WORLD TRADE ORGANIZATION

Panel established pursuant to Article 6 of the
Understanding on Rules and Procedures Governing the Settlement of Disputes

UNITED STATES – CONTINUED DUMPING
AND SUBSIDY OFFSET ACT OF 2000

(WT/DS217)
(WT/DS234)

Replies by Australia to the
Questions from the Panel after the First Meeting

Geneva, 27 February 2002
QUESTIONS TO COMPLAINING PARTIES

1. Please comment on para. 91 of the US first written submission. Do you agree that "it is clearly possible for an action to be 'in response to' dumping or a subsidy but not be 'against' dumping or a subsidy"? Please explain, taking into account the Appellate Body's finding that "specific action against dumping" … is action that is taken in response to situations presenting the constituent elements of 'dumping'" (1916 Act, para. 122). Does the Appellate Body's finding suggest that "specific action against dumping" is necessarily a subset of action "in response to" dumping? Please explain.

Australia considers that the statement by the United States is unsustainable:

- it ignores that the Appellate Body’s finding on the meaning of the phrase ‘specific action against dumping’ gave meaning to the word ‘against’, and did so in a way that encompasses other ordinary meanings of the word in context;

- it ignores also that, consistent with the requirement of Article 3.2 of the DSU, the Appellate Body’s finding on the meaning of ‘specific action against dumping’ gave meaning to the phrase, as well as the word ‘against’, in their context and in light of the object and purpose of the broader framework of rules governing the imposition of anti-dumping and countervailing measures provided by Article VI of GATT 1994 as interpreted by the Anti-Dumping and SCM Agreements in accordance with the customary rules of interpretation of public international law. (See also reply to Question 35 below);

- it is premised on a misquotation of the Appellate Body finding in US – 1916 AD Act. The US statement at issue is preceded by numerous references to the Appellate Body having said that ‘specific action against dumping’ is ‘action that is taken in response to the constituent elements of dumping’. In fact, the Appellate Body said that ‘specific action against dumping’ is ‘action that is taken in response to situations presenting the constituent elements of dumping’. The two statements are not equivalent;

- it is based on selective quotations of the meaning of ‘against’. However, the word ‘against’ has other, equally valid, ordinary meanings, including ‘in competition with’, ‘to the disadvantage of’, ‘in resistance to’ and ‘as protection from’;

- it presupposes a meaning of ‘dumping’ (and ‘a subsidy’) that has no basis in the relevant texts. Article 18.1 proscribes ‘specific action against dumping of exports from another Member’ not in accordance with GATT 1994. It does not proscribe specific action ‘against dumped exports’ or specific action ‘against the importers of dumped exports’ that is not in accordance with the GATT 1994.

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1 See also Second Submission of Australia, paragraphs 12-21
2 See, for example, First Submission of the United States, paragraphs 81, 84, 86, 87 and 89
3 US – 1916 AD Act, AB Report, paragraph 122
4 First Submission of the United States, paragraph 92
6 See, for example, First Submission of United States, paragraph 92
It follows that Australia does not agree that the Appellate Body’s finding suggests that ‘specific action against dumping’ is necessarily a subset of action ‘in response to’ dumping. In Australia’s view, the Appellate Body’s finding equated the meaning of the two expressions.

2. Please explain exactly how you see that the "constituent elements of dumping" have been incorporated into the CDSOA.

For offset payments to be made pursuant to the Act:

- a domestic producer must have supported an application for an anti-dumping (or countervailing) duty investigation; and

- there must have been a finding of dumping (or subsidisation), as well as injury and a causal link, for an anti-dumping (or countervailing) duty order to have been issued; and

- a domestic producer must have incurred qualifying expenditure after the issue of the anti-dumping duty finding or order (or countervailing duty order).

In other words, the existence of a situation presenting the ‘constituent elements of dumping’ (or a subsidy) is integral to a domestic producer’s potential entitlement under the Act. Contrary to US assertions, Australia has not argued that the offset payments under the Act constitute ‘specific action against dumping / a subsidy’ because they are paid directly from anti-dumping or countervailing duties: offset payments under the Act are ‘specific action against dumping / a subsidy’ because they constitute action that may be taken only when the constituent elements of dumping or a subsidy are present.

3. In your view, would it be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement for a Member to provide subsidies in response to a finding of dumping or subsidization, where that subsidization was in lieu of anti-dumping or countervailing measures? If not, please explain in light of your view that these provisions prohibit any action taken in response to situations presenting the constituent elements of dumping.

To the extent that entitlement to the subsidies as described is conditional on the existence of situations presenting the constituent elements of dumping or subsidisation, such subsidies would be inconsistent with Articles 18.1 and 32.1.

4. Assume that a Member (which has no legal framework for the conduct of anti-dumping / countervail investigations or imposition of anti-dumping countervailing measures) implements a domestic subsidy programme with the explicit purpose and design of offsetting the injurious effects of dumped or subsidized imports. Would that programme constitute a "specific action against dumping" (or subsidy)?

