

CHAPTER VI

SUBSIDIES AND COUNTERVAILING DUTIES

A. THE CONCEPT OF A “SUBSIDY”

Countervailing duties can be mobilized by WTO member states to counteract subsidies granted by other states to their producers. However, there always remains the possibility that countervailing duties may be misused by an importing state to fend off legitimately priced imports from other states. Hence, defining the concept of a subsidy is critical for international trade regulation, since the General Agreement on Tariffs and Trade (GATT) allows WTO member states to use countervailing duties only under certain circumstances when other states use subsidies. When formulated properly, countervailing duty laws allow states to protect their domestic industries against the market distortions caused by subsidizing countries. An ill formulated countervailing duty law would allow a state to pursue a protectionist policy in response to *legitimate* internal policies of other states, if those policies were misconstrued as subsidies. As a result, a state purportedly acting in accordance with GATT rules could in fact be distorting international trade by misusing the rules.

The Subsidies Code that resulted from the Tokyo Round¹ did not deal with this basic issue very effectively.² It did not define “subsidy;” but instead appended an Annex that contained a list of examples of actions that would be considered subsidies. However, the list was illustrative only, and itself referred only to export subsidies. Only approximately two dozen signatories acceded to the code.

In an effort to resolve this problem, a new definitional framework was developed in the Uruguay Round and embedded in a Subsidies and Countervailing Measures Agreement (SCM). In contrast to the 1979 Subsidies Code, the SCM is binding on all WTO members. Review the provisions of the SCM, art. 1-3, 5-6, 8; compare these with the corresponding U.S. statutory provisions, 19 U.S.C. § 1677(5)-(5B), and then consider the following questions:

1. How is “subsidy” defined now for purposes of GATT art. VI?
2. Are the SCM provisions accurately implemented in U.S. law?
3. How and why does the SCM differentiate among various types of subsidies?

In responding to these questions, review the following excerpt.

1. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, T.I.A.S. 9619, 31 U.S.T. 513 [hereinafter Subsidies Code].

2. See, e.g., William K. Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. Int'l L.J. 129, 135-139, 150-151 (1998) (discussing Subsidies Code and its U.S. implementation; commenting on lack of definition in Subsidies Code).

WILLIAM K. WILCOX, GATT-BASED PROTECTIONISM AND THE DEFINITION OF A SUBSIDY

16 B.U. Int'l L.J. 129 (1998)

Changes Resulting from the Uruguay Round

The main changes resulting from the Uruguay Round are the addition of two mechanisms used to limit the use of CVDs [countervailing duties] (the specificity and financial contributions requirements), and the traffic-light framework. . . .

A. The Traffic-Light Framework

Before looking at the new restrictions on the use of CVDs, it is important to understand the framework¹⁷⁴ in which they function. In this framework, subsidies are put into one of three categories. These categories are commonly referred to in terms of a traffic light metaphor. Subsidies in the red-light category are prohibited. Those in the yellow-light category are actionable (can impose a CVD), if they violate GATT or cause injury to a Contracting Party. Those in the green-light category are non-actionable (cannot impose anything to combat its effect).¹⁷⁶ Therefore, one can only use CVDs for the yellow-light subsidies.

The red-light category is the continuation of an absolute prohibition of export subsidies.¹⁷⁷ The only function of export subsidies is to give domestic producers an unfair advantage in the international market, regardless of any financial contribution or specificity test. These subsidies are almost inherently inefficient and are therefore prohibited.

Green-light subsidies are those that are allowed regardless of any financial contribution or specificity test.¹⁸⁰ The contracting parties have again made it very clear that many forms of subsidies are acceptable internal policies that should not be interfered with by foreign countries.¹⁸¹ Three specific types of subsidies are given the green light: those used to assist in research,¹⁸² those used to assist disadvantaged regions,¹⁸³ and those used to aid in the adaptation of existing facilities for environmental requirements.¹⁸⁴ . . . Yellow-light subsidies must be examined in light of the specificity and financial contribution requirements. The specificity requirement is most important for yellow-light subsidies.¹⁸⁶ Yellow-light subsidies are those domestic subsidies that are not classifiable in any of the three green-light ways. These subsidies

174. This is the term commonly used to describe the way the Uruguay Round Subsidies Code categorized subsidies. Red light, yellow light, and green light refer to prohibited subsidies, actionable subsidies, and non-countervailable subsidies, respectively.

176. See Subsidies Agreement, art. 3, 5, 8. . . .

177. See Subsidies Agreement, art. 3. . . .

180. See Subsidies Agreement, art. 8. . . .

181. See *id.* art. 8.2.

182. See *id.* art. 8.2(a). . . .

183. See *id.* art. 8.2(b). Assistance will be given to disadvantaged regions within a member state. However, the area must meet certain criteria such as: contiguous geographical area, neutral and objective criteria, and a requirement that either unemployment or per capita income statistics are used. See *id.*

184. See *id.* art. 8.2(c). Assistance would be given to promote adaptation of existing facilities to new environmental requirements imposed by law and/or regulations that impose greater constraints and financial burden on certain industries. Several limitations were included such as: the maximum percent of cost covered, the restriction to non-recurring measures, and proportionality to actual pollution. See *id.*

186. Export subsidies are generally specific. All green-light subsidies are non-actionable whether those subsidies are specific or generally available. See Subsidies Agreement, art. 8.1(b). . . .

are only actionable if they cause harm to another member by causing: injury in its domestic market,¹⁸⁸ nullification or impairment of GATT benefits,¹⁸⁹ or serious prejudice to members in other countries.¹⁹⁰

B. Specificity

After the Uruguay Round, specificity for the first time was made a requirement under the GATT.¹⁹¹ By essentially adopting this section of U.S. law, WTO members seemed to implicitly accept the need to limit the use of CVDs by the imposition of required objective standards for an actionable subsidy to be recognized under the GATT.

It is clear that it would be a mistake to apply the broadest definition of the term subsidy to domestic subsidies. There are many legitimate actions that a government could take that might be considered subsidies; the GATT explicitly acknowledges this fact.

If some domestic subsidies are going to be countervailable and others are not, a mechanism is required to distinguish between the "good" and the "bad" domestic subsidies. The GATT adopted the specificity requirement mechanism during the Uruguay Round, previously only used in the United States.

Although U.S. courts have had trouble interpreting the specificity requirement,¹⁹⁵ in subsidies law, it acts as a restriction on the ability of the U.S. government to use CVDs to protect domestic producers, rather than to counter the protection being bestowed on foreign producers. This is probably what WTO members are and should be concerned about. If a contracting party wishes to help a particular industry directly in a way that harms foreign industries, the GATT will allow that practice to be countervailed under the Uruguay Round, because of its specificity.¹⁹⁸

Specificity is a crude,¹⁹⁹ but useful and manageable tool that can be used to separate acceptable subsidies from unacceptable ones, and to limit the potential abuse of CVD provisions. Although there are some economic reasons for adopting the specificity requirement, it is clear that it was also done for administrative ease. Generally Americans believe that subsidies that are aimed at a specific industry are more likely to be the kind of subsidies that the GATT was meant to discourage: those that distort markets for the sole purpose of helping domestic producers. . . .

The effectiveness of specificity as a mechanism to separate acceptable from unacceptable subsidies is clearly limited. Legitimate internal policies will always help some industries more (or harm some industries less) than others, and in some cases this differen-

188. See *id.* art. 5(a).

189. See *id.* art. 5(b).

190. See *id.* art. 5(c).

191. See *id.* art. 2(a). . . .

195. See, e.g., *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237 (Ct. Int'l Trade 1984) (purports to uphold *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983)). Both *Carlisle* and the TAA required the application of the specificity test, but the court in *Bethlehem* stated that "[t]he extent to which subsidization is practiced in the country of production is entirely immaterial." *Id.* at 1241. The court was forced to restrict this decision to extremely narrow (and seemingly arbitrary) circumstances since both *Carlisle* and *Bethlehem* involve tax issues. See *id.*

198. See Subsidies Agreement, art. 5.

199. Other, more sophisticated mechanisms could be developed based on the latest economic theories. However, even the best of those economists developing new trade theory can be pessimistic:

The new literature . . . on . . . trade certainly calls into question the traditional presumption that free trade is optimal. Whether it is a practical guide to productive protectionism is another matter. The models described here [that show some subsidies to be beneficial under certain conditions] are all quite special cases; small variations in assumptions can no doubt reverse the conclusions. . . . It may be questioned whether our understanding of how imperfectly competitive industries actually behave will ever be good enough for us to make policy prescriptions with confidence.

tial impact will be clear enough that other countries will be able to classify the actual benefit provided by subsidy as de facto specific. However, if an otherwise legitimate internal policy of one contracting party happens to benefit a certain industry or group of industries, the other contracting parties should not interfere with that country. The GATT has explicitly acknowledged this principle since the Tokyo Round.²²² In cases such as these, another limit on the application of CVDs would be extremely helpful; the Uruguay Round uses a requirement of a financial contribution as this second limitation.²²³ . . .

C. Financial Contribution

[P]rotectionist [CVD] policies should not be possible under the Uruguay Round definition, depending on how it is interpreted.²³³ . . .

[T]he use of a "financial contribution" requirement is not based on the application of economic theory, but, like specificity,²³⁴ is an imperfect and artificial mechanism that is used to separate legitimate internal policy from protectionist market distortions.

The requirement under the Uruguay Round of a financial contribution is even more clearly for the purpose of ease of administration, than that for specificity. Government aid distorts the market no matter what form it takes.²³⁵ The relevant question then is: will

222. See Subsidies [Code], art. 11.1.

Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable.

Id. (Paragraph 1(a)-(f) list six specific legitimate uses for subsidies.)

223. See *id.* art. 1.1.

233. Subsidies Agreement, art. 2. Some members of Congress seem to believe that no substantial changes will result from the new legislation (or, if they do not believe this, they have at least attempted to persuade judges of future disputes by stating this in the legislative history):

In the past, the Department of Commerce (Commerce) has countervailed a variety of programs where the government has provided a benefit through private parties. (*See, e.g., Certain Softwood Lumber Products from Canada . . .*). The specific manner in which the government acted through the private party to provide the benefit varied widely. . . . Commerce has found a countervailing subsidy to exist where the government took or imposed (through statutory, regulatory or administrative action) a formal, enforceable measure which directly led to a discernible benefit being provided to the industry under investigation.

In cases where the government acts through a private party, such as in *Certain Softwood Lumber Products from Canada . . .* (which involved export restraints that led directly to a discernible lowering of input costs), the Committee intends that the law continue to be administered on a case-by-case basis consistent with the preceding paragraph. It is the Administration's view that Article 1.1(a)(1)(iv) of the Subsidies Agreement and section 771(5)(B)(iii) encompass indirect subsidy practices like those that Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable, provided that Commerce is satisfied that the standard under section 771(5)(B)(iii) has been met.

Office of the United States Trade Representative, The Uruguay Round Agreements Act Statement of Administrative Action, Sec. A., September 27, 1994, available in 1994 WL 761793 . . . [hereinafter Statement]. [For judicial discussion of the significance of the Statement, see *AK Steel Corporation v. United States*, *supra*, at ■■■■■.]

234. See Joel P. Trachtman, *International Regulatory Competition, Externalization, and Jurisdiction*, 34 Harv. Int'l L.J. 47, 95-96 (1993).

235. See Subsidies Agreement, art. 1.1. The new Agreement on Subsidies and Countervailing Measures lists several forms of aid that will be considered to be a financial contribution:

For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e., where:

(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

(ii) government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits);

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or

(a)(2) there is any form of income or price support in the sense of Article XVI of the GATT 1994.

Id.

the financial contribution requirement, when combined with the specificity requirement act as a good solution to eradicate the behavior that contracting parties want to discourage?

When the specificity and financial contribution requirements are combined with the traffic light framework, it becomes apparent that the position of the contracting parties is that domestic subsidies should not be interfered with unless it is reasonably clear that their purpose is to benefit domestic producers and give them an unfair competitive advantage over foreign competition. By contrast, the American position has been that domestic subsidies are presumed to be market distorting and may be countervailed unless the benefits of the subsidy are generally available. The conflict between these two perspectives will undoubtedly surface as Commerce decides how to interpret the Uruguay Round Agreements Act, and as disputes arise over subsidies in the future.

B. THE FRAMEWORK OF U.S. LAW

As with the statutory structure of antidumping actions,¹ the statutory structure governing countervailing duties requires action by both the Commerce Department, determining whether a foreign government or public entity is subsidizing the manufacture, production, or export of a class or kind of merchandise imported into the United States,² and the International Trade Commission (ITC), determining if a U.S. industry is materially injured or threatened with material injury, or if the establishment of a U.S. industry is materially retarded, by reason of the subsidized imports.³ If the two determinations are both affirmative, then a countervailing duty must be imposed on the imports.⁴ This structure may seem straightforward, but considerable complications emerge in the details. For example, as we have already seen,⁵ even the definition of what constitutes a “subsidy” against which a countervailing duty may be imposed is a very complex issue under the SCM.

Likewise, the statutory procedures governing the countervailing duty investigation are quite involved. These include detailed provisions concerning the initiation⁶ and termination or suspension⁷ of a countervailing duty investigation, standards governing

1. See Chapter V, *supra*, at ■■■ (discussing 19 U.S.C. § 1673).

2. 19 U.S.C. § 1671(a)(1).

