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CANADA – ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE FROM THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS482/R.

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

WORKING PROCEDURES OF THE PANEL *(AS AMENDED)*

Adopted on 12 August 2015

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it. The Panel shall open its substantive meetings with the parties to the public, in accordance with procedures to be adopted by the Panel after consulting with the parties.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Chinese Taipei requests such a ruling, Canada shall submit its response to the request in its first written submission. If Canada requests such a ruling, Chinese Taipei shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. For example, exhibits submitted by the complaining Member could indicate "Name of Complaining Member–1", "Name of Complaining Member–2", etc. If the last exhibit in connection with the first submission was "Name of Complaining Member -5", the first exhibit in connection with the next submission thus would be "Name of Complaining Member-6".

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Chinese Taipei to make an opening statement to present its case first. Subsequently, the Panel shall invite Canada to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Chinese Taipei presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask Canada if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite Canada to present its opening statement, followed by Chinese Taipei. If Canada chooses not to avail itself of that right, the Panel shall invite Chinese Taipei to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit executive summaries of the facts and arguments as presented to the Panel in its written submissions, other than responses to questions, and its oral statements, in accordance with the timetable adopted by the Panel. Each executive summary of a written submission shall be limited to no more than 10 pages, and each summary submitted by each party of both opening and closing statements presented at a substantive meeting shall be limited to no more than 5 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

21. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

22. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

23. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

24. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

25. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 2 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to xxxxxx@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

26. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

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

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

Adopted on 15 September 2015

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS482.

1. For the purposes of these Panel proceedings, BCI is any information that has been designated as such by the party submitting the information and that was previously treated as confidential within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 by the Canadian investigating authorities in the anti-dumping investigation at issue in this dispute. However, these procedures do not apply to any information that is available in the public domain. In addition, these procedures do not apply to any BCI if the person who provided the information in the course of the aforementioned investigation agrees in writing to make the information publicly available.

2. As required by Article 18.2 of the DSU, a party or third party having access to BCI submitted in these Panel proceedings shall treat it as confidential and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Any information submitted as BCI under these procedures shall only be used for the purposes of this dispute and for no other purpose. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these working procedures to protect BCI. An outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

3. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party under the terms specified in these procedures or an outside advisor to a party or third party for the purposes of this dispute.

4. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

5. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 4.

7. If a party or third party considers that information submitted by the other party or a third party contains information which should have been designated as BCI and objects to such submission without BCI designation, it shall forthwith bring this objection to the attention of the

Panel, the other party, and, where relevant, the third parties. The Panel shall deal with the objection as appropriate. Similarly, if a party or third party considers that the other party or a third party submitted information designated as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, and the Panel shall deal with the objection as appropriate.

8. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

9. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

10. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

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ANNEX B

ARGUMENTS OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

1 INTRODUCTION

1. On 14 May 2012, the Canada Border Services Agency ("CBSA") initiated investigations with respect to the dumping of certain Carbon Steel Welded Pipe ("CSWP") originating in the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu ("TPKM"), India, Oman, Korea, Thailand, Turkey and the UAE and the subsidizing of certain CSWP from India, Oman and the UAE. On 13 July 2012, the Canadian International Trade Tribunal ("CITT") made a preliminary finding that there was reasonable indication that the dumping and subsidies of the subject goods had caused injury or retardation or were threatening to cause injury. Subsequently, the CBSA made a preliminary determination of dumping and subsidizing on 13 August 2012. Provisional anti-dumping duties were imposed on, among others, imports from TPKM, including the imports of those exporters whose margins of dumping were found to be zero or *de minimis*.

2. The CBSA issued its final determination of dumping and subsidizing on 9 November 2012. The CITT made its final injury determination on 11 December 2012, concluding that the dumping of certain CSWP originating in or exported from TPKM, India, Oman, Korea, Thailand and the UAE and the subsidizing of these goods from India were threatening to cause injury to the Canadian domestic industry. Definitive anti-dumping duties were imposed on imports from, among others, TPKM, including the imports of those exporters whose final margins of dumping were found to be zero or *de minimis*.

3. Canada initiated a normal value review on 7 January 2013, one month after the imposition of the definitive anti-dumping duties. The CBSA issued a Notice of conclusion of the re-investigation on 7 May 2013.

4. In the present dispute, TPKM challenges the provisional and definitive anti-dumping measures imposed by Canada on imports of certain CSWP. TPKM submits that these measures violate Articles 1, 2.2, 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 6.8, 6.10, 7.1(ii), 7.5. 9.2, 9.3 and Annex II of the Anti-Dumping Agreement, and Article VI of the GATT 1994.

5. In addition, TPKM also challenges Sections 2(1), 30.1, 35(1), 35(2), 38(1), 41(1), 42(1), 42(6) and 43(1) of the Special Import Measures Act ("SIMA") and Section 37.1(1) of the Special Import Measures Regulations ("SIMR"), as being as such inconsistent with Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 7.1(ii), 7.5, 9.2, and 18.4 of the Anti-Dumping Agreement as well as Article VI of the GATT 1994 and article XVI:4 of the Marrakesh Agreement.

2 CLAIMS CONCERNING THE PROVISIONAL AND DEFINITIVE ANTI-DUMPING MEASURES ON IMPORTS OF CERTAIN CSWP ORIGINATING IN, AMONG OTHERS, TPKM

2.1 Treatment of exporters with a *de minimis* margin of dumping

6. TPKM submits that the treatment of exporters with a *de minimis* margin of dumping by Canada in the present case amounts to a violation of Articles 1, 5.8, 6.10, 7.1(ii), 7.5, 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as will be explained below.

2.1.1 Claim under Article 5.8 of the Anti-Dumping Agreement

7. Article 5.8 of the Anti-Dumping Agreement provides that "[t]here shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". The term "margin of dumping", as clarified by the Appellate Body, refers to the "individual" margin of dumping, as opposed to the "country-wide" margin of dumping. Therefore, Article 5.8 requires WTO Members to terminate anti-dumping investigations with respect to exporters that have an individual *de minimis* margin of dumping, regardless of the country-wide dumping margin.

8. In the present case, two of the three cooperating exporters from TPKM, i.e. Chung Hung Steel Corporation ("Chung Hung Steel") and Shin Yang Steel Co. Ltd. ("Shin Yang Steel"), received individual *de minimis* dumping margins of 0.005% and 0.4%, respectively, in CBSA's final dumping determination. However, the CBSA did not terminate the investigation with respect to these two exporters, but rather continued the investigation and ultimately imposed definitive anti-dumping measures on all imports from TPKM on the basis that the final country-wide margin of dumping for TPKM was greater than *de minimis*, namely 8.9%.

9. TPKM submits that by failing to immediately terminate the investigation, leading to the imposition of definitive anti-dumping measures, with respect to exporters whose individual final margins of dumping were found to be *de minimis*, Canada violated Article 5.8 of the Anti-Dumping Agreement.

2.1.2 Claim under Article 6.10 of the Anti-Dumping Agreement

10. Article 6.10 of the Anti-Dumping Agreement provides that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer". As confirmed by previous case law, the rule to calculate an individual margin of dumping for each known exporter or producer refers to a single margin of dumping. Thus, only one individual dumping margin for each exporter or producer must be determined and used throughout the investigation.

11. In the present case, although the CBSA calculated individual margins of dumping for each known exporter or producer, it used this information to calculate the weighted average margin of dumping for each country under investigation with the purpose of determining whether such country-wide margins of dumping were *de minimis*. TPKM submits that by calculating country-wide margins of dumping and by using those country-wide margins for the purpose of the *de minimis* test, Canada violated Article 6.10 of the Anti-Dumping Agreement since that provision imposes the obligation to determine a single margin of dumping for each individual exporter or producer.

2.1.3 Claim under Article 7.1(ii) of the Anti-Dumping Agreement

12. Article 7.1 of the Anti-Dumping Agreement authorizes the application of provisional measures upon meeting three conditions, one of which is that "a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry". As pointed out by the panel in *EC – Salmon (Norway)*, an exporter with a *de minimis* margin of dumping cannot be treated as "dumping" for the purposes of injury analysis and the imposition of anti-dumping duties.

13. It follows that the CBSA could not have reached a preliminary affirmative determination of dumping with respect to Shin Yang Steel, whose preliminary margin of dumping was found to be 0.5%, and thus was *de minimis*. By applying provisional anti-dumping duties without meeting the criteria provided for in Article 7.1(ii), Canada acted inconsistently with that provision.

2.1.4 Claims under Articles 7.5 and 9.2 of the Anti-Dumping Agreement

14. Article 9.2 of the Anti-Dumping Agreement provides that when an anti-dumping duty is imposed in respect to any product, such anti-dumping duty shall be collected in the appropriate amounts and on a non-discriminatory basis on imports of such product "from all sources found to be dumped and causing injury". The Appellate Body clarified that the meaning of "sources" in Article 9.2 refers to the individual exporters or producers subject to the investigation and not to the country as a whole. Furthermore, a producer with a zero or *de minimis* margin of dumping cannot be considered as "dumping" and thus his imports do not qualify as "sources found to be dumped".

15. Pursuant to Article 7.5, the relevant provisions of Article 9 shall be followed in the application of provisional measures. Article 9.2 is a relevant provision within the meaning of Article 7.5 as it deals with the issue "connected with" the imposition of provisional measures, namely the collection of such measures, but which is not directly addressed by Article 7 itself.

16. In the present case, Canada was required to ensure that its provisional and definitive anti-dumping duties were to be collected only from sources "found to be dumped", i.e. exporters with an individual margin of dumping greater than *de minimis* (i.e. a margin of dumping of 2% or more). Canada, however, failed to do so.

17. TPKM submits that Canada violated Articles 7.5 and 9.2 of the Anti-Dumping Agreement because, by imposing provisional and definitive anti-dumping duties on imports from exporters with a *de minimis* margin of dumping, Canada caused anti-dumping duties to be collected from sources found not to be dumped and causing injury.

2.1.5 Claims under Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement

18. Article VI:2 of the GATT 1994 provides that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product". Article 1 of the Anti-Dumping Agreement establishes a link between that Agreement and Article VI of the GATT 1994, and provides that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement".

19. Since there is no dumping to "offset or prevent" in case of exporters with a zero or *de minimis* margin of dumping, TPKM submits that Canada acted inconsistently with Article VI:2 of the GATT 1994 when it imposed provisional and definitive anti-dumping duties on all TPKM exporters, including Chung Hung Steel and Shin Yang Steel, whose individual margins of dumping were *de minimis*. As a consequence, Canada also violated Article 1 of the Anti-Dumping Agreement since it failed to apply its anti-dumping measures under the circumstances provided for in Article VI of the GATT 1994.

2.2 Treatment of non-dumped imports in the injury and causation analyses

20. TPKM submits that Canada violated Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement because it treated as "dumped imports" for the purposes of the injury and causation analyses imports from exporters with a *de minimis* margin of dumping.

21. Article 3.1 refers to the volume and effects of the "dumped imports". The subsequent paragraphs of Article 3 similarly refer to "dumped imports".

22. As confirmed by case law, imports from exporters whose dumping margins are *de minimis* cannot be considered as "dumped". Therefore, TPKM submits that by failing to exclude from the injury and causation analyses the imports of exporters for whom the CBSA determined in its final dumping determination a *de minimis* dumping margin, Canada acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement.

2.3 Treatment of factors other than dumped imports in the causation analysis

23. Articles 3.1 and 3.5 of the Anti-Dumping Agreement require, as part of the causation analysis, that the investigating authorities carry out "an objective examination" on the basis of "positive evidence" of "known factors" other than the dumped imports and do not attribute to dumped imports injury caused by such other factors which are injuring the domestic industry at the same time.

24. In the present case, the CITT cross-cumulated the effects of dumping and subsidizing and failed to ensure that the injury caused by the effects of subsidies was not attributed to the alleged dumped imports. Furthermore, despite noting the very low capacity utilization rates of the domestic industry during the period of investigation and receiving submissions from interested parties that called attention to the "very bad economic conditions" affecting the Canadian domestic industry, the CITT failed to examine the injurious effects of overcapacity and distinguish such effects from those caused by the alleged dumped imports.

25. TPKM submits that by failing to examine all known factors other than the alleged dumped imports which at the same time were injuring the domestic industry, including the effects of subsidies and overcapacity, and by failing to ensure that the injuries caused by such other factors were not attributed to the alleged dumped imports, Canada violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

2.4 The determination of the dumping margin and duty rate for "all other exporters"

26. TPKM submits that Canada violated Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement in its determination of the dumping margin and duty rate for "all other exporters".

27. In the course of the investigation, the CBSA calculated individual dumping margins for the three cooperative TPKM exporters, i.e. Chung Hung Steel, Shin Yang Steel, and Yieh Phui Enterprise Co. Ltd. ("Yieh Phui"). For "all other exporters", a residual dumping margin of 54.2% was determined on the basis of facts available pursuant to a ministerial specification under SIMA. For these exporters, the normal values were determined by advancing the export prices by the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperative exporter, i.e. 54.2%.

28. Article 6.8 of the Anti-Dumping Agreement provides that in cases in which an interested party "refuses access to, or otherwise does not provide, necessary information", determinations may be made "on the basis of the facts available". Annex II which is entitled "Best Information Available in Terms of Paragraph 8 of Article 6" elaborates further on the recourse to "facts available". As clarified by case law, "the facts available" to be employed by the investigating authorities are expected to be "the best information available", which means information that is not simply correct or useful, but also "the most fitting or most appropriate", with "no better information available to be used in the particular circumstances".

29. TPKM submits that Canada's methodology for calculating the margin of dumping for the other exporters is inconsistent with Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement. First, the CBSA considered the failure to provide the information itself as being sufficient to justify the use of the highest dumping margin, thereby seeking to punish "other exporters" for having failed to co-operate. Second, by applying mechanistically the highest dumping margin established in the course of the investigation, the CBSA failed to evaluate and assess in a comparative manner the information that was on the record in order to identify which information was the "best information available, and in particular, ignored the information provided by the cooperating TPKM exporters. Finally, the highest dumping margin calculated on an individual transaction of one non-TPKM cooperating exporter from Oman is not the "best available information". Indeed, there is no logical relationship between the rate established for all other TPKM exporters, namely 54.2%, and the facts on the record concerning TPKM exports. The CBSA should have rather relied on the information pertaining to the cooperating producers from TPKM which was representative for the TPKM market as a whole.

30. In light of the foregoing, TPKM requests the Panel to conclude that Canada violated Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement by failing to use the "best information available" for the determination of the dumping margin and the determination of the anti-dumping duty rate of "all other exporters" as required by those provisions.

2.5 Treatment of New Product Types to be exported by cooperating exporters

31. TPKM submits that Canada violated Article 9.3, Article 6.8 and Annex II, as well as Articles 2.2 and 6.10 of the Anti-Dumping Agreement with regard to the treatment of new product types to be exported by cooperating exporters.

32. In the final dumping determination and the notice of conclusion of the re-investigation, the CBSA determined that for goods for which specific normal values have not been established, normal values will be based on the export price of the subject goods advanced by 54.2%.

33. As a preliminary remark, TPKM recalls that, in line with well-established case law, dumping and margins of dumping can be found to exist only for the product under investigation as a whole

and not for a type, model, or category of that product. TPKM submits that Canada erred in treating separately, for the purposes of determining the applicable anti-dumping duty, the product types produced by each exporter during the investigation and the "new product types" of those exporters.

34. First, by imposing the residual anti-dumping duty of 54.2% on "new product types", the CBSA applied on "new product types" an anti-dumping duty which exceeds the margin of dumping that has been established under Article 2 of the Anti-Dumping Agreement for each cooperating exporter and thus violated Article 9.3 of the Anti-Dumping Agreement.

35. Second, the CBSA erroneously resorted to "facts available" for determining the anti-dumping duty applicable to "new product types" even though the requirements laid down in Article 6.8 and Annex II of the Anti-Dumping Agreement were not met. Indeed, the TPKM cooperating exporters never refused access to, or otherwise did not provide the necessary information or significantly impeded the investigation. Therefore, Canada's use of facts available is clearly inconsistent with Article 6.8 of the Anti-Dumping Agreement. Furthermore, the information used by the CBSA, was not the "best information available" as required by Annex II.

36. Third, Canada violated Article 2.2 of the Anti-Dumping Agreement because it calculated normal values for new product types of cooperating exporters on the basis of a methodology which is not foreseen in Article 2.2 of the Anti-Dumping Agreement.

37. Finally, Canada violated Article 6.10 of the Anti-Dumping Agreement because the CBSA ignored the individual margins of dumping previously established for the cooperating exporters and determined a separate margin of dumping of 54.2% with respect to new product types to be exported by those exporters, thereby calculating more than one dumping margin for each cooperative exporter.

2.6 Claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

38. TPKM submits that as a consequence of all the above-mentioned violations, the Panel should find that Canada also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

3 CLAIMS CONCERNING CERTAIN PROVISIONS OF THE SPECIAL IMPORT MEASURES ACT ("SIMA") AND OF THE SPECIAL IMPORT MEASURES REGULATIONS ("SIMR")

3.1 Claims concerning Sections 2(1), 30.1, 35(1) and 35(2), 38(1) and 41(1) of SIMA

3.1.1 Sections 2(1), 30.1, 35(1) and 35(2) and 38(1) of SIMA are inconsistent as such with Article 7.1(ii) of the Anti-Dumping Agreement

39. SIMA calls for a preliminary dumping determination with respect to all goods from a country with a country-wide margin of dumping of 2% or more, and thus also with respect to exporters with individual *de minimis* margins of dumping. As discussed in Section 2.1.3 above, Article 7.1(ii) provides that provisional measures may be applied only if "a preliminary affirmative determination has been made of dumping". Since exporters with individual *de minimis* margins of dumping cannot be considered as "dumping", by mandating that an affirmative preliminary dumping determination be made every time the country-wide margin of dumping is 2% or more and by ignoring the fact that such determination cannot cover exporters with an individual *de minimis* margin of dumping, SIMA is inconsistent, as such, with Article 7.1(ii) of the Anti-Dumping Agreement.

3.1.2 Sections 2(1), 30.1, 35(1) and 35(2) and 41(1) of SIMA are inconsistent as such with Article 5.8 of the Anti-Dumping Agreement

40. The abovementioned Sections of SIMA, do not allow for a termination of the dumping investigation with respect to exporters for which a *de minimis* margin of dumping has been determined but require that a final dumping determination be made with respect to those exporters if the country-wide margin of dumping is found to be 2% or more. It follows that these

provisions are as such inconsistent with Article 5.8 of the Anti-Dumping Agreement which requires the immediate termination of an investigation when the authorities determine that the individual margin of dumping is *de minimis*, i.e. less than 2%.

3.1.3 Sections 2(1), 30.1, 35(1) and 35(2), 38(1) and 41(1) of SIMA are inconsistent as such with Articles 7.5 and 9.2 of the Anti-Dumping Agreement

41. Furthermore, Sections 2(1), 30.1, 35(1) and 35(2), 38(1) and 41(1) of SIMA are also, as such, inconsistent with Articles 7.5 and 9.2 of the Anti-Dumping Agreement because in mandating that affirmative preliminary and definitive dumping determinations be made for exporters with a *de minimis* margin of dumping when the country-wide margin of dumping is 2% or more, these provisions cause anti-dumping duties to be collected from sources found not to be "dumped" and "causing injury".

3.1.4 Sections 2(1), 30.1, 35(1) and 35(2), 38(1) and 41(1) of SIMA are inconsistent as such with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

42. Finally, the imposition of anti-dumping duties on exporters with individual *de minimis* margins of dumping but whose country-wide margin of dumping is greater than *de minimis* is in violation of Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, which provide for the possibility to levy an anti-dumping duty only "in order to offset or prevent dumping" and therefore not with respect to imports from exporters with a *de minimis* margin of dumping.

3.2 Claims concerning Sections 42(1), 42(6) and 43(1) of SIMA and Section 37.1(1) of SIMR

43. TPKM submits that Sections 42(1), 42(6), 43(1) of SIMA and Section 37.1(1) of SIMR are inconsistent as such with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement because these provisions result in an automatic inclusion in the category of "dumped imports", in the context of the injury analysis, of imports of exporters with a *de minimis* margin of dumping.

44. Pursuant to the above-mentioned provisions, the imports of exporters with a *de minimis* margin of dumping will always be included in the analysis of the volume of dumped imports and the analysis of the effects of dumped imports on prices contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement. They will be also taken into account in the analysis of the impact of the dumped imports on the domestic industry and for the purpose of the causation analysis in violation of Articles 3.4 and 3.5 of the Anti-Dumping Agreement. Lastly, the imports from exporters with a *de minimis* margin of dumping will be included in the analysis of the existence of a threat of material injury in violation of Article 3.7 of the Anti-Dumping Agreement.

3.3 Claims under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement

45. Since, as explained above, Sections 2(1), 30.1, 35(1), 35(2), 38(1), 41(1), 42(1), 42(6) and 43(1) of SIMA and Section 37.1(1) of SIMR violate a number of provisions of the Anti-Dumping Agreement, it automatically follows that Canada failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Agreement and of the GATT 1994, and therefore, also violated Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement.

3.4 Claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

46. Since the relevant Sections of SIMA and SIMR provide for the imposition of anti-dumping measures even when the circumstances described in Article VI of the GATT 1994 are not met and following investigations that do not comply with the provisions of the Anti-Dumping Agreement, these Sections are also inconsistent as such with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

4 CONCLUSIONS

47. TPKM respectfully requests the Panel to find that the provisional and definitive anti-dumping measures imposed by Canada on imports of certain CSWP from, among others, TPKM, are inconsistent with Articles 1, 2.2, 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 6.8, 6.10, 7.1(ii), 7.5, 9.2, 9.3 and Annex II of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The Panel should also find that, as a consequence of these violations, Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

48. Furthermore, TPKM respectfully requests the Panel to find that Sections 2(1), 30.1, 35(1) and 35(2), 38(1), 41(1), 42(1), 42(6) and 43(1) of SIMA as well as Section 37.1(1) of SIMR are inconsistent as such with Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 7.1(ii), 7.5 and 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. TPKM requests the Panel to also find that, as a consequence of these violations Canada acted inconsistently with Articles 1 and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994 and Article XVI:4 of the Marrakesh Agreement.

