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UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

AB-2002-7

Report of the Appellate Body

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Canada – Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377.
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US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916 – Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, as upheld by the Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R.
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US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001.
US – Norwegian Salmon AD	Panel Report, *Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, adopted 27 April 1994, BISD 41S/I/229.
US – Offset Act (Byrd Amendment)	Panel Report, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R, 16 September 2002.
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US – Section 129(c)(1) URAA	Panel Report, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R, adopted 30 August 2002.

Short Title	Full Case Title and Citation
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US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
US – Underwear	Appellate Body Report, *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11.

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Continued Dumping and Subsidy Offset Act of 2000

United States – *Appellant*
Australia – *Appellee*
Brazil – *Appellee*
Canada – *Appellee*
Chile – *Appellee*
European Communities – *Appellee*
India – *Appellee*
Indonesia – *Appellee*
Japan – *Appellee*
Korea – *Appellee*
Mexico – *Appellee*
Thailand – *Appellee*

Argentina – *Third Participant*
Costa Rica – *Third Participant*
Hong Kong, China – *Third Participant*
Israel – *Third Participant*
Norway – *Third Participant*

AB-2002-7

Present:

Sacerdoti, Presiding Member
Baptista, Member
Lockhart, Member

I. Introduction

1. The United States appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Continued Dumping and Subsidy Offset Act 2000* (the "Panel Report").[1]

2. On 12 July 2001, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand requested the establishment of a panel to examine the WTO-consistency of the United States Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA").[2] At its meeting of 23 August 2001, the Dispute Settlement Body (the "DSB") established the Panel.

3. On 10 August 2001, Canada and Mexico separately requested the establishment of a panel with respect to the same matter.[3] At its meeting of 10 September 2001, the DSB agreed to those

[1]WT/DS217/R, WT/DS234/R, 16 September 2002.

[2]WT/DS217/5. Referred to in the Panel Report also as the "Byrd Amendment" and the "Offset Act".

[3]WT/DS234/12 and WT/DS234/13.

requests and, pursuant to Article 9.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), referred the matter to the Panel established on 23 August 2001.[4]

4. Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand (the "Complaining Parties") argued before the Panel that the CDSOA is inconsistent with Articles 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), in conjunction with Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and Article 1 of the *Anti-Dumping Agreement*; Article 32.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*"), in conjunction with Article VI:3 of the GATT 1994 and Articles 4.10, 7.9 and 10 of the *SCM Agreement*; Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*; and Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*. In addition, with the exception of Australia, the Complaining Parties contended that the CDSOA is in violation of Article X:3(a) of the GATT 1994, Article 8 of the *Anti-Dumping Agreement* and Article 18 of the *SCM Agreement*. Furthermore, in a separate claim, Mexico argued that the CDSOA is in violation of Article 5(b) of the *SCM Agreement*, and India and Indonesia asserted that the CDSOA undermines Article 15 of the *Anti-Dumping Agreement*.

5. In the Panel Report, circulated to the Members of the World Trade Organization (the "WTO") on 16 September 2002, the Panel found that the CDSOA is inconsistent with Articles 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement*; Articles 11.4, 32.1 and 32.5 of the *SCM Agreement*; Articles VI:2 and VI:3 of the GATT 1994; and Article XVI:4 of the *WTO Agreement*.[5]

6. The Panel concluded that the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under the *Anti-Dumping Agreement*, the *SCM Agreement* and the GATT 1994 to the extent that the CDSOA is inconsistent with those agreements.[6] Consequently, the Panel recommended that the DSB request the United States to bring the CDSOA into conformity with its obligations under the *Anti-Dumping Agreement*, the *SCM Agreement* and the GATT 1994.[7]

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[4]WT/DS234/14.

[5]Panel Report, para. 8.1.

[6]*Ibid*., para. 8.4.

[7]*Ibid*., para. 8.5.

7. On 18 October 2002, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the DSU, and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[8] On 28 October 2002, the United States filed its appellant's submission.[9] On 12 November 2002, Australia, Brazil, Canada, Korea and Mexico each filed a separate appellee's submission.[10] The European Communities, India, Indonesia and Thailand filed a joint appellees' submission. Japan and Chile also filed a joint appellees' submission. On the same day, Argentina, Hong Kong, China and Norway each filed a third participant's submission.[11] Israel and Costa Rica notified the Appellate Body of their intention to appear at the oral hearing as third participants.[12]

8. In a letter dated 22 November 2002, the Director of the Appellate Body Secretariat informed the participants and third participants that, in accordance with Rule 13 of the *Working Procedures*, the Appellate Body had selected Mr. Giorgio Sacerdoti to replace Mr. A.V. Ganesan as Presiding Member of the Division hearing this appeal. The latter was prevented from continuing to serve on the Division for serious personal reasons.

9. On 5 November 2002, Canada filed a request for a preliminary ruling in respect of certain questions of fact and law that it claimed were improperly included in the United States' appellant's submission, alleging that they were not included in the Notice of Appeal. The following day, we invited the United States and the other participants and third participants to comment on the issues raised by Canada in its request for a preliminary ruling, and set 8 November 2002 as the deadline for submission of comments. We received comments from the European Communities, India, Indonesia and Thailand (as joint appellees), Japan and the United States. By letter of 8 November 2002, the Director of the Appellate Body Secretariat informed the participants and third participants that we had decided not to issue a preliminary ruling, nor to make findings, at that stage, on the substance of Canada's submissions.

[8]WT/DS217/8, WT/DS234/16, 22 October 2002.

[9]Pursuant to Rule 21(1) of the *Working Procedures*.

[10]Pursuant to Rule 22(1) of the *Working Procedures*.

[11]Pursuant to Rule 24(1) of the *Working Procedures*.

[12]Pursuant to Rule 24(2) of the *Working Procedures*.

10. The oral hearing was held on 28 and 29 November 2002.[13] The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

II. Factual Background

11. The CDSOA was enacted on 28 October 2000 as part of the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act, 2001.[14] The CDSOA amended Title VII of the Tariff Act of 1930 (the "Tariff Act"), entitled "Countervailing and Antidumping Duties", by adding a new Section 754 entitled "Continued Dumping and Subsidy Offset".[15]

12. The CDSOA provides that the United States Commissioner of Customs ("Customs") shall distribute, on an annual basis, duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the United States Antidumping Act of 1921, to "affected domestic producers" for "qualifying expenditures".[16] An "affected domestic producer" is defined as a domestic producer that: (a) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered; and (b) remains in operation.[17] The term "qualifying expenditures" refers to expenditures on specific items identified in the CDSOA, which were incurred

[13]Pursuant to Rule 27 of the *Working Procedures*.

[14]Public Law 106-387, 114 Stat. 1549.

[15]Section 754 of the Tariff Act corresponds to Section 1675c of Title 19 of the United States Code.

[16]The CDSOA provides that: "[d]uties assessed pursuant to a countervailing duty order, an antidumping 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'." (Section 754(a) of the Tariff Act)

[17]Section 754(b)(1) of the Tariff Act defines "affected domestic producer" as:

> … any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that –
>
> > (A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
> >
> > (B) remains in operation.
>
> Companies, businesses, 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.

after the issuance of the anti-dumping duty finding, or order or countervailing duty order.[18] Those expenditures must relate to the production of the same product that is subject to the anti-dumping or countervailing duty order, with the exception of expenses incurred by associations which must relate to the same case.[19]

13. The CDSOA, together with its implementing regulations issued by Customs, provides that Customs shall establish a special account and a clearing account with respect to each countervailing duty order, anti-dumping duty order, or a finding under the Antidumping Act of 1921.[20] All anti-dumping and countervailing duties assessed under such orders or findings are first deposited into a "clearing account".[21] Transfers from "clearing accounts" to "special accounts" are made by Customs throughout the fiscal year.[22] Such transfers are made only after the entries[23] in question that are subject to a countervailing duty order or an anti-dumping order or finding have been properly "liquidated".[24] Thus, when, and only when, the entries have been liquidated, will the proceeds be transferred to a special account. Only once there are funds in a special account (not a clearing

[18]Section 754(b)(4) of the Tariff Act defines the term "qualifying expenditure" as "an expenditure incurred after the issuance of the antidumping 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."

[19]Section 159.61(c) of Title 19, Code of Federal Regulations ("C.F.R.").

[20]Section 754(e)(1) of the Tariff Act, 19 C.F.R. § 159.64(a)(1)(i).

[21]19 C.F.R. § 159.64(a)(2).

[22]19 C.F.R. § 159.64(b)(1)(ii).

[23]Customs defines "entry" as the process of presenting documentation for clearing goods through customs following the arrival of the goods at a port. (See United States Import Requirements at www.customs.gov/impoexpo/import).

[24]19 C.F.R. § 159.64(b)(1)(ii). The United States explained in its first written submission to the Panel that "[u]nder United States' law, liquidation is defined as the 'final computation or ascertainment of duties' – it is Customs' determination of the grand total to be paid by the importer." (United States' first written submission to the Panel, footnote 12.) Generally speaking, it may be said therefore that the United States uses a "retrospective" assessment system under which *final* liability for antidumping and countervailing duties is determined only *after* the goods have been imported. (See "Antidumping Duties; Countervailing Duties", United States Federal Register, 19 May 1997 (Volume 62, Number 96), p. 27392)

account), can distributions to domestic producers under the CDSOA be made.[25] Therefore, if liquidation of entries has been enjoined, for instance, by a court—perhaps pending judicial review of the determination of dumping or countervailable subsidization—or if liquidation of entries has been suspended due to an administrative review of those entries, the relevant special account will be empty and no distribution can be made to domestic producers under the CDSOA.[26]

14. Pursuant to the CDSOA, Customs shall distribute all funds (including all interest earned on the funds) from the assessed duties received in the preceding fiscal year (and contained in the special accounts) to each affected domestic producer based on a certification by the affected domestic producer that it is eligible to receive the distribution and desires to receive a distribution for qualifying expenditures incurred since the issuance of the order or finding.[27] 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.[28] There is no statutory or regulatory requirement as to how a disbursement is to be spent.[29] The Panel found that CDSOA distributions to "affected domestic producers" made as of December 2001 totalled over $206 million.[30]

III. Arguments of the Participants and the Third Participants

A. *United States – Appellant*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

15. The United States claims that the Panel erred in finding that the CDSOA is a specific action against dumping and subsidization under Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

16. According to the United States, the Panel misapplied the "constituent elements" test as developed by the Appellate Body in *US – 1916 Act*. For the United States, the language of the CDSOA does not include the constituent elements of dumping or of a subsidy, and these constituent

[25]19 C.F.R. § 159.64(b)(1)(i).

[26]United States' first written submission to the Panel, para. 13.

[27]Sections 754(d)(2) and (3) of the Tariff Act.

[28]Section 754(c) of the Tariff Act.

[29]"Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers", United States Federal Register, 21 September 2001 (Volume 66, Number 184), p. 48549. See also Panel Report, para. 7.37.

[30]Panel Report, para. 7.44.

elements do not form part of the essential components of the statute. The United States maintains that, unlike the measure at issue in *US – 1916 Act*, the CDSOA by its terms does not impose measures on dumped or subsidized products, or impose any form of liability on importers/foreign producers/exporters when dumping or subsidization is found, and dumping or subsidization is not the trigger for application of the CDSOA. Rather, the United States argues, the CDSOA provides for the distribution of money ("triggered" by an applicant's qualification as an "affected domestic producer") from the United States government to domestic producers.

17. The United States also submits that the CDSOA is not action "in response" to dumping or a subsidy. The United States characterizes the Panel's approach as suggesting that the CDSOA could be perceived as action in response to "injury", which is separate from "dumping" or a "subsidy". According to the United States, the Panel erred in finding that, because the payments follow from the collection of anti-dumping or countervailing duties, the payments may be made only in situations presenting the constituent elements of dumping or of a subsidy. The United States claims that, under the Panel's approach, any expenditure of the collected duties would be specific action against dumping or subsidies. The United States adds that, if the collected duties were spent for international emergency relief, according to the Panel's reasoning they would be specific action against dumping or subsidies, because they would be made only where the constituent elements of dumping or of a subsidy were present. The United States maintains that the only connection that the CDSOA has with anti-dumping and countervailing duty orders is that the CDSOA limits availability of CDSOA offset payments to the universe of products covered by an existing or revoked order, and to "affected domestic producers", namely those who supported the investigation and still produce the particular product. According to the United States, CDSOA payments can and do occur at times when no order continues to exist or even when no dumping or subsidization is currently occurring. Thus, the United States concludes that the Panel's conclusion that there is a "clear, direct and unavoidable connection"[31] between the determination of dumping or of a subsidy and CDSOA offset payments is incorrect. Rather, the United States argues that the CDSOA is an exercise of the intrinsic right of a WTO Member to provide subsidies.

18. The United States also claims that the Panel failed to read Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* in conjunction with footnotes 24 and 56 thereto to determine the meaning of "specific action". According to the United States, the footnotes to Articles 18.1 and 32.1 are an integral part of the Articles' texts and inform the meaning of "specific action". The effect of these footnotes is to permit action involving dumping or subsidies that is

[31]Panel Report, para. 7.21.

consistent with the GATT 1994 provisions and that is not addressed by the provisions on dumping or countervailable subsidies in Article VI of the GATT 1994. The United States argues that the Panel should have interpreted Articles 18.1 and 32.1 in a manner so as to: (1) give meaning to the footnotes' express permission to take "actions" authorized under other relevant provisions of the *WTO Agreement*; and (2) avoid the creation of any limitations on the sovereign power over fiscal matters not otherwise specifically proscribed by the WTO Agreements. In the present case, the Panel examined the CDSOA under the *SCM Agreement* and, according to the United States, did not find the CDSOA to violate any limitations set forth in that Agreement. The United States concludes that the CDSOA is covered by the footnotes 24 and 56, and, therefore, the CDSOA is not a specific action prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.

19. The United States also claims that the Panel failed to consider the ordinary meaning of the term "against" in the context in which it is used or in the light of the object and purpose of the *Anti-Dumping Agreement* and Article VI of the GATT 1994. With respect to the determination of the Panel that the CDSOA operates against dumping or a subsidy, in the sense that it has an adverse bearing on dumping or subsidization, the United States argues that an action can be characterized as operating "against" dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement*, or "against" a subsidy within the meaning of Article 32.1 of the *SCM Agreement*, only if it applies directly to the dumped or subsidized imported good or an entity responsible for the dumped or subsidized imported goods, and if it burdens the dumped or subsidized imported good, or an entity responsible for the dumped or subsidized imported good. The United States says that the Panel erred by finding that the term "against" in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* encompasses any form of adverse bearing, whether it be direct or indirect, and by finding that this term does not imply a requirement that the action applies directly to the imported good or an entity responsible for it and is burdensome.

20. The United States maintains that the Panel erred by concluding that an "adverse bearing" on dumping is demonstrated by the effect of the CDSOA on the competitive relationship between dumped/subsidized goods and domestic products. The United States first criticizes the Panel for failing to provide any explanation for inclusion of such a "conditions of competition" test under Articles 18.1 and 32.1. The United States goes on to explain that, even though, historically, there has been a "conditions of competition" test under Article III of the GATT 1994, which is used to determine whether a measure is applied "so as to afford protection" or accords imports "treatment no less favorable" than that accorded like domestic products, Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* do not call for a "conditions of competition" test, as the language in Articles 18.1 and 32.1 is markedly different from the language in Article III of the

GATT 1994. The United States points out that there is no indication in the text of Article 18.1 or Article 32.1 that use of the words "against dumping" or "against a subsidy" was intended to encompass a "conditions of competition" test.

21. The United States further submits that, even assuming, *arguendo*, that a "conditions of competition" test is applicable to an analysis under Articles 18.1 and 32.1, the CDSOA's impact on the conditions of competition would be too remote and indirect to result in a violation. The United States posits several reasons: first, the CDSOA does not mandate that qualifying expenses be based on costs incurred by domestic producers in competing with dumped/subsidized imports subject to an order; second, there is nothing in the text of the CDSOA that directs, or even provides any incentive for, domestic producers to spend disbursements to bolster their competitive position over dumped/subsidized products; third, the CDSOA cannot ensure that, even if domestic producers do use the distributed money in the production of the product covered by an order, they will be successful in improving their competitive position *vis-à-vis* foreign producers/exporters; and fourth, the CDSOA does not prohibit foreign producers from lowering prices to compete with domestic products. The United States argues, therefore, that the Panel's conclusion that the CDSOA has an adverse bearing on the conditions of competition is pure speculation.

22. The United States maintains that the Panel erred in finding that the CDSOA will have the effect of providing a financial incentive for domestic producers to file, or at least support, a petition, and that this compounds the CDSOA's adverse bearing on dumping or subsidization, because the financial incentive will likely result in a greater number of anti-dumping/countervail applications and investigations, and in a greater number of anti-dumping/countervail orders. According to the United States, even if the CDSOA were to result in more investigations being initiated and, in turn, more orders being put in place, such a result could not lead to a violation of Article 18.1 of the *Anti-Dumping* or Article 32.1 of the *SCM Agreement*. This is because the Panel did not find any provision of United States law relating to the imposition of anti-dumping or countervailing duty orders to be inconsistent with United States WTO obligations. Thus, any increase in WTO-consistent investigations and orders cannot result in violations of Articles 18.1 and 32.1. The United States goes on to state that, even assuming, *arguendo*, that an increase in WTO-consistent anti-dumping and countervailing duty investigations and orders could lead to a WTO violation, no evidence was adduced before the Panel to show that the CDSOA provides a financial incentive that will induce producers to file or support a petition they otherwise would not file or support. According to the United States, nor was there any evidence that any such incentive will lead to an increase in investigations or orders brought before the Panel.

23. The United States argues that the Panel incorrectly relied on the stated purpose of the CDSOA to confirm that the CDSOA constitutes specific action against dumping or a subsidy. According to the United States, debates surrounding the passage of the CDSOA or the "Findings of Congress" introducing the CDSOA would be relevant to its interpretation only if the terms of the CDSOA were ambiguous and its operation unclear. In this case, because there was no allegation that the CDSOA is ambiguous, the only relevant question before the Panel was whether, by its terms, the CDSOA constitutes specific action against dumping and subsidization.

24. The United States also submits that the Panel erred in extending the Appellate Body's reasoning in *US - 1916 Act* on permissible responses to dumping to the permissible responses to subsidization under the GATT 1994 and the *SCM Agreement*. The United States contrasts the language of Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement* with Article VI:3 of the GATT 1994 and Article 10 of the *SCM Agreement*. The United States argues that the conclusion reached by the Appellate Body in *US – 1916 Act*—that Article VI of the GATT 1994 encompasses all measures taken against dumping—was based on the specific language of Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*. The United States submits that such a conclusion cannot be extended to the subsidy provisions of Article VI of the GATT 1994 and of Part V of the *SCM Agreement*, because their scope is limited to the imposition of countervailing duties (and by implication, provisional duties and price undertakings).

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

25. The United States claims that the Panel erred in finding a violation of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. The United States argues that the Panel agreed with the United States that those provisions "require[ ] only that the statistical thresholds be met, and impose[ ] no requirement that the investigating authorities inquire into the motives or intent of a domestic producer in electing to support a petition."[32] The Panel also concluded that the United States has implemented its obligations under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* in its domestic laws and that the CDSOA did not in any way amend or modify such laws. According to the United States, the Panel should have "ended its inquiry" there.[33]

[32]United States' appellant's submission, para. 95, quoting Panel Report, para. 7.63.

[33]United States' appellant's submission, para. 97.

26. The United States further refers to the Panel's finding that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* because it allegedly undermines the value of those provisions to the countries with whom the United States trades, and because it allegedly defeats the object and purpose of those articles. In this respect, the United States emphasizes that the Appellate Body has repeatedly directed panels to the *words* of the agreement to determine the intentions of parties and has explained that, as set out in Article 31 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[34], principles of treaty interpretation do not condone the imputation into a treaty of words or concepts that are not there. According to the United States, the Panel used the object and purpose of Articles 5.4 and 11.4, rather than the terms of those provisions, as the basis for finding a violation.

27. The United States submits that a finding of a violation cannot be based solely on the conclusion that a measure, although consistent with the text of the relevant provisions, "undermines the value"[35] of those provisions to other trading partners. According to the United States, the Panel in this case confused the basis for finding a violation of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* with the basis for making a finding of non-violation nullification and impairment under Article XXIII:1(b) of the GATT 1994.

28. The United States criticizes the Panel for its finding that the United States may be regarded as not having acted in good faith. According to the United States, there is no basis in the *WTO Agreement* for a panel to conclude that a Member has not acted in good faith, or to enforce a principle of "good faith" as a substantive obligation agreed to by WTO Members. The United States emphasizes that dispute settlement panels are subject to clear and unequivocal limits on their mandate: they may clarify "existing provisions" of covered WTO agreements and may examine the measures at issue in the light of the relevant provisions of the covered WTO agreements.[36]

29. The United States maintains that the Panel erred in conducting an analysis of whether the CDSOA creates an incentive for a domestic producer to support an investigation, despite its finding that the texts of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* do not impose an obligation to inquire into the motives behind such support. It was thus legal error for the Panel to conclude that the CDSOA creates a financial incentive to support applications in anti-

[34]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[35]United States' appellant's submission, para. 101.

[36]*Ibid.*, para. 106, referring to Articles 3.2 and 7.1 of the DSU.

dumping and countervailing duty investigations and therefore "in effect mandates" [37] domestic producers to support such petitions, and then to use this conclusion as a basis for finding that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. Moreover, according to the United States, the Panel's finding was based on "nothing more than assumption and speculation" [38] that the CDSOA creates a "spectre" [39] of such investigations being initiated without proper industry support.

30. The United States adds that the Panel's finding is at odds with the CDSOA and the operation of relevant United States laws. Under those laws, the United States Department of Commerce ("USDOC") alone, and not the United States International Trade Commission ("USITC"), makes a determination whether there is sufficient domestic industry support for initiation of an anti-dumping or countervailing duty investigation. The necessary declaration of support to qualify for CDSOA distributions is made by domestic producers before the USITC, and not before USDOC. Moreover, the United States notes that the CDSOA declaration of support is not required *prior* to the initiation of an investigation, and may contradict previously expressed opposition to an application. The United States adds that a domestic producer can express support as late as the final injury investigation questionnaire, which can be issued more than 200 days after an application has been filed.

31. The United States submits that the Panel's "failure to understand the operation of U.S. law is compounded by its consideration of the only two purported pieces of 'evidence' that have been advanced in support of complaining parties' claim." [40] One of the pieces of evidence is described as a letter from a domestic producer in which it reportedly changed its position to express support for an application to be able to benefit from any potential CDSOA distributions. USDOC's decision to initiate the investigations, however, had been made 294 days before the domestic producer purportedly changed its position before the USITC. Moreover, an examination of the letter reveals, according to the United States, that it is not what the Panel claimed it to be. In fact, the United States points out that "the company that authored the letter states therein that it is expressing its 'continuing' support for the petitions (*i.e.*, it is not expressing a change in position)". [41]

32. The United States also refers to a letter in which a United States' producer purportedly urged other domestic producers to support a petition against Canadian softwood lumber imports by citing

[37]United States' appellant's submission, para. 112.

[38]*Ibid*., para. 113.

[39]*Ibid*.

[40]*Ibid*., para. 118.

[41]*Ibid*., para. 120.

the CDSOA. According to the United States, examination of the letter referencing the CDSOA shows that it was not written by a domestic producer, but instead by a law firm *informing* domestic producers of the merits and circumstances of their case, as well as various provisions of United States law, including the CDSOA. Thus, according to the United States, there was no evidence to support the Panel's conclusion. As such, there was no evidence on the record with which Complaining Parties could meet their burden to establish a *prima facie* case and, as a consequence, the Panel's finding amounts to a shifting of the burden of proof to the United States.

3. The Combination of Duties and CDSOA Offset Payments

33. The United States alleges that the Panel exceeded its terms of reference by examining claims concerning the CDSOA in combination with other United States laws and regulations. Citing Article 7 of the DSU and the Appellate Body Report in *India – Patents (US)*, the United States notes that a panel's terms of reference are limited to the claims set out in the complaining parties' request for establishment of a panel. In this case, the United States argues, the Complaining Parties' request for establishment of a panel set out a challenge to the CDSOA as such, that is, the Complaining Parties challenged the CDSOA prior to implementation and independent of any other laws. According to the United States, although the Panel acknowledged that the CDSOA was the measure at issue, the Panel proceeded to find that the CDSOA violates Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* because the *combination* of anti-dumping duties (or countervailing duties) and the CDSOA transfers a competitive advantage to affected domestic producers.

