

## ANNEX A

### Third Party Submissions and Oral Statements

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## ANNEX A-1

### THIRD PARTY SUBMISSION OF ARGENTINA

(17 January 2002)

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## **I. INTRODUCTION**

1. Argentina thanks the Panel for this opportunity to submit its comments on these proceedings as a third party, and would like to turn to the arguments of the parties concerning the inconsistency of the Continued Dumping and Subsidy Offset Act of 2000 (known as the Byrd Amendment) with Article 5.4 of the Anti-Dumping Agreement (hereinafter the AD Agreement) and Article 11.4 of the Agreement on Subsidies and Countervailing Measures (hereinafter the SCM Agreement), Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement, and Article XVI: 4 of the WTO Agreement.

2. Firstly, Argentina submits that the said Act is inconsistent with Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement and can be used to create, artificially, conditions that encourage enterprises to file anti-dumping or anti-subsidy complaints, favouring the initiation of investigations and the application of provisional measures and impacting negatively on trade flows.

3. Secondly, Argentina submits that the distribution of offsets to the affected producers as stipulated in the Act weakens the ability of the United States authorities to determine objectively whether there should be an agreement on price undertakings (Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement), and thus hinders efforts to explore the possibilities of "constructive remedies" (Article 15 of the AD Agreement), impairing the special situation of the developing countries.

4. Thirdly, Argentina submits that the system of incentives created by the Continued Dumping and Subsidy Offset Act of 2000 should be considered inconsistent with the obligations established in the AD and SCM Agreements, and results in the violation of Article XVI: 4 of the WTO Agreement.

## **II. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLES 5.4 OF THE AD AGREEMENT AND 11.4 OF THE SCM AGREEMENT (INITIATION OF INVESTIGATIONS AND ADOPTION OF PROVISIONAL MEASURES)**

5. Argentina submits that the Byrd Amendment breaches the provisions of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement in that it induces United States producers to petition for the initiation of investigations or to support them. Thus, it is inconsistent with the object and purpose of those provisions.

6. Indeed, the provisions are aimed at the due selection of domestic producers that could be interested in an investigation, ensuring an adequate degree of representativeness within the industry concerned. They should not, under any circumstances, be used for the artificial creation of conditions that encourage companies to file anti-dumping petitions or that foster the initiation of investigations.

7. To accept this would be to impair the idea of "selection", under which both articles provide for a procedure involving percentages (50 per cent and 25 per cent) to ensure objective representativeness of those domestic producers that are truly affected.

8. As regards the United States argument that the subjective reason<sup>1</sup> for the domestic industry's support for the initiation of an anti-dumping investigation is irrelevant in that it is not provided for in the AD Agreement, Argentina repeats and stresses that it is not the subjective reason that is at issue, but the change brought about by the incentive offered to the local producers by the Byrd Amendment in enabling offsets to be provided for the so-called "qualifying expenditures". The crux of the problem is not the personal and subjective reason of each of the complainant producers, but specifically, the incentive to file complaints provided by the Act, and the access it gives to a mechanism for the payment of offsets for so-called "qualifying expenditures".

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<sup>1</sup> First written submission by the United States, paragraph 119.

9. As regards the industry, being influenced and encouraged by the United States Government, its interest in petitioning for an investigation and supporting it would not be genuine, a factor which, in normal circumstances, an objective and reasonable authority would have to take into account in an investigation for alleged dumping or subsidies.

10. In other words, Members must "take the conditions" that exist at the time of initiation of the investigation for alleged dumping or subsidies, and not create them as could be the case if the Byrd Amendment were accepted.

11. Moreover, the last sentence of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement – "however, no investigation shall be initiated when ... account for less than 25 per cent of total production ..." – is a sort of "reinsurance" or "*de minimis*", which suggests that the object and purpose of these provisions is to prevent an unjustified proliferation of investigations that could hinder the normal flow of trade between WTO Members. The Byrd Amendment would clash head on with these deterrent provisions because in fact, it favours the initiation of investigations.

12. Finally, it should be borne in mind that the mere initiation of an investigation brings with it the possibility of provisional measures being introduced (Articles 7 of the AD Agreement and 12.12 of the SCM Agreement). Hence, the proliferation of investigations could entail concrete injury to a large number of exporters to the United States market. In other words, the initiation of an investigation for alleged dumping or alleged subsidies itself already authorizes the Member concerned to apply provisional measures under WTO rules, and consequently, the proliferation of investigations could spell the proliferation of provisional measures as well, with their concrete and direct effects on the flow of trade.

### **III. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLES 8.3 OF THE AD AGREEMENT AND 18.3 OF THE SCM AGREEMENT (PRICE UNDERTAKINGS) FROM THE POINT OF VIEW OF THE DEVELOPING COUNTRIES**

13. In Argentina's view, the Byrd Amendment violates the above-mentioned provisions of the AD Agreement and the SCM Agreement in that it detracts from the effectiveness of an alternative remedy, price undertakings, expressly provided for and encouraged by the WTO. Indeed, with a pecuniary incentive to petition for and support investigations of alleged dumping or subsidies, United States producers are unlikely to be interested in any undertakings: they would have a pecuniary interest in the proliferation of investigations and the application of anti-dumping and/or countervailing duties in order to receive their so-called offsets for "qualifying expenditures".

14. Argentina submits that this serious disincentive to price undertakings is detrimental to the normal application of the WTO anti-dumping and countervailing duty rules (measures taken by Member States to protect the normal flow of trade), which always favour the reestablishment of the trade flow or agreement by parties to restore the trade flow to the extent reasonable.

15. It goes without saying that price undertakings are of fundamental importance to the developing countries, for whom it is of the utmost necessity to ensure normal access to developed country markets and for whom it is not easy to overcome barriers to trade, in particular when they are established by a developed country. Acceptance of the Byrd Amendment, with its system of disincentives to price undertakings, would not only increase the barriers to trade that the developing countries have to face in order to find outlets for their products, but would also be a direct obstacle to the creation and establishment of new export-oriented industries in the developing countries. All of this would be in breach of the right to development contained in the preamble to the Marrakesh Agreement, which stipulates that "... there is need for positive efforts designed to ensure that

developing countries, and especially the least developed among them, secure a share in growth in international trade commensurate with the needs of their economic development ...".

16. Argentina would also like to recall that according to Article 15 of the AD Agreement, "... special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members." (emphasis added). Consequently, the Byrd Amendment is inconsistent not only with the favouring of price undertakings, but also with the special situation of the developing countries.

17. It is important to bear in mind that Article 15 of the AD Agreement imposes an obligation on the developed countries to explore the possibilities of making use of the "constructive remedies" provided for and, as stated by the Panel in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*<sup>2</sup>, price undertakings must be considered as constituting one of these possible remedies. However, the acceptance of price undertakings as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury and causal link, would not be a sufficiently attractive option for United States producers in view of the possibility offered by the Byrd Amendment, which would ensure them the reimbursement of their so-called "qualifying expenditures".

18. The likelihood of a United States producer accepting a price undertaking is fairly slim: indeed, a producer that has petitioned for the initiation of an anti-dumping investigation on the basis of the prerogative offered by the Byrd Amendment is highly unlikely to be interested in accepting a price undertaking when what can be expected is the imposition of definitive measures following the investigation process.

19. While Article 15 "imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered ...", it does "impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to the imposition of an anti-dumping measure that would affect the essential interests of a developing country."<sup>3</sup> Argentina submits that the Byrd Amendment provides the necessary mechanisms and tools for greater private sector participation in the initiation of anti-dumping investigations, discourages any cooperation by the sector "allegedly" affected by the dumped imports in exploring constructive remedies, and at the same time acts as an obstacle to the use of such remedies prior to the imposition of the anti-dumping measures which affect the essential interests of the developing countries. In short, the Byrd Amendment "empties" the constructive remedy alternative offered by Article 15 of the AD Agreement of its content.

20. We add that the Byrd Amendment would not only place the developing countries at a disadvantage *vis-à-vis* the United States producers, but *vis-à-vis* the developed country exporters affected by the Amendment as well. In short, the developing country exporters would suffer injury both with respect to the United States producers who petition for and support the initiation of investigations – the beneficiaries of the Byrd Amendment – and with respect to the other "victims" of the Byrd Amendment, i.e. the developed country exporters.

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<sup>2</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000, paragraph 6.229.

<sup>3</sup> *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R of 30 October 2000, paragraph 6.233 and footnote 92.

#### **IV. INCONSISTENCY OF THE BYRD AMENDMENT WITH ARTICLE XVI:4 OF THE WTO AGREEMENT**

21. In view of the above considerations, Argentina contends that the Byrd Amendment, because it establishes a system of incentives to the proliferation of investigations which adversely affects the normal flow of trade and acts as an obstacle to price undertakings, should be found to be inconsistent with the above-mentioned WTO obligations under the AD Agreement and the SCM Agreement, and hence to be in violation of Article XVI:4 of the WTO Agreement.

#### **V. CONCLUSION**

22. Argentina does not deny that every WTO Member has a right to spend the money collected in various ways.<sup>4</sup> However, each Member must do so in conformity with the international obligations it has assumed, and in particular, these compensations must not in any way involve a violation of the commitments assumed under the WTO Agreements.

23. In Argentina's view, the United States' application of the Continuing Dumping and Subsidy Offset Act of 2000 – the so-called Byrd Amendment – involves a violation of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement in that it creates a mechanism of incentives to initiate investigations, and hence facilitates the application of provisional measures. The proliferation of such initiations and the adoption of such measures inevitably involves an alteration of the normal flow of trade.

24. We repeat that it is not a matter of investigating the personal and subjective reason of each local producer for filing a complaint, but rather, of analysing the incentive and the access to a mechanism for the reimbursement of the so-called "qualifying expenditures" established by the Byrd Amendment.

25. Argentina considers the Byrd Amendment to be inconsistent with Articles 8.3 of the AD Agreement and 18.3 of the SCM Agreement in that it deprives an alternative remedy expressly provided for and encouraged under those Agreements of its effectiveness, namely the "price undertakings".

26. The Byrd Amendment has a particularly damaging impact on the developing countries in that first of all, it provides the necessary mechanisms and tools for greater private sector participation in the initiation of anti-dumping and alleged subsidies investigations; secondly, it discourages any cooperation by this vast sector "allegedly" affected by the importation of the product under investigation in exploring constructive remedies; and finally, it acts as an obstacle to the use of such remedies prior to the imposition of the anti-dumping measures or countervailing duties which affect the essential interests of the developing countries.

