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

THIRD PARTY SUBMISSION OF THE UNITED STATES

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I. INTRODUCTION

1. The United States makes this third party submission to provide its views of the proper legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") and the General Agreement on Tariffs and Trade 1994 ("GATT 1994") that are relevant to these disputes. In particular, this submission will address the parties' claims with respect to Articles 5.8 and 6.8 of the AD Agreement.

II. CLAIMS REGARDING ARTICLE 5.8 OF THE AD AGREEMENT

2. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM") challenges Canada's actions in connection with the Canadian investigating authority's finding of *de minimis* margins for two TPKM exporters. TPKM argues that Canada breached its obligations under Article 5.8 of the AD Agreement when it failed to terminate the investigation with respect to two TPKM exporters whose individual margins of dumping were found to be *de minimis*, resulting in the imposition of final margins of dumping in an antidumping order for both *de minimis* exporters and non-*de minimis* exporters.[1] In response, Canada argues that it was not required to terminate the investigation with respect to the TPKM exporters with *de minimis* margins of dumping because TPKM's country-wide margin of dumping was not *de minimis*.[2]

3. The United States, while taking no position on the merits of the factual allegations made by both parties, agrees with 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*. Accordingly, the United States understands that Canada did not comply with its AD Agreement obligations if, as was the case here, these two exporters were included in the scope of the definitive antidumping measure.

4. Article 5.8 of the AD Agreement states:

> There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*….The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 percent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 percent of imports…

5. As an initial matter, 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 5.8 should be interpreted in the context of Article 9.4 of the AD Agreement, which refers to the "margin of dumping" as "established with respect to

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[1] *See* TPKM's First Written Submission, para. 2.

[2] *See generally* Canada's First Written Submission, paras. 30-92.

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.

6. The fourth sentence 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*. That sentence 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.

7. The Appellate Body has interpreted Article 5.8 consistent with this understanding. As the Appellate Body stated in *Mexico – Anti-Dumping Measures on Rice*, quoting *US – Hot-Rolled Steel*:

> "[M]argins" means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[3]

8. The Appellate Body arrived at this interpretation for "margin of dumping" after considering the term in light of the other provisions in the AD Agreement that used the same term. Canada incorrectly argues that the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* ignored Article 3.3 in arriving at this interpretation.[4] In fact, the Appellate Body expressly addressed Article 3.3 and concluded that "Article 3.3 does not provide useful context for interpreting the term 'margin of dumping' in Article 5.8."[5]

9. 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.[6]

10. Indeed, where the investigating authority has found zero or *de minimis* margins for the individual exporter or producer, the obligation under Article 5.8 for a "termination in cases"

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[3] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 216.

[4] *See* Canada's First Written Submission, para. 87.

[5] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 220.

[6] *See* TPKM's First Written Submission, paras. 53-56.

necessarily entails that the investigating authority cannot subject such an individual exporter or producer to an antidumping duty order. Indeed, the Appellate Body has stated:

> The issuance of the order that establishes anti-dumping duties, or the decision not to issue an order, is the ultimate step of the 'investigation' contemplated in Article 5.8; in most cases, an investigation is 'terminated' with the issuance of an order or a decision not to issue an order … Given that the issuance of the order establishing anti-dumping duties necessarily occurs after the final determination is made, the only way to terminate immediately an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order.[7]

11. Additionally, as the Panel explained in *US – DRAMS*, "Article 5.8 requires the termination of investigations in cases where the margin of dumping is *de minimis*. Thus, in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order."[8] In other words, once a zero or *de minimis* margin has been finally determined for a particular producer or exporter, the investigation must be terminated, which must lead the investigating authority to exclude the producer / exporter from the scope of the order or definitive imposition of the antidumping duty.

12. In sum, Canada 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

13. TPKM contends that Canada breached Article 6.8 and Annex II, paragraph 7, of the AD Agreement in making its determination of the dumping margin and duty rate for "all the exporters;" that is, those exporters who did not participate in the investigation, were not known to Canada, or did not exist at the time of the investigation.[9] Specifically, TPKM argues that to the extent that CBSA sought to apply the facts available to "all other exporters" for having failed to cooperate in the investigation, the Panel should find the CBSA's actions as inconsistent with

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[7] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 219.

[8] *US –DRAMS*, para. 6.90.

[9] TPKM's First Written Submission, paras. 4, 174.

