LIST OF ANNEXES

ANNEX A

Third Party Submissions and Oral Statements

I. INTRODUCTION

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

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

1.3 On 12 July 2001, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand requested the establishment of a panel pursuant to Articles 4.7 and 6 of the DSU, Article XXIII of the GATT 1994, Article 17 of the Anti-Dumping Agreement and Article 30 of the SCM Agreement, in accordance with the standard terms of reference provided for in

Article 7.1 of the DSU (WT/DS217/5). At its meeting of 23 August 2001, the Dispute Settlement Body (the "DSB") established the Panel.

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

1.5 The terms of reference of the Panel are:

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

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

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panellists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

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

Chairman: H.E. Mr. Luzius Wasescha

Members: Mr. Maamoun Abdel-Fattah

Mr. William Falconer

1.8 Argentina, Canada, Costa Rica, Hong Kong, China, Israel, Mexico and Norway reserved their third party rights in DS217, and were considered as third parties in the single Panel. Australia, Brazil, Canada (in respect of Mexico's

complaint), the European Communities, India, Indonesia, Japan, Korea, Mexico (in respect of Canada's complaint) and Thailand reserved their third party rights in DS234.

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

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

II. FACTUAL ASPECTS

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

2.2 The CDSOA provides that :

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

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

> a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that –
>
> (A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and
>
> (B) remains in operation.
>
> Companies, business, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company

[1] Public Law 106-387, 114 Stat. 1549, 28 October 2000, sections 1001-1003.
[2] Codified as 19 USC 1675c.
[3] *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 48,546 (US Customs Service 21 Sept. 2001) (final rule) (codified at 19 CFR §§ 159.61 – 159.64) (the "Regulations").
[4] United States Tariff Act of 1930, Section 754 (a).
[5] *Ibid.* Section 754(b)(1).

that opposed the investigation shall not be an affected domestic producer.[6]

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

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

(F) Health care benefits to employees paid for by the employer.

(G) Pension benefits to employees paid for by the employer.

(H) Environmental equipment, training or technology.

(I) Acquisition of raw materials and other inputs.

(J) Working capital or other funds needed to maintain production."[7]

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

2.6 Special accounts are to be terminated after "(A) the order or finding with respect to which the account was established has terminated; (B) all entries relating to the order or finding are liquidated and duties assessed collected; (C)

---

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

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

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

9 *Ibid.* Section 754(e)(2)

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

11 *Ibid.* Section 754 (c)

the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c); and (D) 90 days has elapsed from the date of the notice described in subparagraph (C)." All amounts that remain unclaimed in the Account are to be permanently deposited into the general fund in the US Treasury.[12]

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. Complaining Parties

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

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

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

[12] United States Tariff Act of 1930, § 754(e)(4), CDSOA § 1003(a), 114 Stat. 1549A-75. Regulations, 66 Fed. Reg. 48,546, 48,554 (19 C.F.R. § 159.64(d)).
[13] Section 1003 (c) of the CDSOA.
[14] United States Tariff Act of 1930, Section 754(d)(1).

US laws and regulations implementing the provisions of the AD Agreement and the SCM Agreement regarding standing determinations and undertakings.

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

- Article 18.1 of the AD Agreement, in conjunction with Article VI:2 of the GATT and Article 1 of the AD Agreement;
- Article 32.1 of the SCM Agreement, in conjunction with Article VI.3 of the GATT and Articles 4.10, 7.9 and 10 of the SCM Agreement;[16]
- Article X (3)(a) of the GATT;
- Article 5.4 of the AD Agreement and Article 11.4 of the SCM Agreement;
- Article 8 of the AD Agreement and Article 18 of the SCM Agreement; and
- Article XVI.4 of the Marrakesh Agreement establishing the WTO, Article 18.4 of the AD Agreement and Article 32.5 of the SCM Agreement.

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

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

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

B. United states

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

3.9 The United states submits that there is no evidence either that the CDSOA has been or will be administered in an unreasonable or partial manner (Art. X:3(a) of GATT 1994) so as to affect standing and undertaking determinations in

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

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

anti-dumping and countervailing duty investigations. According to the United States, the complaining parties have failed to establish a *prima facie* case of a WTO violation, and in the absence of a specific violation of another WTO Agreement provision, the complaining parties' claims under Article XVI:4 of the *Marrakesh Agreement establishing the WTO*, Article 18.4 of the Antidumping Agreement, and Article 32.5 of the SCM Agreement must also fail.

IV. ARGUMENTS OF THE PARTIES

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

A. First Written Submission of the Complaining Parties

1. Australia

(a) Introduction

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

4.3 The Act as implemented provides that:

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

(b) Legal Argument

(i) The Act is mandatory legislation

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

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

4.5 Australia argues that the scope of GATT Article VI:2 and Articles 1 and 18.1 of the Anti-Dumping Agreement was examined in detail in *US – 1916 AD Act*. According to Australia, in that case, the Appellate Body found that Article 18.1 of the Anti-Dumping Agreement, in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement, are the only provisions applicable to a measure that is a specific action against dumping and prohibit any action that is not a definitive anti-dumping duty, a provisional measure or a price undertaking. To the extent that a measure provides for "specific action against dumping" other than those permissible responses, it will necessarily be inconsistent with Article 18.1 of the Anti-Dumping Agreement, read in conjunction with GATT Article VI:2 and Article 1 of the Anti-Dumping Agreement.

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

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

4.8 Australia argues that "Duties assessed pursuant to … an anti-dumping duty order, or a finding under the Antidumping Act of 1921" under the Act refers to duties that may only be assessed in response to situations presenting the constituent elements of dumping within the meaning of GATT Article VI:1, as

elaborated by Article 2 of the Anti-Dumping Agreement. They are thus a "specific action against dumping of exports from another Member" within the meaning of Article 18.1 of the Anti-Dumping Agreement.

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

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

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

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

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

4.11 Australia argues that the distribution of assessed duties is not simply a subsidy to producers but is contingent on, and linked to, positive determinations of countervailing duty orders. The duties are only distributed to affected producers who have supported the original petition and in situations where there has been a countervailing duty order issued. If duties are not collected, i.e., if there is no countervailing duty order, then the duties are not distributed to affected producers for eligible expenditure on the product which has been the subject of a countervailing duty investigation. The affected domestic producers will not receive a distribution of duties assessed unless they have supported the original petition and unless a special account has been established in response to a countervailing duty order. When the countervailing duty order is terminated, so too is the special account. The affected producers are no longer "entitled" or eligible to receive the duties assessed.

4.12 Australia asserts that the Act mandates action in response to situations presenting the constituent elements of subsidisation and is therefore a specific action against a subsidy within the meaning of Article 32.1 of the SCM Agreement, in conjunction with GATT Article VI. However, Australia notes, the

Act does not mandate a countervailing duty, a provisional measure, a voluntary undertaking, or a countermeasure authorised by the DSB, which are the only responses to a subsidy permitted by GATT Article VI, read in conjunction with the SCM Agreement.

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

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

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

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

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