

**UNITED STATES – CONTINUED DUMPING AND SUBSIDY  
OFFSET ACT OF 2000**

*Report of the Panel*

The report of the Panel on United States – Continued Dumping and Subsidy Offset Act of 2000 is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 16 September 2002 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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**Note by the Secretariat:** This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

## 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 panelists 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.<sup>1</sup> The CDSOA amends Title VII of the Tariff Act of 1930 by adding a new section 754 entitled *Continued Dumping and Subsidy Offset*.<sup>2</sup> Regulations prescribing administrative procedures under the Act were brought into effect on September 21, 2001.<sup>3</sup>

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".<sup>4</sup>

2.3 The term "affected domestic producers" means :<sup>5</sup>

a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that –

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<sup>1</sup> Public Law 106-387, 114 Stat. 1549, 28 October 2000, sections 1001-1003.

<sup>2</sup> Codified as 19 USC 1675c.

<sup>3</sup> *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").

<sup>4</sup> United States Tariff Act of 1930, Section 754 (a).

<sup>5</sup> *Ibid.*, Section 754(b)(1).

(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.<sup>6</sup>

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.”<sup>7</sup>

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<sup>8</sup> and deposit into such account all the duties assessed under that Order.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.

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

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<sup>6</sup> 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.

<sup>7</sup> *Ibid.*, § 754(b)(4), 114 Stat. 1549A-73.

<sup>8</sup> United States Tariff Act of 1930, Section 754(e)(1).

<sup>9</sup> *Ibid.*, Section 754(e)(2)

<sup>10</sup> *Ibid.*, Section 754(d)(2) and (3).

<sup>11</sup> *Ibid.*, Section 754 (c)

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.<sup>12</sup>

2.7 The CDSOA applies with respect to all anti-dumping and countervailing duty assessments made on or after 1 October 2000<sup>13</sup> 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.<sup>14</sup>

### 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<sup>15</sup>, 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:

- 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;<sup>16</sup>

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<sup>12</sup> 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)).

<sup>13</sup> Section 1003 (c) of the CDSOA.

<sup>14</sup> United States Tariff Act of 1930, Section 754(d)(1).

<sup>15</sup> 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 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.

**[Parties' arguments in Sections IV and V deleted from this version.]**

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<sup>16</sup> 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.

## 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)*.<sup>256</sup>

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.<sup>257</sup> 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 complaints 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,<sup>258</sup> Mexico would have been denied its right to comment on a separate interim report in respect of its dispute. Although the United 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

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<sup>256</sup> *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.

<sup>257</sup> See *EC – Bananas III (US)*, para. II.42.

<sup>258</sup> 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".

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 inadvertently be overlooked or mis-attributed when preparing the separate final report.<sup>259</sup>

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 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

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<sup>259</sup> 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).

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.<sup>260</sup>

## **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).<sup>261</sup> 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.

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

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<sup>260</sup> Comments were received from Japan and the United States.

<sup>261</sup> 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.

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)*<sup>262</sup> 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 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*

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<sup>262</sup> *United States – Anti-Dumping Act of 1916* ("US – 1916 Act (AB)"), WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000.

(Japan)<sup>263</sup> 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.<sup>264</sup> 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.<sup>66</sup>

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 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

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<sup>263</sup> *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.

<sup>264</sup> *US – 1916 Act (AB)*, para. 137.

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*.<sup>265</sup> 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*.

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

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<sup>265</sup> 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".

measure at issue, which imposed criminal and civil liabilities on importers engaged in dumping, constituted action "against" dumping.<sup>266</sup>

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".<sup>267</sup> 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".<sup>268</sup> 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".<sup>269</sup> Without necessarily providing a definitive statement of the meaning of the term "against", we conclude that action "against" dumping must have some adverse bearing<sup>270</sup> 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.<sup>271</sup> Action which is in response to dumping, but also beneficial to dumping (or neutral in effect on dumping), is not "against" dumping.<sup>272</sup>

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 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

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<sup>266</sup> 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.

<sup>267</sup> US first written submission, para. 92, citing the new Shorter Oxford English Dictionary, 38-39 (L. Brown ed., 1993).

<sup>268</sup> Australia, second written submission, para. 16. EC, India, Indonesia and Thailand, second written submission, para. 28.

<sup>269</sup> Canada, second written submission, para. 45.

<sup>270</sup> The Oxford English Dictionary Online ([www.oed.com](http://www.oed.com)) refers to "against" as "expressing the adverse bearing of many verbs and nouns of action".

<sup>271</sup> 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.

<sup>272</sup> 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).

sense that it may be taken only in situations presenting the constituent elements of dumping,<sup>273</sup> 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<sup>274</sup> 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 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

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<sup>273</sup> 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).

<sup>274</sup> 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.

