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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

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## CASES CITED IN THIS REPORT

Short title	Full case title and citation
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<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727
<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, p. 1269
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<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3
<i>EU – Biodiesel (Argentina)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
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<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007

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<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
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<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3



**ABBREVIATIONS USED IN THIS REPORT**

<b>Abbreviation</b>	<b>Description</b>
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	Business Confidential Information
CBSA	Canada Border Services Agency
Chinese Taipei	The Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
CITT	Canadian International Trade Tribunal
CSWP	Carbon Steel Welded Pipe
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Marrakesh Agreement	Marrakesh Agreement Establishing the World Trade Organization
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIMA	Special Import Measures Act
SIMR	Special Import Measures Regulations
WTO	World Trade Organization

## 1 INTRODUCTION

### 1.1 Complaint by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

1.1. On 25 June 2014, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei) requested consultations with Canada pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 17 of the Agreement on Implementation of Article VI of the GATT 1994 (Anti-Dumping Agreement) with respect to provisional and definitive anti-dumping measures imposed by Canada on imports of certain Carbon Steel Welded Pipe (CSWP) originating in or exported from Chinese Taipei and the investigations underlying the measures.<sup>1</sup>

1.2. On 7 November 2014, Chinese Taipei, in an *addendum* to its initial request for consultations, requested further consultations with Canada on other aspects of the above-mentioned anti-dumping measures and on certain provisions of the Special Import Measures Act (SIMA) and the Special Import Measures Regulations (SIMR).<sup>2</sup>

1.3. Consultations were held on 24 July 2014 and 4 December 2014, but failed to resolve the dispute. On 22 January 2015, Chinese Taipei requested the establishment of a panel.<sup>3</sup>

### 1.2 Panel establishment and composition

1.4. At its meeting on 10 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Chinese Taipei in document WT/DS482/2, in accordance with Article 6 of the DSU.<sup>4</sup>

1.5. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu in document WT/DS482/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>5</sup>

1.6. Following the agreement of the parties, the Panel was composed on 12 May 2015 as follows:

Chairperson: Mr Jose Antonio Buencamino  
Members: Ms Andrea Marie Dawes (née Brown)  
Mr David Evans

1.7. Brazil, China, the European Union, the Republic of Korea, Norway, the United Arab Emirates, and the United States reserved their rights to participate in the Panel proceedings as third parties.

### 1.3 Panel proceedings

#### 1.3.1 General

1.8. After consultation with the parties, the Panel adopted its Working Procedures<sup>6</sup> and timetable on 12 August 2015. The Panel revised its Working Procedures on 17 December 2015. The Panel revised its timetable on 17 December 2015, 13 January 2016, and 1 February 2016.

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<sup>1</sup> See *Canada – Welded Pipe*, Chinese Taipei's request for consultations, WT/DS482/1 (dated 25 June 2014, circulated 30 June 2014).

<sup>2</sup> See *Canada – Welded Pipe, Addendum* to Chinese Taipei's request for consultations, WT/DS482/1/Add.1 (dated 7 November 2014, circulated 12 November 2014).

<sup>3</sup> See *Canada – Welded Pipe*, Chinese Taipei's request for the establishment of a panel, WT/DS482/2 (dated 22 January 2015, circulated 27 January 2015).

<sup>4</sup> See Dispute Settlement Body, Minutes of meeting held on 10 March 2015, WT/DSB/M/358 (circulated 20 April 2015).

<sup>5</sup> See *Canada – Welded Pipe*, Constitution of the Panel, Note by the Secretariat, WT/DS482/3 (dated 10 March 2015, circulated 13 May 2015).

<sup>6</sup> See the Panel's Working Procedures in Annex A-1.

1.9. The Panel held a first substantive meeting with the parties on 16 and 17 March 2016. A session with the third parties took place on 17 March 2016. The Panel held a second substantive meeting with the parties on 28 and 29 June 2016. On 5 August 2016, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 7 October 2016. The Panel issued its Final Report to the parties on 18 November 2016.

### 1.3.2 Working procedures on Business Confidential Information (BCI)

1.10. After consultations with the parties, the Panel adopted, on 15 September 2015, additional procedures for the protection of Business Confidential Information (BCI).<sup>7</sup>

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns the provisional and definitive anti-dumping measures applied by Canada on imports of certain CSWP originating in or exported from Chinese Taipei, as well as certain provisions of SIMA and SIMR, in particular subsection 2(1), section 30.1, and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA, as well as subsection 37.1(1) of SIMR.

2.2. On 14 May 2012, the Canada Border Services Agency (CBSA) initiated investigations with respect to dumping of certain CSWP from, among others, Chinese Taipei.<sup>8</sup> On 15 May 2012, the Canadian International Trade Tribunal (CITT) issued a notice of commencement of a preliminary injury inquiry.<sup>9</sup>

2.3. On 13 July 2012, the CITT determined that there was evidence that disclosed a reasonable indication that the dumping of CSWP had caused injury or retardation or was threatening to cause injury.<sup>10</sup> The CBSA issued its preliminary dumping determination on 13 August 2012<sup>11</sup> and its final dumping determination on 9 November 2012.<sup>12</sup> On 11 December 2012, the CITT issued its final (threat of) injury determination.<sup>13</sup>

<sup>7</sup> See the Panel's Additional Working Procedures on Business Confidential Information, Annex A-2.

<sup>8</sup> CBSA, Notice of Initiation of the Investigation, 14 May 2012, (Exhibit TPKM-4). See also CBSA, Statement of Reasons concerning the initiation of investigations into the dumping of certain CSWP originating in or exported from TPKM, India, Oman, Korea, Thailand, Turkey, and the United Arab Emirates and the subsidizing of certain CSWP originating in or exported from India, Oman, and the United Arab Emirates, 29 May 2012, (Exhibit TPKM-5). The investigation also extended to the subsidizing of certain CSWP from countries other than Chinese Taipei.

<sup>9</sup> CITT, Commencement of Preliminary Injury Inquiry, 15 May 2012, *Canada Gazette* 2012.I.146.21 (26 May 2012), pp. 1382 and 1383, (Exhibit TPKM-6).

<sup>10</sup> CITT, Determination, Preliminary Injury Inquiry No. PI-2012-003, 13 July 2012, *Canada Gazette* 2012.I.146.29 (21 July 2012), pp. 2095 and 2096, (Exhibit TPKM-7). See also CITT, Determination and Reasons, Preliminary Injury Inquiry No. PI-2012-003, 30 July 2012, (Exhibit TPKM-8).

<sup>11</sup> CBSA, Decision, Preliminary Determinations of Dumping and Subsidizing, 13 August 2012, *Canada Gazette* 2012.I.146.34 (25 August 2012), p. 2518, (Exhibit TPKM-9). See also CBSA, Statement of Reasons concerning the preliminary determinations with respect to the dumping of certain CSWP originating in or exported from TPKM, India, Oman, Korea, Thailand, Turkey and the United Arab Emirates and the subsidizing of certain CSWP originating in or exported from India, Oman and the United Arab Emirates, 28 August 2012, (Exhibit TPKM-10).

<sup>12</sup> CBSA, Decision, Final Determinations Dumping and Subsidizing, 9 November 2012, *Canada Gazette* 2012.I.146.47 (24 November 2012), pp. 3172 and 3173, (Exhibit TPKM-12). See also CBSA, Statement of Reasons concerning the making of Final Determinations of Dumping and Subsidizing and the Termination of Dumping and Subsidizing Investigations respecting certain CSWP originating in or exported from TPKM, India, Oman, Korea, Thailand, Turkey, and the United Arab Emirates, 26 November 2012 (Statement of Reasons concerning the Final Determination), (Exhibit TPKM-2).

<sup>13</sup> CITT, Finding, Injury Inquiry No. NQ-2012-003, 11 December 2012, *Canada Gazette* 2012.I.146.51, 22 December 2012, pp. 3555 and 3556, (Exhibit TPKM-13). See also CITT, Finding and Reasons, Injury Inquiry No. NQ-2012-003, 27 December 2012, (Exhibit TPKM-14).

### 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Chinese Taipei requests the Panel to find that<sup>14</sup>:

- a. With respect to the treatment of exporters with a *de minimis* margin of dumping Canada violated:
  - i. Article 5.8 of the Anti-Dumping Agreement because Canada failed to immediately terminate the investigation with respect to exporters with a *de minimis* margin of dumping;
  - ii. Article 6.10 of the Anti-Dumping Agreement because Canada failed to determine only one individual margin of dumping for each exporter in its determination of whether to continue the investigation and the subsequent determination of duty rates;
  - iii. Article 7.1(ii) of the Anti-Dumping Agreement because Canada applied provisional anti-dumping measures in the absence of a preliminary affirmative determination of dumping when it applied such measures to imports of certain CSWP from exporters with a *de minimis* margin of dumping;
  - iv. 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; and
  - v. Article VI:2 of the GATT 1994 and Article 1 of the Anti-Dumping Agreement because the possibility to levy an anti-dumping duty only applies "in order to offset or prevent dumping" and therefore not with respect to imports from exporters with a *de minimis* margin of dumping.
- b. With respect to the treatment of non-dumped imports and of factors other than the dumped imports in the injury and causation analyses Canada violated:
  - i. Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement because, for the purpose of the injury and causation analyses, Canada failed to exclude from the dumped imports, the imports of the exporters with a *de minimis* dumping margin thereby failing to properly consider the volume of dumped imports, the effects of the dumped imports on prices in the domestic market, the impact of the dumped imports on the domestic industry and whether the dumped imports are causing injury and/or threat of injury to the domestic industry.
  - ii. Articles 3.1 and 3.5 of the Anti-Dumping Agreement because Canada failed to examine all known factors other than the alleged dumped imports which at the same time were injuring the domestic industry – including the overcapacity of the domestic industry and the subsidies – and failed to ensure that the injury caused by such other factors was not attributed to the alleged dumped imports.
- c. With respect to the dumping determination and determination of the duty rate for "all other exporters" Canada violated:
  - i. Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement because Canada improperly applied facts available in determining the dumping margin and duty rate applicable to "all other exporters" without complying with the conditions laid down in those provisions.

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<sup>14</sup> See Chinese Taipei's first written submission, paras. 318-321.

- d. With respect to the treatment of new product types to be exported by cooperating producers Canada violated:
  - i. Article 9.3 of the Anti-Dumping Agreement because Canada imposed anti-dumping duties on new product types of the cooperating exporters that exceed their margin of dumping as established under Article 2 of the Anti-Dumping Agreement;
  - ii. Article 6.8 and Annex II of the Anti-Dumping Agreement because Canada resorted to facts available for the calculation of the normal values with respect to imports of new product types of the cooperating exporters, thus resorting to facts available even though the conditions laid down in these provisions had not been met;
  - iii. Article 2.2 of the Anti-Dumping Agreement because Canada 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;
  - iv. Article 6.10 of the Anti-Dumping Agreement because Canada determined more than one individual margin of dumping for cooperating exporters; and
- e. As a consequence of the above-mentioned violations, Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

3.2. Furthermore, Chinese Taipei requests the Panel to find that the provisions of SIMA and SIMR are inconsistent "as such" with the Anti-Dumping Agreement and the GATT 1994, and more specifically that:

- a. 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; and
- b. subsections 42(1), 42(6), and 43(1) of SIMA and subsection 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.

3.3. Chinese Taipei requests the Panel to also find that, as a consequence of the above, Canada acted inconsistently with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement insofar as it failed to take all steps to ensure the conformity of its laws, regulations, and administrative procedures with the provisions of the GATT 1994 and of the Anti-Dumping Agreement. According to Chinese Taipei, this also results in the violation of Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

3.4. In light of the above, Chinese Taipei 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.

3.5. Canada requests that the Panel reject all of Chinese Taipei's claims in this dispute.

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 to B-4 and C-1 to C-4).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of Brazil, the European Union, Norway, the United Arab Emirates, and the United States are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes D-1 to D-5). China and Korea did not submit written or oral arguments to the Panel.

## 6 INTERIM REVIEW

6.1. On 7 October 2016, the Panel submitted its Interim Report to the parties. On 21 October 2016, Chinese Taipei and Canada each submitted written requests for the review of precise aspects of the Interim Report. On 4 November 2016, both parties submitted comments on each other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

6.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including those identified by the parties. The Panel is grateful for the assistance of the parties in this regard.

### **6.1 Paragraphs 6.9, 6.49, 6.50, 6.51, 6.72, 6.91, 6.102, 6.113, 6.123, 6.149, 6.166, and 6.213 (paragraphs 7.9, 7.49, 7.50, 7.51, 7.73, 7.92, 7.103, 7.114, 7.124, 7.150, 7.167, and 7.214 of the Final Report)**

6.4. Chinese Taipei asks the Panel to supplement and/or amend its description of Chinese Taipei's arguments in a number of parts of the Interim Report.

6.5. Canada makes no comment on Chinese Taipei's request.

6.6. We have decided to accommodate the requests by Chinese Taipei. The amendments proposed by Chinese Taipei all reflect arguments made in Chinese Taipei's submissions to the Panel. Although the current summaries of those arguments are not inaccurate, we see no reason not to include further elements that more closely mirror the actual arguments made by Chinese Taipei. With respect to paragraph 6.9, we consider it more appropriate to use a wording that differs from Chinese Taipei's proposal in order to accurately reflect the arguments made. With respect to paragraph 6.50, we have decided to include the proposed additional sentence in a footnote at the end of that paragraph and with a slight modification to the suggested source reference. Regarding paragraph 6.72, rather than adding a supplementary description of Chinese Taipei's arguments at the end of the paragraph, we consider it more appropriate to include this description in a sentence that precedes that paragraph's last sentence.

### **6.2 Paragraph 6.14 (paragraph 7.14 of the Final Report)**

6.7. Chinese Taipei proposes that the Panel supplements its description of Norway's arguments to fully reflect the arguments presented by Norway.

6.8. Canada makes no comment on Chinese Taipei's request.

6.9. We have decided to accommodate Chinese Taipei's request.

### **6.3 Paragraph 6.53 (paragraph 7.54 of the Final Report)**

6.10. Canada requests that the footnote reference to "Canada's second written submission, para. 47" be changed to "Canada's second written submission, paras. 49-52".

6.11. Chinese Taipei disagrees with the suggested change, to the extent that paragraphs other than paragraph 49 of Canada's second written submission should be referenced in this footnote.

6.12. We agree with Chinese Taipei that only paragraph 49 of Canada's second written submission should be included in the footnote and have made the modification accordingly.

#### **6.4 Paragraph 6.64 (paragraph 7.65 of the Final Report)**

6.13. Chinese Taipei requests the Panel to include discussion of Chinese Taipei's arguments in relation Article 7.1(iii) of the Anti-Dumping Agreement and its relevance to the issue before the Panel. Chinese Taipei also does not support Canada's request to delete the reference to that article in the paragraph.

6.14. Canada suggests that the statements relating to Article 7.1(iii) in the last three sentences of the paragraph are outside of the Panel's terms of reference, and therefore requests deletion thereof. Should the Panel decide to accede to Chinese Taipei's request, Canada asks that the Panel also include Canada's response to Chinese Taipei's arguments.

6.15. We have not made any changes to our Report concerning this matter. Since there is no claim under Article 7.1(iii), there is no need for us to examine this provision in great detail. We refer to it merely to explain our treatment of certain arguments made by Chinese Taipei concerning the object and purpose of Article 7.1.

#### **6.5 Paragraph 6.79 (paragraph 7.80 of the Final Report)**

6.16. Chinese Taipei requests the Panel to amend its description of Canada's arguments in order to clarify that observations relating to the case law invoked by Chinese Taipei were made by Canada.

6.17. Canada makes no comment on Chinese Taipei's request.

6.18. We have decided to accommodate Chinese Taipei's request.

#### **6.6 Paragraph 6.84 (paragraph 7.85 of the Final Report)**

6.19. Canada requests the Panel to modify this paragraph to accurately reflect Canada's position as set out in paragraph 72 of its second written submission. Canada contends that it does not argue that Chinese Taipei's claim is undermined by the fact that there are no Appellate Body decisions that endorse the approach advanced by Chinese Taipei. Rather, Canada's point is that the Appellate Body report cited by Chinese Taipei does not, contrary to Chinese Taipei's submission, address the issue of whether imports from exporters with a *de minimis* margin of dumping are to be excluded in an injury analysis.

6.20. Chinese Taipei disagrees with Canada and considers that the paragraph accurately reflects Canada's argument.

6.21. We have decided to accommodate Canada's request by modifying the paragraph accordingly.

#### **6.7 Paragraphs 6.109 and 6.111 (paragraphs 7.110 and 7.112 of the Final Report)**

6.22. Chinese Taipei requests the Panel to modify paragraph 6.109 to more accurately reflect Chinese Taipei's reliance in its submissions on specific statements made by the interested party Knightsbridge in the CSWP investigation.<sup>15</sup> In light of this modification, Chinese Taipei also requests that paragraphs 6.109 and 6.111 be changed to no longer state that Chinese Taipei did not specify exactly which statement made by Knightsbridge it was relying on.

6.23. Canada makes no comment on Chinese Taipei's request.

6.24. We have decided to accommodate Chinese Taipei's request, albeit not in the exact manner as suggested by Chinese Taipei.

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<sup>15</sup> Knightsbridge International Corp., Submission to CITT related to the Preliminary Injury Inquiry PI-2012-003, 18 June 2012, (Exhibit TPKM-16).

**6.8 Paragraphs 6.133 and 6.135 (paragraphs 7.134 and 7.136 of the Final Report)**

6.25. Chinese Taipei understands that the Ministerial Specification is not a document that is published and made available to the public. Chinese Taipei observes that it is thus not a "published report", contrary to its characterization in these paragraphs.

6.26. Canada makes no comment on Chinese Taipei's request.

6.27. We have decided to change the description of the documents referred to in paragraph 6.133. Instead of referring to "published reports", we now refer to "documents in the record of the investigation". A consequential change is made in paragraph 6.135 which now refers to the "record's relevant documents".

**6.9 Paragraph 6.142 (paragraph 7.143 of the Final Report)**

6.28. Chinese Taipei requests the Panel to insert a footnote following the paragraph's second sentence. Chinese Taipei recalls its position that while the fact of imposing residual duties may allow investigating authorities to preclude circumvention and to provide an incentive to cooperate, this objective does not itself justify the use of one of the worst possible information available.

6.29. Canada makes no comment on Chinese Taipei's request.

6.30. We have decided not to accommodate Chinese Taipei's request. The Panel's statement, in respect of which Chinese Taipei seeks clarification of its argument, accurately reflects a specific issue on which the parties' views did not diverge.

**6.10 Paragraphs 6.144 and 6.145 (paragraphs 7.145 and 7.146 of the Final Report)**

6.31. Canada requests the Panel to correct factual inaccuracies with respect to the Panel's description of the operation of Canada's prospective normal value system.

6.32. Chinese Taipei makes no comment on Canada's request.

6.33. We have decided to correct the inaccuracies identified by Canada. In the interest of clarity, we revised the relevant sentence in paragraph 6.145.

**6.11 Paragraphs 6.170-6.173 (paragraphs 7.171-7.174 of the Final Report)**

6.34. Chinese Taipei requests the Panel to address Chinese Taipei's argument that the conditions set forth in Article 6.8 or Annex II of the Anti-Dumping Agreement were not met because the information concerning new product types was not "held" by the cooperating exporters as such information was non-existent at the time of the original investigation.

