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

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

April 1, 2016

TABLE OF REPORTS

Argentina – Textiles and Apparel (AB)	Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R and Corr.1, adopted 22 April 1998
China – Auto Parts (Panel)	Panel Reports, *China – Measures Affecting Imports of Automobile Parts*, WT/DS339/R / WT/DS340/R / WT/DS342/R / Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
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Mexico – Olive Oil	Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008
US – 1916 Act (EC) (Panel)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report WT/DS136/AB/R, WT/DS162/AB/R
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr. 1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Export Restraints	Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

US – Shrimp II (Viet Nam) (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Frozen Warmwater Shrimp from Viet Nam*, WT/DS429/AB/R and Corr. 1, adopted 22 April 2015

QUESTIONS FOR THE THIRD PARTIES

1.1. The second sentence of Article 5.8 states that: "There shall be immediate termination on cases where the authorities determine that the margin of dumping is *de minimis*." In your view, what is the meaning of "determine" in this sentence? In particular, does it refer to a preliminary determination of a *de minimis* dumping margin, or only to a final or definitive determination?

1. In the view of the United States, the word "determine" in the second sentence of Article 5.8 refers to a final or definitive determination. Indeed, an examination of the usage of the word "determine" in the AD Agreement shows that the word "determine" – standing alone – refers to a final determination, and that when a reference is made to preliminary determinations, this is done so explicitly. "Determine" or a variation of the word is used 62 times throughout the AD Agreement. The word "preliminary" is used in conjunction with the word "determine" or some variation thereof seven times. The agreement is particular about using the word "preliminary" and does so when it is specifically referring to a preliminary determination.[1] This suggests that in instances where the AD Agreement does *not* use the word "preliminary" in conjunction with the word "determines" or some variation thereof that it is not referring to the preliminary determination but to the final determination. This usage confirms that, in Article 5.8, where the word "preliminary" is not used in the second sentence in conjunction with the word "determine", the provision is referring to a final or definitive determination and not a preliminary determination.

1.2. Please comment on Canada's argument at paras. 78-84 of its first written submission that an interpretation of Article 5.8 supporting termination of an investigation with respect to an individual exporter with a *de minimis* margin of dumping would make part of Article 9.4 redundant, contrary to the principle of effectiveness in treaty interpretation.

2. Canada's reliance on Article 9.4 is misplaced. Article 9.4 concerns the situation where not all exporters or producers are examined in an investigation. In this case, Article 9.4 provides that the antidumping duties for non-examined exporters or producers shall not exceed antidumping duties based on the use of weighted average normal values or weighted average margins of dumping of investigated exporters or producers. Article 9.4 mentions *de minimis* margins in the following context: when calculating these weighted averages, an investigating authority must disregard zero or *de minimis* margins of dumping of individual exporters or producers examined during the investigation.[2] Nothing in this process for determining weighted averages applicable to non-examined exporters or producers is inconsistent with the proposition that Article 5.8 requires termination of an investigation with respect to exporters or producers with zero or *de minimis* margins.

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[1] *See* AD Agreement, Articles 6.8, 6.14, 7.1, 8.2, 12.2, 12.2.1, and 16.4.

[2] Canada's First Written Submission, para. 79.

1.3. Without prejudice to the Panel's evaluation of Chinese Taipei's Article 5.8 claim, please assume for present purposes that Article 5.8 does provide for immediate termination on an exporter-specific basis, for exporters with individual *de minimis* margins of dumping: Does Article 7.1(ii) preclude the application of provisional antidumping duties on exporters with a *de minimis* margin of dumping? Please answer with reference to the meaning of the terms "preliminary affirmative determination" and "dumping" as interpreted in accordance with the *Vienna Convention*. Is Article 5.8 relevant context for this analysis?

3. The United States does not agree that Article 7.1(ii), standing alone, precludes the application of provisional antidumping duties on exporters or producers with a zero or *de minimis* margin of dumping. However, the non-applicability of Article 7.1 to this issue does not mean that the amount of provisional antidumping duties applied to a specific exporter or producer may be greater than an amount based on the margin of dumping preliminarily determined for that exporter or producer. To the contrary, Article 7.2 of the AD Agreement states that the provisional duty shall not be "greater than the provisionally estimated margin of dumping."[3] Article 7.2 governs the *amount* of the provisional duties provided for under Article 7. In this context, Article 7.2 uses the term "margin of dumping." This term – as opposed to the more general determination of "dumping and consequent injury to the domestic industry" – is generally specific to particular producers or exporters.[4]

1.4. Without prejudice to the Panel's evaluation of Chinese Taipei's Article 5.8 claim, please assume for present purposes that Article 5.8 does provide for immediate termination on an exporter-specific basis, for exporters with individual *de minimis* margins of dumping: Do Articles 7.5 and 9.2 preclude the application of provisional antidumping duties on exporters with a *de minimis* margin of dumping? Please answer with reference to the meaning of the terms "all sources" and "found to be dumped" as interpreted in accordance with the *Vienna Convention*. Is Article 5.8 relevant context for this analysis?

4. The United States is uncertain whether the text of Articles 7.5 and 9.2 precludes the application of provisional antidumping duties on exporters with an individual *de minimis* margin of dumping, and in any event, questions whether Taiwan has met its burden of argument in this regard.

5. Article 7.5 is a general provision stating that the "relevant provisions of Article 9 shall be followed in the application of provisional measures." In turn, Article 9 is a lengthy provision,

[3] There may be instances where the investigating authority determines that a group of companies is in a close enough relationship to support their treatment as a single entity prior to calculating and applying duties to those companies' exports. In these circumstances, application of provisional duties would be appropriate if the group as a whole had a margin of dumping, even if an individual member of the group had a lower or even zero margin of dumping. Here, however, there is no such relationship between the companies.