27. Argentina concludes that the United States legislation known as the Byrd Amendment, with its system of incentives to the proliferation of investigations affecting the normal flow of trade and the uncertainty involved in reaching price undertakings, should be considered inconsistent with the WTO obligations under the AD Agreement (Articles 5.4 and 8.3) and the SCM Agreement (Articles 11.4 and 18.3), and hence to be in violation of Article XVI:4 of the WTO Agreement.

28. Were the Panel not to find that the Byrd Amendment was inconsistent with the above-mentioned provisions, the same type of measure could be used not only by the United States, but by other countries as well including, in particular, the developing countries. Indeed, in that case, Argentina considers that such a move would be appropriate, particularly in the light of

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<sup>4</sup> First written submission by the United States, paragraph 11.

Article XVIII:2 of the GATT 1994, i.e. "in order to implement programmes and policies of economic development designed to raise the general standard of living of their people, to take protective or other measures affecting imports ...". In this scenario, the payment of the expenses of local producers that took the initiative would entitle them to countervailing duties or anti-dumping measures as "protective measures" "affecting imports" with a view to protecting a particular industry.

29. If the Byrd Amendment were considered by the Panel to be consistent, WTO Members would have to consider the possibility of showing greater flexibility in enabling the developing countries to apply measures of this kind. One alternative might be to limit the distribution of funds resulting from the application of anti-dumping and countervailing duties to xx percent of the total in the case of the developed countries, without any limit of any kind for the developing countries.

## ANNEX A-2

### THIRD PARTY ORAL STATEMENT OF ARGENTINA

(6 February 2002)

#### I. INTRODUCTION

1. Argentina is grateful for this possibility of submitting its arguments to the Panel as third party in these proceedings and commenting on the inconsistencies of the Continued Dumping and Subsidy Offset Act of 2000 (hereinafter the "Byrd Amendment") with the obligations of the United States under the Anti-Dumping Agreement (AD Agreement), the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the WTO Agreement. Specifically, Argentina submits that the said United States Act violates, firstly, the articles relating to the initiation of investigations and the adoption of provisional measures, and secondly, the provisions on price undertakings, including those which provide for special and differential treatment for the developing countries. Finally, Argentina would like to state that these violations of the AD and SCM Agreements also imply non-compliance with the requirements laid down in Article XVI.4 of the WTO Agreement.

#### II. THE BYRD AMENDMENT

##### A. VIOLATIONS RELATING TO ARTICLES 5.4 OF THE AD AGREEMENT AND 11.4 OF THE SCM AGREEMENT

##### 1. The Byrd Amendment as an incentive

Argentina considers the Byrd Amendment to be a clear incentive to initiate anti-dumping or alleged subsidy investigations. Leaving aside whatever subjective motivation United States producers may have<sup>1</sup> for requesting or supporting the initiation of such investigations, what is being challenged here is the United States legislation in itself, since the Byrd Amendment acts as an incentive. It clearly alters the preexisting conditions when it comes to deciding whether or not the anti-dumping or alleged subsidy investigation should be initiated. Regardless of whether the implementing authority, acting in an objective and reasonable manner, can determine which are the producers with a genuine interest in requesting an investigation and which of the producers are motivated solely by their interest in receiving an offset for expenses incurred, the fact is that what is being challenged here is the mechanism of the Byrd Amendment, which operates as an incentive to file complaints.

Bearing this in mind, Argentina would like to draw attention to the scope of this incentive: under the Byrd Amendment, the conditions that all WTO Members must take into account when considering whether to initiate an investigation are altered by the introduction, in the legislation of a Member (the United States), of elements that lead to the artificial creation of conditions for a purpose

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<sup>1</sup> First written submission by the United States, paragraph 119: "Contrary to the complaining parties' arguments, a simple review of the text confirms that there is no requirement in Article 5.4 and 11.4 that administering authorities determine the *reason for the domestic industry's support*. The obligation is to determine whether the quantitative benchmarks have been met. (...). Rather, the complaining parties argue the reason for support is not appropriate. The complaining parties would have this Panel read into the agreements a requirement that the administering authority must determine that, in addition to the expression of support, the domestic industry support for the investigation is 'true' or 'genuine'".

not provided for in the WTO Agreements, elements which constitute an encouragement to file complaints. In other words, these elements would clearly boost the number of complainants and facilitate the achievement of the minimum thresholds – percentages – required under the AD and SCM Agreements for the initiation of an investigation.

In its turn, this objective framework legally created by the provisions of the Byrd Amendment multiplies the regular impact on trade of the mere filing of an anti-dumping or alleged subsidy complaint, since it is well known that apart from the possible application of provisional measures, the mere filing of a complaint can have a chilling effect on trade; and it is precisely this incentive to file a complaint that the Byrd Amendment generates.

Article 5.4 of the AD Agreement sets up two separate calculations to determine that a minimum level of "support" for the application is shown by domestic producers and a proper determination of standing is made prior to the initiation of the anti-dumping investigation at issue, as confirmed by the findings set forth in the report of the panel on *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed Linen from India*.<sup>2</sup>

The new element which would act as an "encouragement" in the case of the Byrd Amendment is the alteration of the conditions to be considered by the authorities "on the basis of an examination of the degree of support for, or opposition to". Argentina considers that the United States legislation creates conditions which permit the alteration – artificially and by introducing new elements through the reimbursement of "qualifying expenditures" – of the "degree of support for, or opposition to, the application expressed by domestic producers of the like product". While it is correct to use methods of calculation to quantify the examination of the degree of support, the Byrd Amendment acts "a priori", modifying the conditions and thus influencing the "degree of support for" or "opposition to".

## **2. Unjustified proliferation of investigations. Effect on trade**

Argentina would like to repeat that incentives of the Byrd Amendment kind would produce an unjustified and unreasonable proliferation of anti-dumping or alleged subsidy investigations. Indeed, if WTO Members were free to apply such incentives, they themselves could create conditions that would encourage the filing of anti-dumping or alleged subsidy investigations. As already stated, the mere act of filing for the initiation of an investigation would already have a concrete disruptive effect on trade – a chilling effect – as has already been confirmed in WTO practice.

Indeed, Argentina repeats that the provisions of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement, which establish minimum percentages (25%, 50%) for ensuring objective representativeness of the domestic industry, in fact constitute a deterrent to the unjustified proliferation of investigations that could affect the flow of trade. An incentive such as the Byrd Amendment would be in direct violation of these provisions, being inconsistent with their object and purpose.

## **3. Unjustified proliferation of investigations. Resulting imbalance**

The AD and SCM Agreements provide the instruments needed to correct the imbalances caused by goods export practices that involve dumping or subsidization, in other words practices which alter the conditions of competition in the markets. Under these two agreements, measures may legitimately be adopted with a view to re-establishing the mentioned balances through anti-dumping or countervailing duties, while at the same time, instruments are provided to defend the domestic industries against dumping or subsidies. If a WTO Member also had the right to implement additional incentives to increase the number of investigations, the other WTO Members would be unduly

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<sup>2</sup> WT/DS141/R, 30 October 2000, paragraphs 6.211 and 6.218.

disadvantaged with respect to that Member. Indeed, an incentive such as that provided by the Byrd Amendment would be detrimental to the results achieved during the negotiation of the WTO Agreements in that it would introduce an element that would disrupt the regulatory balance between the capacity of a Member to protect itself against unfair practices and the rights of the other Members whose market access and enjoyment of negotiated concessions have not been equally restricted.

In other words, the Byrd Amendment is a legal creation which introduces a disruptive element by adding incentives – through the reimbursement of qualified expenditures to petitioners – to the conditions provided for in the text of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement.

## B. VIOLATIONS RELATING TO ARTICLES 8.3 OF THE AD AGREEMENT AND 18.3 OF THE SCM AGREEMENT, AND SITUATION OF THE DEVELOPING COUNTRIES

The above-mentioned imbalance is amplified where the country involved is a developing country.

### 1. Price undertakings

Argentina submits that the provisions of the Byrd Amendment constitute an incentive to the initiation of investigations and, at the same time, a disincentive to price undertakings.

Price undertakings are an alternative remedy, expressly provided for in the WTO rules, by which those who need to apply an anti-dumping measure or a countervailing duty try to smooth their differences with those who wish to be able to continue exporting, in spite of the presumption that by doing so they are engaging in unfair trade practices that could alter the conditions of competition in the markets.

A provision such as the Byrd Amendment would deter domestic market producers from seeking a price undertaking and encourage them to take advantage, instead, of offsets of the kind provided – mandatorily - under that Amendment.

In short, on the one hand the challenged US legislation provides an incentive for something that the WTO seeks to discourage – unjustified anti-dumping and alleged subsidy investigations – while on the other hand it acts as a disincentive to using a legitimate instrument provided for under the WTO rules – price undertakings.

### 2. Situation of the developing countries

In addition to the above considerations, Argentina would like to stress once again the fundamental importance of price undertakings for the developing countries, which are more vulnerable than the developed countries to any type of measures that affects their chances of exporting and developing export industries. This circumstance is in fact mentioned in the preamble to the Marrakesh Agreement, which recognizes the right of developing countries to sustained development.

Similarly, under Article 15 of the AD Agreement, the situation of the developing countries must be taken into account when introducing a measure that could disrupt the normal flow of trade.

Regardless of whether specific actions such as offering constructive remedies are mandatory or not, the fact is that there does exist an obligation to explore the "possibilities" of using these remedies in the case of the developing countries, stipulated in Article 15 of the AD Agreement. In its report in the case *European Communities – Anti-dumping Duties on Imports of Cotton-Type Bed*

*Linen from India*, the Panel stated: "We recall that Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in the light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must actively be undertaken by the developed country authorities with a willingness to reach a positive outcome."<sup>3</sup>

Argentina believes that the introduction of incentives such as those resulting from the Byrd Amendment would be inconsistent with this provision of Article 15 of the AD Agreement, which requires, at least, that the implications of imposing measures that could affect the developing countries be considered. Through the Byrd Amendment the United States, as a developed country, has created an instrument which is inconsistent with the requirements of Article 15 of the AD Agreement, interpreted in the above-mentioned Panel Report as follows: "the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome." The Byrd Amendment not only is not conducive to, it is in fact a disincentive to, any active effort to explore possibilities; and worse still, it makes the idea of considering a hypothetical price undertaking less attractive in view of an "almost certain" reimbursement of qualified expenditures as the result of the petition for the initiation of an investigation.