6.35. Canada makes no comment on Chinese Taipei's request.

6.36. We have decided not to accommodate Chinese Taipei's request. Addressing Chinese Taipei's argument in addition to the reasoning contained in the relevant parts of the Report is not necessary for resolving the dispute. As we observed in the Report, Canada did not contend that relevant information was requested from the exporters when a determination based on facts available was made in the original investigation. As a result, the issue of whether such information was in fact "held" by the relevant exporters does not arise in the analysis under Article 6.8 and Annex II.



## 7 FINDINGS

### 7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

#### 7.1.1 Treaty Interpretation

7.1. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.

#### 7.1.2 Standard of Review

7.2. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

[A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.<sup>16</sup>

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the agency provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.<sup>17</sup>

7.4. The Appellate Body has also commented that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>18</sup> At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>19</sup>

7.5. Further to Article 11 of the DSU, Article 17.6 of the Anti-Dumping Agreement sets forth a specific standard of review applicable to anti-dumping disputes, namely:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; and

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

#### 7.1.3 Burden of Proof

7.6. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>20</sup> Therefore, Chinese Taipei bears the burden of demonstrating that the

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<sup>16</sup> Emphasis added.

<sup>17</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>18</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

<sup>19</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>20</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

Canadian measures are inconsistent with the WTO Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>21</sup> Finally, it is generally for each party asserting a fact to provide proof thereof.<sup>22</sup>

## 7.2 Immediate termination under Article 5.8 of the Anti-Dumping Agreement: exporter-specific or country-wide margins of dumping?

### 7.2.1 Introduction

7.7. This claim concerns the interpretation and application of the second sentence of Article 5.8 of the Anti-Dumping Agreement, which provides:

There shall be 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.

7.8. Chinese Taipei's claim is brought under the first part of this provision, concerning termination of an investigation in respect of *de minimis* margins of dumping. Chinese Taipei submits that Canada violated this provision by failing to terminate the investigation in respect of two Chinese Taipei exporters for which the CBSA had determined *de minimis* final<sup>23</sup> margins of dumping. Canada asks the Panel to reject Chinese Taipei's claim, arguing that the second sentence of Article 5.8 only requires immediate termination in respect of country-wide margins of dumping that are *de minimis*.

### 7.2.2 Main arguments of the parties

7.9. Chinese Taipei's arguments are based principally on the Appellate Body's finding in *Mexico – Anti-Dumping Measures on Rice* that the phrase "margin of dumping" in the second sentence of Article 5.8 of the Anti-Dumping Agreement relates to the individual margin of dumping of an exporter or producer, rather than a country-wide margin of dumping.<sup>24</sup> Chinese Taipei relies in particular on the Appellate Body's finding that "the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of zero or *de minimis* is determined".<sup>25</sup> Chinese Taipei further submits that the ordinary meaning of the words used in Article 5.8 as well as the context provided by other provisions of the Anti-Dumping Agreement, including Article 3.3 and 9.4, do not support Canada's position that Article 5.8 requires immediate termination of the investigation when the country-wide margin of dumping is *de minimis*.<sup>26</sup>

7.10. Canada submits that the termination of an investigation under Article 5.8 of the Anti-Dumping Agreement is only required when the country-wide margin of dumping is *de minimis*. Canada contends that the ordinary meaning of the terms used in the second sentence of Article 5.8 is consistent with this approach.<sup>27</sup> Canada contends that Chinese Taipei reads into Article 5.8 the words "with regard to that exporter", without any basis in the text or context for doing so. Canada contends that there is nothing in Article 5.8 or elsewhere in the Anti-Dumping Agreement that subdivides an investigation into any number of separate

<sup>21</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>22</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>23</sup> Chinese Taipei's claim concerns Article 5.8 termination in the context of final margins of dumping that are *de minimis* ("Canada violated Article 5.8 of the Anti-Dumping 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"). (Chinese Taipei's first written submission, para. 43). We confirm at paras. 7.63.-7.64 below that the second sentence of Article 5.8 only applies in respect of final margins of dumping that are *de minimis*. Our findings here therefore only concern the issue of whether or not Canada should have immediately terminated the investigation after finding that the final margins of dumping of two Chinese Taipei exporters were *de minimis*.

<sup>24</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 216-221.

<sup>25</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217. (emphasis original)

<sup>26</sup> Chinese Taipei's second written submission, paras. 10-26.

<sup>27</sup> Canada's first written submission, para. 56.

investigations that could be individually terminated for individual exporters.<sup>28</sup> Canada submits that the immediate context of Article 5.8 taken as a whole shows that termination under the second sentence of Article 5.8 pertains to a country, particularly since it is clear that termination in respect of negligible volume or injury must pertain to a country.

7.11. Regarding broader context, Canada observes that Article 5 provides for the initiation of a single investigation in relation to a product of a country of export.<sup>29</sup> Canada also argues that Chinese Taipei's interpretation of Article 5.8 would render Article 9.4 redundant, because there would be no need any longer to exclude *de minimis* margins at the assessment stage if the investigation had already been terminated in respect of exporters with individual *de minimis* margins of dumping.<sup>30</sup> Canada further asserts that the specific reference in Article 3.3 to a country-based margin of dumping, "as defined" in Article 5.8, provides further confirmation that the *de minimis* margin of dumping found in Article 5.8 is also country-based.<sup>31</sup> Canada also argues that Chinese Taipei's interpretation of Article 5.8 would result in inconsistent treatment of exporters under Article 9.5. In particular, Canada contends that any termination pursuant to Article 5.8 would not apply to new shippers, since the investigation would already have been completed and measures put in place. Canada asserts that new shippers found to have dumped would therefore be subject to anti-dumping measures pursuant to Article 9.5, even if their margin of dumping were only *de minimis*. Canada asserts that this inconsistent treatment does not occur if termination under Article 5.8 for a *de minimis* margin of dumping pertains to a country. Canada submits that its arguments provide cogent reasons for the Panel to depart from the interpretation of Article 5.8 of the Anti-Dumping Agreement developed by the WTO adjudicators in *Mexico – Anti-Dumping Measures on Rice*.<sup>32</sup>

### 7.2.3 Main arguments of third parties

#### 7.2.3.1 Brazil

7.12. Brazil contends that if the factual background presented by Chinese Taipei is accurate, the investigation should have been terminated with respect to those exporters whose final margins of dumping were found to be *de minimis*. Brazil asserts that the combined interpretation of the articles mentioned by Chinese Taipei, as supported by the jurisprudence of the DSB, 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. The investigating authority cannot rely on a country-wide margin of dumping when the individual margins are determined.<sup>33</sup>

#### 7.2.3.2 European Union

7.13. 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. The European Union also recalls that panels are expected, even in practice "obliged" to follow previous Appellate Body findings with respect to previously decided legal issues.<sup>34</sup>

#### 7.2.3.3 Norway

7.14. Norway 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. Norway observes that the panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* reached this very same conclusion on this exact

<sup>28</sup> Canada's second written submission, para. 20.

<sup>29</sup> Canada's second written submission, paras. 22 and 23.

<sup>30</sup> Canada's second written submission, para. 30.

<sup>31</sup> Canada's second written submission, para. 25.

<sup>32</sup> Canada's first written submission, paras. 85-92; second written submission, paras. 12-44.

<sup>33</sup> Brazil's third-party submission, para. 3.

<sup>34</sup> European Union's third-party submission, paras. 7-10.

question.<sup>35</sup> Norway contends that the context provided by Article 9.4 supports the interpretation that the obligation to terminate an investigation under Article 5.8 when the margin of dumping is *de minimis* pertains to the individual producer.<sup>36</sup>

#### 7.2.3.4 United Arab Emirates

7.15. The United Arab Emirates shares the analysis provided by Chinese Taipei. The United Arab Emirates considers that Chinese Taipei's claim is justified by the language of the Anti-Dumping Agreement, and confirmed by previous panels and the Appellate Body.<sup>37</sup>

#### 7.2.3.5 United States

7.16. The United States, while taking no position on the merits of the factual allegations made by both parties, agrees with Chinese Taipei that a proper interpretation of Article 5.8 of the Anti-Dumping Agreement requires that the investigating authority terminate an investigation with respect to an exporter or producer for which an individual margin of dumping is determined as zero or *de minimis*. Accordingly, the United States understands that Canada did not comply with its Anti-Dumping Agreement obligations if, as was the case here, these two exporters were included in the scope of the definitive anti-dumping measure.<sup>38</sup>

7.17. The United States contends that panels are not obliged to follow Appellate Body findings. The United States asserts that, to the extent a panel finds prior Appellate Body or panel reasoning to be persuasive, a panel may rely on that reasoning in conducting its own objective assessment of the matter. Nowhere in the DSU, however, is a panel given the authority not to assess objectively the legal issues in dispute, including by applying customary rules of interpretation to the text of the covered agreements, nor does the DSU require, or permit, a panel to follow – without any examination – prior Appellate Body findings.<sup>39</sup>

#### 7.2.4 Evaluation by the Panel

7.18. The parties agree that the second sentence of Article 5.8 requires immediate termination of an investigation in the event that the "margin of dumping" is *de minimis*.<sup>40</sup> The parties disagree whether the "margin of dumping" that triggers immediate termination relates to the exporting country as a whole, or to each exporter or producer individually. This is the issue that we must resolve.

7.19. The same issue was addressed by the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Both the panel and the Appellate Body found that 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. The panel noted that Article 6.10 of the Anti-Dumping Agreement provides 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".<sup>41</sup> The panel considered that this provision provides for the general rule of calculating an individual margin of dumping for each known exporter or producer. The panel observed that the exception to this rule is provided for in Article 9.4 of the Anti-Dumping Agreement. The panel stated that both the general rule and the exception to the rule provide for the calculation of individual margins of dumping, and do not envisage the calculation of a country-wide margin. The panel then examined the rest of the Anti-Dumping Agreement to see whether there is anything in the Agreement that contradicts this conclusion that the term "margin of dumping" in the Anti-Dumping Agreement is company-specific rather than country-wide. The panel found that there was not. According to the panel, "whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of

<sup>35</sup> Norway's third-party submission, para. 5.

<sup>36</sup> Norway's third-party statement, paras. 5 and 6.

<sup>37</sup> United Arab Emirates' third-party submission, paras. 5 and 8.

<sup>38</sup> United States' third-party submission, para. 3.

<sup>39</sup> United States' third-party statement, para. 7.

<sup>40</sup> The parties also agree that Article 5.8 only requires immediate termination in respect of *final* margins of dumping that are *de minimis*.

<sup>41</sup> See Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137.

dumping determined for the individual exporter".<sup>42</sup> The panel also noted that, in Article 5.8 of the Anti-Dumping Agreement, the margin of dumping is juxtaposed to the volume of dumped imports. The panel observed that while it is expressly stipulated that the latter is to be examined on a country-wide basis, no such stipulation is made with regard to the margin of dumping. This further confirmed the panel's view that the reference to the margin of dumping in Article 5.8 of the Anti-Dumping Agreement is a reference to the individual margin of dumping determined on an exporter-specific basis.<sup>43</sup>

7.20. The Appellate Body agreed with the reasoning of the panel.<sup>44</sup> The Appellate Body further observed that:

The Panel's position – that 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 – is consistent with the use of the term "margins of dumping" in Article 2.4.2 of the *Anti-Dumping Agreement*, as stated by the Appellate Body in *US – Hot-Rolled Steel*:

"[M]argins" means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.<sup>45</sup>

7.21. For our part, we consider that the ordinary meaning of the text of the second sentence of Article 5.8 does not unambiguously resolve the legal issue before us, since it does not clarify whether the "margin of dumping" that triggers immediate termination should be established for an exporting country or for individual exporters in a given exporting country.<sup>46</sup> The text of the phrase "margin of dumping" offers no guidance in this respect. The "investigation" to be immediately terminated is expressed in the singular, suggesting that it pertains to a singular investigation of exports of a given product from some or all of the producers/exporters of that product in a given exporting country as a whole. However, Article 6.10 of the Anti-Dumping Agreement provides for a general rule that a margin of dumping is to be determined for each foreign producer/exporter. Thus, a single investigation could be "terminated" *in respect of* some of those individual producers/exporters (even if it remains active for others).<sup>47</sup> We agree with the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* that, when viewed in the context of other provisions of the Anti-Dumping Agreement, the "margin of dumping" that triggers immediate termination under the second sentence of Article 5.8 should be understood to relate to the margin of dumping established for each producer or exporter individually, rather than a margin of dumping established for the exporting country as a whole.

7.22. The findings of the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* have been adopted by the DSB. It is well established that adopted reports create legitimate expectations, such that the same legal issues should be resolved in the same way in subsequent cases, absent cogent reasons for finding differently.<sup>48</sup> Canada contends that there are cogent reasons why we should not follow the decisions of the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice*. Canada points to the reference to a country-wide margin of dumping in Article 3.3, the alleged redundancy of part of Article 9.4, and the alleged inconsistent treatment of *de minimis* exporters under Article 9.5. We shall address each of these elements in turn.

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<sup>42</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.

<sup>43</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.137-7.141.

<sup>44</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217.

<sup>45</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216. (fns omitted)

<sup>46</sup> Canada asserts at para. 56 of its first written submission that the ordinary meaning of the second sentence of Article 5.8 is "consistent" with termination occurring on a country-wide basis. We consider rather that the ordinary meaning is ambiguous in this regard.

<sup>47</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218.

<sup>48</sup> See, for example, Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 14; and *US – Stainless Steel (Mexico)*, para. 160.

#### 7.2.4.1 Article 3.3 of the Anti-Dumping Agreement

7.23. Canada submits that the interpretation of the phrase "margin of dumping" by the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice* is at odds with Article 3.3 of the Anti-Dumping Agreement, which establishes conditions for the cumulative assessment of the effects of imports from multiple exporting countries. Article 3.3 provides in relevant part:

Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 ... .

7.24. Canada observes that Article 3.3 refers to a single margin of dumping being established for all imports from an exporting country, i.e. a country-wide margin of dumping. According to Canada, the specific reference in Article 3.3 to the Article 5.8 *de minimis* standard "implies that the type of margin of dumping is the same in both provisions – a margin of dumping with respect to a country".<sup>49</sup> Canada therefore concludes that Article 5.8, like Article 3.3, refers to a country-wide margin of dumping. Canada contends that the panel ignored Article 3.3 in its analysis, and that the Appellate Body endorsed the panel's analysis without referring to that error by the panel.<sup>50</sup>

7.25. We recall that the *Mexico – Anti-Dumping Measures on Rice* panel reasoned 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".<sup>51</sup> In making this statement, the panel did not refer to Article 3.3 in its analysis. However, the Appellate Body did consider the relevance of this provision, because Mexico made arguments regarding Article 3.3 to the Appellate Body that are similar to those being made by Canada in the present case. The Appellate Body rejected Mexico's arguments on the ground that "Article 3.3 does not add to the analysis of Article 5.8".<sup>52</sup> The Appellate Body reasoned as follows:

First, Article 3.3 establishes conditions for cumulation of the effects of the imports from more than one country, which is unrelated to the termination of an investigation under Article 5.8. Secondly, although, as Mexico pointed out, Article 3.3 refers to Article 5.8, this reference concerns uniquely the definition of a *de minimis* margin of dumping (defined in the third sentence of Article 5.8 as a margin of less than two per cent, expressed as a percentage of the export price). Mexico's contention that the Panel erred in the interpretation of Article 5.8 does not relate to the definition of "*de minimis*". Accordingly, we are of the view that the reference to Article 5.8 in Article 3.3 is not relevant to Mexico's argument under Article 5.8. Thirdly, it is explicitly provided in Article 3.3 that "the margin of dumping [is] established in relation to the imports from each country". It could be argued that this specific language was incorporated into Article 3.3 to mark a departure from the general rule that the term "margin of dumping" refers to the individual margin of dumping of an exporter or producer. In other words, although Mexico contends that Article 3.3 provides context to suggest that the Panel erred in its interpretation of Article 5.8, it could also be viewed as context that supports the Panel's interpretation of Article 5.8, as no language similar to that of Article 3.3 ("the margin of dumping [is] established in relation to imports from each country") can be found in Article 5.8. Accordingly, we are of the view that, contrary to what Mexico argues, Article 3.3 does not provide useful context for interpreting the term "margin of dumping" in Article 5.8.<sup>53</sup>

7.26. We agree. In our view, Article 3.3 marks a departure from the general rule that the term "margin of dumping" refers to the individual margin of dumping of an exporter or producer. Neither Canada's argument that Article 3.3 refers to the margin of dumping "as defined" in Article 5.8, nor Canada's suggestion that both provisions therefore refer to the same type of margin of dumping (i.e. a country-wide margin), persuade us otherwise. As the Appellate Body

<sup>49</sup> Canada's first written submission, para. 83.

<sup>50</sup> Canada's first written submission, para. 87.

<sup>51</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.

<sup>52</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220.

<sup>53</sup> *Ibid.*

observed, this reference in Article 3.3 concerns uniquely the definition of *de minimis*.<sup>54</sup> The fact that Article 3.3 refers to the Article 5.8 *de minimis* standard does not mean that the basis for determining the margin of dumping in Article 5.8 must necessarily be the same as the one referred to in Article 3.3. It simply means that the definition of *de minimis* provided for in Article 5.8 (i.e. a margin of less than 2%) applies under Article 3.3. Under Article 3.3, this standard is applied per country, whereas the same standard is applied per-exporter or producer under Article 5.8. There is nothing to suggest that Article 3.3, a provision that concerns the unrelated matter of cumulation, is intended to import any meaning into Article 5.8.

#### 7.2.4.2 Article 9.4 of the Anti-Dumping Agreement

7.27. Canada also relies on Article 9.4, which regulates the maximum amount of anti-dumping duty that may be imposed or collected in respect of imports from exporters that were not individually examined, in cases where authorities limit their examination in accordance with the second sentence of Article 6.10. Article 9.4 provides in relevant part that the anti-dumping duty applied to imports from exporters not included in the investigating authority's examination shall not exceed:

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6.

7.28. Canada suggests that the requirement in Article 9.4 to disregard zero or *de minimis* margins of dumping of individual exporters when calculating a weighted average margin of dumping or a weighted average normal value for non-examined exporters is most telling for interpreting Article 5.8.<sup>55</sup> Canada asserts that the application of duties contemplated in Article 9.4 takes place during the period of duty assessment, and therefore after an investigation has been completed. Canada submits that, had the investigation already been terminated with respect to individual exporters with zero or *de minimis* margins of dumping pursuant to Article 5.8, there would be no need to exclude their margins under Article 9.4. According to Canada, the need to expressly exclude zero or *de minimis* exporter-specific margins of dumping at this stage confirms that an investigation is only terminated pursuant to Article 5.8 when the margin of dumping of a country is *de minimis*. Canada contends that an interpretation of Article 5.8 supporting termination of an investigation with respect to an individual exporter with a *de minimis* margin of dumping would make part of Article 9.4 redundant, contrary to the principle of effectiveness in treaty interpretation. Canada further observes that, unlike Article 3.3, Article 9.4 does not contain any reference to the definition of a *de minimis* margin of dumping in Article 5.8. Canada submits that the absence of such a reference indicates that the margin of dumping referred to in Article 9.4, i.e. an exporter-specific margin of dumping, is not the same type as that in Article 5.8, i.e. a country-based margin of dumping.<sup>56</sup>

7.29. We are not persuaded by Canada's argument. First, Article 9.4 provides that the anti-dumping duties for non-examined exporters or producers shall not exceed the weighted average normal values or weighted average margins of dumping of investigated exporters or producers. Nothing in this provision is inconsistent with the proposition that Article 5.8 requires immediate termination in the event that an exporter has a *de minimis* individual margin of dumping. It is worth emphasising that Article 9.4 is unrelated to the termination of an investigation under the second sentence of Article 5.8. These provisions concern discrete issues, and there is nothing in the text of Article 9.4 to suggest that it has any bearing on the termination of an investigation under Article 5.8.