34. The United States notes, however, that the request did not include a challenge to provisions of United States laws or regulations relating to the imposition of anti-dumping or countervailing duties, or a challenge to the CDSOA in conjunction with provisions of United States laws or regulations relating to the imposition of anti-dumping or countervailing duties. Furthermore, according to the United States, the Complaining Parties did not even mention in their request for establishment of a panel the provisions of United States laws or regulations relating to the imposition of anti-dumping or countervailing duties. Therefore, the United States argues that the Panel's terms of reference were limited to determining whether the CDSOA, as such, violates identified provisions of the *WTO Agreement*.

35. The United States acknowledges that the Panel can review relevant provisions of United States law for interpretative purposes, but argues that the Panel was not at liberty to examine the CDSOA together with other provisions of United States law in order to find a WTO violation. In support of its claim, the United States refers to the Appellate Body Report in *US – Certain EC*

Products and the Panel Report in *US – Section 129(c)(1) URAA*. Therefore, the United States concludes, the Panel exceeded its terms of reference by examining whether the CDSOA, in combination with United States laws on the imposition of anti-dumping duties (or countervailing duties), violates Articles 18.1 and 32.1.

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

36. The United States requests that the Appellate Body reverse the Panel's finding that the CDSOA violates Article XVI:4 of the *WTO Agreement* on the grounds that the CDSOA is consistent with Articles VI:2 and VI:3 of the GATT 1994, Articles 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement*, and Articles 11.4, 32.1 and 32.5 of the *SCM Agreement*. For the same reason, the United States requests the Appellate Body to reverse the Panel's finding that the benefits accruing to the Complaining Parties under the *WTO Agreement* have been nullified or impaired.[42]

5. The "Advisory Opinion"

37. The United States maintains that the Panel erred by rendering an advisory opinion on a measure that was not before it. Specifically, the United States appeals the Panel's statement that "[e]ven 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 … that offset payments may be made only in situations presenting the constituent elements of dumping."[43] The United States asserts that there was no measure before the Panel where payments were funded directly from the United States Treasury and, therefore, there was no basis for the Panel to opine on what its findings would be if such a measure were presented to it. The United States emphasizes that this finding should be reversed because the Panel has no authority to make findings on a matter that is not before it.

6. Article 9.2 of the DSU

38. The United States submits that the Panel erred in denying the request by the United States for the issuance of a separate panel report in the dispute brought by Mexico. According to the United States, Article 9.2 of the DSU gives Members an unqualified right to the issuance of separate panel reports upon request. Specifically, that provision contains no requirement for a party to make its request for a separate panel report by a certain time in the panel proceeding. Nor does it, according to

[42]United States' appellant's submission, para. 133.

[43]Panel Report, para. 7.22.

the United States, require the requesting party to demonstrate that it would suffer prejudice if its request is not accepted. Nor does it require that a separate interim report be issued, contrary to what the Panel stated.

B. *Australia – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

39. Australia submits that the Panel did not err in concluding that the CDSOA is "specific action" against dumping or a subsidy. The Panel's position—that a measure that may be taken only in situations presenting the constituent elements of dumping is clearly specific action in response to dumping—was not an unexplained assumption. The Panel's conclusion was plainly arrived at in the context of its examination of the scope of the Appellate Body's findings concerning the meaning of the phrase "specific action against dumping" in *US – 1916 Act*.

40. According to Australia, the Panel did not err in determining that the CDSOA acts specifically in response to dumping. The Panel correctly applied the rationale of the Appellate Body's finding in *US – 1916 Act* in holding that offset payments under the CDSOA are conditioned on a determination of dumping: offset payments are actions which may be taken only in response to conduct which presents the constituent elements of dumping. In the view of Australia, the constituent elements of dumping are built into the essential elements for eligibility under the CDSOA. A determination of dumping or subsidization is the first requirement for eligibility for offset payments under the CDSOA.

41. Australia contends that the Panel did not err when it concluded that it did not need to examine footnote 24 to the *Anti-Dumping Agreement* and footnote 56 to the *SCM Agreement*. The Appellate Body's findings in *US – 1916 Act* are fully dispositive of this matter in this dispute, and the Panel's finding is fully consistent with them. Having found the CDSOA to be "specific action against dumping" within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and "specific action against a subsidy" within the meaning of Article 32.1 of the *SCM Agreement*, the Panel correctly concluded that the CDSOA was governed solely by Articles 18.1 and 32.1. Otherwise, the Panel would have erroneously treated footnotes 24 and 56 as the primary provisions, and Articles 18.1 and 32.1 as the residual provisions.

42. Australia maintains that the Panel did not err when it concluded that the CDSOA acts "against" dumping. The Panel's conclusion that action "against" dumping must have some adverse bearing on dumping, took account of all ordinary meanings of the word "against". According to Australia, the Panel did not err when it concluded that there is no requirement that a measure act

directly on an imported dumped product or entities responsible for that product. The Panel correctly noted that Article 18.1 of the *Anti-Dumping Agreement* refers only to measures that act against "dumping" as a practice, and that there is no express requirement that the measure must act against the imported dumped product, or entities responsible for that product. The Panel similarly noted that Article 32.1 of the *SCM Agreement* refers to specific action against "a subsidy", not action against the imported subsidized product or a responsible entity. In the view of Australia, the notion of "direct" does not necessarily attach to the term "against". For Australia, the Panel considered both the meaning and the context of the word "against", was mindful of the Appellate Body's findings in *US – 1916 Act*, and correctly concluded that the ordinary meaning of the term "against", which is not qualified in any way in Article 18.1, encompasses any form of adverse bearing, be it direct or indirect.

43. Australia submits that the Panel did not err in finding that the CDSOA has an adverse bearing on dumping. The United States argues that the Panel did not examine whether the CDSOA burdens imports or the entity responsible for their importation, but rather whether the CDSOA distorts the conditions under which imports compete. However, according to Australia, this argument is premised on the Panel having erred in concluding that there is no requirement that a measure act directly on an imported dumped product or a responsible entity. As the Panel did not err in making that conclusion, the United States' argument is not sustainable. In any case, Australia maintains that the Panel's conclusion that the CDSOA has an adverse bearing on dumping is correct. Offset payments to "affected domestic producers" when combined with anti-dumping duties operate to impose a double remedy in respect of dumped goods. To provide a double remedy is to cross the line of equilibrium at which point something undesirable is counteracted or removed, and to create a new situation requiring redress or relief. By its very nature, a double remedy to "affected domestic producers" is adverse to dumped goods.

44. According to Australia, the Panel did not err in considering that the CDSOA's "legislative history" confirmed that the CDSOA constitutes "specific action against dumping". The Panel's review of the intent of United States Congress after it had already concluded that the CDSOA bears adversely on dumping and therefore acts against dumping, cannot be considered to be reliance on the intent of United States Congress to reach a finding. It is not an error *per se* for a panel to review whether the stated purpose or intent of a law concurs with its own findings.

45. Australia maintains that the Panel did not err when it concluded that the Appellate Body's interpretation of the provisions of the *Anti-Dumping Agreement* in *US – 1916 Act* applies equally to the provisions of the *SCM Agreement*. For Australia, the Panel correctly concluded that the only remedies permitted by the GATT 1994, as interpreted by the *SCM Agreement*, were countervailing

duties, provisional measures, undertakings and countermeasures, and that to the extent that the CDSOA may be regarded as a specific action against a subsidy, but not a permissible remedy, it would be inconsistent with Article 32.1 of the *SCM Agreement*. Textual differences between Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*, on the one hand, and Article VI:3 of the GATT 1994 and Article 10 of the *SCM Agreement*, on the other hand, do not render the Panel's conclusion invalid.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

46. Australia submits that the Panel reached its finding in respect of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* on the basis of the text of the relevant provisions. Thus, the Panel did not confuse violations of Articles 5.4 and 11.4 with a non-violation claim of nullification and impairment under Article XXIII:1(b) of the GATT 1994. Australia submits that the Panel expressly stated that "the first consequence" of the CDSOA's operation is that it renders the quantitative tests established by those Articles irrelevant, and that it was on this basis that the Panel found a violation of those Articles.

47. Australia endorses the Panel's application of the principle of good faith in its analysis of claims made in relation to Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. According to Australia, the Panel's finding is consistent with the general rule of treaty interpretation set out in Article 31 of the *Vienna Convention* and the Appellate Body's findings in *US – Gasoline* and *US – Hot-Rolled Steel*. Adopting a measure that renders meaningless a WTO Member's application of these provisions cannot be consistent with the principle of good faith that informs them.

48. Australia endorses the Panel's conclusion that the CDSOA creates a financial incentive for domestic producers to initiate and support petitions. According to Australia, it was not an error for the Panel to use that conclusion as a basis for its finding that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.[44]

3. The Combination of Duties and CDSOA Offset Payments

49. Australia argues that the Panel did not exceed its terms of reference by examining claims concerning the CDSOA in combination with other United States laws and regulations. Australia agrees with the United States that the Complaining Parties' panel request did not include a challenge

[44]Australia's appellee's submission, para. 61.

to provisions of United States laws or regulations relating to the imposition of anti-dumping or countervailing duties, or a challenge to the CDSOA in conjunction with provisions of United States laws or regulations relating to the imposition of anti-dumping or countervailing duties. However, according to Australia, "[t]he Panel's reference to 'the combination of anti-dumping duties and offset subsidies' is not a finding concerning the CDSOA in combination with other anti-dumping laws and regulations of the United States as such."[45] Rather, it is, and "should properly be seen, as a general reference to 'anti-dumping duties' as a permissible remedy within the meaning of the *Anti-Dumping Agreement*."[46]

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

50. Australia submits that the Panel correctly found that the CDSOA violates Articles 5.4 and 18.1 of the *Anti-Dumping Agreement* and Articles 11.4 and 32.1 of the *SCM Agreement*. Accordingly, the Panel's finding that the CDSOA is inconsistent with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement* is also correct. Australia goes on to argue that, under Article 3.8 of the DSU, such violations constitute a *prima facie* case of nullification or impairment. Because the United States did not present to the Panel any evidence to rebut such presumption of nullification and impairment, the CDSOA constitutes a violation of Article 3.8 of the DSU as well.

5. The "Advisory Opinion"

51. Australia submits that the Panel did not exceed its terms of reference by clarifying the scope of its finding in the first sentence of paragraph 7.22. Australia notes that, in arguing that the Panel erred in issuing an advisory opinion on a measure outside its terms of reference, the United States has not entered any argument in relation to the first sentence of paragraph 7.22; rather, the United States' argument relates strictly to the second sentence of the Panel's statement at paragraph 7.22 of its Report.

[45]Australia's appellee's submission, para. 72, quoting Panel Report, para. 7.36.

[46]Australia's appellee's submission, para. 72.

C. *Brazil – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

52. Brazil submits that the Panel did not err in finding that CDSOA payments violate Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. For Brazil, there can be no question that entitlement to the remedy provided for in the CDSOA is an action which is taken in response to situations presenting the constituent elements of dumping, precisely the situation addressed by the Appellate Body in *US – 1916 Act.* The specific action—distribution of duties assessed under anti-dumping duty orders to affected domestic producers—is permitted only when the constituent elements of dumping have been demonstrated. Brazil argues that it is not the expenditure of the collected anti-dumping duties in a vacuum that constitutes the response to dumping, but the disbursement to the petitioning parties that make up the industry producing the product covered by the anti-dumping order.

53. Brazil refers to the United States' argument that, because CDSOA payments can and do occur at points in time when an order no longer exists and there is no finding that dumping is currently occurring, they cannot be considered against, or in response to, dumping or subsidization.[47] Brazil disagrees with this argument. For Brazil, this apparently addresses the delay in disbursement, which would be more a function of the retrospective nature of the anti-dumping regime in the United States and the logistics of liquidation and payment, rather than some disconnect between the payments and a finding of the constituent elements of dumping. The more appropriate question to ask is whether the payments can be made before a finding of the constituent elements of dumping. According to Brazil, the answer is no.

54. For Brazil, it is indisputable that CDSOA payments constitute specific action against dumping. This is discerned from a review of Article VI of the GATT 1994, the premise behind the CDSOA, the actual effect of CDSOA payments, as well as the comparisons to be drawn from the measure at issue in *US – 1916 Act*, which the Appellate Body has already found to be a specific action against dumping. The measure, which the panel and Appellate Body found in *US – 1916 Act* to be inconsistent with Article VI of the GATT 1994 and Article 18.1 of the *Anti-Dumping Agreement*, included the very same remedy that the Panel in these proceedings found invalid, namely the awarding of monetary damages to parties that have been found to be injured by dumping. Both

[47]United States' appellant's submission, para. 22.

the damages awarded by the CDSOA and the damages awarded under the measure at issue in *US – 1916 Act* are based on a demonstration of the constituent elements of dumping. Brazil adds that the CDSOA is not simply a decision by the United States government on how to spend revenues generated by anti-dumping duties. It is, rather, intended to have the effect of providing an additional remedy for dumping. It provides additional deterrence in that monies paid in the form of dumping duties by importing parties are distributed in the form of monetary damages to competitors. It also provides an additional incentive to United States' domestic industries to pursue anti-dumping actions in that it rewards them with monetary damages.

55. Brazil supports the conclusion of the Panel that an action "against" dumping must have some adverse bearing on dumping. The term "against" is best understood in the context of Article VI:2 of the GATT 1994, which states that anti-dumping duties are to be imposed in order to "offset or prevent dumping". Brazil sees no inconsistency in the Panel's treatment of the term "against" and the object and purpose of anti-dumping duties. In respect of the United States' contention that the Panel established a new "conditions of competition" test under Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, Brazil contends that Article 18.1 of the *Anti-Dumping Agreement* refers only to measures that act against "dumping" as a practice; there is no express requirement in the provision that the measure must act against the imported dumped product, or entities connected to, or responsible for, the dumped good.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

56. Brazil endorses the Panel's conclusion that the CDSOA violates Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. Brazil maintains that the CDSOA operates in such a manner that United States' investigating authorities are unable to conduct an objective and impartial examination of the level of support for an application. As a consequence, the Panel correctly concluded that the CDSOA has undermined the value of provisions of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* and that the United States "may be regarded as not having acted in good faith in promoting this outcome."[48] According to Brazil, the incentive to file or support anti-dumping and countervailing duty petitions created by CDSOA payments raises the potential for a minority of domestic producers to be able to control and initiate anti-dumping and/or countervailing duty proceedings. The numerical thresholds under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* have, as their object and purpose, to prevent this from happening. According to Brazil, "[i]t is this return to the situation that

[48]Brazil's appellee's submission, para. 27.

existed before the Uruguay Round Agreements that implicates and violates the provisions of Article 5.4 of the *AD Agreement* and Article 11.4 of the *SCM Agreement*."[49]

3. The Combination of Duties and CDSOA Offset Payments

57. Brazil argues that the Panel did not exceed its terms of reference by examining claims concerning the CDSOA in combination with other United States laws and regulations. According to Brazil, the Complaining Parties raise no claims against United States laws or regulations relating to the imposition of anti-dumping or countervailing duties, because they are not the subject of this dispute. Rather, Brazil argues, the relationship of those laws and regulations to the claims that the CDSOA violates Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* is incidental to the dispute. Brazil submits that the Complaining Parties do not dispute that, in as much as they are permitted specific actions, anti-dumping and countervailing duties are presumably valid under the *Anti-Dumping Agreement* and the *SCM Agreement*. Instead, Brazil claims that the Complaining Parties are disputing the CDSOA payments because they clearly do not qualify as permissible measures under Article 18.1 and Article 32.1.

D. *Canada – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

58. Canada submits that the CDSOA is a specific action against dumping or subsidization within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. According to Canada, neither the text nor context of Article 18.1 or the Appellate Body's interpretation of that provision in *US – 1916 Act* indicates that the constituent elements of dumping must be built into a measure for it to constitute "specific action." A measure is "specific action" where its operation is contingent upon the existence of constituent elements of dumping or a subsidy. A WTO Member may not escape its obligations by calling dumping or a subsidy something else, or by not incorporating the definition of dumping or a subsidy into the measure itself. Where a practice is clearly defined in national laws, it is not necessary for each and every law targeting that practice to specifically incorporate the constituent elements of that practice. Requiring that the constituent elements of dumping or of a subsidy be built into the measure for it to constitute "specific action", would eviscerate Articles 18.1 and 32.1. This would create a loophole for measures that have no other purpose and effect than to act against dumping or a subsidy, solely because they do not, in themselves, contain the elements of these practices.

[49]Brazil's appellee's submission, para. 30.

59. Canada maintains that, in fact, the CDSOA does incorporate the constituent elements of dumping and a subsidy. Offset subsidies are possible only where there is an anti-dumping or countervailing duty order. Such orders are imposed once there has been a determination of injurious dumping or a subsidy. Offset subsidies are therefore possible only where there is already a determination of dumping or a subsidy, and in no other circumstance. As well, offset subsidies are paid out to "affected domestic producers". These are not domestic producers generally affected by imports. Rather, they are producers that produce like domestic products and that initiate or support an anti-dumping or countervailing investigation. Finally, offset subsidies reimburse certain "qualifying expenditures"; qualifying expenditures must relate to a product covered by an order. Thus, for Canada, every element of the CDSOA depends, for its operation, on a finding of dumping or subsidization.

60. Canada argues that the "trigger" for the operation of the CDSOA is, by design, an anti-dumping or countervailing duty order, not simply status as an "affected domestic producer". The very notion of "affected domestic producer" in this context does not exist separate from, or without the presence of, dumping or subsidization.

61. Canada contends that the Panel did not need to examine whether the CDSOA was an "action" within footnotes 24 and 56, because it had already found it was "specific action" within the meaning of Articles 18.1 and 32.1. "Specific action" is to be distinguished from "action" within the meaning of the footnotes. A measure is a "specific action" against dumping where the objective reason for the imposition of the measure is dumping itself. Action triggered by something other than dumping (like a safeguard based on a serious increase in imports that could have been caused by dumping by foreign exporters) that nevertheless has an incidental impact on dumping is "action" within the meaning of footnote 24. In that event, the basis for the imposition of a measure would not objectively be dumping, but its causes or effects. Canada adds that a measure does not escape the requirements of Article 18.1 of the *Anti-Dumping Agreement* on the sole ground that it is otherwise consistent with the GATT 1994.

62. Canada submits that the Panel decided correctly that the CDSOA is "against" dumping or a subsidy. The Panel's interpretation of the term "against" is in accordance with the principles of treaty interpretation. For Canada, a measure that is in some way related to dumping may have but one of three possible effects on the practice: it may encourage it; be neutral to it; or, discourage it. A measure is against dumping when it is structured in a way as to discourage the practice of dumping exports. This interpretation of "against" is supported by the context of Article 18.1. The provisions of the *Anti-Dumping Agreement* regulate not only what measures WTO Members may impose in

response to dumping, but also the modalities of that imposition. The *Anti-Dumping Agreement* specifically permits duties, provisional duties and undertakings, and prohibits all specific action, direct or indirect, against dumping that is not one of those remedies. This limitation on specific action is in keeping with the object and purpose of the *Anti-Dumping Agreement* to further the substantial reduction of tariffs and other barriers to trade, to eliminate discriminatory treatment in international trade relations and to develop a more viable and durable multilateral trading system.

63. Canada further maintains that, in finding adverse bearing in respect of the CDSOA, the Panel relied on traditional concepts employed by panels: an examination of conditions of competition. In this regard, the Panel was not reading words into the text of the treaty or proposing a new test. In fact, the Panel considered "conditions of competition" in giving substance to the proposed definition that a measure is "against dumping" where it "burdens" imports.

64. Canada contends that the United States' arguments concerning the alleged "remoteness" of the consequences of the CDSOA or the "speculative" nature of the Panel's analysis, are without merit. The CDSOA is mandatory legislation that is being challenged as such. The direct and necessary consequences of the CDSOA are apparent from its design, architecture and underlying structure. Based on the design, architecture and underlying structure of the CDSOA, the Panel determined that certain consequences necessarily follow from its operation that tied the offset payments to dumping and subsidies.

65. Canada submits that Article 32.1 of the *SCM Agreement* is identical in terminology, structure and intent to Article 18.1 of the *Anti-Dumping Agreement*, except for the reference to subsidy instead of dumping. This identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition. In the view of Canada, footnote 35 to Article 10 of the *SCM Agreement* expressly confirms this presumption. It provides that there are two sets of "specific action" consistent with the *WTO Agreement*, and requires that Members may choose one or the other specific action against a subsidy: countermeasures under Part II or III and countervailing duties, undertakings and provisional measures under Part V. For Canada, no other remedies are contemplated. Article 32.1 is identical in scope to Article 18.1 of the *Anti-Dumping Agreement*. Remedies against subsidies are restricted to the three measures governed by Part V of the *SCM Agreement*, and to multilaterally-sanctioned countermeasures.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

66. Canada endorses the Panel's finding that the CDSOA violates Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

67. Canada emphasizes that Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* require an investigating authority to determine that an application has the support of the domestic industry, based on an examination of the level of support for an application in the domestic industry. Canada argues that "[t]his determination and examination is not a mechanical exercise of toting up the number of producers and their share of domestic production."[50] The requirement is, rather, for an objective and impartial assessment of evidence on the record that indicates that requisite support exists to initiate an investigation.

68. Canada submits that, under the CDSOA, "the United States pays domestic producers either to bring or to support applications."[51] According to Canada, providing such a "monetary reward for producers to support an antidumping application … precludes the possibility of an objective and impartial determination … of industry support."[52] Canada submits that the CDSOA violates Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* precisely because it prevents the United States from complying with its obligations under those Agreements.

69. Canada takes the view that, in arguing for a literal reading of the texts of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, the United States ignores the fact that those provisions "expressly require an authority to *examine* (enquire into the nature, look closely or analytically) the evidence as to those thresholds and *determine* (establish precisely) industry support."[53] According to Canada, this is "manifestly at variance with the apparent U.S. position that the sole obligation of a member is to tally up numbers presented by applicants."[54]

70. Canada further submits that the Panel's reference to good faith and object and purpose was not meant to replace the text of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* with either of these principles; but "rather to give a full and effective meaning

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[50]Canada's appellee's submission, para. 96.

[51]*Ibid*., para. 106.

[52]*Ibid*.

[53]*Ibid*., para. 109. (original emphasis)

[54]*Ibid*.

to the text in the light of these interpretative principles."[55] Good faith and object and purpose are elements to be considered in the elaboration of an obligation by virtue of Article 31 of the *Vienna Convention*. According to Canada, "[t]his necessarily means that the obligation under Article 5.4 and 11.4 cannot be met where a Member vitiates its own capacity to make a 'determination', or to undertake an 'examination', by offering inducements that influence the basis for that determination."[56] Such an inducement, Canada argues, would render the determination partial and subjective.

3. The Combination of Duties and CDSOA Offset Payments

71. Canada argues that the Panel made no findings with regard to United States anti-dumping and countervailing duty laws outside of the CDSOA; rather, the statement of the Panel is clearly with regard to the operation and effect of the CDSOA in the context of the United States trade remedies system. According to Canada, when the Panel stated that the combination of anti-dumping duties and offset subsidies is not merely to level the playing field, but to transfer the competitive advantage to affected domestic producers, it was referencing the impact of offset payments in addition to duties that would also exist. Canada further states that the CDSOA does not operate in a vacuum, and it constitutes a second remedy against dumped imports.

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

72. Canada agrees with the Panel that the CDSOA is inconsistent with Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement* because it violates Articles 18.1 and 5.4 of the *Anti-Dumping Agreement*, Articles 32.1 and 11.4 of the *SCM Agreement*, and Articles VI:2 and VI:3 of the GATT 1994. Based on these findings, Canada also agrees with the Panel's conclusion that the CDSOA constitutes a breach of Article 3.8 of the DSU, because it nullifies and impairs benefits accruing to the complainants under the covered agreements.

5. The "Advisory Opinion"

73. Canada takes the view that the Panel did not render an advisory opinion. Instead, it made a statement in support of its overall argument concerning the operation of the CDSOA. According to Canada, the Panel did not arrive at a legal conclusion in respect of the payment of duties from the United States Treasury itself, and so could not have been in legal error. Nor did the Panel offer an

[55]Canada's appellee's submission, para. 115.

[56]*Ibid.*, para. 117.

"advisory opinion" on that issue. Canada also points out that, in stating that "[e]ven 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 … that offset payments may be made only in situations presenting the constituent elements of dumping"[57], the Panel was merely responding to specific arguments raised by the United States in the course of the proceedings.

6. Article 9.2 of the DSU

74. Canada argues that Article 9.2 should be interpreted in the context of the other provisions of the DSU and in the light of the overall object and purpose of that Agreement. Canada refers, in particular, to Articles 3.2 and 3.3 of the DSU.