Consideration of qualified expenditures to be reimbursed further aggravates the situation from the point of view of the developing countries, since the reimbursement covers a wide range of expenditure categories:<sup>4</sup> (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid for by the employer; (8) environmental equipment, training or technologies; (9) acquisition of raw materials and other inputs; (10) working capital or other funds needed to maintain production. Obviously there is a requirement that these expenditures should be related to the production of the actual product at issue. However, the inclusion of some of these categories, for example research and development expenditures, could be understood, from the point of view of the developing countries, as a disguised subsidy. Likewise, the possibility of including in the claim for expenditures items (6) and (7) relating to health care benefits and pension benefits to employees paid by the employer would appear to be excessive as regards the determination of dumping under the AD Agreement. If the object pursued is to avoid cases in which the product cost does not provide for adequate protection of the rights of the worker and production is ultimately facilitated without respect for social and/or welfare legislation, the Byrd Amendment, by reimbursing expenditures, is not the instrument to modify a circumstance that is not expressly provided for in multilateral regulations.

If the Byrd Amendment as such were declared consistent with WTO obligations, the developing countries would require greater flexibility under other articles of the GATT – for instance Article XVIII – so that a Byrd Amendment type mechanism could be applied more loosely, according to the particular difficulties faced by the developing countries in achieving competitive status on foreign markets.

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<sup>3</sup> WT/DS141/R, 30 October 2000, paragraph 6.233.

<sup>4</sup> Federal Register/Vol.66 N184/Friday, 21 September 2001/Rules and regulations, p. 48552, Subpart F-Continued Dumping and Subsidy Offset #159.61. General (c) Qualifying expenditures.

### **III. CONCLUSION**

In the light of the above considerations, Argentina repeats what it requested in its first written submission, i.e. that the Panel find that the Byrd Amendment is inconsistent with Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement as well as Articles 8.3 and 18.3 of the SCM Agreement, and is therefore also inconsistent with Article XVI.4 of the WTO Agreement.

## ANNEX A-3

### THIRD PARTY SUBMISSION OF HONG KONG, CHINA

(17 January 2002)

#### I. INTRODUCTION

1. The dispute at issue concerns the *Continued Dumping and Subsidy Offset Act of 2000* (also known as the "CDSOA" or "Byrd Amendment") which was enacted into law by the United States on 28 October 2000. Hong Kong, China decided to participate in the current proceedings as a third party in view of the systemic importance of the dispute.

2. Hong Kong, China does not question the right of WTO Members to enact domestic legislation to protect legitimate trade interests, but such legislation must not detract from their obligations under the WTO. We believe that the CDSOA constitutes a violation by the United States of their obligations under the following WTO provisions:

- Article 18.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (hereafter referred to as the "ADA") in conjunction with Article VI:2 of GATT 1994; and
- Article 32.1 of the Agreement on Subsidies and Countervailing Measures (hereafter referred to as the "ASCM") in conjunction with Article VI:3 of GATT 1994.

We also submit that the CDSOA is inconsistent with the object and purpose of the ADA and the ASCM, and violates Article 5 of ASCM.

#### II. THE LEGISLATION AT ISSUE

3. The CDSOA amends the Tariff Act of 1930, which is the principal statute governing the United States anti-dumping and countervailing proceedings, by adding a new Section 754 entitled *Continued Dumping and Subsidy Offset*.

4. Section 754(a) provides that:

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

5. The term "affected domestic producers" is defined in Section 754(b)(1) as including:

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

(A) was a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Anti-dumping Act of 1921, or a countervailing duty order has been entered, and

(B) remains in operation.

Companies, business, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer."

6. As for the term "qualifying expenses", it is defined in Section 754 (b)(4) as follows:

"Expenditure incurred after the issuance of the anti-dumping duty finding or order or countervailing duty order in any of the following categories -

(A) Manufacturing facilities.

(B) Equipment.

(C) Research and development.

(D) Personnel training.

(E) Acquisition of technology.

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

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

(H) Environmental equipment, training or technology.

(I) Acquisition of raw materials and other inputs.

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

### III. THE ARGUMENTS

#### A. MANDATORY LEGISLATION

7. According to established GATT and WTO jurisprudence, legislation that mandates action that is inconsistent with WTO rules and leaves no discretion to the executive branch of government can be challenged as such. As summed up in the *United States - Tobacco*<sup>1</sup> case,

" ... panels had consistently ruled that *legislation which mandated action inconsistent with the General Agreement could be challenged as such*, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such ... " (emphasis added)

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<sup>1</sup> Panel report adopted on 4 October 1994, BISD 41S/13.

The Appellate Body has embraced this rationale. See *United States - 1916 Anti-dumping Act*, WT/DS136/AB/R, WT/DS162/AB/R, AB-2000-5, AB-2000-6, paragraphs 88-89.

8. That the *CDSOA* is mandatory legislation is demonstrated by the repeated use of the word "shall" in its provisions. For example, the *CDSOA* provides that,

"duties assessed pursuant to a countervailing duty order, and anti-dumping duty order ... **shall** be distributed on an annual basis ... to the effected domestic producers ..."  
(emphasis added)

"[t]he Commissioner **shall** establish ... a special account with respect to each such order or finding." (emphasis added)

"[t]he Commissioner **shall** distribute all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers ..." (emphasis added)

The above passages demonstrate that the *CDSOA* is mandatory legislation that leaves no discretion to the executive branch of the United States government regarding the distribution of the assessed anti-dumping and countervailing duties to affected domestic producers. Hence, the *CDSOA* as such can be subject to WTO dispute settlement procedures.

B. ARTICLE 18.1 OF THE ADA AND ARTICLE 32.1 OF THE ASCM IN CONJUNCTION WITH ARTICLE VI OF GATT 1994

9. By mandating specific action against dumping and subsidization that is not in accordance with Article VI of GATT 1994, as interpreted by the ADA and the ASCM, the *CDSOA* is inconsistent with Article 18.1 of the ADA and Article 32.1 of the ASCM in conjunction with Article VI of GATT 1994.

10. The relevant provisions are quoted below.

Article 18.1 of the ADA provides that,

"[n]o specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

Article 32.1 of the ASCM provides that,

"[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

*Specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM*

11. In the *United States Anti-dumping Act of 1916* case, the Appellate Body stated that,

"[i]n our view, the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is **action that is taken in response to situations presenting the constituent elements of 'dumping'**. 'Specific action against

dumping' of exports, must, at a minimum, encompass *action that may be taken only when the constituent elements of 'dumping' are present.*"<sup>2</sup> (emphasis added)

12. By the same logic, the phrase "specific action against a subsidy" in Article 32.1 of the ASCM should also be construed to encompass, at a minimum, action that may be taken *only* when the constituent elements of subsidization are present.

13. Section 1002 of the *CDSOA* illustrates that the Act is taken in response to situations presenting the constituent elements of dumping and subsidization:

"Congress makes the following findings:

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

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

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

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

14. In brief, the Act is to remedy the "continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders" by transferring anti-dumping and countervailing duties to the "affected domestic producers". Therefore, the offset payments mandated under the *CDSOA* are clearly in response to situations presenting the constituent elements of dumping and subsidization.

15. The terms of the *CDSOA* demonstrate that the offset payments are possible *only* when the constituent elements of dumping and subsidization are present. As seen in paragraph 5 above, offset payments are *only* and *exclusively* available to those producers "affected" by an instance of anti-dumping or subsidization which has been subject to an anti-dumping duty order, a finding under the Anti-dumping Act of 1921 or a countervailing duty order. Unless there is an anti-dumping order/finding or a countervailing duty order, the United States authorities cannot assess any anti-dumping or countervailing duties and as a result, no offset can be paid. In other words, the constituent elements of dumping and subsidization (leading to an anti-dumping order/finding or a countervailing duty order) are prerequisites to offset payments.

16. The above also means that the *CDSOA*, being a specific action "*in response to*" dumping or subsidy, is no different from an action "*against*" dumping or a subsidy. Indeed the very existence of the *CDSOA* payment hinges upon the existence of the constituent elements of dumping and subsidization. The distribution of the *CDSOA* payment is again based upon the existence of the

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<sup>2</sup> United States – Anti-dumping Act of 1916, AB-2000-5 and 6 at paragraph 122.

constituent elements of dumping and subsidization – the payment will only be distributed to producers affected by an instance of anti-dumping or subsidization. In terms of the effect, the CDSOA provides a subsidy to the affected domestic industries and places them in an advantageous position comparing with the alleged dumped or subsidized imports in the cases concerned, which are by definition competing in the same market. The CDSOA therefore upsets the balance of competitive conditions as established under the ADA and ASCM in the direction of hampering the competitiveness of the imports concerned. This upset of balance against the competitiveness of the imports is particularly serious if the duties imposed and distributed are above what would be adequate to remove the injuries to the domestic industries.

17. With the above analysis, we submit that the mandated distribution of offsets under *CDSOA* constitutes specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM.

*Specific action against dumping and subsidization not authorized under Article VI of GATT 1994*

18. The Appellate Body's ruling in the *United States - 1916 Anti-dumping Act* is instructive:

"Article VI, and in particular, Article VI:2, read in conjunction with the Anti-dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings."<sup>3</sup>

19. The Appellate Body unequivocally restricted permissible responses to dumping to definitive anti-dumping duties, provisional measures or price undertakings. Therefore, legislation that mandates specific actions against dumping other than these actions constitutes a breach of Article VI of GATT 1994. The distribution of offsets mandated by the *CDSOA* does not fall under any of the above three permissible responses. In line with the Appellate Body's ruling, the *CDSOA*, by mandating the distribution of offsets to domestic producers, is demonstrably inconsistent with Article VI:2 of GATT 1994. We believe that the legal reasoning of the Appellate Body applies equally to similar provisions regarding measures that can be taken in the context of subsidization under the ASCM and Article VI:3 of GATT 1994. By way of the analysis in foregoing paragraphs, we come to a similar conclusion, i.e. the *CDSOA* is a specific action against a subsidy that is not permitted by Article VI:3 of the GATT 1994 as interpreted by the ASCM.

C. OBJECT AND PURPOSE OF THE ADA AND THE ASCM

20. We also submit that the *CDSOA* is inconsistent with the *object and purpose* of WTO anti-dumping and countervailing laws.