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<sup>54</sup> Ibid.

<sup>55</sup> Canada's first written submission, paras. 80 and 81.

<sup>56</sup> Canada's first written submission, para. 84.

7.30. Second, we consider that the distinction drawn by Canada between the investigation and assessment phases is overly rigid. We do not consider that all elements addressed in Article 9 must necessarily be viewed as pertaining only to a post-investigation phase of duty assessment. Canada relies<sup>57</sup> on the statement by the Appellate Body stated in *EC – Bed Linen (Article 21.5 – India)* that the use of the present perfect tense in sub-paragraphs 1 and 4 of Article 9:

[I]ndicates that the imposition and collection of anti-dumping duties under Article 9 is a separate and distinct phase of an anti-dumping action that necessarily occurs *after* the determination of dumping, injury, and causation under Articles 2 and 3 has been made. Members have the right to impose and collect anti-dumping duties only *after* the completion of an investigation in which it *has been established* that the requirements of dumping, injury, and causation "*have been fulfilled*".<sup>58</sup>

7.31. *EC – Bed Linen (Article 21.5 – India)* did not present the Appellate Body with the legal issue currently before us, namely the relevance of Article 9.4 for the interpretation of Article 5.8. We note that the Appellate Body also stated in *Mexico – Anti-Dumping Measures on Rice* that "[t]he 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".<sup>59</sup>

7.32. For us, there is a logical progression in the investigation and imposition of anti-dumping duties. In order to issue an order imposing anti-dumping duties on non-examined exporters, an investigating authority must determine the amount of anti-dumping duty to be imposed and collected.<sup>60</sup> In order to do that, it must first calculate the ceiling for the amount of duty that may legitimately be imposed and collected in respect of imports from such exporters. It seems to us that the calculation of that ceiling, governed by Article 9.4, would be part of the authority's investigation of dumping, and be undertaken after the calculation of the investigated exporters' individual margins of dumping, but before the imposition of any anti-dumping duty.<sup>61</sup>

7.33. Third, in any event, we recall that Article 9.4 provides that the ceiling for non-examined exporters be fixed by reference to the margins of dumping established for investigated exporters. The simple fact that an investigation has already been terminated in respect of an exporter having a *de minimis* margin of dumping does not mean that the margin of dumping determined for that investigated exporter would necessarily be excluded by the investigating authority when determining the ceiling for non-examined exporters. The fact that the investigation has been terminated in respect of an exporter does not remove that exporter from the category of exporters that were investigated, i.e. the category that is used as the basis for determining the ceiling for non-examined exporters. Nor does termination in respect of an investigated exporter mean that the data pertaining to that exporter is expunged from the investigating authority's record. Since the data pertains to an investigated exporter, it would seem reasonable that an investigating authority might subsequently use that data when establishing the ceiling for duty collection in respect of non-examined exporters, consistent with the general approach set forth in the first part of Article 9.4 (up to and including sub-paragraphs (i) and (ii)). It is only the express textual exclusion of zero and *de minimis* margins in the latter part of Article 9.4 that prevents the authority from doing so.<sup>62</sup> Indeed, one might consider that this express textual exclusion is only

<sup>57</sup> For example, Canada's opening statement at the second meeting of the Panel, para. 14.

<sup>58</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 123. (emphasis original, fn omitted)

<sup>59</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

<sup>60</sup> Indeed, the fact that the Article 12.2.2 public notice refers to the "conclusion ... of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty" suggests to us that the "determination providing for the imposition of a definitive duty" is made *before* the investigation is concluded.

<sup>61</sup> This would be consistent with the scope of the investigation envisaged by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, discussed above at para. 7.31. Furthermore, the determination of a duty rate for unexamined exporters, at some level below the calculated ceiling, could be viewed as the corollary to the determination of margins of dumping for examined exporters under Article 2 of the Anti-Dumping Agreement.

<sup>62</sup> It is similarly possible that facts pertaining to an exporter with a zero or *de minimis* margin could be used as facts available under Article 6.8 (if properly verified, etc.). For example, the authority may use cost data pertaining to that exporter as facts available in constructing a normal value for a different exporter. The fact that the investigation in respect of the exporter whose data is being used is terminated under Article 5.8 does not necessarily undermine the utility of that exporter's data in the context of Article 6.8. Absent any express exclusion of the use of such facts, there is no reason why they should not be used by the



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required precisely because the zero or *de minimis* margins of dumping might otherwise be retained by the investigating authority.

#### 7.2.4.3 *De minimis* exporters in Article 9.5 new shipper reviews

7.34. Canada submits that, because the *de minimis* standard under Article 5.8 does not apply to new exporter reviews under Article 9.5, a new exporter with a *de minimis* margin would be subject to anti-dumping duties, while an exporter with the same margin would be subject to termination in an original investigation.<sup>63</sup>

7.35. Canada's argument is premised on a conclusion of law concerning the relationship between Articles 5.8 and 9.5, a question that has not been addressed in WTO dispute settlement.<sup>64</sup> It is not clear to us that, in the context of an Article 9.5 new shipper review, an anti-dumping duty could be imposed on a new shipper for which a *de minimis* margin of dumping is determined in that review.<sup>65</sup>

7.36. In any event, Article 9.5 is unrelated to the termination of an investigation under the second sentence of Article 5.8. We do not consider that Article 9.5 informs the interpretation of the second sentence of Article 5.8. These provisions concern discrete issues, and there is nothing in the text of Article 9.5 to suggest that it should import meaning into the second sentence of Article 5.8.

#### 7.2.4.4 Conclusion

7.37. We recall our view that the second sentence of Article 5.8, when read in light of the context of the phrase "margin of dumping" as used in other provisions of the Anti-Dumping Agreement, requires immediate termination of an investigation in respect of exporters that have individual *de minimis* margins of dumping. We further recall that this approach is consistent with the decisions of the panel and Appellate Body regarding the same issue in *Mexico – Anti-Dumping Measures on Rice*. For the reasons explained above, we find that Canada has failed to establish that there are cogent reasons for us to depart from those decisions. We therefore uphold Chinese Taipei's claim that Canada violated the second sentence of Article 5.8 by failing to immediately terminate the investigation in respect of two Chinese Taipei exporters with *de minimis* margins of dumping.

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investigating authority in the context of Article 6.8 simply because they pertain to an exporter in respect of which the investigation has been terminated.

<sup>63</sup> Canada's second written submission, paras. 39-44.

<sup>64</sup> Canada observes that the Appellate Body stated at para. 341 of its report in *EC – Fasteners (China)* that all of the paragraphs of Article 9 concern the imposition of duties. Canada understands that Article 9.5, like the remainder of Article 9, only applies to the duty assessment phase, as distinct from the investigation phase. We also observe that the Appellate Body found in *US – Carbon Steel* that the *de minimis* standard set forth in the equivalent provision in the SCM Agreement (i.e. Article 11.9) did not apply in the context of sunset reviews undertaken under Article 21.3 of the SCM Agreement. (Appellate Body Report, *US – Carbon Steel*, para. 68). However, in neither of these cases was the Appellate Body considering the application of the immediate termination mechanism in the context of new shipper reviews.

<sup>65</sup> It may be that an Article 9.5 new shipper review should rather be viewed as a supplementary investigation, bearing in mind that it is the first time that the margin of dumping is being established for that shipper. Canada accepts that the Article 6.8 facts available mechanism applies in the context of Article 9.5 reviews, even though that provision applies when an interested party fails to provide necessary information or significantly impedes the "investigation". (Canada's response to Panel question No. 7.4, para. 13). There is some inconsistency, therefore, in Canada's argument that provisions pertaining to the "investigation" phase should not apply in the context of new shipper reviews. Canada contends that there is no justifiable reason why the criteria in Article 5.8 would be applicable to new shipper reviews. (Canada's response to Panel question No. 7.4, para. 16). It seems to us that there is an obvious reason why the relevant parts of Article 5.8 might apply in this context, namely to ensure that new shippers with *de minimis* margins of dumping are not subject to anti-dumping duties in the same way as exporters examined in the original investigation. The first sentence of Article 9.2 may also apply in this context, to ensure appropriateness and non-discrimination in respect of the anti-dumping duties.

### 7.3 Multiple margins of dumping: Article 6.10 of the Anti-Dumping Agreement

#### 7.3.1 Introduction

7.38. Chinese Taipei submits that Canada violated the first sentence of Article 6.10, whereby:

The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation.

7.39. Canada asks the Panel to reject Chinese Taipei's claim.

#### 7.3.2 Main arguments of the parties

7.40. Chinese Taipei submits that the CBSA failed to comply with the requirement in the first sentence of Article 6.10 to determine a single margin of dumping for each known exporter. Chinese Taipei asserts that the CBSA determined – and the exporters and producers were confronted with – two margins for each exporter, namely one company-specific margin established under Article 2, and a second, country-wide dumping margin used for assessing the need for immediate termination under the second sentence of Article 5.8. Chinese Taipei stresses that what violates Article 6.10 is not the simple fact that Canada has calculated more than one margin of dumping for each exporter, but rather that Canada used the additional, country-wide margin of dumping for the purpose of applying Article 5.8.<sup>66</sup>

7.41. Canada rejects Chinese Taipei's claim on the basis that the CBSA complied with the Article 6.10 requirement to determine individual exporter-specific margins of dumping. Canada asserts that the determination of an additional, country-wide margin of dumping is irrelevant under Article 6.10.<sup>67</sup>

#### 7.3.3 Main arguments of third parties

##### 7.3.3.1 Brazil

7.42. Brazil considers that Canada has not violated Article 6.10 of the Anti-Dumping Agreement. Brazil asserts that the CBSA complied with the Article 6.10 obligation to "determine an individual margin of dumping for each known exporter or producer". According to Brazil, the mere fact that the CBSA calculated a country-based margin of dumping does not in itself violate Article 6.10, and such calculation may be used for other purposes in the Anti-Dumping Agreement, such as in Article 3.3(a).<sup>68</sup>

#### 7.3.4 Evaluation by the Panel

7.43. We see neither a factual nor a legal foundation for Chinese Taipei's claim. Chinese Taipei asserts, as a matter of fact, that the CBSA determined "two margins [of dumping] for each exporter".<sup>69</sup> However, the second allegedly exporter-specific margin of dumping identified by Chinese Taipei is actually the *country-wide* margin established for Chinese Taipei as a whole.<sup>70</sup> By definition, the country-wide margin pertains to the country, rather than to any given exporter.

7.44. As a matter of law, nothing in the text of the first sentence of Article 6.10 precludes an investigating authority from determining – in addition to exporter-specific margins of dumping – a country-wide margin of dumping.<sup>71</sup>

<sup>66</sup> Chinese Taipei's second written submission, paras. 36-39.

<sup>67</sup> Canada's first written submission, para. 94.

<sup>68</sup> Brazil's third-party submission, para. 6.

<sup>69</sup> Chinese Taipei's second written submission, para. 38.

<sup>70</sup> See Chinese Taipei's second written submission, para. 38: "Canada determined – and the exporters and producers were confronted with – two margins for each exporter, namely one company-specific margin established under Article 2, and a second, country-wide dumping margin, which was to be applied to each and every exporter from that country, in order to determine whether their dumping margin was *de minimis*". There is nothing on the record to suggest that Canada somehow used the country-wide margin to determine whether or not individual exporter margins were *de minimis*.

<sup>71</sup> According to para. 39 of Chinese Taipei's second written submission, Chinese Taipei's main concern in bringing this Article 6.10 claim is to address the manner in which the CBSA used the country-wide margin for

7.45. We therefore reject Chinese Taipei's claim that Canada acted in a manner inconsistent with the first sentence of Article 6.10.

#### **7.4 Provisional measures on imports from a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping: Article 7.1(ii) of the Anti-Dumping Agreement**

##### **7.4.1 Introduction**

7.46. Chinese Taipei claims that Canada acted inconsistently with Article 7.1(ii) of the Anti-Dumping Agreement by imposing provisional measures on imports from a Chinese Taipei exporter with a preliminary margin of dumping below the 2% *de minimis* threshold set forth in Article 5.8. Canada imposed provisional duties on this exporter after determining that the preliminary country-wide margin of dumping for Chinese Taipei was greater than *de minimis*. The amount of provisional duty was based on the individual exporter's preliminary margin of dumping.<sup>72</sup>

7.47. Article 7.1 of the Anti-Dumping Agreement provides:

Provisional measures may be applied only if:

- (i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and
- (iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.48. Canada asks the Panel to reject Chinese Taipei's claim, principally on the basis that provisional duties may be imposed in respect of any exporter found to have dumped.

##### **7.4.2 Main arguments of the parties**

7.49. Chinese Taipei submits that there can be no "preliminary affirmative determination ... of dumping" (within the meaning of Article 7.1(ii)) for a specific exporter if the preliminary margin of dumping for that exporter is *de minimis* as defined by Article 5.8. Chinese Taipei relies in this regard on a finding by the panel in *EC – Salmon (Norway)* that "a finding of *de minimis* dumping margins is a finding that there is no legally cognizable dumping by the producer or exporter in question".<sup>73</sup> Chinese Taipei notes that the term "preliminary affirmative determination" can be understood as "initial positive finding" of dumping.<sup>74</sup> Chinese Taipei submits that Canada's investigating authorities could not make such "initial positive finding" of dumping since imports from exporters with a *de minimis* margin of dumping cannot be treated as "dumped".

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the purpose of applying the second sentence of Article 5.8. This issue is already addressed in our evaluation of Chinese Taipei's Article 5.8 claim, above.

<sup>72</sup> On a number of occasions in its first written submission (see, for example, paras. 97 and 105 of Chinese Taipei's first written submission), Chinese Taipei makes reference to the alleged WTO-inconsistency of Canada's imposition of a 0% preliminary anti-dumping duty on imports from Chung Hung Steel Corporation, a Chinese Taipei exporter with a preliminary margin of dumping of zero. We note that there is no claim regarding this issue in Chinese Taipei's request for the establishment, which refers only to the imposition of provisional measures in respect of exporters with *de minimis* margins of dumping. (*Canada – Welded Pipe*, Chinese Taipei's request for the establishment of a panel, WT/DS482/2 (dated 22 January 2015, circulated 27 January 2015), p. 3, bullet 4). Nor is this issue referred to in para. 318 of Chinese Taipei's first written submission, where Chinese Taipei summarizes the findings that it would like the Panel to make. Bearing in mind that our terms of reference are circumscribed by Chinese Taipei's request for the establishment, we do not address this issue in our findings.

<sup>73</sup> Chinese Taipei's first written submission, paras. 69-74 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.625).

<sup>74</sup> Chinese Taipei's second written submission, paras. 43-44; response to Panel question No. 1.15, para. 33.

7.50. Chinese Taipei submits that, in accordance with Article 5.8, an investigation needs to be terminated with regard to producers/exporters with a final margin of dumping that is *de minimis*. Chinese Taipei asserts that it logically follows that no definitive anti-dumping duties can be imposed on such imports since they are no longer part of the investigation. This also implies that imports with a *de minimis* margin of dumping have to be excluded from the injury analysis.<sup>75</sup> Chinese Taipei submits that the consistent interpretation of the term "dumped" requires that the same reasoning be applied in the context of Article 7.1(ii) with regard to the imposition of provisional measures, even if Article 5.8 is not directly applicable at the preliminary stage of the investigation. According to Chinese Taipei, it therefore follows that Article 7.1(ii) of the Anti-Dumping Agreement precludes the application of provisional anti-dumping measures on exporters with an individual *de minimis* margin of dumping.<sup>76</sup>

7.51. Chinese Taipei also asserts that the conditions for the imposition of provisional measures are stricter than those for the imposition of definitive measures since pursuant to Article 7.1(iii) they must be "necessary to prevent injury being caused during the investigation".<sup>77</sup> Chinese Taipei posits that if no definitive measure can be imposed on imports from exporters with a *de minimis* margin of dumping pursuant to Article 5.8, *a fortiori* no anti-dumping measure may be applied at the provisional stage on imports of such exporters. Chinese Taipei also argues that since no injury can be caused "through the effects of dumping" by imports from exporters with a *de minimis* margin of dumping, the imposition of provisional measures to offset *de minimis* margins of dumping is unnecessary to prevent injury.<sup>78</sup>

7.52. Chinese Taipei contends that its interpretation is confirmed by the object and purpose of Article VI of the GATT 1994 and the Anti-Dumping Agreement, which is to balance the potentially conflicting interests of offsetting injury caused by dumped imports with the due process rights of investigated exporters. Chinese Taipei contends that the Anti-Dumping Agreement therefore provides for a statutory threshold for the margin of dumping, below which a product cannot be considered as "dumped".<sup>79</sup>

7.53. Canada asserts<sup>80</sup> that Chinese Taipei's claim must fail for two reasons. First, because the specific reference in Article 7.1(i) to a single investigation being initiated in accordance with the provisions of Article 5 contradicts Chinese Taipei's argument that the preliminary affirmative determination of dumping relates to individual exporters, rather than the exporting country as a whole. Canada observes that there are not as many preliminary determinations as there are exporters. Article 7.1(ii), read with the *chapeau*, sets out that "[p]rovisional measures may be applied only if ... a preliminary affirmative determination has been made". According to Canada, this *singular* determination relates to the investigation as a whole, without reference to individual exporters, per Article 7.1(i), and will be affirmative if dumping has been preliminarily found to be occurring, per Article 7.1(ii).

7.54. Second, Canada asserts that there is no legal basis for Chinese Taipei's assertion that exporters with a *de minimis* margin of dumping may not be considered as dumping.<sup>81</sup> Canada asserts that the definition of dumping is found in Article 2.1 of the Anti-Dumping Agreement, where a product is considered to be dumped if it is imported into a country at an export price less than its normal value. The operation of comparing whether the export price is less than the normal value to determine if dumping exists is a clear and simple comparison; there is no additional threshold or percentage that must be factored in. According to Canada, this definition of dumping does not distinguish between goods being dumped at a margin above *de minimis* or below *de minimis*.

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<sup>75</sup> Chinese Taipei's second written submission, para. 45.

<sup>76</sup> Chinese Taipei's second written submission, para. 46. Chinese Taipei makes a distinction between terminating the investigation and applying the provisional duty. (Chinese Taipei's response to Panel question No. 1.2, paras. 6 and 7; second written submission, paras. 49 and 50). According to Chinese Taipei, while the investigation may continue in case of finding of preliminary *de minimis* margin of dumping, the authorities cannot apply any measures during the remaining part of the investigation.

<sup>77</sup> Chinese Taipei's second written submission, para. 47; opening statement at the second meeting of the Panel, para. 28.

<sup>78</sup> Chinese Taipei's opening statement at the second meeting of the Panel, para. 27.

<sup>79</sup> Chinese Taipei's response to Panel question No. 1.15, para. 42.

<sup>80</sup> Canada's second written submission, paras. 46-48.

<sup>81</sup> Canada's second written submission, para. 49.