75. Canada argues that to interpret Article 9.2 in a manner that permits a WTO Member to ask for separate reports at any time, including at the end of the panel process, would undermine the prompt settlement of disputes. Canada submits that such a reading of Article 9.2 would also violate procedural fairness and impose an additional burden on the rights of parties. Canada concludes that Article 9.2 of the DSU does not grant an unfettered right to Members to ask for separate reports at any point in time; rather, where the exercise of such a right amounts to a potential *abus de droit*, a panel must have the discretion to refuse to grant the request.

E. *European Communities, India, Indonesia and Thailand – Appellees*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

76. The European Communities, India, Indonesia and Thailand, as joint appellees, submit that the Panel correctly applied the test enunciated by the Appellate Body in *US – 1916 Act* in determining that the CDSOA is a specific action against dumping or a subsidy. According to them, this test does not require the Panel to establish whether the constituent elements of dumping are "explicitly built into" the CDSOA, but, rather, whether the offset payments are actions that may be taken only when the constituent elements of dumping are present. This test is met not only when the constituent elements of dumping are "explicitly built into" the action at issue, but also where they are implicit in the express conditions for taking the action concerned. They maintain that the CDSOA offset payments meet this test for the following reasons. First, the offset payments are not made to all United States' enterprises, or even to all United States' producers "affected" by imports, but only and exclusively to the United States' producers "affected" by an instance of dumping or subsidization

[57]Panel Report, para. 7.22.

which has been previously the subject of an anti-dumping or a countervailing duty order, respectively. Second, the offset payments are paid for "qualifying expenses" incurred by the affected domestic producers "after" the issuance of an anti-dumping or a countervailing duty order and prior to the termination of the order. Third, the "qualifying expenses" must be related to the production of a product that has been the subject of an anti-dumping or countervailing duty order.

77. The European Communities, India, Indonesia and Thailand argue that, to determine whether the CDSOA is specific, the Panel was not required to examine footnote 24 of the *Anti-Dumping Agreement* and footnote 56 of the *SCM Agreement*. According to them, the scope of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* and that of the footnotes are mutually exclusive. Therefore, once it is established that an action is "specific action against dumping", it is not necessary to make a finding to the effect that such action is not covered by the footnote. They add that, in any event, offset payments do not constitute "action" under other relevant provisions of the GATT 1994 within the meaning of footnotes 24 and 56 and that the CDSOA is not an action taken "under other relevant provisions" of the GATT 1994.

78. The European Communities, India, Indonesia and Thailand contend that the Panel was not required to further consider whether the CDSOA was action "against" dumping or a subsidy because, in the light of the test enunciated by the Appellate Body in *US – 1916 Act*, a conclusion that the CDSOA offset payments constitute specific action against dumping or a subsidy stems from the establishment that the offset payments are an action that may be taken only when the constituent elements of dumping, or of a subsidy, are present. In any event, they submit that the Panel's interpretation of the term "against", which encompasses action that has an "indirect" adverse bearing on dumping or subsidization, is in accordance with the rules of treaty interpretation. According to them, the Panel's interpretation is consistent with the ordinary meaning of the term "against" as it corresponds to definitions such as "in competition with", "to the disadvantage of", "in resistance to" and "as protection from"; it would also be borne out by the immediate context of the term "against", in particular by the surrounding language of Articles 18.1 and 32.1, which does not prohibit specific action against dumped or subsidized imports, or against the importers of dumped or subsidized products, but rather against "dumping" and against "a subsidy". Also, they point out that the *SCM Agreement* authorizes indirect action in the form of "countermeasures".

79. The European Communities, India, Indonesia and Thailand support the conclusion of the Panel that the CDSOA has an adverse bearing on dumping and subsidization because it puts dumped/subsidized imports at a competitive disadvantage. According to the European Communities,

India, Indonesia and Thailand, this conclusion is based exclusively on the interpretation of Articles 18.1 and 32.1, more specifically of the term "against".

80. The European Communities, India, Indonesia and Thailand submit that the CDSOA operates "against" dumping/a subsidy because the offset payments are objectively apt to have an "adverse bearing" on dumping or subsidization. In this vein, they point out that the qualifying expenses under the CDSOA are costs incurred "in competing with" the dumped/subsidized imports. They add that the offset payments allow the domestic producers to improve their competitive position *vis-à-vis* dumped and subsidized imports, and it is reasonable to expect that, in practice, they will use them for that purpose.

81. The European Communities, India, Indonesia and Thailand support the Panel's conclusion that the stated purpose of the CDSOA confirms that it is specific action against dumping. They are of the view that the stated purpose of the CDSOA is relevant for its interpretation, and they assert that Section 1002 is an integral part of the terms of the CDSOA.

82. The European Communities, India, Indonesia and Thailand submit that countervailing measures and countermeasures are the only permitted responses to subsidization. According to them, the Appellate Body's finding in *US – 1916 Act*—that the only specific actions against dumping allowed by Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, are definitive duties, provisional measures and price undertakings—was not based exclusively on the presence of the term "measure" in Article 1 of the *Anti-Dumping Agreement*. They add that footnote 35 to Article 10 of the *SCM Agreement* provides contextual confirmation that the *SCM Agreement* does not allow the application of other measures against a subsidy. They contend that, as the wording of Article 32.1 mirrors that of Article 18.1, it is reasonable to assume that both provisions have a similar object and purpose; consequently, they should have a similar scope. Furthermore, they submit that the United States' interpretation of Article 32.1 would reduce that provision to redundancy.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

83. The European Communities, India, Indonesia and Thailand endorse the finding of the Panel that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. They assert that, contrary to what the United States maintains, the Panel reached its conclusion based on the text of those provisions.

84. The European Communities, India, Indonesia and Thailand submit that the examination of the relevant facts for establishing whether an application is made "by or on behalf of the domestic industry" must be conducted in an "objective" manner. This is not stated expressly in Articles 5.4 or 11.4, but it is a corollary of the principle of good faith which informs all the covered agreements. According to them, the CDSOA is incompatible with the obligation to make an "objective" examination required by Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* because, through the offset payments, the United States authorities are "unduly influencing the very facts which they are required to 'examine'."[58]

85. The European Communities, India, Indonesia and Thailand argue that the United States' reading of Articles 5.4 and 11.4 would lead to absurd and unacceptable results and cannot be correct. If it did not matter whether an application or an expression of support is "genuine", the authorities could take any action within their reach in order to coerce or induce the domestic producers to make or support applications, so as to ensure that the quantitative thresholds of Articles 5.4 and 11.4 are reached.

86. The European Communities, India, Indonesia and Thailand emphasize that they are not suggesting that an investigating authority is to ascertain actively in each case the subjective motivations of a producer in expressing support for an application; but they 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 Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

87. The European Communities, India, Indonesia and Thailand endorse the Panel's conclusion that the CDSOA defeats the object and purpose of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* because it encourages the initiation of investigations in cases where the domestic industry has no genuine interest in the imposition of anti-dumping or countervailing duties. The consequence is that United States investigating authorities are prevented from reaching a proper determination of support before initiating an investigation.

88. The European Communities, India, Indonesia and Thailand submit 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 *Anti-Dumping Agreement* and the *SCM Agreement*. They submit that the obligation to perform a treaty obligation

[58]European Communities', India's, Indonesia's and Thailand's appellees' submission, para. 127.

in good faith means that such obligations "must not be evaded by a merely literal interpretation".[59] It means also that the parties "must abstain from acts that are calculated to frustrate the object and purpose of the treaty".[60]

89. The European Communities, India, Indonesia and Thailand emphasize that the Panel's finding that the CDSOA provides a financial incentive to file or support applications is a question of fact, and not a question of law. They add that the United States has not claimed that, by finding that the CDSOA provides a financial incentive to file or support applications, the Panel has acted inconsistently with Article 11 of the DSU; accordingly, in their view, this finding is beyond the scope of appellate review.

90. In any event, the European Communities, India, Indonesia and Thailand submit that the Panel correctly concluded that the CDSOA provides a financial incentive to file or support applications. They submit that the reason why the evidence of "actual effects" of the CDSOA cannot be shown is because, as a result of the CDSOA, "it has become impossible, both for the U.S. authorities and for the complainants, to tell whether a domestic producer supports the imposition of measures as such or the distribution of the offset. The appropriate consequence to be drawn from this is not that the CDSOA can have no effects on the degree of support, but rather that the U.S. authorities are no longer in a position to make a proper determination of support, whether positive or negative."[61]

91. The European Communities, India, Indonesia and Thailand emphasize that they "have not claimed that the CDSOA affects the standing determination in each and every case."[62] Rather, their claim is that "there is a risk that the offset payments will influence the decision of the domestic producers in an indeterminate number of cases"[63] and that by creating that risk, the United States has acted inconsistently with the obligation to conduct an objective examination of the level of support. They submit that "[t]he existence of such risk can be reasonably inferred, as the Panel did, from the potential amount of the payments made under the CDSOA, as compared to the costs of filing or supporting applications."[64]

92. The European Communities, India, Indonesia and Thailand note that the United States argues that the declarations of support for the purposes of the distribution of the offset payments can be made

[59]European Communities', India's, Indonesia's and Thailand's appellees' submission, para. 148.

[60]*Ibid.*

[61]*Ibid.*, para. 163.

[62]*Ibid.*, para. 164.

[63]*Ibid.*

[64]*Ibid.*

to the USITC after the initiation of the investigation. They stress that it remains true, however, that the CDSOA provides an incentive for filing applications or for supporting them before the initiation of the investigation because domestic producers cannot be sure that the other domestic producers will file or support an application, and thus whether the thresholds set out in Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* will be met.

3. The Combination of Duties and CDSOA Offset Payments

93. The European Communities, India, Indonesia and Thailand argue that the Panel did not exceed its terms of reference in the manner alleged by the United States. According to them, the Panel made findings and recommendations exclusively with respect to the CDSOA. They argue that the Panel made no finding or recommendation with respect to the WTO-consistency of the United States laws or regulations relating to the imposition of anti-dumping duties or countervailing duties. Rather, the European Communities, India, Indonesia and Thailand submit that the Panel treated the duties imposed pursuant to those laws and regulations as a fact when assessing the WTO-consistency of the CDSOA. They argue that the Panel correctly took into account those facts when assessing whether the offset payments had an adverse bearing on dumping and subsidization. According to them, by doing so, the Panel was merely assessing the effects of the CDSOA against the relevant factual background, and thus the Panel did not exceed its terms of reference.

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

94. The European Communities, India, Indonesia and Thailand argue that the CDSOA is inconsistent with Article XVI:4 of the *WTO Agreement* and nullifies or impairs benefits accruing to the complainants under Article 3.8 of the DSU because the CDSOA is inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*.

5. The "Advisory Opinion"

95. The European Communities, India, Indonesia and Thailand note that the statement at issue was provided in response to a United States' argument. They argue that paragraph 7.22, where the statement in question appears, is part of the Panel's reasoning, and is pertinent and useful in order to understand the Panel's rationale for considering why the CDSOA constitutes "specific action" against dumping or a subsidy. Thus, they argue that the statement in question is not beyond the Panel's terms of reference.

6. Article 9.2 of the DSU

96. The European Communities, India, Indonesia and Thailand argue that, even though Article 9.2 of the DSU does not set any deadline for requesting a separate panel report, this does not mean that the parties to a dispute may request a separate report at any time of the proceedings. Citing the Appellate Body's statement in *US – FSC*, they argue that WTO Members are under a positive duty to exercise their procedural rights under the DSU in good faith and may forfeit those rights if they fail to do so. In the same way as the principle of good faith requires a defendant to raise its objections "seasonably and promptly"[65], it requires also that the right to a separate report under Article 9.2 of the DSU be exercised in a timely manner. They conclude that, because the United States clearly failed to request the report in a timely manner, the Panel was correct in rejecting the United States' request.

F. *Japan and Chile – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

97. Japan and Chile, as joint appellees, submit that the CDSOA constitutes a violation of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. They argue that the United States' assertion that a Members' sovereign power over fiscal matters is totally unconstrained by its WTO obligations is an overstatement. WTO Members agreed to impose many limitations on their sovereign powers to promulgate and enforce domestic laws and regulations, even in fiscal matters. For example, Article III of the GATT 1994 limits the power of Members with regard to taxation. Article VI of the GATT 1994 and the *SCM Agreement* restrain the otherwise sovereign power of Members to provide subsidies. Specifically relevant to this dispute, the United States has committed not to adopt measures that would constitute specific action against dumping or subsidization except in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement* and the *SCM Agreement*.

98. Japan and Chile contend that the presence of the constituent elements of dumping, as determined by the United States investigating authorities themselves, is a condition *sine qua non* of the application of the CDSOA. This is supported by the text of the law itself, which provides that duties assessed pursuant to anti-dumping or countervailing duty orders shall be distributed to affected domestic producers. In *US – 1916 Act*, the Appellate Body stated that a measure constitutes a

[65]European Communities's, India's, Indonesia's and Thailand's appellees' submission, para. 188, quoting Appellate Body Report, *US – FSC*, para. 166.

specific action if it is taken *only* in situations presenting the constituent elements of dumping. They contend that the CDSOA meets this test, as the CDSOA refers explicitly to the requirement of an anti-dumping order. Thus, the "constituent elements of dumping" can be found in the CDSOA's textual reference to the prerequisite of an anti-dumping order. According to Japan and Chile, the CDSOA addresses dumping and subsidization as such. As the title of the CDSOA and the Congressional findings in Section 1002 of the CDSOA make clear, the distribution of duties to the affected domestic producers offsets continued dumping and subsidization. The CDSOA acts specifically against dumping because it addresses dumping and subsidization as such, since dumping or subsidization are its cause and trigger, and because it will apply only when the constituent elements of dumping or subsidization are present. They add that, in their view, there is a clear connection between the determination of dumping and CDSOA offset payments.

99. Japan and Chile argue that the text of the CDSOA refutes the United States' claim that the link between the CDSOA and dumping or subsidization is remote. The findings listed in Section 1002 of the CDSOA reveal an immediate and clear link between dumping or subsidization and the offset payments. According to them, the link is evident from the title of the CDSOA—*the Continued Dumping and Subsidy Offset Act*.

100. According to Japan and Chile, the Panel correctly found that the CDSOA acts "against" dumping, in the sense that it has an adverse bearing on dumping. For them, there is no textual basis in either Article 18.1 or 32.1 for the interpretation of the word "against" as requiring a direct contact or impact on the dumped good or on the entity responsible for it. Therefore, the United States' argument that action "against" dumping must operate directly on the imported goods or entities responsible for them is not supported by the ordinary meaning of the phrase "specific action against dumping" in its context and in the light of the object and purpose of the *Anti-Dumping Agreement* or the *SCM Agreement*. They add that the very rationale underpinning Articles 18.1 and 32.1 is that Members should not be allowed to modify the conditions of competition between imported and domestic products that are in a competitive relationship, except to the extent necessary to counteract dumping and subsidization. They submit that the issue is not whether the CDSOA gives the affected domestic producers the incentive to use offset payments to bolster their competitive position, or whether it guarantees that producers will be successful in any attempts to bolster their competitive positions. The CDSOA gives the affected domestic producers the resources to improve their competitive positions *vis-à-vis* dumped imports, and it does so only because the imports are dumped—not as the United States' argument implies—regardless of the fact that they are dumped. That is precisely the element that, according to Japan and Chile, renders the CDSOA action against dumping. They also submit that the CDSOA creates an incentive to file or support applications for

anti-dumping or countervailing investigations, and that a measure that leads to an increased number of investigations and orders is a measure "against" dumping/a subsidy.

101. According to Japan and Chile, the Panel correctly interpreted and gave full meaning to footnote 24 of the *Anti-Dumping Agreement* and footnote 56 of the *SCM Agreement*. The Panel explained, in accordance with the decision of the Appellate Body in the *US – 1916 Act* case, that "specific action" under Articles 18.1 and 32.1 must be distinguished from "action" under footnotes 24 and 56. Article 18.1 covers "specific action" against dumping. Footnote 24, by contrast, addresses non-specific action, and clarifies that the prohibition in Article 18.1 does not cover non-specific action under "other relevant provisions of the GATT", that is, provisions not interpreted by the *Anti-Dumping Agreement*. Footnote 24 covers action that addresses the "causes or effects of dumping", but not action that addresses dumping *as such*, or which makes dumping the cause for its imposition. Footnote 56 also refers exclusively to non-specific action.

102. Japan and Chile maintain that the Panel treated the stated purpose of the CDSOA as confirming evidence of the fact that the CDSOA acts against dumping, a conclusion it had already reached based on other considerations. According to them, reliance on municipal law as evidence of facts is accepted under WTO law and general public international law.

103. Japan and Chile argue that the minor textual differences between the text in the *Anti-Dumping Agreement* and the *SCM Agreement* do not undermine the Panel's conclusions regarding the applicability of the Appellate Body's interpretation of Article 18.1 of the *Anti-Dumping Agreement* in the *US – 1916 Act* to Article 32.1 of the *SCM Agreement*. They point to footnote 35 of the *SCM Agreement*, and note that it expressly states that, in certain circumstances, "only one form of relief" against subsidization may be available. Thus, according to them, the text of the *SCM Agreement* makes plain that Article VI of the GATT 1994 applies to more than one type of action against subsidization. They add that, if Article VI of the GATT 1994 and the *SCM Agreement* governed only countervailing duties, as the United States alleges, then the prohibition in Article 32.1 would not prohibit effectively specific action against a subsidy and would be rendered meaningless. The meaning and effectiveness of Article 32.1, like Article 18.1, lie in the fact that it prohibits *all* types of specific action against a subsidy, except for the specific actions that are permitted under Article VI of the GATT 1994 and the *SCM Agreement*. Japan and Chile also note that Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* are virtually identical, and that, in *US – 1916 Act*, the Appellate Body stated that Article 18.1 supports a conclusion that Article VI of the GATT 1994 is applicable to any "specific action against dumping" of

exports. They argue that, by the same logic, Article 32.1 means that Article VI of the GATT 1994 is applicable to any specific action against a subsidy.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

104. Japan and Chile maintain that the language of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reflects the intention of WTO Members to ensure that anti-dumping and countervailing duty petitions have a specified level of support before investigations based on those petitions are initiated. According to them, the CDSOA distorts the proper expression and measure of this support by providing a financial incentive to members of an industry to express their views one way rather than another.

105. Japan and Chile refer to the report of the Appellate Body in *US – FSC*, and in *EC – Sardines*, to maintain that WTO Members are required to fulfill, perform and execute their treaty obligations in accordance with the "pervasive" principle of good faith. According to them, the Panel correctly found that the United States ignored its good faith obligations when it adopted the CDSOA.

106. Japan and Chile find support for their conclusion in other provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. They see, implicit in those provisions, a recognition that even a properly initiated investigation can impose a severe burden on the parties required to respond. According to them, those provisions, as well as Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, seek to limit that burden. The object and purpose of Articles 5.4 and 11.4 was thus to place disciplines on the initiation of burdensome anti-dumping and countervailing duty investigations and to require that support, within the meaning of those provisions, be "freely-expressed".[66]

107. Japan and Chile agree with the United States that the motives of domestic producers in deciding whether to support or file an application are not relevant under Articles 5.4 and 11.4. They submit, however, that the action by the United States to influence those motives through a payment is relevant.

3. The Combination of Duties and CDSOA Offset Payments

108. Japan and Chile argue that the Panel's finding that the CDSOA has an adverse bearing on the conditions of competition of dumped or subsidized goods is not based on, nor does it question, the consistency of the United States laws or regulations relating to the imposition of anti-dumping or

[66]Japan's and Chile's appellees' submission, para. 101.

countervailing duties. According to them, the CDSOA was the only measure whose consistency with the GATT 1994, the *Anti-Dumping Agreement* and the *SCM Agreement* was examined by the Panel. In examining whether the CDSOA constitutes a specific action against dumping/a subsidy, and whether it is consistent with Articles 18.1 and 32.1, they claim it was necessary for the Panel to consider other relevant United States trade laws in its examination of the CDSOA, since the terms of the CDSOA incorporate those laws by direct reference to anti-dumping and countervailing duty orders and to findings under the Antidumping Act of 1921. Nevertheless, none of the Panel's conclusions depends on any finding regarding the text of laws other than the CDSOA.

109. Japan and Chile also note the United States' reference to footnote 334 of the Panel Report (referring to the combination of anti-dumping duties and offset payment subsidies in the particular circumstances of the CDSOA). According to them, the purpose of footnote 334 is to reiterate the Panel's statement in paragraph 7.52, which makes clear that the Panel did not make findings regarding anti-dumping and countervailing duty orders under the respective United States trade laws that were outside its terms of reference. They argue that it is inaccurate to assert that the Panel examined other provisions of United States law in order to find a WTO violation. Rather, they argue that the Panel made an objective assessment of the facts of the case, which included anti-dumping and countervailing duty orders issued under applicable United States laws.

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

110. Japan and Chile argue that, because the CDSOA is inconsistent with Articles 18.1 and 5.4 of the *Anti-Dumping Agreement*, Articles 32.1 and 11.4 of the *SCM Agreement*, and Articles VI:2 and VI:3 of the GATT 1994, it is also in violation of Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement*.

5. The "Advisory Opinion"

111. Japan and Chile submit that the Panel's observations contained in paragraph 7.22 of the Panel Report are not, as the United States claims, an "advisory opinion." They point out that the Panel was merely clarifying the factual basis for its finding that the offset payments under the CDSOA can be made only in situations where the constituent elements of dumping are present. By stating that it would have reached the same conclusion had the payments been funded directly from the United States Treasury, and in an amount unrelated to the collected anti-dumping duties, the Panel, according to them, was emphasizing that the connection between the offset payments and the determination of

dumping was so clear, direct and unavoidable, that it would remain even if the payments were funded from another source.

6. Article 9.2 of the DSU

112. Japan and Chile argue that the Panel's decision not to accept the United States' request for separate panel reports was justified by the right of the Complaining Parties to a prompt settlement of the dispute and the need to prevent an untimely and abusive exercise of rights on the part of the United States, which would have prejudiced the complainants. According to them, it is inherent in every legal precept that confers rights to a party in a proceeding that such rights, either procedural or substantive, must be exercised in a reasonable and timely manner.

113. Japan and Chile submit that, by rejecting the request for separate panel reports, the Panel did not diminish the United States' rights under Article 9.2 of the DSU; rather, it protected the complainants' right under Article 3.3 of the DSU to a prompt settlement of the dispute and also protected them from an abusive exercise of the United States' rights. They also claim that the Panel properly determined that acceptance of the United States' request would have delayed the issuance of the final report and would have prolonged the nullification and impairment of the rights of the complainants under the covered agreements caused by the CDSOA. Thus, they conclude, that the Panel maintained the proper balance between the procedural right of the United States to separate panel reports and its obligations not to nullify and impair the benefits accruing to the complainants under the covered agreements.

G. *Korea – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

114. Korea submits that the CDSOA is a specific action in response to dumping. According to Korea, the Panel carefully analyzed the structure and design of the CDSOA, and found that the CDSOA requires the constituent elements of dumping for its application. It was only on that basis that the Panel concluded that there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments, and that the CDSOA is "specific action" related to dumping.

115. Korea contends that the Panel's definition of "against" was in line with the rules of treaty interpretation. Korea notes the United States' assertion that "against" implies that an action must come into contact directly with the imported or subsidized good or importer, exporter or foreign

producer. Korea argues that "in contact with" is an ordinary meaning of "against" when it is used to describe physical contact, and that it cannot be the ordinary meaning of "against" as it is used in relevant WTO provisions. Korea adds that the proper context in which the term "against" is used is "against dumping". It is neither against dumped imports nor against entities connected to the dumped good.

116. Korea submits that the Panel fully explained why the "conditions of competition" test is applicable to Article 18.1 and Article 32.1. The Panel found, from the ordinary meaning of "against", that a measure will act "against" dumping if it has an adverse bearing on the practice of dumping. The Panel then took note of the fact that "against" is not qualified in any way in Article 18.1, and thus found that the ordinary meaning of "against" encompasses any form of adverse bearing, be it direct or indirect. The Panel then proceeded to analyze the structure and design of the CDSOA to see how the CDSOA distorts the conditions of competition between dumped and domestic products. From this, the Panel found that the CDSOA distorts the conditions of competition between domestic and dumped products, which it found to be a *form* of adverse bearing on dumping.