49. In light of the above, TPKM respectfully requests the Panel to recommend that the DSB request Canada to bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.

ANNEX B-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

1. In this second written submission, TPKM will address the arguments advanced by Canada in its first written submission, during the first substantive meeting with the Panel, and those provided in Canada's responses to the Panel questions to the parties.

1 TREATMENT OF EXPORTERS WITH A *DE MINIMIS* MARGIN OF DUMPING

1.1 Canada violated Article 5.8 of the Anti-Dumping Agreement

2. TPKM submits that Canada violated Article 5.8 of the Anti-Dumping Agreement because it failed to immediately terminate the investigation with respect to exporters whose final margins of dumping were *de minimis*. Contrary to Canada's assertion, the ordinary meaning of the terms used in Article 5.8 and their context do not indicate that the termination of an investigation is required on a country basis. Instead, the ordinary meaning of the words "termination", "investigation", "dumping" and "margin of dumping" used in Article 5.8 actually confirms that the investigation needs to be terminated with respect to exporters/producers with an individual final *de minimis* margin of dumping.

3. Canada's position is also not supported by the context of Article 5.8. First, the characteristics of investigation described in Article 5 of the Anti-Dumping Agreement do not suggest that the requirement to terminate such an investigation concerns the imports of the product at issue from one or more countries and not from an individual exporter. While an investigation is product-specific, it results in a different level of duties being imposed on the different exporters/producers and in that sense is also exporter-specific. Second, the language used in the different sentences of Article 5.8 does not indicate that the termination in case of *de minimis* margin of dumping should be made on a country basis. Third, Canada's arguments relating to the use of the term "*de minimis*" in Articles 3.3 and Article 9.4 of the Anti-Dumping Agreement distort the meaning of these provisions and simply do not stand.

4. Canada also takes issue with the panel and the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* invoked by TPKM. Canada's arguments must all be rejected. Indeed, the panel and the Appellate Body's findings are legally sound and should be followed by the Panel in the present case. Furthermore, as the Appellate Body noted in *US – Stainless Steel (Mexico)*, the panel's failure to follow previously adopted Appellate Body reports addressing the same issues would undermine the development of a coherent and predictable body of jurisprudence.

1.2 Canada violated Article 6.10 of the Anti-Dumping Agreement

5. TPKM claims that Canada violated Article 6.10 of the Anti-Dumping Agreement because it failed to determine a single individual margin of dumping for each exporter or producer by calculating an additional country-wide margin of dumping and using that margin for the purpose of the *de minimis* test required by Article 5.8.

1.3 Canada violated Article 7.1(ii) of the Anti-Dumping Agreement

6. TPKM submits that Canada violated Article 7.1(ii) of the Anti-Dumping Agreement because it applied provisional anti-dumping measures in the absence of a preliminary affirmative determination of dumping. According to Canada, "[n]othing in Article 7.1(ii) suggests that provisional measures cannot be applied to dumped imports from an exporter with a *de minimis* margin of dumping". This argument must be rejected. One of the conditions set out in Article 7.1 for the application of provisional measures is that the investigating authority has made a "preliminary affirmative determination" of dumping and consequent injury to a domestic industry (Article 7.1(ii)). The panel in *EC – Salmon (Norway)* explained that in case of imports from

exporters with *de minimis* margins of dumping, there is "no legally cognizable dumping". Thus, Canada's investigating authorities could not have reached a preliminary affirmative determination of dumping with respect to the exporters with a *de minimis* dumping margin since such imports could not be treated as "dumped imports". Further, pursuant to Article 5.8 of the Anti-Dumping Agreement, an investigation needs to be terminated with regard to producers/exporters with a *de minimis* dumping margin, and thus no definitive anti-dumping duties can be imposed on such imports. The consistent interpretation of the term "dumped" requires that the same reasoning applies in the context of Article 7.1(ii).

7. TPKM submits that the balance between the need to safeguard free trade and the application of provisional measures necessary to prevent injury during the investigation, enshrined in Article 7.1, requires that in case of imports from exporters with *de minimis* margin of dumping, while the investigation may continue, no measures should be applied during the remaining part of the investigation.

8. Canada refers to the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* and argues that "provisional measures could still have been applied until the final determination of dumping and the finding of injury were made". This is an incorrect reading of the Appellate Body Report in that case, which only held that where the issuance of the order establishing anti-dumping duties occurs after the final determination is made, the producers with a *de minimis* margin of dumping are excluded from the scope of the order. Finally, the Panel should dismiss the arguments put forward by the European Union and the United States in their responses to the Panel question No. 1.3 where both third parties erroneously refer to Article 7.2 of the Anti-Dumping Agreement and focus on the issue of the amount of provisional duties.

1.4 Canada violated Article 7.5 and Article 9.2 of the Anti-Dumping Agreement

9. TPKM submits that Canada violated Articles 7.5 and 9.2 of the Anti-Dumping Agreement because in imposing provisional and definitive anti-dumping duties on imports from exporters with a *de minimis* margin of dumping, Canada caused anti-dumping duties to be collected from sources found not to be dumped and causing injury. Canada argues that the CBSA respected the requirements of Articles 7.5 and 9.2. While addressing the requirements imposed by Article 9.2, Canada observes that besides an exception for imports from exporters from which price undertakings have been accepted, Article 9.2 contains no further exception. This argument, however, does not stand. Indeed, since Article 9.2 requires an anti-dumping duty to be collected from all "sources found to be dumped" which does not cover producers with *de minimis* margins of dumping, no such exception is needed. TPKM notes that the phrase "sources found to be dumped" should be interpreted in the context of Article 9.2 which deals with the imposition of anti-dumping duties. Since Article 5.8 provides that the investigation needs to be immediately terminated in case of exporters with a *de minimis* margin of dumping it is clear that no anti-dumping duties can be imposed on imports of such exporters and, thus, the phrase "sources found to be dumped" do not cover these exporters.

10. With regard to the application of provisional measures, some of the third parties argue that Articles 7.5 and 9.2 "do not necessarily preclude the application of provisional anti-dumping duties". TPKM submits that they erroneously focus on the issue of the "appropriate amounts" of provisional measures. What is relevant in the context of the imposition of provisional measures is that such measures can be collected only from "sources found to be dumped and causing injury". Exporters with a *de minimis* margin of dumping cannot be treated as "sources found to be dumped".

1.5 Canada violated Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement

11. TPKM submits that by imposing provisional and definitive anti-dumping duties on imports from exporters with zero or *de minimis* margin of dumping, Canada violated Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement. In its first written submission, Canada failed to rebut these arguments.

2 TREATMENT OF NON-DUMPED IMPORTS IN THE INJURY AND CAUSATION ANALYSES

12. TPKM submits that Canada violated Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement because it treated imports from exporters with a *de minimis* margin of dumping as "dumped imports" in its injury and causation analyses. Canada relies on the Appellate Body's findings in *US – Carbon Steel* to argue that the term "dumping" is not limited to dumping at a rate equal to or in excess of the *de minimis* threshold. This reference is inapposite since that case related to the applicability of the *de minimis* standard in Article 11.9 of the SCM Agreement to sunset reviews. Moreover, previous panels and the Appellate Body have consistently found that "dumped imports" for the purpose of the injury analysis should be understood as imports attributable to producers or exporters with a margin of dumping greater than *de minimis*.

13. Canada also erroneously claims that all previous cases referred to in TPKM's first written submission concern companies with a zero and not *de minimis* margin of dumping and that none of those cases contain any analysis as to why imports with *de minimis* margin of dumping should be excluded from the injury analysis. This is factually incorrect. Indeed, in both *EC – Salmon (Norway)* and *EC – Bed Linen*, *de minimis* margins of dumping were found by the authorities and the panels in both cases reached the conclusion that imports of producers with zero or *de minimis* margin of dumping may not be considered as "dumped". Furthermore, as noted above, since there is "no legally cognizable dumping" in case of imports from exporters with *de minimis* margins of dumping, such imports should not be treated as "dumped imports" for the purpose of injury analysis or, in fact, for any aspect of an anti-dumping investigation.

3 TREATMENT OF FACTORS OTHER THAN DUMPED IMPORTS IN THE CAUSATION ANALYSIS

14. TPKM claims that Canada violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because it failed to examine all known factors other than the alleged dumped imports which at the same time were causing injury to its domestic industry, in particular the effects of subsidies and overcapacity, and failed to ensure that the injuries caused by such other factors were not attributed to the alleged dumped imports.

15. TPKM submits that the effects of subsidies constitute an "other factor", known to the Canadian authorities, the effects of which should have been separated and distinguished from the effects of dumping in the causation analysis. Canada's assertion that there is no requirement to separate and distinguish the effects of the Indian subsidization from the effects of the dumped imports would render *inutile* the words "through the effects of dumping" contained in Article 3.5 of the Anti-Dumping Agreement. In TPKM's view, when the same goods are dumped and subsidized at the same time there may be effects of subsidization that are not directly reflected in the dumping margin. TPKM submits that without analysing the relationship between different subsidy programs and dumping in India, Canada could not have assumed that there is no need to distinguish between the effects of dumping and the effects of subsidization.

16. With respect to overcapacity, Canada argues that the CITT was not obliged to examine and to separate and distinguish the effects of overcapacity, since low capacity utilization rates are not a cause of injury but merely an injury indicator. TPKM considers that "low capacity utilization rates" and "overcapacity" are two distinct concepts. While overcapacity can be the cause of injury, it is not in itself an injury indicator. Therefore, in order to satisfy the requirements of Article 3.5, "overcapacity" must be properly separated and distinguished from the injury caused by the dumped imports. Since the CITT failed to do so, it violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

4 THE DETERMINATION OF THE DUMPING MARGIN AND DUTY RATE FOR "ALL OTHER EXPORTERS"

17. TPKM submits that Canada's determination of the dumping margin and duty rate for all other exporters is inconsistent with Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement. TPKM submits that the use of the highest dumping margin seeks to punish TPKM other exporters from failing to cooperate. Canada argues that "the CBSA's ministerial specification cannot be considered punitive" because it was based on verified facts and on reasonable inferences concerning exporters that decided not to participate in the investigation.

TPKM submits that, while a determination based on Article 6.8 must be based on "facts" and non-cooperation may be one of the procedural circumstances that may be taken into account when selecting facts available, the investigating authority cannot choose whichever factual element it wishes on the sole basis that the exporter did not cooperate. The two cases referred by Canada, namely *EC – Countervailing Measures on DRAM Chips* and *US – Carbon Steel (India)* support TPKM's position. In the present case, the CBSA mechanistically applied the rule laid down in the SIMA Handbook which calls for the use of the highest margin of dumping and thus used the worst possible information, thereby acting such as to punish all other exporters from failing to cooperate.

18. TPKM also submits that the CBSA failed to make any comparative and evaluative assessment of the facts on the record. TPKM notes in particular that Canada has expressly confirmed that there is no evidence on the record showing any such assessment in order to select the "best" information available when determining the rate applicable to all other TPKM exporters.

19. TPKM further submits that Canada violated Article 6.8 and Annex II, paragraph 7 because there is no "logical relationship" between the rate established for all other TPKM exporters and the facts on the record concerning TPKM exports. In particular, Canada ignored the data concerning TPKM cooperating exporters which were representative of the TPKM market as a whole. Canada argues that TPKM's argument "lacks support in the Anti-Dumping Agreement as it ignores the procedural character of the obligations under Annex II, paragraph 7" and that "[these] obligations do not guarantee a specific outcome". However, TPKM does not challenge the outcome *per se*, namely, the 54.2% margin of dumping, but the methodology followed by the CBSA, which determines the rate for all other TPKM exporters on the basis of facts that are totally unrelated to them.

5 TREATMENT OF NEW PRODUCT TYPES TO BE EXPORTED BY COOPERATING EXPORTERS

5.1 Canada violated Article 9.3 of the Anti-Dumping Agreement

20. TPKM submits that Canada violated Article 9.3 of the Anti-Dumping Agreement because it imposed anti-dumping duties on new product types of cooperating exporters that exceed their margin of dumping as established under Article 2.

21. Canada's argument that TPKM's claim is based on speculation is entirely misplaced. Indeed, TPKM does not argue that its exporters are prevented from making a refund request pursuant to Article 9.3.2 or that Canada has failed to refund duties paid by importers. What is at issue is the fact that the anti-dumping duty applied on imports of new product types for cooperating exporters is based on the residual duty rate. This is inconsistent with Article 9.3. Therefore, in order to succeed with this claim which is based on Article 9.3 and does not involve Article 9.3.2, TPKM is not required to provide any evidence that imports of new product types have been subject to an initial duty assessment. Canada's further argument that it is only in the context of the duty refund procedure that the obligation in Article 9.3 must be complied with, must also be rejected. This position is not correct and not supported by the case-law referred to by Canada. In fact, Canada's position leads to the absurd outcome that every fully cooperating exporter with new product models to be imported into Canada must be subject to the residual duty rate – even those exporters with a zero margin of dumping.

22. Finally, Canada's argument that "when an importer believes that anti-dumping duties were improperly collected it can apply for a refund", is misleading. In fact, the application of the residual duty rate on imports of new product types has effectively prevented purchase of such new product types by Canadian importers.

23. In conclusion, Article 9.3 is relevant not only in the context of the refund mechanism under Article 9.3.2. The "margin of dumping as established under Article 2" referred to in Article 9.3 also refers to the margin of dumping which is established during the original investigation. By using a prospective normal value for new product types based on the "all others rate" instead of the individual rate determined for the relevant exporters, Canada therefore violated Article 9.3 of the Anti-Dumping Agreement.

5.2 Canada violated Article 6.8 and Annex II of the Anti-Dumping Agreement

24. TPKM also submits that Canada violated Article 6.8 and Annex II of the Anti-Dumping Agreement because it resorted to facts available for the calculation of the normal value with respect to imports of new product types to be exported by the cooperating exporters. Canada should not have resorted to "facts available" because the conditions laid down in Article 6.8 were not fulfilled. Canada claims that "[w]ithout an ability to apply facts available, anti-dumping duties could never be levied on new models, thereby creating a significant gap in the anti-dumping disciplines." However the CBSA did possess the "necessary information", each TPKM cooperating exporter fully cooperated in the investigation and, on the basis of the information provided by each of them, the CBSA calculated a dumping margin of respectively 0.005% for Chung Hung Steel, 0.4% for Shin Yang Steel and of 4.7% for Yieh Phui. Canada manifestly fails to take into account that under the Anti-Dumping Agreement, dumping and dumping margin are determined and imposed with respect to the product under investigation as a whole. Therefore, if the anti-dumping duty is calculated by reference to prospective normal values, the relevant "normal values" cannot be higher than those that have been determined for the purposes of determining the dumping margin for that product.

25. The determination regarding the normal value for new product types is also manifestly inconsistent with Annex II, paragraph 7. TPKM notes that the Appellate Body emphasised that "investigating authorities should not arrive at a "less favourable" outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has "cooperated" with the investigating authorities, within the meaning of paragraph 7 of Annex II of the Anti-Dumping Agreement." Since the two TPKM exporters fully cooperated during the investigation, the anti-dumping duty determined for new product types could not be based on facts available leading to a result which is less favourable to them. Furthermore, it appears that the information used was not the "best" information available, nor could it be considered as the "most fitting" information. Canada failed to address these arguments.

5.3 Canada violated Article 2.2 of the Anti-Dumping Agreement

26. TPKM claims that Canada violated Article 2.2 of the Anti-Dumping Agreement because it calculated normal values for new product types of cooperating exporters on the basis of a methodology which is not foreseen in Article 2.2 of the Anti-Dumping Agreement. Canada argues that TPKM has failed to prove that a violation occurred because TPKM "has not referred to a single shipment of a new product model by one of its exporters that was subject to the treatment that [TPKM] alleges violates Article 2.2." Canada misses the point, because it is the calculation of the normal value which is at issue. Second, Canada submits that the investigating authority is not in a position to determine model-specific normal values for the new product types when they are imported as they have yet to be investigated and therefore, Article 6.8 of the Anti-Dumping Agreement permits the CBSA to use facts available. Since the conditions to resort to "facts available" were not fulfilled, the CBSA could only apply the methodologies provided for in Article 2.2. By failing to do so, Canada acted inconsistently with Article 2.2 of the Anti-Dumping Agreement.

5.4 Canada violated Article 6.10 of the Anti-Dumping Agreement

27. TPKM submits that Canada violated Article 6.10 of the Anti-Dumping Agreement to the extent that Canada did not calculate one dumping margin for each cooperating exporter but another additional dumping margin with respect to new product types.

6 CLAIM UNDER ARTICLE 1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLE VI OF THE GATT 1994

28. TPKM claims that all the above-mentioned violations resulted in a consequential violation of Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. Since Canada failed to rebut any of TPKM's claims, the Panel should conclude that it has also acted inconsistently with the above two provisions.

7 CLAIMS CONCERNING CERTAIN PROVISIONS OF THE SPECIAL IMPORT MEASURES ACT ("SIMA") AND OF THE SPECIAL IMPORT MEASURES REGULATIONS ("SIMR")

7.1 Claims concerning Subsection 2(1), Section 30.1, and Subsections 35(1) and 35(2), 38(1) and 41(1) of SIMA

29. TPKM claims that Subsection 2(1), Section 30.1, and Subsections 35(1) and 35(2), 38(1) and 41(1) of SIMA are inconsistent, as such, with Articles 1, 5.8, 7.1(ii), 7.5 and 9.2 of the Anti-Dumping Agreement as well as Article VI:2 of the GATT 1994 because they provide for a *de minimis* test to be carried out on a country-wide basis instead of an exporter-specific basis.

30. First, TPKM submits that Subsection 2(1), Section 30.1 and Subsections 35(1), 35(2) and 38(1) are as such inconsistent with Article 7.1(ii) of the Anti-Dumping Agreement because they mandate that an "affirmative preliminary dumping determination" be made for exporters with a *de minimis* margin of dumping when the country-wide margin of dumping is 2% or more. One of the conditions spelled out in Article 7.1(ii) is that the investigating authority makes a "preliminary affirmative determination" of dumping. By mandating that such affirmative preliminary determination be made every time the country-wide margin of dumping is 2% or more and by ignoring the fact that such determination cannot cover exporters with an individual *de minimis* margin of dumping, the relevant provisions of SIMA are inconsistent, as such, with Article 7.1(ii) of the Anti-Dumping Agreement. Contrary to what Canada argues, the fact that investigation is not terminated with respect to exporters with a *de minimis* margin of dumping does not imply that the investigating authority can impose provisional measures on imports from such exporters. TPKM also fails to see how the findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* support Canada's position that an investigating authority is permitted to apply provisional measures on dumped imports until definitive anti-dumping duties can be imposed. In fact, paragraph 219 of the Appellate Body Report, referred to by Canada, does not even address the issue of the imposition of provisional measures.

31. Second, Subsection 2(1), Section 30.1 and Subsection 41(1) of SIMA are inconsistent as such with Article 5.8 of the Anti-Dumping Agreement. Canada argues that even if Article 5.8 were to be interpreted as requiring exporter-specific termination, SIMA could not be found to violate as such Article 5.8 because Subsection 43(1) of SIMA confers discretion to the CITT to terminate an investigation regarding the dumped imports from an exporter with a *de minimis* margin of dumping by excluding that exporter from the injury finding. TPKM disagrees. First, the text of Subsection 43(1) of SIMA does not indicate that the CITT enjoys discretion to terminate an investigation with regard to exporters with a *de minimis* margin of dumping. Canada also did not provide any evidence which would confirm that the CITT enjoys the alleged discretion. Second, even if the Panel were to conclude that the SIMA text confers some discretion - *quod non* - this would be still inconsistent with the requirements of the Anti-Dumping Agreement, as Article 5.8 clearly requires an immediate termination of the investigation with respect to exporters with *de minimis* margins of dumping and does not allow for any discretion. It follows that to the extent SIMA grants any discretion for the CITT to act otherwise it is as such inconsistent with Article 5.8. Finally, TPKM notes that the alleged discretion cannot render the relevant provisions of SIMA consistent with Article 5.8. Indeed, excluding an exporter from an injury finding is not equal to terminating the investigation with respect to such exporter. Furthermore, even assuming – for the sake of argument – that SIMA provides for discretion to terminate investigation with respect to exporters with *de minimis* margins of dumping, such discretion would be provided only to the CITT, while pursuant to Article 5.8, the investigation should have already been terminated by the CBSA.

32. Third, TPKM submits that Subsection 2(1), Section 30.1, and Subsections 35(1), 35(2), 38(1), and 41(1) of SIMA are as such inconsistent with Articles 7.5 and 9.2 of the Anti-Dumping Agreement because these provisions require affirmative preliminary and definitive dumping determinations be made and anti-dumping duties collected for exporters with a *de minimis* margin of dumping, even from sources found not to be dumped and causing injury. Canada asserts that "anti-dumping duties are to be collected on imports from all individual exporters and producers found to be dumped and causing injury, including on imports from exporters with *de minimis* margins of dumping". This is incorrect, since the term "dumped" used in Article 9.2 requires a dumping margin that is more than *de minimis*. Canada also refers to Subsection 43(1) of SIMA and the alleged discretion of the CITT to exclude exporters with *de minimis* margins of dumping from an injury finding. As explained above, this Subsection does not provide for any discretion.

33. Finally, TPKM maintains that the SIMA provisions requiring anti-dumping duties to be imposed on exporters with a *de minimis* margin of dumping amount to an as such violation of Article VI:2 of the GATT 1994, which only allows the levying of anti-dumping duties "in order to offset or prevent dumping". Canada failed to rebut TPKM's claims in that regard.

7.2 Claims concerning Subsections 42(1), 42(6) and 43(1) of SIMA and Subsection 37.1(1) of SIMR and any implementing or related measures

34. TPKM claims that Subsections 42(1), 42(6) and 43(1) of SIMA and Subsection 37.1(1) of SIMR, as well as any implementing or related measures, are as such inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement because they result in the automatic inclusion in the category of "dumped imports", in the context of the injury analysis, of the imports from exporters with a *de minimis* margin of dumping. Canada essentially repeats its previous arguments made in the context of the claims concerning anti-dumping measure at issue and fails to rebut TPKM's claims.