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7 As set out in paragraphs 32-41 of the First Submission of Australia, an anti-dumping duty order or finding under the Antidumping Act of 1921 within the meaning of the Act are the administrative instruments by which the US has formally determined that there exists a situation presenting the constituent elements of dumping. (Similarly, a countervailing duty order is the administrative instrument by which the US has formally determined that there exists a situation presenting the constituent elements of a subsidy.)

8 See, for example, First Submission of the US, paragraph 19
If not, please explain, and provide a reasoned explanation as to how Article 18.1 of the AD Agreement (or Article 32.1 of the SCM Agreement) can be interpreted to distinguish between this hypothetical subsidy programme and the CDSOA regime.

It is not possible to provide a clear answer to this hypothetical question. The key issue in determining whether such a measure would be ‘specific action against dumping / a subsidy’ within the meaning of Articles 18.1 and 32.1 would be whether entitlement is conditional on the existence of situations presenting the constituent elements of dumping or subsidisation, in other words, whether the presence of dumping or subsidisation is a necessary condition.

5. Would a victim compensation scheme (funded from central treasury resources, rather than penalties imposed on convicted criminals) constitute a "specific action against" crime? Please explain. Would your answer be any different if the scheme were funded from penalties imposed on convicted criminals? Why?

With respect, Australia questions the relevance of this scenario to the matter at issue in this dispute.

6. Assume that a Member enacts legislation mandating the payment of $5,000 to petitioners to compensate them for the cost of making the petition and participating in the anti-dumping investigation. Would that payment constitute a "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

See reply to Question 4.

7. Assume that a Member enacts legislation requiring that any anti-dumping duties collected be paid to state retirement homes. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement? Why, or why not?

See reply to Question 4.

8. Assume that the US restricted offset payments under the CDSOA to cases where the US found the existence of dumping, injury and causation but did not impose an anti-dumping order, and that such payments equalled the amount of anti-dumping duty that would have been collected had an anti-dumping order been put in place. Would such payments constitute "specific action against dumping of exports" within the meaning of Article 18.1 of the AD Agreement, or "action under other relevant provisions of GATT 1994" within the meaning of note 24? Why, or why not?

See reply to Question 4.

9. Would the CDSOA violate AD Article 5.4 if offset payments were made to all domestic producers of the product under investigation, and not merely those domestic producers supporting the petition? Please explain.

Yes, because offset payments as described would still make it easier for the needed levels of industry support to be reached. The offset payments as described would continue to provide an incentive to domestic producers to support a petition until such time as the standing thresholds for initiation of an investigation have been met, thereby distorting, or threatening to distort, the requirement that the application be made ‘by or on behalf of the domestic industry’.

10. Is a Member not acting in good faith when it provides incentives for the use of a WTO-consistent remedy? Please explain.
While it may be possible in some circumstances for a Member to act in good faith while providing incentives for the use of a WTO-consistent remedy, the question is incorrectly premised in the context of the present dispute. A remedy cannot be WTO-consistent if a Member takes action that distorts the application of one of the necessary conditions for the availability of that remedy: in this case, that an application be made ‘by or on behalf of the domestic industry’.

11. Does support for an anti-dumping petition have to be genuine (i.e., based on the actuality or expectation of injury) for the purposes of Article 5.4 of the AD Agreement? If so, how could an investigating authority ensure that support is genuine in all cases?

The negotiating history of Article 5.4 confirms that its intent was to ensure that an application was being made ‘by or on behalf of the domestic industry’. Moreover, Article 5.4, read in the context of Article 5 as a whole, provides that support for an anti-dumping investigation be expressed by the domestic industry on the basis of evidence of dumping, injury and a causal link between the dumping and injury. (In that context, Australia notes that the premise of the question, “i.e., based on the actuality or expectation of injury”, is misleading.) A variety of factors may of course influence a domestic producer’s decision whether or not to support a petition. The basis of Australia’s claim in this dispute, however, is that a Member government may not take action that distorts that decision in ways not permitted by the GATT Article VI and the Anti-Dumping and SCM Agreements.

Absent evidence to the contrary, an investigating authority must presume that the views expressed by domestic producers are genuine. If, however, an investigating authority has evidence to indicate that the expression of views by domestic producers may not be genuine, the investigating authority may not ignore that evidence. By its very existence and nature, the financial incentive provided by the Act to ‘affected domestic producers’ must be presumed to affect, at least to some degree, the genuine expression of views by domestic producers in ways not contemplated by the Anti-Dumping Agreement. In such circumstances, the investigating authority must either suspend or nullify the examination of domestic industry views pending further investigation of the possible effect of the extraneous influence or, if the investigating authority is not empowered to take such action, to bring the matter to the attention of those authorities who are so empowered.