117. Korea supports the Panel's finding that the CDSOA has an adverse impact on the conditions of competition. Korea disagrees with the United States that this finding of the Panel is based on mere suppositions, and argues that it results rather from an analysis of the structure and design of the CDSOA. Korea contends that the Panel correctly referred to the stated purpose of the CDSOA to confirm this finding. Korea notes that in *Chile – Alcoholic Beverages*, the Appellate Body made a distinction between *subjective* intentions inhabiting the minds of individual legislators, and the purpose or objective *objectively* expressed in the statute itself. According to Korea, although it is not necessary for the panel to sort through the *subjective* intentions of legislators, the Appellate Body found that the purpose or objective *objectively* expressed in the statute itself are pertinent. The Appellate Body added that this *objective* expression can be discerned from the design, the architecture and the structure of a measure.[67] Korea submits that the Panel's analysis was in full compliance with such guidance from the Appellate Body.

118. Korea maintains that the Panel correctly found that its findings on claims under Article 18.1 of the *Anti-Dumping Agreement* apply equally in respect of the claims under Article 32.1 of the *SCM Agreement*. According to Korea, the Appellate Body's analysis in *US – 1916 Act* was not based on any particular provisions of the *Anti-Dumping Agreement* in isolation, but on the *Anti-Dumping Agreement* as a whole. Also, Korea notes that the Panel stated that it is important to have

[67]Appellate Body Report, *Chile – Alcoholic Beverages*, para. 62.

regard to the fact that the types of remedies foreseen by the *SCM Agreement* are broad, including countervailing duties and countermeasures.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

119. Korea endorses the Panel's finding that the CDSOA constitutes a violation of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

120. According to Korea, the peculiarity of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* is that the object and purpose of those provisions is explicitly contained in the provisions themselves. Korea concludes that a violation of the "object and purpose" of those provisions is a violation of the explicit terms of those provisions as well.

121. Korea notes the assertion by the United States that the Panel's finding is not based on a violation of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, but rather on a violation of the principle of good faith. According to Korea, the United States seems thereby to assert that, even though "good faith implementation of a treaty provision is a substantive obligation arising from the *Vienna Convention on the Law of Treaties*"[68], it is not "part of the WTO law."[69]

122. Korea submits that WTO 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 *Anti-Dumping Agreement* and the *SCM Agreement*.

123. Korea endorses the Panel's finding that the CDSOA provides a financial inducement to domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, because CDSOA payments are made only to those producers that file or support such applications and because the financial rewards for doing so are significant. Korea submits that the Panel's findings to this effect were based on a careful examination of the structure and operation of the CDSOA and not on speculation, as the United States asserts.

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[68]Korea's appellee's submission, para. 50.

[69]*Ibid*.

3. The Combination of Duties and CDSOA Offset Payments

124. Korea notes that the United States, in making the claim that the Panel exceeded its terms of reference by examining the CDSOA in combination with United States laws, does not make any reference to the Panel Report. Korea argues that the absence of any reference is not because of inadvertence, but because the Panel did not make such an examination.

125. According to Korea, the CDSOA and anti-dumping (or countervailing) duties are not bifurcated and independent from each other. On the contrary, the presence of anti-dumping duties is a *sine qua non* for the disbursement of CDSOA offset payments. Korea submits that all of the relevant findings of the Panel were made in relation to the analysis of the CDSOA alone, without any reference to United States laws on the imposition of anti-dumping (or countervailing) duties.

H. *Mexico – Appellee*

1. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

126. Mexico submits that the Panel interpreted Articles 18.1 and 32.1 properly. The Panel applied the analysis of "constituent elements" used by the Appellate Body in *US – 1916 Act* and determined that the CDSOA offset payments acted specifically in response to dumping. The Panel interpreted the meaning of "against dumping" as "an adverse bearing on dumping" and applied its legal interpretation to the facts of the dispute in order to determine that the CDSOA was a non-permissible "specific action against dumping". The Panel also applied its analysis in relation to Article 18.1 of the *Anti-Dumping Agreement* to the argument on Article 32.1 of the *SCM Agreement*, and found that the CDSOA was a non-permissible "specific action against a subsidy".

127. Mexico contends that it is not necessary for the "constituent elements" of dumping or of a subsidy to be expressed in the language of the law. Interpreting Article 18.1 as requiring that a law must explicitly establish the constituent elements of dumping opens up the possibility of circumventing this provision. Such an interpretation should, therefore, be avoided.

128. Mexico argues that the distribution of CDSOA offset payments is directly related to, and caused by, the imposition of anti-dumping or countervailing duties, which legally can be imposed only when the elements of dumping and subsidy are present. According to Mexico, the Panel correctly found that there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments.

129. Mexico adds that there is nothing in the "constituent elements" test that specifies that the payments and the dumping must occur at the same time. Even though, under certain circumstances, CDSOA payments may be retrospective, this does not alter the fact that there is an unavoidable connection between the payments and the dumping or subsidization. By their very structure and design, CDSOA payments occur after the collection of anti-dumping and countervailing duties.

130. Mexico maintains that the scope of Articles 18.1 and 32.1 on the one hand, and footnotes 24 and 56 on the other, are mutually exclusive. Action prohibited by an article cannot be permitted by a footnote to that article. According to Mexico, even though the footnotes are relevant to this dispute, the United States has not established that the CDSOA is action "under other relevant provisions of GATT 1994". The fact that the measures are not inconsistent with the GATT 1994 does not mean that they are taken under other relevant provisions of the GATT 1994.

131. Mexico submits that there is no basis for interpreting the word "against" as meaning that action must have an adverse bearing on imports or persons "directly" related to the imports. There is no mention in any part of Articles 18.1 or 32.1 of actions taken "directly" against dumped or subsidized imports and there is no text or context that imposes this requirement. Those Articles simply refer to "action against", which may include direct or indirect action. The reference in Article 18.1 to "dumping of exports" instead of "dumped exports" and the reference in Article 32.1 to "a subsidy of another Member" instead of "subsidized imports" or "subsidized exports" confirms this. For Mexico, if those who drafted the two Agreements had wanted to follow the limited interpretation given by the United States, they would have used other words instead of "dumping of exports" or "a subsidy of another Member".

132. Mexico contends that the Panel did not interpret Articles 18.1 and 32.1 to include a "conditions of competition" test. The Panel's reference to conditions of competition was in the context of evaluating the relevant facts and circumstances of the CDSOA, and whether the CDSOA has "an adverse bearing" on dumping. For Mexico, the Panel was not creating a new legal test. Mexico maintains that the distortion of competition between the dumped product and the domestic product is proof of an adverse bearing on dumping.

133. Mexico submits that the conclusions of the Panel that the CDSOA has a specific adverse impact on the competitive relationship between domestic products and dumped imports, and that such dissuasive effect means that the CDSOA bears adversely on dumping, and therefore acts against dumping, are not the result of speculation and are not based on assumptions or hypothetical examples. Rather, they are the result of the Panel's analysis of the structure and design of the CDSOA. The real impact of the CDSOA is shown in the Panel's finding that "[e]xporters/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."[70]

134. Mexico argues that the Panel is empowered to examine the legislative history of a law when examining its significance. In *US – 1916 Act*, the panel considered the text of the measure at issue in that dispute in the context of its enactment, including the legislative history.[71] In *US – Countervailing Measures on Certain EC Products*, the panel indicated that "when examining internal legislation, a Panel must look to all the elements that establish its meaning, not just the statutory language. Therefore, it is also necessary to look at other domestic interpretive tools such as the legislative history …".[72] In *US – Section 110(5) Copyright Act*, the panel stated that "we also observed that stated public policy purposes could be of subsidiary relevance for drawing inferences about the scope of an exemption and the clarity of its definition. In our view, the statements from the legislative history indicate an intention of establishing an exception with a narrow scope."[73] Mexico adds that the Panel in this case did not base its finding that the CDSOA constitutes "specific action against dumping" on the legislative history. Rather, it looked to the legislative history of the CDSOA to confirm its finding.

135. Mexico maintains that the Panel correctly interpreted Article 32.1 of the *SCM Agreement*. As noted by the Panel, Article 18.1 and Article 32.1 contain essentially identical language. The Panel acknowledged the differences between Article 1 of the *Anti-Dumping Agreement* and Article 10 of the *SCM Agreement*, but did not see why a different approach should apply in respect of the permissible responses to subsidization. In the case of the *Anti-Dumping Agreement*, the permitted responses to dumping are provisional anti-dumping duties, definitive anti-dumping duties and price undertakings. In the case of the *SCM Agreement*, the permitted responses to a subsidy are provisional and definitive countervailing duties, price undertakings, and countermeasures.

[70]Panel Report, para. 7.39.

[71]Panel Report, *US – 1916 Act (EC)*, paras. 6.120-6.133 and 6.228; Panel Report, *US – 1916 Act (Japan)*, paras. 6.141-6.151 and 6.289.

[72]Panel Report, *US – Countervailing Measures on Certain EC Products*, para. 7.139.

[73]Panel Report, *US – Section 110(5) Copyright Act*, para. 6.157.

2. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

136. Mexico supports the finding of the Panel that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, because it operates in such a way that the investigating authorities cannot carry out an objective and impartial examination of the degree of support for the application.

137. Mexico submits that, contrary to the United States' claim, the wording of these provisions interpreted in good faith and taking into account their context and object and purpose, does not mean that the only thing WTO Members have to do is to examine whether the statistical thresholds in Articles 5.4 and 11.4 have been met prior to initiating an investigation. Rather, Articles 5.4 and 11.4 require a positive determination based on the degree of support for an application "by or on behalf of the domestic industry". Such a determination must be objective and must comply with the principle of good faith.

138. Mexico submits that, for the thresholds set out in Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* to be meaningful, a WTO Member may not distort the degree of support for, or opposition to, any particular application. In order to comply with this obligation, it is not necessary to enquire into the motives or intent of producers that elect to support an application. Members of the WTO must ensure, however, that no measure increases (or decreases) the possibility that the domestic industry meets the prescribed threshold, and that the investigating authority's decision regarding the degree of support is objective and unbiased.

139. Mexico concludes that, "[b]y giving applicants or those supporting applications economic advantages, the CDSOA prevents the United States investigating authorities from making an objective and unbiased finding regarding the degree of support for any application."[74] In itself, the CDSOA "invariably distorts the degree of support for an application"[75] and is therefore inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

140. Mexico further submits that the Panel's analysis of whether or not the CDSOA creates a financial incentive to support anti-dumping or countervailing duty investigations is relevant with respect to addressing the issue of whether the United States has maintained measures which prevent investigating authorities from conducting an objective examination of whether or not an application has been made "by or on behalf of the domestic industry" within the meaning of Articles 5.4 and 11.4.

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[74]Mexico's appellee's submission, para. 54.

[75]*Ibid.*

3. The Combination of Duties and CDSOA Offset Payments

141. Mexico argues that the Panel did not exceed its terms of reference by examining the claims concerning the CDSOA in combination with other laws and regulations. According to Mexico, the CDSOA is within the Panel's terms of reference. In addition, the complainants did not contest the consistency of United States legislation on anti-dumping and countervailing duties, so it is not necessary for this legislation to be identified as the actual measure in dispute in this case. At the same time, however, the Panel had the authority to examine the context of the CDSOA, which includes other United States legislation. Mexico also claims that the panel report in *US – Section 129(c)(1) URAA*, cited by the United States, does not support the United States' position, but is rather contrary to it.

4. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

142. Mexico argues that the Panel correctly found that the CDSOA is inconsistent with Articles 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement*, Articles 11.4, 32.1 and 32.5 of the *SCM Agreement*, and Articles VI.2 and VI.3 of the GATT 1994. Therefore, the CDSOA is inconsistent with Article XVI.4 of the *WTO Agreement*. It also nullifies or impairs the benefits accruing to the Complaining Parties under these agreements.

5. The "Advisory Opinion"

143. Mexico argues that paragraph 7.22 of the Panel Report is *obiter dictum* and not a legal finding by the Panel that has to be upheld, modified or reversed by the Appellate Body.

I. *Arguments of the Third Participants*

1. Argentina

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

144. Argentina supports the conclusion of the Panel that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, because it induces United States producers to file or to support applications for the petition for the initiation of anti-dumping and countervailing duty investigations.

145. Argentina emphasizes that the object and purpose of Articles 5.4 and 11.4 should be considered "just as valid"[76] as the text of those provisions. According to Argentina, Articles 5.4 and 11.4 seek to ensure not only that WTO Members comply with the threshold tests set out in those provisions, but also that investigations are initiated in proper form and that "unjustified proliferation of investigations"[77] is avoided. According to Argentina, this "object and purpose" is also reflected in the requirement contained in those provisions not to initiate investigations when domestic producers expressly supporting the application account for less than 25 per cent of the domestic industry.

146. Argentina notes that the mere initiation of an investigation brings with it the possibility of provisional measures being introduced in accordance with Article 7 of the *Anti-Dumping Agreement* and Article 12.12 of the *SCM Agreement*. Argentina submits that a proliferation of investigations could entail injury to a large number of exporters to the United States' market and disrupt normal trade flows among WTO Members.

(b) Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

147. Argentina argues that, because the CDSOA is inconsistent with the United States' WTO obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*, it also violates Article XVI:4 of the *WTO Agreement*.

2. Hong Kong, China

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

148. Hong Kong, China submits that the mandated distribution of offsets under the CDSOA constitutes specific action against dumping and subsidization under Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Although the constituent elements of dumping are not referred to in the CDSOA, no payments under the CDSOA can be made unless anti-dumping duties are collected. Anti-dumping duties cannot be collected unless an anti-dumping order is imposed. An anti-dumping order cannot be imposed unless the constituent elements of dumping exist. The same is true for subsidization. Notwithstanding the fact that the CDSOA does not refer to the constituent elements of dumping or subsidization, actions under the CDSOA can be taken only if the

[76]Argentina's third participant's submission, para. 7.

[77]*Ibid.*, para. 8.

constituent elements of dumping and/or subsidization are found. Thus, actions under the CDSOA are clearly "in response" to the constituent elements of dumping and/or subsidization.

149. Hong Kong, China adds that the CDSOA is a specific action against dumping or subsidization because it places imported goods at a competitive disadvantage relative to domestically-produced goods, and brings about an adverse impact on the imported goods. The additional burden is a direct result of the domestic producers of the United States having an increased cash flow that, in turn, is the result of distribution of funds directly stemming from the existence of an anti-dumping or countervailing duty order. The mere fact that the United States producers receive a distribution because an anti-dumping or countervailing duty order is in place is sufficient to render the CDSOA inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*.

150. Hong Kong, China says that the Panel has not concluded that there exists a test for conditions of competition or competitive advantage in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Rather, according to Hong Kong, China, the Panel has used this analysis only to demonstrate that the CDSOA is a direct burden on imported goods. By offsetting the effects of dumping and subsidization in addition to the anti-dumping and countervailing duty order, payments under the CDSOA impermissibly alter the competitive conditions in favour of domestic producers. According to Hong Kong, China, if anti-dumping and countervailing duties level the playing field, the CDSOA payments tilt the field back in favour of the domestic producers in the United States. By definition, CDSOA payments would improve the recipients' competitive position. Hong Kong, China says that it is, therefore, established, through the conditions of competition analysis, that the CDSOA results in a "direct" burden on imported goods.

151. Hong Kong, China notes that in the dispute concerning the *US – 1916 Act*, the Appellate Body unequivocally restricted permissible responses to dumping to definitive anti-dumping duties, provisional measures or price undertakings. The Appellate Body's analysis was not based on any particular provisions in the *Anti-Dumping Agreement* in isolation, but rather on the *Anti-Dumping Agreement* as a whole. In that case, the Appellate Body looked at the overall purpose and meaning of the *Anti-Dumping Agreement* and found that only those measures expressly provided for in the *Anti-Dumping Agreement* are permissible specific actions against dumping. As far as the present case on the CDSOA is concerned, Hong Kong, China says that it sees no reason why the same analysis of examining the overall purpose and meaning of the whole Agreement should not be adopted in order to decide whether any action that is not expressly provided for in the Agreement is permissible.

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

152. Hong Kong, China submits that the object and purpose of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* is to limit the initiation of investigations to those instances where the domestic industry has a genuine interest in the adoption of measures against dumping or subsidization. Hong Kong, China maintains that the CDSOA provides domestic producers who have not been adversely affected by dumped/subsidized imports with an incentive to file or to support anti-dumping and countervailing actions, and in doing so, renders the quantitative thresholds in Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* meaningless.

3. Israel

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

153. Israel submits that the CDSOA is a specific action against dumping and subsidization within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, because it awards monetary damages to parties that have been found to be injured by dumping or subsidization.

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

154. Israel endorses the Panel's finding that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, because it operates in such a way that the investigating authorities are unable to conduct an objective and impartial examination of the level of support that exists for an application.

4. Norway

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

155. Norway submits that the Panel correctly concluded that the CDSOA is a non-permissible specific action against dumping contrary to Article 18.1 of the *Anti-Dumping Agreement* and that it is a non-permissible specific action against a subsidy contrary to Article 32.1 of the *SCM Agreement*. As Article 32.1 of the *SCM Agreement* contains parallel language to Article 18.1 of the *Anti-Dumping Agreement*, Norway says it agrees with the Panel that the phrase "specific action against a

subsidy" must be understood similarly to encompass, at a minimum, action that may be taken only when the constituent elements of a subsidy are present. Norway adds that a Member's actions with respect to subsidies are spelled out in Articles VI and XVI of the GATT 1994, as interpreted by the *SCM Agreement*, and limited to one of the following three types of action against subsidization: "countervailing measures" imposed in accordance with Part V of the *SCM Agreement*; "countermeasures" against a "prohibited subsidy" imposed in accordance with Part II of the *SCM Agreement*; or, "countermeasures" against subsidies that cause "adverse effects" to the interests of the Member concerned, according to Part III of the *SCM Agreement*. The "specific measures" available to a WTO Member to meet subsidization are thus limited to the above-mentioned measures.

156. Norway notes that the United States has argued in *US – Norwegian Salmon AD* that limits exist with respect to the actions a Member State may take in response to unfair trade practices.

157. Norway contends that the legislative history of the CDSOA is a relevant and important factor to be taken into account when demonstrating that the CDSOA was aimed at creating an additional specific measure as a response to foreign dumping and subsidization.

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

158. Norway expresses agreement with the Panel that the CDSOA, by mandating offset payments to affected domestic producers, provides a strong financial incentive to domestic producers to file applications for the imposition of anti-dumping or countervailing measures, or to support such applications made by other domestic producers. In Norway's submission, a domestic producer cannot be considered to have made an "application", or to have "supported" it, within the meaning of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, if it does so in order to qualify for offset payments provided under the CDSOA.

159. Norway submits that the CDSOA has the effect of stimulating the filing of applications and making it easier for applicants to obtain the support of other domestic producers, so as to meet the quantitative thresholds laid down in Article 5.4 of the *Anti-Dumping Agreement* and in Article 11.4 of the *SCM Agreement*. In doing so, the CDSOA operates in a way which prevents the United States' authorities from conducting an objective examination of whether an application is made "by or on behalf of the domestic industry" as required by Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

(c) Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

160. Norway argues that the CDSOA is inconsistent with Article XVI:4 of the *WTO Agreement* and nullifies and impairs benefits accruing to the complainants because it is inconsistent with Articles 18.1 and 5.4 of the *Anti-Dumping Agreement*, and with Articles 32.1 and 11.4 of the *SCM Agreement*.

IV. Procedural Matters: Arguments of the Participants and the Third Participants

A. *Allegation of Flaws in the Notice of Appeal*

1. Canada

161. In a letter dated 5 November 2002, Canada requested the Appellate Body to issue a preliminary ruling that the United States is in breach of Rule 20(2)(d) of the *Working Procedures*, because the United States' appellant's submission contains certain arguments, allegations and requests for ruling that the United States did not include in the Notice of Appeal dated 18 October 2002. Canada refers explicitly to paragraph 40 of the United States' appellant's submission, in which the United States argues that the Panel failed to set out "the basic rationale behind" its finding as required by Article 12.7 of the DSU (by not explaining why it examined the burden the measure creates on the conditions of competition under which imports compete), and that the Panel failed to conduct an "objective assessment of the matter before it" as required by Article 11 of the DSU.

162. Canada also refers to Sections IV and VI of the United States' appellant's submission, where the United States alleges that the Panel exceeded its terms of reference, by examining claims concerning the CDSOA in combination with other United States laws and regulations, and by issuing an advisory opinion on a measure outside its terms of reference. According to Canada, these claims relate to the exercise of jurisdiction by the Panel under Article 7 of the DSU, and the United States should have included them in its Notice of Appeal.

163. Canada concludes that the United States' claims, concerning violations by the Panel of Articles 7, 11 and 12 of the DSU, are outside the scope of appellate review, because the United States failed to include them in its Notice of Appeal.

2. United States

164. Responding to the arguments raised by Canada in its request for a preliminary ruling, the United States argues that its Notice of Appeal "is more than sufficient in setting out the 'findings or legal interpretations of the Panel' from which the United States is appealing."[78] The United States submits that, in the first numbered paragraph of its Notice of Appeal, it appeals as erroneous the Panel's findings that the CDSOA is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*; and that such findings are based on "erroneous findings of issues of law and related legal interpretations."[79] According to the United States, each of its arguments alleged by Canada to be outside the scope of the appeal falls within the matters raised in this first numbered paragraph of the United States' Notice of Appeal.

165. As regards paragraph 40 of the United States' appellant's submission, the United States notes that one of the legal bases for the Panel's findings on Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* is the "conditions of competition" test. Because the United States' claim at issue in paragraph 40 concerns the "conditions of competition" test, it relates to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. The United States' Notice of Appeal covers the Panel's findings and related legal interpretations regarding Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, and, therefore, the matters addressed in paragraph 40 "fall squarely within the matters raised in the first numbered paragraph of the U.S. notice."[80] The United States also argues that Canada's claim that the United States' Notice of Appeal should have specifically cited Articles 11 and 12.7 of the DSU is contrary to the Appellate Body's interpretation of Rule 20 of the *Working Procedures*. The United States submits that, under the interpretation of this rule set out by the Appellate Body in *US – Shrimp*, the Notice of Appeal need only identify the findings or legal interpretations of the Panel which are being appealed as erroneous; the Notice of Appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The United States clarified at the oral hearing that it does not request the Appellate Body to make a specific finding that the Panel has failed to comply with Articles 11 or 12.7 of the DSU; the comments on these Articles found in paragraph 40 are simply supportive of the United States' argument that the Panel erred in interpreting Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

[78]United States' letter of 8 November 2002.

[79]*Ibid.*

[80]*Ibid.*

166. Turning next to Canada's contentions regarding Section IV of the United States' appellant's submission, the United States submits that the Panel's findings on Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* were based in part on the Panel's findings concerning the CDSOA in combination with other United States laws. Because the United States' claim at issue in Section IV concerns the combination issue, it relates to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. The United States' Notice of Appeal covers the Panel's findings and related legal interpretations regarding Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, and, therefore, the matters addressed in Section IV "are plainly covered" by the Notice of Appeal.[81]

167. As to Canada's contentions on Section VI of the United States' appellant's submission, the United States submits that the Panel's advisory opinion was made in the context of its findings on Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Section VI concerns the advisory opinion issue and, therefore, relates to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Because the United States' Notice of Appeal covers the Panel's findings and related legal interpretations regarding Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, the matters addressed in Section VI "are well within the scope"[82] of the Notice of Appeal.

168. The United States also argues that Canada's arguments alleging that due process mandates that these issues should be included in the Notice of Appeal are without merit. The United States points out that there is no "notice of appeal" preceding an "other appellant's" submission under the *Working Procedures*. Furthermore, an appellee has 15 days to respond to an appellant's submission (which is preceded by a notice of appeal), but only 10 days to respond to an "other appellant's" submission (which is not preceded by a notice of appeal). Thus, the United States argues, Canada's logic regarding due process would suggest that all appeals to date under the WTO in which there has been an "other appellant's" submission have violated the "fundamental requirements of due process".

3. Australia

169. Australia contends that some allegations of errors by the United States are not properly before the Appellate Body by reason of insufficiencies of the Notice of Appeal. Australia submits that the Notice of Appeal does not include any reference to the fact that the Panel may have violated

[81]United States' letter of 8 November 2002.

[82]*Ibid.*

Articles 11 and 12.7 of the DSU. Nor does it include any reference that the Panel may have exceeded its terms of reference.

4. Brazil

170. According to Brazil, the United States' claim that the Panel exceeded its terms of reference by examining claims concerning the CDSOA in combination with other United States laws is not properly before the Appellate Body, because the United States failed to include this claim in its Notice of Appeal.

