

***CANADA – ANTIDUMPING MEASURES ON IMPORTS OF CERTAIN  
CARBON STEEL WELDED PIPE FROM THE SEPARATE CUSTOMS  
TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU  
(WT/DS482)***

**EXECUTIVE SUMMARY  
OF THE UNITED STATES OF AMERICA**

**April 1, 2016**

## EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

### I. INTRODUCTION

1. In this submission, the United States will provide comments on certain legal issues involving the interpretation and application of Articles 5.8 and 6.8 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”).

### II. CLAIMS REGARDING ARTICLE 5.8 OF THE AD AGREEMENT

2. The United States, while taking no position on the merits of the factual allegations made by both parties, agrees with The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (“TPKM”) that a proper interpretation of Article 5.8 of the AD Agreement requires that the investigating authority terminate an investigation with respect to an exporter or producer for which an individual margin of dumping is determined as zero or *de minimis*.

3. The term “margin of dumping” in Article 5.8 of the AD Agreement refers to the margin of dumping for an individual exporter or producer, rather than the margin of dumping with respect to a country. Article 9.4 of the AD Agreement refers to the “margin of dumping” as “established with respect to the selected exporters or producers.” Nothing in the text of Article 5.8 suggests that the term “margin of dumping” should be interpreted differently in Article 5.8 than in Article 9.4.

4. The text of Article 5.8 of the AD Agreement provides additional contextual support for the view that an investigating authority must exclude individual exporters or producers from the antidumping measure if their individual “margin of dumping” is zero or *de minimis*. The fourth sentence of Article 5.8 states that the investigating authority’s analysis of negligible imports is normally done on a country-wide basis. In the absence of similar language in Article 5.8 suggesting that the dumping analysis is to be done on a country-wide basis, the immediate context within Article 5.8 supports the conclusion that margin of dumping is to be determined on an individual, producer- or exporter-specific basis. The Appellate Body has supported this interpretation of Article 5.8.

5. Following that interpretation, the United States agrees with TPKM that an investigating authority acts inconsistently with Article 5.8 of the AD Agreement when it fails to terminate the investigation for exporters or producers which are found to have zero or *de minimis* margins, and instead relies on the results of the country-wide margin as a basis for including exporters with *de minimis* margins within the scope of the definitive antidumping measure. Once a zero or *de minimis* margin has been determined for a particular producer or exporter, the obligation under Article 5.8 for a “termination in cases” necessarily entails that the investigating authority cannot subject such an individual exporter or producer to an antidumping order.

6. Canada thus acted inconsistently with Article 5.8 of the AD Agreement to the extent that it calculated zero or *de minimis* margins of dumping for individual exporters, failed to terminate the investigation with respect to those exporters, and then issued a final dumping order covering those exporters.

### **III. CLAIMS REGARDING ARTICLE 6.8 AND ANNEX II OF THE AD AGREEMENT**

7. Article 6.8 permits investigating authorities to apply the facts available in cases where an interested party refuses access to, or otherwise does not provide, information that is necessary to the investigation within a reasonable period of time, or significantly impedes the investigation. Annex II further reflects that an investigating authority’s ability to rely on facts less favorable to the interests of a non-cooperating interested party is inherent in the authority’s role in conducting an investigation in accordance with the AD Agreement. At the same time, the investigating authority must provide a sufficient basis for any application of the facts available.

8. To the extent that TPKM is alleging that CBSA has insufficiently explained the basis for its application of the facts available, the sufficiency of an investigating authority’s explanations is dealt with under the procedural obligations under Article 12 of the AD Agreement, and not Article 6.8.

9. Accordingly, the Panel in this dispute should assess in accordance with Article 6.8 and Annex II whether the other exporters refused access to, or otherwise did not provide information that was necessary to the investigation within a reasonable period, or significantly impeded the investigation by CBSA. The Panel also should assess whether CBSA provided a sufficient basis for its application of the facts available to the “all other exporters.”

### **IV. AS SUCH CLAIMS REGARDING CERTAIN PROVISIONS OF SIMA**

10. In this dispute, the United States does not take a position on whether Sections 2(1), 30.1, 35(1) and (2), 41(1), 42(1), 42(6), and 43(1) of the SIMA and Section 37(1) of the SIMR are, as such, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 5.8 and 7.1(ii) of the AD Agreement. The Panel will need to assess whether the facts substantiate each party’s assertions as to whether the SIMA and SIMR measures “require” certain action or provide “discretion” to Canada’s investigating authority to take different action. To prevail on its claims, TPKM will need to demonstrate that SIMA and SIMR “requires” that Canada act in a WTO-inconsistent manner or precludes WTO-consistent action.

### **EXECUTIVE SUMMARY OF U.S. THIRD-PARTY ORAL STATEMENT AT THE THIRD PARTY SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES**

#### **V. INTRODUCTION**

11. The United States appreciates the opportunity to provide our views as a third party in this dispute. In our third-party submission, we presented views on a number of the issues pertaining to TPKM’s claims regarding the interpretation and application of Articles 5.8 and 6.8 of the AD Agreement. The United States will focus its remarks in our oral statement on two matters related to these claims pertaining to Articles 3.1 and 3.5 of the AD Agreement, which were not addressed in the U.S. third-party submission.

## **VI. THE OBLIGATION OF PANELS TO FOLLOW PRIOR APPELLATE BODY FINDINGS**

12. Before addressing those issues, the United States first would like to respond to certain statements made by two third parties regarding the role of Appellate Body reports in the dispute settlement system. The United States notes with concern that the European Union (“EU”) and Norway have asserted that panels are obligated to follow prior Appellate Body findings.<sup>1</sup> The United States understands these assertions to be without foundation and fundamentally incorrect, and this proposition as inconsistent with the text of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and the *Agreement Establishing the World Trade Organization* (“WTO Agreement”).

13. The text of the DSU and WTO Agreement establish that in the WTO, adopted panel or Appellate Body legal findings are not “authoritative interpretations”. To be sure, to the extent a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may rely on that reasoning in conducting its own objective assessment of the matter. However, there is no provision in the DSU that grants a panel the authority not to assess objectively the legal issues in dispute, including by applying customary rules of interpretation to the text of the covered agreements, nor does the DSU require, or permit, a panel to follow – without any examination – prior Appellate Body findings.

## **VII. CLAIMS REGARDING ARTICLES 3.1 AND 3.5 OF THE AD AGREEMENT**

14. Turning to TPKM’s claims under Articles 3.1 and 3.5 of the AD Agreement, the United States views those claims as lacking in legal merit. The United States finds no support in the text of the AD Agreement for TPKM’s argument that Article 3.5 of the AD Agreement required Canada to examine “the effects of subsidies” applicable to the dumped imports as an “other known factor” that is somehow separate from the effects of the dumped imports.<sup>2</sup> An investigating authority is not required to assess the effects of any subsidies on dumped imports separately from the effects of the dumped imports themselves under Article 3.5 of the AD Agreement. Consequently, this Panel should not find that Canada acted inconsistently under Article 3.5 to the AD Agreement to the extent that the Canada Border Services Agency did not examine the effects of India’s alleged subsidies as an “other known factor” injuring the domestic industry.

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<sup>1</sup> EU’s Third Party Submission, para. 10; Norway’s Third Party Submission, para. 13.

<sup>2</sup> TPKM’s First Written Submission, paras. 135, 145.