12. Does a domestic producer only "support" an anti-dumping application for the purpose of Article 5.4 if its support is motivated solely by its desire for the imposition of an anti-dumping measure? Please explain.

See reply to question 11.

13. Is it your view that there is no "support" (within the meaning of Article 5.4) for an application if such support is motivated - in part, at least - by a domestic producer's desire to be eligible for CDSOA offset payments?

See reply to question 11.

14. Would a Member violate Article 8.3 of the AD Agreement if it decided, as a matter of general policy, never to accept price undertakings? Please explain.

Australia is not pursuing a claim concerning voluntary undertakings under Article 8.1 of the Anti-Dumping Agreement.

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9 See, for example, First Submission of Japan and Chile, paragraphs 4.51-4.55
QUESTION TO CANADA

30. At para. 44 of its oral submission, Canada states that the Offset Act is a "specific action against dumping" because inter alia "payments are made only to those producers 'affected' by dumping". Does Canada consider that the Offset Act would be a "specific action against dumping" if payments were made to all domestic producers, and not only those that had supported the petition? Please explain.

Even if eligibility for the offset payments were extended to all domestic producers, including those who did not support an investigation, they would still be a 'specific action against dumping' (or 'a subsidy') because the payment would still be conditional on the existence of a finding of dumping (or subsidisation).

QUESTIONS TO ALL PARTIES

32. With reference to footnote 24 of the AD Agreement and footnote 56 to the SCM Agreement, to what extent can subsidization be considered an action "under" Article XVI of GATT 1994?

Footnotes 24 and 56 clarify the scope of Articles 18.1 and 32.1: they do not create exceptions to the scope of those provisions. In the same way that a subsidy may be consistent with GATT Article XVI but inconsistent with, for example, GATT Article III:2, for so long as the Act constitutes ‘specific action against dumping / a subsidy’ within the meaning of Articles 18.1 and 32.1, that is, action that may be taken only when the constituent elements of dumping are present, it will be inconsistent with those provisions.

Moreover, GATT Article XVI is one of the provisions of GATT 1994 interpreted by the SCM Agreement, in particular in Part III, within the meaning of Article 32.1 of the SCM Agreement. It cannot also be an ‘other relevant provision of GATT 1994’ within the meaning of footnote 56 to the SCM Agreement.

33. Please provide an example of a "non-specific" action against dumping.

It is unclear what the Panel means by ‘non-specific’ action in the context of the present dispute. As indicated in response to Question 1 above, the Appellate Body has clarified the meaning of the entire phrase ‘specific action against dumping’. If the Panel means action that may be taken in a situation where there may or may not be dumping or subsidisation, then such action could be a tariff or safeguard action, subject to that action being consistent with other relevant WTO provisions.

34. Please give examples of the sort of "other reasons, including reasons of general policy" that Members might invoke under Article 8.3 of the AD Agreement.

Australia is not pursuing a claim concerning voluntary undertakings under Article 8.1 of the Anti-Dumping Agreement.

35. Does the violation of the international law principle of good faith necessarily constitute a violation of the WTO Agreement? Does either the AD Agreement or the WTO Agreement impose an independent obligation on Members to act in good faith?

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10 See also Second Submission of Australia, paragraphs 22-26
Pursuant to Article 3.2 of the DSU, the provisions of the covered agreements are to be clarified in accordance with customary rules of interpretation of public international law, which the Appellate Body has found are expressed in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31.1 provides:

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

Accordingly, Article 3.2 of the DSU requires that the provisions of the covered agreements, including the Anti-Dumping and the SCM Agreements, are to be interpreted in good faith.

Moreover, ‘the principle of good faith, which is, at once, a general principle of law and a principle of general international law, informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements’.

Thus, while there is no specific provision dealing with the principle of good faith, the covered agreements must be interpreted by Members and in the dispute settlement system in accordance with that principle.

36. Is there anything in the panel or Appellate Body reports in the 1916 Act case to suggest that either the panel or the Appellate Body, when addressing the meaning of Article 18.1 of the AD Agreement, had in mind the pure subsidy hypothetical set forth in question 3 above?

Australia notes that the Appellate Body, at paragraph 81 of its Report, expressly stated that ‘specific action against dumping could take a wide variety of forms’. Australia notes, too, that the Appellate Body continued to be mindful of the possible variety of possible actions in its subsequent examination of the scope of GATT Article VI at paragraphs 109-126. In particular, footnote 66 to paragraph 122 would seem to indicate that the Appellate Body was concerned that its finding in relation to the meaning of the phrase “specific action against dumping” might in fact be too limiting.

However, Australia is not in a position to speculate on what other forms the Appellate Body may have actually considered that specific action against dumping could take when making its finding.

11 Article 17.6(ii) of the Anti-Dumping Agreement imposes a similar obligation in respect of that Agreement


13 United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, Report of the Appellate Body, WT/DS184/AB/R, paragraph 101