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".<sup>275</sup> 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'".<sup>276</sup>

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".<sup>277</sup> 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 to, in the sense of being responsible for, the dumped or subsidized good such as the importer, exporter or foreign producer."<sup>278</sup>

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<sup>275</sup> Australia's response to Question 8 from the Panel after the second substantive meeting.

<sup>276</sup> Replies to Questions 6 and 8 from the Panel after the second substantive meeting.

<sup>277</sup> US first written submission, para. 92.

<sup>278</sup> US oral statement at the second substantive meeting, para. 32.

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 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.<sup>279</sup>

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.<sup>280</sup> 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.”<sup>281</sup> 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.<sup>282</sup> 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.<sup>283</sup> 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.

7.32 The complaining parties assert that even if the CDSOA is merely a “payment programme”,<sup>284</sup> 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

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<sup>279</sup> *US – 1916 Act (EC)*, para. 6.116.

<sup>280</sup> *US – 1916 Act (EC)*, note 376.

<sup>281</sup> *EC – Parts and Components*, BISD 37/132, para. 5.7

<sup>282</sup> *US – 1916 Act (EC)*, para. 6.117; *US - 1916 Act (Japan)*, para. 6.135.

<sup>283</sup> *US – 1916 Act (EC)*, para. 6.116.

<sup>284</sup> See US first written submission at para. 19.

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.<sup>285</sup> 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.<sup>286</sup> Nor do we consider that action may only be considered to be "against" dumping if it 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.<sup>287</sup> 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.<sup>288</sup> 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".<sup>289</sup>

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)

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<sup>285</sup> 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.

<sup>286</sup> 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.

<sup>287</sup> 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.

<sup>288</sup> 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.

<sup>289</sup> *US – 1916 Act (AB)*, para. 81.

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."<sup>290</sup> 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".<sup>291</sup> 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. Moreover, since money is fungible, what the recipient actually does with the cash received is irrelevant.<sup>292</sup>

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<sup>290</sup> US response to question 3(d) from the Panel after the second substantive meeting.

<sup>291</sup> The competitive advantage enjoyed by subsidised imports is likewise transferred to "affected domestic producers" through the combination of countervailing duties and offset subsidies.

<sup>292</sup> Under the SCM Agreement, countervailing duties may be imposed if the subsidy is specific, and causes 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.

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).<sup>293</sup>

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 dumping.<sup>294</sup> Such dissuasive effect means that the CDSOA bears adversely on dumping, and therefore acts against dumping.<sup>295</sup>

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,

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<sup>293</sup> 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.

<sup>294</sup> Exporters/foreign producers will similarly be dissuaded from accepting subsidies, or from selling into the United States at subsidized prices.

<sup>295</sup> 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.

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".<sup>296</sup> 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".<sup>297</sup>

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<sup>296</sup> US first written submission, para. 99.

<sup>297</sup> 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.<sup>298</sup> 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).<sup>299</sup> The prospect of an increased number of investigations will disrupt the trading environment for foreign producers/exporters that may be engaged in dumping.<sup>300</sup>

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.<sup>301</sup> 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 conclude that the CDSOA will provide a clear incentive to domestic producers to file anti-

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<sup>298</sup> See also paras 7.59- 7.66 below.

<sup>299</sup> 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).

<sup>300</sup> 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.

<sup>301</sup> We note that the cost of filing an application could of course be spread across a number of applicants.

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".<sup>302</sup>

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 do so 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.<sup>303</sup> 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."<sup>304</sup> 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.<sup>305</sup> 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 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

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<sup>302</sup> Transcript of US Senate Committee on Financing hearing on steel imports, 23 March 1999, copyright 1999 Federal Document Clearing-house, Inc. Political Transcripts.

<sup>303</sup> 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.

<sup>304</sup> 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.

<sup>305</sup> Brief of Fred Tebb & Sons, Inc., dated 22 March 2002.

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.<sup>306</sup> Indeed, the United States has expressly asserted that footnotes 24 and 56 are not exceptions to Articles 18.1 or 32.1.<sup>307</sup> 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.<sup>308</sup> 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 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

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<sup>306</sup> 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).

<sup>307</sup> 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".)

<sup>308</sup> 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.

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.<sup>309</sup>

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<sup>310</sup>:

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 application expressed<sup>13</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>14</sup> The application shall be considered to have been made "by

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<sup>309</sup> 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.

<sup>310</sup> 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)

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.

<sup>13</sup> 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.

<sup>14</sup> 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.<sup>311</sup> 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 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.

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<sup>311</sup> 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.

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".<sup>312</sup> 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 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.

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<sup>312</sup> First written submission of the European Communities, India, Indonesia and Thailand, footnote 49.