7.3 Claims under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement

35. TPKM submits that since Canada failed to ensure the conformity of its laws, regulations and administrative procedures with the provisions of the GATT 1994 and of the Anti-Dumping Agreement, it has acted inconsistently with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement.

7.4 Claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

36. Since Canada failed to rebut any of TPKM's claims concerning as such violations, it is clear that Canada has also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

ANNEX B-3

INTEGRATED EXECUTIVE SUMMARY OF THE STATEMENTS OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU AT THE FIRST MEETING OF THE PANEL

Opening Statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

1 INTRODUCTION

1. The present proceedings concern provisional and definitive anti-dumping measures imposed by Canada on imports of certain Carbon Steel Welded Pipe. These measures, and the investigation that led to their imposition, are deeply flawed and violate several provisions of the Anti-Dumping Agreement and the GATT 1994. Moreover, the underlying Canadian legislation, namely the Special Import Measures Act (or SIMA) and the Special Import Measures Regulations (or SIMR), is inconsistent as such with the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement.

2. The economic impact of Canada's measures on our steel industry has been devastating as the value of our exports of the product at issue to Canada suffered a 75% drop – from 16 million US Dollars to 4 million between 2011 and 2013.

2 TREATMENT OF EXPORTERS WITH A *DE MINIMIS* MARGIN OF DUMPING

3. Canada puts forward a distorted interpretation of the relevant provisions of the Anti-Dumping Agreement in order to respond to the arguments raised by us. First, with regard to the claim under **Article 5.8 of the Anti-Dumping Agreement**, Canada argues that the requirement to terminate an investigation when the margin of dumping is *de minimis* pertains to a country and not to an individual exporter. This interpretation of Article 5.8 is incorrect and goes against findings of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Canada erroneously argues that the Appellate Body in that case overlooked Articles 3.3 and 9.4 in its interpretation of Article 5.8 in the context of other provisions of the Anti-Dumping Agreement. Article 3.3 deals with situations "where imports of a product from more than one country are simultaneously subject to anti-dumping investigations", which explains the reference to the margin of dumping from "each country". Article 9.4 addresses the calculation criteria for the margin of dumping of non-sampled exporters where sampling is used by the investigating authorities. Contrary to what Canada argues, there is no conflict between the requirement to terminate the investigation for individual exporters with *de minimis* margins of dumping and the obligation to disregard such *de minimis* margins of dumping in the calculations under Article 9.4. We submit that the Panel in the present case should follow the interpretation adopted by the Appellate Body in previous cases dealing with similar issues, in order not to undermine the coherence and the predictability of the WTO legal system.

4. Canada argues that it did not violate **Article 6.10** because it had already determined an individual margin of dumping for each exporter and because the additional determination of a country-wide margin of dumping is irrelevant. Canada disregards that Article 6.10 requires a single company-specific margin of dumping to be established for each exporter. The establishment of a second country-wide margin for each exporter for the purpose of the application of the *de minimis* test is inconsistent with Article 6.10.

5. Canada argues that nothing in **Article 7.1(ii)** suggests that provisional measures cannot be applied to dumped imports from an exporter with a *de minimis* margin of dumping. This argument must be rejected, since an exporter with a *de minimis* margin of dumping cannot be treated as "dumping". The fact that the investigating authority may continue the investigation until it makes a final dumping determination does not mean that it can disregard the requirements of Article 7.1 and apply a provisional anti-dumping duty on imports from exporters with a provisional *de minimis* margin of dumping.

6. Canada further argues that it did not violate **Articles 7.5 and 9.2** in applying provisional measures and imposing definitive measures on exporters with a *de minimis* margin of dumping. This contention is in contradiction with the Appellate Body's finding that a producer with a zero or *de minimis* margin of dumping cannot be considered as "dumping" and thus his imports do not qualify as "sources found to be dumped". Finally, Canada violated Article VI:2 of the GATT 1994 because the possibility to levy an anti-dumping duty only applies "in order to offset or prevent dumping" and therefore does not apply to imports from exporters with a *de minimis* margin of dumping. As a consequence, Canada also violated Article 1 of the Anti-Dumping Agreement.

3 TREATMENT OF NON-DUMPED IMPORTS IN THE INJURY AND CAUSATION ANALYSES

7. We submit that by failing to exclude from the category of "dumped imports" the imports of the exporters with a *de minimis* margin of dumping, Canada violated Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the Anti-Dumping Agreement. Canada claims that nothing in these provisions suggests that "dumped imports" should exclude imports from exporters with *de minimis* margins of dumping. This goes against a number of previous reports of panels and the Appellate Body, according to which the term "dumped imports" refers to imports of producers with a margin of dumping above *de minimis*. Canada claims that all previous cases referred to by our concern companies with a zero and not *de minimis* margin of dumping. This is factually incorrect, since in *EC – Salmon (Norway)*, the EC calculated a *de minimis* margin of dumping of 0.8% for one company and, likewise, in *EC – Bed Linen*, the EC found *de minimis* margins for four Pakistani exporters. In both cases the panels reached the conclusion that imports of producers with zero or *de minimis* margin of dumping may not be considered as "dumped".

4 TREATMENT OF FACTORS OTHER THAN DUMPED IMPORTS IN THE CAUSATION ANALYSIS

8. We claim that Canada failed to examine all known factors other than the alleged dumped imports, such as the effects of the subsidies and overcapacity, which at the same time were causing injury to the domestic industry. Concerning the effects of subsidies, Canada argues that the Anti-Dumping Agreement does not require that the effects of the subsidies be separated from the effects of the dumping. We argue that subsidised imports constitute another factor, the effects of which should have been distinguished from the effects of dumping in the causation analysis.

9. With regard to overcapacity, Canada argues that low capacity utilization rates cannot be said to cause injury and thus do not have to be examined in the causation analysis. We maintain that although the low capacity utilization rate is one of the injury factors under Article 3.4, the overcapacity which was present at the beginning of the investigation period was a known factor that the Tribunal failed to examine in the context of its non-attribution analysis. As a consequence, the Canadian authorities violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

5 THE DETERMINATION OF THE DUMPING MARGIN AND DUTY RATE FOR "ALL OTHER EXPORTERS"

10. Canada's methodology for calculating the margin of dumping for "all other exporters" is inconsistent with Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement. Canada's automatic use of the highest dumping margin found for an individual transaction from another market to determine the duty applicable for all other exporters seeks to punish all other exporters on the sole basis that they were either unknown or failed to provide information. By applying mechanistically the rule in the SIMA Handbook – which requires the investigating authorities to apply the highest margin of dumping found for one transaction of a cooperating exporter – Canada failed to evaluate in a comparative manner the information that was on the record. Canada failed to explain how the highest dumping margin of a single transaction in the investigation was appropriate for establishing the "all others rate". Nor did Canada provide any evidence that it has made a careful evaluation of the facts available.

11. We submit that there is no logical relationship between the residual rate established for our exporters, namely 54.2%, and the facts on the record. The Appellate Body clarified that the term "best information" means that information has to be the "most appropriate information" available. The data provided by cooperating exporters from us, which was representative for our exports as a

whole, would clearly be the "most fitting" information available in the present case, but was nonetheless ignored.

12. Finally, contrary to Canada's contention, we did not argue that Canada violated Annex II and Article 6.8 of the Anti-Dumping Agreement because it should have reached another or any specific outcome. We simply submit that any outcome must be based on methodologies that comply with the rules of the Anti-Dumping Agreement. All the evidence on the record demonstrates that there was no assessment of the facts before the investigating authorities and thus we have made a *prima facie* case that Canada violated Article 6.8 and Annex II of the Anti-Dumping Agreement.

6 TREATMENT OF NEW PRODUCT TYPES TO BE EXPORTED BY COOPERATING EXPORTERS

13. Canada argued that, to the extent an importer can apply for a refund to ensure that final duty assessment is based on accurate normal values, the applied anti-dumping duties are consistent with Article 9.3. Under Canada's approach, there would be no limitation as to how the prospective normal values must be determined. This would lead to the absurd situation where Members having a prospective system could use whichever prospective normal value they wish as long as they have a refund system. We consider that "the margin of dumping as established under Article 2" referred to in the chapeau of Article 9.3 relates to the margin of dumping which has been established during the original investigation. In a prospective normal value system, the normal value calculated for the purposes of determining the dumping margin during the original investigation constitutes the relevant benchmark for the determination of the anti-dumping duty. By using a prospective normal value for new models based on the "all others rate" instead of a prospective value based on the individual rate determined for the relevant exporters, Canada violated the chapeau of Article 9.3.

14. As to our claim under Article 6.8, Canada erroneously argues that without being able to apply facts available, anti-dumping duties could never be levied on new models. Our cooperating exporters provided relevant information and data for all the models they exported during the investigation period and Canada could have therefore used such information to determine relevant prospective normal values for new models.

15. We do not take issue with the Canadian system of prospective normal values but with the way Canada has determined the anti-dumping duty applicable to new product types of our cooperating exporters. As a result, all exporters, including those with *de minimis* or even zero dumping margins are subject to the residual duty of 54.2% if they decide to export new product types. In practice, this leads to a chilling effect whereby the exporters are effectively prevented from exporting any new product types. This can never be remedied by the availability of a refund mechanism.

7 CLAIMS OF "AS SUCH" VIOLATION REGARDING CERTAIN PROVISIONS OF SIMA AND SIMR

16. Canada did not develop any arguments in order to rebut our claims that certain provisions of SIMA and SIMR are as such inconsistent with the Anti-Dumping Agreement and the GATT 1994 and essentially repeats the arguments used with regard to our challenge of the anti-dumping measures at issue. Concerning Article 5.8 of the Anti-Dumping Agreement, Canada argues that Subsection 43(1) of SIMA grants the Canadian International Trade Tribunal discretion to terminate an investigation regarding the dumped imports from an exporter with a *de minimis* margin of dumping by excluding that exporter from its injury finding. We disagree as the text of Subsection 43(1) of SIMA does not indicate that the Tribunal enjoys discretion to terminate investigation with regard to exporters with a *de minimis* margin of dumping. Moreover, Article 5.8 provides for a positive obligation to immediately terminate an investigation with respect to exporters with *de minimis* margins of dumping and does not allow for any type of discretion. Canada did not provide any proof that the Tribunal has exercised its alleged discretion at least once in the past, let alone in the present case. Since Canada failed to rebut any of our claims, it is clear that it has also acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. It also follows that since Canada failed to ensure the conformity of its laws with the provisions of the GATT 1994 and of the Anti-Dumping Agreement, it has acted inconsistently with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement.

Closing statement of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

17. Our position is that exporters with a zero or *de minimis* margin of dumping are not considered as "dumping" under the Anti-Dumping Agreement as confirmed by previous panels as well as the Appellate Body. It is imports with a dumping margin of 2% or more that are "dumped imports" and only such imports can cause injury to domestic industry. Furthermore, if the investigating authorities have determined that subsidies cause injury at the same time as dumped imports, they must review that known factor to ensure that particular injury would not be wrongfully attributed to dumped imports. The same applies to the pre-existing overcapacity in the concerned industry. With regard to the determination of the "all others rate", we submit that the investigating authorities are required to look into the information available on the record and to use the most appropriate one. The investigating authorities cannot resort to the worst information available. We further maintain that individual margins of dumping determined for cooperating exporters must be applied also to new models. Finally, we respectfully ask the Panel to look into the relevant Canadian laws and regulations and to decide whether they are written in such a manner that is as such inconsistent with several provisions of WTO law.

ANNEX B-4

INTEGRATED EXECUTIVE SUMMARY OF THE STATEMENTS OF THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU AT THE SECOND MEETING OF THE PANEL

Opening Statement of TPKM

1 INTRODUCTION

1. This oral statement focuses on addressing some of Canada's newly developed arguments and providing clarifications regarding issues that are particularly relevant to our case. Canada's selective reading of the Anti-Dumping Agreement is not only legally erroneous, it also ignores the realities of the investigation process and leads to absurd and unreasonable consequences. In each section, we will ask the Panel to examine the practical consequences of Canada's interpretation and show that its outcomes are manifestly unreasonable.

2 TREATMENT OF EXPORTERS WITH A *DE MINIMIS* MARGIN OF DUMPING

2. Canada repeats all of its previous arguments contending that the margin of dumping for the **Article 5.8** *de minimis* test ought to be determined on a country-wide basis and not an individual basis. In doing so, Canada fails to provide any "cogent reasons" to depart from the Appellate Body's ruling in *Mexico – Anti-Dumping Measures on Rice*. The ordinary meaning of the relevant terms of Article 5.8 as well as the broader context of Article 5 and the Anti-Dumping Agreement confirm that the investigation must be terminated with respect to individual exporters. Furthermore, Canada erroneously argues that our interpretation of Article 5.8 would result in an inconsistent treatment of new exporters under Article 9.5. In making this argument, Canada assumes incorrectly that Article 9.5 does not allow for the application of the *de minimis* standard under Article 5.8, when in fact, Article 9.5 is silent on this issue. In any event, Article 9.5 deals with a different stage of anti-dumping proceedings which is not at issue in the present dispute. Contrary to what Canada argues, our interpretation of Article 5.8 would also not render Article 9.4 inutile. Article 9.4 is not limited to a distinct phase in the anti-dumping proceedings and refers to the determination of the duty rate and *not* the imposition of anti-dumping duties. Thus, there is no conflict between the requirement to terminate the investigation for individual exporters with *de minimis* margins of dumping under Article 5.8 and the obligation to disregard such margins in the calculations carried out under Article 9.4. Finally, Canada's position under Article 5.8, if held to be WTO-consistent, would result in a fundamentally unfair outcome that companies that have always traded at fair market price are still made subject to anti-dumping measures.

3. With respect to the claim under **Article 6.10**, Canada ignores the established case law that requires a single margin of dumping determined for the individual exporter for the purposes of the *de minimis* test. Thus, the fact that Canada calculated individual margins of dumping is irrelevant, if it used another margin, namely the country-based margin of dumping, for the determination and imposition of anti-dumping duties.

4. Canada submits two new arguments with respect to our claim under **Article 7.1(ii)**. First, it argues that Article 7.1(ii), when read together with the chapeau of Article 7.1, Article 7.1(i) and Article 5, must refer to a determination of alleged dumping for the investigation as a whole. This argument is taken out of context as Article 7.1 relates to the initiation of the investigation while Article 7.1(ii) deals with the preliminary determination of dumping and injury. Furthermore, the term "determination of dumping" is inherently exporter-specific. Therefore, in order to apply provisional measures, the investigating authority needs to reach a preliminary affirmative determination of dumping with regard to each individual exporter.

5. Canada's second argument that an investigating authority satisfies Article 7.1(ii) by merely making a preliminary affirmative determination that the export price is less than the normal value is equally erroneous. As confirmed by case law, imports of exporters with a *de minimis* margin of

dumping should not be treated as "dumped" because "no legally cognizable dumping" can be found with regard to such exporters. In this regard, the terms "dumping" and "dumping margin" when read in the context of the provision governing the imposition of anti-dumping duties necessarily refer to dumping which exceeds the statutory *de minimis* threshold of Article 5.8. We also note that Article 7.1 is designed to strike a balance between the need to safeguard free trade and the application of provisional measures "to prevent injury being caused during the investigation". The conditions to impose provisional measures are also stricter than those for imposing definitive measures. Accordingly, if no definitive measures can be imposed on imports from exporters with a *de minimis* margin of dumping, *a fortiori* no anti-dumping duties may be applied at the provisional stage on imports of such exporters.

6. Similarly, for claims under **Articles 7.5 and 9.2**, Canada continues to base its interpretation of the phrase "from all sources found to be dumped" in Article 9.2, on the definition of dumping under Article 2.1. This argument must be rejected, since Article 9.2 deals with the imposition of anti-dumping duties and Article 5.8 provides that the investigation needs to be immediately terminated in case of imports with a *de minimis* margin of dumping and thus no anti-dumping duties can be imposed on such imports. Finally, Canada's argument pertaining to "appropriate amounts" is irrelevant to this claim.

3 TREATMENT OF NON-DUMPED IMPORTS IN THE INJURY AND CAUSATION ANALYSES

7. Similar to the argument made in relation to Article 7.1(ii) and Article 9.2, Canada once again relies on the definition of dumping under Article 2.1 to argue that imports dumped at a margin below *de minimis* are still "dumped imports" in the context of **Articles 3.1, 3.2, 3.4, 3.5 and 3.7**. As we have explained, imports from exporters with a *de minimis* margin of dumping do not constitute "dumped imports" as in those cases there is "no legally cognizable dumping". In other words, *de minimis* margins of dumping are too "insignificant" to warrant any action. It follows that both imports with *de minimis* and zero margins of dumping should be excluded from the injury and causation analysis.

4 TREATMENT OF FACTORS OTHER THAN DUMPED IMPORTS IN THE CAUSATION ANALYSIS

8. Canada's repeated arguments that it was not required to consider the effects of the subsidies and overcapacity as factors other than the dumped imports in the non-attribution analysis should be rejected. With regard to **overcapacity**, Canada insists that the "low capacity utilization" is not a factor or cause of injury but merely an injury indicator. However, "low capacity utilization rates" and "overcapacity" are two distinct concepts, and overcapacity can be the cause of injury but is not in itself an injury indicator. In the present case, Canada failed to examine the overcapacity present at the beginning of the investigation period and thus acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. The fact that the CITT made a determination only about a threat of injury and not actual injury does not waive the obligation under Article 3.5.

9. Regarding the "**effects of subsidies**", Canada distorts the Appellate Body's findings in *Japan – DRAMS (Korea)* to argue that the Anti-Dumping Agreement does not require that the effects of subsidies be separated and distinguished from the effects of dumping. The Appellate Body merely stated that the SCM Agreement does not require the examination of the subsidies as distinguished from the effects of *the subsidised imports*. In failing to properly assess and distinguish the effects of subsidies from the effects of dumping, Canada acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

5 THE DETERMINATION OF THE DUMPING MARGIN AND DUTY RATE FOR "ALL OTHER EXPORTERS"

10. With regard to the claim under Article 6.8 and Annex II, paragraph 7, Canada's repeated assertions are directly contradicted by the facts of the record. First, Canada's argument that the methodology employed by the CBSA was not "mechanistic" because the SIMA Handbook indicates that the CBSA, as a general practice, considers whether it is necessary to disregard anomalous or aberrant transactions when selecting facts for the ministerial specification is inapposite. Second, Canada's argument that the CBSA analysed all the information on the record is irrelevant. Third, Canada's attempt to explain that the CBSA did not base its determination solely on the

procedural circumstances of the investigation, and that it selected verified facts and took into account the totality of information is also unsupported by any evidence and entirely unconvincing. It is clear from the record that the normal value was determined by using the highest dumping margin according to the rule laid down in the SIMA Handbook.

11. Canada's further argument that the CBSA could have used the worse information from the petitioners' complaint actually asks the Panel to lower the standard required by Article 6.8 to use the "best information available". The all others rate determined in the present case, was a margin from a country that was found to have provided subsidies to its industry and fails to bear any "logical relationship" with the information concerning our cooperating exporters, which was representative of our market as a whole.

12. Finally, while the investigating authority should enjoy a certain degree of discretion with respect to the determination of the all others rate, it cannot choose whatever fact it wishes. To be clear, we are not asking the Panel to reach a specific outcome or decide on the specific information the CBSA should have used to make its all others rate determination. Rather, we are asking the Panel to conclude that Canada violated Article 6.8 and Annex II since the methodology followed by the CBSA to determine the duty rate for our all other exporters does not comply with the requirements laid down in those provisions.

6 TREATMENT OF NEW PRODUCT TYPES TO BE EXPORTED BY COOPERATING EXPORTERS

13. What is at issue with regard to our claim under Article 9.3 is not whether Canada has refunded our exporters, but the fact that the anti-dumping duties applied on imports of new product types for cooperating exporters are based on the residual duty rate. Under Canada's approach, there would be no limitation as to how the prospective normal values must be determined. Canada's interpretation of Article 9.3 would lead to the absurd results where Members having a prospective system could use whichever prospective normal value they wish as long as they have a refund system. In our view, Article 9.3 mandates that the dumping margin from the original investigation constitutes the relevant benchmark when applying the prospective normal value for the anti-dumping duty.

14. As to our claim under Article 6.8, our position remains that Canada could not resort to "facts available" as the conditions laid down in Article 6.8 were not fulfilled. Canada erroneously asserts that its prospective application of facts available to new product models is necessary as otherwise it would lack information essential to the assessment of duties on such products. In that regard, it is essential to underline that dumping and margin of dumping are determined in relation to the product as a whole and not on a model per model basis. In the present case, Canada did possess the "necessary information" as our cooperating exporters provided all relevant information for the purposes of determining the company specific dumping margin for the product as a whole.

7 CLAIMS OF "AS SUCH" VIOLATION REGARDING CERTAIN PROVISIONS OF SIMA AND SIMR

15. Canada has failed to respond to our *as such* claims, and even its Article 5.8 arguments are repetitive at best. Contrary to Canada's contention, we have made a *prima facie* case that the challenged Sections of SIMA are, *as such*, WTO-inconsistent since they only require terminating an investigation if the country-wide margin of dumping is *de minimis*. Neither the text nor any evidence provided by Canada supports its assertion that Subsection 43(1) of SIMA grants the CITT discretion to terminate an investigation with regard to exporters with a *de minimis* margin of dumping. Article 5.8 bestows a positive obligation to terminate investigations with respect to exporters with *de minimis* margins of dumping. To the extent that SIMA grants any discretion for the CITT to act otherwise, it would lead to a violation of Article 5.8. Furthermore, any discretion provided by Subsection 43(1) to the CITT would, in any event, not ensure the consistency with Article 5.8 as it would not guarantee an "immediate termination" which should happen already at the CBSA level.