7.55. Canada also objects to Chinese Taipei's argument that the object and purpose of the Anti-Dumping Agreement provide for a statutory threshold for the margin of dumping, below which a product cannot be considered to be dumped. Canada contends that there is no basis in the Agreement for these arguments, either in terms of its object and purpose or in terms of Chinese Taipei's assertion of the existence of a "statutory threshold". Canada observes that the Appellate Body has noted specifically that the Anti-Dumping Agreement does not contain an explicit indication of its object and purpose.<sup>82</sup> Canada also observes that Chinese Taipei refers to the panel report in *US – Zeroing (EC)* in an attempt to justify its argument regarding the object and purpose of the Anti-Dumping Agreement. According to Canada, that reference is taken out of context.<sup>83</sup> Canada also refers to the findings of the panel in *EC – Salmon (Norway)* to argue that it is the normal value that constitutes the point of reference when imposing anti-dumping duties, not the normal value less an additional *de minimis* threshold. Moreover, Canada suggests that Article 7.2 of the Anti-Dumping Agreement provides relevant context to Article 7.1(ii). Article 7.2 stipulates that provisional measures may be applied, through the imposition of duties or by use of a security, in an amount "equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping". Canada observes that there is no exception in Article 7.2 that the provisional measure must not be applied if the margin of dumping is *de minimis*, and no such exception should be read into that provision.<sup>84</sup>

### 7.4.3 Main arguments of third parties

#### 7.4.3.1 Brazil

7.56. Brazil considers that neither provisional nor definitive anti-dumping duties may be imposed on imports from exporters with a *de minimis* margin of dumping.<sup>85</sup>

### 7.4.4 Evaluation by the Panel

7.57. Article 7.1 of the Anti-Dumping Agreement provides that provisional measures may be applied only if certain conditions are met. One of those conditions, set forth in sub-paragraph (ii), is that "a preliminary affirmative determination has been made of dumping". Chinese Taipei's claim is premised on two factors. First, that this "preliminary affirmative determination" needs to be made for each foreign producer/exporter, rather than for each exporting country, and second, that the term "dumping" in this context only refers to margins of dumping exceeding the 2% *de minimis* threshold set forth in Article 5.8.

7.58. Regarding the nature of the "preliminary affirmative determination" to be made, we have already explained in the context of Chinese Taipei's Article 5.8 claim that determinations of dumping are generally made in respect of individual exporters.<sup>86</sup> The fact that a single investigation is undertaken is not inconsistent with this approach, since, as we have concluded above, such an investigation may be terminated in respect of a given exporter. Similarly, a "preliminary affirmative determination" may be made in respect of multiple exporters. In addition, Article 7.2 provides that provisional measures should take the form of a cash deposit or bond equal to "the amount of anti-dumping duty provisionally estimated". Article 7.5 states that the relevant provisions of Article 9 should be followed in the application of provisional measures. This includes the requirement in Article 9.2 to collect anti-dumping duties from "all sources found to be dumped". The Appellate Body has confirmed that the term "sources" relates to individual exporters, rather than exporting countries.<sup>87</sup> Read together, these considerations indicate that the "preliminary affirmative determination" should be made in respect of individual exporters. It is difficult to conceive of the utility of Article 7.1(ii) providing for a country-wide preliminary affirmative determination of dumping, if provisional duties are to be applied on the basis of exporter-specific margins of dumping.

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<sup>82</sup> Canada's second written submission, para. 54 (referring to Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118).

<sup>83</sup> Canada's second written submission, para. 54.

<sup>84</sup> Canada's second written submission, para. 59.

<sup>85</sup> Brazil's third-party submission, para. 9.

<sup>86</sup> With the exception of the margin of dumping referred to in Article 3.3.

<sup>87</sup> Appellate Body Report, *EC – Fasteners (China)*, para. 338.

7.59. We now turn to the second premise of Chinese Taipei's claim, namely that the exporter-specific determination of dumping referred to in Article 7.1(ii) contains a *de minimis* component. The term "dumping" is defined in Article 2.1 as referring to a situation where a product is "introduced into the commerce of another country at less than its normal value". By virtue of this definition, a product is either dumped (i.e. the export price is less than normal value), or it is not dumped (i.e. the export price is equal to or greater than normal value). There is no scope in this definition for any notion of *de minimis* dumping, in the sense of the export price being less than normal value by only a particular degree. Had the drafters intended to define "dumping" with a *de minimis* component, they could readily have done so.

7.60. Chinese Taipei argues that its interpretation of Article 7.1(ii) is supported by case law. We disagree. As we explain below, the findings cited by Chinese Taipei were made by panels addressing different issues than the one before us in this dispute. Furthermore, only one of the panels provided any rationale for its findings, and that rationale does not apply in respect of provisional measures.

7.61. Chinese Taipei refers<sup>88</sup> to the findings of three panels that imports from exporters with *de minimis* margins of dumping may not be treated as "dumped imports" for the purpose of the Article 3 injury analysis. This is not the issue currently before us. In the first two cases, namely *EC – Bed Linen (Article 21.5 – India)* and *Argentina – Poultry Anti-Dumping Duties*, neither panel provided any rationale for its finding. While the *Argentina – Poultry Anti-Dumping Duties* panel stated that, "[o]n the basis of the ordinary meaning of the text ... the term 'dumped imports' refers to all imports attributable to producers or exporters for which a margin of dumping greater than *de minimis* has been calculated"<sup>89</sup>, that panel did not explain how the ordinary meaning of the phrase "dumped imports" supported that finding. In particular, the panel made no reference to the definition of the term "dumping" set forth in Article 2.1.

7.62. Chinese Taipei then notes that a similar approach was adopted by the panel in *EC – Salmon (Norway)*. That panel explained its approach by reference to Article 5.8 of the Anti-Dumping Agreement:

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. Article 5.8 of the AD Agreement provides that there shall be "immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". Thus, it is clear that no anti-dumping duties can be imposed on such imports. 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.<sup>90</sup>

7.63. We see logic in the panel referring to the second sentence of Article 5.8 when considering the meaning of the phrase "dumped imports" in Article 3, since the requirement to immediately terminate an investigation in respect of an exporter with a final *de minimis* margin of dumping suggests that imports from that exporter should not be treated as dumped. However, the relevance of the *EC – Salmon (Norway)* panel's finding in the present case is not apparent since, for the reasons outlined below, we do not consider that the second sentence of Article 5.8 applies in respect of preliminary affirmative determinations of dumping.

7.64. Article 7.2 makes it clear that the preliminary determination relates to "the amount of the anti-dumping duty provisionally estimated", and the "provisionally estimated margin of dumping". This "preliminary affirmative determination" of dumping is therefore no more than a provisional estimate. This reflects the fact that the provisional determination may be based on data that is incomplete, or that the investigating authority has not yet satisfied itself is accurate. We do not consider that an investigating authority would be required to immediately terminate an

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<sup>88</sup> We are referring in particular to the explanation of Chinese Taipei's claim set forth in its response to Panel question No. 1.15.

<sup>89</sup> Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

<sup>90</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.625. (emphasis added)

investigation on the basis of only a *provisional estimate* of the amount of dumping determined using unverified data. Nor do we consider that the "legal cognizance" of dumping should be based on no more than a provisional estimate. The parties also agree that it is only a final determination of a *de minimis* margin of dumping that triggers immediate termination under Article 5.8. Chinese Taipei even goes so far as to assert that "[t]his finding relating to Article 5.8 of the Anti-Dumping Agreement is irrelevant to the issue of the application of provisional measures".<sup>91</sup> In these circumstances, the findings of the *EC – Salmon (Norway)* panel are not relevant to the interpretation of the term "dumping" in the context of Article 7.1(ii), and those findings therefore provide no support for an argument that there is no legally cognizable dumping once a *preliminary* affirmative determination of *de minimis* dumping has been made.<sup>92</sup>

7.65. In addition, Chinese Taipei also refers to the object and purpose of Article 7.1. Chinese Taipei asserts that Article 7.1 is designed to strike a balance between the need to safeguard free trade as long as there is no final determination that anti-dumping duties are actually justified and the application of provisional measures in case these are necessary to prevent injury being caused while the investigation is carried out.<sup>93</sup> As indicated by Canada, the Appellate Body has already stated that no object and purpose of the Anti-Dumping Agreement has been formulated.<sup>94</sup> Furthermore, even if Chinese Taipei had correctly identified the object and purpose of Article 7.1, we note that such purpose is broadly reflected in the requirement, set forth in Article 7.1(iii), that "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". It is entirely possible that an investigating authority might determine that provisional measures are not necessary to prevent injury being caused during the investigation by imports from an exporter with a preliminary *de minimis* margin of dumping. However, this determination would be made pursuant to Article 7.1(iii), rather than Article 7.1(ii). Chinese Taipei has not pursued any claim under Article 7.1(iii).

7.66. For the above reasons, we reject Chinese Taipei's claim that Canada acted in violation of Article 7.1(ii) by applying provisional measures in respect of imports from a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping.

## **7.5 Additional claims under Articles 1, 7.5, and 9.2 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994**

### **7.5.1 Introduction**

7.67. Chinese Taipei contends that the imposition of provisional and definitive anti-dumping duties on imports from exporters with *de minimis* margins of dumping is inconsistent with Articles 1, 7.5, and 9.2 of the Anti-Dumping Agreement, and Article VI:2 of the GATT 1994.

7.68. The first sentence of Article 1 of the Anti-Dumping Agreement provides that:

An 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.<sup>95</sup>

7.69. Article 9.2 of the Anti-Dumping Agreement provides in relevant part:

When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted.

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<sup>91</sup> Chinese Taipei's second written submission, para. 53.

<sup>92</sup> We note that the *EC – Salmon (Norway)* panel also stated that imports attributable to a *de minimis* producer or exporter should not be treated as dumped "for any aspect of that investigation". However, consistent with our reasoning above, we do not interpret this to be referring to the provisional measure stage of the investigation.

<sup>93</sup> Chinese Taipei's second written submission, para. 48.

<sup>94</sup> Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 118.

<sup>95</sup> Fn omitted.

7.70. Article 7.5 of the Anti-Dumping Agreement provides:

The relevant provisions of Article 9 shall be followed in the application of provisional measures.

7.71. The first sentence of Article VI:2 of the GATT 1994 provides:

In order to offset or prevent dumping, a Member may levy on any dumped product an anti-dumping duty not greater than the margin of dumping in respect of such product.

7.72. Canada asks the Panel to reject Chinese Taipei's claims.

### 7.5.2 Main arguments of the parties

7.73. Chinese Taipei asserts that exporters with final *de minimis* margins of dumping do not constitute "sources found to be dumped" within the meaning of Article 9.2 first sentence of the Anti-Dumping Agreement. Chinese Taipei contends that the imposition of definitive anti-dumping duties on exporters with *de minimis* margins of dumping is therefore inconsistent with Article 9.2.<sup>96</sup> Chinese Taipei submits that Article 9.2 of the Anti-Dumping Agreement applies equally to the imposition of provisional measures, by virtue of Article 7.5 of the Anti-Dumping Agreement. Chinese Taipei contends that the phrase "sources found to be dumped" cannot be given a different meaning in the context of provisional measures.<sup>97</sup> According to Chinese Taipei, therefore, Canada's imposition of provisional duties on imports from a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping is inconsistent with Article 7.5.<sup>98</sup>

7.74. Chinese Taipei contends that Canada violated Article VI:2 first sentence of the GATT 1994 by imposing provisional anti-dumping duties on imports from exporters with preliminary *de minimis* dumping margins, and by imposing definitive anti-dumping duties on imports from Chinese Taipei exporters with final *de minimis* margins of dumping.<sup>99</sup> According to Chinese Taipei, the existence of *de minimis* margins of dumping means that there was no dumping to offset or prevent as required under Article VI:2 of the GATT 1994. Chinese Taipei alleges that the violation of Article VI:2 of the GATT 1994 necessarily entails a violation of Article 1 of the Anti-Dumping Agreement.<sup>100</sup>

7.75. Canada insists that the CBSA acted in accordance with the requirements of Articles 7.5 and 9.2. In particular, Canada argues that Article 9.2 allows the imposition of anti-dumping duties on all sources found to be dumped. Canada asserts that Article 9.2 contains no exception for individual exporters with *de minimis* margins of dumping.<sup>101</sup> Canada contends that there is therefore no basis to uphold Chinese Taipei's consequential claims under Article 1 of the Anti-Dumping Agreement or Article VI:2 of the GATT 1994.<sup>102</sup>

### 7.5.3 Evaluation by the Panel

7.76. We recall our finding that Canada violated the second sentence of Article 5.8 by failing to terminate its investigation in respect of individual Chinese Taipei exporters with margins of dumping of less than 2%. We also recall our findings that the second sentence of Article 5.8 only applies in respect of final margins of dumping that are *de minimis*. It follows that exporters with final *de minimis* margins of dumping should not have been treated as "sources found to be dumped" for the purpose of duty imposition under Article 9.2. The investigation in respect of those exporters should have been terminated immediately after final determinations of *de minimis* margins of dumping were made for those producers, and no anti-dumping measures should have been imposed on them. We therefore uphold Chinese Taipei's claim that the imposition of definitive anti-dumping measures in respect of imports from these exporters is inconsistent with

<sup>96</sup> Chinese Taipei's first written submission, paras. 87-93.

<sup>97</sup> Chinese Taipei's second written submission, para. 57.

<sup>98</sup> Chinese Taipei's first written submission, paras. 94-97.

<sup>99</sup> Chinese Taipei's first written submission, para. 105.

<sup>100</sup> Chinese Taipei's first written submission, para. 107.

<sup>101</sup> Canada's first written submission, para. 108.

<sup>102</sup> Canada's first written submission, para. 112.



Article 9.2 of the Anti-Dumping Agreement. As a result, we also uphold Chinese Taipei's claims under Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 in respect of the imposition of definitive anti-dumping measures on these exporters.

7.77. We have rejected Chinese Taipei's claim that Canada acted inconsistently with Article 7.1(ii) by imposing provisional anti-dumping measures on a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping. At the stage of its preliminary determination, the CBSA was entitled to treat this exporter as a "source[] found to be dumped" within the meaning of Article 9.2. At this preliminary stage, immediate termination under the second sentence of Article 5.8 was not required. There is therefore no basis for us to find that the imposition of provisional measures in respect of imports from this exporter is inconsistent with Articles 1 or 7.5 of the Anti-Dumping Agreement, or Article VI:2 of the GATT 1994.

## **7.6 The treatment of imports from exporters with *de minimis* margins of dumping in the injury investigation: Article 3 of the Anti-Dumping Agreement**

### **7.6.1 Introduction**

7.78. Article 3, and the various sub-paragraphs thereof, require the investigating authority to demonstrate that "dumped imports" are causing material injury to a domestic industry. Chinese Taipei challenges the CITT's decision to treat imports from Chinese Taipei exporters with final *de minimis* margins of dumping as "dumped imports" for the purpose of its injury and causation determinations.

### **7.6.2 Main arguments of the parties**

7.79. Chinese Taipei submits that Canada violated each of the provisions of Article 3 that address the treatment of "dumped imports" in the investigating authority's injury and causation determinations (Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement). In particular, Chinese Taipei asserts that Canada acted inconsistently with each of these paragraphs of Article 3 of the Anti-Dumping Agreement by treating imports from exporters determined by the CBSA to have *de minimis* margins of dumping as "dumped imports" within the meaning of these provisions.<sup>103</sup> Chinese Taipei contends that imports from *de minimis* exporters may not be treated as "dumped" within the meaning of Article 3, and refers to case law in support.<sup>104</sup> According to Chinese Taipei, such imports should be excluded from the investigating authority's assessment of the injurious effects of "dumped imports".

7.80. Canada contends that imports with a *de minimis* margin of dumping remain "dumped" within the meaning of Article 2.1 of the Anti-Dumping Agreement, and are therefore properly treated as "dumped imports" for the purpose of the Article 3 injury and causation analyses. Canada asserts that only non-dumped imports should be excluded from the category of "dumped imports". In considering whether imports are "dumped", Canada contends that there is no distinction between imports that are dumped at a margin above *de minimis* and imports that are dumped at a margin below *de minimis*. Canada relies on findings by the Appellate Body in *US – Carbon Steel* to support its position.<sup>105</sup> Canada rejects the case law relied on by Chinese Taipei, either because it contends that those cases concerned exporters for which the margins of dumping or duties were zero, or because it contends that the panels were only making *obiter dicta*.<sup>106</sup>

<sup>103</sup> Chinese Taipei's first written submission, para. 115; second written submission, para. 69.

<sup>104</sup> Chinese Taipei's first written submission, paras. 118-128 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*; and Panel Reports, *Argentina – Poultry Anti-Dumping Duties*; *EC – Salmon (Norway)*; and *EC – Fasteners (China)*).

<sup>105</sup> Canada's first written submission, para. 122 (referring to Appellate Body Report, *US – Carbon Steel*, para. 80).

<sup>106</sup> Canada's first written submission, para. 123.

### 7.6.3 Main arguments of third parties

#### 7.6.3.1 Brazil

7.81. Brazil agrees with Chinese Taipei that the term "dumped imports" does not include imports from exporters with a *de minimis* margin of dumping. Brazil asserts that the DSB has already addressed this issue on different occasions.<sup>107</sup>

#### 7.6.3.2 United Arab Emirates

7.82. The United Arab Emirates agrees with Chinese Taipei'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 Anti-Dumping Agreement.<sup>108</sup>

### 7.6.4 Evaluation by the Panel

7.83. We have already examined, in the context of Chinese Taipei's Article 7.1(ii) claim, the finding by the *EC – Salmon (Norway)* panel that imports from an exporter with a *de minimis* margin of dumping may not be treated as "dumped" for purposes of the injury analysis.<sup>109</sup> The panel's finding was based on the immediate termination requirement set forth in the second sentence of Article 5.8. On the understanding that the finding by the *EC – Salmon (Norway)* panel applies only in respect of a *final* determination of an exporter's margin of dumping, we agree with that finding. Article 5.8 effectively means that there is no legally cognizable dumping by an exporter with a final *de minimis* margin of dumping. As a result, imports from that exporter should not be treated as "dumped" for the purpose of the analysis and final determinations of injury and causation.

7.84. Canada suggests that the facts of the present case should be distinguished from the facts at issue in *EC – Salmon (Norway)*, because the definitive anti-dumping duty for the relevant exporter in that case was zero.<sup>110</sup> Although Canada is correct as a factual matter that a zero duty was applied in the *EC – Salmon (Norway)* case, the amount of the duty was irrelevant to the finding of the panel. The panel's finding was based rather on the fact that a *de minimis* margin of dumping had been established for that exporter. The panel stated expressly that "an interpretation of 'dumped imports' in Article 3 which would allow an investigating authority to include in the volume of dumped imports for purposes of injury analysis imports attributable to a producer/exporter *for which a de minimis margin has been calculated* is impermissible".<sup>111</sup> The panel rejected arguments by the respondent that the fact that no anti-dumping duties were ultimately imposed on this exporter should justify the inclusion of its exports as "dumped imports".<sup>112</sup>

7.85. Canada also argues that, contrary to Chinese Taipei's proposition, there are no Appellate Body decisions that endorse the approach advanced by Chinese Taipei.<sup>113</sup> It is true that the Appellate Body jurisprudence invoked by Chinese Taipei did not address the issue of whether imports from exporters with a *de minimis* margin of dumping are to be excluded from the injury analysis. Nevertheless, we consider this fact irrelevant. The findings of the *EC – Salmon (Norway)* panel have been adopted by the DSB. As a result, they give rise to legitimate expectations on the part of WTO Members, including Chinese Taipei.