5. European Communities, India, Indonesia and Thailand

171. The European Communities, India, Indonesia and Thailand argue that, only if the allegations of error are adequately identified in the Notice of Appeal, are the other parties to the proceedings in a position to exercise their rights under the DSU and the *Working Procedures*. They also recall the Appellate Body's recognition that Article 3.10 of the DSU commits WTO Members to engage in the dispute settlement procedures "in good faith" and that the procedural rights under the DSU must be exercised in a manner that does not prevent other Members from exercising their own rights. According to the European Communities, India, Indonesia and Thailand, withholding a claim of error until the filing of the appellant's submission is inconsistent with the requirements of good faith and due process. Thus, the European Communities, India, Indonesia and Thailand conclude that the claims identified in Canada's letter dated 5 November 2002 should be excluded from the scope of this appeal.

6. Japan

172. Japan argues that the claims identified in Canada's letter dated 5 November 2002 as new claims of error made by the United States cannot be characterized simply as grounds for the current appeal, as legal arguments in support of an allegation included in the Notice of Appeal, or as statements of a provision of the covered agreements. Therefore, Japan concludes that the United States contravened Rule 20(2)(d) of the *Working Procedures* by including these new allegations in its appellant's submission.

7. Korea

173. Korea submits that the United States included in its appellant's submission several points not raised in the Notice of Appeal. According to Korea, this is in violation of Rule 20(2)(d) of the *Working Procedures*.

8. Norway

174. Norway contends that some of the allegations in the United States' appellant's submission are not mentioned in the Notice of Appeal and, therefore, should be excluded from the scope of appellate review.

B. *Allegations Regarding the Scope of Appellate Review*

1. Canada

175. Canada further argues in its request for a preliminary ruling and in its appellee's submission that the United States' appellant's submission is "inconsistent with Article 17.6 of the DSU, because it purports to adduce new evidence … and that consideration of such new evidence is outside the scope of appellate review."[83] According to Canada, Article 17.6 of the DSU prohibits the Appellate Body from receiving and examining evidence that was not before the Panel in order to impugn the factual findings of the Panel.

176. Canada submits that in paragraphs 120-121 of the United States' appellant's submission, the United States purports to impugn evidence on which the Panel relied, namely two letters submitted to the Panel by Canada. For Canada, this attempt by the United States to impugn the "credibility and weight"[84] the Panel attached to the two letters is inconsistent with Article 17.6 of the DSU. Canada also stresses that the United States does so even though it did not comment on this evidence when the evidence was first brought before the Panel, and even though the Panel gave the United States ample opportunity to comment on the letters.

177. In addition, Canada submits that in footnotes 148-149 of the United States' appellant's submission, the United States adduces new evidence that it characterizes as being "available on the public record". Canada argues that consideration by the Appellate Body of such new evidence would be contrary to Article 17.6 of the DSU and that such new evidence "should be struck from the record".[85]

2. United States

178. The United States argues that nothing in its appellant's submission requests, or in any way indicates, that the Appellate Body should do anything but examine the issues of law underlying the

[83]Canada's letter dated 5 November 2002.

[84]Canada's appellee's submission, para. 155.

[85]Canada's letter dated 5 November 2002.

Panel's findings and the associated legal interpretations. According to the United States, paragraphs 120 and 121 of its appellant's submission, cited by Canada, "go to the core of one of the legal errors committed by the Panel"[86], namely that the Panel assumed, as a matter of law, without sufficient basis, that the statute would necessarily result in the initiation of anti-dumping and subsidy cases with less than the level of support required under the *WTO Agreement*. The United States argues that the Panel's erroneous conclusions resulted, in part, from the Panel's "misunderstanding of two letters"[87], and that paragraphs 120 and 121 of the appellant's submission seek to clarify the contents of these letters. The United States claims that, in showing that the Panel lacked a basis for its finding that the CDSOA amounts to a *prima facie* violation of the *WTO Agreement*, the arguments in paragraphs 120 and 121 are entirely appropriate and "well within the scope of the matters to be examined in this appeal."[88]

179. As to footnotes 148 and 149 of its appellant's submission, the United States submits that the appeal involves a *prima facie* challenge to the CDSOA and that the issue turns on whether or not the Panel had a sufficient basis for its legal conclusions. Thus, the United States argues, it "cited to [the public documents in these footnotes] to provide the Appellate Body with a greater understanding of the facts involved in the dispute and to reinforce the point that the panel lacked a sufficient basis for its findings."[89]

3. Australia

180. Australia submits that, under Article 17.6 of the DSU, paragraphs 120 and 121 of the United States' appellant's submission, and footnotes 148 and 149 thereto, should be disregarded, as the United States may not contest the accuracy of, or introduce, factual evidence for the first time in appeal proceedings.

4. European Communities, India, Indonesia and Thailand

181. The appellees argue that the new factual arguments and the new factual evidence adduced by the United States at paragraphs 120 and 121 of its appellant's submission, and in the accompanying footnotes, should be disregarded by the Appellate Body. The new factual arguments in paragraphs 120 and 121 were not raised during the Panel proceedings. In addition, the footnotes refer to documents that were not part of the record of the Panel proceedings.

[86]United States' letter dated 8 November 2002.

[87]*Ibid.*

[88]*Ibid.*

[89]*Ibid.*

5. Japan

182. Japan first recalls that in *Canada – Aircraft*, the Appellate Body declined to rule on a new argument made by Brazil on appeal. According to Japan, the Appellate Body's decision was based on the ground that in order to rule on the new argument, it would have to solicit, receive and review new facts that were not before the Panel, and that were not considered by it, a scenario excluded by Article 17.6 of the DSU. Therefore, Japan argues that the new argument and the new evidence brought by the United States should be rejected.

6. Korea

183. Korea contends that the United States' appellant's submission is inconsistent with Article 17.6 of the DSU because it adduces new evidence that had not been presented to the Panel.

7. Norway

184. Norway argues that the United States has adduced new factual arguments and new factual evidence in its appellant's submission that are outside the scope of appellate review.

V. Procedural Matters and Ruling

185. We turn first to the procedural matters raised in this appeal. As we indicated earlier in this Report[90], Canada, supported by other appellees[91] and one third participant[92], argues that the United States is in breach of Rule 20(2)(d) of the *Working Procedures*, because the United States' appellant's submission allegedly includes claims, allegations and requests for ruling that were not included in the United States' Notice of Appeal.[93] Canada requests that these claims be struck from the appeal. In addition, Canada objects, with support from other appellees[94] and one third participant[95], to the inclusion in the United States' appellant's submission of arguments that, in Canada's view, impugn certain evidence relied upon by the Panel, and to the inclusion of what Canada

[90]*Supra*, paras. 161-163.

[91]Australia, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand join Canada in respect of allegations regarding the non-inclusion of claims under DSU Articles 7, 11 and 12.7. In addition, Brazil joins Canada in respect of allegations regarding the non-inclusion of claims under Article 7 of the DSU.

[92]Norway.

[93]The Notice of Appeal is attached as Annex I to this Report.

[94]Australia, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand.

[95]Norway.

regards as new evidence that was not before the Panel. Canada submits that these arguments and the alleged new evidence are outside the scope of appellate review by virtue of Article 17.6 of the DSU.

186. Canada requested a preliminary ruling on these issues[96], to which the United States objected on the grounds that Canada's claims are "meritless"[97] and because neither the DSU nor the *Working Procedures* permits such rulings.[98] We denied the request for a preliminary ruling[99] without ruling on the substance of the issues. We will address them here in turn.

A. *Allegations of Flaws in the Notice of Appeal*

187. Canada, supported by other participants, argues that the United States refers in its appellant's submission to four issues that were not included in the Notice of Appeal:

- the United States' contention in paragraph 40 of its appellant's submission that the Panel failed to meet its obligations under Article 11 of the DSU[100] because the Panel did not undertake an objective assessment of the matter before it;

- the United States' contention in paragraph 40 of its appellant's submission that the Panel failed to meet its obligations under Article 12.7 of the DSU[101] because the Panel did not explain why it examined the burden that the measure creates on conditions of competition;

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[96]Letter dated 5 November 2002 from the Permanent Representative of Canada to the Presiding Member (hereinafter, Canada's letter dated 5 November 2002). A letter was submitted jointly on 8 November 2002 by the European Communities, India, Indonesia and Thailand, in support of Canada's request for a preliminary ruling. Japan also filed a letter on 8 November 2002 in support of Canada's request for a preliminary ruling.

[97]United States' letter dated 8 November 2002.

[98]*Ibid.*

[99]Letter from the Director of the Appellate Body Secretariat dated 8 November 2002.

[100]Article 11 states in relevant part:

> … a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

[101]Article 12.7 states in relevant part:

> … the report of a panel shall set out the findings of fact, the applicability of relevant provisions and the *basic rationale behind any findings and recommendations* that it makes." (emphasis added)

- the United States' contention in Section IV of its appellant's submission that the Panel exceeded its terms of reference [102] by examining claims concerning the CDSOA "in combination" with other United States laws and regulations; and

- the United States' contention in Section VI of its appellant's submission that the Panel exceeded its terms of reference by issuing an "advisory opinion" on a measure that was not before it.

188. Canada submits that these "claims, allegations and requests for ruling" [103] are not properly before us because they were not included in the Notice of Appeal. According to Canada, Rule 20(2)(d) of the *Working Procedures* "requires a Notice of Appeal to include 'a brief statement of the nature of the appeal, including allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.'" [104] Canada argues that these requirements, "as well as the requirements of due process, mandate[ ] the United States to include in its Notice of Appeal all *claims* of error that the United States intends to raise." [105] Canada submits that "[b]y failing to include any reference to claims that the Panel violated Articles 7, 11 and 12.7 of the DSU, the United States is in breach of these requirements." [106] Canada asserts that these claims of error are very serious allegations that must not be made without proper notification to the appellees in the Notice of Appeal. [107] Finally, Canada requests that the claims with respect to Articles 7, 11 and 12.7 be struck from this appeal.

189. The United States clarified at the oral hearing that it is not requesting a finding that the Panel failed to act consistently with Articles 11 and 12.7 of the DSU. The United States explained that the reference in paragraph 40 of its appellant's submission to the Panel's failure to meet its obligations

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[102] Article 7.1 of the DSU sets out the standard terms of reference for panels:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
>
> "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

[103] Canada's appellee's submission, para. 139.

[104] *Ibid*.

[105] *Ibid*. (original emphasis)

[106] *Ibid*.

[107] Canada's letter dated 5 November 2002.

under Articles 11 and 12.7 of the DSU is merely an argument in support of its claim that the Panel erred in interpreting Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

190. As we have not been asked to make findings under Articles 11 and 12.7, we make no such findings. However, we observe that paragraph 40 of the United States' appellant's submission refers explicitly to the Panel's failure to meet its obligations under those provisions. The clear implication is that the United States was indeed making claims under Articles 11 and 12.7 of the DSU. We also note that the United States did not suggest in its letter of 8 November 2002, objecting to Canada's request for a preliminary ruling on the scope of appeal, that it was not requesting findings under those provisions. In our view, Canada and the other appellees were therefore justified in interpreting the United States' appellant's submission as if such claims were indeed being made by the United States. However, given the United States' explanation at the oral hearing that it was not pursuing such claims, the issue of whether they were notified in the Notice of Appeal has become moot.

191. We look next to the other two matters raised by Canada and other participants as not being in the Notice of Appeal and hence not properly before us, namely the United States' arguments in Sections IV and VI of its appellant's submission that the Panel exceeded its terms of reference. The United States contends[108] that its Notice of Appeal is in accordance with Rule 20(2)(d) and relies on our interpretation of that Rule in *US – Shrimp*, where we said:

> The *Working Procedures for Appellate Review* enjoin the appellant to be *brief* in its notice of appeal in setting out "the nature of the appeal, including the allegations of errors". We believe that, in principle, the "nature of the appeal" and "the allegations of errors" are sufficiently set out where the notice of appeal adequately identifies the findings or legal interpretations of the Panel which are being appealed as erroneous. The notice of appeal is not expected to contain the reasons why the appellant regards those findings or interpretations as erroneous. The notice of appeal is not designed to be a summary or outline of the arguments to be made by the appellant. The legal arguments in support of the allegations of error are, of course, to be set out and developed in the appellant's submission.[109] (original emphasis)

[108]United States' letter dated 8 November 2002.

[109]Appellate Body Report, *US – Shrimp*, para. 95.

192. According to the United States, its Notice of Appeal "is more than sufficient in setting out the 'findings or legal interpretations of the Panel' from which the United States is appealing."[110] The United States contends that the claims regarding the Panel's exceeding its terms of reference are included in the Notice of Appeal because they fall within the United States' claim set out in the Notice that the Panel erred in its interpretation of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. In any event, the United States stated at the oral hearing that, as a question of jurisdiction, it is open to the Appellate Body to examine whether a panel exceeded its terms of reference even if no such claim is included in the Notice of Appeal.

193. In examining these submissions, we look first to Rule 20(2) of the *Working Procedures*, which prescribes what is to be included in the Notice of Appeal. In addition to the title of the panel report under appeal, the name of the appellant, and the service address, paragraph (d) states that a Notice of Appeal shall include:

> … a brief statement of the nature of the appeal, including the allegations of errors in the issues of law covered in the panel report and legal interpretations developed by the panel.

194. We have examined this provision in previous appeals.[111] Most recently, in *US – Countervailing Measures on Certain EC Products*, we said:

> [O]ur previous rulings have underscored the important balance that must be maintained between the right of Members to exercise the right of appeal meaningfully and effectively, and the right of appellees to receive notice through the Notice of Appeal of the findings under appeal, so that they may exercise their right of defence effectively. …[The] requirements under Rule 20(2) serve to ensure that the appellee also receives notice, albeit brief, of the "nature of the appeal" and the "allegations of errors" by the panel.[112]

195. The underlying rationale of Rule 20(2)(d) is thus to require the appellant to provide notice of the claims of error that the appellant intends to argue on appeal.[113]

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[110]United States' letter dated 8 November 2002.

[111]Appellate Body Report, *US – Shrimp*, paras. 92-97; Appellate Body Report, *EC – Bananas III*, paras. 151-152; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 50-75.

[112]*US – Countervailing Measures on Certain EC Products*, para. 62.

[113]In its letter dated 8 November 2002, the United States points out that, under the *Working Procedures*, there is no "notice of appeal" preceding an "other appellant's" submission and therefore Canada's arguments regarding due process are without merit. In our view, the United States' argument is inapposite because the *Working Procedures* do not require an other appellant to file a Notice of Appeal. In this respect, we refer to para. 62 of our Report in *US – Countervailing Measures on Certain EC Products* and footnote 142 thereto.

196. Turning to the Notice of Appeal filed in this case, the United States maintains that "[e]ach of the U.S. arguments claimed by Canada to be outside the scope of the appeal fall squarely within the matters raised in the first numbered paragraph of the U.S. notice."[114]

197. We examine first the arguments in Section IV of the United States' appellant's submission, which is entitled "The Panel Exceeded Its Terms of Reference By Examining Claims Concerning The CDSOA In Combination With Other U.S. Laws And Regulations." In that Section, the United States submits that the Panel exceeded its terms of reference by examining whether the CDSOA, in combination with United States laws on the imposition of anti-dumping duties (or countervailing duties), violate Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.[115] The United States argues that the Panel's terms of reference are limited to examining whether the CDSOA, *as such*, is WTO-consistent, and do not permit an examination of whether the CDSOA, *in combination* with any other United States law or regulation, violates United States obligations' under the *WTO Agreement*.

198. Canada, supported by other appellees[116] and one third participant[117], alleges that Section IV of the United States' appellant's submission relates to a claim as to "the exercise of jurisdiction by the Panel under Article 7 of the DSU"[118], and that such claim was not included in the Notice of Appeal. Canada asks us to exclude this claim from the scope of appeal. The United States responds that "[b]ecause the U.S. notice of appeal covers the Panel's findings and related legal interpretations regarding Antidumping Agreement Article 18.1 and SCM Agreement 13.2 [*sic*], the matters addressed in Section IV are plainly covered by the notice of appeal."[119]

199. A plain reading of the first numbered paragraph of the United States' Notice of Appeal, which the United States submits includes the claim that the Panel exceeded its terms of reference by ruling on the CDSOA in combination with other laws, reveals that there is no explicit reference to Article 7 of the DSU. Nor is there any allegation, explicit or implied, that the Panel exceeded its terms of reference with respect to any of its findings. Indeed, no such claim is apparent in any of the paragraphs of the Notice of Appeal.

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[114]United States' letter dated 8 November 2002. For the full text of the United States' Notice of Appeal, see Annex 1 to this Report.

[115]United States' appellant's submission, para. 131.

[116]Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand.

[117]Norway.

[118]Canada's letter dated 5 November 2002.

[119]United States' letter dated 8 November 2002.

200. We do not agree with the United States' contention that the first numbered paragraph of the United States' Notice of Appeal, referring generally to the Panel's failure properly to interpret Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, "plainly covers" a claim that the Panel exceeded its terms of reference. As we have said, the Notice of Appeal "serve[s] to ensure that the appellee also receives notice, albeit brief, of the 'nature of the appeal' and the 'allegations of errors' by the panel."[120] Generic statements such as that relied upon by the United States cannot serve to give the appellees adequate notice that they will be required to defend against a claim that the Panel exceeded its terms of reference. This is particularly so for procedural errors; it can be especially difficult to discern a claim of procedural error by a panel from general references to panel findings or from extracts of a panel report, because allegations of procedural error by a panel may not necessarily be raised until the appellate stage.

201. Therefore, we agree with Canada and other participants that the Notice of Appeal does not provide adequate notice that a claim that the Panel exceeded its terms of reference in ruling on the CDSOA in combination with other laws would be argued by the United States on appeal.

202. Canada, supported by other appellees[121] and one third participant[122], also challenges the United States' arguments set out in Section VI of the United States' appellant's submission as being outside the scope of appeal because they were not included in the Notice of Appeal. Section VI of the United States' appellant's submission is entitled "The Panel Erred in Issuing an Advisory Opinion on a Measure Outside of Its Terms of Reference." The United States contends in that Section that the Panel rendered an "advisory opinion" by making a finding on a measure that was not before it, when it said:

> 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.[123]

203. The United States argues that because there was no measure before the Panel regarding payments funded directly from the United States Treasury, the Panel had no authority to make this finding.

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[120]Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 62.

[121]Australia, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand.

[122]Norway.

[123]Panel Report, para. 7.22.

204. Canada, supported by other participants, alleges that Section VI of the United States' appellant's submission relates to a claim as to "the exercise of jurisdiction by the Panel under Article 7 of the DSU"[124], which was not in the Notice of Appeal. Canada requests us to rule that this claim of the United States is outside the scope of appellate review. The United States responds that "[b]ecause the U.S. notice of appeal covers the Panel's findings and related legal interpretations regarding Antidumping Agreement Article 18.1 and SCM Agreement Article 13.2 [*sic*], the matters addressed in Section VI are well within the scope of the notice of appeal."[125]

205. We have already explained that we see no reference, explicit or implicit, in the Notice of Appeal regarding the Panel's exceeding its terms of reference. Therefore, our reasoning above applies equally to the United States' claim regarding the alleged advisory opinion in the Panel Report.

206. Having concluded that the Notice of Appeal does not provide notice to the appellees that the United States intended to make claims that the Panel exceeded its terms of reference, the next question is whether we are precluded from examining these claims on appeal. As we have explained, if an appellee has not received sufficient notice in the Notice of Appeal that a particular claim will be advanced by the appellant, that claim normally will be excluded from the appeal. However, we observe that the United States has argued in this appeal that we are entitled to examine questions of jurisdiction in any event, even if not included in the Notice of Appeal.[126]

207. We agree with the United States' position. We have stated previously, in relation to a panel's obligation to address issues related to its jurisdiction, that:

> … panels have to address and dispose of certain issues of a fundamental nature, even if the parties to the dispute remain silent on those issues. In this regard, we have previously observed that "[t]he vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings." For this reason, panels cannot simply ignore issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters. Rather, panels must deal with such issues – if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed.[127] (footnote omitted)

[124]Canada's letter dated 5 November 2002.

[125]United States' letter of 8 November 2002.

[126]United States' response to questioning at the oral hearing.

[127]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

208. In our view, the same reasoning applies in this case. As we have said, "[a]n objection to jurisdiction should be raised as early as possible"[128] and it would be preferable, in the interests of due process, for the appellant to raise such issues in the Notice of Appeal, so that appellees will be aware that this claim will be advanced on appeal. However, in our view, the issue of a panel's jurisdiction is so fundamental that it is appropriate to consider claims that a panel has exceeded its jurisdiction even if such claims were not raised in the Notice of Appeal.

209. It is convenient to proceed now with a consideration of the United States' claims that the Panel exceeded its terms of reference "by examining claims concerning the CDSOA in combination with other U.S. laws and regulations" and "in issuing an advisory opinion on a measure outside of its terms of reference."[129]

210. Turning to the first of the United States' contentions, the Panel stated, in connection with its discussion on whether the CDSOA operates "against" dumping or a subsidy, that:

> 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 producer".[130] (emphasis added; footnote omitted)

211. In addition, the Panel said in a footnote:

> 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 <u>combination</u> of anti-dumping duties and offset payment subsidies in the particular circumstances of the CDSOA.[131] (original underlining)

212. In our view, these statements do not constitute a finding by the Panel that was outside its terms of reference. The Panel was merely reflecting in its reasoning the fact that the CDSOA does not operate in a vacuum but, rather, operates in a context that includes other laws and regulations. The Panel's view was that the combination of anti-dumping duties (or countervailing duties) and CDSOA offset payments distorts the competitive relationship between dumped (subsidized) and domestic

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[128]Appellate Body Report, *US – 1916 Act*, para. 54.

[129]United States' appellant's submission, Sections IV and VI.

[130]Panel Report, para. 7.36.

[131]*Ibid*., para. 7.119 and footnote 334 thereto.

products, to the detriment of dumped (subsidized) products. This led the Panel to find that the CDSOA—alone—has an adverse bearing on dumping (subsidization) and, therefore, operates "against" dumping (subsidies) within the meaning of Article 18.1 of the *Anti-Dumping Agreement* (and Article 32.1 of the *SCM Agreement*). Therefore, we dismiss the claim of the United States that the Panel exceeded its terms of reference by examining claims concerning the CDSOA "in combination" with other United States laws and regulations.

213. We turn next to the United States' contention that the Panel erred in issuing an "advisory opinion" on a measure outside of its terms of reference. The United States takes issue with the following statement by the Panel:

> 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.[132]

214. We note that the Panel made this observation in response to the United States' argument that the fact that CDSOA distributions are funded by proceeds from anti-dumping and countervailing duties does not render the CDSOA a "specific action against dumping."[133] The Panel reasoned that, even if the offset payments were funded directly from the United States Treasury, and in an amount unrelated to the collected duties, it would still "reach the conclusion … that offset payments may be made only in situations presenting the constituent elements of dumping."[134] We do not agree with the United States that, in making this statement, the Panel was making a finding on a matter that was outside the Panel's terms of reference. In our view, the Panel was simply making an observation to make it abundantly clear that its finding was in no way based on the fact that offset payments are

[132]Panel Report, para. 7.22.

[133]*Ibid*., para. 7.20. See also Panel Report, para. 4.504, which sets out, in relevant part, the United States' contention in its first oral statement, that "the complaining parties' primary argument is that because the source of the funds for the distributions under CDSOA are AD/CVD duties, the CDSOA is, on its face, inconsistent with the Antidumping and SCM Agreements. The reality is that, because money is fungible, the only real connection between the funds distributed under CDSOA and the orders is that the duties collected serve to cap or limit the amount of the annual distributions."

[134]Panel Report, para. 7.22.

funded from collected anti-dumping duties. Therefore, we dismiss the United States' claim that the Panel issued an "advisory opinion" exceeding its terms of reference.[135]

B. *Allegations Regarding the Scope of Appellate Review Under Article 17.6 of the DSU*

215. We turn next to the second procedural issue raised by Canada[136], supported by other appellees[137] and one third participant[138], namely the issue whether the United States included arguments and evidence in its appellant's submission that are outside the scope of appellate review by virtue of Article 17.6 of the DSU. Specifically, Canada points to the comments in paragraphs 120 and 121 of the United States' appellant's submission regarding two letters referred to in paragraphs 7.62 and 7.45 of the Panel Report. In addition, Canada contends that footnotes 148 and 149 of the United States' appellant's submission refer to evidence that was not before the Panel.

216. In examining these questions, we recall first that Article 17.6 of the DSU provides:

> An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel.