21. First, it is useful to recall that the aim of anti-dumping and countervailing duties is to restore a level playing field by removing the injury to the relevant domestic industry. Through the imposition of duties, the playing field (which is allegedly tilted against the domestic producers as a result of dumping and subsidization) is leveled. By distributing anti-dumping and countervailing duties to the domestic producers, the *CDSOA* provides them with an additional (and WTO-inconsistent) layer of protection. The level playing field (restored as a result of the imposition of duties) will ironically be tilted again (but this time against the exporters) by having the duties transferred to the domestic producers which have already been given adequate protection through the imposition of anti-dumping and countervailing duties.

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<sup>3</sup> *United States – Anti-dumping Act of 1916*, adopted on 26 September 2000, AB-2000-5 and 6 at paragraph 137

22. Apart from destroying the level playing field, it is also submitted that the *CDSOA* runs counter to the principles of *restraint* and *proportionality* as evidenced in the following provisions.

Article 11.1 of the ADA provides that,

"An anti-dumping duty shall remain in force *only as long as* and *to the extent necessary* to counteract dumping which is causing injury." (emphasis added)

Article 9.1 of the ADA states that,

"It is desirable that ... the (anti-dumping) duty be *less than the margin* if such lesser duty would be *adequate* to remove the injury to the domestic industry." (emphasis added)

Article 21.1 of the ASCM provides that,

"A countervailing duty shall remain in force only *as long as* and *to the extent necessary* to counteract subsidization which is causing injury." (emphasis added)

Article 19.2 of the ASCM states that,

"It is desirable ... that the (countervailing) duty should be *less than the total amount of the subsidy* if such lesser duty would be *adequate* to remove the injury to the domestic industry ..." (emphasis added)

23. The above provisions demonstrate that care must be taken to ensure that the amount of duties imposed should not be more than what is necessary to remedy the injury caused by dumping and subsidization. With the imposition of anti-dumping and countervailing duties, any such injury has already been removed. Disregarding the principles of restraint and proportionality, the *CDSOA* goes beyond what is necessary to be done by according additional protection to the domestic producers.

#### D. ARTICLE 5 OF THE ASCM

##### *CDSOA payments are subsidies in the WTO context*

24. For a subsidy to exist within the meaning of the ASCM, there has to be (i) a financial contribution by a government or any public body within the territory of a Member which (ii) confers a benefit and (iii) is specific. We submit that this is indeed the case with respect to the *CDSOA*.

25. We shall first establish that the offsets distributed under the *CDSOA* are subsidies within the meaning of Article 1 of the ASCM. As quoted in paragraph 4 above, Section 754(a) of the *CDSOA* provides for distribution of assessed antidumping and countervailing duties to the affected domestic producers in the United States. By distributing the duties collected, which constitute an entry to the US budget, to eligible domestic producers, the United States makes a financial contribution in the form of a direct transfer of funds referred to in Article 1.1(a)(1)(i) of the ASCM.

##### *CDSOA payments confer a benefit on the recipients*

26. We now tackle the question of whether, in a case of a *CDSOA* payment against the background of imposition of duties to counteract a subsidy or dumping, the whole amount paid is a benefit in the sense of Article 1.1(b) of the ASCM. The Appellate Body report on *Canada – Measures Affecting the Export of Civilian Aircraft* provides some useful guidance on what constitutes a benefit under Article 1.1(b) of the ASCM. In that case, the Appellate Body supported the Panel's

ruling that the ordinary meaning of "benefit" clearly encompasses some form of advantage. In order to determine whether a financial contribution confers a "benefit", i.e. an advantage, it is necessary to determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution. In other words, a "benefit" to the recipient exists when the financial contribution makes the recipient "better off" than it would otherwise have been, absent that contribution.<sup>4</sup> Given that a *CDSOA* payment would inevitably place the recipients in a more competitive and advantageous position than would have been the case but for the transfer, we submit that such a payment confers a benefit referred to in Article 1.1(b) of the ASCM.

*CDSOA payments are specific*

27. For the *CDSOA* scheme to be an actionable subsidy, we must further show that the subsidy paid is specific within the meaning of Article 2.1 of the ASCM. Pursuant to Article 2.1(a), a subsidy is specific if the granting authority or legislation limits access to the subsidy to "certain enterprises". Pursuant to Article 2.1(b), if the granting authority or legislation establishes objective criteria or conditions governing the eligibility for and amount of a subsidy, the subsidy is not specific. As explained in footnote 2 of the ASCM, objective criteria or conditions are neutral, do not favor certain enterprises over others, and are economic in nature and horizontal in application. Article 2.1(c) describes other factors that may be considered, including the use of the subsidy for a limited number of enterprises, predominant use by certain enterprises and disproportionately large subsidy amounts for certain enterprises.

28. The *CDSOA* meets the criteria for specificity. It provides specific subsidies as defined under Article 2.1(a) because it explicitly limits access to the subsidy to certain enterprises, that is, the group of manufacturers, producers, farmers, ranchers, or worker representatives that were petitioners in support of an anti-dumping duty order or finding or a countervailing duty order. Those in the same industry, even if they are under the same economic condition, but have chosen, for whatever reasons, not to support such an anti-dumping duty order or countervailing duty order are not similarly subsidized. The subsidy is therefore specific and selective in application as it only applies to a certain group of enterprises within the industries concerned. Nor is Article 2.1(b) a sufficient defense for the United States since the criteria governing eligibility for and the amount of the subsidy are not objective in the sense of footnote 2 of the ASCM. As argued above, the *CDSOA* favors enterprises that support an antidumping or countervailing duty action over enterprises that choose not to, regardless of the fact that these enterprises may be under the same economic condition and in same industry. The criteria are therefore political rather than economic in nature, nor are they horizontal in application, as required under footnote 2 of Article 2.1(b).

29. In practice, eligibility under the *CDSOA* also meets the factors indicating specificity in Article 2.1(c) of the ASCM. There is evidence that it is predominantly used by certain industries and that disproportionately large amounts are granted to certain enterprises (e.g. more than one-third of the 350-odd antidumping and countervailing duty orders are for iron and steel goods; one company will receive US\$31,000,000 or more than 15% of the US\$200,000,000 payable for fiscal year 2001<sup>5</sup>). To conclude, the *CDSOA* payments are specific subsidies as defined in Article 2.1 of the ASCM.

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<sup>4</sup> See Appellate Body report on Canada – Measures Affecting the Export of Civilian Aircraft (ref: WT/DS70/AB/R of 2 August 1999) paragraphs 149 – 161

<sup>5</sup> See Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, Vol. 66 Federal Register 40782 (3 August 2001) and The eBearing Times (7 December 2001).

*Nullification or impairment of benefits to other WTO Members*

30. According to Article 5 of the ASCM, no Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1 of the ASCM, adverse effects to the interests of other Members. Adverse effects, in the sense of Article 5, can take the form of either (i) injury to the domestic industry of another Member, or (ii) nullification or impairment of benefits accruing to other Members under GATT 1994, or (iii) serious prejudice to the interests of another Member. We submit that the *CDSOA* causes adverse effects in the form of nullification or impairment of benefits as set forth in Article 5.

31. GATT/WTO case law<sup>6</sup> has clarified that three conditions must be met for a complaint on nullification and impairment to succeed:

- (i) a concession in the form of a tariff binding must have been made by a Member;
- (ii) a subsequent action that was not reasonably anticipated must have been taken by the Member that has bound its tariff;<sup>7</sup> and
- (iii) the subsequent action must have nullified or impaired benefits accruing to other WTO Members in the sense that it has reduced the value of the concession.

All three conditions have been met in the case of the *CDSOA*. On (i), as a result of successive rounds of multilateral trade negotiations, the United States have bound almost all their tariff lines. On (ii), the *CDSOA* was enacted subsequent to the entry into force of the Uruguay Round agreements, and could not have been reasonably anticipated when the Uruguay Round was concluded. It should not be assumed that Members could “reasonably anticipate” the *CDSOA* before the tariff concessions entered into force merely by the fact that similar legislative proposals were being discussed during the Uruguay Round. Legislative proposals have to be distinguished from legislation in effect. If the effect of possible legislative proposals (instead of legislation) has to be taken into account, negotiations will be subject to a very uncertain environment. The fact that the present dispute has been the object of a complaint by no less than eleven WTO Members also supports our argument that the *CDSOA* is not reasonably anticipated. On (iii), payments made under the *CDSOA*, operating as specific subsidies, enable the United States domestic producers to retain a larger market share in the United States market than would have been the case absent the payments, thereby upsetting the balance of competitive conditions established through negotiation of the concession (i.e. tariff binding). The resultant displacement of foreign products from the United States markets amounts to a reduction in value of the concession made by the United States, thereby nullifying the benefits which should otherwise be accruing to other WTO Members. The above analysis demonstrates that the *CDSOA* can nullify or impair benefits which should otherwise be accruing to other WTO Members, and hence is contrary to Article 5 of the ASCM.

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<sup>6</sup> See Panel Report on Japan –Measures Affecting Consumer Photographic Film & Paper (ref: WT/DS44R of 22 April 1998) paragraph 10.41.

<sup>7</sup> Paragraphs 10.79 & 10.80 of WT/DS44R provide a useful device that helps divide the burden of proof with respect to the 'reasonable expectations' requirement. The panel's understanding in this respect is that if an alleged measure pre-dates a concession, the affected Members carry the burden of proof to demonstrate that they could not anticipate the effects of the measure. Conversely, if the measure occurs after negotiations of the concession, the defending Member has the burden of proof to show that the measure should have been reasonably anticipated by the affected Members. The *CDSOA* came into effect after conclusion of the Uruguay Round tariffs negotiations. The burden of proof should therefore rest with the United States.

#### IV. CONCLUSION

32. We conclude from the above analysis that *CDSOA* is inconsistent with the following WTO provisions :

- Article 18.1 of the ADA in conjunction with Article VI:2 of GATT 1994;
- Article 32.1 of the ASCM in conjunction with Article VI:3 of GATT 1994;
- the object and purpose of the ADA and the ASCM; and
- Article 5 of the ASCM.