3. *Id.* § 1671(a)(2). This version of the scope of the ITC’s determination only applies to countervailing duty investigations involving imports from a “Subsidies Agreement country.” A Subsidies Agreement country” is defined as:

- (1) a WTO member country,
- (2) a country which the President has determined has assumed obligations with respect to the United States which are substantially equivalent to the obligations under the Subsidies Agreement, or
- (3) a country with respect to which the President determines that—
 - (A) there is an agreement in effect between the United States and that country which—
 - (i) was in force on December 8, 1994, and
 - (ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States, and
 - (B) the agreement described in subparagraph (A) does not expressly permit—
 - (i) actions required or permitted by the GATT 1947 or GATT 1994, as defined in section 3501(1) of this title, or required by the Congress, or
 - (ii) nondiscriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

Id. § 1671(b). In a case involving imports from a country that is not a “Subsidies Agreement country,” a material injury determination is not required. *Id.* § 1671(c).

4. *Id.* § 1671(a).

5. See § A, *supra* (discussing definition of “subsidy”).

6. 19 U.S.C. § 1671a.

7. *Id.* § 1671c.

the preliminary⁸ and final determinations⁹ of Commerce and the ITC, and provisions with respect to the assessment¹⁰ and payment¹¹ of the countervailing duty.

Another complication is a matter of historical accident. The statutory provisions concerning countervailing duties have been the subject of successive and extremely extensive amendments over a considerable period of time. Because some of the earlier provisions may survive in one form or another despite successive amendments, and because judicial interpretation and application of the new framework mandated by the SCM is still in process, it is important to maintain an appreciation of the historical background of the current U.S. statutory provisions. In that regard, consider the following questions:

1. Can we identify an historical trend or direction followed in the successive amendments of these provisions?
2. What perceived problems or other motivations prompted each of these amendments?
3. Is the current statutory framework likely to be more effective in dealing with subsidized imports than previous versions of the statute?

In responding to these questions, consider the following excerpt.

**WILLIAM K. WILCOX, GATT-BASED
PROTECTIONISM AND THE DEFINITION
OF A SUBSIDY**

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Developments in U.S. Subsidy Law

U.S. subsidy law has changed significantly and regularly over the past century in its determination of which subsidies are countervailable. Since CVDs have both a protectionist and a free trade effect, and separating acceptable from unacceptable subsidies is extremely difficult, it is proper for governments to constantly evaluate and fine-tune subsidy laws to minimize protectionism. However, when one examines the specific changes in subsidy laws in the United States over the past century, it becomes evident that the changes facilitating U.S. protectionism have outweighed those that limit it.¹⁹

The Trade Agreements Act of 1979 ("TAA")²⁰ caused U.S. subsidy law to change dramatically. Due to the magnitude of the change implemented by this legislation, it is important that this Act be examined in light of the history of transformation in U.S. subsidy law over the last century. There has been an overall trend of expanding

8. *Id.* § 1671b.

9. *Id.* § 1671d.

10. *Id.* § 1671e.

11. *Id.* §§ 1671f, 1671h.

19. From 1897 (Tariff Act of 1897, ch. 11, §5, 30 Stat. 151, 205) through today, the United States has slowly, but almost continually, expanded the scope of what it considers to be a countervailable subsidy. There have been exceptions such as the addition of the specificity rule [discussed in note 38, *infra*; see also text, *infra* at ■■■ (explaining specificity rules)], but Congress has generally chosen to defer to administrative agencies by using vague language. The judicial branch has frequently responded with deference to those same agencies.

20. The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.) [hereinafter TAA]. This law was passed in response to the Tokyo Round of the GATT.

protectionism in U.S. subsidy law²² that must be examined in order to determine if the new legislation will sufficiently counter that trend. . . .

A. Early U.S. Subsidy Law and the Trade Act of 1974

Although U.S. statutes permitting the use of CVDs date back to 1897,²³ the Tariff Act of 1930 ("Tariff Act")²⁴ has been the main source of subsidy law in the United States during this century.²⁵ This Act used the phrase "bounty or grant,"²⁶ causing significant confusion in case law, because it has the same meaning as "subsidy" (although neither term has been clearly defined).²⁸ The Tariff Act is still in effect as amended by the TAA.²⁹

The Trade Act of 1974³⁰ was another significant development in U.S. subsidies law. It directly altered U.S. CVD law and also offered a means of sanctioning foreign competitors even when the government was not able to show the existence of a subsidy.³¹

The Trade Act of 1974 allowed CVDs to be imposed on duty-free imports when the subsidy resulted in a material injury to a domestic industry. Another major change resulting from the Trade Act of 1974 is section 201: the escape clause.^a

B. The Trade Agreements Act of 1979

The TAA refined subsidy law significantly, although it too failed to yield a useful definition of a subsidy. The primary significance of the TAA was that it implemented the results of the Tokyo Round.³⁷ In addition, the United States went beyond its obligations as a contracting party and Subsidies Code signatory by adding the specificity requirement.³⁸

1. Response to the Tokyo Round

One major change in subsidy law resulting from the TAA was that a distinction was made between responses to contracting parties of the GATT, and responses to other countries, when subsidies were used.³⁹ This resulted from the Tokyo Round of the

22. The United States has been the clear leader in the use of CVDs, and has used them much more since the Tokyo Round. See [Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 Colum. L. Rev. 199 (1989)], at 202. "The view that U.S. protectionism . . . will increase in the future seems to represent a consensus among trade policy experts." Jonathan Eaton, *Credit Policy and International Competition*, in [Strategic Trade Policy and the New International Economics, (Paul R. Krugman ed., 1986),] at 115, 123 [(hereinafter Strategic Trade Policy)].

23. See Tariff Act of 1897, § 5, 30 Stat. at 205.

24. 19 U.S.C. §§ 1303-1677h (1994).

25. See Michael Y. Chung, *U.S. Antidumping Laws: A Look at the New Legislation*, 20 N.C. J. Int'l L. & Com. Reg. 495 (1995).

26. The phrase "bounty or grant" is used in describing when CVDs may be applied.

[W]henver any country . . . shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country... then upon the importation of such article or merchandise into the United States, . . . there shall be levied and paid, in all such cases, . . . a duty equal to the net amount of such bounty or grant.

19 U.S.C. §1303(a)(1).

28. 19 U.S.C. 1677(5)(a).

29. See TAA, § 102, 93 Stat. at 150.

30. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat 1978 (1976).

31. See § 301, 88 Stat. at 2041-43.

a. On § 201 actions, see Chapter 4, *supra*, at ■■■■■.

37. See TAA, § 2, 93 Stat. at 147-48.

38. See 19 USC § 1677(5A). The specificity test adds an additional requirement to when a CVD can be imposed. Not only must a subsidy exist, but the subsidy must either target and benefit a specific industry or in the case of a de facto subsidy, the subsidy as applied and used must benefit a single or few industries. See *id.* See generally *PPG Indus., Inc. v. United States*, 928 F.2d 1568, 1571-72 (Fed. Cir. 1986) (following the test created by the court in *Cabot Corp.*); *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985) (adopting the case by case de facto specificity test).

39. Countries not parties to the Tokyo Round are still subject to the test created by the Tariff Act of 1930. This act does not require the Treasury to find that the subsidy has caused any injury to U.S. producers. See TAA, § 701(c), 93 Stat. at 151. See also *PPG Indus.*, 928 F.2d at 1570. . . .

GATT, which only allowed countervailing duties to be used on contracting parties when the subsidies actually cause injury to domestic industry.⁴⁰

Prior to the TAA, the determination of whether to use a CVD involved a one-step test conducted by the Treasury Department.⁴¹ The TAA imposed a two-step test that must be satisfied before a CVD can be used against a contracting party. The first step under the TAA requires that the Commerce Department determine whether a subsidy even exists. Then, if there is a subsidy, the International Trade Commission must then determine whether there has been material injury to a U.S. industry.⁴⁴ This bifurcated process reduced the ability of the United States to abuse GATT CVD procedures. Paradoxically, CVDs have actually been used much more frequently since the TAA was enacted. This indicates that other changes making CVD laws easier to use and abuse overwhelmed this limitation.⁴⁵

The TAA distinguished between countries "under the agreement," and the rest of the world.⁴⁶ The Tariff Act remains in effect for countries that are not members of the WTO.⁴⁷ The United States may impose CVDs on any of these non-members that subsidize any industry that produces exports.⁴⁸ The United States will not countervail against other members' subsidies unless those subsidies cause injury to U.S. industry.⁴⁹

The TAA also distinguished between domestic and export subsidies.⁵⁰ This distinction is also made in the GATT after the Uruguay Round negotiations, which completely prohibit export subsidies.⁵¹ An export subsidy is a subsidy that is based upon export to foreign markets. It is any government program or practice that increases the profitability of export sales, but does not increase the sales for domestic consumption. All other subsidies (those that are given regardless of whether the product is sold inside or outside the subsidizing country) are domestic subsidies.

2. The Clarification of the Meaning of a Subsidy

The TAA also further clarified the term subsidy, although no exact definition is given.⁵³ The TAA describes a subsidy as any financial contribution, any form of price or income support as defined in the present GATT.⁵⁴ The TAA also addresses instances where a government could make payments to a funding mechanism that would then transfer these payments to another entity. These payments would be classified as a subsidy as long as the payments being made by the funding mechanism to the other entity are one which a government agency would normally make. The TAA uses

40. See TAA, § 701(a)(2), 93 Stat. at 151. . . .

41. The Treasury only had to find that a subsidy existed in a foreign market. See Restatement (Third) Foreign Relations Law of the United States § 806 reporter's note 3 (1987) [hereinafter Restatement].

44. The International Trade Commission ("ITC") can refuse to impose a CVD if it finds that the injury does not meet its de minimis standard of injury. See *id.* reporter's note 4. See also *ASG Indus., Inc. v. United States*, 467 F. Supp. 1200 (Cust. Ct. 1979). The Customs Court required the U.S. government to impose a CVD against Italian glass makers despite the Italian government's argument that the subsidy's impact was so minimal that it did not distort trade. See *id.* at 1216-25. Although the court ruled against the government, it did recognize that a de minimis exception could exist. See *id.*

45. . . . While CVDs had only been used 58 times before 1974, they had been used 289 times between 1980 and 1987. . . . Cooper, *U.S. Policies and Practices on Subsidies in International Trade*, in *International Trade and Industrial Policies* 106, 114 (Steven J. Warnecke ed., 1978).

46. See 19 USC § 1671(c).

47. See TAA, § 701(c), 93 Stat. at 151.

48. See 19 U.S.C. § 1303(a).

49. See 19 U.S.C. § 1671(a)(1)-(a)(2)(B).

50. See 19 U.S.C. § 1671(a).

51. See Subsidies Agreement, arts. 2, 3.

53. One of the reasons that U.S. law regarding subsidies is so vague is that the GATT itself contained no definition and only a vague description of what is a subsidy, and which subsidies are countervailable. . . .

54. See 19 USC § 1677(5)(B).

language that makes it clear that a subsidy does not require a direct financial transfer from government.⁵⁷ For example, the setting of a price ceiling for a certain good or service could be seen as a subsidy to an industry that uses that good or service, because lowering the input costs is the equivalent (for the producer) of providing a per-unit cash subsidy. An indirect subsidy is countervailable under the statute.⁵⁸

The TAA clarified the term "subsidy" further by referring to the Illustrative List of Export Subsidies in Annex 1 of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade ("Subsidies Code").⁵⁹ This list provides some examples of subsidies that are countervailable, but it is explicitly non-exhaustive.⁶⁰ It provides only the clearest examples and leaves the difficult questions unanswered. While Congress could have clarified the confusion over the definition of a countervailable subsidy, it purposefully avoided the controversy and simply codified the list.⁶² Here ambiguity in the definition of a countervailable subsidy is the equivalent of deference to the administering agency. . . .

3. Specificity

The TAA also added the specificity test to U.S. law.⁶⁶ This limits the classification of "countervailable domestic subsidy," to those domestic subsidies that are directed at specific targets as opposed to those that are generally available.⁶⁷ The paradigm case is that of public roads paid for by the government. These roads will make it less expensive for virtually every industry to produce virtually any good; this could be considered a subsidy if an expansive definition were adopted. However, it is clear that if governments were allowed to use CVDs against every such subsidy, the result would be "absurd"⁶⁸ and the benefits of the GATT would soon be lost. It is therefore clear that the definition of an actionable or countervailable subsidy for the purposes of the GATT and U.S. law should be different from any such expansive definition.

Although the specificity test serves an important purpose in limiting abuse of CVD provisions, it has been criticized for being ill-defined and for making a senseless distinc-

57. See 19 U.S.C. § 1677(5)(C). ("The determination of whether a subsidy exists shall be made . . . without regard to whether the subsidy is provided directly or indirectly").

58. See 19 USC §§ 1677(5)(B), (C).

59. See 19 U.S.C. § 1677 (5)(A).

60. See Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, April 12, 1979, T.I.A.S. 9619, 31 U.S.T. 513, at Annex 1, Illustrative List of Export Subsidies. [hereinafter Subsidies Code]. The final item on the list is "[a]ny other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement." *Id.*

62. See 19 U.S.C. § 1677(5)(B) (defining a subsidy to a limited and not all inclusive extent).

66. "A subsidy is specific if it is an export subsidy described in subparagraph (B) or an import substitution subsidy described in subparagraph (C), or if it is determined to be specific pursuant to subparagraph (D)." 19 U.S.C. § 1677(5)(A). A domestic subsidy is specific where the "authority providing the subsidy, or legislation pursuant which the authority operates,"

(i) expressly limits access to the subsidy to an enterprise or industry...