1. The United States' Comments About Letters Before the Panel

217. In paragraphs 7.45 and 7.62 of the Panel Report, the Panel refers to a letter from a United States producer[139] which, according to the Panel, demonstrates that that producer changed its position concerning an application after initiation of the investigation, and decided to express support for the application to impose anti-dumping and countervailing duties in order to remain eligible for possible offset payment subsidies.[140] In the same paragraphs, the Panel also referred to a letter from a lawyer dated 8 January 2001[141], which, according to the Panel, illustrates the potential for the CDSOA to encourage domestic producers to support applications for the imposition of dumping or countervailing

[135] We observe that the concept of "advisory opinion" has a special meaning in the context of international adjudication. A number of international courts and tribunals, including the International Court of Justice and the European Court of Justice, provide in their statutes or rules for the provision of such opinions upon the request of States or of certain authorized bodies.

[136] Canada's letter dated 5 November 2002; Canada's appellee's submission, paras. 149-157.

[137] Australia, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand.

[138] Norway.

[139] Brief of Fred Tebb & Sons, Inc., dated 22 March 2002, filed by Canada on 27 March 2002 in the Panel proceedings. (Exhibit CDA-20)

[140] Panel Report, para. 7.62.

[141] 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.

duties.[142] The Panel referred to those letters in paragraph 7.62 to support its finding that the United States failed to comply with its obligations under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* (more specifically, as regards the issue that the CDSOA operates as an incentive for domestic producers to support applications for imposition of anti-dumping and countervailing duties). These letters were also cited in paragraph 7.45 in relation to the finding that the CDSOA is contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* (more specifically, as regards the question whether the CDSOA operates "against" dumping or subsidies within the meaning of those provisions).

218. The United States makes the following comments on the letters in paragraphs 120 and 121 of its appellant's submission:

> Moreover, the examination of the letter reveals that the letter is not what the Panel claimed it to be. It is neither a letter from a "domestic producer" nor a letter changing positions. In fact, the company that authored the letter states therein that it is expressing its "continuing" support for the petitions (*i.e.*, it is not expressing a change in position), citing a letter it submitted to the ITC over a month earlier in which the producer had already expressed support for the petition. Moreover, the company had entered an appearances before the ITC and Commerce as a "foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise" - not a domestic producer. Thus, the letter is irrelevant to the issue for which the Panel cited it. Contrary to the claim of the Panel, the company did not change its position.[143] (footnotes omitted)

[142]Panel Report, para. 7.45.

[143]United States' appellant's submission, para. 120.

> The Panel also cited a letter in which a U.S. producer purportedly urged other domestic producers to support a petition against Canadian softwood lumber imports by citing the CDSOA. Examination of the letter referencing the CDSOA, however, shows that it was not written by a domestic producer, but instead by a law firm *informing* domestic producers of the merits and circumstances of their case, as well as various provisions of U.S. law including the CDSOA. Importantly, the letter counsels that petitioners/supporters cannot count on obtaining funds under the CDSOA. The letter does not try to use the CDSOA to induce other domestic producers to support a petition. It certainly does not promise CDSOA disbursements if domestic producers support the petition. Furthermore, there is no indication that the letter actually had the effect of influencing any domestic producers to support the petition, much less to support a petition it otherwise would not but for the potential to become eligible for CDSOA offsets. [144] (original emphasis; footnotes omitted)

219. Canada agrees that the two letters referred in paragraphs 120-121 of the United States appellant's submission were in evidence before the Panel. Canada's objection is that the United States is prohibited by virtue of Article 17.6 of the DSU from challenging the "credibility and weight the Panel attached to the two letters." [145] Canada argues that the Panel's statements about the letters did not form part of its legal reasoning. Therefore, according to Canada, we cannot consider the United States' explanations about the nature of the letters because there is "no question of legal characterisation by the Panel of facts before it in respect of the two letters". [146]

220. We do not regard the United States' comments in paragraphs 120-121 as impugning the Panel's factual findings on the two letters. In our view, the United States' comments form part of its challenge to the Panel's legal conclusions that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, as well as with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Whether such findings are supported by those letters is an issue of law, properly raised by the United States in its Notice of Appeal, on which we have the authority to decide under Article 17.6 of the DSU.

2. Allegations of New Evidence in Footnotes 148 and 149

221. In footnotes 148 and 149 of the United States' appellant's submission, the United States cites various documents in connection with its challenge to the Panel's conclusions about the import of the

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[144]United States' appellant's submission, para. 121.

[145]Canada's appellee's submission, para. 155.

[146]*Ibid.*

two letters referred to above, noting that they are "available on the public record".[147] According to Canada[148], supported by other participants[149], the documents constitute new evidence that was not before the Panel and, consequently, our consideration of that evidence is beyond the scope of appellate review by virtue of Article 17.6 of the DSU.

222. We agree with the submission of Canada. It is not disputed that footnotes 148 and 149 of the United States' appellant's submission refer to documents that were not part of the Panel record. The United States submits that it referred to the documents "to provide the Appellate Body with a greater understanding of the facts involved in the dispute".[150] However, Article 17.6 is clear in limiting our jurisdiction to issues of law covered in panel reports and legal interpretations developed by panels. We have no authority to consider new facts on appeal. The fact that the documents are "available on the public record" does not excuse us from the limitations imposed by Article 17.6. We note that the other participants have not had an opportunity to comment on those documents and, in order to do so, may feel required to adduce yet more evidence. We would also be precluded from considering such evidence. We find, therefore, that the documents referred to in footnotes 148 and 149 of the United States' appellant's submission that were not part of the Panel record, constitute new evidence. Consequently, by virtue of Article 17.6 of the DSU, we are precluded from taking those documents into account in deciding this appeal.

VI. Issues Raised in This Appeal

223. The following issues are raised in this appeal:

(a) whether the Panel erred in finding, in paragraphs 7.51 and 8.1 of the Panel Report, that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and Article 32.1 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*");

[147]United States' appellant's submission, footnotes 148 and 149.

[148]Canada's letter dated 5 November 2002; Canada's appellee's submission, paras. 149-157.

[149]Australia, Chile, the European Communities, India, Indonesia, Japan, Korea, Norway and Thailand.

[150]United States' letter dated 8 November 2002.

(b) whether the Panel erred in finding, in paragraphs 7.66 and 8.1 of the Panel Report, that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*;

(c) whether the Panel erred in finding, in paragraphs 7.93 and 8.1 of the Panel Report, that the CDSOA is inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* and that, therefore, the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI.4 of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*");

(d) whether the Panel erred in finding, in paragraph 8.4 of the Panel Report, that, pursuant to Article 3.8 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under those Agreements; and

(e) whether the Panel acted inconsistently with Article 9.2 of the DSU by rejecting, in paragraph 7.6 of the Panel Report, the request by the United States for a separate panel report on the dispute brought by Mexico.

VII. Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*

224. We turn now to the United States' appeal of the Panel's conclusion that the CDSOA is a non-permissible specific action against dumping, contrary to Article 18.1 of the *Anti-Dumping Agreement*, and a non-permissible specific action against a subsidy, contrary to Article 32.1 of the *SCM Agreement*.[151] We will start by reviewing briefly the Panel's analysis of this issue.

225. The Panel began its analysis by referring to our ruling in *US – 1916 Act*, where we said:

> 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.[152] (original emphasis; footnote omitted)

[151]Panel Report, para. 7.51.

[152]Appellate Body Report, *US – 1916 Act*, para. 122.

226. The Panel decided that this ruling is not conclusive of whether the CDSOA is a specific action against dumping or a subsidy for three reasons. *First*, the Panel observed that, in *US – 1916 Act*, we were not interpreting Article 18.1 of the *Anti-Dumping Agreement*, as such, but were rather referring to that Article in order to clarify the scope of application of Article VI of the *General Agreement on Tariffs and Trade* (the "GATT 1994").[153] *Second*, the Panel noted that we were not required to consider, in deciding that appeal, the meaning of the word "against" as used in Article 18.1 of the *Anti-Dumping Agreement*, because there was no disagreement between the participants in that dispute that the measure at issue, which imposed criminal and civil liabilities on importers engaged in dumping, constituted action "against" dumping.[154] *Third*, the Panel opined that the category of action "in response to" dumping is broader than the category of action "against" dumping.[155]

227. Having decided that our ruling in *US – 1916 Act* was not dispositive of the issues in the present case, the Panel developed the following standard to determine whether a measure is a specific action against dumping or a subsidy: a measure will constitute specific action against dumping or a subsidy if: (1) it acts "specifically" in response to dumping or a subsidy, in the sense that the measure may be taken *only* in situations presenting the constituent elements of dumping or a subsidy; and (2) it acts "against" dumping or a subsidy, in the sense that the measure has an *adverse bearing* on the practice of dumping or on the practice of subsidization.[156]

228. Applying this standard to the CDSOA, the Panel, as a preliminary matter, determined that the CDSOA is a "specific action related to"[157] dumping or a subsidy. According to the Panel, the CDSOA meets the first condition of the standard because CDSOA payments may be made *only* in situations where the constituent elements of dumping (or of a subsidy) are present. The Panel also pointed out that CDSOA offset payments follow automatically from the collection of anti-dumping (or countervailing) duties, which in turn may be collected only following the imposition of anti-dumping (or countervailing duty) orders, which in turn may be imposed only following a determination of dumping (or subsidization). The Panel thus determined that the CDSOA is a specific

[153]Panel Report, para. 7.15.

[154]*Ibid*., para. 7.16.

[155]*Ibid*., para. 7.17.

[156]*Ibid*., para. 7.18. In paragraph 7.18, the Panel refers only to dumping. We understand, however, that, in the light of the conclusion the Panel reached in paragraph 7.51, the two conditions set out in paragraph 7.18 extend *mutatis mutandis* to Article 32.1 of the *SCM Agreement*, which deals with subsidies.

[157]Panel Report, para. 7.23.

action related to dumping (or subsidization) because there is a "clear, direct and unavoidable connection"[158] between the determination of dumping (or subsidization) and CDSOA offset payments.

229. Moving to the question whether the CDSOA acts "against" dumping or a subsidy, in the sense that it has an adverse bearing on dumping or a subsidy, the Panel affirmed that Article 18.1 of the *Anti-Dumping Agreement* (and Article 32.1 of the *SCM Agreement*) concerns measures that act against dumping as a practice (or subsidization as a practice), and do not require that the measure at issue must act against the imported dumped (or subsidized) product, or entities connected to, or responsible for, the dumped (or subsidized) product, such as the importer, exporter, or foreign producer.[159] The Panel added that the term "against" in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* encompasses measures having a direct, as well as indirect, adverse bearing on the practice of dumping (or subsidization).[160]

230. Two considerations led the Panel to find that the CDSOA operates "against" dumping (or a subsidy), in the sense that it has an adverse bearing on dumping (or a subsidy). First, according to the Panel, the CDSOA acts against dumping (or a subsidy) by conferring on affected domestic producers, which incur qualifying expenses, an offset payment subsidy that would allow them to establish a competitive advantage over dumped (or subsidized) imports. Second, the Panel was of the view that the CDSOA has an adverse bearing on dumping (or a subsidy) because it provides a financial incentive for domestic producers to file anti-dumping (or countervail) applications, or at least to support such applications, in order to establish their eligibility for offset payments.

231. The Panel noted that, in our Report in *US – 1916 Act*, we found that Article VI of the GATT 1994, in particular Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limits the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings.[161] The Panel took the view that a similar approach should apply in respect of the permissible responses to subsidization.[162] The Panel observed that Part V of the *SCM Agreement* foresees definitive countervailing duties, provisional measures and undertakings, whereas Part III foresees countermeasures. According to the Panel, these are the permissible responses to subsidization.[163] Because the CDSOA does not fall within the range of the permissible responses to

[158]Panel Report, para. 7.21.

[159]*Ibid*., para. 7.33.

[160]*Ibid*.

[161]*Ibid*., para. 7.7.

[162]*Ibid*.

[163]*Ibid*.

dumping under Article VI of the GATT 1994 and the *Anti-Dumping Agreement*, or within the range of the permissible responses to subsidization under the GATT 1994 and the *SCM Agreement*, the Panel concluded that the CDSOA constitutes a non-permissible specific action against dumping, contrary to Article 18.1 of the *Anti-Dumping Agreement*, and a non-permissible specific action against a subsidy, contrary to Article 32.1 of the *SCM Agreement*.

232. In addition, the Panel rejected the United States' argument that the CDSOA is an action permitted by virtue of footnote 24 to Article 18.1 of the *Anti-Dumping Agreement* and footnote 56 to Article 32.1 of the *SCM Agreement*. According to the Panel, a measure that has been characterized as "specific" under Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement* cannot be permitted under those footnotes, because the footnotes cover *non-specific* actions against dumping or a subsidy. In other words, the "actions" covered in the provisions and the "actions" covered in the footnotes are mutually exclusive.

233. On appeal, the United States contends that the Panel erred in finding that the CDSOA constitutes specific action against dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and specific action against a subsidy within the meaning of Article 32.1 of the *SCM Agreement*, and asks us to reverse the Panel's finding that the CDSOA is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

234. We begin our analysis with a review of the relevant provisions. Article 18.1 of the *Anti-Dumping Agreement* reads as follows:

> *Final Provisions*
>
> 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.[24]
>
> _____
>
> [24] This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

235. Article 32.1 of the *SCM Agreement* reads as follows:

> *Other Final Provisions*
>
> No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.[56]
>
> _____
>
> [56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

236. Looking to the ordinary meaning of the words used in these provisions, we read them as establishing two conditions precedent that must be met in order for a measure to be governed by them. The first is that a measure must be "specific" to dumping or subsidization. The second is that a measure must be "against" dumping or subsidization. These two conditions operate together and complement each other. If they are not met, the measure will not be governed by Article 18.1 of the *Anti-Dumping Agreement* or by Article 32.1 of the *SCM Agreement*. If, however, it is established that a measure meets these two conditions, and thus falls within the scope of the prohibitions in those provisions, it would then be necessary to move to a further step in the analysis and to determine whether the measure has been "taken in accordance with the provisions of GATT 1994", as interpreted by the *Anti-Dumping Agreement* or the *SCM Agreement*. If it is determined that this is not the case, the measure would be inconsistent with Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.

A. *The Term "Specific" in the Phrase "Specific Action Against" Dumping or a Subsidy*

237. We observe that Article 18.1 of the *Anti-Dumping Agreement* is identical in language, terminology and structure to Article 32.1 of the *SCM Agreement,* except for the reference to dumping instead of subsidy. The Panel analyzed the terms "specific" and "against" in Article 18.1 in the same manner as it did with respect to their use in Article 32.1. We agree with the Panel's approach. We also note that the United States does not challenge such approach and that, at the oral hearing, none of the appellees or third participants expressed the view that the terms, as used in Article 18.1 should have a different meaning as used in Article 32.1.

238. As mentioned above, in *US – 1916 Act,* we interpreted the phrase "specific action against dumping" in Article 18.1 of the *Anti-Dumping Agreement*. We said:[164]

[164] Appellate Body Report, *US – 1916 Act*, para. 122.

> In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present.[66]
>
> ---
>
> [66] We do not find it necessary, in the present cases, to decide whether the concept of "specific action against dumping" may be broader.

Given that Article 18.1 of the *Anti-Dumping Agreement* and 32.1 of the *SCM Agreement* are identical except for the reference in the former to dumping, and in the latter to a subsidy, we are of the view that this finding is pertinent for both provisions.

239. We recall that, in *US – 1916 Act*, the United States argued that the 1916 Act did not fall within the scope of Article VI of the GATT 1994 because it targeted predatory pricing, as opposed to dumping. We disagreed, and determined that the 1916 Act was a "specific action against dumping" because the constituent elements of dumping were "built into"[165] the essential elements of civil and criminal liability under the 1916 Act. We also found that the "wording of the 1916 Act … makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of 'dumping'."[166] Accordingly, a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a "specific action" in response to dumping within the meaning of Article 18.1 of the *Anti-Dumping Agreement* or a "specific action" in response to subsidization within the meaning of Article 32.1 of the *SCM Agreement*. In other words, the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. Such link or correlation may, as in the 1916 Act, be derived from the text of the measure itself.

240. This leads to the question of how to determine what are the constituent elements of dumping or a subsidy. We recall that, in *US – 1916 Act*, we said the constituent elements of dumping are found in the definition of dumping in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the

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[165] Appellate Body Report, *US – 1916 Act*, para. 130.

[166] *Ibid*. (original emphasis)

Anti-Dumping Agreement.[167] As regards the constituent elements of a subsidy, we are of the view that they are set out in the definition of a subsidy found in Article 1 of the *SCM Agreement*.[168]

241. We turn now to determine whether the CDSOA is a "specific action" against dumping or subsidization within the meaning of Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.

242. In our view, the Panel was correct in finding that the CDSOA is a specific action related to dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.[169] It is clear from the text of the CDSOA, in particular from Section 754(a) of the Tariff Act[170], that the CDSOA offset payments are inextricably linked to, and strongly correlated with, a determination of dumping, as defined in Article VI:1 of the GATT 1994 and in the *Anti-Dumping Agreement*, or a determination of a subsidy, as defined in the *SCM Agreement*. The language of the CDSOA is unequivocal. *First*, CDSOA offset payments can be made *only* if anti-dumping duties or countervailing duties have been collected. *Second*, such duties can be collected *only* pursuant to an anti-dumping duty order or countervailing duty order. *Third*, an anti-dumping duty order can be imposed *only* following a determination of dumping, as defined in Article VI:1 of the GATT 1994 and in the *Anti-Dumping Agreement*. *Fourth*, a countervailing duty order can be imposed only following a determination that exports have been subsidized, according to the definition of a subsidy in the *SCM Agreement*. In the light of the above elements, we agree with the Panel that "there is a clear, direct and unavoidable connection between the determination of dumping and CDSOA offset payments"[171], and we believe the same to be true for subsidization. In other words, it seems to us unassailable that CDSOA offset payments can be made only following a determination that the constituent elements of dumping or subsidization are present. Therefore, consistent with the test established in *US – 1916 Act*, we find that the CDSOA is "specific action"

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[167]Appellate Body Report, *US – 1916 Act*, paras. 105-106 and 130.

[168]In response to questioning at the oral hearing, the participants did not dispute that the constituent elements of dumping refer to the definition of dumping in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the *Anti-Dumping Agreement*, and that the constituent elements of a subsidy refer to the definition of a subsidy found in Article 1 of the *SCM Agreement*.

[169]Panel Report, para. 7.23.

[170]Section 754(a) of the Tariff Act provides:

> 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".

[171]Panel Report, para. 7.21.

related to dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.

243. In its appellant's submission, the United States argues that the CDSOA is not specific action related to dumping or to a subsidy because, contrary to the 1916 Act examined in a previous appeal, the language of the CDSOA does not refer to the constituent elements of dumping (or of a subsidy), and dumping (or subsidization) is not the trigger for application of the CDSOA.[172] The United States suggested at the oral hearing that the CDSOA is not "specific" because the constituent elements of dumping or of a subsidy do not form part of the essential components of the CDSOA. In addition, the United States submits that, according to the Panel's reasoning, *any* expenditure of collected anti-dumping (or countervailing) duties, including expenditure for international emergency relief, would be characterized as specific action against dumping (or a subsidy). For the United States, the Panel's approach "cannot withstand scrutiny."[173]

244. We disagree with these arguments. The criterion we set out in *US – 1916 Act* for specific action in response to dumping is not whether the constituent elements of dumping or of a subsidy are explicitly referred to in the measure at issue, nor whether dumping or subsidization triggers the application of the action, nor whether the constituent elements of dumping or of a subsidy form part of the essential components of the measure at issue. Our analysis in *US – 1916 Act* focused on the strength of the link between the measure and the elements of dumping or a subsidy. In other words, we focused on the degree of correlation between the scope of application of the measure and the constituent elements of dumping or of a subsidy. In noting that the "wording of the 1916 Act also makes clear that these actions can be taken *only* with respect to conduct which presents the constituent elements of 'dumping'"[174], we did not *require* that the language of the measure include the constituent elements of dumping or of a subsidy. This is clear from our use of the word "also", which suggests that this aspect of the 1916 Act was a supplementary reason for our finding, and not the basis for it. Indeed, we required that the constituent elements of dumping (or of a subsidy) be "present"[175], which in our view can include cases where the constituent elements of dumping and of a subsidy are implicit in the measure. Thus, we agree with the European Communities, India, Indonesia and Thailand that the "test"[176] established in *US – 1916 Act* "is met not only when the constituent elements of dumping are 'explicitly built into' the action at issue, but also where … they are implicit in

[172]United States' appellant's submission, para. 18.

[173]*Ibid*., para. 20.

[174]Appellate Body Report, *US – 1916 Act*, para. 130. (original emphasis)

[175]*Ibid*., para. 122.

[176]European Communities', India's, Indonesia's and Thailand's appellees' submission, para. 14.

the express conditions for taking such action."[177] In fact, the presence of the constituent elements of dumping and of a subsidy is implied by the very words of the CDSOA, which refer to "[d]uties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 …".[178]

245. We also disagree with the submission of the United States that, under the Panel's reasoning, any expenditure of the collected anti-dumping (or countervailing) duties would be characterized as a specific action against dumping (or a subsidy). This submission does not take into account the express terms of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, which, as we said earlier, contain two conditions precedent, namely that the action be "specific" to dumping or a subsidy, and that it be "against" dumping or a subsidy. To refer to the example given by the United States, international emergency relief financed from collected anti-dumping or countervailing duties would not, in our opinion, be subject to the prohibitions of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, because such action would have no effect whatsoever on dumping or subsidization and, therefore, could not be characterized as operating "against" dumping or a subsidy. As the Panel noted, we did not focus on the word "against" in our ruling in *US – 1916 Act*, because there was no dispute there that the measure (imposing civil and criminal liabilities on importers) was indeed "against" something—the question there was whether the action was against dumping, or some other conduct (predatory pricing).[179]

B. *The Term "Against" in the Phrase "Specific Action Against" Dumping or a Subsidy*

246. We move now to an analysis of the term "against" as used in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. As mentioned above, Article 18.1 of the *Anti-Dumping Agreement* is identical in language, terminology and structure to Article 32.1 of the *SCM Agreement*, except for the reference to dumping instead of subsidy, and therefore we will proceed, as the Panel did, with an analysis of the word "against" on the basis that it has the same meaning in both provisions. We note that neither the United States nor any of the appellees objects to this approach.

247. We agree with the Panel that our statement in *US – 1916 Act*—to the effect that "the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of 'dumping'"[180]—

[177]European Communities', India's, Indonesia's and Thailand's appellees' submission, para. 14.

[178]Section 754(a) of the Tariff Act.

[179]Panel Report, para. 7.16.

[180]Appellate Body Report, *US – 1916 Act*, para. 122.

is not conclusive as to the nature of the condition flowing from the term "against". The Panel took the position that an action operates "against" dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* if it has an *adverse bearing* on dumping or subsidization.[181] The United States criticizes this approach, contending that an action is "against" dumping or a subsidy if it is "in hostile/active opposition" to dumping or a subsidy.[182] The United States puts emphasis on the argument that an action, in order to be characterized as being "against" dumping or a subsidy, must "come into contact with"[183] dumping or a subsidy, in the sense of "operating directly"[184] on the imported good, or the entity responsible for the dumped or subsidized good.[185] In the view of the United States, the Panel erred by finding that the term "against" in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* encompasses any form of adverse bearing, whether it be direct or indirect, and by finding that this term does not imply a requirement that the action applies directly to the imported good or an entity responsible for it, and is burdensome.[186] The United States contends that such a requirement derives from the ordinary meaning of the term "against". Specifically, the United States relies on a definition found in the *New Shorter Oxford English Dictionary*, according to which "against" means "in contact with".[187] In order to identify the ordinary meaning of the term "against" as used in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, the United States posits three definitions of that term: (1) "of motion or action in opposition"; (2) "in hostility or active opposition to"; and (3) "in contact with".[188]

248. In our view, the first and second definitions invoked by the United States could, arguably, have some relevance in identifying the ordinary meaning of the term "against" as used in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement.* However, we do not believe the third definition is appropriate given the substance of Articles 18.1 and 32.1. Indeed, the third definition refers to physical contact between two objects and, thus, in our view, is irrelevant to the idea of opposition, hostility or adverse effect that is conveyed by the word "against" as used in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. It should be

[181]Panel Report, para. 7.18 and footnote 271 thereto.

[182]United States' appellant's submission, para. 31.

[183]*Ibid*., para. 32.

[184]*Ibid*., para. 33.

[185]*Ibid*.

[186]Panel Report, para. 7.33.

[187]United States' appellant's submission, para. 31.

[188]*Ibid*.

remembered that dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents.