33. We would like to point out that Article VI of GATT 1994, the ADA and the ASCM provide for trade remedy measures which represent exceptions to the GATT/WTO guiding principles of trade liberalization. As such, these measures must be used *only* under the specific conditions laid down in the aforesaid Agreements. We are seriously concerned that trade remedy measures are too often used as tools to protect domestic industries from import competition. In this respect, we consider it imperative that the Panel, through its rulings, should confirm the principle of fairness on which the Agreements are based so that there can be a guarantee that the multilaterally agreed principles and rules will be fully respected and, in particular, that the disciplines of the WTO Agreements will be strictly observed. We respectfully request the Panel to carefully consider our comments and to recommend that the US bring the *CDSOA* into compliance with their WTO obligations.

## ANNEX A-4

### THIRD PARTY ORAL STATEMENT OF HONG KONG, CHINA

(6 February 2002)

1. Hong Kong, China participates in this dispute as a third party in view of its systemic importance. While a WTO Member may distribute anti-dumping or countervailing duties under its domestic legislation, such measure must be consistent with its obligations under the WTO. Like the complaining parties, we believe that the Continued Dumping and Subsidy Offset Act (CDSOA) constitutes a violation by the United States (US) of their obligations under:

- Article 18.1 of the Agreement on Implementation of Article VI of GATT 1994 (ADA) in conjunction with Article VI:2 of GATT 1994; and
- Article 32.1 of the Agreement on Subsidies and Countervailing Measures (ASCM) in conjunction with Article VI:3 of GATT 1994.

2. We also submit that the *CDSOA* is inconsistent with the object and purpose of the ADA and the ASCM and violates Article 5 of the ASCM.

3. First, we submit that the mandated distribution of offsets under the *CDSOA* constitutes specific action against dumping and subsidization under Article 18.1 of the ADA and Article 32.1 of the ASCM, and such action is not authorized under Article VI of GATT 1994.

4. As stated in the ruling of the Appellate Body in the *United States Anti-dumping Act of 1916* case, "the ordinary meaning of the phrase 'specific action against dumping' of exports within the meaning of Article 18.1 is ***action that is taken in response to situations presenting the constituent elements of 'dumping'***. 'Specific action against dumping' of exports, must, at a minimum, encompass ***action that may be taken only when the constituent elements of 'dumping' are present***". By the same logic, the phrase "specific action against a subsidy" in Article 32.1 of the ASCM should be similarly construed. It is clear from the provisions of the *CDSOA*, that the Act is to remedy the "continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders". The offsets distributed under the *CDSOA* are by definition in response to situations presenting the constituent elements of dumping and subsidization.

5. The *CDSOA*, being a specific action "***in response to***" dumping or subsidy, is no different from an action "***against***" dumping or a subsidy. In terms of effect, the *CDSOA* provides a subsidy to the affected domestic industries and places them in an advantageous position comparing with the alleged dumped or subsidized imports. Such action was not anticipated during the negotiations of the WTO Agreements.

6. The distribution of offsets mandated by the *CDSOA* does not fall under any of the three permissible responses to dumping, namely, dumping to definitive anti-dumping duties, provisional measures or price undertakings, as provided for in the ruling of the Appellate Body in the *United States Anti-dumping Act of 1916* case. In line with the Appellate Body's ruling, the *CDSOA* is

inconsistent with Article VI:2 of GATT 1994. And, by applying the Appellate Body's legal reasoning in the context of subsidization under the ASCM and Article VI:3 of the GATT 1994, we come to a similar conclusion that the *CDSOA* is a specific action against subsidy that is not permitted by Article VI:3 of the GATT 1994 as interpreted by the ASCM.

7. We also submit that the *CDSOA* is inconsistent with the *object* and *purpose* of the ADA and ASCM. We all note that the aim of anti-dumping and countervailing duties is to restore a level playing field by removing the injury to the relevant domestic industry. By distributing anti-dumping and countervailing duties to the domestic producers, the *CDSOA* provides them with an additional and WTO-inconsistent layer of protection and therefore destroys the level playing field.

8. The *CDSOA* also runs counter to the principles of *restraint* and *proportionality* as enshrined in Articles 11.1 and 9.1 of the ADA as well as Articles 21.1 and 19.2 of the ASCM. Disregarding the principles of restraint and proportionality, the *CDSOA* goes beyond what is necessary to be done by according additional protection to the domestic producers.

9. Finally, we submit that the *CDSOA* violates Article 5 of the ASCM. A *CDSOA* payment inevitably places the recipients in a more advantageous position than would have been the case but for the transfer. Following the interpretative guidance provided by the Appellate Body in the *Canada-Measures Affecting the Export of Civilian Aircraft* case, we submit that such a payment confers a benefit referred to in Article 1.1(b) of the ASCM.

10. We submit that the *CDSOA* meets the criteria of a "specific" subsidy under Article 2.1(a) of the ASCM. The offsets to be distributed are explicitly limited to domestic producers who supported an anti-dumping duty order or finding or a countervailing duty order. We also reject Article 2.1(b) as a defence for the US. The *CDSOA* clearly favors enterprises that support an antidumping or countervailing duty action over enterprises that choose not to. Its eligibility criteria are political rather than economic in nature, as required by footnote 2 of Article 2.1(b). The *CDSOA* predominantly benefits certain industries and that disproportionately large amounts are granted to certain enterprises, thereby meeting the de facto 'specificity' factors in Article 2.1(c).

11. The *CDSOA* and the offsets so distributed cause nullification or impairment of benefits to WTO Members. According to GATT/WTO jurisprudence, the *CDSOA* meets the three conditions for nullification or impairment. The US has bound almost all their tariff lines as a result of successive rounds of multilateral trade negotiations. The *CDSOA* was enacted subsequent to such tariff binding, and could not have been reasonably anticipated when the Uruguay Round was concluded. Finally, *CDSOA* payments upset the balance of competitive conditions established through negotiation of the tariff concession made by the US, thereby nullifying the benefits which should otherwise be accruing to other WTO Members. Such nullification takes place whenever an offset is distributed to a domestic producer when the above conditions are met.

12. We conclude that the *CDSOA* constitutes a violation by the US of their obligations under the relevant WTO provisions. Given the large number of anti-dumping and countervailing duty users, it is of paramount importance that such a WTO-inconsistent measure should be withdrawn expeditiously. Otherwise, there is a danger that other Members may introduce similar legislation, which would cause further upsetting of the balance of rights and obligations provided under the ADA, the ASCM and other WTO Agreements.

13. Thank you.

## ANNEX A-5

### THIRD PARTY SUBMISSION OF ISRAEL

(17 January 2002)

#### I. INTRODUCTION

Israel makes this third party submission to provide the Panel with its view that the Continued Dumping and Subsidy Offset Act of 2000 (the Act) is in violation of certain provisions for the General Agreement on Tariffs and Trade 1994 (GATT 1994), Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement), and the Subsidies and Countervailing Measures Agreement (SCM Agreement). The Act is a mandatory act that obligates U.S. Authorities to distribute the proceeds of duties assessed pursuant to anti dumping and countervailing duty orders among those domestic producers that applied for and supported the requests for the investigation which led to the imposition and assessment of such duties.

Without prejudice to other issues Israel may wish to raise in the third party meeting, Israel will address the following three issues in this written submission:

1. The Act is inconsistent with Article VI of GATT 1994, Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement because it constitutes a “specific action” against imports not prescribed by those provisions.
2. The Act is inconsistent with Articles 5.4 of the AD Agreement and Article 11.4 of the SCM because it distorts and undermines the standing threshold, by providing a financial inducement to domestic producers for making applications for the imposition of anti dumping or countervailing measures or for supporting such applications.
3. The Act is inconsistent with Article 8 of the AD Agreement and Article 18 of the SCM Agreement because it precludes the US Government from performing an objective evaluation whether to accept an undertaking.

#### II. ARGUMENTS

##### **1. The Act is inconsistent with provisions of GATT 1994, the AD Agreement and the SCM Agreement because it constitutes an impermissible “specific action” against imports.**

The Appellate Body in the United States-Antidumping Act of 1916 stated that Article 18.1 of the AD Agreement prohibits a Member from taking specific action against dumping of exports from another Member unless that action is in accordance with Article VI:2 of the GATT. The Appellate Body stated that paragraph VI:2 limits the permissible responses to dumping to definitive anti dumping duties, provisional measures and price undertakings.

Israel is of the opinion that the Act mandates specific action against dumping that is not covered under Article VI and is therefore in violation of Article 18.1 of the AD Agreement. The Act authorizes the dispersement of the assessed anti dumping duties only if and when the United States

determines that the elements of dumping are present and accordingly levies an anti dumping duty on the importation of the product concerned. The Act therefore provides for specific action against dumping, as that phrase has been interpreted by the Appellate Body, which is not a provisional measure in the form of duties or securities, definitive anti dumping duty or a price undertaking and as such is in violation of Article 18.1 of the AD Agreement.

Article 32.1 of the SCM Agreement can be viewed as the parallel to Article 18.1 of the AD Agreement and therefore the same reasoning applying to that Article also applies to Article 32.1 of the SCM Agreement. As such the Act is a violation of 32.1 of the SCM Agreement.

**2. The Act is inconsistent with Articles 5.4 of the AD Agreement and Article 11.4 of the SCM because it distorts and undermines the standing threshold by providing a financial inducement to domestic producers for making applications for the imposition of anti dumping or countervailing measures or for supporting such applications.**

Under Article X:3 of GATT 1994 there is a requirement that Members “administer in a uniform, impartial and reasonable manner all its laws, regulations decisions and rulings” which is applicable to antidumping and subsidy investigations. The principle of “good faith” has been interpreted by the Appellate Body in United States-Anti Dumping Measures on Certain Hot Rolled Flat Rolled Carbon Quality Steel Products from Japan WT/DS184/AB/R/ paragr. 101 as being incorporated in Article X:3 and “informs the provisions of the Anti Dumping Agreement, as well as other covered agreements.” Thus the rules of objectivity, impartiality and good faith apply to the determinations of the Authority throughout the anti dumping investigation. Both Article 5.4 of the AD Agreement and 11.4 of the SCM Agreement require the Authorities to make determinations as regards the level of support for the application for investigations under the AD and SCM Agreements. The question to be determined at this stage is whether there is sufficient industry support for the application. The prospect of a monetary transfer to affected companies induces such companies to bring applications and to express support for petitions that otherwise would be uninterested in the initiation of an investigation. The Authorities have no way of distinguishing support for the application for the imposition of duties as opposed to the desire not to forego the possible financial transfer as a result of the imposition of such duties. This undermines the requirement of Articles 5.4 of the AD Agreement and 11.4 of the SCM Agreement and renders an “objective” determination to be carried out by the Authorities impossible.