7.86. Canada argues that there is Appellate Body support for its position that the phrase "dumped imports" includes any imports that are dumped, including those with only a *de minimis* rate of dumping. Canada refers in this regard to the finding by the Appellate Body in *US – Carbon Steel*

<sup>107</sup> Brazil's third-party submission, para. 9.

<sup>108</sup> United Arab Emirates' third-party submission, para. 14.

<sup>109</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.628. We recall that the same finding was also made by the *EC – Bed Linen (Article 21.5 – India)* and *Argentina – Poultry Anti-Dumping Duties* panels.

<sup>110</sup> Canada's first written submission, para. 123; second written submission, para. 72.

<sup>111</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.628. (emphasis added)

<sup>112</sup> Panel Report, *EC – Salmon (Norway)*, paras. 7.627 and 7.628.

<sup>113</sup> Canada's second written submission, para. 71. We understand Canada to refer to Chinese Taipei's reliance, at paragraphs 118 and 119 of its first written submission, on the Appellate Body report in *EC – Bed Linen (Article 21.5 – India)*, paras. 111 and 113.

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that the meaning of the term "subsidization" in the Agreement on Subsidies and Countervailing Measures (SCM Agreement) is not confined to subsidization greater than *de minimis*.<sup>114</sup>

7.87. The facts of the present case are very different from the facts in *US – Carbon Steel*. In that case, the Appellate Body was examining whether or not the *de minimis* standard set forth in Article 11.9 of the SCM Agreement applies in Article 21.3 sunset reviews. The Appellate Body found that it did not:

[N]one of the words in Article 11.9 suggests that the *de minimis* standard that it contains is applicable *beyond* the investigation phase of a countervailing duty proceeding. In particular, Article 11.9 does *not* refer to Article 21.3, nor to reviews that may follow the imposition of a countervailing duty.<sup>115</sup>

7.88. The Appellate Body in the above extract was considering only whether the equivalent provision in the SCM Agreement should apply "beyond" the investigation phase. A different result is warranted in the factual circumstances of the present case, which concerns an original investigation. We are in no doubt that Article 5.8 applies in original investigations. The application of Article 5.8 means that there is no legally cognizable dumping by an exporter with a final *de minimis* margin of dumping. Accordingly, imports from that exporter may not be treated as "dumped imports" for the purpose of the Article 3 injury analysis.

7.89. In light of the above, we find that Canada acted in a manner inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement by treating imports from two Chinese Taipei exporters with final *de minimis* margins of dumping as "dumped imports" in the CITT's analysis and final determinations of injury and causation.

## **7.7 The treatment of factors other than dumped imports in the causation analysis: Articles 3.1 and 3.5 of the Anti-Dumping Agreement**

### **7.7.1 Introduction**

7.90. Chinese Taipei's claims are based on the so-called "non-attribution" requirement set forth in Article 3.5 of the Anti-Dumping Agreement. After the first sentence of Article 3.5 requires the investigating authorities to demonstrate that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury, the third sentence provides:

The 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.

Previous panel and Appellate Body reports have established that investigating authorities are thereby required to "separate and distinguish" any injury caused by other known factors from the injury caused by the subject imports.<sup>116</sup>

7.91. Following a negative determination of present material injury, the CITT made an affirmative determination that dumped imports were causing a threat of material injury. In its threat determination, the CITT considered the potential injury caused by two known other factors. Chinese Taipei submits that the CITT should also have considered potential injury caused by two additional factors, namely: (a) the effect of subsidies provided in respect of imports from India (that were also dumped); and (b) overcapacity in the domestic industry.

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<sup>114</sup> Canada's first written submission, para. 122; second written submission, para. 73 (both referring to Appellate Body Report, *US – Carbon Steel*, para. 80).

<sup>115</sup> Appellate Body Report, *US – Carbon Steel*, para. 68. (emphasis original, fn omitted)

<sup>116</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 226.

## 7.7.2 Main arguments of the parties

### 7.7.2.1 The effect of subsidization

7.92. Chinese Taipei argues that the CITT failed to separate and distinguish the effect of the subsidy from the effect of the dumping in respect of imports from India that were both subsidized and dumped. Chinese Taipei submits that Canada thereby acted inconsistently with Article 3.5 and, as a result, Article 3.1. Chinese Taipei contends that Canada thereby rendered *inutile* the words "through the effects of dumping" contained in the first sentence of Article 3.5 of the Anti-Dumping Agreement.<sup>117</sup> According to Chinese Taipei, the fact that Article 3.5 calls for a demonstration that the dumped imports are causing injury "through the effects of dumping" implies that the investigating authority needs to separate any effects that are not the result of dumping. In Chinese Taipei's view, when the same goods are both dumped and subsidized, there may be effects of subsidization that are not directly reflected in the dumping margin, particularly in cases where subsidization leads to lower prices without increasing the dumping margin.<sup>118</sup> Chinese Taipei submits that without analysing the relationship between the 36 subsidy programs available in India, including some non-export-oriented programs, and dumping in that country, Canada could not have assumed that there is no need to distinguish between the effects of dumping and the effects of subsidization.<sup>119</sup>

7.93. Canada denies that an investigating authority is required to determine that injury or threat thereof was caused by the effects of the dumping specifically, as opposed to the dumped imports more generally. Canada submits that the Appellate Body established in *Japan – DRAMs (Korea)* that there is no requirement under the Anti-Dumping Agreement to determine that the effect of the dumping specifically caused or threatened to cause injury.<sup>120</sup> The central issue is rather whether dumped imports caused or threatened to cause injury. Canada submits that, because all subsidized imports from India were also dumped, it was not improper for the CITT to include those imports in its causation analysis, without separating and distinguishing the subsidy and dumping effects embodied within those imports.<sup>121</sup>

### 7.7.2.2 Overcapacity

7.94. Chinese Taipei submits that Canada violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to separate and distinguish the effect of alleged overcapacity. Chinese Taipei submits that this factor was "known" to the CITT as a potential cause of injury.<sup>122</sup>

7.95. Canada understands Chinese Taipei to equate overcapacity with low utilization of capacity.<sup>123</sup> Canada contends that, pursuant to Article 3.4 of the Anti-Dumping Agreement, capacity utilization is an indicator of injury rather than a potential cause of injury.<sup>124</sup> According to Canada, therefore, there was no need for the CITT to examine this factor in the context of its non-attribution analysis. Canada contends that, 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.<sup>125</sup>

## 7.7.3 Main arguments of third parties

### 7.7.3.1 Brazil

7.96. Brazil submits that, since Canada made a finding of threat of material injury, the non-attribution requirement in Article 3.5 does not apply. In Brazil's opinion, the legal standard that should guide the causation assessment in the present case should be that foreseen in Article 3.7, which makes reference to the obligation of an investigating authority to take into

<sup>117</sup> Chinese Taipei's second written submission, para. 94.

<sup>118</sup> Chinese Taipei's second written submission, para. 95.

<sup>119</sup> Chinese Taipei's second written submission, para. 101.

<sup>120</sup> Canada's first written submission, para. 141; second written submission, para. 89.

<sup>121</sup> Canada's second written submission, para. 92.

<sup>122</sup> Chinese Taipei's first written submission, paras. 156 and 157; second written submission, para. 107.

<sup>123</sup> Canada's first written submission, para. 146.

<sup>124</sup> Canada's first written submission, paras. 146 and 147.

<sup>125</sup> Canada's second written submission, para. 98.

consideration several 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.<sup>126</sup>

### 7.7.3.2 European Union

7.97. The European Union observes that, according to Article 3.5 of the Anti-Dumping Agreement, an investigating 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, subsidization causing the dumping is irrelevant for the injury and causation analysis under Articles 3.1 and 3.5 of the Anti-Dumping Agreement.<sup>127</sup> In the view of the European Union, such subsidization 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).<sup>128</sup>

### 7.7.3.3 United States

7.98. The United States considers that Chinese Taipei's claims lack legal merit. The United States asserts that, by its plain text, Article 3.5 requires an examination of known factors *other* than the dumped imports, whereas Chinese Taipei would somehow require a non-attribution analysis with respect to these *same* dumped imports. The United States asserts that, by definition, in the context of applying Article 3.5, the dumped imports cannot simultaneously be both "dumped imports" and "factors other than the dumped imports".<sup>129</sup>

## 7.7.4 Evaluation by the Panel

### 7.7.4.1 The effect of subsidization

7.99. Chinese Taipei's claim concerns the CITT's investigation of imports from India that were both dumped and subsidized. Chinese Taipei claims that the CITT should have separated the subsidy and dumping effects in those imports, and shown that injury was caused by the dumping effect only. Chinese Taipei's position is that the non-attribution provision requires the investigating authority "to separate any effects that are not the result of dumping".<sup>130</sup>

7.100. Chinese Taipei's claim is inconsistent with the text of Article 3.5. The text of this provision focuses the injury analysis on the effect of the dumped imports, rather than on the effects of the dumping *per se*. The first sentence of Article 3.5 requires the investigating authority to "demonstrate[] that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury". The first sentence of Article 3.5 therefore refers to injury being caused by the dumped imports that are the subject of the investigation, rather than by the effects of dumping. Moreover, "effects of the dumping" is modified by the phrase "as set forth in [Articles 3.2 and 3.4]". Article 3.2 requires investigating authorities to consider the volume and price effects of the dumped imports. Similarly, Article 3.4 requires investigating authorities to examine "the impact of the dumped imports on the domestic industry". The focus on the dumped imports continues in the non-attribution provision in the third sentence of Article 3.5, which requires investigating authorities to examine any known factors "other than the dumped imports" which at the same time are injuring the domestic industry, and ensure that any injury caused by such other factors is not attributed "to the dumped imports". Logically, the imports subject to the investigation cannot simultaneously be both the "dumped imports" referred to in these provisions **and** factors "other than the dumped imports" referred to in the third sentence of Article 3.5.

7.101. Chinese Taipei suggests that a focus on the effect of the dumped imports, as opposed to the effect of the dumping, reads the words "through the effects of dumping" out of the first sentence of Article 3.5. We disagree. As discussed above, the first sentence of Article 3.5 requires the investigating authority to demonstrate that dumped imports are causing injury through the

<sup>126</sup> Brazil's third-party submission, paras. 16 and 17.

<sup>127</sup> European Union's third-party submission, para. 15.

<sup>128</sup> European Union's third-party submission, para. 16.

<sup>129</sup> United States' third-party statement, para. 11.

<sup>130</sup> Chinese Taipei's second written submission, para. 94.

effects of dumping "as set forth in paragraphs 2 and 4". This textual formulation indicates that information relating to the volume and price effects (Article 3.2) and the consequent impact of the dumped imports on the domestic industry (Article 3.4) define the "effects of dumping" for purposes of determining whether material injury is caused by dumped imports through those effects. Provided a proper consideration and evaluation are undertaken pursuant to paragraphs 2 and 4 of Article 3, the authority may properly demonstrate that dumped imports are causing injury through the effects of dumping.

7.102. Our understanding of the text of Article 3.5 is consistent with the findings of the Appellate Body in *Japan – DRAMS (Korea)*. That case concerned the equivalent provision of the SCM Agreement, i.e. Article 15.<sup>131</sup> Like Chinese Taipei in the present case, Korea argued before the Appellate Body *inter alia* that the panel's focus on the subsidized imports, rather than the effect of the subsidization, would read the "through the effects of subsidy" language out of Article 15.5 of the SCM Agreement. The Appellate Body rejected Korea's appeal on the basis *inter alia* that:

It is clear from the architecture of Articles 15.2, 15.4, and 15.5 that, for determining whether the "subsidized imports are, through the effects of subsidies, causing injury" to the domestic industry, what is required is the examination of the effects of the subsidized imports as set forth in Articles 15.2 and 15.4. These paragraphs neither envisage nor require the two distinct types of examinations suggested by Korea, namely, an examination of the effects of the subsidized imports as per Articles 15.2 and 15.4; and, a second examination of the effects of the subsidies as distinguished from the effects of the subsidized imports on a case-by-case basis.

...

We are therefore of the view that, if an investigating authority carries out the examination required under Articles 15.2, 15.4, and 15.5, such examination suffices to demonstrate that "subsidized imports are, through the effects of subsidies, causing injury" within the meaning of the *SCM Agreement*.<sup>132</sup>

7.103. Chinese Taipei argues that the Appellate Body's findings are of limited utility because while the Appellate Body found that there is no obligation to distinguish the effects of subsidies from the effects of the subsidized imports it "did not address at all the distinction between the effects of dumping and the effects of the subsidies".<sup>133</sup> Chinese Taipei therefore maintains its position that the phrase "'through the effects of dumping' implies that the investigating authority needs to separate any effects that are not the result of dumping".<sup>134</sup> In making this argument, Chinese Taipei fails to recognize the full implications of the Appellate Body's findings for its claim. The Appellate Body confirmed that there is no need for the investigating authority to analyse the effect of the subsidy, as opposed to the effect of the subsidized imports. The starting point for Chinese Taipei's argument, namely the focus on the effect of the *dumping* or *subsidy*, is therefore flawed. The proper starting point for the causation and non-attribution analysis in an anti-dumping investigation is rather the effect of the dumped imports. There is no obligation to "separate any effects that are not the result of dumping" (such as effects that are the result of subsidization), because there is in any event no need to isolate the effects that *are* the result of dumping.

7.104. Chinese Taipei asserts that its position is supported by the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. That case concerned Article VI:5 of the GATT 1994, which prohibits the concurrent application of anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization. In considering the meaning of the phrase "same situation", the Appellate Body observed that domestic subsidies will

<sup>131</sup> Article 15.5 of the SCM Agreement is virtually identical to Article 3.5 of the Anti-Dumping Agreement. The reference in Article 3.5 of the Anti-Dumping Agreement to the effects of dumping "as set forth in paragraphs 2 and 4" is provided for in fn 47 to Article 15.5 of the SCM Agreement. Furthermore, Ministers have recognized "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures". (Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Party V of the Agreement on Subsidies and Countervailing Measures).

<sup>132</sup> Appellate Body Report, *Japan – DRAMS (Korea)*, paras. 264 and 268.

<sup>133</sup> Chinese Taipei's second written submission, paras. 91-93.

<sup>134</sup> Chinese Taipei's second written submission, para. 94.

generally affect the prices at which a producer sells its goods in the domestic market and in export markets in the same way and to the same extent, so that any lowering of prices attributable to the subsidy will be reflected on both sides of the dumping margin calculation. The Appellate Body contrasted this to the situation of an export subsidy, which will result in a *pro rata* reduction in the export price of a product but not the price of domestic sales of that product, resulting in a higher margin of dumping.<sup>135</sup> Chinese Taipei contends that this finding supports its position that there may be situations where the effects of subsidies are unrelated to the effects of dumping.<sup>136</sup>

7.105. We do not consider that the findings in *US – Anti-Dumping and Countervailing Duties (China)* offer any guidance for the interpretation of Article 3.5 of the Anti-Dumping Agreement. That case concerned a different provision of a different Agreement and an entirely different issue. No reference was made by the Appellate Body to the provisions governing causation or non-attribution requirements. Furthermore, the conclusion that Chinese Taipei seeks to draw from these findings is at odds with the above-mentioned findings made by the Appellate Body in *Japan – DRAMs (Korea)*, concerning the very same issue arising under the essentially identical provision in the SCM Agreement.<sup>137</sup> The fact that the Appellate Body has suggested in a different context that subsidies and dumping can have different effects is irrelevant, since the causation/non-attribution analysis is not focused on the dumping or subsidy effect.

7.106. For these reasons, we reject Chinese Taipei's claim that the CITT acted inconsistently with Article 3.5 (and Article 3.1) by failing to separate the effect of the subsidization from the effect of the dumping in respect of subsidized and dumped imports from India.

#### 7.7.4.2 Overcapacity

7.107. The Article 3.5 non-attribution requirement applies only in respect of other injurious factors that are "known" to the investigating authority. Chinese Taipei identifies two grounds for asserting that "overcapacity" was "known" to the CITT as a cause of injury that should have been examined pursuant to the non-attribution requirement: (a) the CITT's reference to "the significant unused capacity of the domestic industry"<sup>138</sup>; and (b) the written submission made by Knightsbridge, an interested party in the investigation.<sup>139, 140</sup>

7.108. We understand the CITT's reference to "the significant unused capacity of the domestic industry" as referring to the low capacity utilization rates prevailing in the domestic industry during the period of investigation, rather than overcapacity.<sup>141</sup> Low capacity utilization and overcapacity are different concepts. This is acknowledged by Chinese Taipei itself:

TPKM considers that "low capacity utilization rates" and "overcapacity" are two distinct concepts that should not be equated. As explained in TPKM's replies to questions from

<sup>135</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 568.

<sup>136</sup> Chinese Taipei's second written submission, para. 97.

<sup>137</sup> We emphasise that Ministers have recognized "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures". (Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures).

<sup>138</sup> See CITT, Finding and Reasons, Injury Inquiry No. NQ-2012-003, 27 December 2012, (Exhibit TPKM-14), para. 129.

<sup>139</sup> See Knightsbridge International Corp., Submission to CITT related to the Preliminary Injury Inquiry PI-2012-003, 18 June 2012, (Exhibit TPKM-16).

<sup>140</sup> See Chinese Taipei's first written submission, para. 154 (Chinese Taipei refers to "this huge overcapacity" immediately after citing the CITT's reference to "the significant unused capacity of the domestic industry") and fns 116 and 117; and second written submission, fn 102. See also Chinese Taipei's response to Panel question No. 3.4, para. 66 ("overcapacity was also apparent from the submission of one of the interested parties called Knightsbridge").

<sup>141</sup> The reference to "the significant unused capacity of the domestic industry" is properly understood in its context. The first paragraph (para. 125) of the section entitled "Production, Capacity and Capacity Utilization" in Exhibit TPKM-14 addresses domestic production. The beginning of the first sentence of para. 126 refers to "stable" production capacity. The second part of that first sentence observes that there were, however, "very low utilization rates". The remainder of the CITT discussion in that section discusses those capacity utilization rates. In this context, the reference in para. 129 to "the significant unused capacity of the domestic industry" is properly understood as a continued reference to those same "very low [capacity] utilization rates". (CITT, Finding and Reasons, Injury Inquiry No. NQ-2012-003, 27 December 2012, (Exhibit TPKM-14)).

the Panel, while "overcapacity" stands for a situation where producer has capacity much larger than what is required by the demand on the market, the term "low capacity utilization rates" refers to the actual production as a percentage of the total (over-) capacity.<sup>142</sup>

7.109. Since low capacity utilization and overcapacity are, in the words of Chinese Taipei, "two distinct concepts that should not be equated", the fact that the CITT knew of, and refers to, low capacity utilization is not sufficient to establish that overcapacity was also "known" to the CITT as a cause of injury.<sup>143</sup>

7.110. Chinese Taipei refers to page 2 of Knightsbridge's submission which provides in relevant part:

In this case, we are all aware of the economic downturn affecting the majority of industry. We are all operating at less than 50% of where we were at. This is a reality that all business must adjust to. The ERW Pipe and Tube from the named countries are not to blame for reduced sales and profitability. There remains a need for this product to be imported to give customers access to a full product range and competitive prices.<sup>144</sup>

7.111. Canada contends that this statement does not indicate that excess capacity was a cause of injury in the CSWP investigation. Canada suggests that 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. Canada notes that, in the same paragraph of its submission, Knightsbridge also refers to reduced sales and profitability, two other listed indicators of injury.<sup>145</sup>

7.112. We understand Knightsbridge's statement that "[w]e are all operating at less than 50% of where we were at" to mean that the industry in general was utilizing less than half of the capacity that it had previously utilized. In other words, this statement again refers to low capacity utilization, rather than overcapacity. Since the decline in capacity utilization could be caused by dumped imports, rather than overcapacity, this statement is not sufficient to establish that overcapacity was "known" to the CITT as an "other factor" causing injury.