249. We also note that the third dictionary definition cited by the United States is incomplete; not only does that dictionary definition refer to "in contact with", it also refers to "supported by". This latter element is difficult to reconcile with any idea of opposition, hostility or adverse bearing.[189]

250. Therefore, as the definition "in contact with" cannot be used to ascertain the ordinary meaning of "against" as used in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, we do not believe the United States is justified in using that definition to support its view that an action against dumping or a subsidy must have direct contact with the imported good, or the entity responsible for the dumped or subsidized good. More generally, we fail to see how such a meaning can be given to the term "against", which, given the substance of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, must relate to an idea of opposition, hostility or adverse effect.

251. A textual analysis of Articles 18.1 and 32.1 supports, rather than defeats, the finding of the Panel that these provisions are applicable to measures that do not come into direct contact with the imported good, or entities responsible for the dumped or subsidized good. We note that Article 18.1 refers only to measures that act against "dumping", and that there is no express requirement that the measure must act against the imported dumped product, or entities responsible for that product. Likewise, Article 32.1 of the *SCM Agreement* refers to specific action against "a subsidy", not action against the imported subsidized product or a responsible entity. The United States' contention is further contradicted by the contextual consideration that the *SCM Agreement* authorizes multilaterally-sanctioned countermeasures "against" a subsidy, which may consist of indirect action affecting other products.

252. Turning to considerations of object and purpose, we do not consider that the object and purpose of the *Anti-Dumping Agreement* and of the *SCM Agreement*, as reflected in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, support the incorporation into these provisions, through the term "against", of a requirement that the measure must come into direct contact with the imported good, or the entity responsible for it. Both provisions fulfil a function

[189]Further support for our view is found in the examples given by the *New Shorter Oxford English Dictionary* in relation to this definition:

> 17. W. OWEN Under his helmet, up against his pack, . . Sleep took him by the brow and laid him back. R. CHANDLER There was a bar against the right hand wall.

of limiting the range of actions that a Member may take unilaterally to counter dumping or subsidization.[190] Excluding from Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* actions that do not come into direct contact with the imported good or the entity responsible for the dumped or subsidized good, would undermine that function.

253. We, therefore, agree with the Panel that in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, there is no requirement that the measure must come into direct contact with the imported product, or entities connected to, or responsible for, the imported good such as the importer, exporter, or foreign producer. We also agree with the Panel that the test should focus on dumping or subsidization as *practices*.[191] Article 18.1 refers only to measures that act against "dumping"; there is no express requirement that the measure must act against the imported dumped product, or entities responsible for that product. Likewise, Article 32.1 of the *SCM Agreement* refers to specific action against "a subsidy", not to action against the imported subsidized product or a responsible entity.

254. Recalling the other two elements of the definition of "against" from the *New Shorter Oxford Dictionary* relied upon by the United States, namely "of motion or action in opposition" and "in hostility or active opposition to", to determine whether a measure is "against" dumping or a subsidy, we believe it is necessary to assess whether the design and structure of a measure is such that the measure is "opposed to", has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of dumping or the practice of subsidization, or creates an incentive to terminate such practices. In our view, the CDSOA has exactly those effects because of its design and structure.

255. The CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors. This is demonstrated by the following elements of the CDSOA regime. *First*, the CDSOA offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters. *Second*, the CDSOA offset payments are made to an "affected domestic producer", defined in Section 754(b) of the Tariff Act as "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 that "remains in operation". In response to our questioning at the oral hearing, the United States confirmed that the "affected domestic producers" which are eligible to receive payments under the CDSOA, are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or

[190]See *supra*, para. 231.

[191]Panel Report, para. 7.33.

countervail order. *Third*, under the implementing regulations issued by the United States Commissioner of Customs ("Customs") on 21 September 2001, the "qualifying expenditures" of the affected domestic producers, for which the CDSOA offset payments are made, "must be related to the production of the same product that is the subject of the related order or finding, with the exception of expenses incurred by associations which must relate to a specific case."[192] *Fourth*, Customs has confirmed that there is no statutory or regulatory requirement as to how a CDSOA offset payment to an affected domestic producer is to be spent[193], thus indicating that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position *vis-à-vis* their competitors, including the foreign competitors subject to anti-dumping or countervailing duties.

256. All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors—producers of like products—through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action "against" dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.

257. We note that the United States challenges what it views as the Panel's incorporation of a "conditions of competition test" in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*.[194] In our view, in order to determine whether the CDSOA is "against" dumping or subsidization, it was not necessary, nor relevant, for the Panel to examine the conditions of competition under which domestic products and dumped/subsidized imports compete, and to assess the impact of the measure on the competitive relationship between them. An analysis of the term "against", in our view, is more appropriately centred on the design and structure of the measure; such

[192]19 C.F.R. § 159.61(c).

[193]"Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers", United States Federal Register, 21 September 2001 (Volume 66, Number 184), p. 48549.

[194]United States' appellant's submission, para. 41. The Panel found that the CDSOA is a measure against dumping or a subsidy because it "has a specific adverse impact on the competitive relationship between domestic products and dumped [or subsidized] imports". (Panel Report, para. 7.39) According to the Panel, the CDSOA is against dumping or a subsidy because it affects competition between, on the one hand, dumped or subsidized products, and, on the other hand, domestic products, to the detriment of the imported products.

an analysis does not mandate an economic assessment of the implications of the measure on the conditions of competition under which domestic product and dumped/subsidized imports compete.

258. As mentioned above[195], the finding of the Panel that the CDSOA is a measure against dumping or a subsidy is also based on the view that the CDSOA provides a financial incentive for domestic producers to file or support applications for the initiation of anti-dumping and countervailing duty investigations, and that such an incentive will likely result in a greater number of applications, investigations and orders.[196] We agree with the United States that this consideration is not a proper basis for a finding that the CDSOA is "against" dumping or a subsidy; a measure cannot be against dumping or a subsidy simply because it facilitates or induces the exercise of rights that are WTO-consistent. The Panel's reasoning would give Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement* a scope of application that is overly broad. For example, the Panel's reasoning would imply that a legal aid program destined to support domestic small-size producers in anti-dumping or countervailing duty investigations should be considered a measure against dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, because it could be argued that such legal aid is a financial incentive likely to result in a greater number or applications, investigations and orders.

259. The United States also argues that the Panel erred in relying on the stated purpose of the CDSOA, as expressed in the "Findings of Congress" set forth in Section 1002 of the CDSOA, to support its finding that the CDSOA is a measure against dumping or a subsidy.[197] We note that the Panel referred to the "Findings of Congress", not as a *basis* for its conclusion that the CDSOA constitutes a specific action against dumping or subsidies, but rather as a consideration confirming that conclusion.[198] We agree with the Panel that the intent, stated or otherwise, of the legislators is not conclusive as to whether a measure is "against" dumping or subsidies under Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*. Thus, it was not necessary for the Panel to inquire into the intent pursued by United States legislators in enacting the CDSOA and to take this into account in the analysis. The text of the CDSOA provides sufficient information on the structure and design of the CDSOA, that is to say, on the manner in which it operates, to permit an analysis whether the measure is "against" dumping or a subsidy. Specifically, the text of the

[195]See *supra*, para. 230.

[196]Panel Report, para. 7.42.

[197]United States' appellant's submission, paras. 80-83. The United States, viewing the statutory provision entitled "Findings of Congress" as legislative history, stated at the oral hearing that a United States' court will not look to the legislative history of a statute unless that statute is ambiguous.

[198]Panel Report, para. 7.41.

CDSOA establishes clearly that, by virtue of that statute, a transfer of financial resources is effected from the producers/exporters of dumped or subsidized goods to their domestic competitors. This essential feature of the CDSOA constitutes, in itself, the decisive basis for concluding that the CDSOA is "against" dumping or a subsidy—because it creates the "opposition" to dumping or subsidization, such that it dissuades such practices, or creates an incentive to terminate them. Therefore, there was no need to examine the intent pursued by the legislators in enacting the CDSOA.[199] In our view, however, the Panel did not err in simply noting that the stated legislative intent, which appears in the statute itself, confirms the conclusion it had reached as to the scope of the measure.

C. *Footnote 24 of the Anti-Dumping Agreement and Footnote 56 of the SCM Agreement*

260. The United States challenges the way the Panel addressed footnote 24 of the *Anti-Dumping Agreement* and footnote 56 of the *SCM Agreement*, arguing that the Panel erred in declining to examine the import of the footnotes because it had already determined that the CDSOA was a "specific action" under Article 18.1 of the *Anti-Dumping Agreement* and under Article 32.1 of the *SCM Agreement*. The United States contends that these footnotes permit actions involving dumping or subsidies consistent with GATT 1994 provisions and not addressed by Article VI of the GATT 1994, and that these actions are not encompassed by the prohibitions against "specific action" in Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. In other words, according to the United States, an action that falls within footnotes 24 and 56 cannot be characterized as a "specific action" within the meaning of Article 18.1 of the *Anti-Dumping*

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[199] We discussed the role of the legislative or regulatory intent in *Japan – Alcoholic Beverages II*, where we examined whether a measure is consistent with Article III:2 of the GATT 1994. We said:

> This third inquiry under Article III:2, second sentence, must determine whether "directly competitive or substitutable products" are "not similarly taxed" in a way that affords protection. This is not an issue of intent. It is not necessary for a panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "*applied* to imported or domestic products so as to afford protection to domestic production". This is an issue of how the measure in question is *applied*. (original emphasis; underlining added)

(Appellate Body Report, *Japan – Alcoholic Beverages II*, at 119)

Agreement and Article 32.1 of the *SCM Agreement*, and such action would, therefore, not be WTO-inconsistent.[200]

261. We disagree with this argument. We note, first, that, in *US – 1916 Act*, we commented on footnote 24 as follows:

> Footnote 24 to Article 18.1 of the *Anti-Dumping Agreement* states:
>
> > This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.
>
> We note that footnote 24 refers generally to "action" and not, as does Article 18.1, to "specific action against dumping" of exports. "Action" within the meaning of footnote 24 is to be distinguished from "specific action against dumping" of exports, which is governed by Article 18.1 itself.[201]

262. The United States' reasoning is tantamount to treating footnotes 24 and 56 as the primary provisions, while according Articles 18.1 and 32.1 residual status. This not only turns the normal approach to interpretation on its head, but it also runs counter to our finding in *US – 1916 Act*. In that case, we provided guidance for determining whether an action is specific to dumping (or to a subsidy): an action is specific to dumping (or a subsidy) when it may be taken *only* when the constituent elements of dumping (or a subsidy) are present, or, put another way, when the measure is inextricably linked to, or strongly correlates with, the constituent elements of dumping (or of a subsidy). This approach is based on the *texts* of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, and not on the accessory footnotes. Footnotes 24 and 56 are clarifications of the main provisions, added to avoid ambiguity; they confirm what is implicit in Article 18.1 of the *Anti-Dumping Agreement* and in Article 32.1 of the *SCM Agreement*, namely, that an action that is *not* "specific" within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.

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[200]United States' appellant's submission, paras. 25-29.

[201]Appellate Body Report, *US – 1916 Act*, para. 123.

D. *Whether the CDSOA is in Accordance with the WTO Agreement*

263. Having determined that the CDSOA is a "specific action against" dumping or a subsidy within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, we move to the next step of our analysis, which is to determine whether the action is "in accordance with the provisions of the GATT 1994, as interpreted by" the *Anti-Dumping Agreement* or the *SCM Agreement*.

1. The *Anti-Dumping Agreement*

264. We interpreted "provisions of GATT 1994" as referred to in Article 18.1 of the *Anti-Dumping Agreement* in *US – 1916 Act*. In particular, we stated that the "provisions" are, in fact, the provisions of Article VI of the GATT 1994 concerning dumping:

> We recall that footnote 24 to Article 18.1 refers to "*other* relevant provisions of GATT 1994". These terms can only refer to provisions other than the provisions of Article VI concerning dumping. Footnote 24 thus confirms that the "provisions of GATT 1994" referred to in Article 18.1 are in fact the provisions of Article VI of the GATT 1994 concerning dumping.[202] (original emphasis)

265. We also stated in that appeal 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."[203] As CDSOA offset payments are not definitive anti-dumping duties, provisional measures or price undertakings, we conclude, in the light of our finding in *US – 1916 Act*, that the CDSOA is not "in accordance with the provisions of the GATT 1994, as interpreted by" the *Anti-Dumping Agreement*. It follows that the CDSOA is inconsistent with Article 18.1 of that Agreement.

2. The *SCM Agreement*

266. As regards subsidization, the United States argues that Article VI:3 of the GATT 1994, read in conjunction with Article 10 of the *SCM Agreement*, does not limit the permissible remedies for subsidies to duties. The United States submits that the legal regime governing permissible responses to dumping is different from that governing the permissible responses to subsidization. Therefore, it is inappropriate to rely on the reasoning from *US – 1916 Act* to determine what is meant by "in

[202] Appellate Body Report, *US – 1916 Act*, para. 125.

[203] *Ibid*., para. 137.

accordance with the provisions of the GATT 1994" as that phrase relates to permissible responses to subsidies.

267. The United States also submits that the CDSOA is in accordance with Article VI:3 of the GATT 1994 and the provisions of Part V of the *SCM Agreement*, because those provisions do not encompass *all* measures taken against subsidization; they contemplate *only* countervailing duties (and by implication, provisional measures and price undertakings).[204] Thus, it cannot properly be concluded that the CDSOA violates Article VI:3 of the GATT 1994 or the provisions of Part V of the *SCM Agreement*, because the CDSOA offset payments are *not* countervailing duties (or provisional measures or price undertakings), and, therefore, do not constitute an action covered by these provisions. In support of its submissions, the United States contrasts the language of Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement* with Article VI:3 of the GATT 1994 and Article 10 of the *SCM Agreement*.[205] The United States argues, on the basis of textual differences, that the conclusion we reached in *US – 1916 Act* that Article VI of the GATT 1994 encompasses all measures taken against dumping, was based on the specific language of Article VI:2 of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*. Therefore, according to the United States, such a conclusion should not be extended to the textually different subsidy provisions of Article VI of the GATT 1994 and of Part V of the *SCM Agreement*, which are limited to the imposition of countervailing duties (and by implication, provisional duties and price undertakings). In particular, the United States argues that the permissible responses to dumping are limited to definitive anti-dumping duties, provisional measures and price undertakings, because Article 1 of the *Anti-Dumping Agreement* refers to anti-dumping *measures*, a generic expression that encompasses *all* measures taken against dumping, and not only duties. Article 10 of the *SCM Agreement*, by contrast, refers to countervailing *duties*, and thus only countervailing duties (and, by implication, provisional duties and price undertakings) are governed by Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement*.

[204]United States' appellant's submission, paras. 84-92.

[205]The United States contrasts the terms "may levy … an anti-dumping duty" in Article VI:2 with "[n]o countervailing duty shall be levied" in Article VI:3; the United States also contrasts the reference to an "antidumping measure" and to "action … taken under anti-dumping legislation or regulations" in Article 1 of the *Anti-Dumping Agreement* with the use of the expression "countervailing duty" and "countervailing duties" in Article 10 of the *SCM Agreement*. (United States' appellant's submission, para. 87)

268. We disagree with these submissions for the following reasons. As the Panel noted, our analysis in *US – 1916 Act* "was not based on any particular AD provision in isolation, but on the AD Agreement as a whole."[206] We agree with the Panel that:

> Since the Appellate Body's analysis [in *US – 1916 Act*] 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.*[207] (emphasis added)

As pointed out above, Article 32.1 of the *SCM Agreement* is identical in terminology and structure to Article 18.1 of the *Anti-Dumping Agreement*, except for the reference to subsidy instead of dumping. We endorse Canada's contention that "[t]his identical wording gives rise to a strong interpretative presumption that the two provisions set out the same obligation or prohibition."[208]

269. Article VI of the GATT 1994 and the *Anti-Dumping Agreement* identify three responses to dumping, namely, definitive anti-dumping duties, provisional measures and price undertakings. No other response is envisaged in the text of Article VI of the GATT 1994, or the text of the *Anti-Dumping Agreement*. Therefore, to be in accordance with Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, a response to dumping must be in one of these three forms. We confirmed this in *US – 1916 Act*. We fail to see why similar reasoning should not apply to subsidization. The GATT 1994 and the *SCM Agreement* provide four responses to a countervailable subsidy: (i) definitive countervailing duties; (ii) provisional measures; (iii) price undertakings; and (iv) multilaterally-sanctioned countermeasures under the dispute settlement system. No other response to subsidization is envisaged in the text of the GATT 1994, or in the text of the *SCM Agreement*. Therefore, to be "in accordance with the GATT 1994, as interpreted by" the *SCM Agreement*, a response to subsidization must be in one of those four forms.

270. We note that interpreting these provisions as limiting the permissible responses to a countervailable subsidy to the four remedies envisaged in the *SCM Agreement* and the GATT 1994 is consistent with footnote 35 to Article 10 of the *SCM Agreement*, and with the function of Article 32.1 of the *SCM Agreement*. Footnote 35 reads as follows:

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[206]Panel Report, para. 7.7.

[207]*Ibid*.

[208]Canada's appellee's submission, para. 78.

> The provisions of Part II or III may be invoked in parallel with the provisions of Part V; however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, *only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available*. The provisions of Parts III and V shall not be invoked regarding measures considered non-actionable in accordance with the provisions of Part IV. However, measures referred to in paragraph 1(a) of Article 8 may be investigated in order to determine whether or not they are specific within the meaning of Article 2. In addition, in the case of a subsidy referred to in paragraph 2 of Article 8 conferred pursuant to a programme which has not been notified in accordance with paragraph 3 of Article 8, the provisions of Part III or V may be invoked, but such subsidy shall be treated as non-actionable if it is found to conform to the standards set forth in paragraph 2 of Article 8. (emphasis added)

It is appropriate to emphasize the phrase "only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available." It expressly sets out two forms of specific action, and provides that WTO Members may choose to apply one or the other against a subsidy. The assumption underlying the requirements of footnote 35 is that remedies under the *SCM Agreement* are limited to countervailing duties (and, by implication, provisional measures and price undertakings), explicitly envisaged in Part V of the *SCM Agreement*, and to countermeasures under Articles 4 and 7 of the *SCM Agreement*. Footnote 35 requires WTO Members to choose between two forms of remedy; such a requirement would be meaningless if responses to a countervailable subsidy, other than definitive countervailing duties, provisional measures, price undertakings and multilaterally-sanctioned countermeasures, were permitted under the GATT 1994 and the *SCM Agreement*.

271. Moreover, Article 32.1 of the *SCM Agreement* limits the range of actions a WTO Member may take unilaterally to counter subsidization. Restricting available unilateral actions against subsidization to those expressly provided for in the GATT 1994 and in the *SCM Agreement* is consistent with this function. The United States' reasoning would deprive Article 32.1 of the *SCM Agreement* of effectiveness. As we have stated on many occasions, the internationally recognized interpretive principle of effectiveness should guide the interpretation of the *WTO Agreement*[209], and, under this principle, provisions of the *WTO Agreement* should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or

[209] See Appellate Body Report, *US – Gasoline*, at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, at 106; Appellate Body Report, *US – Underwear*, at 24; Appellate Body Report, *US – Shrimp*, para. 131 (referencing various authors); Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *Canada – Dairy*, para. 133; and Appellate Body Report, *Argentina – Footwear (EC)*, para. 88.

inutility.[210] Accepting the United States' contention that Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* cover only countervailing duties would render Article 32.1 of the *SCM Agreement* redundant or inutile, because, under the United States' approach, Article 32.1 of the *SCM Agreement* would not provide additional discipline. Thus, a violation of Article 32.1 would flow only from a violation of another provision; violating Article 32.1 would be only a mechanical consequence of a violation of another provision.

272. Furthermore, Article 32.1 of the *SCM Agreement* would be inutile with respect to "specific action[s] against a subsidy" other than countervailing duties, as it would be impossible, in such case, to find a violation of Article 32.1. Given that Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* would, under the United States' reasoning, be limited to countervailing duties, such specific actions would always be in accordance with Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* and, therefore, consistent with Article 32.1. Consequently, we reject the United States' contention that Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* encompass only countervailing duties.

273. In our view, Article VI:3 of the GATT 1994 and Part V of the *SCM Agreement* encompass *all* measures taken against subsidization. To be in accordance with the GATT 1994, as interpreted by the *SCM Agreement*, a response to subsidization must be either in the form of definitive countervailing duties, provisional measures or price undertakings, or in the form of multilaterally-sanctioned countermeasures resulting from resort to the dispute settlement system. As the CDSOA does not correspond to any of the responses to subsidization envisaged by the GATT 1994 and the *SCM Agreement*, we conclude that it is not in accordance with the provisions of the GATT 1994, as interpreted by the *SCM Agreement*, and that, therefore, the CDSOA is inconsistent with Article 32.1 of the *SCM Agreement*.

274. Accordingly, we uphold, albeit for different reasons, the finding of the Panel that the CDSOA is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

[210]See Appellate Body Report, *US – Gasoline*, at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, at 106; Appellate Body Report, *Korea – Dairy*, para. 80; Appellate Body Report, *Canada – Dairy*, para. 133; Appellate Body Report, *Argentina – Footwear (EC)*, para. 88; and Appellate Body Report, *US – Section 211 Appropriations Act*, paras. 161 and 338.

VIII. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*

275. We turn now to examine whether the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

276. First, we consider the Panel's findings under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, and then we examine whether the Panel's interpretation of those provisions is consistent with the customary rules of interpretation codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"). In doing so, we begin with the words of Articles 5.4 and Article 11.4 and then turn to the object and purpose of the *Anti-Dumping Agreement* and the *SCM Agreement*. As a separate matter, we address the Panel's application of the principle of good faith.

A. *The Panel's Findings on the Interpretation of Articles 5.4 and 11.4*

277. The Panel's findings under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* may be summarized as follows. The Panel found that the CDSOA provides a financial incentive for domestic producers to file or support applications for the initiation of anti-dumping or countervailing duty investigations, because offset payments are made only to producers that file or support such applications. According to the Panel, the CDSOA will result in more applications having the required level of support from domestic industry than would have been the case without the CDSOA, and that "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, … the majority of petitions will achieve the levels of support required"[211] under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. In reaching its conclusion, the Panel relied, *inter alia*, on a letter in which a "US producer seeks support from other producers for a proposed countervail application ... 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.'"[212] The Panel also referred to another letter in which a domestic producer indicates, according to the Panel, that it changed its position concerning an application by deciding to express support for that application "in order to remain eligible for possible offset payment subsidies".[213] In the Panel's view, "these letters are

[211]Panel Report, para. 7.62.

[212]*Ibid*., para. 7.45 and footnote 304 thereto.

[213]Panel Report, para. 7.62.

evidence of the inevitable impact of the CDSOA on the position of the domestic industry vis-à-vis anti-dumping/countervail applications."[214]

278. Notwithstanding these findings, the Panel agreed with the United States' argument that Article 5.4 of the *Anti-Dumping Agreement* "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".[215] The Panel went on to conclude, however, that this argument did not "address the matter at issue" because "the operation of the CDSOA … is [such] that it renders the quantitative tests included in [Articles 5.4 and 11.4] irrelevant"[216] and "den[ies] parties potentially subject to the investigation a meaningful test of whether the petition has the required support of the industry."[217] According to the Panel, in doing so, the CDSOA "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."[218] The Panel concluded that 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."[219]

279. Turning to what it identified as the "object and purpose" of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, the Panel found that those provisions require investigating authorities "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."[220] The Panel appears to have found that the CDSOA "defeats this object and purpose"[221] by implying a return to the situation which existed before the introduction of Articles 5.4 and 11.4. According to the Panel, those Articles were "introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports."[222]

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[214]Panel Report, para. 7.62.

[215]*Ibid*., para. 7.63.

[216]*Ibid*.

[217]*Ibid*.

[218]*Ibid*.

[219]*Ibid*.

[220]*Ibid*., para. 7.64.

[221]*Ibid*., paras. 7.64-7.65.

[222]*Ibid*., para. 7.65.

280. The Panel went on to conclude that the CDSOA "in effect mandates"[223] domestic producers to support applications for the initiation of anti-dumping and countervailing duties by making such support "a prerequisite for receiving offset payments"[224] and thus renders the threshold test of Articles 5.4 and 11.4 "completely meaningless".[225] Accordingly, the Panel found that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

B. *The Meaning of Articles 5.4 and 11.4*

281. At the outset, we express our concern with the Panel's approach in interpreting Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. Specifically, we fail to see how the Panel's interpretation of those provisions may be said to be based on the ordinary meaning of the words found in those provisions, and hence we do not believe the Panel properly applied the principles of interpretation codified in the *Vienna Convention*. It is well settled that Article 3.2 of the DSU requires the application of those principles.[226] Article 31(1) of the *Vienna Convention* provides in relevant part that:

> … [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Thus, the task of interpreting a treaty provision must begin with the specific words of that provision. Accordingly, we turn first to the texts of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. Those provisions are identical and provide, in relevant part, that:

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[223]Panel Report, para. 7.66.