**3. The Act is inconsistent with Article 8 of the AD Agreement and Article 18 of the SCM Agreement because it precludes the US Government from performing an objective evaluation whether to accept an undertaking.**

The Act forms a clear financial incentive for producers to support the imposition of duties rather than support the alternative remedy of an undertaking since only if a duty is imposed will they receive the transfer of duties collected pursuant to the Act. Since petitioners in the United States have an effective veto over the decision by the Authorities to accept an undertaking as provided under Article 8 of the AD Agreement and Article 18 of the SCM Agreement, the Authorities will not be free to accept an undertaking. Therefore, the Act is incompatible with the obligation of the Authorities to carry out an “objective” and “fair” examination to determine whether to accept an undertaking if “appropriate” under Article 8.3 of the AD Agreement and 18.3 of the SCM Agreement.

### **III. CONCLUSION**

For the reasons stated above, Israel respectfully requests that the Panel find the Continued Dumping and Subsidy Offset Act of 2000 to be inconsistent with the obligations of the United States under Article VI of GATT 1994, Articles 5.4, 8 and 18.1 of the AD Agreement and Articles 11.4, 18 and 32.1 of the SCM Agreement.

## ANNEX A-6

### THIRD PARTY SUBMISSION OF NORWAY

(17 January 2002)

#### Introduction

1. The case at hand concerns whether the US Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), also known as the “Byrd Amendment”, is consistent with the obligations of the United States under the WTO agreement and annexed agreements.

2. Norway reserved its third party rights in the case during the Dispute Settlement Body meeting on 23 August 2001 (WTO/217/5). Norway’s participation reflects both systemic and substantive trade interests.

3. In deciding the case, Norway submits that the Panel should base its arguments on the following:

#### **I. The Byrd Amendment constitutes mandatory, non-discretionary legislation that is actionable under WTO law/rules**

4. It is established in GATT and WTO jurisprudence that mandatory, non-discretionary legislation, which is inconsistent with the WTO rules, can be challenged as such, independently from the application of such legislation. The Byrd Amendment is a mandatory, non-discretionary legislation, requiring the US authorities to distribute, on an annual basis, the duties assessed pursuant to a countervailing duty order, an anti-dumping order or a finding under the Anti-Dumping Act of 1921 to the “affected domestic producers” for certain “qualifying expenses” incurred by them after the issuance of such order or finding.

5. Under the mandatory Byrd Amendment no discretion is accorded to the US authorities with regard to their distribution of offsets. Against this background Norway agrees with Japan and Chile that it falls within the authority and mandate of the Panel to review the consistency of the Byrd Amendment as such with the WTO agreements referred to in the requests for the establishment of the Panel.

#### **II. The Byrd Amendment is inconsistent with Article 18.1 of the Anti-Dumping Agreement and with Article 32.1 of the SCM Agreement because the offset payments it mandates constitute specific action against dumping and subsidisation which is not in accordance with the provisions of the GATT, as interpreted by the Anti-Dumping Agreement and the SCM Agreement.**

6. Article 18.1 of the Anti-Dumping Agreement provides that:

“No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement”.

7. In the case United States - Anti-dumping Act of 1916, the Appellate Body analysed how to determine if the measure at issue was a “specific action against dumping” and if so, whether it was one of the permissible actions that are in accordance with GATT 1994 (Article VI) as interpreted by the Anti-Dumping Agreement. The following interpretation was given with regard to the concept “specific action”:

“In our view, the ordinary meaning of the phrase “specific action against dumping” of exports within the meaning of Article 18.1 is action taken in response to situations presenting the constituent elements of “dumping”. “Specific action against dumping” must at a minimum encompass action that may be taken only when the constituent elements of dumping are present [...]”<sup>1</sup>

8. Article 32.1 of the SCM Agreement contains parallel language to Article 18.1 of the Anti-Dumping Agreement, and the phrase “specific action against a subsidy” must be understood similarly to encompass, at a minimum, action that may be taken only when the constituent elements of a subsidy are present.

9. Reference is made to the reasoning by the European Communities, India, Indonesia and Thailand in this respect demonstrating that, as such, the Byrd Amendment mandates a specific action against dumping and subsidisation. In the above mentioned case the Appellate Body found that, in general, specific action could take a wide variety of forms. However, based on its interpretation of Article VI:2 of GATT 1994, in conjunction with the Anti-Dumping Agreement, it concluded that in response to injurious dumping a Member’s actions were limited to definitive anti-dumping duties, provisional measures and/or price undertakings.<sup>2</sup>

10. A Member’s actions with respect to subsidies are spelled out in Articles VI and XVI of the GATT 1994, as interpreted by the SCM Agreement and similarly limited to one of the following three types of action against subsidisation: “countervailing measures” imposed in accordance with Part V of the SCM Agreement, “countermeasures” against a “prohibited subsidy” imposed in accordance with Part II of the SCM Agreement, or « countermeasures » against subsidies that cause « adverse effects » to the interests of the Member concerned, according to Articles 4 and 7 of the SCM Agreement.

11. The “specific measures” available to (WTO) Members to meet dumping or subsidisation are thus limited to the abovementioned measures. If a Member would like to see new measures added to this exhaustive list, or change the said measures, such proposals for amendments of the WTO provisions will have to be negotiated within the WTO. There is no option for adopting unilateral measures like the US offset at issue.

12. In support of this, the United States itself has argued that limits exist with respect to the actions a Member state may take in response to unfair trade practices. In United States - Anti-Dumping Duties of Salmon from Norway, the United States argued before the panel as follows:

“Regarding the negotiating history of the General Agreement; the United States also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit tougher

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<sup>1</sup> Report of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R at para. 122.

<sup>2</sup> United States - 1916 Act, Appellate Body Report WT/DS136/AB/R, para. 137.

countermeasures than merely offsetting duties. However, in the end Article VI remedy had been limited to such duties »<sup>3</sup>

13. Finally, reference should be made to the legislative history of the Byrd Amendment, which clearly demonstrates that the Byrd Amendment was aimed at creating an additional specific measure as a response to foreign dumping and subsidisation - by hitting twice at foreign exporters and thereby providing double protection to the US domestic industry.

14. Both the substance of the bill and the manner in which it was adopted caused significant concern within the US Congress and Administration. The legislation which constitutes a trade measure was, due to lack of support, attached to the FY 2001 Agricultural Appropriations bill and adopted as part of this. In the October 2000 Statement of Administration policy, the US Administration stated that “there are significant concerns regarding administrative feasibility and consistency with our trade objectives, including the potential for trading partners to adopt similar mechanisms.” President Clinton asked Congress to override the Byrd Amendment, taking the position that the offsets would provide select industries with a subsidy beyond the protection level needed to counteract foreign subsidies.

**III. The Byrd Amendment prevents the United States from making decisions in accordance with Article 5.4 of the Anti-dumping Agreement and Article 11.4 of the SCM Agreement, on whether the application for an initiation of an anti-dumping or anti-subsidy investigation has been made « by or on behalf of the domestic industry »:**

15. The Anti-Dumping Agreement and the SCM Agreement stipulate that, except in “special circumstances”, the authorities of the importing Member shall not initiate an anti-dumping or anti-subsidy investigation unless they have received a written application made “by or on behalf of the domestic industry”.

16. Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement set out the requisite support required in order for the domestic authorities to initiate a dumping or countervailing duty investigation. These provisions require that such investigations cannot be initiated “unless the authorities have determined, on the basis of an examination of the degree of support...that the application has been made by the domestic industry”.

17. The Byrd Amendment, by mandating offset payments to « the affected domestic producers » provides a strong financial incentive to domestic producers to file applications for the imposition of anti-dumping or countervailing measures, or to support such applications made by other domestic producers. This implies encouragement to initiate investigations by the US authorities in cases not necessarily based on a « genuine » interest among the industry concerned. The Byrd Amendment thus creates a powerful incentive for companies to bring or support petitions without merit. In short by offering a « cash reward » the Byrd Amendment encourages abuse of the US AD and CVD legislation.

18. The Byrd Amendment provides that the offset is only to be paid the “affected domestic producers”, a category that is defined as including the petitioners and those interested parties who support the petition. Accordingly, producers that oppose or do not support the petition, are not eligible for offsets and risk being put at a financial disadvantage vis-à-vis domestic competitors who support the application.

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<sup>3</sup> Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87. Report of the Panel adopted on 27 April 1992, BISD 41S/229, para. 75.

19. A domestic producer cannot be considered to have made an “application”, or to “support” it, within the meaning of Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, if he does so in order to qualify for the offset payments provided under the Byrd Amendment.

20. Thus, the Byrd Amendment has the effect of stimulating the filing of applications and making it easier for the applicants to obtain the support of other domestic producers, so as to meet the quantitative thresholds laid down in Article 5.4 of the Anti-Dumping Agreement and in Article 11.4 of the SCM Agreement.<sup>4</sup>

21. Members must observe the general principle of good faith when performing their treaty obligations. The Appellate Body has noted that in order to be “objective” an examination must conform to “the dictates of the basic principles of good faith and fundamental fairness”.<sup>5</sup>

22. The Byrd Amendment operates in a way which prevents the US authorities from conducting an objective examination of whether an application is made « by or on behalf of the domestic industry » as required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

23. These provisions express two key obligations, both of which are affected by the design of the Act. First, Articles 5.4 of the Anti-Dumping Agreement and 11.4 of the SCM Agreement require a positive determination by the authorities, carried out on the basis of an examination of the degree of support or opposition to the application. Second, the examination must show that the application has been made “by or on behalf of the domestic industry”. An application is considered to have been made “by or on behalf of the domestic industry”, only where the examination shows that an application passes both of the following positive and negative tests. A positive test requires that a majority of those in the industry expressing views, supports an application. A negative test bars initiation of any application that fails to gain the positive support of producers representing at least 25 per cent of domestic production.

24. The Uruguay Round negotiating history of the said provisions confirms this interpretation. The present text of these articles was shaped by the widespread reaction against the pre-WTO practice of the US authorities, simply to rely on an applicant’s assertion that it represented the domestic industry, unless the majority of the industry actively opposed the petition. Many delegations sought to require investigating authorities to examine the support for an application before initiation to ensure that the application was properly filed “by or on behalf of” the domestic industry. The investigating

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<sup>4</sup> These effects of the *Byrd Amendment* were anticipated by some US legislators. For example, Representative Kolbe cautioned that:

The lure of a potential monetary windfall could spur litigation under our AD/CVD laws. In order to be eligible for the potential windfall, US industry would be encouraged to join in the filing of AD/CVD petitions. Otherwise, they would not be eligible for any payments which might be made under this new provision.