(ii) establishes objective criteria or conditions governing the eligibility for, and the amount of subsidy, the subsidy is not specific

if-

(I) eligibility is automatic,

(II) the criteria or conditions for eligibility are strictly followed, and

(III) the criteria or conditions are clearly set forth in the relevant statutory regulation, or other official document as to be capable of verification.

19 U.S.C. § 1677 (5A)(D)(i-ii).

67. See 19 USC § 1677(5)(B).

68. "These [types of generally available] subsidies have such a widespread effect on production that countervailing duties, were they allowed in such cases, could be imposed on almost every product which enters international commerce." See *Carlisle Tire and Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983) (quoting John J. Barcelo, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 L. & Pol'y Int'l Bus. 779, 836 (1977) (discussing the need for specificity in applying CVD laws). . . .

tion between generally available and specific subsidies. The language used ("specific enterprise or industry or groups of enterprises or industries") gives one the distinct impression that the drafters have avoided specificity in the specificity test for the same reason that any concrete definition of a subsidy had been avoided: to avoid offending any particular industrial group or country, to delegate responsibility to the courts, and to allow for an expansionist attitude toward the use of CVDs. Such issues regarding specificity play a major role in the confusing case law that results. . . .

NOTES AND QUESTIONS

1. *Effect of the 1979 Subsidies Code.* The Trade Act of 1974 authorized the President to negotiate a subsidies code with U.S. trading partners, to establish uniform conditions for imposing countervailing duties. Trade Act of 1974, Pub. L. No. 93-618, § 102(b), 88 Stat. 1978, 1982-83 (1975). The Subsidies Code, signed in 1979, emerged from the Tokyo Round. *See* Agreement of Interpretation and Application of Articles VI, XVI, & XXIII of the GATT (Subsidies Code), *reprinted in* II Bruce E. Clubb, *United States Foreign Trade Law* 648-49 (1991). By acceding to the Subsidies Code, the United States agreed to incorporate GATT's Article VI "material injury" requirement into its national countervailing duty law for all proceedings involving its signatory partners. Subsidies Code, art. I, *reprinted in* Clubb, *supra*, at 650. In 1979, Congress amended the countervailing duty laws to comply with the Subsidies Code. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.) (the 1979 Act). The 1979 Act, however, left the existing countervailing duty law in place, in amended form, to apply to countries that did not sign the Subsidies Code or an equivalent agreement. 19 U.S.C. § 1303(a)(1) (1988) (repealed 1994). The 1979 Act amended section 1303(a)(1) specifically to exclude any "article or merchandise which is the product of a country under the Agreement." 1979 Act, § 103(a), 93 Stat. at 190. For a discussion of the interrelation between the pre-Subsidies Code statutory framework and the situation under the Trade Agreements Act, see *Ceramica Regiomontana*, excerpted *infra*.

2. *Effect of the Uruguay Round.* The Uruguay Round produced, among other things, the SCM, a new subsidies agreement that replaces the 1979 Subsidies Code. In accordance with U.S. obligations under the SCM, Congress repealed 19 U.S.C. § 1303—the then current version of the original U.S. countervailing duty provision—effective January 1, 1995. Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 261(a), 108 Stat. 4809, 4908 (1994). In addition, the URAA amended U.S. countervailing duty provisions to conform them with the SCM. *See* URAA, Pub. L. No. 103-465, tit. II, §§ 221(b), 222, 229(b), 233, 251, 266, 267, 270, 108 Stat. 4869, 4890, 4898, 4900-02, 4915, 4917-18 (Dec. 8, 1994). The requirements of the SCM significantly changed the countervailing duty statute as of January 1, 1995. *See, e.g.*, 19 U.S.C. § 1677(5)(F) (concerning effect of change in ownership of all or part of subsidized foreign enterprise). *Cf. Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996) (considering change in ownership in case governed by pre-SCM statute).

3. Much has been written on the subject of the purpose, intent, and proper economic

approach to the administration of the countervailing duty law.¹ To trigger a countervailing duty, why is it not enough under the statute that a subsidy has been extended to the exporter? Should it not be obvious that, in a competitive market, the subsidized import will injure U.S. producers? Consider the following case.

**CERAMICA REGIOMONTANA, S.A. v.
UNITED STATES**

64 F.3d 1579 (Fed. Cir. 1995)

RADER, CIRCUIT JUDGE.

[A Mexican exporter of ceramic tiles challenged the imposition of a countervailing duty and the method by which the ITA had determined the duty rate. The CIT denied the challenge and remanded to the ITA. An appeal was dismissed as premature by the Federal Circuit. After remand, the CIT affirmed the remand results and dismissed. The exporter appealed again, claiming that once a subsidies agreement had been entered into between the United States and Mexico, an injury determination was required before countervailing duties could be assessed on imports from that country.]

Background

The United States countervailing duty laws protect domestic industries from unfair foreign competition. When a foreign government provides a subsidy to a foreign importer for the manufacture, production, or export of goods, ITA may impose a countervailing duty on imports of those goods. 19 U.S.C. § 1671(a) (1988), *as amended by Uruguay Round Agreements Act*, Pub.L. No. 103-465, § 262, 108 Stat. 4809, 4910 (1994). The countervailing duty equals the amount of the subsidy. *Id.*

Before ITA may impose countervailing duties, the International Trade Commission (ITC) must make an affirmative injury determination. *Id.* ITC must find that the imports caused, or threatened to cause, material injury to a domestic industry, or that the imports materially retarded the establishment of a domestic industry. *Id.*

Before 1980, Title 19 did not require an injury determination for dutiable goods. *See* Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687, *as amended by Trade Act of 1974*, Pub. L. No. 93-618, § 331(a)(1), 88 Stat. 1978, 2049 (1975) (codified as amended at 19 U.S.C. § 1303(a)(1) (1976)). An early version of the countervailing duty law provided:

Whenever any country . . . shall pay or bestow . . . any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . then upon the importation of such article or merchandise into the United States . . . there shall be levied and paid . . . in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

1. *See, e.g.,* Richard Diamond, *A Search for Economic and Financial Principles in the Administration of United States Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507 (1990); Richard Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767 (1989); E. Kwaku Andoh, *Countervailing Duties in a Not Quite Perfect World: An Economic Analysis*, 44 STAN. L. REV. 1515 (1992); Ronald A. Cass, *Trade Subsidy Law: Can A Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL'Y INT'L BUS. 609 (1990); Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989); Charles J. Goetz, Lloyd Granet, & Warren F. Schwartz, *The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17 (1986). *See also* David A. Codevilla, *Discouraging the Practice of What We Preach: Saarstahl I, Inland Steel, and the Implementation of the Uruguay Round of GATT 1994*, 3 GEO. MASON INDEP. L. REV. 435 (1995).

19 U.S.C. § 1303(a)(1) (1976).

For "countries under the Agreement," the 1979 Act provided a new statutory provision for imposition of countervailing duties. 1979 Act, § 701, 93 Stat. at 151 (codified at 19 U.S.C. § 1671). This provision applies to countries that signed the Subsidies Code or have since assumed substantially equivalent obligations by agreement with the United States. 19 U.S.C. § 1671(a) (setting forth requirements for imposing countervailing duties); 19 U.S.C. § 1671(b) (defining "country under the Agreement"). Thus, as of 1980, and during the time at issue in this case, the United States had two standards for countervailing duties: section 1671 for "countries under the Agreement" and section 1303 for all others.

The major difference between the two standards of title 19 is the injury determination requirement. Section 1303 authorizes imposition of countervailing duties without an injury determination. 19 U.S.C. § 1303(a)(1), (b). Section 1671, however, bars imposition of countervailing duties until after ITC makes an injury determination. 19 U.S.C. § 1671(a). . . .

Discussion

The issue on appeal is whether ITA has authority to impose countervailing duties on ceramic tile imported from Mexico after April 23, 1985—the date Mexico became a "country under the Agreement" as defined by section 1671(b)—absent an injury determination. Put another way, this court must decide whether Mexico's change in status to a "country under the Agreement" deprives ITA of statutory authority to assess duties on ceramic tile imported after the status change, based on an order properly issued before the status change under section 1303(a)(1). . . .

Section 1303(a)(1) of Title 19 authorizes ITA to impose countervailing duties on dutiable goods imported from certain countries. 19 U.S.C. § 1303(a)(1). Section 1303(a)(1) specifically excepts goods imported from "countr[ies] under the Agreement" from its scope:

Except in the case of an article or merchandise which is the product of a country under the Agreement (within the meaning of section 1671(b) of this title), whenever any country . . . shall pay . . . any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country . . . then upon the importation of such article or merchandise into the United States . . . there shall be levied and paid . . . a duty equal to the net amount of such bounty or grant, however the same shall be paid or bestowed.

Id. (Emphasis added.)

By its language, section 1303(a)(1) ceases to operate as authority for countervailing duties on goods imported after the importing country has become a "country under the Agreement." The language of section 1303(a)(1) links the importing country's status—which is determinative of the section's applicability—to the time of importation of goods under review. As recited in the statute, except for goods imported by a country under the Agreement, ITA shall levy a duty "upon the importation" of subsidized goods. Countervailing duties are imposed upon entry or importation of goods, not upon issuance of the original countervailing duty order. *See Cementos Guadalajara, S.A. v. United States*, 686 F.Supp. 335, 351 (Ct.Int'l Trade 1988), *aff'd.*, 879 F.2d 847, 848, 7 Fed.Cir. (T) 113, 114 (1989), *cert. denied*, 494 U.S. 1016 (1990). It is at this time—the time of importation of the goods—that ITA must evaluate whether a country is a "country under the Agreement" to determine whether section 1303 or section 1671 applies.

Mexico became a "country under the Agreement" on April 23, 1985. Ceramic tile imported after that date falls outside the scope of section 1303(a)(1). Ceramica imported the ceramic tile under review between January 1, 1986 and December 31, 1986. Because that ceramic tile entered after Mexico's recognition as a "country under the Agreement," section 1303(a)(1) does not apply.

Any other reading of section 1303(a)(1) would lead to the absurd conclusion that a country with outstanding countervailing duty orders would have to pay duties on those orders potentially in perpetuity, even after becoming a "country under the Agreement." A valid countervailing duty order under section 1303 does not establish a legal basis for imposition of duties into perpetuity. Rather, the importation of goods during the year in review triggers the duties. *Cementos Guadalajara*, 686 F.Supp. at 351 ("That the liability for duties is established at the time of entry of the goods into the United States has been recognized as an axiom of countervailing duty law.").

After Mexico became a "country under the Agreement," the only provision under which ITA could continue to impose countervailing duties was section 1671. Section 1671 requires ITC to conduct an injury determination. 19 U.S.C. § 1671(a)(2). ITC, however, did not conduct an injury determination in connection with the subject administrative review. Thus, this court holds that neither section 1303(a)(1) nor section 1671 authorized Commerce to collect duties on ceramic tile imported from Mexico after April 23, 1985.

The 1979 Act included transition rules. 1979 Act, § 104, 93 Stat. at 190-93 (codified at 19 U.S.C. § 1671 note (1988)). The transition rules addressed countervailing duty orders in effect on January 1, 1980, for countries under the Agreement. 1979 Act, § 104(b), 93 Stat. at 191-92. The countervailing duty order against Mexico's ceramic tile imports issued in 1982. Thus, the transition rules do not apply in this case.

Moreover, the clear language of section 1303(a)(1) trumps any language contained in the Understanding. *See Cementos Anahuac del Golfo, S.A. v. United States*, 689 F.Supp. 1191, 1211 (Ct.Int'l Trade 1988) ("United States countervailing duty law is the source of direction and guidance in this [countervailing duty] matter."), *aff'd.*, *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847, 848, 7 Fed.Cir. (T) 113, 114-15 (1989), *cert. denied*, 494 U.S. 1016, 110 S.Ct. 1318, 108 L.Ed.2d 494 (1990). The only effect attributable to the Understanding is to change Mexico's status to that of a "country under the Agreement." Title 19 governs the imposition of countervailing duties.

In sum, when Mexico attained the status of a "country under the Agreement," section 1303 no longer applied because Congress expressly limited that statute to countries other than those under the Agreement. The only statutory authority upon which Congress could impose duties was section 1671. Without the required injury determination, Commerce lacked authority to impose duties under section 1671. *See* 19 U.S.C. § 1671(a)(2).

NOTES AND QUESTIONS

1. Would the result in *Ceramica Regiomontana* have been different if the post-Uruguay Round provision, 19 U.S.C. § 1677(5)(F), had applied to the case?

2. For the most part, once a countervailing duty investigation (or an antidumping investigation) is initiated, the relevant statutory provisions require it to be carried through to its conclusion. Under certain specified circumstances, however, the statute does allow for a resolution by the use of a settlement agreement between the home government of the exporter and the ITA. *See, e.g.*, 19 U.S.C. § 1671c(b) (authorizing Commerce to suspend investigation where subsidizing country or subject exporters agree

to eliminate subsidy); *id.* § 1671c(c) (authorizing Commerce under extraordinary circumstances to suspend investigation where subsidizing country or subject exporters agree to eliminate injurious effects). One peculiarity of this procedure is that the domestic producers that are the petitioners in the investigation are *not* parties to the “settlement” or its negotiation. They do have the statutory right to submit comments and criticism with respect to the proposed settlement once it is negotiated. For an example of a successful challenge to a settlement agreement by domestic producers, see *Bethlehem Steel Corporation v. United States*, 159 F. Supp.2d 730 (Ct. Intl. Trade 2001).