7.113. In light of the above, we find that Chinese Taipei has failed to establish that overcapacity in the domestic industry was "known" to the CITT as a factor causing injury to the domestic industry. Accordingly, there is no basis for us to find that the CITT acted in a manner inconsistent with Article 3.5 (and Article 3.1) by failing to undertake a non-attribution analysis in respect of this factor.

## **7.8 The use of facts available in the determination of the dumping margin and duty rate for "all other exporters": Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement**

### **7.8.1 Introduction**

7.114. Chinese Taipei challenges the way in which the CBSA used facts available for determining the dumping margin and duty rate for imports from non-cooperating exporters from Chinese Taipei, hereinafter also referred to as "all other exporters".<sup>146</sup> Chinese Taipei asserts that Canada violated Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement because

<sup>142</sup> Chinese Taipei's second written submission, para. 104.

<sup>143</sup> Chinese Taipei argues at para. 105 of its second written submission that overcapacity "may be the cause of low capacity utilization rates". This is true. However, the fact that overcapacity may cause low capacity utilization simply confirms that the two concepts are distinct. And the fact that overcapacity "may" cause low capacity utilization demonstrates that the existence of low capacity utilization does not in and of itself demonstrate the existence of overcapacity. This is because the low capacity utilization may also be caused by other factors, such as dumped imports.

<sup>144</sup> Knightsbridge International Corp., Submission to CITT related to the Preliminary Injury Inquiry PI-2012-003, 18 June 2012, (Exhibit TPKM-16), p. 2 (emphasis added), cited in Chinese Taipei's first written submission, at para. 154.

<sup>145</sup> Canada's second written submission, para. 103.

<sup>146</sup> In this dispute, we use the term "all other exporters" as per the parties' use of this term.



the CBSA used facts available in determining the dumping margin and duty rate applicable to "all other exporters" without complying with the conditions laid down in those provisions. Chinese Taipei's claim does not concern the CBSA's resort to facts available *per se*. It is rather concerned with the nature of the available facts that the CBSA relied on and the methodology followed by the CBSA to determine the facts available.<sup>147</sup>

#### 7.8.1.1 The relevant provisions

7.115. Article 6.8 of the Anti-Dumping Agreement and its Annex II, paragraph 7, set out the requirements under which facts available can be resorted to. Article 6.8 provides that:

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

7.116. Annex II is entitled "Best Information Available in Terms of Paragraph 8 of Article 6". Paragraph 7 thereof allows an investigating authority to base its determination on information from a secondary source, subject to certain conditions. Paragraph 7 provides that:

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

#### 7.8.1.2 Factual background

7.117. The CBSA established the dumping margin and duty rate of 54.2% for "all other exporters" on the basis of facts available.<sup>148</sup> The margin and rate were determined using the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperative producer from any country subject to the investigation.<sup>149</sup> The relevant transaction was made by a cooperating producer from a country other than Chinese Taipei.<sup>150</sup>

7.118. The CBSA explained its determination of the dumping margin for "all other exporters" as follows:

For all other exporters that did not provide the requested information during the course of the dumping investigation, normal values were determined in accordance with subsection 29(1) of SIMA, as in the opinion of the President, sufficient information has not been furnished or is not available to enable the determination of normal value as provided in sections 15 to 23 of the Act. In accordance with the ministerial specification, the normal values of the goods sold to the importer in Canada were determined by advancing the export prices of the goods as determined under section 24 of SIMA by the highest amount by which the normal value exceeded the export price on an individual transaction (54.2%) for a cooperative exporter.

For all of the other exporters, import pricing information available from the CBSA's internal information systems was used for the purposes of determining export price.

<sup>147</sup> Chinese Taipei's second written submission, para. 140.

<sup>148</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), paras. 112 and 198.

<sup>149</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), para. 110.

<sup>150</sup> See Canada's and Chinese Taipei's responses to Panel question No. 4.6, para. 49 and para. 90, respectively.

The subject goods exported to Canada by all other exporters during the POI were found to be dumped by a margin of dumping of 54.2%, expressed as a percentage of export price.<sup>151</sup>

7.119. With regard to the applicable duty rate, the CBSA stated:

Exporters of subject goods who did not provide sufficient information in the dumping investigation will have normal values established by advancing the export price by 54.2% based on a ministerial specification pursuant to section 29 of SIMA. Anti-dumping duty will apply based on the amount by which the normal value exceeds the export price of the subject goods.<sup>152</sup>

7.120. The Ministerial Specification referred to by the CBSA provided the following:

Pursuant to subsection 29(1) of the *Special Import Measures Act (SIMA)*, I hereby specify that where, in your opinion, sufficient information has not been furnished or is not available to enable the determination of the normal value or the export price as provided for in sections 15 to 28 of SIMA, the normal value or the export price of the subject goods originating in or exported from Chinese Taipei, the Republic of India, the Sultanate of Oman, the Republic of Korea, Thailand, and the United Arab Emirates, as the case may be, shall be determined in the following manner:

a) The normal value shall be determined on the basis of the export price as determined under section 24, 25 or 29 of SIMA, plus an amount equal to 54.2% of that export price.

b) The export price shall be the selling price to the Canadian importer declared on customs entry documentation, adjusted by deducting therefrom all costs, charges, expenses, duties and taxes described in subparagraph 24(a)(i) to (iii) of SIMA, where this information is included with the customs documentation.<sup>153</sup>

7.121. Section 5.12.2 of the SIMA Handbook entitled "Ministerial Specifications for Dumping Purposes" provides in relevant part that:

For the purposes of the final determination, and ... in respect of goods for which an exporter is required to provide information and fails to provide a complete response, normal values will be established by a ministerial specification pursuant to subsection 29(1) of SIMA. Normal values of the goods will be based on the export price determined under section 24 or 25 of SIMA plus an amount equal to the highest margin of dumping (expressed as a percentage of the export price), found for the final determination from exporters who were required to provide information and who fully complied with the Agency's request for information.<sup>154</sup>

### 7.8.2 Main arguments of the parties

7.122. Chinese Taipei submits that the CBSA's reliance on the highest transaction-specific amount of dumping for a non-Chinese Taipei exporter in its use of facts available is inconsistent with Article 6.8, and Annex II, paragraph 7. This claim is based on the following three grounds.

7.123. First, referring to WTO case law to the effect that facts available must not be applied to punish non-cooperation, Chinese Taipei submits that the CBSA's use of the highest

<sup>151</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), paras. 110-112.

<sup>152</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), para. 198.

<sup>153</sup> CBSA, *Ministerial Specification*, (Exhibit TPKM-20). Section 29(1) of SIMA, referred to in the Ministerial Specification, provides that "[w]here, in the opinion of the President, sufficient information has not been furnished or is not available to enable the determination of normal value or export price ... the normal value or export price, as the case may be, shall be determined in such manner as the Minister specifies." (Special Import Measures Act, R.S.C., 1985, c. S-15 (last amended on 1 November 2014), (Exhibits TPKM-25 and CAN-12) (exhibited twice), section 29(1)).

<sup>154</sup> CBSA, *SIMA Handbook*, sections 5.12-5.14, (Exhibit TPKM-17), section 5.12.2. The SIMA Handbook is a non-binding reference guide for the CBSA and provides a collection of its administrative practice.

transaction-specific amount of dumping was punitive.<sup>155</sup> Chinese Taipei argues that the CBSA's final dumping determination shows that the CBSA considered the failure to provide requested information itself as being sufficient to justify the automatic use of the highest dumping margin.<sup>156</sup> In support of its characterization of the CBSA's approach as punitive, Chinese Taipei observes that the CBSA selected the worst or among the most adverse information possible. Chinese Taipei also relies on the reference contained in the SIMA Handbook that failure to provide necessary information should not benefit the exporter.<sup>157</sup>

7.124. Second, Chinese Taipei contends that the CBSA mechanistically relied on the highest transaction-specific amount of dumping, the approach essentially provided for at paragraph 5.12.2 of the SIMA Handbook, without evaluating and assessing in a comparative manner the available information on file in order to identify the "best information available" to reasonably replace the information that the "all other exporters" failed to provide.<sup>158</sup> In making this argument, Chinese Taipei emphasizes that the CBSA's determination does not contain any explanation reflecting why it used the highest amount by which the normal value exceeded the export price on an individual transaction for one cooperating exporter and which other available facts it had considered. In fact, according to Chinese Taipei, the CBSA ignored other information available on the record, in particular the information provided by the cooperating exporters from Chinese Taipei.<sup>159</sup>

7.125. Third, Chinese Taipei argues that by resorting to information pertaining to the highest transaction-specific amount of dumping for a non-Chinese Taipei producer, the CBSA failed to consider what would be the "best information available" for determining the dumping margin and duty rate applicable to "all other exporters" from Chinese Taipei.<sup>160</sup> Chinese Taipei asserts that there is no logical relationship between the rate of 54.2% and the exports from Chinese Taipei.<sup>161</sup> It recalls that individual dumping margins had been determined for cooperating Chinese Taipei exporters accounting for a vast majority of exports from Chinese Taipei. It contends that information concerning those cooperating Chinese Taipei exporters would have been more representative for the Chinese Taipei market and its exports as a whole, and thus would have been the most fitting or most appropriate information to use in the calculation of the dumping margin and duty rate for "all other exporters" from Chinese Taipei.<sup>162</sup>

7.126. Canada denies that the CBSA's use of facts available was punitive under the specific circumstances of the case.<sup>163</sup> It emphasizes that the use of facts available may legitimately lead to less favourable results in case of non-cooperation, as foreseen in the third sentence of paragraph 7 of Annex II and recognized in WTO jurisprudence.<sup>164</sup> Canada stresses that the investigating authority is allowed to draw adverse inferences from the exporter's failure to cooperate. Canada also asserts that the CBSA's use of facts available was based on verified facts gathered during the investigation, and on reasonable inferences concerning exporters that decided not to participate in the investigation.<sup>165</sup> Moreover, Canada argues that the CBSA's approach could not be deemed punitive because it serves a legitimate policy purpose, namely encouraging participation of exporters in investigations and preventing circumvention through non-cooperation.<sup>166</sup> Given that the CBSA did not use information from the petition, it also rejected the proposition that the worst information available had been used as facts available.

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<sup>155</sup> Chinese Taipei's first written submission, para. 178 (referring to Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238; and *China – GOES*, para. 7.302); second written submission, paras. 109-129.

<sup>156</sup> Chinese Taipei's first written submission, para. 178.

<sup>157</sup> Chinese Taipei's second written submission, paras. 113, 123, and 128; first written submission, para. 178.

<sup>158</sup> Chinese Taipei's first written submission, para. 179; second written submission, paras. 130-136.

<sup>159</sup> Chinese Taipei's first written submission, para. 180; second written submission, para. 135.

<sup>160</sup> Chinese Taipei's first written submission, para. 182; second written submission, paras. 137-141.

<sup>161</sup> Chinese Taipei's first written submission, para. 182; second written submission, para. 139.

<sup>162</sup> Chinese Taipei's opening statement at the first meeting of the Panel, para. 46; second written submission, para. 139.

<sup>163</sup> Canada's first written submission, paras. 160-168; second written submission, para. 118.

<sup>164</sup> See references to, e.g. the Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.468 and 4.469; and Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.60 and 7.61.

<sup>165</sup> Canada's first written submission, para. 168.

<sup>166</sup> *Ibid.*

7.127. Canada asserts that the CBSA undertook a proper comparative assessment of all information on the record, without acting "mechanistically" or "automatically" when resorting to the highest transaction-specific amount of dumping for a cooperating exporter.<sup>167</sup> It submits that the CBSA properly determined that the highest amount by which the normal value exceeded the export price found on an individual transaction made by a cooperating non-Chinese Taipei exporter was "an appropriate basis" for establishing normal values for "all other exporters" from Chinese Taipei.<sup>168</sup> According to Canada, this determination was based on a careful evaluation and comparative assessment of all available evidence on the record of the investigation, including information provided by cooperating exporters from Chinese Taipei.<sup>169</sup> Canada asserts that this is demonstrated by the record of the CSWP investigation, either explicitly, or by necessary implication.<sup>170</sup> Canada argues that the CBSA's flexibility in evaluating facts available permitted the CBSA to conduct its comparative evaluation and assessment as part of the overall assessment of the information on the record instead of conducting a discrete analysis.<sup>171</sup> Moreover, the CSWP investigation should be distinguished from instances where violations of Article 6.8 and Annex II of the Anti-Dumping Agreement have been found, such as cases where an investigating authority simply used facts provided by the petitioner without further scrutiny, selected facts in an arbitrary manner, or made determinations devoid of any factual foundation.<sup>172</sup> Canada also suggests that the general practice of the CBSA to consider whether to disregard anomalous or aberrant transactions when selecting facts available necessarily involved taking into account every export transaction which ensured that the CBSA did not apply facts available in a "mechanistic" or "automatic" manner.<sup>173</sup>

7.128. Canada recognizes that the information selected in the application of facts available must have a logical relationship to the information missing from the record. However, Canada asserts that Chinese Taipei failed to establish that the information selected, which pertained to actual sales transactions of subject goods during the period of investigation, lacks such logical relationship with exports from Chinese Taipei.<sup>174</sup>

7.129. Canada also rejects Chinese Taipei's argument that the CBSA should have taken into account information pertaining to exporters from Chinese Taipei.<sup>175</sup> Canada argues that the obligations under Annex II, paragraph 7, are procedural in nature and entrust the investigating authority with discretion and flexibility when selecting facts available.<sup>176</sup> Hence, they do not require the CBSA to rely specifically on information provided by the cooperating exporters from Chinese Taipei. Nor do they guarantee a specific outcome among different legitimate options. In any event, Chinese Taipei may not request the Panel to conduct a *de novo* review as to what specific information the CBSA should have used in order to establish the margin of dumping and duty rate for "all other exporters" from Chinese Taipei.<sup>177</sup>

### 7.8.3 Main arguments of third parties

#### 7.8.3.1 European Union

7.130. The European Union argues that adverse inferences may be drawn under the disciplines of Article 6.8 of the Anti-Dumping Agreement and its Annex II, paragraph 7.<sup>178</sup> Moreover, 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 the non-cooperating exporters, the

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<sup>167</sup> Canada's first written submission, paras. 169-173.

<sup>168</sup> Canada's first written submission, para. 171.

<sup>169</sup> Canada's first written submission, para. 172. See also Canada's opening statement at the first meeting of the Panel, para. 51.

<sup>170</sup> Canada's first written submission, para. 170 and Canada's opening statement at the first meeting of the Panel, para. 51.

<sup>171</sup> Canada's opening statement at the second meeting of the Panel, para. 74; response to Panel question No. 9.1, para. 28.

<sup>172</sup> Canada's first written submission, para. 173.

<sup>173</sup> Canada's response to Panel question No. 4.3, para. 39; second written submission, paras. 109-111.

<sup>174</sup> Canada's first written submission, para. 175.

<sup>175</sup> Canada's first written submission, para. 176.

<sup>176</sup> Canada's first written submission, para. 176. See also Canada's second written submission, paras. 127-129.

<sup>177</sup> Canada's second written submission, para. 130.

<sup>178</sup> European Union's third-party submission, paras. 24 and 25.

European Union considers the selection of adverse facts to be consistent with Article 6.8, and Annex II, paragraph 7.<sup>179</sup>

### 7.8.3.2 United States

7.131. The United States argues that the alleged insufficiency of the CBSA's explanation of the basis for its application of facts available should be addressed under Article 12 of the Anti-Dumping Agreement, and not Article 6.8 thereof.<sup>180</sup> In the view of the United States, the Panel 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 should also assess whether the CBSA provided a sufficient basis for its application of the facts available to the "all other exporters".<sup>181</sup>

### 7.8.4 Evaluation by the Panel

7.132. This claim raises the issue of whether Canada acted in accordance with Article 6.8 and Annex II, paragraph 7, of the Anti-Dumping Agreement in respect of the facts used by the CBSA to determine the margin of dumping and duty rate for "all other exporters".

7.133. We begin our analysis by examining Chinese Taipei's argument that the CBSA failed to conduct a comparative evaluation and assessment of all the available facts. According to Chinese Taipei, Article 6.8, and Annex II, paragraph 7, required the CBSA to undertake a comparative evaluation and assessment of all the available evidence when selecting facts available. We observe that Chinese Taipei's argument is consistent with the applicable legal standard under Article 6.8, and Annex II, paragraph 7, developed by WTO adjudicators. In particular, we observe that the panel in *Mexico – Anti-Dumping Measures on Rice* found in respect of Article 6.8, and Annex II:

The use of the term "*best* information" means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available".<sup>182</sup>

The panel's approach was upheld by the Appellate Body.<sup>183</sup> We agree with the legal standard applied by the panel and Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, and shall apply it in the present case.<sup>184</sup> The requisite comparative evaluation and assessment necessarily involves consideration and comparison of "all substantiated facts on the record", and must be sufficiently reflected in the investigation's published reports.<sup>185</sup>

<sup>179</sup> European Union's third-party submission, para. 27.

<sup>180</sup> United States' third-party submission, para. 19.

<sup>181</sup> United States' third-party submission, para. 20.

<sup>182</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166 (emphasis original). See also Panel Report, *China – Broiler Products*, para. 7.312.

<sup>183</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289. Although instances may arise in which a comparative evaluation and assessment may not necessarily be required (see Appellate Body Report, *US – Carbon Steel (India)*, para. 4.434), none of the parties have invoked such circumstances to apply in the case at hand and the Panel has no reason to consider that the CBSA was not required to conduct a comparative evaluation and assessment.

<sup>184</sup> Canada also accepts that this legal standard applies to the CBSA.

<sup>185</sup> Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.421 and 4.424; and *US – Countervailing Measures (China)*, para. 4.179.

7.134. In the CSWP investigation, there were two relevant documents in the record of the investigation, namely the CBSA's Statement of Reasons concerning the Final Determinations of Dumping and Subsidizing<sup>186</sup>, and the Ministerial Specification.<sup>187</sup> The Statement of Reasons, in the relevant sections on the dumping margin and duty rate for "all other exporters", states:

In accordance with the ministerial specification, the normal values of the goods sold to the importer in Canada were determined by advancing the export prices of the goods as determined under section 24 of SIMA by the highest amount by which the normal value exceeded the export price on an individual transaction (54.2%) for a cooperative exporter.<sup>188</sup>

Exporters of subject goods who did not provide sufficient information in the dumping investigation will have normal values established by advancing the export price by 54.2% based on a ministerial specification pursuant to section 29 of SIMA.<sup>189</sup>

7.135. The Statement of Reasons contains no comparative evaluation of the facts available, nor any explanation of why the CBSA relied on the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperative exporter. It also does not contain any alternative considerations. The Statement of Reasons refers simply to the Ministerial Specification. That Ministerial Specification, though, also contains no reference to any comparative evaluation of facts on the record, but instead is limited in relevant part to the statement that:

The normal value shall be determined on the basis of the export price as determined under section 24, 25 or 29 of SIMA, plus an amount equal to 54.2% of that export price.<sup>190</sup>

7.136. There is therefore nothing in the record's relevant documents to suggest that the CBSA conducted any comparative evaluation or assessment of all available facts on the record before determining the basis for the margin of dumping and duty rate for "all other exporters".<sup>191</sup>

7.137. Canada alleges that the Ministerial Specification was established only after a careful, comparative and systematic evaluation and assessment of all the evidence on the record, on the basis of a three-step methodology employed by the CBSA.<sup>192</sup> In particular, Canada submits:

[T]hat the record of the CSWP investigation establishes either explicitly, or by necessary implication, that the CBSA performed the following steps when selecting facts available in the determination of normal values for non-cooperating exporters:

- First, the CBSA examined all information on the record, including information provided in the complaint, information provided by cooperating exporters, and customs documentation.
- Second, the CBSA considered whether the information presented by the cooperating exporters, rather than information provided in other secondary sources (e.g., the complaint), was the best information on which to base the methodology for determining normal values.