[224]*Ibid*.

[225]*Ibid*.

[226]Similarly, Article 17.6 (ii) of the *Anti-Dumping Agreement* provides that "the panel shall interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law."

> An investigation shall not be initiated … unless the authorities have determined … 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)

282. Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* thus require investigating authorities to "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry". If a sufficient number of domestic producers has "expressed support" and the thresholds set out in Articles 5.4 and 11.4 have therefore been met, the "application shall be considered to have been made by or on behalf of the domestic industry". In such circumstances, an investigation may be initiated.

283. A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation.[227] Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms "expressing support" and "expressly supporting" clarify that Articles 5.4 and 11.4 require only that authorities "determine" that support has been "expressed" by a sufficient number of domestic producers. Thus, in our view, an "examination" of the "degree" of support, and not the "nature" of support is required. In other words, it is the "quantity", rather than the "quality", of support that is the issue.

284. We observe that the Panel appears to have arrived at the same conclusion when it conducted its examination of the *texts* of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. Specifically, the Panel concluded that the United States was correct in arguing that Article 5.4 of the *Anti-Dumping Agreement* "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".[228] Thus, it seems that, on the basis of a textual analysis of Articles 5.4 and 11.4, the Panel did not find that the CDSOA constitutes a violation of

[227]We note that the parties' submissions do not suggest otherwise.

[228]Panel Report, para. 7.63.

those provisions. The Panel went on to note, however, that this was not the "matter at issue".[229] Instead, according to the Panel, the question was whether the CDSOA "defeats" what it identified as the object and purpose of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.[230]

285. As mentioned above, we have difficulty with the Panel's approach. Clearly, the matter at issue before the Panel included whether the CDSOA is inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement* in the light of their object and purpose, since interpreting Articles 5.4 and 11.4 involves an inquiry into the object and purpose of those Agreements. In our view, however, the Panel dismissed all too quickly the textual analysis of those provisions as irrelevant.

286. We conclude, therefore, that the texts of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* do not support the reasoning of the Panel. By their terms, those provisions require no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application.

287. Having said this, we turn next to examine what the Panel identified as the "object and purpose" of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

288. According to the Panel, Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* have as their "object and purpose" to require investigating authorities "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".[231] The Panel appears to have found that the CDSOA defeats this "object and purpose" because it "in fact implies a return to the situation which existed before the introduction of [Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*]."[232] We understand the Panel to have suggested that the CDSOA "implies a

[229]Panel Report, para. 7.63.

[230]*Ibid*., para. 7.64.

[231]*Ibid*.

[232]*Ibid*., para. 7.65.

return" to the situation in which an application could be "presumed" to have been made by or on behalf of the domestic industry.[233]

289. We do not agree with the Panel's analysis. By their terms, Articles 5.4 and 11.4 do not permit investigating authorities to "presume" that industry support for an application exists. For the thresholds set out in Articles 5.4 and 11.4 to be met, a sufficient number of domestic producers must have "expressed support" for an application. The CDSOA does not change the fact that investigating authorities are required to examine the "degree of support" that exists for an application and that an application shall be considered to have been made "by or on behalf of the domestic industry" only if sufficient support has been "expressed".[234] Hence, we do not agree with the Panel that the CDSOA has "defeated" the object and purpose of Articles 5.4 and 11.4, even if we were to assume that the Panel's understanding of such object and purpose was correct. For the same reason, we also do not agree with the Panel that the CDSOA renders the quantitative threshold tests included in Articles 5.4 and 11.4 "irrelevant"[235] and "completely meaningless."[236]

290. The Panel also took the view that Articles 5.4 and Article 11.4 "[were] introduced precisely to *ensure* … that support expressed by domestic producers was *evidence of industry-wide concern of injury*".[237] Although we agree with the Panel that support expressed by domestic producers *may* be evidence of an "industry-wide concern of injury", we do not agree that such support may be taken to be evidence of such concern alone. Nor do we see anything in Articles 5.4 or 11.4 that would require support to be based on that concern *alone*. Indeed, there may be a number of reasons why a domestic producer could choose to support an investigation. For example, it may do so in the expectation that the protection afforded by future anti-dumping or countervailing duties would improve its competitive position in relation to importers of like foreign products. The Panel appears, however, to have considered that certain motives to support an application would be WTO-consistent, whereas others would not. We see no basis in Articles 5.4 and 11.4 for such an approach.

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[233]The Panel notes in this respect the argument advanced by the European Communities, India, Indonesia and Thailand that Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* "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." (Panel Report, para. 7.61, referring to the European Communities', India's, Indonesia's and Thailand's first written submission to the Panel, footnote 49; underlining added). In our view, this is not, in itself, sufficient evidence of the "object and purpose" of Articles 5.4 and 11.4.

[234]In this respect, we note that the United States does not contest that it continues to be bound by the obligation set out in Articles 5.4 and 11.4 to ensure that anti-dumping and countervailing duty cases are not initiated unless the levels of support set out in Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* are met. (See United States' second written submission before the Panel, para. 81)

[235]Panel Report, para. 7.63.

[236]*Ibid*., para. 7.66.

291. As we have noted, Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* contain no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application. Indeed, it would be difficult, if not impossible, as a practical matter, to engage in that exercise.

292. The Panel found that the CDSOA "will result"[238] in more applications having the required level of support from domestic industry than would have been the case without the CDSOA and stated that "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", it "could conclude that the *majority of petitions will achieve the levels of support required* under AD Article 5.4/ SCM Article 11.4."[239] The evidence contained in the Panel record, however, does not support the overreaching conclusion that "the majority of petitions will achieve the levels of support required" under Articles 5.4 and 11.4 as a *result* of the CDSOA. Indeed, we note that, in its first written submission to the Panel, the United States explained that "it is rare for domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions."[240] In support of its statement, the United States submitted to the Panel a survey[241] that shows, for example, that during the year prior to the enactment of the CDSOA, *all* of the applications that were filed met the legal thresholds for support.[242]

293. We also believe that the Panel had no basis for stating that the CDSOA as such "in effect *mandates* domestic producers to support the application."[243] Even assuming that the CDSOA may create a financial incentive for domestic producers to file or to support an application[244], it would not

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[237]*Ibid*., para. 7.65. (emphasis added)

[238]Panel Report, para. 7.62.

[239]*Ibid*. (emphasis added)

[240]United States' first written submission to the Panel, para. 125.

[241]Exhibit US-6 before the Panel.

[242]In paragraph 116 of its appellant's submission, the United States also relies on the argument that a domestic producer can qualify for receipt of possible offset payments by expressing support as late as "the final injury investigation questionnaire, which can be issued more than 200 days after a petition is filed." Although we note that support, for purposes of qualifying for CDSOA distributions, need not necessarily be expressed *prior to* initiation of the investigation, the incentive to express support may well exist at the stage of the initiation of the investigation. This is because if an investigation is not initiated, for example, due to lack of support, that investigation cannot, by definition, lead to a finding of dumping or subsidization and later to CDSOA distributions. This, however, does not affect our conclusion that Articles 5.4 and 11.4 do not require investigating authorities to determine the motivations of producers that choose to support an anti-dumping or countervailing duty investigation (or indeed the motivations of producers that choose to oppose such investigations).

[243]Panel Report, para. 7.66. (emphasis added)

[244]We consider this to be a factual finding of the Panel.

be correct to say that the CDSOA as such "mandates" or "obliges" producers to do so. The fact that a measure provides an "incentive" to act in a certain way, does not mean that it "in effect mandates" or "requires" a certain form of action. Indeed, we are not considering here a measure that would "coerce" or "require" domestic producers to support an application. Such a measure might well be found to be WTO-inconsistent. It could be considered, *inter alia*, to circumvent the obligations contained in Article 5.6 of the *Anti-Dumping Agreement* and Article 11.6 of the *SCM Agreement* not to initiate an investigation without a written application "by or on behalf of the domestic industry" except when the conditions set out in those provisions have been met. However, the CDSOA is not such a measure.

294. For all these reasons, we reverse the Panel's finding that the CDSOA, *as such*, is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*.

C. *The Panel's Conclusion on Good Faith*

295. We address now the Panel's conclusion, in paragraph 7.63 of the Panel Report, that "the United States may be regarded as not having acted in good faith" with respect to its obligations under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*. However, given our conclusion that the CDSOA does not constitute a violation of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*, the issue of whether the United States "may be regarded as not having acted in good faith" in enacting the CDSOA does not have the relevance it had for the Panel.

296. On appeal, the United States maintains that there is "no basis or justification in the WTO Agreement for a WTO dispute settlement panel to conclude that a Member has not acted in good faith, or to enforce a principle of good faith as a substantive obligation agreed to by WTO Members."[245] We observe that Article 31(1) of the *Vienna Convention* directs a treaty interpreter to interpret a treaty 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 the treaty's object and purpose. The principle of good faith may therefore be said to inform a treaty interpreter's task. Moreover, performance of treaties is also governed by good faith. Hence, Article 26 of the *Vienna Convention*, entitled *Pacta Sunt Servanda*, to which several appellees referred in their submissions[246], provides that "[e]very treaty in

[245]United States' appellant's submission, para. 105.

[246]Canada's appellee's submission, para. 101; the European Communities', India's, Indonesia's and Thailand's appellees' submission, para. 146; Japan's and Chile's appellee's submission, para. 96.

force is binding upon the parties to it and must be performed by them in good faith."[247] The United States itself affirmed "that WTO Members must uphold their obligations under the covered agreements in good faith".[248]

297. We have recognized the relevance of the principle of good faith in a number of cases. Thus, in *US – Shrimp*, we stated that:

> The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states.[249]

In *US – Hot-Rolled Steel*, we found that:

> … the principle of good faith … informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements.[250]

Clearly, therefore, there is a basis for a dispute settlement panel to determine, in an appropriate case, whether a Member has not acted in good faith.

298. Nothing, however, in the covered agreements supports the conclusion that simply because a WTO Member is found to have violated a substantive treaty provision, it has therefore not acted in good faith. In our view, it would be necessary to prove more than mere violation to support such a conclusion.

299. The evidence in the Panel record does not, in our view, support the Panel's statement that the United States "may be regarded as not having acted in good faith". We are of the view that the Panel's conclusion is erroneous and, therefore, we reject it.

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[247]The United States said, in response to questioning at the oral hearing, that it has no difficulty with the notion that Article 26 of the *Vienna Convention* expresses a customary international law principle.

[248]United States' second written submission before the Panel, para. 81. The United States reiterated this point in response to questioning at the oral hearing. See also, Appellate Body Report, *EC – Sardines*, para. 278.

[249]Appellate Body Report, *US – Shrimp*, para. 158. See also, Appellate Body Report, *US – FSC*, para. 166.

[250]Appellate Body Report, *US – Hot-Rolled Steel*, para. 101.

IX. Article XVI:4 of the *WTO Agreement*, Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article 3.8 of the DSU

300. The United States asks that we reverse the Panel's finding that the CDSOA violates Article XVI:4 of the *WTO Agreement* on the grounds that the CDSOA is consistent with Articles VI:2 and VI:3 of the GATT 1994, Articles 5.4, 18.1 and 18.4 of the *Anti-Dumping Agreement*, and Articles 11.4, 32.1 and 32.5 of the *SCM Agreement*. For the same reason, the United States requests that we reverse the Panel's finding that the benefits accruing to the appellees under the *WTO Agreement* have been nullified or impaired.[251]

301. Article 18.4 of the *Anti-Dumping Agreement* and Article 32.5 of the *SCM Agreement* provide that "[e]ach Member shall take all necessary steps, of a general or particular character, to ensure … the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement". Similarly, Article XVI:4 of the *WTO Agreement* provides that "[e]ach Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements", which include the *Anti-Dumping Agreement* and the *SCM Agreement*.

302. As a consequence of our finding that the United States has acted inconsistently with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, we uphold the Panel's finding that the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*.

303. Article 3.8 of the DSU provides, in relevant part, that:

> 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.

304. We conclude that, to the extent we have found that the CDSOA is inconsistent with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, the CDSOA nullifies or impairs benefits accruing to the appellees in this dispute under those Agreements.

[251] United States' appellant's submission, para. 133.

X. Article 9.2 of the DSU

305. The United States claims on appeal that the Panel acted inconsistently with Article 9.2 of the DSU by denying the United States' request for a separate panel report on the dispute brought by Mexico.

306. The Panel took the view that, although Article 9.2 of the DSU provides a general right to WTO Members to request a separate report, such requests "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."[252] The Panel added that, in its view, "such requests should be made at an early juncture in the panel process, preferably at the time that a panel is established."[253] Turning to the case at hand, the Panel observed that "the US request was received on 10 June 2002, approximately two months after issuance of the descriptive part of the Panel's report"[254] and that the United States had provided "no explanation of why it was unable to submit its request at an earlier date".[255] The Panel also noted that the United States had not referred to any prejudice that it would suffer if the Panel were not to issue a separate report on the dispute brought by Mexico.

307. Based on these considerations, the Panel concluded:

> … 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 <u>final</u> 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).[256] (original underlining)

Accordingly, the Panel rejected the United States' request.[257]

308. The United States appeals this finding of the Panel. The United States submits that Article 9.2 of the DSU gives WTO Members an "unqualified right to the issuance of separate panel

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[252]Panel Report, para. 7.4.

[253]*Ibid*.

[254]*Ibid*.

[255]*Ibid*.

[256]*Ibid*., para. 7.5.

[257]*Ibid*., para. 7.6. In paragraphs 6.3-6.5 of its Report, the Panel provides further argumentation for why it rejected the United States' request.

reports upon request".[258] According to the United States, Article 9.2 contains no requirement for a party to make its request for a separate panel report by any particular time in the panel proceeding. Nor does it require any party to demonstrate that it would suffer prejudice if its request is not accepted.

309. In our analysis of this issue, we begin by examining the ordinary meaning of the text of Article 9.2 of the DSU which provides, in relevant part, that:

> The [ ] panel shall organize its examination and present its findings to the DSB 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. *If one of the parties to the dispute so requests, the panel shall submit separate reports on the dispute concerned.* (emphasis added)

310. By its terms, Article 9.2 accords to the requesting party a broad right to request a separate report. The *text* of Article 9.2 does not make this right dependent on any conditions. Rather, Article 9.2 explicitly provides that a panel "shall" submit separate reports "if one of the parties to the dispute so requests". Thus the text of Article 9.2 of the DSU contains no requirement for the request for a separate panel report to be made *by a certain time*. We observe, however, that the text does not explicitly provide that such requests may be made *at any time*.

311. Having made these observations, we note that Article 9.2 must not be read in isolation from other provisions of the DSU, and without taking into account the overall object and purpose of that Agreement. The overall object and purpose of the DSU is expressed in Article 3.3 of that Agreement which provides, relevantly, that the "prompt settlement" of disputes is "essential to the effective functioning of the WTO." If the right to a separate panel report under Article 9.2 were "unqualified", this would mean that a panel would have the obligation to submit a separate panel report, pursuant to the request of a party to the dispute, *at any time during the panel proceedings*. Moreover, a request for such a report could be made for whatever reason—or indeed, *without any reason*—even on the day that immediately precedes the day the panel report is due to be circulated to WTO Members at large. Such an interpretation would clearly undermine the overall object and purpose of the DSU to ensure the "prompt settlement" of disputes.

312. In support of its argument, the United States relied on *EC – Bananas III (US)* where the panel granted the European Communities' request for "four separate panel reports". We note, however, as did the Panel, that the European Communities' request was made at the meeting at which the

[258]United States' appellant's submission, para. 140.

DSB established the panel.[259] *EC – Bananas III (US)* is therefore distinguishable from the present case. Thus, we cannot agree with the United States that the right contained in Article 9.2 is "unqualified".[260]

313. Our view is supported by our decision in *US – FSC*, where we observed that:

> The procedural rules of WTO dispute settlement are designed to promote … the fair, *prompt and effective* resolution of trade disputes.[261] (emphasis added)

In the somewhat different context of the *time* by which procedural objections must be raised, we stated in *Mexico – Corn Syrup (Article 21.5 – US)*, that:

> When a Member wishes to raise an objection in dispute settlement proceedings, it is always incumbent on that Member to do so promptly. A Member that fails to raise its objections in a *timely manner, notwithstanding one or more opportunities to do so*, may be deemed to have waived its right to have a panel consider such objections.[262] (emphasis added; footnote omitted)

314. In the case at hand, the United States made its request under Article 9.2 "approximately two months after the issuance of the descriptive part of the Panel's report"[263] and more than seven months after the Panel had been composed.[264] It therefore cannot be said that the United States made its request "promptly" or in a "timely manner, notwithstanding one or more opportunities to do so".

315. Finally we note that the first sentence in Article 9.2 provides that it is for the panel to "organize its examination and present its findings 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." Our comments in *EC – Hormones* about panels' discretion in dealing with procedural issues are pertinent here:

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[259]Panel Report, para. 6.3.

[260]United States appellant's submission, para. 138, referring to the Panel Report in *EC – Bananas III (US)*, para. 7.55.

[261]Appellate Body Report, *US – FSC*, para. 166.

[262]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 50. The Appellate Body also emphasized the need for procedural objections to be made in a timely manner in *US – 1916 Act*, para. 54.

[263]Panel Report, para. 7.4.

[264]The Panel was composed on 25 October 2001. See Panel Report, para. 1.7.

> … the DSU and in particular its Appendix 3, leave panels a *margin of discretion* to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.[265] (emphasis added)

316. In our view, the Panel acted within its "margin of discretion" by denying the United States' request for a separate panel report. We do not believe that we should lightly disturb panels' decisions on their procedure, particularly in cases such as the one at hand, in which the Panel's decision appears to have been reasonable and in accordance with due process. We observe that, on appeal, the United States is not claiming that it suffered any prejudice from the denial of its request for a separate panel report.[266] We also note that the first sentence of Article 9.2 refers to the rights of all the parties to the dispute. The Panel correctly based its decision on an assessment of the rights of all the parties, and not of one alone.

317. Accordingly, we reject the United States' claim that the Panel acted inconsistently with Article 9.2 of the DSU by not issuing a separate panel report in the dispute brought by Mexico.[267]

XI. Findings and Conclusions

318. For the reasons set out in this Report, the Appellate Body:

(a) upholds the finding of the Panel, in paragraphs 7.51 and 8.1 of the Panel Report, that the CDSOA is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*;

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[265] Appellate Body Report, *EC – Hormones*, footnote 138 to para.152.

[266] The United States submits that a showing of prejudice is not required by the text of Article 9.2. In response to questioning at the oral hearing, the United States added that, although it was not aware of any prejudice that it would have suffered in this case, prejudice could have resulted if, for example, Mexico had chosen to cross-appeal the claim related to Article 5 of the *SCM Agreement*, which only Mexico raised before the Panel.

[267] We express no view on the question whether the Panel was correct in concluding, in paragraph 7.5 of the Panel Report, that it was "not entitled to issue a final report on the dispute brought by Mexico without first having issued an interim report on that dispute". In this respect, we note moreover that the United States has not requested a finding with respect to whether the Panel erred in its interpretation of Article 15.2 of the DSU.

(b) consequently upholds the Panel's finding, in paragraphs 7.93 and 8.1 of the Panel Report, that the CDSOA is inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* and that, therefore, the United States has failed to comply with Article 18.4 of the *Anti-Dumping Agreement*, Article 32.5 of the *SCM Agreement* and Article XVI:4 of the *WTO Agreement*;

(c) upholds the Panel's finding, in paragraph 8.4 of the Panel Report, that, pursuant to Article 3.8 of the DSU, to the extent that the CDSOA is inconsistent with provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*, the CDSOA nullifies or impairs benefits accruing to the Complaining Parties under those Agreements;

(d) reverses the Panel's findings, in paragraphs 7.66 and 8.1 of the Panel Report, that the CDSOA is inconsistent with Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*;

(e) rejects the Panel's conclusion, in paragraph 7.63 of the Panel Report, that the United States may be regarded as not having acted in good faith with respect to its obligations under Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement*; and

(f) rejects the claim of the United States that the Panel acted inconsistently with Article 9.2 of the DSU by not issuing a separate panel report in the dispute brought by Mexico.

319. The Appellate Body *recommends* that the DSB request the United States bring the CDSOA into conformity with its obligations under the *Anti-Dumping Agreement*, the *SCM Agreement*, and the GATT 1994.

Signed in the original at Geneva this 17th day of December 2002 by:

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Giorgio Sacerdoti
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

John Lockhart
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS217/8
WT/DS234/16
22 October 2002
(02-5747)

Original: English

UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU)

The following notification, dated 18 October 2002, sent by the United States to the Dispute Settlement Body (DSB), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the single panel established in response to the requests of Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico, and Thailand in the disputes *United States – Continued Dumping and Subsidy Offset Act of 2000* ("*CDSOA*") (WT/DS217/R and WT/DS234/R) and legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") is inconsistent with Articles VI:2 and VI:3 of the *General Agreement on Tariffs and Trade* 1994 ("GATT 1994"), Article 18.1 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") and Article 32.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). These findings are in error, and are based on erroneous findings on issues of law and related legal interpretations with respect to Articles VI:2 and VI:3 of GATT 1994, Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement, including, for example:

(a) the Panel's legal conclusions that the CDSOA acts specifically in response to dumping, the CDSOA has an adverse bearing on dumping, the CDSOA operates against dumping, actions objectively capable of offsetting or preventing dumping or subsidization constitute action against dumping or subsidization, and Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement apply to the CDSOA or to specific actions that have an adverse bearing on the practice of dumping or the practice of subsidization;

(b) the Panel's legal conclusion that Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement include a conditions of competition or competitive advantage test;

(c) the Panel's legal conclusions that the Appellate Body's interpretation of GATT Article VI:2 and the Antidumping Agreement in *US – 1916 Act* applies equally to GATT Article VI:3 and the SCM Agreement, and that Part III and Part V of the SCM Agreement contain the only permissible remedies for subsidization;

(d) the Panel's legal conclusion that the CDSOA constitutes specific action against the practice of dumping and specific action against the practice of subsidization;

(e) the Panel's legal conclusion that the CDSOA acts "against" dumping and/or a subsidy because of a claimed adverse impact on the competitive relationship between dumped/subsidized imports and the goods produced by "affected domestic producers," and the improper shifting of the burden of proof to the United States to prove that the CDSOA does not have an adverse bearing on the competitive relationship between dumped/subsidized imports and the goods produced by "affected domestic producers;"

(f) the Panel's legal conclusion that it need not examine footnote 24 of the Antidumping Agreement and footnote 56 of the SCM Agreement because it had already concluded that the CDSOA constitutes "specific action" against dumping and subsidization;

(g) the Panel's legal conclusion that the legislative intent of the CDSOA is relevant to determining whether the CDSOA is consistent with WTO obligations; and

(h) the Panel's legal conclusion that the CDSOA creates a "financial incentive" to file or support dumping/countervail petitions and therefore acts "against" dumping and/or a subsidy.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the CDSOA is inconsistent with Article 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement. These findings are in error, and are based on erroneous findings on issues of law and on related legal interpretations with respect to Article 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement, including, for example:

(a) the Panel's legal conclusion that the CDSOA violates Article 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement despite its findings that the U.S. has implemented these obligations under various provisions of U.S. law, that the CDSOA does not amend these laws and that U.S. investigating authorities observe the quantitative thresholds;

(b) the Panel's legal conclusion that the CDSOA renders the quantitative thresholds in Article 5.4 of Antidumping Agreement and 11.4 of the SCM Agreement meaningless;

(c) the Panel's legal conclusion that the CDSOA violates Article 5.4 of the Antidumping Agreement and Article 11.4 of the SCM Agreement because it " in effect mandates" domestic producers to support the initiation of dumping/countervail investigations and/or creates a financial incentive for domestic producers to support the initiation of dumping/countervail investigations; and

(d) the Panel's legal conclusion that the United States has not acted in good faith in enacting the CDSOA.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the CDSOA violates Article 18.4 of Antidumping Agreement, Article 32.5 of the SCM Agreement, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the benefits accruing to the Complaining Parties under the WTO Agreement have been nullified or impaired.

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that the Panel has the discretion under Article 9.2 to reject a party's request for the Panel to submit separate reports.