3. To trigger a countervailing duty, is it enough under the statute that a subsidy has, at some relevant point in time, been extended to the exporter and that the subsidized import has injured U.S. producers? How long do the effects of the subsidy persist? Does it make a difference if the subsidized exporter is later bought out by a third party that did not directly benefit from the original subsidy? Consider *Saarstahl*, excerpted *infra*.

SAARSTAHL AG v. UNITED STATES

78 F.3d 1539 (Fed. Cir. 1996)

MAYER, CIRCUIT JUDGE.

[The ITA made an affirmative final determination against Saarstahl, a foreign manufacturer of steel, in *Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany*, 58 Fed. Reg. 6233 (Dep't Comm. Jan. 27, 1993) (final affirmative countervailing duty determination) (“*Final Determination*”), as modified on remand in *Remand Determination: Certain Hot Rolled Lead and Bismuth Carbon Steel Products From Germany* (Oct. 12, 1993) (“*Remand Determination*”). Saarstahl challenged the ITA’s countervailing duty (CVD) order. The CIT affirmed the CVD in part and reversed in part. The Government appealed.]

. . . Commerce had determined that the arm's length sale of a subsidized government-owned company does not automatically terminate the countervailability of previously bestowed subsidies. Commerce also determined that a portion of the sales price paid by the private party for the steel company constituted repayment of a portion of the previously bestowed subsidies and extinguished the subsidies to the extent of the repayment. In vacating this decision “to the extent [that] Commerce determined [that] previously bestowed subsidies are passed through to a successor company sold in an arm's length transaction,” . . . the Court of International Trade held that the arm's length sale of the company extinguished any remaining “competitive benefit” from the prior subsidies, because the price presumably included the market value of any continuing competitive benefit. . . . For reasons set forth below, we reverse and remand.

Background

Between 1978 and 1985, Saarstahl Volklingen GmbH (“Saarstahl SVK”), a German steel company, received various subsidies from the West German federal government and the Saarland state government. These governments gave Saarstahl SVK guaranteed loans, government funds, and “RZVs,” which are loans that must be repaid at face value, with repayment made contingent on Saarstahl SVK’s return to profitability. When Saarstahl SVK could not make its principal payments, the governments assumed them, and Saarstahl SVK continued to amass RZVs.

Until 1986, Saarstahl SVK was wholly owned by Arbed Luxembourg (“Arbed”), a Luxembourg state-owned company. In that year, with Saarstahl SVK’s financial condition continuing to deteriorate, Arbed transferred 76% of its ownership of Saarstahl SVK

to the government of Saarland. Usinor-Sacilor, a French company that owned German steel producer AG der Dillinger Huttenwerke ("Dillinger") expressed interest in purchasing Sairstahl SVK if it was relieved of its debt burden. The governments therefore devised a restructuring plan that entailed the forgiveness of all of Sairstahl SVK's repayment obligations to the governments, as well as a portion of the company's debts to private banks.

On June 15, 1989, Sairstahl SVK was converted into a stock company called Dillinger Hutte Sairstahl AG ("DHS"). In exchange for Sairstahl SVK's assets and a capital contribution of DM 145.1 million, the Saarland government received 27.5% ownership interest in DHS. Usinor-Sacilor received 70% ownership of DHS in exchange for its shares in Dillinger. Arbed received 2.5% of DHS in exchange for a capital contribution of DM 8.9 million. On June 30, 1989, DHS transferred Sairstahl SVK's lead-bar assets to a newly formed subsidiary, Sairstahl AG ("Sairstahl").

Commerce initiated an investigation of Sairstahl on May 8, 1992, based on a petition filed by Inland Steel and Bethlehem Steel, and issued its preliminary determination on September 17, 1992. On January 27, 1993, in its final determination, Commerce determined that "[b]ecause the debt forgiveness was part of the deal negotiated to effect the merger," it benefited the newly formed company, not DHS's predecessor, and was thus countervailable. *Final Determination*, 58 Fed. Reg. at 6234. Commerce also determined that the debt forgiveness by private banks was countervailable, because it was required by the governments as part of a government-led debt reduction package, and because the governments guaranteed Sairstahl's future liquidity, "implicitly assuring the private banks that the remaining portion of Sairstahl's outstanding loans would be repaid." 58 Fed. Reg. at 6235. Following the International Trade Commission's affirmative injury determination, Commerce issued a countervailing duty order for the relevant products. 58 Fed. Reg. 15,325 (1993).

In the subsequent countervailing duty investigations in *Certain Steel Products From Germany*, 58 Fed. Reg. 37,315 (1993) (final determination), Commerce reconsidered the effect of privatization on the benefits from prior subsidies and determined that, although the privatization of a public company through an arm's length sale did not automatically extinguish the countervailability of the prior subsidies, the price paid for the company could constitute a partial repayment of the prior subsidies.

Commerce requested and was granted a remand to reconsider its original determination, and on remand adopted the methodology developed in the *Certain Steel* cases. ... It determined that the debt forgiveness amounted to a grant bestowed on Sairstahl in 1991, the benefit of which passed through to DHS after Sairstahl was privatized. It also determined that part of the Sairstahl sales price represented partial repayment of the subsidy and adjusted the countervailing duty margins accordingly, treating the purchase price for Sairstahl as payment for prior subsidies to the same extent that subsidies comprised Sairstahl SVK's net worth. On January 27, 1993, Commerce had imposed a countervailing duty of 17.28%. On remand, Commerce imposed a countervailing duty of 16.85%.

On June 7, 1994, the Court of International Trade upheld Commerce's determination that Sairstahl was privatized because it was supported by substantial evidence, but held that Commerce's privatization methodology was unlawful to the extent that it passed previously bestowed subsidies through to a successor company sold in an arm's length transaction. To that extent, the court vacated Commerce's final determination as modified on remand. The court held that the sale of Sairstahl to DHS in an arm's length transaction automatically extinguished subsidies previously bestowed on Sairstahl.

Thus, DHS did not directly or indirectly receive a subsidy, and no countervailable event had occurred under 19 U.S.C. § 1671(a) (1994). The court acknowledged that it must accord deference to Commerce's interpretation of the statute it administers, but concluded that in this case that interpretation would alter Congress's intent.

Discussion

The issue is whether the Court of International Trade erred in vacating Commerce's final determination and holding that Commerce's privatization methodology is unlawful to the extent that it allows previously bestowed subsidies to be passed through to a successor company sold in an arm's length transaction. . . .

The Court of International Trade's decision rests on the premise that subsidies may not be countervailed unless they confer a demonstrable competitive benefit on the merchandise exported to the United States. The court acknowledged that the statute embodies an irrebuttable presumption of competitive benefit from a subsidy, but held that the presumption "ceases to exist where the new owner has paid fair market value for the [company] and is therefore not a 'recipient.'" 858 F.Supp. at 193. "By determining the sale of Saarstahl was at arm's length," the court reasoned, "Commerce has necessarily determined [that] DHS did not receive a competitive benefit [from the prior subsidies], but instead paid the fair market value for the productive unit it purchased." 858 F.Supp. at 194.

The statute provides that countervailing duties may be assessed if two requirements are satisfied: (1) a subsidy is provided "with respect to the manufacture, production, or sale of a class or kind of merchandise;" and (2) a domestic industry is injured by reason of imports into the United States of that class or kind of merchandise. 19 U.S.C. § 1671(a).*

These requirements are satisfied regardless of whether the subsidy actually confers any competitive advantage on the merchandise exported to the United States. Thus, the statute does not limit Commerce to countervailing only subsidies that confer a competitive advantage on merchandise exported to the United States. Nor does the legislative history say that Commerce was expected to perform any calculations of competitive advantage. . . .

The court's improper equation of subsidy and competitive benefit leads it to erroneously inject the International Trade Commission into a statutory provision pertaining to the International Trade Administration's role. To support its decision, the court notes that the legislative history accompanying the 1979 amendments indicates that "relating the benefit of the commercial advantage to the recipient" of the subsidy should be one "reasonable method [] of allocating the value of such subsidies over the production or exportation of products benefitting from them" when calculating the "effect of non-recurring subsidy grants or loans." H.R.Rep. No. 317, 96th Cong., 1st Sess. 75 (1979). This statement, however, is best seen as an explanation of how a subsidy once found to exist should be allocated over time. It cannot be seen as Congress's idea of how Com-

*. On December 8, 1994, Congress passed the Uruguay Round Agreements Act of the General Agreement on Tariffs and Trade. See Uruguay Round Agreements Act, Pub.L. No. 103-465, tit. II, §§ 221(b), 222, 229(b), 233, 251, 266, 267, 270, 108 Stat. 4869, 4890, 4898, 4900-02, 4915, 4917-18 (Dec. 8, 1994). This agreement profoundly changed the countervailing duty statute as of January 1, 1995. Under the current section 1677(5)(F), "[a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction." 19 U.S.C. § 1677(5)(F) (1994). Although the current statutory scheme is fundamentally at odds with the Court of International Trade's decision in this case, our decision is based on the statutory scheme prior to this amendment, and our references are to that version of the statute.

merce should determine whether a subsidy exists, because the statute makes clear that Congress did not require Commerce to determine the effect of the subsidy once bestowed. Indeed, Congress has expressed the contrary view that "an 'effects' test for subsidies has never been mandated by the law and is inconsistent with effective enforcement of the countervailing duty law." North American Free Trade Agreement Implementation Act, S.Rep. No. 189, 103d Cong., 1st Sess. 42 (1993). It would be "burdensome and unproductive for the Department of Commerce to attempt to trace the use and effect of a subsidy demonstrated to have been provided to producers of the subject merchandise." *Id.* at 42-43. For these reasons, it is Commerce's practice to value a nonrecurring subsidy in the year of receipt, subject only to certain statutory offsets not involved here. *See* 19 U.S.C. § 1677(6). The International Trade Commission, not Commerce, is entrusted with the function of determining whether a United States industry is materially injured "by reason of imports of [the subsidized] merchandise." 19 U.S.C. § 1671(a). . . . This injury to domestic industry is the only "effect" relevant under the statutory scheme, and the arm's length sale of a subsidized company would not necessarily prevent the merchandise sold by the newly privatized company from having this adverse effect on the United States industry. *Cf. ASG Indus. v. United States*, 67 C.C.P.A. 11, 610 F.2d 770, 777 (CCPA 1979) (concluding that "it was error to employ an injury (to United States trade) test in determining whether a bounty or grant was paid upon the manufacture or production of the involved merchandise").

In justifying its result, the Court of International Trade stated that it would be onerous to allocate subsidies to companies sold at arm's length. Such an argument, however, is inconsistent with the Court of International Trade's explicit assumption that the buying company is necessarily taking into account "all relevant facts," presumably including the subsidies, in formulating a purchase price. *See* 858 F.Supp. at 193 ("[O]ne must conclude that the buyer and seller have negotiated in their respective self-interests, the buyer has taken into consideration all relevant facts, and the buyer has paid an amount which represents the market value of all it is to receive."). The court assumes that the market purchase price *must* include the complete present value of the subsidies. Commerce has indicated that if such a situation arose it would extinguish the subsidies "to the extent that a portion of the purchase price for a privatized company can reasonably be attributed to prior subsidies." *Remand Determination* at 10 (citing *Certain Steel Products from Austria*, General Issues Appendix, 58 Fed. Reg. 37225, 37262-63 (1993) (final determination)); *see also Certain Corrosion-Resistant Carbon Steel Flat Products From New Zealand*, 57 Fed.Reg. 57730, 57731 (Dec. 7, 1992) (preliminary determination) (stating that it "would recognize as extinguishing a countervailable subsidy" the "repayment to the government by the recipient company of the remaining value of that subsidy"). Indeed, in this case, Commerce held that part of the price paid by the buyer was repayment of a part of the previously bestowed subsidies, and extinguished the subsidies to that extent. Thus, the court erred in holding that *as a matter of law* a subsidy cannot be passed through during an arm's length transaction. Commerce's methodology correctly recognizes that a number of scenarios are possible: the purchase price paid by the new, private company might reflect partial repayment of the subsidies, or it might not.

The court makes an additional policy argument that "as long as the amortization clock is still ticking the subsidy will continue to travel" under Commerce's approach, which "requires buyers to value the potential liability of purchasing productive units which previously received a subsidy." 858 F.Supp. at 194. Thus, according to the court "[a] purchaser could no longer value a business based on market considerations; he would

have to investigate whether there had been previous subsidies that were being, or possibly might be, countervailed in the future." *Id.* at 194. Yet these considerations are precisely the same as those the court assumes have taken place during the arm's length transaction, in which the buyer considered "all relevant facts."