Closing statement of TPKM

16. With regard to the termination of investigation for exporters with *de minimis* dumping margins, Canada has failed to provide any cogent reasons for the Panel to deviate from the well-established case-law. Article 5.8 also makes clear that not all "dumping" warrants legal action, and thus imports with *de minimis* margins of dumping need to be disregarded for the purpose of the injury analysis and the imposition of anti-dumping duties. Furthermore, we have demonstrated that overcapacity and the effects of subsidies in India were known factors that should have been taken into account by the Canadian authorities. With respect to the "all others rate", it is clear that Canada had not engaged in a comparative and evaluative assessment of the relevant facts, and the highest dumping margin applied from another country did not bear any "logical relationship" with the information of our exporters. Canada's use of the residual duty rate for the new product types of cooperating exporters is all the more inconsistent with the Anti-Dumping Agreement, as that rate was significantly higher than the margin of dumping calculated for each cooperating exporter in the original investigation. Finally, Canada has failed to rebut our *prima facie* case of *as such* violations.

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ANNEX C

ARGUMENTS OF CANADA

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. This dispute concerns anti-dumping measures imposed by Canada on imports of certain Carbon Steel Welded Pipe (CSWP) from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei). Chinese Taipei claims that the investigation that led to the imposition of the anti-dumping measures, the measures themselves, and certain provisions of the *Special Import Measures Act* (SIMA) and the *Special Import Measures Regulations* (SIMR) are inconsistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Anti-Dumping Agreement) and the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

2. Canada demonstrates that the investigation and the application of anti-dumping measures on CSWP from Chinese Taipei, as well as the relevant provisions of SIMA and the SIMR, are not inconsistent with the Anti-Dumping Agreement.

II. CLAIMS CONCERNING THE PROVISIONAL AND DEFINITIVE ANTI-DUMPING MEASURES IMPOSED BY CANADA ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE ORIGINATING IN, AMONG OTHERS, CHINESE TAIPEI

A. The CBSA's Treatment of Chinese Taipei Exporters with *de Minimis* Margins of Dumping Did Not Violate Articles 1, 5.8, 6.10, 7.1(ii), 7.5, and 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

1. The CBSA's Treatment of Chinese Taipei Exporters with *de Minimis* Margins of Dumping Did Not Violate Article 5.8 of the Anti-Dumping Agreement

3. Chinese Taipei claims that Canada violated Article 5.8 of the Anti-Dumping Agreement by failing to immediately terminate the CSWP investigation with respect to Chinese Taipei exporters whose margins of dumping were *de minimis*.

4. Canada demonstrates that the ordinary meaning of the terms "termination", "investigation", and "margin of dumping", which are essential to the interpretation of Article 5.8, is consistent with the termination of an investigation being required on a country basis. Canada also shows that the context within which these terms are found clearly establishes that the termination of an investigation with respect to a country is what is required by the second sentence of Article 5.8 when the country based margin of dumping is *de minimis*. As a result, interpreting Article 5.8 to require the termination of an investigation with respect to an individual exporter is inconsistent with the very terms of Article 5.8 when considered in their context.

5. Chinese Taipei relies on the panel and Appellate Body decisions in *Mexico – Anti-Dumping Measures on Rice* to support its position that Article 5.8 of the Anti-Dumping Agreement requires that an investigation be terminated with respect to an individual exporter with a *de minimis* margin of dumping. These decisions are undermined by four significant flaws.

6. First, the panel and the Appellate Body relied too heavily on the references to individual margins of dumping in the Anti-Dumping Agreement when interpreting the reference to the margin of dumping contained in Article 5.8. Second, the panel and the Appellate Body failed to properly consider the scope of the investigation described in Article 5 and the context in which the termination of an investigation is required under Article 5.8. Third, the panel and the Appellate Body ignored that requiring exporter-specific termination contradicts Article 9.4 of the Anti-Dumping Agreement. Finally, the panel and the Appellate Body's flawed analysis led them to improperly read words into Article 5.8. Reading in the words "*in respect of the individual exporter*

or producer for which a zero or de minimis *margin is established*" means that an exporter with a *de minimis* margin of dumping is excluded from an investigation that nonetheless continues.

7. Had the panel and the Appellate Body conducted a proper analysis of Article 5.8, giving its terms their ordinary meaning within their context, they could only have come to the conclusion that an investigation is terminated as a whole, and, consequently, that the reference to the *de minimis* margin of dumping in that provision pertains to a country.

2. The CBSA's Determination of an Individual Margin of Dumping for Each Chinese Taipei Exporter Did Not Violate Article 6.10 of the Anti-Dumping Agreement

8. Chinese Taipei claims that Canada violated Article 6.10 of the Anti-Dumping Agreement because the CBSA failed to determine only one individual margin of dumping for each exporter by calculating a country-based margin of dumping and using that margin for the purpose of conducting the *de minimis* test required by Article 5.8.

9. Article 6.10 requires that "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". In this investigation, the CBSA determined an individual margin of dumping for each cooperating Chinese Taipei exporter as evidenced in the CBSA's Final Dumping Determination filed by Chinese Taipei. The additional determination by the CBSA of a country-based margin of dumping is simply irrelevant under Article 6.10. The CBSA therefore did not violate Article 6.10.

3. The CBSA's Application of Provisional Measures on Dumped Imports from a Chinese Taipei Exporter with a *de Minimis* Margin of Dumping Did Not Violate Article 7.1(ii) of the Anti-Dumping Agreement

10. Chinese Taipei claims that Canada violated Article 7.1(ii) of the Anti-Dumping Agreement because the CBSA applied provisional measures on CSWP imports from one Chinese Taipei exporter with a *de minimis* margin of dumping in the absence of a preliminary affirmative determination of dumping.

11. Chinese Taipei's claim must fail because the CBSA satisfied the requirements of Article 7.1(ii) when applying provisional measures on a Chinese Taipei exporter found to have a *de minimis* margin of dumping in the CBSA's preliminary determination of dumping. Furthermore, the Appellate Body has confirmed that the termination of an investigation with respect to an individual exporter with a *de minimis* margin of dumping does not need to occur before the issuance of the order establishing the definitive anti-dumping duties. Therefore, regardless of the proper interpretation to be given to Article 5.8, the CBSA cannot be found to have violated Article 7.1(ii) when it applied provisional measures on one Chinese Taipei exporter with a *de minimis* margin of dumping.

4. The CBSA's Application of Provisional Measures and Imposition of Definitive Anti-Dumping Duties on Dumped Imports from Chinese Taipei Exporters Did Not Violate Articles 7.5 and 9.2 of the Anti-Dumping Agreement

12. Chinese Taipei claims that Canada violated Articles 7.5 and 9.2 of the Anti-Dumping Agreement because, in applying provisional measures and imposing definitive anti-dumping duties on CSWP imports from Chinese Taipei exporters with *de minimis* margins of dumping, the CBSA caused duties to be collected from sources found not to be dumped and causing injury.

13. Canada demonstrates that, having complied with the three conditions set out in Article 7.1, the CBSA rightfully applied provisional measures on imports from a Chinese Taipei exporter with a *de minimis* margin of dumping. Even accepting Chinese Taipei's interpretation of Article 5.8, the CBSA could still apply provisional measures on imports from that Chinese Taipei exporter until the time when definitive anti-dumping duties were imposed. Given that Chinese Taipei's country-based margin of dumping was not *de minimis*, Canada, in compliance with Article 9.2, rightfully imposed definitive anti-dumping duties on all dumped imports from Chinese Taipei exporters.

14. For the aforementioned reasons, the CBSA's application of provisional measures and imposition of definitive anti-dumping duties to offset dumping did not violate Articles 7.1(ii), 7.5, and 9.2. Consequently, Canada did not violate Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement.

B. The CITT's Treatment of Dumped Imports in its Injury Analysis Did Not Violate Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement

15. Chinese Taipei claims that Canada violated Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement because the CITT treated imports from exporters with *de minimis* margins of dumping as dumped imports for the purposes of its injury analysis. Canada demonstrates that none of these provisions confines the meaning of "dumping" to dumping at a rate equal to or in excess of the *de minimis* threshold and, therefore, that the CITT's treatment of dumped imports, including those from exporters with *de minimis* margins of dumping, did not violate the Anti-Dumping Agreement.

16. There is no distinction to be drawn between imports that are dumped at a margin above *de minimis* and those dumped at a margin below *de minimis* – both are "dumped". It is only imports with a zero margin that should be considered as not dumped.

17. Canada demonstrates that the CITT's approach in the CSWP injury inquiry is consistent with the Appellate Body's analysis in *US – Carbon Steel*. In that case, which was decided under the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement), the Appellate Body noted that the definition of injury in footnote 45 to the SCM Agreement makes no reference to the amount of subsidy involved. Article 3 of the Anti-Dumping Agreement contains a footnote with an identical definition of injury. Therefore, the Anti-Dumping Agreement similarly does not confine the meaning of "dumping" to dumping at a rate equal to or in excess of the *de minimis* threshold.

18. Canada also demonstrates that the decisions referred to by Chinese Taipei in its first written submission, to support its position that imports from exporters with *de minimis* margins of dumping should not have been included by the CITT in its injury analysis, concerned companies for which the margin of dumping or definitive anti-dumping duty was zero. In each case, the panel concluded that the imports at issue were "non-dumped" and therefore should not have been included in the injury analysis. To the extent that these panels referred to *de minimis* margins, these references should properly be considered as *obiter dicta*.

19. Furthermore, no analysis was conducted in any of the decisions as to why imports with *de minimis* margins should be excluded. Whereas it is logical to exclude imports that are not dumped, nothing in the text of the Anti-Dumping Agreement supports an exclusion of imports that are dumped, irrespective of their margin of dumping.

20. Chinese Taipei has failed to establish that Canada violated Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement when the CITT included "dumped imports", including those from exporters with *de minimis* margins of dumping, in its injury analysis.

C. The CITT's Non-Attribution Analysis Did Not Violate Articles 3.1 and 3.5 of the Anti-Dumping Agreement

1. The CITT Was Not Obligated to Examine and to Separate and Distinguish the Effects of Subsidies

21. Chinese Taipei argues that by failing to separate and distinguish the effects caused by the subsidies from the effects caused by the dumping Canada acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

22. Canada demonstrates that, pursuant to the Appellate Body decision in *Japan – DRAMs (Korea)*, the CITT acted consistently with Article 3.5 of the Anti-Dumping Agreement in the CSWP inquiry by determining whether the dumped imports caused or threatened to cause injury to the domestic industry. The Anti-Dumping Agreement does not require an additional analysis as to whether the dumping, as opposed to the dumped imports, caused or threatened to cause injury. Given that there was no requirement to assess the effects of the dumping *per se*, there cannot be

a requirement to separate and distinguish the effects of the subsidization from the effects of the dumping.

23. Second, contrary to Chinese Taipei's argument, the Appellate Body decision in *US – Carbon Steel (India)* is not relevant to this case. In that decision, the Appellate Body held that the SCM Agreement only allows the cumulation of subsidized imports; it does not allow the cumulation of dumped but non-subsidized imports. In the CSWP investigation, there were no imports that were subsidized but not dumped. The CITT, consistent with Article 3.3 of the Anti-Dumping Agreement, cumulated the effects of imports from India with those from Chinese Taipei and four other subject countries because the imports from all of these countries were dumped. The fact that the imports from India were also subsidized was irrelevant to the CITT's decision to cumulate the effects of all dumped imports.

2. The CITT Was Not Obligated to Examine and to Separate and Distinguish the Effects of Overcapacity

24. Canada submits that low capacity utilization rates (which Chinese Taipei refers to as overcapacity) are not a cause of injury and therefore do not result in effects that must be separated and distinguished from the effects of the dumped imports. Low capacity utilization rates are merely an *indicator* of injury and were treated as such by the CITT in its injury analysis.

25. As an indicator and not a cause of injury, there was no need for the CITT to separate and distinguish the effects of the low utilization rates from the effects of the dumped imports on the domestic industry pursuant to Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

D. The CBSA's Use of Facts Available to Determine the Dumping Margin and Duty Rate for "All Other Exporters" Did Not Violate Article 6.8 and Annex II of the Anti-Dumping Agreement

26. Chinese Taipei claims that the ministerial specification used by the CBSA to determine the margin of dumping and the anti-dumping duty rate for "all other exporters" violated Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. Its arguments under these provisions, however, mischaracterize relevant facts and applicable law.

27. First, Chinese Taipei argues that the CBSA's use of facts available effectively punished non-cooperating exporters. While Canada agrees that an investigating authority is prohibited from using facts available to punish non-cooperating parties, Chinese Taipei fails to recognize that an investigating authority is permitted to draw inferences, including adverse inferences, based on the procedural circumstances of the investigation. Contrary to Chinese Taipei's argument, the case law recognizes that where an interested party withholds necessary information, an unbiased and objective investigating authority may take this procedural circumstance into account and use facts on the record in a manner which, as contemplated in paragraph 7 of Annex II of the Anti-Dumping Agreement, may be less favourable, i.e. adverse, to that party than if it had cooperated. In this context, and contrary to Chinese Taipei's argument, the CBSA's ministerial specification cannot be considered punitive.

28. Second, Chinese Taipei argues the CBSA's use of facts available was not based on a comparative evaluation that took into account all of the information on the record. This allegation is factually incorrect. In particular, Chinese Taipei fails to recognize that the record of the CSWP investigation establishes either explicitly, or by necessary implication, that the CBSA engaged in a systematic evaluation of all of the facts on the record pursuant to which it determined the appropriate basis for establishing the normal values for non-cooperating exporters. Indeed, the CBSA's conduct in the CSWP investigation can be distinguished from instances where an investigating authority was found to have contravened Article 6.8 and Annex II by simply using facts that were included in petitioner applications without further scrutiny, by corroborating the appropriateness of the selected facts in an arbitrary manner, or by making determinations that are devoid of any factual foundation.

29. Third, Chinese Taipei argues that the CBSA's use of facts available was contrary to the "best information available" requirement on the basis that there was no "logical relationship" between the rates established for "all other" Chinese Taipei exporters and the facts on the record

concerning Chinese Taipei exports. While Canada agrees that the information selected in the application of facts available must have a "logical relationship" to the missing information from the record, Chinese Taipei fails to establish that the CBSA did not meet this requirement. Indeed, the methodology described above ensured that the CBSA used facts that reasonably replaced the information missing from the record. It also ensured that the procedural circumstances of the investigation were taken into account, as well as the need to encourage cooperation and prevent anti-dumping duty circumvention.

30. Moreover, to the extent Chinese Taipei argues that the CBSA should have relied on the information provided by the cooperating Chinese Taipei exporters, Canada submits such an argument lacks support in the Anti-Dumping Agreement as it ignores the procedural character of the obligations under Annex II, paragraph 7. Those obligations do not guarantee a specific outcome to non-cooperating interested parties.

31. For these reasons, Canada submits that Chinese Taipei's claims with respect to the treatment of "all other exporters" must fail.

E. The CBSA's Prospective Treatment of New Product Models Would Not Violate Articles 9.3 and 6.8, Annex II, and Articles 2.2 and 6.10 of the Anti-Dumping Agreement

32. Chinese Taipei also claims that the CBSA's prospective application of the ministerial specification to new product types ("new product models") exported by cooperating exporters would violate Articles 9.3 and 6.8, Annex II, and Articles 2.2 and 6.10 of the Anti-Dumping Agreement. These claims, however, are premised on a fundamental misunderstanding of Canada's prospective duty assessment system, rely on misinterpretations of the relevant legal obligations, and ignore the practical need to apply facts available to product models that have not been investigated.

1. The CBSA's Prospective Use of Facts Available in the Calculation of Anti-Dumping Duties for New Product Models Would Not Violate Article 9.3 of the Anti-Dumping Agreement

33. Chinese Taipei claims that the CBSA violated Article 9.3 of the Anti-Dumping Agreement because it imposed anti-dumping duties on new models of subject goods from cooperating exporters in excess of their margin of dumping.

34. Chinese Taipei's claim that the CBSA violated Article 9.3 is flawed, as it is premised on speculation. Article 9.3.2 conditions the availability of a refund on (i) an importer of subject goods paying anti-dumping duties; and (ii) that importer requesting a refund for overpayment with respect to those duties. Chinese Taipei has provided no evidence that any exporter from Chinese Taipei has shipped a new model of subject goods to Canada that has been subject to the "all other exporters" rate determined by ministerial specification. Therefore, no Chinese Taipei exports of new models have been subject to an initial duty assessment, let alone an assessment that has been subject to a refund request, as contemplated under Article 9.3.2. In this sense, not only is Chinese Taipei's claim premature, it does not even amount to a *prima facie* case of a violation.

35. Chinese Taipei also incorrectly claims that the ceiling for anti-dumping duties under Article 9.3 is limited to the "margin of dumping" established in the original investigation. Chinese Taipei's theory is directly contradicted by the relevant jurisprudence on the liability for payment and collection of anti-dumping duties in prospective normal value systems, which indicates that the margin of dumping during duty assessment is not limited by the margin of dumping established for a particular exporter during the original investigation.

36. Moreover, Chinese Taipei's claim that the application of the ministerial specification to new models will necessarily result in duties that exceed the margin of dumping for cooperating exporters ignores that under a prospective duty system the initial collection of anti-dumping duties is not the final stage of duty assessment. Under Canada's prospective duty system, anti-dumping duties are assessed and collected on the basis of a comparison between normal values determined during an investigation or re-investigation and export prices determined during the enforcement

period. When an importer believes that anti-dumping duties were improperly collected it can apply for a refund to ensure that final duty assessment is based on accurate normal values.

2. The CBSA's Prospective Use of Facts Available with Respect to New Product Models Would Not Violate Article 6.8 and Annex II of the Anti-Dumping Agreement

37. Chinese Taipei also claims that the CBSA violated Article 6.8 and Annex II of the Anti-Dumping Agreement by resorting to facts available to determine normal values for new models of subject goods shipped by cooperating exporters. However, Chinese Taipei's claim is internally inconsistent and illogical.

38. Chinese Taipei initially argues that the CBSA lacked the legal authority to rely on facts available with respect to new models of subject goods. However, it then criticizes the CBSA for its selection of certain available facts. In so doing, Chinese Taipei implicitly concedes that resorting to facts available was appropriate under these circumstances.

39. This makes sense, as not being able to do so would prevent an investigating authority from establishing normal values for new models of subject goods that could not have been investigated during the initial investigation. Without an ability to apply facts available, anti-dumping duties could never be levied on new models, thereby creating a significant gap in the anti-dumping disciplines.

40. Finally, when claiming that the CBSA's application of the ministerial specification contravenes paragraph 7 of Annex II, Chinese Taipei fails to recognize the variety of review procedures under Canada's trade remedies regime that fairly accommodate exporters and importers of new product models of subject goods.

3. The CBSA's Prospective Use of Facts Available in the Calculation of Normal Values for New Product Models Would Not Violate Article 2.2 of the Anti-Dumping Agreement

41. Chinese Taipei claims that the CBSA's application of the ministerial specification to establish normal values for new models of subject goods contravenes Article 2.2 of the Anti-Dumping Agreement.

42. Chinese Taipei fails to recognize that the obligations under Article 2.2 presuppose that an investigating authority has the information necessary to calculate normal values. "New" product models are those shipped after an initial investigation. As a result, an investigating authority is not in a position to determine model-specific normal values for those products when they are imported as they have yet to be investigated. Chinese Taipei ignores this, and does not explain how the CBSA could properly apply one of the Article 2.2 methodologies to new models of subject goods exported to Canada after the original CSWP investigation.

43. In the absence of the required information, Article 6.8 of the Anti-Dumping Agreement permits the CBSA to use facts available from the original investigation to determine a normal value for new product models. The use of facts available would cease, and individual normal values would be calculated in accordance with one of the methodologies set out under Article 2.2, when cooperating exporters or importers of new models of subject imports seek a re-investigation or a re-determination.

4. The CBSA's Prospective Use of Facts Available in the Calculation of Normal Values for New Product Models Would Not Violate Article 6.10 of the Anti-Dumping Agreement

44. Chinese Taipei also claims that the CBSA determined "two different dumping margins" for the same cooperating exporter, one during the original investigation and another, for new product models, during the duty enforcement phase. Chinese Taipei claims that in so doing the CBSA violated the general rule under Article 6.10 that an investigating authority shall determine "an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

45. Chinese Taipei's claim is flawed, as it is premised on an incorrect interpretation of the term "margin of dumping" and a fundamental misunderstanding of Canada's prospective duty assessment system. Chinese Taipei fails to take into account that, under the Anti-Dumping Agreement, "margins of dumping" are not specific to a particular product model or export transaction, but instead are determined for all export transactions from a particular exporter or producer, pertaining to products within the same defined scope over a designated period of time. Hence, a "margin of dumping", by definition, cannot be based on transactions pertaining only to specific product models.

46. By failing to acknowledge that the general rule under Article 6.10 has limited relevance after the conclusion of an anti-dumping investigation, Chinese Taipei also appears to fundamentally misunderstand the basic operation of Canada's duty assessment system. Under the Canadian system, the margin of dumping for a particular exporter calculated during the investigation phase has no relevance to duty assessment. After an investigation is complete, the CBSA compares the relevant normal value to an individual export transaction to determine the appropriate amount of the anti-dumping duty to be collected, if any. The calculation of an anti-dumping duty on this basis does not constitute a determination of a "margin of dumping". This is the case regardless of whether the normal value for a particular product model was established during the investigation or is established by ministerial specification during the enforcement phase.

F. Chinese Taipei Has Failed to Establish That Canada Violated Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

47. Chinese Taipei also makes the consequential claims that Canada violated Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. As established above, however, the determinations of dumping and injury by the CBSA and the CITT did not violate the Anti-Dumping Agreement and the GATT 1994. As a result, Chinese Taipei's claims under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 must fail.

III. CLAIMS CONCERNING CERTAIN PROVISIONS OF THE SPECIAL IMPORT MEASURES ACT AND OF THE SPECIAL IMPORT MEASURES REGULATIONS

A. Subsection 2(1), Section 30.1, and Subsections 35(1), 35(2), 38(1), and 41(1) of SIMA Are Not Inconsistent with Articles 1, 5.8, 7.1(ii), 7.5, and 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

48. Chinese Taipei claims that Subsection 2(1), Section 30.1, and Subsections 35(1), 35(2), 38(1), and 41(1) of SIMA are inconsistent, as such, with Articles 1, 5.8, 7.1(ii), 7.5, and 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, essentially because SIMA provides for a *de minimis* margin of dumping test to be carried out on a country basis, and not on an exporter-specific basis.