Similarly, Senator Nickles warned that:

[the Byrd Amendment] says if you have a dumping complaint, and if you happen to win, the benefits go back directly to that company, directly to the company involved. So there is a reward and incentive that **if you file a dumping complaint and win, you will receive benefits. This encourages lawsuits on dumping because you can win the "lottery"**.

<sup>5</sup> Report of the Appellate Body, *United States - Hot Rolled Steel from Japan*, WT/DS184/AB/R, para. 193.

authorities should be required to verify the standing of petitioners. The Nordic countries expressed their view, i.e.

“that the investigating authority is obliged to verify that the petitioners satisfy the ‘major proportion requirement’ ... before initiating an investigation. As it seems that the [Anti-dumping] Code is not sufficiently clear on this point, it should be clarified in order to prevent unfounded investigations.”<sup>6</sup>

25. The Byrd Amendment, by making possible, and even encouraging, the initiation of investigations in cases where the domestic industry has no genuine interest in the adoption of such measures, also leads to unnecessary burdens for foreign exporters because of such unfounded examinations. If maintained, the Byrd Amendment would thereby alter, in favour of the US the balance of Members rights and obligations under the Anti-Dumping Agreement and the SCM Agreement.

26. For the above reasons, Norway submits that the Byrd Amendment is inconsistent with Article 5.4 of the Anti-Dumping Agreement and with Article 11.4 of the SCM Agreement.

**IV. The Byrd Amendment is inconsistent with the undertakings provisions of Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement, by making it more difficult to get acceptance for undertakings by US authorities**

27. Articles 8.1 of the Anti-Dumping Agreement and Article 18.1 of the SCM Agreement provide for an alternative to the imposition of anti-dumping and countervailing duties. Every Member State is required to consider proposed undertakings in good faith as an alternative to the imposition of duties. In support of this the provisions of Articles 8.3 of the Anti-Dumping Agreement and 18.3 of the SCM Agreement, require authorities to have a proper reason for rejecting an offered undertaking.

28. Under US law, the petitioners play an active and privileged role in the procedure leading to the decision whether to accept an undertaking. Furthermore, the US authorities have stated that the petitioner’s opposition is something to which they accord “considerable weight” when assessing whether to accept an undertaking.

29. Under the Byrd Amendment, the US authorities provide a financial incentive to the petitioners for opposing the acceptance of undertakings. The US authorities then rely upon such opposition in order to decide whether to accept an undertaking.

30. Following the adoption of the Byrd Amendment, the petitioners are likely to object systematically to any undertakings offered by the exporters, not because they consider them less effective than the imposition of duties, but rather because they have a vested financial interest in the imposition of duties.

31. Against this background, the Norwegian Government supports the conclusion of the European Communities and others that the Byrd Amendment is incompatible with the obligation of the US authorities to conduct an objective examination of whether the acceptance of an undertaking would be “appropriate”; and it undermines the object and purpose of those two provisions, which is to provide an alternative remedy to the imposition of duties. As such it is inconsistent with Articles 8.1 and 8.3 of the Anti-Dumping Agreement and with Articles 18.1 and 18.3 of the SCM Agreement.

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<sup>6</sup> “Amendments to the Anti-Dumping Code,” Submission by the Nordic Countries, Section V(a), MTN.GNG/NG8/W/64 (22 December 1989)

**V. The offsets under Byrd Amendment constitute subsidies which nullify or impair benefits accruing to other WTO Members under the WTO rules.**

32. It is clear that the offsets to be distributed under the Byrd Amendment constitute a subsidy as defined in Article 1 of the SCM Agreement, which is "specific" within the meaning of Article 2 of the SCM Agreement, and thus actionable under Article 5 of the same agreement once the conditions of Article 5 are fulfilled. In this respect Norway associates itself with the first written submission of Mexico.

33. Norway, furthermore, supports the arguments made by Mexico that the wording "through the use of" [a subsidy] in Article 5 of the SCM Agreement must encompass all subsidies that are "granted or maintained", meaning that a WTO Member under such conditions is entitled to invoke the remedy mechanism in Article 7 of the SCM Agreement to a violation of Article 5 of the same Agreement.

34. The question under Article 5 is whether such subsidy (the offsets to be distributed under the Byrd Amendment) causes "adverse effects to the interests of other Members" in any of the three ways listed in Article 5, letters (a) through (c). Bearing in mind that the present case is a "legislative complaint", and not directed at a concrete subsidization, Norway, like Mexico, believes that the subsidization should be evaluated against the criteria of Article 5 (b).

35. Article 5 (b) of the SCM Agreement refers to nullification or impairment of benefits accruing directly or indirectly to Members under GATT 1994, in particular benefits of concessions bound under Article II of GATT 1994. The relevant provisions of GATT 1994 include the violation and the non-violation nullification or impairment provisions of Article XXIII.

36. Norway, like Mexico, believes that it is highly likely that the majority of the products affected by the Byrd Amendment will be products subject to customs duties bound by the US WTO tariff concessions. Consequently nullification or impairment of tariff concessions caused by this subsidy, can be presumed. Additionally other GATT obligations, as listed by Mexico, may also be violated.

37. It may be argued that the nullification or impairment of tariff concessions caused by this subsidy is not a concrete violation of Article II of the GATT 1994, but must be evaluated as a "non-violation nullification or impairment" and thus subject to GATT Article XIII(1)(b) and jurisprudence related to this provision. However, to the extent that Article 5(b) of the SCM Agreement incorporates non-violation nullification or impairment under Article XXIII of the GATT 1994, it transforms such non-violation nullification or impairment caused "through the use of any subsidy" into a violation of Article 5(1)(b) of the SCM Agreement. Consequently there is no need to enter into a discussion of non-violation nullification or impairment based on GATT Article XXIII(1)(b) or DSU Article 26.

38. The nullification or impairment caused by the subsidies in question is systematic and direct. The subsidies under the Byrd Amendment must be distributed to producers of like products who compete directly with foreign exports of such products, giving these national producers an added competitive advantage to the detriment of foreign exporters. To the foreign exporters this subsidy will function in a similar way as an extra tariff, aggravating the relative competitiveness of their products over and beyond what could be expected from the tariff concession and possible anti-dumping and countervailing duties.

39. Accordingly, based on the facts of this case, the granting or maintaining of subsidies by the US Government under the Byrd Amendment causes nullification and impairment through the use of subsidies in violation of Article 5(b) of the SCM Agreement.

**VI. For the above reasons, the offset payments under the Byrd Amendment result in an “unreasonable” and “partial” administration of the US laws and regulations on the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings, which is inconsistent with Article X:3(a) of the GATT**

40. Article X:3(a) of the GATT states that each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

41. The Byrd Amendment leads to an « unreasonable » administration of the US laws and regulations concerning the initiation of investigations of alleged dumping or subsidies, because it provides a strong financial incentive to file or support applications which will increase the number of investigations initiated by the US authorities. The offset payments result in the « partial » administration of the US laws and regulations concerning the initiation of investigations because they increase artificially the level of support for the applications. This favours certain parties (those domestic producers who support the adoption of measures) at the expense of other interested parties (including the foreign exporters, but also the domestic producers who oppose the initiation).

42. The Byrd Amendment also leads to an « unreasonable » administration of the US laws and regulations concerning undertakings as alternative to anti-dumping or countervailing duties. In order to receive the offset payments, the petitioners will oppose systematically any undertakings offered by the foreign exporters, regardless of whether such undertakings provide an appropriate remedy against the injuries caused by dumping or subsidisation. Together with the US policy of according « considerable » weight to the petitioners' opposition, this will render more difficult, if not impossible, the acceptance of undertakings. Thus, foreign exporters will be deprived of an alternative, more beneficial, remedy for no other reason than the interest of the domestic producer in securing a windfall financial gain.

43. The offset payments also lead to a « partial » administration of the US laws and regulations concerning undertakings because, as a result, the exporters' interest in obtaining an alternative remedy in lieu of the imposition of duties is subordinated to the pecuniary interest of the domestic producers.

44. Against this background, the United States acts inconsistently with Article X:3(a) of GATT 1994 because the Byrd Amendment prevents the administration of US anti-dumping and countervailing duty law in a reasonable, impartial and uniform manner.

**VII. By enacting the Byrd Amendment, the United States is in breach of the obligation of all Members to ensure that its laws, regulations and administrative procedures are in conformity with the provisions of the General Agreement on Tariffs and Trade 1994 (the “GATT”), the Agreement on Implementation of Article VI of GATT 1994 (the “Anti-Dumping Agreement”) the Agreement on Subsidies and Countervailing Measures (the “SCM Agreement”), and the Marrakesh Agreement establishing the World Trade Organization (the “WTO Agreement”) :**

45. Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement (both with identical wording) provide that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement.

46. Thus, by being inconsistent with Articles 18.1, 5.4, 8.1 and 8.3 of the Anti-Dumping Agreement and with Articles 32.1, 11.4, 18.1 and 18.3 of the SCM Agreement, the Byrd Amendment is also inconsistent with Article 18.4 of the Anti-Dumping Agreement and with Article 32.5 of the SCM Agreement, respectively.

47. Similarly, Article XVI:4 of the WTO Agreement states that Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

48. The United States, as a result of its violation of the Anti-Dumping Agreement, the SCM Agreement and the GATT, is also violating its general obligation under Article XVI of the Agreement Establishing the WTO (“the WTO Agreement”), Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement to ensure the conformity of its laws, regulations and administrative procedures with its obligations under the covered agreements.

### **VIII. Conclusion**

For the reasons stated in this submission, Norway respectfully requests the Panel to find that the Continued Dumping and Subsidy Offset Act of 2000, also known as the Byrd Amendment, is inconsistent with the obligations of the United States under

- Article 18.1 of the Anti-Dumping Agreement and Article 32.1 of the SCM Agreement;
- Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement;
- Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement;
- Article 5(b) of the SCM Agreement
- Article X:3(a) of the GATT;
- Article 18.4 of the Anti-Dumping Agreement and Article 32.5 of the SCM Agreement; and
- Article XVI:4 of the WTO Agreement.