Ultimately, the court did not accord sufficient deference to Commerce's approach. It states that "Commerce has developed its privatization methodology in the absence of any direction by Congress and in direct contravention of the guiding purpose of the [countervailing duty] laws." It then notes that Commerce conceded that Congress has provided no guidance as to what proportion of the purchase price of a privatized company should be attributed to prior subsidies. In the absence of explicit mandates, however, Commerce's approach must be accorded deference. Instead, the court decided that the subsidy remains with the seller—in this case, "reverts to the state,"—"[t]o the extent that the government is not fully reimbursed for its previous subsidy payments." 858 F.Supp. at 193. In reaching this conclusion, the court disregarded the fact that Commerce's approach is merely the flip side of the court's preferred approach: Commerce determined that the subsidy survives unless there is evidence that it went elsewhere or was repaid.

Commerce's approach was reasonable and should not have been disturbed, and therefore the court erred in concluding that subsidies cannot pass through to privatized companies. The case must be remanded because the court did not address all of the parties' arguments, including Commerce's request for a remand to review the agency's allocation of Saarstahl's purchase price to repayment of prior subsidies and to assess Saarstahl's creditworthiness in 1989. . . .

C. THE FRAMEWORK OF GATT LAW OF SUBSIDIES

In the preceding sections, the material has focused primarily on the SCM and the U.S. statutory provisions that relate to it. From the perspective of the GATT, this means that we have been limiting the context of our discussion to Article VI of the GATT, which authorizes, under specified circumstances, the imposition of countervailing duties in response to certain subsidies. It is important to keep in mind, however, that other important provisions of the GATT also have a role to play in relation to subsidies.

Consider the following problem. In October 2000, Congress enacted the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA).¹ The CDSOA provides as follows:

§ 1675c. Continued dumping and subsidy offset

(a) In general

Duties 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".

(b) Definitions

As used in this section:

(1) Affected domestic producer

The term "affected domestic producer" means 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

¹ Pub. L. No. 106-387, § 1(a) [Title X, § 1003(a)], Oct. 28, 2000, 114 Stat. 1549, 1549A-73 (codified at 19 U.S.C. § 1675c).

an antidumping 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.

(2) Commissioner

The term "Commissioner" means the Commissioner of Customs.

(3) Commission

The term "Commission" means the United States International Trade Commission.

(4) Qualifying expenditure

The term "qualifying expenditure" means 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.

(5) Related to

A company, business, or person shall be considered to be "related to" another company, business, or person if—

(A) the company, business, or person directly or indirectly controls or is controlled by the other company, business, or person,

(B) a third party directly or indirectly controls both companies, businesses, or persons,

(C) both companies, businesses, or persons directly or indirectly control a third party and there is reason to believe that the relationship causes the first company, business, or persons to act differently than a nonrelated party.

For purposes of this paragraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

(c) Distribution procedures

The Commissioner shall prescribe procedures for distribution of the continued dumping or subsidies offset required by this section. Such distribution shall be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year.

(d) Parties eligible for distribution of antidumping and countervailing duties assessed

(1) List of affected domestic producers

The Commission shall forward to the Commissioner within 60 days after the effective date of this section² in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required

2. Pub. L. No. 106-387, § 1(a) [Title X, § 1003(c)], Oct. 28, 2000, 114 Stat. 1549, 1549A-75, provided that: "The amendments made by this section shall apply with respect to all antidumping and countervailing duty assessments made on or after October 1, 2000."

or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

(2) Publication of list; certification

The Commissioner shall publish in the Federal Register at least 30 days before the distribution of a continued dumping and subsidy offset, a notice of intention to distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1). The Commissioner shall request a certification from each potentially eligible affected domestic producer—

(A) that the producer desires to receive a distribution;

(B) that the producer is eligible to receive the distribution as an affected domestic producer; and

(C) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution under this section has not previously been made.

(3) Distribution of funds

The Commissioner shall distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers based on the certifications described in paragraph (2). The distributions shall be made on a pro rata basis based on new and remaining qualifying expenditures.

(e) Special accounts

(1) Establishments

Within 14 days after the effective date of this section, with respect to antidumping duty orders and findings and countervailing duty orders notified under subsection (d)(1), and within 14 days after the date an antidumping duty order or finding or countervailing duty order issued after the effective date takes effect, the Commissioner shall establish in the Treasury of the United States a special account with respect to each such order or finding.

(2) Deposits into accounts

The Commissioner shall deposit into the special accounts, all antidumping or countervailing duties (including interest earned on such duties) that are assessed after the effective date of this section under the antidumping order or finding or the countervailing duty order with respect to which the account was established.

(3) Time and manner of distributions

Consistent with the requirements of subsections (c) and (d), the Commissioner shall by regulation prescribe the time and manner in which distribution of the funds in a special account shall made.³

(4) Termination

A special account shall terminate after—

(A) the order or finding with respect to which the account was established has terminated;

(B) all entries relating to the order or finding are liquidated and duties assessed collected;

(C) the Commissioner has provided notice and a final opportunity to obtain distribution pursuant to subsection (c); and

(D) 90 days has elapsed from the date of the notice described in subparagraph (C). Amounts not claimed within 90 days of the date of the notice described in subparagraph (C), shall be deposited into the general fund of the Treasury.

As to the legislative purpose behind the CDSOA, Pub. L. No. 106-387, § 1(a) [Title

3. So in original. Probably should be "shall be made".

X, § 1002], Oct. 28, 2000, 114 Stat. 1549, 1549A-72 (codified at 19 U.S.C. § 1675c note), provided that:

"Congress makes the following findings:

"(1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.

"(2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.

"(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

"(4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.

"(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved."

NOTES AND QUESTIONS

Faced with subsidized imports, a WTO member state presumably could invoke the following:

- GATT Article VI allows contracting parties to use CVDs if another contracting party's subsidy causes "material injury" or threatens to cause material injury to established domestic industry, but the CVD must not be more than necessary to offset the effect of the subsidy. Use of CVDs under article VI, however, is subject to the provisions of the WTO Agreement on Subsidies and Countervailing Measures (the "SCM Agreement").
- GATT Article XVI specifies appropriate conduct between "contracting parties" when a subsidy is used by one of them—reporting a domestic subsidy; consultation with other contracting parties about possible limitation of the subsidy, if the subsidy threatens or causes serious "prejudice" to a domestic industry.
- GATT Article XIX safeguard measures might be appropriate to counter the effects of the subsidy.⁴
- GATT Article XXIII might provide a basis for the importing state to suspend concessions or obligations in favor of the subsidizing state's rights if the subsidy caused a nullification or impairment of the importing state's rights under the GATT.⁵

Under the CDSOA, the U.S. Government would impose countervailing duties on subsidized products, and Customs would have authority to distribute a subsidy offset to the U.S. producers who suffered material injury from the subsidized imports. Would this CDSOA response be consistent with the remedies and responses expressly provided for in pertinent WTO rules? Must it be consistent with these rules? In answering these questions, consider the following Appellate Body report.

4. See *id.* art. XIX(1)(a),(b). [On escape clause actions, see Chapter IV, *infra*, at ■■■■■.]

5. See *id.*, art. XXIII(2). [On nullification and impairment actions, see Chapter IX, *infra*, at ■■■■■.]

UNITED STATES–CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

WT/DS217/AB/R, WT/DS234/AB/R (January 16, 2003)

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").

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. At its meeting of 10 September 2001, the DSB agreed to those 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. 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, . . . 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.

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. 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. . . .

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

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. 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[, 19 U.S.C. § 1675c,] entitled "Continued Dumping and Subsidy Offset".

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". 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. The term "qualifying expenditures" refers to expenditures on specific items identified in the CDSOA, which were incurred after the issuance of the anti-dumping duty finding, or order or countervailing duty order. 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.

13. The CDSOA, together with its implementing regulations issued by Customs[, 19 C.F.R. §§ 159.61, 159.64], 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. All anti-dumping and countervailing duties assessed under such orders or findings are first deposited into a "clearing account". Transfers from "clearing accounts" to "special accounts" are made by Customs throughout the fiscal year. Such transfers are made only after the entries²³ 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 account), can distributions to domestic producers under the CDSOA be made. 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.

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. Funds deposited in each special account

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)

during each fiscal year are to be distributed no later than 60 days after the beginning of the following fiscal year. There is no statutory or regulatory requirement as to how a disbursement is to be spent. The Panel found that CDSOA distributions to "affected domestic producers" made as of December 2001 totalled over \$206 million. . . .

VI. Issues Raised in This Appeal

223. The following issues are raised in this appeal:

(a) whether the Panel erred in finding . . . 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");

(b) whether the Panel erred in finding . . . 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 . . . 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 . . . 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. 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.

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"). 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. Third, the Panel opined that the category of action "in response to" dumping is broader than the category of action "against" dumping.

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" 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 action related to dumping (or subsidization) because there is a "clear, direct and unavoidable connection" 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. 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).

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

¹⁵⁶. [Panel Report], 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.

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. The Panel took the view that a similar approach should apply in respect of the permissible responses to subsidization. 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. Because the CDSOA does not fall within the range of the permissible responses to 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. [The Appellate Body then quotes the two articles and their respective accompanying footnotes 24 and 56.]

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:

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

⁶⁶We 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" 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'." 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 Anti-Dumping Agreement. 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. It is clear from the text of the CDSOA, in particular from Section 754(a) of the Tariff Act, that the CDSOA offset

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.

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", 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" 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. . . . [T]he 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. 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."

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'", 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", 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" 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 the express conditions for taking such action." 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 ...".

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).

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

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'"—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. 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. 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" dumping or a subsidy, in the sense of "operating directly" on the imported good, or the entity responsible for the dumped or subsidized good. 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. 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". 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".

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 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 of limiting the range of actions that a Member may take unilaterally to counter dumping or subsidization. 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

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.

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. 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 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." 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

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.

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 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 [in ¶ 230, *supra*], 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. 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. We agree

194. . . . 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.

197. . . . 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.

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

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

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.

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

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.

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.

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.

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." 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 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). 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.

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." 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.

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.

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."

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:

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.

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 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.

VIII. 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

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.

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.

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" 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.'" 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". In the Panel's view, "these letters are evidence of the inevitable impact of the CDSOA on the position of the domestic industry vis-à-vis anti-dumping/countervail applications."

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". 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" and "den[ies] parties potentially subject to the investigation a meaningful test of whether the petition has the required support of the industry." 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." 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."

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." The Panel appears to have found that the CDSOA "defeats this object and purpose" 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."

280. The Panel went on to conclude that the CDSOA "in effect mandates" domestic producers to support applications for the initiation of anti-dumping and countervailing duties by making such support "a prerequisite for receiving offset payments" and thus renders the threshold test of Articles 5.4 and 11.4 "completely meaningless". 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:

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

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."

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. 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". 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 those provisions. The Panel went on to note, however, that this was not the "matter at issue". 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.

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". 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]." We understand the Panel to have suggested that the CDSOA "implies a 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" and "completely meaningless."

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". 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.

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" 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." 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

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." . . . 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.

domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions." In support of its statement, the United States submitted to the Panel a survey 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." Even assuming that the CDSOA may create a financial incentive for domestic producers to file or to support an application, it would not 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 . . . 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." 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, provides that "[e]very treaty in

242. . . . [T]he 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).

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".

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.

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.

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.

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.

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. [The Appellate Body quotes DSU Article 3.8.]

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.

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. . . .

XI. Findings and Conclusions

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

(a) upholds 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;

(b) consequently upholds the Panel's finding . . . 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 . . . 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 . . . 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 . . . 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.

NOTES AND QUESTIONS

1. Reread paragraph 4 of the Appellate Body's report. What would be the basis for the claims that the CDSOA violates:

- a. Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement");
- b. GATT Article X:3(a);
- c. SCM Agreement Article 4.10;
- d. SCM Agreement Article 5(b);
- e. SCM Agreement 7.9;
- f. SCM Agreement 10;
- g. SCM Agreement Article 11.4;
- h. SCM Agreement Article 18;
- i. SCM Agreement Article 32.1, in conjunction with GATT Article VI:3; and,
- j. SCM Agreement Article 32.5.

In general, how does the Appellate Body respond to each of these claims?

2. The full Appellate Body report in *United States—Continued Dumping And Subsidy Offset Act of 2000* is a rich source of guidance on jurisdictional and procedural issues.

Many of these issues are considered in Chapter IX, *infra* at ■■■, ■■■.

3. The Appellate Body treats the parallel issues raised under the Anti-Dumping Agreement and the SCM Agreement as being essentially the same, and it repeatedly relies on *US-1916 Act*, its report in an antidumping dispute, as authority for its analysis of issues concerning the interpretation and application of the SCM Agreement. Yet the Appellate Body concedes in ¶ 227 that “our ruling in *US-1916 Act* was not dispositive of the issues in the present case.” Do you think that the Appellate Body is justified in invoking *US-1916 Act* as authority in resolving the issues raised with respect to the SCM Agreement?

4. The CDSOA is merely a mechanism for distributing financial assistance to producers affected by certain unfair trade practices. In what sense is the act “‘specific’ to dumping or subsidization”? Since the act is operative only *after* a remedy has been imposed on dumped or subsidized imports, in what sense is it “‘against’ dumping or subsidization”?

5. Why is the CDSOA not an action permitted under footnote 56 to Article 32.1 of the SCM Agreement? Does the U.S. position on this issue, as the Appellate Body report asserts in ¶ 262, really “tantamount to treating footnotes 24 and 56 as the primary provisions, while according Articles 18.1 and 32.1 residual status”?