49. Canada demonstrates that SIMA is not inconsistent with Articles 5.8, 7.1(ii), 7.5, and 9.2, and, consequently, with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. In conformity with the Anti-Dumping Agreement, SIMA requires the termination of an investigation with respect to a country in certain situations, including when the margin of dumping of that country is *de minimis*. Unless the investigation is terminated as a whole, dumped imports are subject to the application of provisional measures and the imposition of definitive anti-dumping duties if injury is found, irrespective of an individual exporter's margin of dumping. However, Subsection 43(1) of SIMA confers discretion to the CITT to exclude an exporter with a *de minimis* margin of dumping from an injury finding.

B. Subsections 42(1), 42(6), and 43(1) of SIMA and Subsection 37.1(1) of the SIMR Are Not Inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement

50. Chinese Taipei submits that Subsections 42(1), 42(6), and 43(1) of SIMA and Subsection 37.1(1) of the SIMR are, as such, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement because they result in the automatic inclusion in the category of dumped imports, in the context of the injury analysis, of the imports of exporters with a *de minimis* margin of dumping.

51. According to Subsection 2(1) of SIMA, dumped "in relation to any goods, means that the normal value of the goods exceeds the export price thereof". Therefore, the term "dumped goods" as used in SIMA covers goods of exporters with a *de minimis* margin of dumping. This is consistent with the definition of dumping outlined in Article 2.1 of the Anti-Dumping Agreement, which does not distinguish between imports that are dumped at a margin above *de minimis* and those dumped at a margin below *de minimis* – both are "dumped".

52. The Appellate Body in *US – Carbon Steel,* when dealing with the meaning of subsidization under the SCM Agreement, stated that "[n]one of the provisions in the SCM Agreement that uses the term 'subsidization' confines the meaning of 'subsidization' to subsidization at a rate equal to or in excess of 1 percent ad valorem, or to any other *de minimis* threshold". Similarly, none of the references to dumping in Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement confines the meaning of "dumping" to dumping at a rate equal to or in excess of the *de minimis* threshold. Therefore, there is nothing in these provisions that requires the exclusion of imports with a *de minimis* margin of dumping from dumped imports when an investigating authority conducts an injury analysis.

53. Thus, Chinese Taipei has failed to demonstrate that Subsections 42(1), 42(6), and 43(1) of SIMA and Subsection 37.1(1) of the SIMR, as well as any implementing or related measures, are inconsistent, as such, with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement.

C. Chinese Taipei Has Failed to Establish that SIMA and the SIMR Are Inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement

54. As Canada demonstrates above, Subsection 2(1), Section 30.1, Subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and Subsection 37.1(1) of the SIMR are not inconsistent, as such, with the Anti-Dumping Agreement. Therefore, Chinese Taipei's claim under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement must fail.

D. Chinese Taipei Has Failed to Establish that SIMA and the SIMR Are Inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994

55. As Canada demonstrates above, Subsections 2(1), Section 30.1, Subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6) and 43(1) of SIMA and Subsection 37.1(1) of the SIMR are not inconsistent with the Anti-Dumping Agreement. Therefore, Chinese Taipei's claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 must fail.

IV. CONCLUSION

56. For the foregoing reasons, Canada respectfully requests that the Panel reject Chinese Taipei's claims.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CANADA

I. INTRODUCTION

1. In this second written submission, Canada responds to the submissions of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) at the first meeting of the Panel and in response to the Panel's questions. These submissions failed to prove that the Carbon Steel Welded Pipe (CSWP) investigation, the anti-dumping measures imposed as a result of the investigation, and the Special Import Measures Act (SIMA) are inconsistent with Canada's WTO obligations.

2. In its submissions, Chinese Taipei has put forward a number of arguments based on a misunderstanding of the Canadian system, a misapprehension of key factual elements of the CSWP investigation, and flawed interpretations of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994).

3. For the reasons that follow, in addition to the reasons in Canada's prior submissions, Canada submits that Chinese Taipei's claims have no merit and should be rejected by this Panel.

II. CLAIMS CONCERNING THE PROVISIONAL AND DEFINITIVE ANTI-DUMPING MEASURES IMPOSED BY CANADA ON IMPORTS OF CERTAIN CARBON STEEL WELDED PIPE ORIGINATING IN, AMONG OTHERS, CHINESE TAIPEI

A. The CBSA's Treatment of Chinese Taipei Exporters with *de Minimis* Margins of Dumping Did Not Violate Articles 5.8, 6.10, 7.1(ii), 7.5, and 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

1. The CBSA's Treatment of Chinese Taipei Exporters with *de Minimis* Margins of Dumping Did Not Violate Article 5.8 of the Anti-Dumping Agreement

4. Chinese Taipei claims that the Canada Border Services Agency (CBSA) violated Article 5.8 of the Anti-Dumping Agreement by failing to terminate the CSWP investigation with respect to Chinese Taipei exporters with *de minimis* margins of dumping.

5. The Appellate Body has recognized that a panel can depart from prior reasoning on a legal question if there are "cogent reasons" to do so. In the present dispute, there are cogent reasons to depart from the interpretation in *Mexico – Anti-Dumping Measures on Rice* that Article 5.8 requires termination of an investigation with respect to an individual exporter.

6. The Panel must interpret Article 5.8 in accordance with the ordinary meaning of the terms "termination", "investigation", and "margin of dumping", and in accordance with the context of those terms, which altogether establish that the requirement for termination of an investigation must be on a country basis. Article 5.8 establishes the requirements for termination of the investigation as a whole, which is set out in Article 5 as being conducted in relation to a product of a country of export, not an individual exporter. The greater context of Articles 9.4 and 3.3 confirms that the *de minimis* margin of dumping referred to in Article 5.8 is country based.

7. Furthermore, the interpretation in *Mexico – Anti-Dumping Measures on Rice* requiring exporter-specific termination is irreconcilable with the text of Article 9.4. Article 9.4 pertains to the application of Anti-Dumping duties in the separate and distinct phase of duty assessment occurring after the original investigation. Any assessment of duties done in accordance with Article 9.4, where *de minimis* margins would be disregarded, must necessarily be done following the definitive determination of dumping, injury, and causation made under Articles 2 and 3. If an investigation had been terminated with respect to exporters with *de minimis* margins of dumping, there would

be no need to disregard these margins of dumping when assessing definitive Anti-Dumping duties. The interpretation that termination for a *de minimis* margin of dumping under Article 5.8 pertains to an individual exporter therefore renders part of Article 9.4 inutile, contrary to the principle of effectiveness in treaty interpretation.

8. Finally, Chinese Taipei's interpretation would result in inconsistent treatment between an exporter found to be dumping at a *de minimis* margin during the original investigation and a new exporter found to be dumping at a *de minimis* margin during the duty assessment phase in a review under Article 9.5. The latter exporter could not be subject to termination under Article 5.8, as the investigation would have already been completed. Definitive anti-dumping duties could thus be imposed on that exporter, while definitive duties could not be imposed on an exporter dumping at a *de minimis* margin during the original investigation.

9. By contrast, there are no contradictions, inconsistencies, or redundancies in the Anti-Dumping Agreement if termination under Article 5.8 pertains to a country with a *de minimis* margin of dumping.

2. The CBSA's Application of Provisional Measures on Dumped Imports from a Chinese Taipei Exporter with a *de Minimis* Margin of Dumping Did Not Violate Article 7.1(ii) of the Anti-Dumping Agreement

10. Chinese Taipei claims that the CBSA should not have reached a preliminary affirmative determination of dumping against an exporter with a *de minimis* margin of dumping, and thus was not permitted to apply provisional measures against that exporter.

11. This claim must fail because the CBSA satisfied all the criteria of Article 7.1 in applying provisional measures. Article 7.1 of the Anti-Dumping Agreement requires an investigating authority to make a *singular* determination that relates to the investigation as a whole, per Article 7.1(i), that will be affirmative if dumping has been preliminarily found to be occurring and causing consequent injury, per Article 7.1(ii). The same is true with respect to the determination that provisional measures are necessary to prevent injury being caused during the investigation under Article 7.1(iii), which is determined with respect to the domestic industry of the country, not with respect to individual exporters.

12. Furthermore, there is no legal basis for Chinese Taipei's assertion that exporters with a *de minimis* margin of dumping are not considered as "dumping", neither in terms of the definition of dumping nor the object and purpose of the Anti-Dumping Agreement. A product is considered to be dumped, per Article 2.1, if it is imported into a country at an export price less than its normal value. The definition of dumping has the same meaning in all provisions of the Anti-Dumping Agreement and does not distinguish between goods being dumped at a margin above *de minimis* or below *de minimis*.

13. In the CSWP investigation, an investigation was initiated, preliminary affirmative determinations of dumping and consequent injury were made, and, given that provisional measures were considered necessary to prevent injury during the investigation, provisional duties were applied on dumped imports from Chinese Taipei exporters in an amount not greater than their margins of dumping. As a result, all the requirements of Article 7.1 were satisfied and the CBSA therefore did not violate Article 7.1(ii).

3. The CBSA's Application of Provisional Measures and Imposition of Definitive Anti-Dumping Duties on Dumped Imports from Chinese Taipei Exporters Did Not Violate Articles 7.5 and 9.2 of the Anti-Dumping Agreement

14. Chinese Taipei claims that the CBSA violated Articles 7.5 and 9.2 of the Anti-Dumping Agreement because the CBSA collected duties from sources found not to be dumped and causing injury by applying provisional measures and imposing definitive anti-dumping duties on CSWP imports from Chinese Taipei exporters with *de minimis* margins of dumping.

15. Chinese Taipei's position is irreconcilable with the definition of dumping and the meaning of the term "appropriate amounts". The appropriate amount means the amount by which the normal value exceeds the export price, which is consistent with the definition of dumping referring to a product introduced into the commerce of another country at less than its normal value in that country. There is no exception or threshold for a *de minimis* margin of dumping in this definition or in Article 9.2. Therefore, the CBSA's application of duties in the appropriate amounts on all exporters that were found to be dumping did not violate Articles 7.5 and 9.2.

4. The CBSA's Determination of an Individual Margin of Dumping for Each Chinese Taipei Exporter Did Not Violate Article 6.10 of the Anti-Dumping Agreement

16. Chinese Taipei alleges that the CBSA violated Article 6.10 of the Anti-Dumping Agreement by calculating a country-based margin of dumping in addition to the individual margins of dumping calculated for each exporter. It argues that Article 6.10 requires the calculation of a single margin of dumping and that the country based margin of dumping constitutes a second margin of dumping for each exporter.

17. Chinese Taipei's argument must be rejected. The calculation of a country based margin of dumping does not constitute the establishment of a second margin of dumping for an individual exporter. Article 6.10 simply requires that an investigating authority determine an individual margin of dumping for each known exporter, which was done by the CBSA in the CSWP case.

B. The CITT's Treatment of Dumped Imports in Its Injury Analysis Did Not Violate Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement

18. Contrary to Chinese Taipei's claim, the Canadian International Trade Tribunal's (CITT) inclusion of all dumped imports in its injury analysis, including those from exporters with a *de minimis* margin of dumping, was consistent with the Anti-Dumping Agreement. Nothing in Articles 3.1, 3.2, 3.4, 3.5, or 3.7 the Anti-Dumping Agreement confines the meaning of "dumping" to dumping at a rate equal to or in excess of the *de minimis* threshold.

19. The definition of dumping clearly does not provide for a distinction to be drawn between imports that are dumped at a margin above *de minimis* and those dumped at a margin below *de minimis* –both are "dumped". Furthermore, the references to the term "dumped" in Articles 3.1, 3.2, 3.4, 3.5 and 3.7 are in no way qualified by any reference to *de minimis* margins of dumping. It is therefore only imports with a zero margin that should be considered as not dumped. This was the approach taken by the CITT in its injury analysis in the CSWP investigation. The Appellate Body decision in *US – Carbon Steel* is directly relevant to this issue and supports Canada's position.

C. The CITT's Non-Attribution Analysis Did Not Violate Articles 3.1 and 3.5 of the Anti-Dumping Agreement

1. The CITT Was Not Obligated to Examine and to Separate and Distinguish the Effects of Subsidies

20. Chinese Taipei criticizes the CITT for having failed, in its CSWP injury analysis, to separate and distinguish the effects of subsidies granted to Indian exporters.

21. Article 3.5 of the Anti-Dumping Agreement provides that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement". It also provides that "[t]he authorities 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." These obligations are referred to as the causal link and non-attribution requirements. Pursuant to the non-attribution requirement, an investigating authority must ensure that it separates and distinguishes the effects of other known factors of injury from the effects of the dumped imports.

22. Subsidies provided to exporters of dumped imports are not a factor *other than the dumped imports* which can at the same time injure the domestic industry because subsidies provided to exporters of dumped imports can only injure the domestic industry *through* the dumped imports. Therefore, a non-attribution analysis cannot be based on a requirement to separate and distinguish the effects of the subsidies from the effects of the dumped imports. A non-attribution analysis concerning subsidies could only be based on a requirement to separate and distinguish the effects of the subsidies from the effects of dumping. In turn, the only reason to conduct a non-attribution analysis of that nature under the Anti-Dumping Agreement would be if the required causal link were between dumping and injury. However, this is not the case. In an injury analysis conducted in accordance with the Anti-Dumping Agreement, in line with the Appellate Body decision in *Japan – DRAMs (Korea)*, the central issue is whether the *dumped imports* are causing or are threatening to cause injury to a domestic industry. The required causal link is thus between dumped imports and injury, not between dumping and injury.

23. Given that there is no requirement that the effects of the *dumping* be found to cause injury under the Anti-Dumping Agreement, there can be no requirement under the Agreement that, when goods are both dumped and subsidized, the effects of *subsidies* be separated and distinguished from the effects of the *dumping*.

24. In the CSWP inquiry, the CITT cumulated the effects of imports from India with those from Chinese Taipei and four other subject countries because the imports from all of these countries were dumped. The fact that the imports from India were also subsidized was not relevant to the CITT's injury analysis under the Anti-Dumping Agreement. There was no requirement to examine and to separate and distinguish the effects of the subsidies provided by India.

2. The CITT Was Not Obligated to Examine and to Separate and Distinguish the Effects of Excess Capacity

25. Chinese Taipei argues that, in the CSWP inquiry, excess capacity[1] was a known factor of injury that the CITT was required to examine in the context of its non-attribution analysis.

26. Article 3.5 of the Anti-Dumping Agreement requires that the effects of other known factors of injury be separated and distinguished from the effects of dumped imports. As a general rule, excess capacity or low capacity utilization in a domestic industry is an indicator of injury, not a factor or cause of injury to that industry.

27. Even assuming that excess capacity may be a cause of injury in certain cases, Chinese Taipei has not demonstrated that it was a known cause of injury in the CSWP inquiry that the CITT had to examine in its threat of injury analysis.

28. First, contrary to Chinese Taipei's assertion, the CITT did not consider that there was excess capacity in the domestic CSWP industry constituting a cause of injury.

29. Second, the only evidence to which Chinese Taipei refers to support its position that excess capacity as a cause of injury was brought to the CITT's attention is a submission by Knightsbridge filed during the CITT's preliminary injury inquiry. Knightsbridge did not refer to any evidence to support its statement that "[w]e are all operating at less than 50% of where we were at". Its ambiguous statement does not appear consistent with the data on capacity utilization in the CITT's pre-hearing staff report. Moreover, that statement does not indicate that excess capacity was a cause of injury in the CSWP investigation. Knightsbridge does not refer to excess capacity but rather to a decline in the utilization of capacity, an indicator of injury listed in Article 3.4 of the Anti-Dumping Agreement.

30. Third, the CITT did not find that the subject imports had caused injury to the domestic industry. Therefore, it was not required to examine other possible factors that could have caused injury. The CITT found that the subject imports threatened to cause material injury to the domestic industry in the future. In assessing threat of injury, the CITT considered two other possible factors or causes of injury. Chinese Taipei does not refer to any evidence on the record of

[1] While Chinese Taipei uses the term "overcapacity" in its submissions, Canada will use the term "excess capacity" henceforth.

the CITT indicating that the alleged excess capacity was a known factor that threatened to cause injury in the future, at the same time as the dumped imports.

D. The CBSA's Treatment of "All Other Exporters" Did Not Violate Article 6.8 and Annex II of the Anti-Dumping Agreement

1. Chinese Taipei Misrepresents the Process by Which the CBSA Selected Information for the Ministerial Specification in the CSWP Investigation

31. According to Chinese Taipei, the process by which the CBSA applied facts available was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement. Chinese Taipei claims that the CBSA's methodology was inconsistent with the disciplines on facts available because it was "mechanistic", "automatic", and, ultimately, "punitive". It also alleges that the CBSA used the "worst information available" and outright failed to assess facts on the record of the investigation.

32. These arguments are directly contradicted by information on the record of the investigation, which indicates that the CBSA complied with the procedural obligations disciplining the use of facts available. Contrary to Chinese Taipei's characterization, the methodology employed by the CBSA was not "mechanistic" as it included an assessment of all export transactions from the period of investigation. The record to the investigation makes it clear that the CBSA conducted a systematic assessment of all the information submitted by all interested parties in the CSWP investigation, including by Chinese Taipei exporters.

33. Moreover, it cannot be said that the CBSA based its determination solely on the procedural circumstances of the investigation. Chinese Taipei's argument on this point ignores the process by which the CBSA selected available facts and improperly equates the use of adverse inferences with "punitive" conduct. In this respect, the CBSA's selection of reliable and representative facts in the CSWP investigation is also distinguishable from violations of the disciplines on facts available in other WTO proceedings, particularly *Mexico – Anti-Dumping Measures on Rice* and *China – GOES*.

34. Finally, the proposition that the CBSA used the "worst information available" to arrive at the worst possible result for "all other exporters" is unsubstantiated and irreconcilable with the facts on the record in the CSWP investigation. In particular, the CBSA's use of information from the application by the domestic industry could have led to a margin of dumping and duty rate for "all other exporters" higher than that prescribed in the ministerial specification.

2. Chinese Taipei Ignores an Investigating Authority's Necessary Flexibility in the Application of Facts Available

35. In its submissions, Chinese Taipei has repeatedly implied that the CBSA was obligated to base its determination on information from Chinese Taipei exporters. Chinese Taipei suggests that the CBSA's failure to do so reflected a lack of objectivity. This argument, however, ignores the flexibility inherent to an investigating authority's discretion when applying facts available.

36. As noted in Canada's first written submission, the disciplines under Annex II are procedural in nature and do not guarantee specific outcomes to non-cooperating parties. Where an exporter fails to participate in an investigation, or otherwise withholds certain information, an investigating authority necessarily has flexibility in determining the appropriate information to serve as a proxy.

37. This flexibility is encompassed within the "reasonable replacement" standard articulated by the Appellate Body for determining the appropriateness of an investigating authority's selection of particular "facts". Flexibility is also necessary so that an investigating authority can establish a residual duty rate that achieves the policy objectives outlined by the panel in *China – Autos (US)*.

38. Furthermore, in addition to being inconsistent with the procedural obligations under Annex II, a finding that the CBSA was required to use specific information would be contrary to Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 17.6 of the Anti-Dumping Agreement. The role of the Panel in this dispute is to determine whether the establishment of the "all other exporters" rate by the CBSA was consistent with the Anti-Dumping Agreement. It is not to decide what information the CBSA should have used to establish that rate.

E. The CBSA's Prospective Treatment of New Product Models Would Not Violate the Anti-Dumping Agreement

1. The CBSA's Prospective Treatment of New Product Models Would Not Violate Article 9.3 of the Anti-Dumping Agreement

39. Chinese Taipei continues to argue that the CBSA violated the *chapeau* of Article 9.3 of the Anti-Dumping Agreement by prospectively assigning a duty rate based on the ministerial specification to new product models in the CSWP investigation. This argument, however, is predicated on a fundamentally incorrect interpretation of Article 9.3.

40. Chinese Taipei ignores that Members that employ prospective normal value systems, as is the case in Canada, comply with Article 9.3 by refunding excess duties collected, in accordance with Article 9.3.2. Under Article 9.3.2, a refund for overpayment of duties is available if: 1) an importer of subject goods actually pays anti-dumping duties; and 2) that importer requests a refund for overpayment that is duly supported by evidence. In the present dispute, because no evidence on the record indicates that Chinese Taipei exports of new product models have been subject to an initial duty assessment, let alone an assessment that has been subject to a refund request, the CBSA cannot be said to have violated Article 9.3.2 or the general obligation under Article 9.3. It is in this sense that Chinese Taipei's claim is premature, and must be rejected on the basis that Chinese Taipei has not established a *prima facie* case of violation.

41. A related point pertains to the intermediate nature of the initial collection of duties under prospective duty assessment systems. By claiming that applying the ministerial specification to new models will necessarily result in duties that exceed the margin of dumping for cooperating exporters, Chinese Taipei ignores that the initial collection of anti-dumping duties is not the final stage of duty assessment. When an importer believes that anti-dumping duties were improperly collected it can apply for a re-determination to ensure that final duty assessment is based on accurate normal values, and that any duties collected in excess of the appropriate amount are refunded.

42. Chinese Taipei also incorrectly argues that the margin of dumping from the original investigation sets an upper limit on duty assessment. Contrary to Chinese Taipei's claim, the panel decisions in *Argentina – Poultry Anti-Dumping Duties* and *EC – Salmon (Norway)* indicate that an investigating authority is not required to assess anti-dumping duties by reference to the margin of dumping established during the original investigation.

43. Finally, Chinese Taipei fails to recognize that the Anti-Dumping Agreement does not prescribe a specific methodology according to which duties for new product models must be assessed. In Canada's view, this silence permits investigating authorities a measure of flexibility with respect to the treatment of those models for duty assessment purposes. The CBSA's use of facts available to establish normal values for new product models should be viewed in line with that flexibility. Following Chinese Taipei's position on what the CBSA "should" have done would not only ignore this flexibility, it would also be inconsistent with the Panel's role in adjudicating this dispute, as set out under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement.

2. The CBSA's Prospective Application of Facts Available to New Product Models Is Both Necessary and Reasonable

44. Chinese Taipei argues that the CBSA is prohibited from applying facts available when assessing duties on new product models from cooperating exporters, yet it ignores that information pertaining to those models is necessary in order to determine their normal values.

