to the imposition of duties.

V. Fifth: Norway submits is that the offsets under the Byrd Amendment constitute subsidies which nullify or impair benefits accruing to other WTO Members under the WTO rules.

21. Norway supports the arguments made by Mexico that the offsets to be distributed under the Byrd Amendment constitute a subsidy as defined in Article 1 of the SCM Agreement, which is

[3] "Amendments to the Anti-dumping Code", submission by the Nordic Countries; Section V (a), MTN.GNG/NG8/W/64 (22 December 1989)

”specific” within the meaning of Article 2 and thus actionable under Article 5 of the same agreement; once the conditions of Article 5 are fulfilled.

22. Furthermore, the wording ”through the use of” [a subsidy] in Article 5 of the SCM Agreement must encompass all subsidies that are ”granted or maintained”, meaning that a WTO Member under such conditions is entitled to invoke the remedy mechanism in Article 7 of the SCM Agreement to a violation of Article 5 of the same Agreement.

23. The question under Article 5 is whether such subsidy causes ”adverse effects to the interests of other Members” in any of the three ways listed in Article 5, letters (a) through (c). Bearing in mind that the present case is a ”legislative complaint”, and not directed at a concrete subsidization, Norway, believes that the subsidization should be evaluated against the criteria of Article 5 (b).

24. This provision refers to nullification or impairment of benefits accruing, directly or indirectly, to Members under GATT 1994, in particular benefits of concessions bound under Article II of GATT 1994. The relevant provisions of GATT 1994 include the violation and the non-violation nullification or impairment provisions of Article XXIII.

25. Norway, like Mexico, believes that it is highly likely that the majority of the products affected by the Byrd Amendment will be products subject to customs duties bound by the US WTO tariff concessions. Consequently nullification or impairment of tariff concessions caused by this subsidy, can be presumed.

26. The nullification or impairment caused by the subsidies in question is systematic and direct. The subsidies under the Byrd Amendment must be distributed to producers of like products who compete directly with foreign exports of such products, giving these national producers an added competitive advantage to the detriment of foreign exporters. This subsidy will function in a similar way as an extra tariff, aggravating the relative competitiveness of their products over and beyond what could be expected from the tariff concession and possible anti-dumping and countervailing duties.

VI. For the above reasons, Norway also maintains that the offset payments under the Byrd Amendment result in an “unreasonable” and “partial” administration of the US laws and regulations on the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings, which is inconsistent with Article X:3(a) of the GATT

27. At this point I refer to our written submission para 40 through 44 supporting what has been stated by the European Communities and other Members in this respect.

VII. Finally, Norway submits that by enacting the Byrd Amendment, the United States is in breach of the obligation of all Members to ensure that its laws, regulations and administrative procedures are in conformity with the provisions of the “GATT”, the “Anti-Dumping Agreement”, the Agreement on Subsidies and Countervailing Measures, and the “WTO Agreement”:

28. In this respect, I refer to Norway’s written submission para 45 through 48.

29. In concluding, Norway maintains its position as stated in its written submission, and respectfully requests the panel to take this into consideration and to recommend that the United States brings its legislation into conformity with the WTO rules.

Thank you so much for your attention and for your patience.