6. According to ¶ 240 of the Appellate Body report, “the constituent elements of a subsidy . . . are set out in the definition of a subsidy found in Article 1 of the SCM Agreement.” How does the CDSOA fit that definition?

7. In ¶ 256, the Appellate Body report asserts 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.

Yet, in ¶ 257, the report states that

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 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.

Are these two positions consistent with each other?

8. What does it add, if anything, to the Appellate Body’s analysis of the CDSOA to question “[w]hether the CDSOA is in Accordance with the WTO Agreement,” as the report does in ¶¶ 263-274?

9. Why does the Appellate Body consider it necessary or pertinent to invoke Articles 31 and 32 of the Vienna Convention on the Law of Treaties?

10. In ¶¶ 295-299 the Appellate Body report considers the relevance of the panel’s conclusion that the United States was not acting in good faith with respect to Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement. In the Appellate Body’s view, is this issue pertinent to the resolution of the dispute?

11. *CDSOA Remedies and Responses*. As a practical matter, what follows from the Appellate Body's recommendation in paragraph 319? As the following excerpt indicates, the situation became politicized—and considerably complicated.

**GENERAL ACCOUNTABILITY OFFICE, INTERNATIONAL TRADE:
ISSUES AND EFFECTS OF IMPLEMENTING THE CONTINUED
DUMPING AND SUBSIDY OFFSET ACT**

GAO-05-979 (Sept. 26, 2005)

The [CDSOA] has provided over \$1 billion to hundreds of U.S. companies in industries deemed to have been injured by unfair competition from dumped or subsidized imports. Before CDSOA's enactment, these funds, which come from duties (import taxes) imposed and collected on such imports, went to the Department of the Treasury's (Treasury) general revenue fund. Some of CDSOA's defenders argue that the law gives U.S. firms and their employees a reasonable chance to compete and invest, despite facing continued unfair trade from foreign competitors. However, since the act's enactment, various domestic and international interests have opposed its implementation. Some domestic opponents contend, among other things, that CDSOA recipients receive a large, unjustified windfall from the U.S. treasury. Also, several nations lodged a complaint over the law against the United States at the World Trade Organization (WTO) in 2001. Nevertheless, defenders of CDSOA say that U.S. trading partners have been unable to demonstrate they actually suffered adverse effects from the law. The President has proposed repealing the CDSOA three times. However, legislation recently introduced⁴ to do so faces strong bipartisan opposition. . . .

Some U.S. industries are facing the imposition of additional tariffs by key U.S. trading partners as authorized by the WTO because CDSOA does not comply with WTO agreements. In response to separate complaints about CDSOA by 11 WTO members, the WTO ruled in January 2003 that CDSOA violated U.S. WTO obligations. The rationale for the WTO's ruling was that CDSOA was not among the allowed trade remedy responses to injurious dumping and subsidies specifically listed in the applicable WTO agreements. The United States pledged to comply with the adverse ruling, but it did not do so by the December 2003 deadline. Although the President proposed CDSOA's repeal, no change has been enacted by Congress. Three countries agreed to give the United States more time to come into compliance; the other eight members requested and received WTO authorization to retaliate by imposing additional tariffs on imports from the U.S. WTO arbitrators found that each of the eight members would be entitled to suspend concessions against U.S. exports in an amount equal to 72 percent of the CDSOA disbursements associated with AD/CV duties on that member's products each year. The total suspension authorized for 2005 could be up to \$134 million based on the fiscal year 2004 CDSOA disbursements. Specifically, for the fiscal year 2004 disbursements, the WTO arbitrators authorized the imposition of additional duties covering a total value of trade not exceeding \$0.3 million for Brazil, \$11.2 million for Canada, \$0.6 million for Chile, \$27.8 million for the European Union (EU), \$1.4 million for India, \$52.1 million for Japan, \$20.0 million for Korea, and \$20.9 million for Mexico. On May 1, 2005, Canada and the EU began the imposition of additional duties on various U.S. exports. On August 18, 2005, Mexico began imposing additional duties on U.S. exports. On September 1, 2005, Japan began imposing additional duties on U.S. exports as well. The remaining four members say they might suspend concessions.

12. *Export Subsidies on Sugar: Remedies and Responses*. In reviewing the following panel report and its conclusions, consider what steps the EU would be required to take to comply with the recommendation of the panel's report. What about its suggestion?

EUROPEAN COMMUNITIES—EXPORT SUBSIDIES ON SUGAR

WT/DS265/R, 2004 WL 2377976 (Oct. 15, 2004)

I. Introduction

1.1 This proceeding was initiated by three complaining parties, Australia, Brazil and Thailand [with respect to export subsidies provided by the European Communities to its sugar industry]. . . .

1.9 Australia, Barbados, Belize, Brazil, Canada, China, Colombia, Côte d'Ivoire, Cuba, Fiji, Guyana, India, Jamaica, Kenya, Madagascar, Malawi, Mauritius, New Zealand, Paraguay, Saint Kitts and Nevis, Swaziland, Tanzania, Thailand, Trinidad and Tobago, and the United States notified their interest to participate in the panel proceedings as third parties. . . .

III. Factual Aspects

3.1 The European Communities established, in 1968, a Common Organization (CMO) for Sugar, the main rules of which are today set out in "Council Regulation (EC) No. 1260/2001 on the common organization of the markets in the sugar sector" (the Regulation), dated 19 June 2001. The Regulation is valid for marketing years 2001/2002 to 2005/2006 and the information below refers to those years.

3.2 The Regulation sets out the basic rules with respect to, *inter alia*, the intervention prices for raw and white sugar, respectively; the basic price and the minimum price for beet; A and B quotas as well as C sugar; import and export licences; levies; export refunds; and preferential import arrangements.

3.3 The EC sugar regime applies *inter alia* to cane and beet sugar, sugar beet, and sugar cane as well as to isoglucose. The sugar cane and the sugar beet are primarily transformed into raw sugar and/or white sugar.

3.4 The sugar regime establishes two categories of production quotas: one for A sugar and the other one for B sugar. . . . These quotas constitute the maximum quantities eligible for domestic price support and direct export subsidies (in EC terminology, "refunds"). The quota system does not involve any limits on the quantities of sugar that may be produced or exported. However, sugar produced in excess of A and B quantities, called C sugar, while not subject to quota, is not eligible for domestic price support or direct export subsidies and must be exported. If no proof has been supplied that the C sugar has been exported within the required time limits, a charge is levied on that sugar.

3.5 Sugar production quotas are allocated in the first instance to member States, with current quotas applying to the marketing years 2001/02 to 2005/06. Member States, in turn, allocate quota to each undertaking (processor) on the basis of its actual production during a particular reference period.

3.6 The Regulation fixes a basic quota for the entire Community for the production of A and B sugar. The basic quantities for A and B sugar are set, respectively, at 11,894,223.3 tonnes (white sugar) and 2,587,919.20 tonnes (white sugar). Each of these quantities is broken down by member State which in turn allocates quantities to producer undertakings established on its territory. A Member state may transfer quota between undertakings, "taking into consideration the interests of each of the parties concerned, particularly sugar beet and cane producers", up to a maximum of 10 per cent of an undertaking's A or B quota (with some limited exceptions). Each undertaking may carry forward to the next marketing year sugar that it has produced in excess of its A and B quota (*i.e.* C sugar) up to a limit of 20 per cent of its A quota. It may also carry forward

all or part of its B sugar production. In addition, an undertaking may carry forward all or part of its production of A and B sugar which has been reclassified as C sugar after reduction of the guaranteed quantities in conformity with Article 10 of the Regulation. Quantities carried forward must be stored for 12 consecutive months from a date to be determined.

3.7 To achieve the objectives of the common agricultural policy and in order to stabilize the EC sugar market, the EC Regulation provides for intervention agencies to buy in sugar. An intervention price is established for this purpose at a level which will ensure a fair income for sugar-beet and sugar-cane producers. The intervention price valid for standard quality is €63.19/100 kg for white sugar and €52.37/100 kg for raw sugar. The actual price received for white sugar is, on average, around 10 to 20 per cent in excess of the intervention price. The intervention price is valid for the domestic market and as a guaranteed minimum price to be paid by EC purchasers for imports of sugar from ACP states^a and India.

3.8 A basic price for quota beet of standard quality is derived from the intervention price of white sugar and has been established at €47.67 per tonne. The Regulation also establishes minimum prices for A and B beet, standard quality, intended to be processed into A and B sugar, respectively and paid by sugar manufacturers buying beet. The minimum price of A beet has been set at €46.72 per tonne whereas the minimum price for B beet has been fixed at €32.42 per tonne. Manufacturers are required to pay growers at least the minimum price for A and B beet they process into A and B sugar. The price for beet paid by the manufacturer to produce C sugar may be lower than that paid for A and B beet.

3.9 In accordance with Article 15, a basic production levy shall be charged to manufacturers on their production of inter alia A and B sugar, when the forecasts and adjustments result in a foreseeable overall loss. Such a levy shall not exceed 2 per cent of the intervention price for white sugar. Another levy of a maximum 37.5 per cent of the intervention price for B sugar may be charged if the loss is not fully covered by the proceeds from the levy mentioned above.

3.10 Imports into and exports from the European Communities of inter alia cane or beet sugar and isoglucose are subject to the presentation of an import or export licence, issued by the respective member States. These licences are valid throughout the Community and are subject to the lodging of a security.

3.11 In order to enable inter alia the products mentioned in paragraph 3.3 above to be exported without further processing at world market prices, the difference between the world market price and the Community price may be covered by export refunds. The export refund for raw sugar may not exceed that of white sugar. Such refunds shall be the same for the whole Community and for all sugar except C sugar but may vary according to destination. Refunds may be fixed at regular intervals or by a tendering procedure for products for which such a procedure has been used in the past. Refunds are paid directly from the EC budget. However, the system of levies outlined in paragraph 3.9 is designed to recover from EC producers part of the cost of export refunds for quota sugar produced in excess of EC consumption.

3.12 Article 42 of the Regulation establishes a Management Committee for Sugar to assist the EC Commission to consider any issue referred to it by the Commission, or by

a. The ACP states, a group of cane sugar producers, are: Barbados, Belize, Côte d'Ivoire, Fiji, Guyana, Jamaica, Kenya, Madagascar, Malawi, Mauritius, St. Kitts and Nevis, Swaziland, Tanzania and Trinidad and Tobago. All were among the third parties intervening in this dispute.

a member State, with respect to the management of the sugar regime, such as the preparation of supply and demand forecasts.

3.13 The commitments set out in the table in Section II, of Part IV of the EC's Schedule [under the Agreement on Agriculture] amount to €499.1 million and 1,273.5 thousand tonnes. A footnote to the table provides:

"Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio t."

According to the European Communities' latest notification (marketing year 2001/2002) to the Committee on Agriculture, total exports of sugar amounted to 4.097 million tonnes (product weight).

3.14 The European Communities is required to import 1,294,700 tonnes (white sugar equivalent) of cane sugar, called "preferential sugar" under Protocol 3 to Annex IV to the ACP/EC Partnership Agreement. It also has agreed to import 10,000 tonnes of preferential sugar from India. Preferential sugar is imported at zero duty and at guaranteed prices.

3.15 In addition to imports of ACP/India preferential cane sugar, special preferential raw cane sugar (SPS sugar) may be imported from the same countries which benefit from the ACP/India preferential arrangements in order to ensure adequate supplies to Community refineries. Volumes of SPS sugar vary from year to year but have amounted to around 320,000 tonnes per year in recent years. A reduced rate of duty is levied on imports of such sugar. The quantities of SPS sugar to be imported is decided on the basis of a supply balance forecast for each marketing year. . . .

VII. Findings . . .

7.101 In light of Article 21.1 of the Agreement on Agriculture, Article 3 of the SCM Agreement⁴²⁶ and the relevant jurisprudence, the Panel shall first examine the consistency of the challenged export subsidies on sugar, an agricultural product, first under the Agreement on Agriculture.⁴²⁷ . . .

7.102 The Complainants have submitted that the European Communities is exporting subsidized sugar in excess of its commitment levels contrary to Articles 3, 8, and 9 of the Agreement on Agriculture. The parties disagree as to what constitutes the European Communities' commitment level. While the Complainants argue that the European Communities' quantity commitment level is to be determined with reference to its entry in Section II of Part IV of its Schedule, the European Communities submits that its commitment comprises two components: one component is its entry in Section II of Part IV of its Schedule and the other component includes the additional quantity of 1.6 million tonnes provided for in Footnote 1 (the ACP/India sugar Footnote) to Section II, Part IV of its Schedule. The Panel must thus determine, first, what constitutes the

⁴²⁶ Article 21.1 of the Agreement on Agriculture provides that: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." Article 3 of the SCM Agreement provides that: 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited: (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I; (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods. 3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1."

⁴²⁷ In *Canada - Dairy* (Article 21.5 - New Zealand and US), para. 123, the Appellate Body stated that Article 3.1 of the SCM Agreement "indicates that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture."

European Communities' commitment level for the purpose of Articles 3 and 8 of the Agreement on Agriculture.