45. This is because different models of subject goods can have different characteristics. The normal value of one model cannot be assumed to be applicable to another for which there is no pricing information. In this respect, information pertaining to product models that were not investigated should be viewed as necessary.

46. Under Canada's prospective duty assessment system, anti-dumping duties are assessed based on a comparison between model-specific normal values and transaction-specific export prices. As "new" product models are those that have not been subject to an investigation or

re-investigation, the CBSA would not have pricing or cost information for those models to establish their normal values. Thus, at the time of duty assessment, the CBSA would be prevented from establishing normal values for uninvestigated models if it were not able to rely on facts available, i.e. information pertaining to *different* exporters or product models. In turn, this lack of information would prevent the CBSA from being able to assess duties on new product models, which would create a gap in the anti-dumping disciplines.

47. Therefore, to the extent that any exporter from Chinese Taipei does not provide information pertaining to new product models, it would be appropriate for the CBSA to apply facts available, following the parameters of Annex II of the Anti-Dumping Agreement, in order to establish the normal values of those models.

III. CLAIMS CONCERNING CERTAIN PROVISIONS OF THE *SPECIAL IMPORT MEASURES ACT* AND OF THE *SPECIAL IMPORT MEASURES REGULATIONS*

A. SIMA Is Not Inconsistent "As Such" with Article 5.8 of the Anti-Dumping Agreement with Respect to the Treatment of Exporters with *de Minimis* Margins of Dumping

48. Chinese Taipei claims that Subsection 2(1), Section 30.1, and Subsection 41(1) of SIMA are, as such, inconsistent with Article 5.8 of the Anti-Dumping Agreement because, when read together, they require that an affirmative dumping determination be made with respect to all goods of a country, including those of exporters with *de minimis* margins of dumping, if that country's margin of dumping is two percent or more. Chinese Taipei further claims that the text of Subsection 43(1) of SIMA does not provide the CITT with discretion to terminate an investigation with respect to exporters with *de minimis* margins of dumping.

49. Canada has demonstrated that Article 5.8 of the Anti-Dumping Agreement does not require the termination of an investigation with respect to an exporter with a *de minimis* margin of dumping. Even if Article 5.8 were to be interpreted as requiring exporter-specific termination, SIMA could not be found to violate, as such, Article 5.8. Canada acknowledges that Subsection 2(1), Section 30.1 and Subsection 41(1) of SIMA do not grant the CBSA discretion to terminate an investigation with regard to exporters with *de minimis* margins of dumping. However, Subsection 43(1) of SIMA provides the CITT with the discretion necessary to exclude such exporters from an injury finding and therefore to terminate the investigation with respect to those exporters.

50. It is well settled that, as a general rule, the burden rests upon the complaining party to establish the inconsistency of the measure it challenges with a particular provision of a WTO covered agreement. When a measure is challenged "as such", the starting point for an analysis must be the measure on its face. If the meaning and content of a measure are clear on its face, then the consistency of the measure "as such" can be assessed on that basis alone. To warrant a finding of an "as such" violation, the measure must be determinative in precluding WTO consistent action.

51. The CITT's discretion to exclude exporters, including exporters with *de minimis* margins of dumping, is clear on the face of Subsection 43(1) of SIMA. The CITT's discretion to grant exclusions from an affirmative injury or threat of injury finding is well established in Canadian law. In its statement of reasons in the CSWP inquiry, the CITT stated that "[t]he Tribunal has discretionary authority under subsection 43(1) of *SIMA* to grant exclusions from its findings". The CITT referred to Federal Court of Appeal of Canada and NAFTA Chapter 19 binational panel decisions confirming its discretion to grant product and producer exclusions. The CITT's discretion is illustrated by the fact that it granted two product exclusions in its CSWP inquiry. The CITT used its discretion in deciding not to grant the producer exclusion requested. By addressing the request on its merits, the CITT implicitly confirmed that it had the discretion under Subsection 43(1) of SIMA to grant producer exclusions.

B. SIMA and the SIMR Are Not Inconsistent "As Such" with Articles 1, 3.1, 3.2, 3.4, 3.5, 3.7, 7.1(ii), 7.5, 9.2, and 18.4 of the Anti-Dumping Agreement, Article VI of the GATT 1994, and Article XVI:4 of the WTO Agreement

52. Canada responded to these claims in its first written submission. Given that Chinese Taipei has not presented additional arguments in support of its claims related to these provisions, Canada will not address these claims further in this submission.

IV. CONCLUSION

53. For the reasons outlined above, Canada respectfully requests that the Panel reject Chinese Taipei's claims.

ANNEX C-3

EXECUTIVE SUMMARY OF THE STATEMENT OF CANADA
AT THE FIRST MEETING OF THE PANEL

I. INTRODUCTION

1. This dispute concerns anti-dumping measures imposed by Canada on imports of certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (or Chinese Taipei). Chinese Taipei claims that the investigation that led to the imposition of the anti-dumping measures, the measures themselves, and certain provisions of the *Special Import Measures Act* (or SIMA) are inconsistent with the Anti-Dumping Agreement and the GATT 1994. Canada demonstrates that the investigation and the application of anti-dumping measures on Welded Pipe from Chinese Taipei, as well as the relevant provisions of SIMA, are not inconsistent with the Anti-Dumping Agreement.

II. THE CBSA'S TREATMENT OF CHINESE TAIPEI EXPORTERS WITH *DE MINIMIS* MARGINS OF DUMPING DID NOT VIOLATE ARTICLE 5.8 OF THE ANTI-DUMPING AGREEMENT

A. The Termination of an Investigation Pertains to a Country and Is Only Required When the Country-Based Margin of Dumping Is *de Minimis*

2. The fundamental question raised by Chinese Taipei's claim is whether the requirement in Article 5.8 to terminate an investigation when the margin of dumping is *de minimis* pertains to a country or to an individual exporter. Canada submits that termination of an investigation is required when a country-based margin of dumping is *de minimis*, not when an individual exporter has a *de minimis* margin of dumping.

3. A treaty must be interpreted "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". The ordinary meaning of the terms "termination", "investigation", and "margin of dumping" is consistent with the termination of an investigation being required on a country basis.

4. Canada has demonstrated that the context in which these terms are used confirms that an investigation of dumped imports from a country must be terminated only when that country's overall margin of dumping is de minimis. According to Article 5, an investigating authority initiates and conducts only one investigation – for a country. The investigating authority does not conduct as many investigations as there are exporters. Consequently, the requirement to terminate an investigation must pertain to a country, not to an individual exporter. All of the situations in Article 5.8 pertain to country-based termination. In all situations, it is the investigation as a whole that must be terminated. An interpretation of Article 5.8 requiring termination of an investigation with respect to an individual exporter with a *de minimis* margin of dumping would render part of Article 9.4 redundant. In addition, the specific reference in Article 3.3 to the phrase *de minimis* strongly implies that the type of margin of dumping is the same in both Article 3.3 and Article 5.8 – a margin of dumping with respect to a country.

5. As a result, termination of an investigation with respect to an entire country is what is required under the second sentence of Article 5.8 when the country-based margin of dumping is *de minimis*. Even if the Panel agreed with Chinese Taipei's interpretation of Article 5.8, SIMA would nevertheless be consistent with the Anti-Dumping Agreement. When making an injury finding, the CITT has the discretion to exclude any exporter whose margin of dumping is less than two percent.

B. The CBSA Did Not Violate Articles 6.10, 7.1(ii), 7.5, and 9.2 of the Anti-Dumping Agreement

6. Chinese Taipei also makes three related claims of violations of other provisions of the Anti-Dumping Agreement that are premised on Article 5.8 requiring an exporter-specific termination. These claims must be rejected. First, Chinese Taipei claims that Canada violated Article 6.10, which requires an investigating authority to determine an individual margin of dumping for each exporter. However, Chinese Taipei admits that the CBSA determined an individual margin of dumping for each exporter. The CBSA's additional determination of Chinese Taipei's country-based margin of dumping is simply irrelevant under Article 6.10. Therefore, Chinese Taipei's claim of a violation "as applied" is without merit.

7. Second, Chinese Taipei claims that Canada violated Article 7.1(ii) both "as applied" and "as such". Article 7.1(ii) requires that preliminary affirmative determinations of dumping and injury must be made in order for provisional duties to be applied. In terms of the "as applied" claim, it is sufficient to point out that the CBSA made a preliminary dumping determination before applying provisional measures on dumped imports. This is shown by Chinese Taipei's own evidence. Accordingly, the CBSA complied with the requirements under Article 7.1(ii). In response to the "as such" claim, nothing in Article 7.1(ii) suggests that provisional measures cannot be applied on dumped imports from an exporter whose provisionally estimated margin of dumping is *de minimis*.

8. Third, Chinese Taipei claims that Canada violated Articles 7.5 and 9.2, both "as applied" and "as such", because the CBSA collected duties on dumped imports from exporters with *de minimis* margins of dumping. Article 9.2 requires that anti-dumping duties be collected on imports from *all* individual exporters with the sole exception of exporters from which price undertakings have been accepted. In the Welded Pipe investigation, the CBSA imposed provisional and definitive anti-dumping duties on all imports from Chinese Taipei exporters that had an export price less than their normal value. That is, it imposed duties on all dumped goods, including the dumped imports from any exporter with a *de minimis* margin of dumping. This is what SIMA requires and it is consistent with the Anti-Dumping Agreement. Therefore, Chinese Taipei's "as applied" and "as such" claims of violation under Articles 7.5 and 9.2 must fail.

III. THE CBSA'S USE OF FACTS AVAILABLE TO DETERMINE THE DUMPING MARGIN AND DUTY RATE FOR "ALL OTHER EXPORTERS" DID NOT VIOLATE ARTICLE 6.8 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

9. Chinese Taipei claims that the CBSA's use of facts available to determine the margin of dumping and the anti-dumping duty rate for "all other exporters" violated Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. Chinese Taipei's arguments must fail as they mischaracterize relevant facts and applicable law.

10. First, Chinese Taipei argues that the CBSA's use of facts available effectively punished non-cooperating exporters. However, Chinese Taipei fails to recognize that an investigating authority has discretion to draw inferences, including adverse inferences, based on the procedural circumstances of the investigation. These inferences must have a reasonable connection to the information available, but the express terms of Annex II clearly indicate that they may lead to a less favourable outcome for the non-cooperating party. In the Welded Pipe investigation, the CBSA's use of facts available cannot be considered punitive: it was based not only on verified facts gathered during the investigation, but also on reasonable inferences concerning exporters that decided not to participate. Indeed, if the CBSA's approach were deemed punitive, exporters and foreign producers that have injuriously dumped could actually benefit from a lack of cooperation.

11. Second, Chinese Taipei argues that the CBSA's use of facts available was not based on a comparative evaluation that took into account all of the information on the record. This is factually incorrect. The record of the Welded Pipe investigation establishes either explicitly, or by necessary implication, that the CBSA engaged in a systematic evaluation of all of the information on the record, following which it determined how it would establish normal values for non-cooperating exporters.

12. Third, Chinese Taipei argues that the CBSA failed to select facts for "all other" Chinese Taipei exporters that were logically related to facts on the record concerning Chinese Taipei exports. Yet, the methodology employed by the CBSA ensured that it used facts from the investigation that reasonably replaced information that was missing from the record. It also ensured that the procedural circumstances of the investigation were taken into account, as well as the need to encourage cooperation and prevent anti-dumping duty circumvention. For these reasons, Chinese Taipei's claims under Article 6.8 and Annex II must fail.

IV. THE CBSA'S PROSPECTIVE TREATMENT OF NEW PRODUCT MODELS WOULD NOT VIOLATE THE ANTI-DUMPING AGREEMENT

A. The CBSA's Prospective Use of Facts Available in the Calculation of Anti-Dumping Duties for New Product Models Would Not Violate Article 9.3 of the Anti-Dumping Agreement

13. Chinese Taipei claims that the CBSA violated Article 9.3 of the Anti-Dumping Agreement because it imposed anti-dumping duties on new models of subject goods in excess of their margin of dumping. Its claim, however, fails to address the relationship between Article 9.3 and Article 9.3.2. Article 9.3.2 sets two primary conditions for the availability of a refund: first, an importer of subject goods must have paid anti-dumping duties; *and* second, an importer must have requested a refund for overpayment with respect to those duties. Here, Chinese Taipei has provided no evidence that any exports of new product models have been subject to an initial duty assessment, let alone an assessment that has been subject to a refund request. In this sense, not only is Chinese Taipei's claim premature, it does not even amount to a *prima facie* case of a violation.

14. Chinese Taipei also incorrectly claims that the ceiling for anti-dumping duties under Article 9.3 is limited to the "margin of dumping" established in the original investigation. Canada draws the Panel's attention to *Argentina – Poultry Anti-Dumping Duties* and *EC – Salmon (Norway)*, which contradict Chinese Taipei's argument.

15. Chinese Taipei further claims that applying the ministerial specification to new product models will necessarily result in duties that exceed an exporter's margin of dumping established in the original investigation. However, this claim ignores that under a prospective duty system, the initial collection of anti-dumping duties is not the final stage of duty assessment. The Appellate Body recognized this in *US – Continued Zeroing*. Under the Canadian duty assessment system, an importer can request updated normal values through a re-determination or a re-investigation. Any retroactive update of the normal values can result in a refund if the updated normal values are lower than they were before the update.

B. The CBSA's Prospective Use of Facts Available with Respect to New Product Models Would Not Violate Article 6.8 and Annex II of the Anti-Dumping Agreement

16. Chinese Taipei also claims that the CBSA violated Article 6.8 and Annex II of the Anti-Dumping Agreement by resorting to facts available to determine normal values for new product models. Chinese Taipei initially argues that the CBSA lacked the legal authority to rely on facts available with respect to new product models. However, it then criticizes the CBSA for its selection of certain available facts. In so doing, Chinese Taipei implicitly concedes that resorting to facts available was appropriate under these circumstances. This is logical and reasonable, as not being able to rely on facts available would prevent an investigating authority from establishing normal values for new models of subject goods that could not have been investigated during the initial investigation.

C. The CBSA'S Prospective Use of Facts Available in the Calculation of Normal Values for New Product Models Would Not Violate Article 2.2 or 6.10 of the Anti-Dumping Agreement

17. Canada demonstrates that the claims of violation under Articles 2.2 and 6.10 with respect to new product models are without merit. With respect to Article 2.2, "new" product models are those shipped after an initial investigation. As a result, an investigating authority is not in a position to

determine model-specific normal values for those products when they are imported as they have yet to be investigated.

18. Chinese Taipei's claim that the CBSA violated Article 6.10 by calculating "two different dumping margins" for the same cooperating exporter fails to take into account that, under the Anti-Dumping Agreement, "margins of dumping" are not specific to a particular product model or export transaction. Rather, "margins of dumping" are determined for all export transactions from a particular exporter or producer. Thus, contrary to Chinese Taipei's argument, a "margin of dumping" by definition cannot be based on only transactions pertaining to specific product models. In making this claim, Chinese Taipei's also appears to fundamentally misunderstand the operation of Canada's duty assessment system under which anti-dumping duties are assessed on a transaction-specific basis.

V. THE CITT'S TREATMENT OF DUMPED IMPORTS IN ITS INJURY ANALYSIS DID NOT VIOLATE ARTICLES 3.1, 3.2, 3.4, 3.5, AND 3.7 OF THE ANTI-DUMPING AGREEMENT

19. Nothing in the provisions cited by Chinese Taipei confines the meaning of "dumping" to dumping at a rate equal to or in excess of a *de minimis* threshold. There is no distinction to be drawn between imports that are dumped at a margin above *de minimis* and those dumped at a margin below *de minimis* – both are "dumped". It is only imports for which the margin of dumping is zero that should be considered as not dumped. The CITT's approach in its injury analysis in the Welded Pipe investigation is consistent with the Appellate Body's analysis in *US – Carbon Steel*.

20. On this issue, all of the decisions referred to by Chinese Taipei in its first written submission concerned companies for which the margin of dumping or definitive anti-dumping duty was zero. In each case, the panel concluded that the imports at issue were "non-dumped" and therefore should not have been included in the injury analysis. Thus, to the extent that these panels referred to *de minimis* margins of dumping, these references should be considered as *obiter dicta*.

21. Furthermore, as outlined above, an investigation need not be terminated with respect to imports from an individual exporter for which a *de minimis* margin of dumping has been calculated. Therefore, the CITT's treatment of dumped imports, including those from exporters with *de minimis* margins of dumping, did not violate the Anti-Dumping Agreement. Similarly, the relevant provisions of SIMA that require the CITT to include imports from *de minimis* exporters in its injury analysis are not "as such" inconsistent with the Anti-Dumping Agreement.

VI. THE CITT'S NON-ATTRIBUTION ANALYSIS DID NOT VIOLATE ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

22. Chinese Taipei argues that that by failing to separate and distinguish the effects caused by the subsidies from the effects caused by the dumping, Canada acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement. This argument is incorrect for two reasons. First, the Appellate Body decision in *Japan – DRAMs (Korea)* demonstrates that when the same goods are both dumped and subsidized, an investigating authority is not required to separate and distinguish the effects of the subsidies from the effects of the dumping of the goods. Hence, the CITT was not required to ensure that injury caused by the subsidizing was not attributed to the dumping. This is because the focus of an injury analysis is on the effects of the dumped imports, not on the effects of dumping or subsidizing.

23. Second, Chinese Taipei inappropriately relies on the Appellate Body decision in *US – Carbon Steel (India)* to support its position that the CITT should have separated the effects of the subsidies from those of the dumping. That decision essentially deals with cumulation rather than non-attribution. In the Welded Pipe inquiry, the effects of dumped imports from Chinese Taipei, India, and four other subject countries were cumulated by the CITT, consistent with Article 3.3 of the Anti-Dumping Agreement. The fact that the imports from India were also subsidized was irrelevant to the CITT's decision to cumulate the effects of all dumped imports. Therefore, the CITT was not required to examine the effects of subsidies and ensure that any injury caused by such subsidies was not attributed to the dumped imports.

24. Chinese Taipei also claims that Canada violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because the CITT failed to examine overcapacity and to separate and distinguish the effects caused by overcapacity from the effects caused by dumped imports. Declines in utilization rates, just as declines in sales and profits, are *indicators* of whether the domestic industry has suffered injury. They do not *cause* injury. Thus, the CITT did not violate Articles 3.1 and 3.5 of the Anti-Dumping Agreement by not separating and distinguishing the effects of low utilization rates, or overcapacity, from the effects of the dumped imports on the domestic industry.

VII. CONCLUSION

25. For the reasons presented, Canada submits that Chinese Taipei's claims have no merit and should be rejected by this Panel.

ANNEX C-4

EXECUTIVE SUMMARY OF THE STATEMENT OF CANADA
AT THE SECOND MEETING OF THE PANEL

I. INTRODUCTION

1. In its submissions, Chinese Taipei has put forward a number of arguments based on a misunderstanding of the Canadian system, a misapprehension of key factual elements of the Welded Pipe investigation, and flawed interpretations of the Anti-Dumping Agreement, the GATT 1994, and corresponding jurisprudence.

II. THE CBSA'S TREATMENT OF CHINESE TAIPEI EXPORTERS WITH *DE MINIMIS* MARGINS OF DUMPING DID NOT VIOLATE ARTICLES 5.8, 6.10, 7.1(II), 7.5, AND 9.2 OF THE ANTI-DUMPING AGREEMENT

2. Chinese Taipei argues that Article 5.8 of the Anti-Dumping Agreement requires that an investigation be terminated with respect to individual exporters with a *de minimis* margin of dumping. This argument, however, cannot be reconciled with the text of the Agreement.

3. Article 5.8 contemplates the termination of an investigation where the margin of dumping is *de minimis*, or where the volume of dumped imports or the injury is negligible. The first sentence of Article 5.8 explicitly states that it is the investigation as a whole that must be terminated when there is insufficient evidence of dumping. In this context, it is clear in the second sentence that "immediate termination" when the margin of dumping is *de minimis* also refers to the investigation as a whole. The volume, the injury, and the margin of dumping are all used in the singular, in reference to a single investigation, where each of these terms pertains to a country.

4. Moreover, Article 9.4 would be rendered inutile under Chinese Taipei's interpretation. The Appellate Body has stated that Article 9.4 relates to the application of duties in "a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation". Therefore, any of the rules contained in Article 9.4 must only be applicable after the completion of the investigation, meaning after any termination under Article 5.8 would have already taken place.

5. In addition, Chinese Taipei's position on exporter-specific termination results in inconsistent treatment under Article 9.5. Under Chinese Taipei's interpretation of Article 5.8, an exporter with a *de minimis* margin of dumping would be subject to termination if it had exported during the original period of investigation, yet it would be subject to the application of anti-dumping duties if it had only begun exporting in the duty assessment phase. This inconsistency does not exist if termination under Article 5.8 for a *de minimis* margin of dumping pertains to a country.

6. Chinese Taipei further argues that Canada violated Article 7.1(ii) in applying provisional measures against exporters with a *de minimis* margin of dumping because dumping at a *de minimis* margin cannot be considered "dumping". However, there is no "statutory threshold for the margin of dumping", as Chinese Taipei has argued, and no justification for altering the definition of what constitutes dumping. Canada satisfied the requirement under Article 7.1(ii) that a single preliminary determination of dumping be made, in relation to the entire investigation.

7. Moreover, Chinese Taipei argues that the CBSA's application of anti-dumping duties violates Articles 7.5 and 9.2 because the phrase "all sources found to be dumped" does not include exporters dumping at a *de minimis* margin. Chinese Taipei thereby proposes reading in an exception for a *de minimis* threshold where none is found in the text of the Agreement. Duties collected on imports from "all sources found to be dumped" includes imports dumped at a *de minimis* margin of dumping.

8. Chinese Taipei also argues that the CBSA violated Article 6.10 because it calculated a country-based margin of dumping for all Chinese Taipei exporters and used this in applying the

de minimis test. Article 6.10 does not preclude calculations other than determining an individual margin of dumping for each exporter from being performed. The calculation of a country-based margin of dumping, in addition to being required under Article 5.8, is also required under Article 3.3.