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.<sup>313</sup> 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.<sup>314</sup> 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 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

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<sup>313</sup> Also see: V.D. Degan, Sources of International Law, Martinus Nijhoff, 1997, p.401

<sup>314</sup> 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).

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<sup>315</sup> 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.<sup>316</sup> 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.

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

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<sup>315</sup> 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).

<sup>316</sup> 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)).

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:<sup>317</sup>

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 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.

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<sup>317</sup> 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.

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;<sup>318</sup> 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;<sup>319</sup> and must "consult" with the petitioner concerning its intention to suspend the investigation.<sup>320</sup>

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,

"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"<sup>321</sup>.

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

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<sup>318</sup> Sections 704(e)(1) and 734(e)(1) of the *Tariff Act of 1930* (Common Exhibit- 15).

<sup>319</sup> *Ibid.*, Sections 704(e)(2) and 734(e)(2).

<sup>320</sup> *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).

<sup>321</sup> 19 CFR 351 et al., "Explanation of the Final Rule", at p. 27312 (Common Exhibit - 12).

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.<sup>322</sup>

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 Article 18.3 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.

#### 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

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<sup>322</sup> 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.

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.<sup>323</sup> 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 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**

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<sup>323</sup> See, for example, *EC – Bananas III*, para. 142 (WT/DS27/AB/R).

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,<sup>324</sup> 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.

## **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.

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<sup>324</sup> 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.

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.<sup>325</sup> 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.

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

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<sup>325</sup> *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.

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.<sup>326</sup> 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 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

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<sup>326</sup> *Japan – Film, supra*, at para. 10.79.

Article XXIII:1(b) should be approached with caution and should remain an exceptional remedy.”<sup>327</sup> 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 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.”<sup>328</sup> 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.

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<sup>327</sup> Appellate Body Report *EC – Asbestos*, WT/DS133/AB/R, adopted 5 April 2001, para. 186.

<sup>328</sup> See Report of the Working Party on Other Barriers to Trade, BISD 3S/222. at para. 13 (3/3/55).

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,<sup>329</sup> 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:

(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<sup>2</sup> 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

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<sup>329</sup> 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.

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.

<sup>2</sup> 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".<sup>330</sup> 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

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<sup>330</sup> Mexico's second written submission, note 18.

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.<sup>331</sup> 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.<sup>332</sup> 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.

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

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<sup>331</sup> At the time that Mexico requested establishment of this Panel, no disbursements under the CDSOA had been made.

<sup>332</sup> The CDSOA constitutes a subsidy for the purpose of SCM Article 5 because it is a programme that mandates the grant of subsidies.

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)".<sup>333</sup> 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 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.<sup>334</sup> 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".

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<sup>333</sup> Mexico's first written submission, para. 74.

<sup>334</sup> 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.

(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.<sup>335</sup> 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 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

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<sup>335</sup> *Japan – Film*, para. 10.41.

"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".<sup>336</sup> 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.

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".<sup>337</sup> 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".<sup>338</sup>

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*.<sup>339</sup> 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".<sup>340</sup> This would suggest, therefore, that the *EEC – Oilseeds* panel considered that

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<sup>336</sup> 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.

<sup>337</sup> *EC – Asbestos*, para. 185.

<sup>338</sup> *EC – Asbestos*, para. 186.

<sup>339</sup> *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.

<sup>340</sup> *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).

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.<sup>341 342</sup> 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 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 subsidies (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.

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<sup>341</sup> 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.

<sup>342</sup> 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).

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.<sup>343</sup> 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

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<sup>343</sup> 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.

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.<sup>344</sup> On this basis, we consider Australia to have withdrawn its claims concerning these provisions and do not make a finding.<sup>345</sup>

### **I. GATT ARTICLE X:3(A)**

#### **1. Arguments of the parties**

7.137 The complaining parties<sup>346</sup> 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).<sup>347</sup> 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

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<sup>344</sup> See para. 4.867 above.

<sup>345</sup> The text of this paragraph was proposed by Australia in its comments on the interim report.

<sup>346</sup> We note that Australia has not claimed a violation of Article X of the GATT 1994.

<sup>347</sup> 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.

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.<sup>348</sup> 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.<sup>349</sup> The United States submits that, in contrast to the measure at issue in the *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<sup>350</sup> 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.

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<sup>348</sup> *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.

<sup>349</sup> *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).

<sup>350</sup> These measures are contained in the US Tariff Act of 1930 and applicable US Department of Commerce implementing regulations.

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".<sup>351</sup> 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".<sup>352</sup>

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 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

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<sup>351</sup> *Argentina – Hides and Leather*, para. 11.70.

<sup>352</sup> *Argentina – Hides and Leather*, para. 11.72.

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<sup>353</sup> 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 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.

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<sup>353</sup> Brazil, Chile, Japan, Korea and Mexico.