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<sup>186</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2).

<sup>187</sup> CBSA, *Ministerial Specification*, (Exhibit TPKM-20).

<sup>188</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), para. 110.

<sup>189</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), para. 198.

<sup>190</sup> CBSA, *Ministerial Specification*, (Exhibit TPKM-20), p. 1.

<sup>191</sup> We note that section 5.12.2 of the SIMA Handbook provides for increasing export prices by an amount equal to the highest amount of dumping found for a cooperating exporter as the default methodology when establishing facts available for the determination of normal values. It does not refer to any comparative evaluation and assessment of all available record evidence. It appears that in the CSWP investigation the CBSA followed the approach set out in section 5.12.2 of the SIMA Handbook. (CBSA, *SIMA Handbook*, sections 5.12-5.14, (Exhibit TPKM-17)).

<sup>192</sup> Canada's first written submission, paras. 170-172.

- Third, after determining that verified information from the cooperating exporters was appropriate, the CBSA examined the difference between normal value and export price for each individual transaction for the exporters who provided sufficient information in order to identify an appropriate margin for the ministerial specification. In this process, the CBSA considered whether it was necessary to disregard any of those transactions as anomalies or aberrations. Based on its standard practice, the CBSA also took into account whether it was necessary to make any adjustments based on "[c]ommon sense, fairness and other practical considerations".<sup>193</sup>

7.138. At the first substantive meeting with the parties, the Panel asked Canada to explain in detail, by reference to record evidence and relevant documentation, the basis for its assertion that the record establishes either explicitly, or by necessary implication, that the CBSA had engaged in a systematic evaluation of all of the information on the record.<sup>194</sup> Canada was unable to identify any precise element of the record in this regard. Instead, Canada merely referred to the entire Statement of Reasons, taken as a whole.<sup>195</sup> Canada points to the parts of the Statement of Reasons according to which the CBSA had issued requests for information to all potential exporters and importers, considered their responses, issued supplemental requests for information, conducted on-site verifications, and provided its analysis in respect of each cooperating exporter.<sup>196</sup> In addition, Canada refers to the ruling letters<sup>197</sup> sent to the individual cooperating exporters, in particular those from Chinese Taipei, as providing further detail on the methodologies used to calculate each individual exporter's normal values and export prices and as showing how the CBSA had conducted a systematic evaluation of all of the information on the record for each exporter.<sup>198</sup>

7.139. At the second substantive meeting with the parties, Canada maintained that the CBSA had considered it "appropriate" to resort to the highest margin of dumping found for a cooperating exporter in respect of a single transaction when selecting facts available. The Panel requested Canada to explain why the CBSA had considered this approach appropriate in the present case and to indicate where in the record this explanation is reflected.<sup>199</sup> In response, Canada repeated the elements already mentioned above.<sup>200</sup>

7.140. The factors identified by Canada fail, individually or taken as a whole, to show that the CBSA conducted a comparative evaluation and assessment of all the facts on record when selecting facts available in respect of the margin of dumping and duty rate for "all other exporters". No element referred to by Canada expressly or implicitly addresses the issue of whether and, if so, how the CBSA evaluated and assessed the available information specifically with respect to and for purposes of determining the dumping margin and duty rate for "all other exporters". The investigative and procedural steps taken by the CBSA, also invoked by Canada as part of the three-step methodology<sup>201</sup>, are entirely unrelated to the specific issue of the selection of facts available in respect of "all other exporters". They simply demonstrate that the CBSA collected and verified a large volume of data. Collecting data is not the same as undertaking a comparative and systematic evaluation and assessment of that data for the purpose of applying facts available. Nor does checking for anomalies, aberrations, or the need for adjustments equate

<sup>193</sup> Canada's first written submission, para. 170. (fn omitted)

<sup>194</sup> Canada's response to Panel question No. 4.4.

<sup>195</sup> Canada's response to Panel question No. 4.4, para. 41.

<sup>196</sup> Canada's response to Panel question No. 4.4, paras. 41-44 (referring to the Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), paras. 42, 44, and 52-102). See also Canada's second written submission, para. 112.

<sup>197</sup> Ruling letters were issued by the CBSA to give notice of the final dumping determinations, including the relevant exporter's dumping margin and future normal values.

<sup>198</sup> Canada's response to Panel question No. 4.4, para. 44; second written submission, para. 113 (referring to the relevant ruling letters provided as Exhibits TPKM-22 (CBSA, Final Dumping Determination regarding Chung Hung Steel Corporation, 9 November 2012, (Exhibit TPKM-22) (BCI)); TPKM-23 (CBSA, Final Dumping Determination regarding Shin Yang Steel Co. Ltd., 9 November 2012, (Exhibit TPKM-23) (BCI)); and TPKM-24 (CBSA, Final Dumping Determination regarding Yieh Phui Enterprise Co. Ltd., 9 November 2012, (Exhibit TPKM-24) (BCI))).

<sup>199</sup> Canada's response to Panel question No. 9.1(ii).

<sup>200</sup> Canada's response to Panel question No. 9.1(ii), para. 28.

<sup>201</sup> See para. 7.137 above.

to a comparative evaluation and assessment.<sup>202</sup> Despite several specific requests from the Panel, Canada failed to provide any indication as to how the CBSA determined that the highest transaction-specific dumping margin from a cooperating exporter was appropriate, and even the best fitting information, for establishing dumping margins and duty rates for "all other exporters".<sup>203</sup>

7.141. In light of the above, we conclude that the CBSA applied facts available in respect of the margin of dumping and duty rate for "all other exporters" without undertaking a comparative evaluation and assessment of all the available information on the record before applying facts available in respect of "all other exporters".

7.142. Regarding Chinese Taipei's argument that the CBSA should have relied on information concerning the cooperating Chinese Taipei exporters as the most fitting or most appropriate information, we recall our finding that the CBSA failed to conduct a comparative and evaluative assessment of all the record evidence when determining that the highest amount of dumping for a specific transaction for any cooperating exporter should be used as facts available. Absent any such comparative and evaluative assessment by the CBSA, the Panel has no basis on which to determine whether information concerning cooperative exporters from Chinese Taipei would have been the "best information available".

7.143. Considering the above, we do not need to reach a definitive conclusion in respect of Chinese Taipei's argument that the CBSA used facts available to punish "all other exporters" from Chinese Taipei. We observe, however, that both parties accept that any punitive use of facts available is inconsistent with the disciplines on facts available.<sup>204</sup> They also share the view that duty rates for non-cooperating exporters – based on facts available – may serve to encourage cooperation and prevent anti-dumping duty circumvention. We do not disagree. There may be a fine line between, on the one hand, incentivizing cooperation and preventing circumvention and, on the other hand, punishing non-cooperating exporters. In the case at hand, it appears to us that by singling out the highest transaction-specific amount of dumping from a cooperative exporter without any comparative evaluation and assessment, and without any form of explanation, the CBSA went beyond what was appropriate and necessary to achieve the objectives of encouraging cooperation and preventing circumvention.<sup>205</sup>

7.144. In light of the above, we find that the CBSA acted in a manner inconsistent with Article 6.8 of the Anti-Dumping Agreement, and its Annex II, paragraph 7, when establishing the dumping margin and duty rate for "all other exporters" on the basis of the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperative producer from any country subject to the investigation.

## 7.9 The treatment of imports of new product models or types

### 7.9.1 Introduction

7.145. Under a prospective normal value duty assessment system as operated by Canada, the amount of anti-dumping duty is generally equivalent to the difference between the export price and the pre-determined, or prospective, normal value established for the particular product model being imported. Prospective normal values are usually established during the investigation for the models or types of the product subject to the investigation to the extent that such models or types have been exported by foreign producers/exporters to Canada during the period of investigation.

7.146. A difficulty arises in the event that a producer/exporter exports new product models or types after the investigation has been completed and an anti-dumping measure is imposed. Such

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<sup>202</sup> It is more than obvious that the fact that a transaction is not anomalous or aberrant or does not need adjustment does not mean that it is appropriate to use as facts available.

<sup>203</sup> See the second step of the CBSA's methodology invoked by Canada.

<sup>204</sup> This is in line with established WTO case law. (See Panel Reports, *China – GOES*, para. 7.302; and *Mexico – Anti-Dumping Measures on Rice*, para. 7.238; and Appellate Body Report, *US – Carbon Steel (India)*, para. 4.468).

<sup>205</sup> We do not exclude that there could be circumstances in which a single transaction made by a cooperating exporter may appropriately be selected as facts available. However, the onus would be on the investigating authority to explain the need for such an approach.



product models or types will not have been examined during the investigation, since they did not exist or were not exported to Canada during the period of investigation. Consequently, the investigating authority will not have established any normal values for them. Accordingly, anti-dumping duties cannot be assessed by simply comparing the export price to a model-specific prospective normal value. This claim concerns the determination by the CBSA of the alternative basis for duty assessment to be used for new product models or types.

7.147. In its Final Determination, the CBSA established an amount of duty for imports of new product models or types from two investigated and cooperative Chinese Taipei exporters using facts available. The CBSA determined that the amount of duty would be the difference between the export price and the export price increased by 54.2%.<sup>206</sup> This is the same methodology as it used for establishing the facts available duty rate for "all other exporters".<sup>207</sup> This margin of dumping is significantly higher than the *de minimis* margins of dumping that had been determined for the Chinese Taipei exporters at issue in the original investigation.

7.148. Chinese Taipei pursues a number of claims concerning the CBSA's determination. First, Chinese Taipei submits that Canada violated Article 9.3 because the anti-dumping duty applied in respect of new product models or types is the same as the all others rate, and therefore does not reflect the margin of dumping established for the relevant exporters during the original investigation. Second, Chinese Taipei 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 for new product types without finding that the relevant exporters had failed to cooperate. Third, Chinese Taipei submits that Canada violated Article 2.2 of the Anti-Dumping Agreement because it calculated normal values for new product models or types of cooperating exporters on the basis of a methodology that is not foreseen in Article 2.2 of the Anti-Dumping Agreement. Fourth, Chinese Taipei submits that Canada violated Article 6.10 of the Anti-Dumping Agreement because, in establishing a second margin of dumping for new product models or types, Canada determined more than one individual margin of dumping for the cooperating exporters. We discuss each of these claims below.

## **7.9.2 The relevance of the margin of dumping established during the investigation: Article 9.3 of the Anti-Dumping Agreement**

### **7.9.2.1 Main arguments of the parties**

7.149. Chinese Taipei's claim is based on the *chapeau* of Article 9.3, which provides that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2".

7.150. Chinese Taipei claims that Canada improperly applied anti-dumping duties on imports of new product models or types for investigated and cooperative exporters on the basis of the residual duty rate, rather than using the margins of dumping established for those exporters during the original investigation.<sup>208</sup> In particular, Chinese Taipei claims that in a prospective normal value system, such as the one in Canada, the normal value calculated for the purposes of determining the dumping margin during the original investigation constitutes the relevant benchmark when determining the anti-dumping duty.<sup>209</sup> Chinese Taipei claims that the margin of dumping established by the CBSA for each exporter during the original investigation was necessarily for the product under investigation as a whole for each exporter.<sup>210</sup> Chinese Taipei submits that because new product types still fall within the category of the product under investigation, a margin of dumping had already been established for those product types during the investigation. Chinese Taipei contends that, consistent with the *chapeau* of Article 9.3, the anti-dumping duties collected on imports of new product models or types should therefore not exceed the margin of dumping established during the investigation.

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<sup>206</sup> See, for example, CBSA, Final Dumping Determination regarding Chung Hung Steel Corporation, 9 November 2012, (Exhibit TPKM-22) (BCI), appendices 2 and 3.

<sup>207</sup> See above at para. 7.117.

<sup>208</sup> Chinese Taipei's opening statement at the second meeting of the Panel, para. 56; second written submission, para. 157.

<sup>209</sup> Chinese Taipei's second written submission, para. 163.

<sup>210</sup> Chinese Taipei's first written submission, para. 212.

7.151. Canada contends that Chinese Taipei ignores that the *chapeau* of Article 9.3 contains a general obligation that is implemented through the more specific sub-paragraphs of that provision.<sup>211</sup> Canada suggests that the Appellate Body has found that Members comply with Article 9.3 by refunding any excess duties collected:

The sub-paragraphs of Article 9.3 – including, of particular relevance here, sub-paragraphs 1 and 2 – specify in greater detail how investigating authorities are to comply with this more general obligation, namely, by providing for refunds to respondents whose duties have exceeded their dumping margins. Article 9.3.1 deals with such refunds for Members employing a *retrospective* system for the assessment and collection of anti-dumping duties, whereas Article 9.3.2 deals with those Members, such as Mexico, employing a *prospective* system.<sup>212</sup>

7.152. According to Canada, Members that employ prospective normal value systems comply with Article 9.3 by following the obligations under Article 9.3.2. Canada observes that, under Article 9.3.2, a refund for overpayment of duties is available if: (a) an importer of subject goods actually pays anti-dumping duties; and (b) that importer requests a refund for overpayment that is duly supported by evidence. Canada asserts that, 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.<sup>213</sup> Canada submits that Chinese Taipei's claim is therefore premature, and must be rejected on the basis that Chinese Taipei has not established a *prima facie* case of violation.

7.153. Furthermore, Canada denies that the ceiling for anti-dumping duties under Article 9.3 is limited to the margin of dumping established for the product as a whole in the original investigation. Canada contends that Chinese Taipei's position is contradicted by case law concerning the payment and collection of anti-dumping duties in prospective normal value systems. First, Canada relies on the finding by the *Argentina – Poultry Anti-Dumping Duties* panel that the margin of dumping established during the investigation was not the ceiling for the levy of anti-dumping measures.<sup>214</sup> Canada also relies on the finding by the panel in *EC – Salmon (Norway)*, in the specific context of duty assessment conducted on a prospective basis, that anti-dumping duties should not exceed the actual margin of dumping determined *on the sales that are subject to duty assessment*.<sup>215</sup>

## 7.9.2.2 Main arguments of third parties

### 7.9.2.2.1 European Union

7.154. 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. The European Union contends that 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.<sup>216</sup> The European Union asserts that there is no indication that the Anti-Dumping Agreement excludes the possibility for an authority to assess the amount of duties on a prospective basis in respect of product types or models for which a normal value has not previously been determined, because such types or models of subject products were not exported to the territory of that authority during the period of investigation.<sup>217</sup> 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

<sup>211</sup> Canada's first written submission, paras. 196 and 197; second written submission, para. 136.

<sup>212</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 311. (emphasis original)

<sup>213</sup> Canada's first written submission, para. 199.

<sup>214</sup> Canada's first written submission, para. 201; second written submission, para. 139.

<sup>215</sup> Canada's first written submission, para. 202.

<sup>216</sup> European Union's third-party submission, para. 37.

<sup>217</sup> European Union's third-party submission, para. 39.

subject to an anti-dumping investigation, as being consistent with the basic requirements of the Anti-Dumping Agreement.<sup>218</sup>

### 7.9.2.3 Evaluation by the Panel

7.155. The *chapeau* of Article 9.3 establishes a general requirement that the amount of anti-dumping duty shall not exceed the margin of dumping.<sup>219</sup> As discussed elsewhere in this Report, the phrase "margin of dumping" is exporter-specific.<sup>220</sup> The Appellate Body has explained, in reference to the *chapeau* of Article 9.3, that investigating authorities "are required to ensure that the total amount of anti-dumping duties collected on the entries of a product from a given exporter shall not exceed the margin of dumping established for that exporter".<sup>221</sup> This finding reflects the fact that the *chapeau* of Article 9.3 establishes a fundamental link between: (a) a particular exporter's margin of dumping; and (b) the maximum amount of anti-dumping duty applicable to imports from that particular exporter. According to its title, Article 9 governs both the imposition and collection of anti-dumping duties. The margin of dumping established for an exporter therefore serves as a ceiling for the amount of anti-dumping duty imposed or collected in respect of imports from that exporter.

7.156. Canada argues<sup>222</sup> that, in the context of a prospective normal value or variable duty assessment system, the ceiling for anti-dumping duties under Article 9.3 need not be restricted to the margin of dumping established in the original investigation. Instead, the ceiling may be determined by reference to the "actual" margin of dumping referred to in Article 9.3.2. Canada's argument is consistent with the finding by the panel in *EC – Salmon (Norway)* that:

[T]he obligation in Article 9.3 to ensure that anti-dumping duties are not collected in excess of the "margin of dumping as established under Article 2" does not prohibit an investigating authority from imposing and collecting anti-dumping duties in excess of the margin of dumping calculated in the *original investigation*. In the specific context of duty assessment conducted "on a prospective basis", which is the situation that is before us at present as regards the application of the fixed duties, what is important in terms of compliance with Article 9.3 (and Article 9.1) of the AD Agreement is that any duties imposed and collected on investigated parties do not exceed the *actual* margin of dumping determined on the sales that are subject to duty assessment.<sup>223</sup>

7.157. We agree with this finding. If an updated, "actual" margin of dumping is determined with respect to particular imports at some time after the original investigation has been completed, that updated margin of dumping serves as the ceiling for the amount of anti-dumping duty that may be imposed or assessed on those imports. In other words, the ceiling for the imposition or collection of anti-dumping duties is the exporter-specific margin of dumping prevailing at any given time. However, recognizing that an exporter's margin of dumping may change over time is very different from allowing a particular exporter's margin of dumping to be ignored, and the duty ceiling for that exporter to be established by reference to some other exporter's data.

7.158. Even if the margin of dumping established in the original investigation is subsequently replaced by an updated, "actual" margin of dumping, the updated margin of dumping still relates to the particular exporter at issue. The findings of the *EC – Salmon (Norway)* panel do not envisage anti-dumping duties be imposed or collected with respect to imports from one exporter by reference to some other exporter's margin of dumping. The panel explicitly stated that the updated, "actual" margin of dumping must "represent[] the difference between an investigated party's normal value and the export price of the transaction subject to duty assessment".<sup>224</sup>

<sup>218</sup> European Union's third-party submission, para. 40.

<sup>219</sup> We note that the Appellate Body has referred to the *chapeau* as containing a "general obligation". (See Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 311). The Appellate Body has also referred to the "overarching requirement" set forth in the *chapeau* of Article 9.3. (See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102).

<sup>220</sup> See above, paras. 7.18-7.37.

<sup>221</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 130.

<sup>222</sup> Canada's second written submission, paras. 147-152.

<sup>223</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.760 (fns omitted, emphasis original). The same approach was taken by the panel in *Argentina – Footwear (EC)*.

<sup>224</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.749.