III. THE CITT'S TREATMENT OF DUMPED IMPORTS IN ITS INJURY ANALYSIS DID NOT VIOLATE ARTICLES 3.1, 3.2, 3.4, 3.5, AND 3.7 OF THE ANTI-DUMPING AGREEMENT

9. Nothing in the wording of Articles 3.1, 3.2, 3.4, 3.5, or 3.7 of the Anti-Dumping Agreement confines the meaning of "dumping" to dumping at a rate equal to or in excess of a *de minimis* threshold. The use of the term "dumped" in these provisions is in no way qualified by any reference to a *de minimis* margin of dumping. Only imports with a zero margin are properly considered as not dumped.

10. The facts of the present dispute can be distinguished from those in the panel decisions cited by Chinese Taipei, all of which concerned companies for which the margin of dumping *or* definitive anti-dumping duty was zero. Therefore, all of the statements referring to *de minimis* margins in these decisions should be considered *obiter dicta*. Furthermore, contrary to Chinese Taipei's assertion, the Appellate Body has never ruled on whether imports of exporters with a *de minimis* margin of dumping are to be excluded from an injury analysis. Indeed, the CITT's injury analysis in the Welded Pipe investigation is consistent with the Appellate Body's analysis in *US – Carbon Steel*.

IV. THE CITT'S NON-ATTRIBUTION ANALYSIS DID NOT VIOLATE ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT

11. Chinese Taipei argues that the effects of subsidies should have been separated and distinguished from the effects of dumping in the CITT's causation analysis. This argument improperly relies on the assumption that the Anti-Dumping Agreement requires an analysis of the effects of the dumping, as opposed to the effects of the dumped imports. The Appellate Body decision in *Japan – DRAMS (Korea)* shows that this assumption is false.

12. Given that there is no requirement that the effects of the dumping be found to be causing injury under the Anti-Dumping Agreement, there can be no requirement under the Agreement, when goods are both dumped and subsidized, that the effects of subsidies be separated and distinguished from the effects of the dumping. Moreover, there can be no requirement that the effects of the subsidies be separated and distinguished from the effects of the dumped imports, either. Therefore, the fact that certain dumped imports are also subsidized is not relevant to an injury analysis conducted pursuant to the Anti-Dumping Agreement.

13. In the Welded Pipe inquiry, the CITT cumulated the effects of imports from Chinese Taipei and five other subject countries because the imports from all of these countries were dumped. The fact that the imports from one of these countries, India, were also subsidized was not relevant to the CITT's injury analysis under the Anti-Dumping Agreement. There was no requirement to examine and to separate and distinguish the effects of the subsidies provided by India.

14. There is also no basis to Chinese Taipei's claims that overcapacity, or excess capacity, was an "other" factor that the CITT was required to examine in its non-attribution analysis. As a general rule, excess capacity or low capacity utilization in a domestic industry is an indicator of injury, not a factor or cause of injury to that industry. However, even assuming that excess capacity may be a cause of injury in certain cases, Chinese Taipei has not demonstrated that it was a known cause of injury in the Welded Pipe inquiry that the CITT had to examine in its threat of injury analysis.

V. THE CBSA'S USE OF FACTS AVAILABLE TO DETERMINE THE DUMPING MARGIN AND DUTY RATE FOR "ALL OTHER EXPORTERS" DID NOT VIOLATE ARTICLE 6.8 AND ANNEX II OF THE ANTI-DUMPING AGREEMENT

15. Chinese Taipei argues that the CBSA's use of the highest amount by which the normal value exceeded the export price in one transaction from a non-Chinese Taipei exporter punishes Chinese Taipei exporters for failing to cooperate.

16. This argument must fail. Chinese Taipei omits key aspects of the jurisprudence, resulting in a fundamental misrepresentation of the current state of the law. The tenuous nature of Chinese Taipei's argument is further highlighted by the repeated assertion that the CBSA selected the "worst information", which is both misleading and factually incorrect.

17. Chinese Taipei also claims that the CBSA failed to make any comparative and evaluative assessment of the facts on the record, despite the CBSA's analysis of all of the information filed by interested parties. Chinese Taipei ignores that the Appellate Body in *US – Carbon Steel (India)* rejected the need for a formalistic approach, recognizing that the form and extent of the evaluation of "facts available" may differ based on the particular circumstances of a given case.

18. Chinese Taipei also argues that the CBSA's application of facts available lacked a "logical relationship" to Chinese Taipei exports. Yet, Chinese Taipei has not clearly indicated what constitutes a "logical relationship" in the context of the selection of facts available nor adequately explained how the CBSA failed to meet such a standard. Indeed, the "logical relationship" in the Welded Pipe investigation is evidenced by the selection of information pertaining to actual sales transactions concerning the same product during the same period of time.

19. More fundamentally, by arguing that the CBSA was obligated to base its determination on information from Chinese Taipei exporters, Chinese Taipei seeks to impose on Canada a substantive obligation not contemplated under the Anti-Dumping Agreement. In so doing, Chinese Taipei ignores the flexibility inherent in an investigating authority's discretion when applying facts available.

VI. THE CBSA'S PROSPECTIVE TREATMENT OF NEW PRODUCT MODELS WOULD NOT VIOLATE THE ANTI-DUMPING AGREEMENT

20. Chinese Taipei claims that the duties imposed by the CBSA would necessarily exceed the margin of dumping from the original investigation and thus contravene the general rule under Article 9.3. Its claim, however, fails to address the relationship between Article 9.3 and Article 9.3.2. Article 9.3.2 sets two primary conditions for the availability of a refund: first, an importer of subject goods must have paid anti-dumping duties; *and* second, an importer must have requested a refund for overpayment with respect to those duties. Chinese Taipei has provided no evidence that any exports of new product models have been subject to an initial duty assessment, let alone an assessment that has been subject to a refund request.

21. Chinese Taipei's claim also ignores that, in a prospective normal value system, the initial collection of anti-dumping duties is not the final stage of duty assessment. Under the Canadian system, the re-determination mechanism allows an importer to ensure that final duty assessment is based on accurate normal values and guarantees that any excess duties collected are refunded. Moreover, the re-investigation mechanism allows an exporter to receive normal values for new product models in advance of their shipment.

22. Chinese Taipei also continues to incorrectly argue that the margin of dumping from the original investigation sets an upper limit on duty assessment. The Panel Reports in *Argentina – Poultry Anti-Dumping* Duties and *EC – Salmon (Norway)* directly contradict Chinese Taipei's argument.

23. Moreover, by arguing that an investigating authority is required to apply the margin of dumping calculated during the original investigation, Chinese Taipei improperly suggests that there is a particular methodology for assessing duties on new product models in the Anti-Dumping Agreement. However, the Agreement contains no such rule. Consistent with the CBSA's approach, this lacuna permits an investigating authority a measure of flexibility with respect to the treatment of new models for duty assessment purposes.

24. Chinese Taipei further argues that the CBSA violated Article 6.8 by relying on facts available to prospectively establish normal values for new product models. However, Chinese Taipei ignores that, without being able to rely on facts available, the CBSA would simply be unable to establish normal values for uninvestigated models, which would prevent the CBSA from being able to assess duties on new product models and would create a gap in the anti-dumping disciplines.

25. With respect to the CBSA's selection of available facts, the lack of information about uninvestigated product models requires caution to ensure that any dumping is fully offset. An initial duty rate based on a ministerial specification is therefore appropriate. However, the available review mechanisms ensure that uninvestigated products receive model-specific normal values and corresponding duty assessments.

26. Chinese Taipei also argues that the CBSA violated Article 2.2 because using facts available to establish a normal value cannot be consistent with any of the methodologies under Article 2.2 since the conditions for resorting to facts available were not fulfilled. However, Canada has already demonstrated that it is necessary and consistent with the Anti-Dumping Agreement for the CBSA to resort to facts available to prospectively establish normal values for new product models.

27. Chinese Taipei further claims that the CBSA violated Article 6.10 to the extent the Panel considers that the CBSA determined a separate margin of dumping for new product models from cooperating exporters. In its first written submission, however, Canada demonstrated that the CBSA's prospective treatment of new product models during duty assessment would not result in the determination of a second margin of dumping.

VII. SIMA IS NOT INCONSISTENT "AS SUCH" WITH ARTICLE 5.8 OF THE ANTI-DUMPING AGREEMENT WITH RESPECT TO THE TREATMENT OF EXPORTERS WITH *DE MINIMIS* MARGINS OF DUMPING

28. Chinese Taipei claims that SIMA is inconsistent "as such" with Article 5.8. It argues that SIMA provides for termination of an investigation *only* where a country-based margin of dumping is *de minimis*.

29. Even if Article 5.8 were to be interpreted as requiring exporter-specific termination, Subsection 43(1) of SIMA provides the CITT with the discretion necessary to exclude an exporter with a *de minimis* margin of dumping from an injury finding and therefore to terminate the investigation with respect to that exporter.

30. In order to establish an "as such" violation, Chinese Taipei must demonstrate that Canada's conduct will necessarily be inconsistent with Article 5.8 of the Anti-Dumping Agreement. Contrary to Chinese Taipei's argument, the CITT's discretion to act inconsistently with Article 5.8 does not support the existence of an "as such" violation, as the CITT also has the discretion to act *consistently* with Article 5.8.

31. The CITT's discretion to exclude exporters, including exporters with *de minimis* margins of dumping, from an injury finding is clear on the face of Subsection 43(1) of SIMA. This discretion is well established in Canadian law. No definitive anti-dumping duties would be imposed on imports from such an excluded exporter. The exclusion of the exporter from the injury finding would constitute immediate termination as described by the Appellate Body.

VIII. CONCLUSION

32. For the reasons presented, Canada submits that Chinese Taipei's claims have no merit and should be rejected by this Panel.

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ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

1. Brazil's participation in this dispute focused, initially, in three main aspects of the case: (I) the treatment given to individual exporters with a *de minimis* margin of dumping; (II) the treatment of non-dumped imports in the injury and causation analyses; and (III) the treatment of other factors besides the dumped imports in the causation analysis.

2. Regarding the first aspect (I), Brazil argued that the investigation should have been terminated with respect to the exporters whose final margins of dumping were found to be *de minimis*. The combined interpretation of the articles mentioned by TPKM, as supported by the jurisprudence, leads to the conclusion that during an investigation the competent authority should take into account individual margins of dumping for each exporter or producer, whenever it is possible for the authority to determine them.

3. In the answers to the panel's questions, Brazil further clarified that the second sentence of Article 5.8 refers essentially to a final determination of dumping. Thus, the termination of an investigation related to an individual producer with a *de minimis* margin of dumping will, in general, occur after the final determination. A termination prior to the final determination will depend on the information provided by the individual exporter, which may convince the investigating authority about the inexistence or a *de minimis* margin of dumping even before the final determination.

4. It is important to underscore that the investigating authority cannot rely on a country-wide margin of dumping when the individual margins are determined. An individual exporter found not to be dumping must not be subject to additional Anti-Dumping Duties.

5. As the Appellate Body has already clarified in *Mexico – Anti-Dumping Measures on Rice*, "the term 'margin of dumping' in Article 5.8 refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping"[1].

6. Brazil also made a point related to the fact that Canada did not violate Article 6.10 of the ADA. The obligation contained in this Article is that the investigating authority must "determine an individual margin of dumping for each known exporter or producer". The individual margins were determined, but Canada failed to use it properly, as it did not terminate the investigation concerning those exporters within a *de minimis* margin. The mere fact that the CBSA calculated a country-based margin of dumping does not in itself violates Article 6.10, and such calculation may be used for other purposes in the ADA, such as in Article 3.3(a).

7. In Brazil's answers to the Panel's questions concerning the matter of the termination of an investigation concerning individual exporters with a *de minimis* margin of dumping two additional issues were raised: the redundancy of Article 9.4 of the ADA and the application of provisional antidumping duties on exporters with a *de minimis* margin of dumping.

8. Concerning the first item, Brazil is of the opinion that there is no redundancy in Article 9.4. Brazil argued that Canada's statement that "[t]he application of duties contemplated in Article 9.4 takes place during the period of duty assessment after an investigation is completed" is not correct, and that the method of calculating duties foreseen in Article 9.4 may also be applied to the determination of provisional duties, according to Article 7.5 of the ADA.

9. Additionally, Brazil presented an understanding to the panel that Articles 7.1 (ii), 7.5 and 9.2 of the ADA preclude the application of antidumping duties on exporters with a *de minimis* margin of dumping, regardless of whether the determination is preliminary or final, if the investigating authority is clearly satisfied with the determination of the *de minimis* margin of dumping. In Brazil's case, in general, the decision concerning the termination of the investigation

[1] *Mexico – Anti-Dumping Measures on Rice*, para. 216.

concerning the producer with a *de minimis* margin would only take place after the final determination. However, as already stated, that may not be the case in other countries.

10. In view of the above, since Brazil agrees that the investigation should have been terminated with respect to those exporters whose final margins of dumping were found to be *de minimis*, it acknowledges that provisional and definitive anti-dumping duties could not have been imposed on imports from exporters with a *de minimis* margin of dumping.

11. Concerning the treatment of non-dumped imports for the purposes of the injury and causation analysis (II), Brazil agreed with TPKM that the term "dumped imports" does not legally include imports from exporters with a *de minimis* margin of dumping. As TPKM argued in its FWS, the DSB has already addressed this issue on different occasions. The Panel in *EC – Salmon*[2] stressed that:

> "We consider that imports attributable to a producer or exporter for which a *de minimis* margin of dumping is calculated may not be treated as "dumped" for purposes of the injury analysis in that investigation. (…) In our view, a finding of *de minimis* dumping margins is a finding that there is no legally cognizable dumping by the producer or exporter in question. If there is no legally cognizable dumping by a particular producer or exporter, as a result of a finding of *de minimis* margins, then it seems inescapable to us that imports attributable to such producer or exporter may not be treated as 'dumped' imports for any aspect of that investigation".

12. In addition, Brazil argued that the Panel in *EC – Fasteners*[3] noted that "the consideration of 'dumped imports' for purposes of making an injury determination consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement entails the consideration of only those imports for which a margin of dumping greater than *de minimis* is established in the course of the investigation".

13. Therefore, Brazil reaffirms its understanding that imports of producers with a *de minimis* margin should not have been considered in the injury and causation analyses.

14. The last point Brazil made during the proceedings is related to the treatment of other factors besides the dumped imports in the causation analysis (III). TPKM claimed that Canada had violated Articles 3.1 and 3.5 of the ADA, as it failed to examine all known factors other than the alleged dumped imports which were at the same time injuring the domestic injury and failed to ensure that the injuries caused by such factors were not attributed to the alleged dumped imports, Brazil presented an opinion that the legal standard brought forth by TPKM may not be entirely accurate.

15. To better understand the factual situation and the disciplines that should have been applied to it, it must be taken into account that the Canadian investigating authority did not reach an affirmative determination of material injury, as stated in CITT's Finding and Reasons, Injury Inquiry (Exhibit TPKM-14):

> "153. In summary, the Tribunal acknowledges that the domestic industry, as a whole, sustained some injury during certain periods of the POI. The domestic industry lost certain market opportunities due to the presence of the subject goods in the Canadian market; however, the Tribunal is of the view that the resulting impact on the domestic industry <u>has not been sufficiently adverse to constitute material injury</u>.
>
> 154. On the basis of the foregoing analysis, the Tribunal finds that the dumping and subsidizing of the subject goods <u>has not caused injury</u> to the domestic industry." (emphasis added)

[2] *EC – Salmon*, para. 7.625.
[3] *EC – Fasteners*, para. 7.354.

16. In view of the above, Canada decided to apply anti-dumping duties based on a threat of material injury to its industry, as authorized by Article VI.1 of GATT. In Brazil's opinion, if there was not an actual damage to the domestic industry, it is not possible to call for the analysis of the "other factors" mentioned in Article 3.5.

17. According to the opinion presented in Brazil's TPS, the legal standard that should guide the causation assessment in the present case should be that foreseen in Article 3.7, which also makes reference to the obligation of an investigating authority to take into consideration "other factors" that might contribute to a threat of damage to the domestic industry, such as those enshrined in subheadings (i), (ii), (iii) and (iv) of Article 3.7.

18. Brazil upheld, nevertheless, that the Panel has the authority to settle that the factors mentioned by TPKM should have been taken into account, for the roster of other factors in the subheadings of Article 3.7 appears to be merely illustrative, given the use of the expression "*inter alia*".

ANNEX D-2

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

1 INTRODUCTION

1. The European Union intervenes in this case because of its systemic interest in the correct and consistent interpretation and application of the covered agreements and other relevant documents, and the multilateral nature of the obligations contained therein, in particular the Anti-Dumping Agreement.

2 OBSERVATIONS OF THE EUROPEAN UNION

2.1 THE TREATMENT OF EXPORTERS WITH A *DE MINIMIS* MARGIN OF DUMPING

2. According to Article 5.8 of the Anti-Dumping Agreement, investigations shall be terminated when the authorities determine that the margin of dumping is *de minimis*. *De minimis* is defined in the Anti-Dumping Agreement as a threshold for the margin of dumping of less than 2%.

3. The European Union recalls that the Appellate Body has already clarified that the margin of dumping in Article 5.8 refers to "individual" margins of dumping of the exporters, as opposed to a "country-wide" margin of dumping.

4. Pursuant to Article 5.8, the investigating authority is required to "immediately" terminate the investigation with respect to those *de minimis* producers and exclude them from the scope of the application of antidumping duties imposed following that investigation.

5. In addition, the Appellate Body held that dumping is the result of the pricing behaviour of individual exporters or foreign producers and noted that other provisions of the Anti-Dumping Agreement also make it clear that "dumping" and "margins of dumping" relate to the exporter or foreign producer.

6. With regard to the temporal dimension of the determination envisaged in the second sentence of Article 5.8 of the Anti-Dumping Agreement, the European Union considers that "determine" refers to the final or definitive determinations made by the authorities of a WTO Member.

7. 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. This ultimate step necessarily follows the final determination.

8. Articles 6.8 and 6.14 of the Anti-Dumping Agreement appear to envisage that the authorities of a Member may reach "preliminary or final determinations, [whether] affirmative or negative". However, the Anti-Dumping Agreement does not mention examples of preliminary negative determinations. By contrast, it refers to preliminary affirmative determinations, namely in Article 7 governing the application of provisional measures.

9. The Article 5.8 provides for two situations where an investigating authority is to immediately terminate an investigation: in case the authority makes a negative determination of dumping (first sentence) or in case it determines that the dumping margin is *de minimis* or the volume of imports is negligible (second sentence).

10. The first sentence of Article 5.8 requires the application of the domestic industry to be rejected, and the investigation to be terminated promptly, as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. The negative determination of dumping mentioned in this provision

appears to be final or definitive in character in respect of any individual exporters concerned by it, even if the investigation may continue in respect of other exporters of the subject product.

11. Similarly, the second sentence of Article 5.8 requires immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. Again, the determinations mentioned in this provision cannot be deemed preliminary, since they do not stand to be confirmed or modified in the course of the investigation.

12. According to Canada, this was the case in the Welded Pipe investigation. In its final determination of dumping, the Canada Border Services Agency (CBSA), found that Turkey's country-based margin of dumping was *de minimis* and terminated the investigation against Turkey.

13. On the other hand, "a preliminary affirmative determination […] of dumping and consequent injury to a domestic industry" as required by Article 7.1 (ii) of the Anti-Dumping Agreement for the application of provisional measures, stands to be confirmed or modified by the final determination reached as a result of the investigation.

14. Pursuant to Article 7.2, where provisional measures take the form of a provisional duty, their amount must not exceed the provisionally estimated margin of dumping.

15. Article 6.6 of the Anti-Dumping Agreement provides that the authorities shall, during the course of an investigation, satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

16. Therefore, an investigating authority will only be in a position to determine that a margin of dumping is *de minimis* once it has sufficient evidence before it to confirm the information supplied by interested parties in that regard. The immediate termination required by the second sentence of Article 5.8 of the Anti-Dumping Agreement can only take place at the stage where a final determination is reached, which in the practice of certain Members may coincide with the closing of the investigation. While the second sentence of Article 5.8 does not distinguish between preliminary and final, the determination in this provision can only be understood as definitive or final in the sense that only when the authorities of a Member are finally satisfied that a margin of dumping is *de minimis* are they under the obligation to immediately terminate the investigation in respect of the exporter.

17. Canada seeks to reverse in the present case the understanding that the margin of dumping in Article 5.8 refers to "individual" margins of dumping of the exporters and provides several reasons for that purpose.

18. For instance, Canada asserts that the exclusion of zero or *de minimis* margins of dumping from the weighted average margin of dumping or weighted average normal value mentioned in Article 9.4 confirms that an investigation is only terminated pursuant to Article 5.8 when the margin of dumping of a country is *de minimis*.

19. The European Union fails to see why the termination of the investigation in respect of individual exporters with *de minimis* margins of dumping, as required by the second sentence of Article 5.8, would render part of Article 9.4 redundant. As already mentioned, the termination of the investigation in respect of individual exporters with *de minimis* margins of dumping can only take place following a final determination. That final determination is only made once the investigation is deemed completed in respect of the individual exporters found to have a *de minimis* margin of dumping.

20. In addition, the European Union notes that Article 9.4 also obliges the authorities concerned to disregard zero margins of dumping. In accordance with the first sentence of Article 5.8, the authorities may have determined even earlier in the course of the investigation that there is not sufficient evidence of dumping in so far as certain exporters are concerned. Moreover, nothing in the language of Article 9.4 confirms that an investigation is terminated pursuant to Article 5.8 when the margin of dumping of a country is *de minimis*.

21. As Canada seeks to reverse previous Appellate Body findings with respect to previously decided legal issues, the European Union recalls that panels are expected, even in practice "obliged" to follow previous Appellate Body reports. The European Union notes that the Appellate Body already addressed the relevance of previous panel and Appellate Body reports. In particular, the Appellate Body clarified the role of its previous reports and indicated how panels should act in cases where the same legal issues arise.

22. The European Union fully agrees with the relevant statements of the Appellate Body in *US – Stainless Steel (Mexico)* without reservation. In this respect, the final sentence of paragraph 160 of the report refers to "an adjudicatory body", which covers the situation in which the Appellate Body might be called upon to resolve the same legal issue that it has already resolved.