[4] *See, e.g,* AD Agreement, Article 6.10 (The authorities shall, as a general rule, determine an individual margin of dumping for each known exporter or producer . . . .").

with over 10 separate paragraphs and subparagraphs, and numerous specific obligations. Determining precisely how to apply Article 9 to provisional measures is problematic.

6. Arguably, Article 7.5, and the "relevant provisions" of Article 9 may serve as further contextual support for interpreting the remaining provisions of Article 7. In this regard, the United States notes that Article 9.3 states that "the amount of the antidumping duty shall not exceed the margin of dumping."

7. On the other hand, Article 9.2 does not appear apposite to this issue. Specifically, Article 9.2 provides that when antidumping duties are being imposed, they shall be collected in appropriate amounts on a non-discriminatory basis from all sources found to be dumped and causing injury. The key phrase here is "in appropriate amounts," and Article 9.2 itself does not define what amounts are, or are not, "appropriate." Rather, the "appropriate amounts" are those determined through application of the rules for investigation and calculation of margins consistent with the AD Agreement.

3.1. Please comment on the extent, if any, to which the past practice of the CITT under subsection 43(1) of the SIMA is relevant to the Panel's evaluation of Chinese Taipei's "as such" claim against this instrument.

8. A complaining Member raising an "as such" claim has the burden of "introducing evidence as to the scope and meaning of [the challenged measure]," as understood within the domestic legal system of the responding Member, to demonstrate that the challenged measure is necessarily inconsistent with a provision of the covered agreements.[5] The scope and meaning of a domestic legal instrument is not an issue of interpretation and application of a WTO agreement. Rather, the domestic legal instrument needs to be understood for what it means and what effects it has as a matter of that Member's domestic legal order.[6] Accordingly, a panel determines as a matter of fact whether the complaining Member has established the meaning of the domestic measure at issue.

9. The type and extent of evidence that will be required to satisfy this burden of proof will vary from dispute to dispute.[7] Whether a legal instrument can be read simply according to the ordinary meaning to be given to its terms, or according to some other rule of interpretation, would be a matter of that Member's domestic law. Absent contrary argument or evidence, it may be sufficient for a Member to raise a prima facie case of the meaning of a domestic legal instrument if its meaning and effect are sufficiently clear based on the text.

10. But where the text supports different meanings, or where its meaning has been contested, it would be for the complaining party to bring forward additional evidence supporting its

[5] *US – Carbon Steel (AB)*, para. 157 (citing *US – Wool Shirts and Blouses (AB)*, para. 335).

[6] *Mexico – Olive Oil*, paras. 7.29-7.30; *EC – Fasteners (China) (Panel)*, para. 7.68; *US – 1916 Act (Panel)*, paras. 6.49-6.51; *US – Hot-Rolled Steel (AB)*, paras. 21-23.

[7] *US – Carbon Steel (AB)*, para. 157.

understanding. That evidence would need to be relevant within the legal system of the Member complained against. In certain circumstances, the past practice of an investigating authority may serve as evidence for such a claim, although past practice alone could not independently give rise to a WTO violation.[8] And where the Member's domestic legal system provides for specific rules to determine the meaning of domestic law, a panel would need to consider and apply those rules in order to arrive at the meaning that the domestic legal system would itself provide.[9]

11. In short, a panel may not interpret a domestic measure in isolation, and without regard to the domestic legal context in which that measure exists and is applied. Additional evidence may be required, in particular, where the interpretation of a statute or regulation in the domestic legal system of the responding Member would require examination of such evidence where the text alone does not unequivocally establish the meaning of that statute. In such a case, a complaining Member may need to present evidence of how a measure is applied or interpreted by the responding Member to satisfy its burden of proof.

12. Aside from the issue of the evidence required in order to ascertain the meaning of the domestic measure, it is clear that the focus of the examination in evaluating an "as such" challenge is to ascertain the meaning of the measure itself, and not whether any particular instance of application was inconsistent with the provision. Even if, for example, a statute has been applied in a manner that is inconsistent with a WTO provision, such application would not render the statute itself inconsistent with that provision. Rather, a complaining party must demonstrate that the challenged measure will "necessarily" result in WTO-inconsistent application.[10] That is, based on a proper interpretation of the meaning of the domestic measure in question, the measure, at least in certain circumstances, will result in action that breaches the WTO provision in question.

13. Thus, in this dispute, the Panel must examine the CITT "practice," among other evidence, to determine whether the SIMA statute, in fact, necessarily prevents the investigating authority from distinguishing, for purposes of its injury analysis, between goods for which a zero or *de minimis* dumping margin was found and goods that were found to be dumped. In other words, the Panel needs to consider whether the statute necessarily results in action, at least in certain circumstances that breaches a WTO obligation. Absent such a finding, there would not be a basis to conclude that the measure is inconsistent, "as such," with Canada's WTO obligations.

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[8] *See US – Export Restraints*, para. 8.126.

[9] *US – 1916 Act (Panel)*, paras. 6.54-6.56, 6.60.

[10] *See US – Shrimp II (Viet Nam) (AB)*, para. 4.39; *US – Carbon Steel (India) (AB)*, para. 4.477; *EC – IT Products*, para. 7.116; *China – Auto Parts (Panel)*, para. 7.540; *see also Argentina – Textiles and Apparel (AB)*, para. 62 (upholding the finding of the Panel that Argentina's tariff measure was inconsistent with Article II:1 because "the structure and design of the DIEM will result, with respect to a certain range of import prices within the relevant tariff category, in an infringement of Argentina's obligations under Article II:1 for all tariff categories in Chapters 51 to 63 of the N.C.M").