Article 6.8 and paragraph 7 of Annex II. In addition, TPKM argues that CBSA failed to explain why its choice of margin constituted the "best information available."[10]

14. In response, Canada argues that Article 6.8 allows the investigating authority to use the facts available when an interested party fails to provide necessary information, or otherwise significantly impedes the investigation.[11] Moreover, Canada contends that it used the "best available information" on the record of the investigation.[12]

15. Article 6.8 provides that:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

16. 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.

17. The provisions of Annex II of the AD Agreement are also relevant in the proper interpretation of Article 6.8. Paragraph 7 of Annex II states:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

18. According to paragraph 7 of Annex II, an investigating authority that relies on information from a secondary source may reach a result "less favourable" to an interested party

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[10] TPKM's First Written Submission, paras. 164-183.

[11] Canada's First Written Submission, para. 156-162.

[12] Canada's First Written Submission, para. 169-170.

if that party "does not cooperate and thus relevant information is being withheld" from the authority.[13] Thus, Annex II 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.

19. At the same time, the investigating authority must provide a sufficient basis for any application of the facts available. 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.

20. 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

21. TPKM also argues that Sections 2(1), 30.1, 35(1) and (2), 41(1), 42(1), 42(6), and 43(1) of the Special Import Measures Act ("SIMA") and Section 37(1) of the Special Import Measures Regulations ("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. With regard to Article 7.1(ii), TPKM points to the fact that Sections 2(1), 30.1, 35(1), 35(2), and 41(1) of SIMA, read together, mandate that an affirmative preliminary dumping margin be made for exporters with a *de minmis* margin of dumping when the country-wide weighted average of the margins of dumping is 2 percent or more.[14] With regard to Article 5.8, TPKM points to the fact that Sections 2(1), 30.1, 35(1), 35(2), and 41(1) of SIMA, read together, mandate that a final affirmative dumping determination be made for exporters with a *de minimis* margin of dumping when the country-wide average of the margins of dumping is 2 percent or more.[15] With regard to Sections 42(1), 42(6), and 43(1) of SIMA and Section 37(1) of SIMR, TPKM argues that these provisions result in the automatic inclusion of the imports of exporters with a *de minimis* margin of dumping in the category of "dumped imports" in the context of the injury analysis.[16]

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[13] *See also US – Hot-Rolled Steel (AB)*, para. 99 (discussing paragraph 7 of Annex II of the AD Agreement, and noting that non-cooperation on the part of an interested party may lead to an outcome that is less favorable to the interested party).

[14] TPKM's First Written Submission, paras. 254-262, 264-267.

[15] TPKM's First Written Submission, paras. 254-262, 268-276.

[16] TPKM's First Written Submission, paras. 291-303.

22. Canada responds that TPKM's claims are without merit because the challenged provisions of SIMA and SIMR are not inconsistent with the AD Agreement in utilizing a *de minimis* margin of dumping test that was "carried out on a country basis, and not on an exporter-specific basis."[17]

23. A number of WTO disputes have dealt with claims brought against a Member on the basis of its legislation "as such," independently from the application of that legislation in specific instances. In such circumstances, as described by the Appellate Body report in *US – Carbon Steel (India)*, the complaining party bears the "burden of introducing evidence as to the scope and meaning of such law to substantiate [its] assertion."[18] The Appellate Body subsequently reviewed whether the text of the measure "reveals its discretionary nature," or identifies "elements requiring an investigating authority to engage in conduct inconsistent with" the relevant WTO agreement.[19]

24. In that dispute, the Appellate Body also reviewed additional evidence, including judicial decisions, legislative history, and quantitative and qualitative materials on the application of the measure,[20] and considered whether the investigating authorities were "subject to rules and disciplines separate from the measure itself."[21] The Appellate Body ultimately concluded that these materials did not "establish conclusively that the measure requires an investigating authority to consistently" act contrary to the relevant WTO obligation.[22]

25. 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.

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[17] Canada's First Written Submission, paras. 230.

[18] *US – Carbon Steel (India) (AB)*, para. 4.450 (*quoting US – Carbon Steel* (Panel), para. 157).

[19] *US – Carbon Steel (India) (AB)*, para. 4.483.

[20] *US – Carbon Steel (India) (AB)*, paras. 4.483, 4.477.

[21] *US – Carbon Steel (India) (AB)*, para. 4.476.

[22] *US – Carbon Steel (India) (AB)*, para. 4.483.

V. CONCLUSION

26. The United States believes that the proper interpretation of the provisions of the AD Agreement discussed above has important systemic implications. The United States appreciates the opportunity to provide its views in this third-party submission and hopes that its comments will be useful to the Panel.