7.103 Moreover, the determination of the European Communities' quantity commitment level is crucial to the operation of the special rule, provided for in Article 10.3 of the Agreement on Agriculture, invoked by the Complainants. When Article 10.3 is invoked by a complaining Member, and it is proven that exports actually exceed the challenged Members' commitment level, it is for that exporting Member to demonstrate that its exports are not subsidized. Based on the Panel's conclusions on the European Communities' commitment level for sugar and the Panel's conclusions on the application of Article 10.3, the Panel will then proceed to assess whether the European Communities' exports of sugar exceed the European Communities' commitment level, inconsistently with Articles 3 and 8 of the Agreement on Agriculture. . . .

D. The European Communities' Export Subsidy Commitment Levels for Subsidized Exports of Sugar

7.106 The Complainants consider that the European Communities' commitment levels for subsidized exports of sugar are as specified in Section II of Part IV of the EC Schedule CXL, entitled:

"Part IV: AGRICULTURAL PRODUCTS: COMMITMENTS LIMITING SUBSIDISATION (Article 3 of the Agreement on Agriculture)
SECTION II: Export Subsidies : Budgetary Outlay and Quantity Reduction Commitments."

7.107 Under the line entitled "Sugar" for 2000, the following quantity is specified: "1,273,500 tonnes." Besides the term Sugar, a footnote (1) is inscribed and at the bottom of the page one can read:

"Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1,6 mio t."

7.108 The Panel assesses hereafter what the commitment level of the European Communities is with respect to exports of sugar pursuant to Articles 3, 8 and 9 of the Agreement on Agriculture.

7.121 In the Panel's view, what constitutes a Member's "reduction commitment level" for the purpose of Article 10.3 of the Agreement on Agriculture or the "reduction commitment within the meaning of Article 9 or the "commitment levels" within the meaning of Article 3.3 or the "commitment as specified in a Member's schedule" within the meaning of Article 8 of the Agreement on Agriculture is an issue of legal interpretation, for which there is no burden of proof as such. It is for the Panel to decide whether the "commitment levels" or the "reduction commitment levels" are composed exclusively of the commitments for export subsidies that have to be reduced (in the case of the EC sugar 1,273,500 tonnes) or whether Members are also entitled to maintain, for instance, ad hoc "limitations" on export subsidization not subject to reduction which would therefore be part of the overall commitment level of a Member.

7.122 To resolve the issue before it, the Panel will therefore have to examine the relationship between terms of (and commitments contained in) a Member's Schedule, in this dispute the content of Footnote 1 (on ACP/India sugar), and the provisions of the Agreement on Agriculture. In particular, the Panel needs to assess whether it is possible

to interpret harmoniously the terms of the Agreement on Agriculture together with those of Footnote 1 of Section II, Part IV of the European Communities' Schedule. If this is not possible, the Panel will have to resolve such a conflict. . . .

7.127 Article 8 of the Agreement on Agriculture on "Export Competition Commitments" contains a general prohibition on export subsidies and provides that:

"Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule."

7.128 The commitments that are specified in Part IV, Section II, of a Member's Schedule describe for each product or group of products concerned, the maximum quantities in respect of which export subsidies, as defined in Article 1(e) of the Agreement on Agriculture, may be provided, as well as the associated maximum levels of budgetary outlays. These commitments are made an integral part of the GATT 1994 under Article 3.1 of the Agreement on Agriculture. The products which are subject to reduction commitments and in respect of which export subsidies may be used within the specified limits are commonly referred to as "scheduled products". Other products, not specified in Schedules, are referred to as "non-scheduled products".

7.129 The export subsidies listed in paragraph 1 of Article 9 of the Agreement on Agriculture, which had also served as the basis for establishing export subsidy reduction commitments in the Uruguay Round negotiations, are subject to the following specific prohibitions set out in Article 3.3 of the Agreement on Agriculture, the first of which relates to "scheduled products":

"Subject to the provisions of paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies listed in paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule."

7.130 It may also be noted that the first terms of Article 3.3 of the Agreement on Agriculture make clear that the final reduction commitment levels are binding beyond the end of the implementation period referred to in Articles 9.2 and 9.4 of the Agreement on Agriculture. Article 3.3 thus complements the provisions of Article 9.2.

7.131 The Panel notes also that Article 3.1 of the Agreement on Agriculture provides that "export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization." Article 3.3 of the Agreement on Agriculture requires that, with respect to agricultural products specified in Section II of Part IV of its schedule, "a Member shall not provide export subsidies ... in excess of the budgetary outlay and quantity commitment levels specified therein." Article 3.3 of the Agreement on Agriculture makes clear that the commitments are those specified in a Member's Schedule.

7.132 Article 3.3 of the Agreement on Agriculture requires that the export subsidies listed in Article 9.1 of the Agreement on Agriculture can only be provided in accordance with a Member's Schedule. . . .

7.133 Article 9.1 of the Agreement on Agriculture describes specific types of export subsidies "subject to reduction commitments" and provides for schedules specifying commitments to reduce budgetary outlays for subsidies and quantities of exports

receiving subsidies ("The following export subsidies are subject to reduction commitments under this Agreement"). . . . In the Panel's view, Article 9.1 of the Agreement on Agriculture makes clear that in the absence of a specific exemption contained in that Agreement, all export subsidies coming within the definitions of Article 9.1(a) - 9.1(f) have to be subject to reduction commitments. Specifically, in accordance with Article 9.2(b)(iv) of the Agreement on Agriculture, at the end of the implementation period, the Schedule must provide for budgetary outlay and quantity commitments no greater than 64 and 79 per cent of their respective base period levels.⁴²⁸ This is the case for Members who took advantage of the flexibility of Article 9.2(b) which was the case of the European Communities. Therefore, export subsidies contained in Section II, Part IV of a Member's Schedule ought to have been subject to the reduction commitments provided for in Article 9 of the Agreement on Agriculture.

7.134 [I]n the Panel's view, Articles 8 and 3 of the Agreement on Agriculture make it clear that Members may not provide export subsidies other than in conformity with the Agreement on Agriculture and—not "or"—Members' Schedules. In particular, Article 3 of the Agreement on Agriculture provides that export subsidies are only possible for products listed in Section II, Part IV of Members' Schedules and only for amounts at or below the maximum level of commitment provided for in a Member's schedule. Through the application of Articles 3, 9.1 and 9.2(b)(iv) of the Agreement on Agriculture, all WTO-consistent export subsidies on scheduled products have been subject to reduction commitments.

7.135 The Panel notes also that Article 3.3 of the Agreement on Agriculture contemplates that a Member may exclude an agricultural product entirely from Part IV, Section II of its Schedule, but does not contemplate that when an agricultural product is included in its Schedule, subsidies provided to that product do not have to be reduced.

. . .

7.137 In the Panel's view, to comply with Article 3.3 of the Agreement on Agriculture, a Member that exports a scheduled product must comply with two distinct requirements: (1) its subsidized exports must be within the quantity limitation specified in its schedule; and (2) its corresponding budgetary outlays must also be within its commitments. . . .

7.145 In order for the Panel to determine the European Communities' commitment level, the Panel must assess the legal value and effect of Footnote 1 contained in Section II of Part IV of the EC's Schedule and to what extent the content of such a Footnote can legally modify the European Communities' obligations under the Agreement on Agriculture with respect to export subsidies. . . .

7.158 [I]n the Panel's view, the principle that scheduled commitments cannot overrule or conflict with the basic obligations contained in a WTO multilateral trade agreement, unless explicitly authorized, remains valid and applicable to export subsidy commitments scheduled in Section II, Part IV of Members' Schedules.

7.159 The Panel believes that this same principle is recognized in Article 8 of the Agreement on Agriculture. . . .

⁴²⁸ Article 9.2(f) of the Agreement on Agriculture provides that: "In any of the second through fifth years of the implementation period, a [0]Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that: (iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 per cent, respectively."

7.161 . . . [A] Members' Schedule cannot provide for non-compliance with provisions of the Agreement on Agriculture. Provisions in Members' Schedules relating to commitments authorized by the Agreement on Agriculture may therefore only qualify such commitments to the extent that the said qualification does not act so as to contradict or conflict with the Members' obligations under the Agreement on Agriculture. . . .

7.169 . . . [T]he ordinary meaning of the terms of the Footnote does not indicate any "limitation on export subsidies for sugar" to 1.6 million tonnes. The Panel therefore fails to see any commitment "limiting subsidization".

7.178 . . . [T]he Panel concludes that the Footnote has never been "treated" or considered by the members of the Committee on Agriculture, nor by the European Communities, as a "commitment" "specified" in the European Communities' Schedule. . . .

7.183 In sum, the Panel considers that the ordinary meaning of the terms of Footnote 1 does not indicate any commitment or concessions constituting a limitation on export subsidization or any other type of commitment authorized by the Agreement on Agriculture which could in any way enlarge or otherwise modify the European Communities' commitment level specified in Section II, Part IV of its Schedule. Rather, Footnote 1 constitutes a unilateral statement by the European Communities that, with regard to exports of ACP/India sugar, it is not making any reduction commitment. Moreover, Footnote 1, if it were to constitute such a limitation on subsidization, would only benefit sugar of ACP/Indian origin per se, contrary to the European Communities' suggestion that 1.6 million tonnes of sugar refer to an amount "equivalent" to the amount imported from ACP countries and India. . . .

7.196 Therefore, the Panel concludes that the ACP/India sugar Footnote cannot be reconciled with the requirements of Article 3.3 that reduction commitments be expressed both in terms of quantity and of budgetary outlays. The content of Footnote 1 is thus inconsistent and conflicts with the requirements of Articles 3 and 8 of the Agreement on Agriculture. Accordingly, the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.

7.197 . . . [T]he content of Footnote 1 to Section II, Part IV of the EC's Schedule is inconsistent and conflicts with Articles 3, 8, 9.1 and 9.2(b)(iv) of the Agreement on Agriculture and as such cannot be read harmoniously with the provisions of the Agreement on Agriculture: it does not provide for any budgetary outlays, and subsidies provided to ACP/India equivalent sugar have not been subject to any reduction. Footnote 1 cannot therefore constitute a second component of the European Communities' overall commitment level for export subsidies on sugar. . . .

7.212 In the Panel's view, even assuming that the participants in the Uruguay Round were authorized to negotiate departures from the Modalities Paper which is not clear, such negotiated departure would only be relevant to the extent that it is reflected in the European Communities' Schedule and is WTO consistent. The acknowledgment of the existence of Footnote 1 or the absence of agreement to the inclusion of said Footnote does not, for the Panel, equal acquiescence on the part of the interested parties. The Panel recalls that in Canada - Dairy, the Appellate Body considered the negotiations which took place with regard to Canada's and the United States' respective Schedules and highlighted that though Canada's commitment had been made unilaterally, they were

the result of lengthy negotiations:⁵²⁰

"In considering 'supplementary means of interpretation', we observe that the 'terms and conditions' at issue were incorporated into Canada's Schedule after lengthy negotiations between Canada and the United States, regarding reciprocal market access opportunities for dairy products. Both Canada and the United States agree that those negotiations failed to produce any agreement between them."⁵²¹

7.213 Unlike the situation highlighted by the Appellate Body in *Canada - Dairy*, the parties to the present dispute did not negotiate the inclusion of the Footnote and did not agree or come to an understanding on the value of such exclusion. There is no evidence of any relevant exchanges between the parties or any other form of negotiation, let alone agreement on this subject matter.

7.214 Moreover, the Panel is also of the view that a departure from the basic obligations of the Agreement on Agriculture, in the form of a footnote in the EC's Schedule, could not be considered a "waiver" agreed to by the Uruguay Round participants.

7.215 Under the WTO, waivers are strictly regulated and subject to the procedures of Article IX:4 of the WTO Agreement, including annual reporting to the General Council. This is obviously not the case with Footnote 1 to the European Communities' Schedule, Section II, Part IV. . . .

7.216 In the Panel's view, the evidence and explanations submitted by the Complainants sufficiently refute the presumption, if any, that silence or lack of challenge would have amounted to agreement that Footnote 1 was in conformity with the WTO Agreement or constituted an agreed departure from the European Communities' basic obligations of the Agreement on Agriculture. . . .

7.220 The Panel concludes therefore that participants in the Uruguay Round and WTO Members did not agree to the European Communities' inclusion of Footnote 1 as an agreed departure to the European Communities' basic obligations under the Agreement on Agriculture. . . .

7.221 The Panel is therefore of the view that, even if it were to be considered to include a commitment limiting subsidization for 1.6 million tonnes of ACP/India equivalent sugar, which it does not, Footnote 1 to Section II, Part IV of the EC's Schedule is inconsistent and conflicts with Articles 3, 8 and 9 of the Agreement on Agriculture and as such cannot be read harmoniously with the provisions of the Agreement on Agriculture. The content of Footnote 1 cannot constitute a second component of the European Communities' overall commitment level for export subsidies on sugar. Moreover, Footnote 1 cannot constitute an agreed departure from the European Communities' basic obligations under the Agreement on Agriculture. ...

E. Is the European Communities Exporting Subsidized Sugar in Quantities Exceeding its Level of Commitment Contrary to Articles 3, 8 and 9 of the Agreement on Agriculture . . .

7.225 Article 10.3 of the Agreement on Agriculture provides special rules on burden of proof:

⁵²⁰. In addition, the commitment did not limit access to the quota as such and did not diminish the rights of the United States. See Panel Report on *Canada - Dairy*, footnote 530 to para. 7.155.

⁵²¹. Appellate Body Report on *Canada - Dairy*, para. 139 (footnotes omitted).

"Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question." ...