23. The European Union notes that the Appellate Body refers to "cogent reasons" as the basis for a change in view. While the reference to "cogent reasons" is not treaty language, it is indicative of the fact that for reasons related to security and predictability there is a high threshold for departing from the case law clarifying a certain legal issue. For instance, in *China – Rare Earths* the respondent unsuccessfully sought to reverse the Appellate Body's findings in *China – Raw Materials*, according to which a proper interpretation of Paragraph 11.3 of China's Accession Protocol did not make available to China the exceptions in Article XX of the GATT 1994.

24. The European Union notes that paragraph 161 of the Appellate Body Report in *US - Stainless Steel (Mexico)* addresses the hierarchical relationship between panels and the Appellate Body. It concludes that the relevance of clarification provided by the Appellate Body on issues of legal interpretation is not limited to the application of a particular provision in a specific case. There is no express reference to "cogent reasons". Finally, in paragraph 162 of the Appellate Body Report in *US – Stainless Steel (Mexico)* the Appellate Body states that it was deeply concerned about the panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues.

25. In other words, WTO panels must –in accordance with Article 11 of the DSU– make an objective assessment of the matter before them, including an objective assessment of conformity with the relevant covered agreements. For this purpose, panels must correctly apply the law; in the context of this dispute this also means that the Panel should follow the rulings of the Appellate Body where the Appellate Body has previously interpreted the same legal questions. Otherwise, the task of providing security and predictability to the multilateral trading system, as enshrined in Article 3.2 of the DSU, would be put in serious danger.

2.2 THE TREATMENT OF NON-DUMPED IMPORTS AND OF FACTORS OTHER THAN THE DUMPED IMPORTS IN THE INJURY AND CAUSATION ANALYSES

26. The European Union understands that the Canadian International Trade Tribunal (CITT) found that it was not possible to isolate the effects caused by the dumping from the effects caused by the subsidising, and thus did not consider the fact that the imports from India were also subsidised as irrelevant. However, Canada maintains that it was irrelevant to the CITT's decision that the imports from India were also subsidized.

27. The European Union notes that "cross-cumulation" is not treaty language but rather language used by panels and the Appellate Body in describing a situation of the kind at issue in the present case.

28. While acknowledging the differences between the specificities of the Anti-dumping Agreement and the SCM Agreement, the European Union recalls that in the context of Article 15.3 of the SCM Agreement the Appellate Body has found that the respective article does not authorize investigating authorities to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations.

29. The European Union understands the difficulties an investigating authority is facing when isolating the effects of dumping from subsidization. However, according to Article 3.5 of the Anti-Dumping Agreement, an investing authority must demonstrate that the dumped imports, "through the effects of dumping", are causing injury to the domestic industry within the meaning

of that Agreement. The European Union is of the view that, as long as the prices are found to be dumped, subsidisation causing the dumping is irrelevant for the injury and causation analysis under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

30. In the view of the European Union, such subsidisation should not be considered under non-attribution analysis as an "other factor" of injury causing injury to the domestic industry at the same time as dumped imports, (i.e. it should not be considered as another factor that must be separated from or must not be attributed to the effects of dumped imports in the sense of Article 3.5 of the Anti-Dumping Agreement). In *EU – Footwear (China)*, the complainant argued that the surge in dumped imports was caused by a variety of factors such as the abolition of preferential tariff treatment and quotas. The panel clearly found that one is not required to investigate the reasons as to why dumping is taking place.

31. Also, in the view of the European Union, such subsidisation is not relevant for demonstrating the causal relationship between dumped imports and the injury to the domestic industry, as the injury caused to the domestic industry by dumped imports that result from subsidisation is still directly attributable to dumping. To be relevant, subsidisation would have to drive down the export price without increasing the dumping margin.

32. Finally, the European Union also recalls that the SCM Agreement provides for the possibility of the imposition of countervailing duties if the respective conditions are met.

2.3 DUMPING DETERMINATION AND DETERMINATION OF DUTY RATE FOR ALL OTHER EXPORTERS

33. TPKM submits that Canada violated Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement in its determination of the dumping margin and duty rate for "all other exporters". TPKM argues that the CBSA has failed to evaluate and assess in a comparative manner the information that was on the record, in particular information provided by the three cooperating TPKM exporters.

34. Canada responds that the CBSA's use of facts available to determine the dumping margin and duty rate for "all other exporters" did not violate Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement.

35. Canada confirms that, for the exporters that failed to provide sufficient information, despite being explicitly cautioned against non-cooperation, the CBSA established normal values on the basis of facts available. However, Canada argues that CBSA's approach was based on reasonable inferences concerning exporters that decided not to participate in the investigation. If that approach were deemed punitive, exporters could actually benefit from a lack of cooperation. Moreover, Canada maintains that CBSA's use of facts available was comparative and took into account all of the information on the record.

36. The European Union agrees that an investigating authority is not prohibited, under Article 6.8 and Annex II of the Anti-Dumping Agreement, from using an inference that may be "adverse to the interests" of non-cooperating exporters.

37. Although Appellate Body and panel reports have emphasised that the purpose of the facts available mechanism "is not to punish non-cooperation by interested parties", but rather to "ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation", this does not preclude an investigating authority from taking account of facts that are detrimental to the interests of non-cooperating parties. The final sentence of Annex II, paragraph 7, explicitly envisages the possibility 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."

38. The CBSA gave notice to all known foreign exporters of CSWP to Canada of the consequences of failing to provide information. To the extent that the facts selected for establishing normal values are not devoid of factual foundation and can contribute to arriving at an accurate determination for those exporters that chose not to cooperate, the European Union

considers that the selection of unfavourable facts is not inconsistent with a Member's obligations under Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement.

2.4 TREATMENT OF NEW PRODUCT TYPES

39. With respect to the treatment of new product types to be exported by cooperating producers, TPKM submits that Canada violated Articles 9.3, 6.8 and Annex II, as well as Articles 2.2 and 6.10 of the Anti-Dumping Agreement and, as a consequence, Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

40. According to TPKM, Canada violated Article 9.3 of the Anti-Dumping Agreement because the anti-dumping duties imposed on "new product types" exceed the margin of dumping established for each cooperating exporter. Canada violated Article 6.8 and Annex II because it resorted to "facts available" in a case where the TPKM cooperating exporters have not refused to provide the necessary information.

41. Canada contests all the claims put forward by TPKM in respect of CBSA's treatment of new product models. Canada asserts that TPKM fundamentally misunderstands the operation of Canada's prospective duty assessment system and ignores the practical need to apply facts available to product models that were not exported during the original period of investigation.

42. Because the CBSA has no information pertaining to product models that were not exported during the initial period of investigation, it establishes their normal values on the basis of facts available, pursuant to a ministerial specification. Nevertheless, under Canada's prospective normal value system, exporters and importers have concrete options for obtaining specific normal values for new product models.

43. Canada points out that when an importer believes that anti-dumping duties were improperly collected it can apply for a refund to ensure that final duty assessment is based on accurate normal values. TPKM's claim that the application of the ministerial specification to new models will necessarily result in duties that exceed the margin of dumping for cooperating exporters ignores that under a prospective duty system the initial collection of anti-dumping duties is not the final stage of duty assessment.

44. The European Union understands that Canada operates a prospective duty assessment system, which is explicitly authorised under Article 9.3.2 of the Anti-Dumping Agreement. It is in the nature of such a system that anti-dumping duties assessed on a prospective basis are subject to final assessment, so that the importer of the product is entitled to obtain, upon request, a prompt refund of any such duty paid in excess of the margin of dumping.

45. Provided that all the obligations in Article 9.3.2 are complied with, the European Union regards the operation of a prospective duty assessment system, and its application to new types or models of products subject to an anti-dumping investigation, as being consistent with the basic requirements of the Anti-Dumping Agreement.

46. As regards the level of the duty that may be collected at the time of initial assessment, the European Union is of the opinion that such level should not be excessive, in the sense that it should comply with the conditions laid down in Article 9.2.

47. In addition, Annex II, paragraph 5 of the Anti-Dumping Agreement suggests that the investigating authority should not be unduly strict in examining and deciding on the relevance of information already provided by cooperating exporters, in view of establishing prospective normal values for new types or models of the subject product.

2.5 AS SUCH CLAIMS

48. TPKM alleges that certain provisions of the Special Import Measures Act (SIMA) and of the Special Import Measures Regulations (SIMR) are inconsistent as such with the Anti-Dumping Agreement and the GATT 1994.

49. Canada differentiates between mandatory and discretionary acts, considering that an as such violation of an obligation in a covered agreement cannot occur when a Member has the discretion necessary to act consistently with that obligation.

50. In this context, the European Union recalls that the Appellate Body has stated that the "mandatory/discretionary distinction" is an analytical tool which may vary from case to case and such a distinction should not be applied in a mechanistic fashion.

51. The European Union also notes that the Appellate Body has considered that "as such" challenges to a Member's legislation are "serious challenges", particularly as Members are presumed to have enacted their laws in good faith.

52. With regard to the type of evidence that is required to be considered in order to establish the content and meaning of municipal law, the Appellate Body has clarified that, in some cases, the text of the relevant legislation may suffice, while in other cases evidence beyond the text of the measure at issue may be required, related to the consistent application of the measure, pronouncements of domestic courts, and the writings of recognized scholars.

53. Finally, the Appellate Body has found that the starting point for an analysis when a measure is challenged "as such" must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone.

3 CONCLUSIONS

The European Union hopes that its contribution in the present case will be helpful to the Panel in objectively assessing the matter before it and in developing the respective legal interpretations of the relevant provisions of the Anti-Dumping Agreement.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. ARTICLE 5.8 OF THE ANTI-DUMPING AGREEMENT: THE DETERMINATION OF *DE MINIMIS* MARGINS OF DUMPING IS PRODUCER-SPECIFIC RATHER THAN COUNTRY-WIDE

1. The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter "TPKM") submits that Canada ignored the individual margins of dumping calculated for each exporter.[1] Instead, it relied on the country-wide margins of dumping in order to determine whether the margins of dumping were *de minimis*. Accordingly, Canada did not terminate the investigation with respect to individual exporters whose definitive margins of dumping were found to be *de minimis* if the corresponding country-wide margin of dumping was 2% or more. TPKM further submits that this entails a violation of Article 5.8 of the Anti-Dumping Agreement.[2]

2. Canada submits that the obligation contained in Article 5.8 to terminate an investigation when the margin of dumping is *de minimis* pertains to a country rather than the individual producer.[3] The termination of an investigation is thus only required when the country-based margin of dumping is *de minimis*, according to Canada.

3. Norway respectfully disagrees with the position that the requirement to immediately terminate an investigation pertains to a country rather than the individual producer. Norway holds that the determination of *de minimis* dumping is by nature producer-specific. The wording of Article 5.8, as well as the context and the consistency with the other Articles of the Anti-Dumping Agreement, clearly leads to this conclusion. Accordingly, as TPKM points out, the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* reached this very same conclusion on this exact question.[4]

4. The panel in *Mexico – Anti-Dumping Measures on Rice*, found that the term "margin of dumping" in the Anti-Dumping Agreement refers to "the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping".[5] The panel found evidence for this in Article 6.10 of the Anti-Dumping Agreement, which stipulates that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". The exception to this rule also provides for the calculation of individual margins of dumping, and does not envisage the calculation of a country-wide margin. The panel then went on to examine the rest of the Anti-Dumping Agreement, to see whether there were any provisions that would contradict this finding. Upon completing this analysis, the panel ultimately concluded that "whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter."[6]

5. The Appellate Body not only confirmed this finding and expressly agreed with the Panel's reasoning, but also added that this conclusion was indeed in line with the use of the term "margins of dumping" in Article 2.4.2 of the Anti-Dumping Agreement, and the finding by the Appellate Body in *US – Hot-Rolled Steel* that this term referred to the individual margin of dumping of an producer.[7]

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[1] First Written Submission of TPKM, para. 53.
[2] First Written Submission of TPKM, para. 54.
[3] First Written Submission of Canada, para. 46.
[4] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 216-217.
[5] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137.
[6] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.
[7] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 216-217, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

6. Norway would like to underline that both the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* pointed out that although there is a single investigation (and not as many investigations as there are exporters), Article 5.8 simply requires the termination of the investigation *in respect of* the individual exporter or producer for which a zero or *de minimis* margin is established.[8] Hence, contrary to what Canada argues, the ordinary meaning of the terms "investigation" and "termination", as well as the context provided by the rest of Article 5 in general and Article 5.8 in particular, do not imply that termination of an investigation is required on a country-wide basis.[9] Rather, the ordinary meaning of these terms and the context of the rest of Article 5 and Article 5.8 provide support for the producer-specific interpretation, as laid down by previous panels and the Appellate Body.

7. As for the immediate context of Article 5.8, the panel in *Mexico – Anti-Dumping Measures on Rice* found it relevant that the second sentence of the paragraph stipulates that negligibility, the other basis upon which immediate termination is required, is to be determined in respect of the volume of dumped imports "from a particular country".[10] Thus, while the Anti-Dumping Agreement expressly stipulates that the negligibility test is to be examined on a country-wide basis, no such stipulation is made with regard to the margin of dumping. The panel concluded that this context further confirmed their view that the reference to the margin of dumping in Article 5.8 is a reference to the individual margin of dumping which is to be determined on an exporter-specific basis. The Appellate Body confirmed the panel's reasoning on this point.[11] Clearly, Canada's assertion that the panel and Appellate Body's findings with regards to Article 5.8 are undermined because they failed to properly consider the context of Article 5 in general and Article 5.8 in particular is flawed.[12] As set out above, this context was indeed a part of the analysis.

8. Canada further argues that the context of Article 9.4 of the Anti-Dumping Agreement makes it clear that Article 5.8 requires that an investigation need only be terminated when the country-based margin of dumping is *de minimis*.[13] As Norway understands it, Canada argues that as Article 9.4 refers to the disregarding of zero and *de minimis* margins of dumping, this means that the investigation is not terminated with respect to these individual exporters. Therefore, this exclusion of *de minimis* dumping margins confirms that an investigation is only terminated pursuant to Article 5.8 when the margin of dumping of a country is *de minimis*. Norway disagrees with this line of reasoning.

9. Article 9.4 contains special rules for the imposition of anti-dumping duties where the authorities have resorted to sampling of exporters. For the non-sampled producers, the anti-dumping duty imposed may not exceed the weighted-average dumping margin established for the sampled producers, with the exception of any *de minimis* dumping margins. In Norway's view, this reference to the formula for calculation of anti-dumping duties when sampling is involved cannot be read as a reference to when an investigation is to be considered terminated in accordance with Article 5.8. There is nothing in the wording of Article 9.4 that suggests such a reading and it is indeed a completely different question.

10. Contrary to what Canada argues, 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 *not* make parts of Article 9.4 redundant and therefore be at odds with the principle of effectiveness in treaty interpretation. Quite the opposite – such an interpretation would be in line with the system of the Anti-Dumping Agreement. Where dumping margins are established as *de minimis* or zero, the investigation is to be terminated *with respect to* these individual producers, in line with Article 5.8, as established by the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*.[14] Hence, these margins of dumping should not be used as a basis for calculating anti-dumping duties when sampling is involved either. A different interpretation could lead to a situation where anti-dumping duties are not calculated for the individual producers with zero or *de minimis* margins of dumping, while these dumping margins could be used in the calculation of

[8] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218.
[9] First Written Submission of Canada, paras. 52, 63, 72 and 91.
[10] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.141.
[11] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217.
[12] First Written Submission of Canada, para. 88.
[13] First Written Submission of Canada, paras. 76-81.
[14] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218.

duties for non-sampled producers. This would clearly be at odds with the system of the Anti-Dumping Agreement.

11. Accordingly, it is Norway's view that the context of Article 9.4 does not support an interpretation where the obligation in Article 5.8 to terminate an investigation where the margin of dumping is *de minimis* pertains to a country. On the contrary, it supports the interpretation where this duty pertains to the individual producer. The consistency of the system, and the numerous references in Article 9.4 to the individual exporters and producers, clearly lead to this conclusion.

12. Canada further argues that Article 3.3 of the Anti-Dumping Agreement provides relevant context for interpreting the term "margin of dumping" in Article 5.8.[15] Once again, the Appellate Body has previously addressed this issue and concluded that "Article 3.3 does not provide useful context for interpreting the term "margin of dumping" in Article 5.8".[16] Norway cannot see that Canada offers any new arguments that would render a different result. Furthermore, Canada's assertion that the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* endorsed the panel's analysis under Article 5.8 without referring to the panel's alleged ignorance of Article 3.3, is clearly flawed.[17] As evidenced by the Appellate Body analysis recited above, the Appellate Body expressly considered Article 3.3 in coming to its conclusion regarding Article 5.8. Canada's submission that the Appellate Body's finding is undermined due to this "flaw" thus clearly has no basis in reality.

13. Norway thus agrees with TPKM that Article 5.8 of the Anti-Dumping Agreement requires WTO Members to terminate anti-dumping investigations with respect to individual exporters that have a *de minimis* margin of dumping. Where all investigated exporters are found to have *de minimis* margins of dumping, this individual producer-specific determination will be extended to a country-wide basis.[18] However, this does not change the producer-specific nature of the determination, but rather follows as a logical consequence of this fact.

II. THE ROLE OF PREVIOUS REPORTS

14. As the question discussed above regarding Article 5.8 of the Anti-Dumping Agreement has largely been addressed by previous panels and the Appellate Body, Norway would like to emphasise the role of previous reports in the WTO dispute settlement system. The very basis of the system is that reports are binding only on the parties to the dispute. The Appellate Body has however underlined "that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."[19] Norway would add that by following previous Appellate Body reports, panels also contribute to ensuring fewer disputes and preserve both the system and the systemic function of the Appellate Body.

[15] First Written Submission of Canada, paras. 82-83.
[16] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220.
[17] First Written Submission of Canada, para. 87.
[18] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.143.
[19] Appellate Body Report, *United States – Continued Zeroing*, para. 362.

ANNEX D-4

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED ARAB EMIRATES

I. ARTICLE 5.8 OF THE AD AGREEMENT: TREATMENT OF EXPORTERS WITH A *DE MINIMIS* MARGIN OF DUMPING

1. TPKM has set out in considerable detail how Canada violated Article 5.8 of the AD Agreement because it failed to immediately terminate the investigation with respect to those exporters whose final margins of dumping were found to be *de minimis* within the meaning of that provision.[1] The UAE shares the analysis provided by TPKM in its submission as it is justified by the language of the AD Agreement and confirmed by previous Panels and the Appellate Body. Indeed, article 5.8 of the AD Agreement reads as follows. The Export price is intrinsically firm-specific and not country-wide margin.

2. The UAE considers relevant in this respect that the fourth sentence of Article 5.8 of the AD Agreement supports the view that the *de minimis* standard is to be applied on a firm-specific basis and not country wide basis. That sentence is drafted in such manner that the term "volume" refers to a country wide basis unlike the term "*de minimis* dumping margin" expressly involves firm-specific basis. The drafters of the AD Agreement expressly utilized different stipulations in Article 5.8 of the AD Agreement. The UAE believes that the construction and the express language of Article 5.8 of the AD Agreement leave no discretion to the investigating authority other than as stated by Article 5.8 of the AD Agreement that there "shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*".

3. The UAE agrees with TPKM that previous panels have reached and confirmed TPKM assertions that there shall be immediate termination of the AD investigation with respect to exporters that have an individual *de minimis* margin of dumping.[2]

4. Additionally, the UAE considers that the examination of other provisions of the AD Agreement provides that whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter.[3] Therefore, the UAE agrees with TPKM that the term margin of dumping in the AD Agreement is company-specific rather than country-wide.

II. ARTICLES 3.1, 3.2, 3.4, 3.5 AND 3.7 OF THE AD AGREEMENT: TREATMENT OF NON-DUMPED IMPORTS IN THE INJURY AND CAUSATION DETERMINATIONS

5. TPKM contends that Canada violated Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the AD Agreement because it treated as "dumped imports" for the purposes of injury and causation analyses imports from exporters with a *de minimis* margin of dumping.[4]

6. The UAE agrees with TPKM's arguments and analysis that by failing to exclude from the "dumped imports" the imports of exporters for which a de *minimis* dumping margin had been determined, the investigating authority acts inconsistently with Articles 3.1, 3.2, 3.4, 3.5 and 3.7 of the AD Agreement.[5]

7. The UAE considers that there is nothing in Article 3 of the AD Agreement that provides for an investigating authority to include imports from exporters with a *de minimis* margin of dumping in the injury and causation determinations of dumped imports. Indeed, the UAE agrees with TPKM that the term dumped imports refers to all imports attributable to exporters for which a margin of dumping greater than *de minimis* has been calculated and not imports of exporters for which a *de minimis* dumping margin had been determined.

[1] First Written Submission of TPKM, paras. 43-56.
[2] First Written Submission of TPKM, para. 52.
[3] First Written Submission of TPKM, para. 47.
[4] First Written Submission of TPKM, para. 108.
[5] First Written Submission of TPKM, para. 133.

8. In light of the text of the AD Agreement in respect of the term "dumped imports" and in accordance with the relevant Dispute Settlement Body's jurisprudence, the UAE considers that the term "dumped imports" does not enable an investigating authority under any conditions to include imports that are found non dumped in the determinations of injury and causality of "dumped imports" under Article 3 of the AD Agreement.

9. The UAE considers that Article 3.1 of the AD Agreement states a general and overarching principle that leaves no discretion for the investigating authority to have a different interpretation of the strict and clear meaning of this article. A different approach by including non-dumped imports in the injury and causation determinations does not meet the meaning of Article 3 of the AD Agreement nor corresponds to a determination made by an objective authority based on positive evidence. Neither reflects the intention of the drafters of the AD Agreement. The UAE considers that the language of Article 3.1 of the AD Agreement using the term "dumped imports" would have no purpose if the determination of injury and causation includes non-dumped imports.

ANNEX D-5

EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

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.[1] 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.

[1] EU's Third Party Submission, para. 10; Norway's Third Party Submission, para. 13.

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.[2] 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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[2] TPKM's First Written Submission, paras. 135, 145.