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

THIRD PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

March 17, 2016

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I. INTRODUCTION

Mr. Chairman, Members of the Panel:

1. The United States appreciates the opportunity to appear before you today and provide the views of the United States as a third party in this dispute. In our written submission, we addressed issues regarding the interpretation and application of Articles 5.8 and 6.8 of the AD Agreement[1].

2. In our statement today, the United States will comment on the claims of TPKM[2] under Articles 3.1 and 3.5 of the AD Agreement. Before addressing those issues, however, we would like to respond to certain statements made by two third parties regarding the role of Appellate Body reports in the dispute settlement system.

3. The United States notes with concern that the EU and Norway have asserted that panels are obligated to follow prior Appellate Body findings.[3] The United States understands these assertions to be without foundation and fundamentally incorrect. Indeed, this proposition is inconsistent with the text of the DSU[4] and the WTO Agreement.[5]

4. Under Article 11 of the DSU, a panel is to conduct "an objective assessment of the matter before it." This objective assessment applies both to factual matters and to issues of legal

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1 *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

2 The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM").

3 EU's Third Party Submission, para. 10; Norway's Third Party Submission, para. 13.

4 *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

5 *Agreement Establishing the World Trade Organization* ("WTO Agreement").

interpretation.[6] For purposes of legal interpretation, the DSU directs WTO adjudicators to apply to the "existing provisions" of the covered agreements – that is, their text – the customary rules of interpretation of public international law,[7] reflected in Articles 31 and 32 of the Vienna Convention.

5. DSU Article 3.2 explains that the dispute settlement system, through panel and Appellate Body findings adopted by the DSB,[8] "serves to…clarify" the provisions of the covered agreements in accordance with those customary rules of interpretation. But, as the Appellate Body itself explained in its *Japan – Alcoholic Beverages* report,[9] this *negative* consensus report adoption procedure *by the DSB* cannot supplant the "exclusive authority" of *the Ministerial Conference and the General Council* to adopt, by *positive* consensus,[10] an "authoritative

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6 DSU, Art. 11 ("Accordingly, a panel should make an objective assessment of the matter before it, including *an objective assessment of* the facts of the case and *the applicability of and conformity with the relevant covered agreements* . . . .") (italics added).

7 DSU, Art. 3.2 ("The Members recognize that [the dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.").

8 *See* DSU, Article 16.4 (adoption of panel report); *id.*, Art. 17.14 (adoption of Appellate Body report).

9 *Japan – Taxes on Alcoholic Beverages (AB)*, pp. 12-15 (Section E: Status of Adopted Panel Reports) (examining WTO Agreement Article IX:2, DSU Article 3.9, and adoption of GATT 1947 reports, and explaining: "We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in [Article IX:2 of] the WTO Agreement. . . . . The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the WTO Agreement is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.").

10 WTO Agreement, Arts. IX:1.

interpretation" of a covered agreement, as explicitly established in DSU Article 3.9[11] and WTO Agreement Article IX:2.[12]

6. The text of these DSU and WTO Agreement provisions has not changed since the WTO came into existence, and so there would be no "cogent reason" for the Appellate Body or any WTO Member to ignore their plain meaning. And the text establishes that, in the WTO, adopted panel or Appellate Body legal findings are not "authoritative interpretations".

7. 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. Nowhere in the DSU, however, is a panel given 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.

8. 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. To recall, TPKM argues 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

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[11] DSU, Art. 3.9 ("The provisions of this Understanding are *without prejudice to the rights of Members to seek authoritative interpretation* of provisions of a covered agreement *through decision-making under the WTO Agreement* or a covered agreement which is a Plurilateral Trade Agreement.") (italics added).

[12] WTO Agreement, Art. IX:2 ("*The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations* of this Agreement and of the Multilateral Trade Agreements.") (italics added).

dumped imports.[13] Canada responds that it was not required to consider the effects of the subsidies when it conducted its non-attribution analysis.[14]

9. The United States finds no support for TPKM's argument in the text of the AD Agreement.

10. Article 3.5 of the AD Agreement states:

> The investigating authority shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.

11. By its plain text, Article 3.5 requires an examination of known factors *other* than the dumped imports. But TPKM would somehow require a non-attribution analysis with respect to these *same* dumped imports. This suggestion defies logic. By definition, in the context of applying Article 3.5, the dumped imports cannot simultaneously be both "dumped imports" and "factors other than the dumped imports." Accordingly, that Indian imports may also allegedly be subsidized is irrelevant for purposes of Article 3.5, which is concerned with ensuring that "injuries caused by *these other* factors . . . not be attributed to the dumped imports." In short, Article 3.5 of the AD Agreement does not require Canada to conduct some sort of non-attribution analysis with respect to subsidies that may have applied to the dumped imports.

12. The Appellate Body's findings in *EC – Tube or Pipe Fittings* are instructive in this regard. As the Appellate Body explained, in order to trigger the "other known factors"

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13 TPKM's First Written Submission, paras. 135, 145.

14 Canada's First Written Submission, para. 128.

obligation under Article 3.5 of the AD Agreement, the factor at issue must be "known" to the investigating authorities; *be a factor other than the subject imports;* and be injuring the domestic industry at the same time as the subject imports.[15]

13. TPKM also ignores that the Appellate Body already rejected a similar legal argument in *Japan – DRAMs* based on a review of the injury provisions in the SCM Agreement,[16] which are parallel to the injury provisions in the AD Agreement.

14. Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement, which are nearly identical in language, both require that investigating authorities examine any known factor other than the dumped/subsidized imports which are injuring the domestic industry. In *Japan – DRAMs*, the Appellate Body concluded that Articles 15.2, 15.4, and 15.5 of the SCM Agreement "neither envisage nor require the two distinct types of examinations…namely, an examination of the effects of the subsidized imports…and a second examination of the effects of the subsidies as distinguished from the effects of the subsidized imports on a case-by-case basis."[17] The Appellate Body concluded that where the investigating authority carried out the examination of

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[15] *EC – Tube or Pipe Fittings (AB)*, para. 175; *see also US – Norwegian Salmon CVD (GATT)*, paras. 335-339 (reviewing the first sentence of Article 6.4 of the Tokyo Round Subsidies Code, which is virtually identical to the first sentence of Article 15.5 of the SCM Agreement, and concluding that the primary focus of the investigating authority's causation analysis is on the effects of the subsidized imports, rather than the effects of the subsidies).

[16] *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

[17] *Japan – DRAMs (Korea) (AB)*, para. 264.

the volume, price effects, and impact of the subject imports, then "such examination suffices to demonstrate" that subject imports are, through the effects of subsidies, causing injury.[18]

15. This interpretation further confirms that 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.

16. The United States would like to thank the Panel for its consideration of these views.

[18] *Japan – DRAMS (Korea) (AB)*, paras. 262-264, 268, 273, 277; *see also China – GOES (AB)*, para. 128 (pursuant to Articles 3.5 and 15.5, it must be demonstrated that subject imports "are causing injury '*through* the effects of' dumping or subsidies '{a}s set forth in paragraphs 2 and 4'. Thus, the inquiry set forth in Articles 3.2 and 15.2, and the examination required in Articles 3.4 and 15.4, are necessary in order to answer the ultimate question in Articles 3.5 and 15.5 as to whether subject imports are causing injury to the domestic industry. The outcomes of these inquiries thus form the basis for the overall causation analysis contemplated in Articles 3.5 and 15.5.") (emphasis in original).