7.244 Council Regulation (EC) No. 1260/2001 sets out rules to promote and protect the EC sugar industry. One main feature of the EC sugar regime is the establishment of price support for domestic sugar including intervention prices for sugar, supply controls by way of quotas, domestic market supply management, import restrictions and export subsidization. The EC sugar regime also sets out the basic price and the minimum price for beet, import and export licences, levies, export refunds; quotas and import restrictions; and preferential import arrangements.

7.245 The intervention price (minimum guaranteed price) for sugar is approximately three times the price of world market prices. The intervention price operates as a safety net that provides for intervention agencies to purchase EC quota sugar at a guaranteed price if sugar prices on the domestic market fall below a certain level. Intervention purchasing has occurred only once in 25 years as the regulatory aspects of the EC sugar regime controlling the amount of sugar sold in domestic markets and protection from outside competition enables quota sugar to be sold at prices well above the intervention price. . . .

7.270 The Panel finds, therefore, that the below total cost of production sales of C beet to C sugar producers involves a payment within the meaning of Article 9.1(c) of the Agreement on Agriculture. . . .

7.279 The Panel finds . . . that the payments to C sugar producers by way of discounted below total cost of production sales of C beet by C beet growers are on the export within the meaning of Article 9.1(c) of the Agreement on Agriculture. . . .

7.291 The Panel is of the view that a significant percentage of farmers of C beet are likely to finance sales of C beet below the costs of production as a result of participation in the domestic market in selling high priced A and B beet. The Panel considers that, through EC Council Regulation No. 1260/2001, the European Communities controls virtually every aspect of domestic beet and sugar supply and management. In particular, the EC Regulation fixes the price of A and B beet that renders it highly remunerative to farmers/growers of C beet. Government action also controls the supply of A and B beet (and sugar) through quotas. The imposition by government of financial penalties on producers of C sugar that divert C sugar into the domestic market is another element of governmental control over the supply of beet and sugar. Further, the degree of government control over the domestic market is emphasized by the fact that the EC Sugar Management Committee overviews, supervises and protects the EC domestic sugar through, inter alia, supply management. In sum, the European Communities controls both the supply and the price of sugar in the internal market. This controlling governmental action is "indispensable" to the transfer of resources from consumers and tax payers to sugar producers for A and B quota sugar and, through them, to growers for A and B quota beet.

7.292 The Panel finds . . . that C sugar producers receive payments on export financed by virtue of governmental action through various governmental actions as specified above, within the meaning of Article 9.1(c) of the Agreement on Agriculture. . . .

7.293 Therefore, the Panel finds that C sugar producers receive payment on export by virtue of governmental action through sales of C beet below the total costs of production to C sugar producers. Pursuant to Article 10.3 of the Agreement on Agriculture, the Panel finds that the European Communities has not demonstrated that exports of C

sugar that exceed the European Communities' commitment levels since 1995 and in particular since the marketing year 2000/2001, have not been subsidized. Consequently, the European Communities is acting inconsistently with Articles 3 and 8 of the Agreement on Agriculture. . . .

7.310 The Panel finds that there is clear evidence that the relatively high EC administered domestic market (above-intervention) prices for A and B quota sugar allow the sugar producers to recover fixed costs and to sell exported C sugar over average variable costs but below the average total cost of production. Sugar is sugar whether or not produced under an EC created designation of A, B or C sugar. A, B or C sugar are part of the same line of production and thus to the extent that the fixed costs of A, B and C are largely paid for by the profits made on sales of A and B sugar, the EC sugar regime provides the advantage which allows EC sugar producers to produce and export C sugar at below total cost of production. For the Panel this cross-subsidization constitutes a payment in the form of a transfer of financial resources . . . from the high revenues resulting from sales of A and B sugar, for the export production of C sugar, within the meaning of Article 9.1(c) of the Agreement on Agriculture. . . .

7.322 The Panel finds that the payment on C sugar production in the form of transfer of financial resources through cross-subsidization resulting from the operation of the EC sugar regime is on export within the meaning of Article 9.1(c) of the Agreement on Agriculture. . . .

7.332 [T]he EC sugar regime uses the high profits on A and B quota sugar to cover fixed costs for C sugar and, most importantly, requires C sugar to be exported and diverted from the domestic market. Again, the result of the EC sugar system is not the production of C sugar in marginal or superfluous amounts simply in the pursuit of ensuring quota fulfilment. Rather, as the EC Court of Auditors stated, over the past years, C production has varied between 11 and 21 per cent of quota production, a significant portion of the European Communities' entire sugar production. . . .

7.340 Consequently, the Panel finds that the European Communities has been acting inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture by providing export subsidies on sugar within the meaning of Articles 9.1(a) and 9.1(c) of the Agreement on Agriculture, in excess of the quantity commitment levels specified in Section II, Part IV of its Schedule. . . .

F. Article 10.1 of the Agreement on Agriculture . . .

7.356 Since the Panel has found that the European Communities is acting inconsistently with Articles 3 and 8 of the Agreement on Agriculture, in providing producers/exporters of C sugar and ACP/India equivalent sugar, with payments on exports financed by virtue of the EC sugar regime, within the meaning of Article 9.1(a) and (c) of the Agreement on Agriculture in excess of the European Communities' commitment level, those subsidies cannot, by definition, be "export subsidies not listed in paragraph 1 of Article 9", as required by Article 10.1 of the Agreement on Agriculture. In this respect the Panel refers to the finding of the Appellate Body in *Canada - Dairy* (Article 21.5 - New Zealand and US) which held:

"It is clear from the opening clause of Article 10.1 that this provision is residual in character to Article 9.1 of the Agreement on Agriculture. If a measure is an export subsidy listed in Article 9.1, it cannot simultaneously be an export subsidy under Article 10.1."⁶⁶⁵

⁶⁶⁵ Appellate Body Report on *Canada-Dairy* (Article 21.5 - New Zealand and US), para. 121. [For excerpts from and discussion of *Canada-Dairy*, see Chapter IX, § B.2, *infra*.]

G. Nullification or Impairment . . .

[The panel then turned to the issue of whether the EU policy with respect to sugar had also resulted in a “nullification or impairment” of the complaining states’ expectations under GATT art. XXIII and DSU art. 3. The Panel found that the EU violations of the Agreement on Agriculture did nullify or impair the benefits to which the complaining states were entitled under the Agreement on Agriculture. This portion of the panel’s report is reproduced in Chapter IX, § B.1, *infra*.]

H. Article 3 of the SCM Agreement . . .

[The complaining states had also argued that the EU policy constituted an export subsidy inconsistent with Article 3 of the SCM Agreement. The raised the question whether it should examine these claims, or should apply the “principle of judicial economy.”^f The Panel noted that the complaining states had not set forth their claims under Article 3 of the SCM Agreement “in quite as clear and unambiguous a manner as under the Agreement on Agriculture,” but rather had focused on the claims under the Agreement on Agriculture. Noting that panels depend on “the active participation of the parties to clarify and develop the issues presented in a dispute,” the Panel exercised judicial economy and declined to examine the export subsidy claims under Article 3 the SCM Agreement.]

VIII. Conclusions, Recommendation and Suggestion

A. Conclusions

8.1 The Panel concludes that:

(a) the European Communities' budgetary outlay and quantity commitment levels for exports of subsidized sugar is determined with reference to the entry specified in Section II, Part IV of its Schedule and the content of Footnote 1 in relation to these entries is of no legal effect and does not enlarge or otherwise modify the European Communities' specified commitment levels.

(b) the European Communities' quantity commitment level for exports of sugar pursuant to Articles 3.3, and 8 of the Agreement on Agriculture is 1,273,500 tonnes per year, with effect from the marketing year 2000/2001.

(c) the European Communities' budgetary outlay commitment level for exports of sugar pursuant to Articles 3.3, and 8 of the Agreement on Agriculture is €499.1 million per year, with effect from the marketing year 2000/2001".

(d) the Complainants have provided prima facie evidence that since 1995 the European Communities' total exports of sugar exceeds its quantity commitment level. In particular, in the marketing year 2000/2001 the European Communities' exported 4,097,000 tonnes of sugar, i.e. 2,823,500 tonnes in excess of its commitment level.

(e) there is prima facie evidence that the European Communities has been providing export subsidies within the meaning of Article 9.1(a) of the Agreement on Agriculture to what it considers to be exports of "ACP/India equivalent sugar" since 1995.

(f) there is prima facie evidence that the European Communities has been providing

^f In Australia—Measures Affecting Importation of Salmon, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327, the Appellate Body referred to situations in which “judicial economy” could be exercised and cautioned against a panel providing only a partial resolution of the matter at issue:

The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and “to secure a positive solution to a dispute”. To provide only a partial resolution of the matter at issue would be false judicial economy. A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings “in order to ensure effective resolution of disputes to the benefit of all Members”.

Appellate Body Report on Australia—Salmon, para. 223.

export subsidies within the meaning of Article 9.1(c) of the Agreement on Agriculture to its exports of C sugar since 1995.

8.2 In light of Article 10.3 of the Agreement on Agriculture, the Panel concludes that the European Communities has not demonstrated that its exports of sugar in excess of its commitment level are not subsidized.

8.3 Therefore, the Panel concludes that the European Communities, through its sugar regime, has acted inconsistently with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, by providing export subsidies within the meaning of Article 9.1(a) and (c) of the Agreement on Agriculture in excess of (i) its quantity commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is for 1,273,500 tonnes of sugar and (ii) its budgetary outlay commitment level specified in Section II, Part IV of its Schedule, which since the marketing year 2000/2001 is €499.1 million per year.

8.4 Since Article 3.8 of the DSU provides that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment", the Panel concludes that - to the extent the European Communities has acted inconsistently with its obligations under the Agreement on Agriculture - it has nullified or impaired benefits accruing to Australia under the Agreement on Agriculture.

B. Recommendation

8.5 In light of the above conclusions, the Panel recommends that the Dispute Settlement Body request the European Communities to bring its EC Council Regulation No. 1260/2001, as well as all other measures implementing or related to the European Communities' sugar regime, into conformity with its obligations in respect of export subsidies under the Agreement on Agriculture.

C. Suggestion by the Panel

8.6 The Panel is aware of the concerns and interests expressed, in the context of these proceedings, by several developing countries, with regard to their continued preferential access to the EC market for their sugar exports.

8.7 Pursuant to Article 19.1 of the DSU, the Panel suggests that in bringing its exports of sugar into conformity with its obligations under Articles 3.3 and 8 of the Agreement on Agriculture, the European Communities consider measures to bring its production of sugar more into line with domestic consumption whilst fully respecting its international commitments with respect to imports, including its commitments to developing countries.

8.8 In this regard, the Panel notes the recent statement of the European Communities on 14 July 2004 that the European Communities "fully stands by its commitments to ACP countries and India" and that with the reform of its sugar regime, the ACP countries and India will "get a clear perspective, keep their import preferences and retain an attractive export market."⁶⁸⁴

⁶⁸⁴. See "Commission proposes more market-, consumer- and trade-friendly regime" dated 14/07/2004. <http://www.europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/915&format=HTML&aged=0&language=EN&guiLanguage=en>.

NOTES AND QUESTIONS

1. Both the EU and the complaining states appealed, challenging pertinent findings in the panel's report.¹ To begin with, the EU argued that the panel's finding that the issues concerning the "payments" in the form of low-priced sales of C beets to sugar producers were not within the panel's terms of reference.² In April 2005, the Appellate Body upheld the panel's jurisdiction in this regard.³

2. Turning to the substantive issues decided by the panel, among other things the Appellate body upheld the panel's finding that Footnote 1 to Section II, Part IV of the European Communities' Schedule did not enlarge or otherwise modify the EU commitment levels specified in the Schedule.⁴ Unshielded by the schedule, the EU sugar regime constituted an export subsidy within the meaning of the Agreement on Agriculture, art. 9.1(c),⁵ and was therefore inconsistent with the requirements of the articles 3.3 and 8 of the Agreement.⁶

3. It is interesting to note that the Appellate Body, agreeing with the complaining states, found that the panel erred in invoking the principle of judicial economy, "and thereby failed to discharge its obligation under Article 11 of the DSU with respect to the Complaining Parties' claims under Article 3 of the SCM Agreement."⁷ However, the Appellate Body went on to say that it was "not in a position, and therefore declines, to complete the legal analysis and to examine the Complaining Parties' claims under the SCM Agreement left unaddressed by the Panel."⁸ The Appellate Body's recommendation to the DSB states only that the latter should

request the European Communities to bring Council Regulation (EC) No. 1260/2001, as well as all other measures implementing or related to the European Communities' sugar regime, found in this Report, and in the Panel Reports as modified by this Report, to be inconsistent with the Agreement on Agriculture, into conformity with its obligations under that Agreement.⁹

What kind of remedy do the complaining states have, then, on their claim that the EU sugar regime violated the SCM Agreement?

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2. This issue is not included in the preceding excerpt from the panel report. On the significance of the agreed terms of reference in framing the issues that are properly the subject of the formal dispute resolution performed by a panel, see DSU art. 7.

3. *Sugar Subsidies*, ¶ 346(a).

4. *Id.*, ¶ 346(b).

5. *Id.*, ¶ 346(c)-(e).

6. *Id.*, ¶ 346(f).

7. *Id.*, ¶ 346(i).

8. *Id.*

9. *Id.*, ¶ 347.

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