Finally, Norway respectfully requests the Panel to recommend that the United States bring the Act into conformity with the corresponding covered agreements. Furthermore, and pursuant to Articles 3.7 and 19.1, second sentence, of the DSU, Norway requests that the Panel suggest the withdrawal of the inconsistent Act as the only possible way for the United States to implement the recommendations. It is the main features and the basic rationale of the Byrd Amendment that violate the cited provisions. Therefore, as stated by Japan and Chile, only by actually repealing the Byrd Amendment could the United States bring it into conformity with the covered agreements and comply with the recommendations.

## ANNEX A-7

### THIRD PARTY ORAL STATEMENT OF NORWAY

(6 February 2002)

Chairman, Members of the Panel,

I would like to thank you for this opportunity to present the Norwegian views in the case at hand. With reference to our written third party submission dated 17 January 2002, I will focus on the following:

**I. First: Norway submits that the Byrd Amendment constitutes mandatory, non-discretionary legislation that is actionable under the WTO rules**

1. As pointed out in our submission, no discretion is accorded under the Byrd Amendment to the US authorities with regard to their distribution of offsets. Norway thus agrees with Japan and Chile that it falls within the authority and mandate of the Panel to review the consistency of the Byrd Amendment as such with the WTO agreements referred to in the requests for the establishment of the Panel.

**II. Second: Norway submits that the Byrd Amendment is inconsistent with Article 18.1 of the Anti-Dumping Agreement and with Article 32.1 of the SCM Agreement because the offset payments it mandates, constitute specific action against dumping and subsidisation which is not in accordance with the provisions of the GATT (as interpreted by the Anti-Dumping Agreement and the SCM Agreement).**

2. Reference is made to the reasoning by the European Communities, India, Indonesia and Thailand demonstrating that, as such, the Byrd Amendment mandates a specific action against dumping and subsidisation.

3. In the case the United States – Anti-dumping Act of 1916 the Appellate Body concluded that in response to injurious dumping a Member's actions were limited to definitive anti-dumping duties, provisional measures and/or price undertakings.<sup>1</sup>

4. A Member's actions with respect to subsidies as spelled out in Articles VI and XVI of the GATT 1994, are similarly limited to (1) "countervailing measures" imposed in accordance with Part V of the SCM Agreement, (2) "countermeasures" against a "prohibited subsidy" imposed in accordance with Part II of the SCM Agreement, or (3) «countermeasures» against subsidies that cause «adverse effects» to the interests of the Member concerned, according to Articles 4 and 7 of the SCM Agreement.

5. The "specific measures" available to Members to meet dumping or subsidisation are thus limited to the abovementioned measures. If a Member would like to see new measures added, or change the said measures, such proposals for amendments of the WTO provisions will have to be negotiated within the WTO.

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<sup>1</sup> United States - 1916 Act, Appellate Body Report WT/DS136/AB/R, para. 137.

6. In support of this, the United States itself has argued that limits exist with respect to the actions a Member may take in response to unfair trade practices. And I quote from the report of the panel in the case the United States - Anti-Dumping Duties of Salmon from Norway:

“Regarding the negotiating history of the General Agreement; the United States also observed that injurious dumping had been viewed with such concern during the original GATT negotiations that proposals had been considered to permit tougher countermeasures than merely offsetting duties. However, in the end Article VI remedy had been limited to such duties”<sup>2</sup>

7. Reference should also be made to the legislative history of the Byrd Amendment, which clearly demonstrates that the Byrd Amendment was aimed at creating an additional specific measure as a response to foreign dumping and subsidisation - by hitting twice at foreign exporters and thereby providing double protection to the US domestic industry.

8. In this respect, reference is made to paragraph 14 of Norway's written submission as well as to parallel descriptions in the submissions of Canada, Japan, Mexico, the European Communities and others.

**III. Third: Norway submits that the Byrd Amendment prevents the United States from making decisions in accordance with Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement, on whether the application for an initiation of an anti-dumping or anti-subsidy investigation has been made «by or on behalf of the domestic industry»:**

9. The Anti-Dumping Agreement as well as the SCM Agreement stipulate that, except in “special circumstances”, the authorities of the importing Member shall not initiate an anti-dumping or countervailing duty investigation unless they have received a written application made “by or on behalf of the domestic industry”.

10. According to the abovementioned articles such investigations cannot be initiated “unless the authorities have determined, on the basis of an examination of the degree of support... that the application has been made by the domestic industry”.

11. The Byrd Amendment, by mandating offset payments to «the affected domestic producers» provides a strong financial incentive to domestic producers to file applications for the imposition of anti-dumping or countervailing measures, or to support such applications made by other domestic producers. The Byrd Amendment thus creates a powerful incentive for companies to bring or support petitions without merit.

12. Producers that oppose or do not support the petition, are not eligible for offsets and risk being put at a financial disadvantage vis-à-vis domestic competitors supporting the application.

13. A domestic producer cannot be considered to have made an “application”, or to “support” it, within the meaning of Article 5.4 of the Anti-Dumping Agreement or Article 11.4 of the SCM Agreement, if he does so in order to qualify for the offset payments provided under the Byrd Amendment.

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<sup>2</sup> Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87. Report of the Panel adopted on 27 April 1992, BISD 41S/229, para. 75.

14. The Byrd Amendment prevents the US authorities from conducting an objective examination of whether an application is made «by or on behalf of the domestic industry» as required by Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement.

15. During the Uruguay Round negotiating history of the said provisions many delegations, including the Nordic countries, expressed their view:

«that the investigating authority is obliged to verify that the petitioners satisfy the ‘major proportion requirement’ ... before initiating an investigation..... in order to prevent unfounded investigations.»<sup>3</sup>

16. The Byrd Amendment, by making possible, and even encouraging, the initiation of investigations in cases where the domestic industry has no genuine interest in the adoption of such measures, also leads to unnecessary burdens for foreign exporters because of such unfounded examinations. If maintained, the Byrd Amendment would thereby alter, in favour of the US, the balance of Members rights and obligations under the Anti-Dumping Agreement and the SCM Agreement.

**IV. Fourth: It is Norway’s view that the Byrd Amendment is inconsistent with the undertakings provisions of Articles 8.1 and 8.3 of the Anti-Dumping Agreement and Articles 18.1 and 18.3 of the SCM Agreement, by making it more difficult to get the US authorities to accept undertakings**

17. As pointed out by Norway and other Members, under US law, the petitioners play an active and privileged role in the procedure leading up to the decision whether to accept an undertaking. Furthermore, the US authorities have stated that the petitioner’s opposition is something to which they accord “considerable weight” when assessing whether to accept an undertaking.

18. Under the Byrd Amendment, the US authorities provide a financial incentive to the petitioners for opposing the acceptance of undertakings. The US authorities then rely upon such opposition in order to decide whether to accept an undertaking.

19. Following the adoption of the Byrd Amendment, the petitioners are likely to object systematically to any undertakings offered by the exporters, not because they consider them less effective than the imposition of duties, but rather because they have a vested financial interest in the imposition of duties.

20. Against this background, the Norwegian Government supports the conclusion of the European Communities and others that the Byrd Amendment is incompatible with the obligation of the US authorities to conduct an objective examination of whether the acceptance of an undertaking would be “appropriate”. And it undermines the object and purpose of Article 8.1 of the Anti-dumping Agreement and Article 18.1 of the SCM Agreement, which is to provide an alternative remedy to the imposition of duties.

**V. Fifth: Norway submits is that the offsets under the Byrd Amendment constitute subsidies which nullify or impair benefits accruing to other WTO Members under the WTO rules.**

21. Norway supports the arguments made by Mexico that the offsets to be distributed under the Byrd Amendment constitute a subsidy as defined in Article 1 of the SCM Agreement, which is

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<sup>3</sup> “Amendments to the Anti-dumping Code”, submission by the Nordic Countries; Section V (a), MTN.GNG/NG8/W/64 (22 December 1989)

"specific" within the meaning of Article 2 and thus actionable under Article 5 of the same agreement; once the conditions of Article 5 are fulfilled.

22. Furthermore, the wording "through the use of" [a subsidy] in Article 5 of the SCM Agreement must encompass all subsidies that are "granted or maintained", meaning that a WTO Member under such conditions is entitled to invoke the remedy mechanism in Article 7 of the SCM Agreement to a violation of Article 5 of the same Agreement.

23. The question under Article 5 is whether such subsidy causes "adverse effects to the interests of other Members" in any of the three ways listed in Article 5, letters (a) through (c). Bearing in mind that the present case is a "legislative complaint", and not directed at a concrete subsidization, Norway, believes that the subsidization should be evaluated against the criteria of Article 5 (b).

24. This provision refers to nullification or impairment of benefits accruing, directly or indirectly, to Members under GATT 1994, in particular benefits of concessions bound under Article II of GATT 1994. The relevant provisions of GATT 1994 include the violation and the non-violation nullification or impairment provisions of Article XXIII.

25. Norway, like Mexico, believes that it is highly likely that the majority of the products affected by the Byrd Amendment will be products subject to customs duties bound by the US WTO tariff concessions. Consequently nullification or impairment of tariff concessions caused by this subsidy, can be presumed.

26. The nullification or impairment caused by the subsidies in question is systematic and direct. The subsidies under the Byrd Amendment must be distributed to producers of like products who compete directly with foreign exports of such products, giving these national producers an added competitive advantage to the detriment of foreign exporters. This subsidy will function in a similar way as an extra tariff, aggravating the relative competitiveness of their products over and beyond what could be expected from the tariff concession and possible anti-dumping and countervailing duties.

**VI. For the above reasons, Norway also maintains that the offset payments under the Byrd Amendment result in an "unreasonable" and "partial" administration of the US laws and regulations on the initiation of anti-dumping and countervailing duty investigations and the acceptance of undertakings, which is inconsistent with Article X:3(a) of the GATT**

27. At this point I refer to our written submission para 40 through 44 supporting what has been stated by the European Communities and other Members in this respect.

**VII. Finally, Norway submits that by enacting the Byrd Amendment, the United States is in breach of the obligation of all Members to ensure that its laws, regulations and administrative procedures are in conformity with the provisions of the "GATT", the "Anti-Dumping Agreement", the Agreement on Subsidies and Countervailing Measures, and the "WTO Agreement":**

28. In this respect, I refer to Norway's written submission para 45 through 48.

29. In concluding, Norway maintains its position as stated in its written submission, and respectfully requests the panel to take this into consideration and to recommend that the United States brings its legislation into conformity with the WTO rules.

Thank you so much for your attention and for your patience.

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