We emphasise in this regard the panel's reference to the updated margin of dumping still being based on the "investigated party's normal value".

7.159. In this case, we are not dealing with a situation where the margins of dumping established for the relevant exporters determined during the investigation were replaced by updated, "actual" margins of dumping established for those same exporters. Nor did Canada use normal values determined for those exporters in establishing a duty rate for imports of new models or types of the product from those exporters. Rather, the CBSA established a duty rate for such imports from these two exporters based on data collected during the original investigation from a different exporter. The CBSA thereby failed to preserve the fundamental link, established by the *chapeau* to Article 9.3, between the amount of the anti-dumping duty imposed or collected in respect of a given exporter and a margin of dumping established for that exporter. There is no basis in the findings of *EC – Salmon (Norway)* panel for the CBSA's approach and determination.<sup>225</sup>

7.160. Canada argues that Members comply with the *chapeau* of Article 9.3 by complying with the obligations under Article 9.3.2. Canada refers in this regard to the Appellate Body's finding in *US – Continued Zeroing* that "[t]he collection of anti-dumping duties on the basis of a *prospective* normal value is only an intermediate stage of collection, since it is subject to final assessment and 'a prompt refund, upon request', under Article 9.3.2".<sup>226</sup> Canada also refers to the Appellate Body's finding in *Mexico – Anti-Dumping Measures on Rice* that "[t]he sub-paragraphs of Article 9.3 ... specify in greater detail how investigating authorities are to comply with [the] more general obligation [set forth in the *chapeau*], namely, by providing for refunds to respondents whose duties have exceeded their dumping margins."<sup>227</sup>

7.161. Canada's reliance on these Appellate Body findings is not well-founded. These cases addressed different issues, and nothing in the Appellate Body's findings suggests that anti-dumping duties may be imposed on imports from one exporter on the basis of the margin of dumping established for another exporter. Nor do we read the Appellate Body as finding that the fundamental link between the margin of dumping established for an exporter and the amount of duty imposed or collected in respect of that exporter, established in the *chapeau* of Article 9.3, does not apply at the intermediate stage of collection.<sup>228</sup>

7.162. We do not accept that the Appellate Body's findings should be interpreted to mean that, in the context of a prospective normal value duty assessment system, a Member may initially impose whatever anti-dumping duty it chooses, provided there is a refund mechanism consistent with Article 9.3.2. Article 9.3.2 simply provides that, under a prospective assessment system, "provision shall be made for a prompt refund". Such a refund mechanism certainly establishes one means of ensuring that duty collection remains consistent with the requirements of the *chapeau* of Article 9.3. However, this does not mean that the provision of an effective refund mechanism addresses all potential violations of the *chapeau* of Article 9.3.<sup>229</sup> If it did, there would be no need for the *chapeau*.

7.163. In the context of a retrospective assessment system, the Appellate Body has stated that "Article 9.3.1 of the *Anti-Dumping Agreement* is subject to the overarching requirement in Article 9.3 that the amount of anti-dumping duty 'shall not exceed the margin of dumping as established under Article 2' of that Agreement".<sup>230</sup> We consider that this statement applies equally

<sup>225</sup> Canada also invokes the findings of the panel in *Argentina – Poultry Anti-Dumping Duties*. Although that panel accepted the use of variable anti-dumping duties, there is nothing in the findings of that panel to support the approach adopted by Canada in respect of new product model types.

<sup>226</sup> Canada's first written submission, para. 204 (referring to Appellate Body Report, *US – Continued Zeroing*, para. 295). (emphasis original)

<sup>227</sup> Canada's second written submission, para. 138 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 311).

<sup>228</sup> Indeed, the fact that the Appellate Body refers in *Mexico – Anti-Dumping Measures on Rice* to refunds for respondents "whose duties have exceeded *their* dumping margins" rather confirms this fundamental link. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 311 (emphasis added)).

<sup>229</sup> Canada observes that Article 18.3.1 of the *Anti-Dumping Agreement* refers to "refund procedures" under paragraph 3 of Article 9. (Canada's response to Panel question No. 10.2, para. 34). We do not read this to mean that Article 9.3 is concerned exclusively with refund procedures.

<sup>230</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 102.

in respect of Article 9.3.2.<sup>231</sup> If the refund mechanism provided for in sub-paragraph 1 and 2 of Article 9.3 remains "subject to" the "overarching requirement" of the *chapeau*, the *chapeau* must have application independently of those refund mechanisms.

7.164. In addition, if the *chapeau* of Article 9.3 were understood to allow the approach taken by Canada, any Member could impose an anti-dumping duty that is so high that imports effectively cease, and argue that it was not acting inconsistently with Article 9.3 because its refund mechanism ensured compliance. But the absence of imports would preclude any refund proceeding, and interested parties could be left without recourse under the Anti-Dumping Agreement.<sup>232</sup>

7.165. Canada further contends that, without recourse to facts available, anti-dumping duties could "never" be collected on new models.<sup>233</sup> This is also not correct. Without resolving the question of how anti-dumping duties may be imposed or collected in respect of new product models or types in a prospective normal value system, we note that Canada has explained that it can initiate "re-investigations" to determine normal values for future imports of new product model types not covered by the original investigation.<sup>234</sup> Anti-dumping duties in respect of new product models or types could be collected once the re-investigation is complete. In the meantime, reasonable security could be required, pursuant to the first paragraph of the Ad Note to Article VI:2 and 3 of the GATT 1994. Alternatively, anti-dumping duties in respect of imports of new product models or types could initially be collected on the basis of the normal value(s) established for the relevant exporter or other relevant information from the original investigation. We note in this regard Canada's statement that "[i]t is a reasonable starting point to apply information from the original investigation to imports of new product models subject to an ongoing anti-dumping measure when there is no other information available in relation to those imports".<sup>235</sup> We do not disagree. However, in such a case, the information from the original investigation to use as a starting point must pertain to the exporter in question, and not to some other exporter.

7.166. Finally, we note Canada's argument that Chinese Taipei's Article 9.3 claim is premature, because no imports of new product model types have yet been assessed, and no refund proceeding has yet taken place. As explained above, we consider that the *chapeau* to Article 9.3 applies independently of Article 9.3.2 (or Article 9.3.1 in respect of retrospective assessment systems).<sup>236</sup> The *chapeau* applies whenever an anti-dumping duty is imposed or collected. It therefore applies when an anti-dumping duty is imposed, even if the absence of imports means that no duty is actually collected. Article 17.4 of the Anti-Dumping Agreement provides that a matter may be referred to the DSB provided "final action has been taken ... to levy definitive anti-dumping duties". Canada acknowledges that "final action" has been taken, in that the CBSA has put in place a mechanism that will lead to the imposition of definitive anti-dumping duties when new models or types are imported.<sup>237</sup> For these reasons, we see no basis to conclude that Chinese Taipei's claim is premature.

<sup>231</sup> We also observe that Article 9.3.2 does not even refer to prospective normal value duty assessment specifically (it refers more generally to duty assessment "on a prospective basis"). We therefore consider it unlikely that provision of an effective refund mechanism would necessarily cover all possible issues arising in such a duty assessment system.

<sup>232</sup> Canada asserts that our interpretation of the *chapeau* of Article 9.3 would lead to the result that an investigating authority would comply with Article 9.3 by providing an appropriate refund, yet violate Article 9.3 by collecting duties in excess of the appropriate amount. (Canada's response to Panel question No. 10.2, para. 37). However, as explained above, the *chapeau* imposes a requirement that the amount of duty imposed or collected in respect of imports from an exporter shall not exceed the margin of dumping established for that exporter. Breach of this requirement cannot be remedied through the Article 9.3.2 refund mechanism.

<sup>233</sup> Canada's first written submission, para. 209.

<sup>234</sup> Canada's response to Panel question Nos. 5.10 and 7.3.

<sup>235</sup> Canada's response to Panel question No. 5.9, para. 73.

<sup>236</sup> This is consistent with the finding by the panel in *EU – Biodiesel (Argentina)* that the European Union violated Article 9.3 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement, independent of any finding under Articles 9.3.1 or 9.3.2. (Panel Report, *EU – Biodiesel (Argentina)*, para. 7.367).

<sup>237</sup> Canada's response to Panel question No. 10.2, para. 33. Canada contends that the fact that "final action" has been taken does not allow a complaining party to disregard substantive elements of treaty obligations. We recall that the *chapeau* to Article 9.3 imposes an overarching requirement of broad application, independent of Articles 9.3.1 and 9.3.2. Accordingly, the substantive elements of the *chapeau* are not being ignored.

### 7.9.3 The CBSA's use of facts available: Article 6.8 and Annex II of the Anti-Dumping Agreement

#### 7.9.3.1 Main arguments of the parties

7.167. Chinese Taipei submits that Canada violated Article 6.8 and Annex II of the Anti-Dumping Agreement by resorting to facts available for the calculation of the duty rate for imports of new product models or types from cooperating Chinese Taipei exporters without complying with the conditions laid down in those provisions.<sup>238</sup> Chinese Taipei contends that it is only when the interested party refuses access to, or otherwise does not provide, the necessary information or when it significantly impedes the investigation that the investigating authority is allowed to use other information for making its preliminary and final determinations.<sup>239</sup> Chinese Taipei notes that the CBSA never determined that the relevant exporters had failed to cooperate with its investigation in any way.<sup>240</sup> Furthermore, Chinese Taipei submits that it cannot be claimed that cooperating exporters refused access to or did not provide "necessary information" given that such information was "non-existent". Otherwise, according to Chinese Taipei, this could lead to the result that an interested party which fully participates and cooperates in the investigation could be subject to facts available determinations simply because it did not provide information that was non-existent.<sup>241</sup>

7.168. Chinese Taipei also submits that, even if the use of facts available had been warranted, by using the highest margin of dumping calculated for a single transaction concerning an exporter from another country, the CBSA failed to use the "best information available", or the "most appropriate information available".<sup>242</sup> Chinese Taipei asserts that the information provided by the two cooperating exporters themselves in the original investigation would constitute the "best information available".<sup>243</sup>

7.169. Canada justifies its recourse to facts available in respect of new product models or types by arguing that, without recourse to facts available, anti-dumping duties could "never" be levied on new models.<sup>244</sup> Referring to panel and Appellate Body reports concerning the use of facts available for determining residual rates for unknown or non-existing exporters<sup>245</sup>, Canada suggests that an investigating authority may resort to facts available in situations where they act to the best of their ability to seek out all relevant information from interested parties under investigation. Canada asserts that the CBSA sought all relevant information from exporters during the initial investigation<sup>246</sup> and the re-investigation.<sup>247</sup> Canada submits that Chinese Taipei has presented no evidence showing that the CBSA failed to consider information relevant to new product models. Canada also contends that, when claiming that the CBSA's application of the ministerial specification<sup>248</sup> contravenes paragraph 7 of Annex II, Chinese Taipei fails to recognize the variety

<sup>238</sup> Chinese Taipei's first written submission, para. 217.

<sup>239</sup> Chinese Taipei's first written submission, para. 226.

<sup>240</sup> Chinese Taipei's first written submission, para. 227.

<sup>241</sup> Chinese Taipei's first written submission, para. 227; second written submission, para. 165.

<sup>242</sup> Chinese Taipei's first written submission, para. 232.

<sup>243</sup> Ibid.

<sup>244</sup> Canada's first written submission, para. 209.

<sup>245</sup> Canada's first written submission, para. 210 and fn 165 (quoting Panel Reports, *China – Autos (US)*, para. 7.130: "a residual duty rate may be determined on the basis of facts available if the record of the investigation shows that the [investigating authority] took all reasonable steps that might be expected from an objective and unbiased [investigating authority] to specify in detail the information requested from unknown producers"; *China – Broiler Products*, para. 7.302: "Article 9.5 of the Anti-Dumping Agreement implicitly recognises that an anti-dumping duty may be applied even to the category of producers/exporters who did not exist, or did not export during the POI, until they request an individual rate through a new-shipper review"; and *China – GOES*, para. 7.390: "[w]hile the Panel agrees that there is indeed a gap in the Anti-Dumping Agreement regarding how dumping margins should be calculated for unknown exporters, Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an investigating authority may resort to facts available. The existence of a lacuna in the Anti-Dumping Agreement does not mean that the conditions should be ignored in order to fill the gap. Although the lack of guidance in the Anti-Dumping Agreement may leave investigating authorities with some discretion regarding the calculation of margins of dumping for unknown exporters, in our view, this discretion should not extend to acting inconsistently with the express terms of Article 6.8 and paragraph 1 of Annex II").

<sup>246</sup> Statement of Reasons concerning the Final Determination, (Exhibit TPKM-2), paras. 20 and 21.

<sup>247</sup> See CBSA, Notice of Conclusion of Re-Investigation, Dumping case AD/1396, 7 May 2013, (Exhibit TPKM-15).

<sup>248</sup> See para. 7.120 above.

of review procedures under Canada's trade remedies regime that fairly accommodate exporters and importers of new product models of subject goods. Canada observes that importers may seek re-determinations of the duty assessment and exporters may request re-investigations with respect to their normal values. Canada asserts that, so long as an exporter cooperates with these review procedures, duty assessments on new product models can be adjusted, and duties paid will be refunded, if warranted, consistent with the Anti-Dumping Agreement.

### 7.9.3.2 Evaluation by the Panel

7.170. Article 6.8 provides that facts available may only be used when an interested party refuses access to, or otherwise does not provide "necessary information" within a reasonable period, or significantly impedes the investigation. Pursuant to paragraph 1 of Annex II, use of facts available is subject to the investigating authority having "specif[ied] in detail the information required", and having ensured that the party is aware that if information is not supplied within reasonable time, it may resort to facts available.

7.171. The CBSA did not apply facts available on the basis of the conditions set forth in Article 6.8 or Annex II of the Anti-Dumping Agreement. Indeed, Canada acknowledges that these exporters "fully cooperated in the original investigation".<sup>249</sup> Furthermore, Canada asserts that "because the CBSA requires a model-specific normal value to assess duties, it uses facts available for product models it has yet to investigate".<sup>250</sup> Since the CBSA had "yet to investigate" the new product models or types at issue, there could be no basis for any determination that the Chinese Taipei exporters failed to provide any necessary information requested by the CBSA in the investigation thereof. In these circumstances, the CBSA's use of facts available did not meet the requirements of Article 6.8 or Annex II of the Anti-Dumping Agreement.<sup>251</sup>

7.172. Canada suggests that the CBSA's reliance on facts available in the present case is supported by the approach taken in WTO dispute settlement to the application of facts available in respect of the determination of all others rates for unknown exporters. According to Canada, these decisions suggest that an investigating authority may resort to facts available in situations where they act to the best of their ability to seek out all relevant information from interested parties under investigation.<sup>252</sup> Canada refers in this regard to the findings of the panels in *China – Autos (US)*, *China – Broiler Products*, and *China – GOES*.

7.173. None of these cases support the CBSA's resort to facts available in respect of imports of new product model types from cooperative exporters, since none of these cases allow the use of facts available outside of the conditions identified in Article 6.8 and Annex II. Indeed, in *China – GOES*, the panel stated specifically that although "there is indeed a gap in the Anti-Dumping Agreement regarding how dumping margins should be calculated for unknown exporters, Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an investigating authority may resort to facts available. The existence of a lacuna in the Anti-Dumping Agreement does not mean that the conditions should be ignored in order to fill the gap."<sup>253</sup> Furthermore, although in *China – Autos (US)* the panel accepted that facts available could potentially be used to determine the all others rate for unknown exporters, the panel found in that case that the investigating authority had failed to comply with the Annex II:1 requirement to "specify in detail to the unknown exporters the information required from them for the determination of the residual AD rate".<sup>254</sup> The panel in *China – Broiler Products* also insisted on compliance with Annex II:1, ultimately finding that the need for the relevant necessary

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<sup>249</sup> Canada's response to Panel question No. 5.5, para. 51. Canada asserts that it requested information in respect of new product models as part of its re-investigation that concluded on 7 May 2013. (Canada's response to Panel question No. 5.8, para. 65; see also second written submission, paras. 159-161). However, we note that facts available were applied for new product models or types in the CBSA's final determination for the original investigation. Canada does not contend that relevant information was requested in the original investigation.

<sup>250</sup> See Canada's response to Panel question No. 5.6, para. 53.

<sup>251</sup> In the alternative, even if the conditions for resort to facts available were considered to have been met by Canada, the CBSA's actual selection of the facts on which to base its determination has already been shown to be flawed. The facts relied on by the CBSA in this context are the same as used by the CBSA to establish the rate for "all other exporters". As explained above, the CBSA failed to undertake any comparative evaluation or assessment of all available information on the record in selecting those facts.

<sup>252</sup> Canada's first written submission, para. 210.

<sup>253</sup> Panel Report, *China – GOES*, para. 7.390.

<sup>254</sup> Panel Report, *China – Autos (US)*, para. 7.133.

information had been adequately communicated to interested parties.<sup>255</sup> In all three cases, therefore, recourse to facts available was evaluated in light of the requirements of Article 6.8 and Annex II. In the present case, as outlined above at paragraph 7.171 those requirements have plainly not been met, and the CBSA's use of facts available is inconsistent with those provisions.

7.174. Canada also argues<sup>256</sup> that Chinese Taipei has presented no evidence showing that the CBSA failed to consider information relevant to new product models or types. This argument is not persuasive, since the burden is on Canada to demonstrate that the investigating authority informed interested parties of the information that was required of them and of the possibility that facts available would be used if that information was not provided, and that those parties failed to cooperate in the provision of that necessary information. There has been no such demonstration in the present case. On the contrary, as noted above, Canada has confirmed that the relevant exporters cooperated fully with the CBSA during the original investigation.

7.175. Finally, we note Canada's argument that the CBSA was required to resort to facts available in order to fill a "gap"<sup>257</sup> in the WTO anti-dumping disciplines. We are not persuaded that there is any gap in the relevant WTO disciplines. As explained in the previous section, other methods were open to Canada to impose or collect anti-dumping duties in respect of imports of new product models or types from investigated and cooperative exporters, without resorting to facts available. Furthermore, even if there were a gap in the disciplines, we agree with the abovementioned finding of the panel in *China – GOES* that "[t]he existence of a lacuna in the Anti-Dumping Agreement does not mean that the conditions [of Article 6.8 and Annex II] should be ignored in order to fill the gap".<sup>258</sup>

7.176. For the above reasons, we uphold Chinese Taipei's claim that the CBSA's use of facts available to determine the amount of anti-dumping duty imposed or collected on imports of new product models or types from investigated and cooperative exporters is inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

#### **7.9.4 The determination of normal values for new product models or types: Article 2.2 of the Anti-Dumping Agreement**

##### **7.9.4.1 Main arguments of the parties**

7.177. Chinese Taipei submits that Canada violated Article 2.2 of the Anti-Dumping Agreement because it calculated normal values for imports of new product models or types from investigated exporters on the basis of a methodology that is not foreseen in Article 2.2 of the Anti-Dumping Agreement.<sup>259</sup>

7.178. Canada notes that Chinese Taipei has not referred to a single shipment of a new product model by one of its exporters that was subject to the treatment that Chinese Taipei alleges violates Article 2.2.<sup>260</sup> Moreover, even if the CBSA had applied the ministerial specification to establish normal values for new product models, Chinese Taipei's argument under Article 2.2 would still be flawed because the obligations under Article 2.2 presuppose that an investigating authority has the information necessary to calculate normal values.<sup>261</sup> Canada asserts that an investigating authority is not in a position to determine model-specific normal values for new product models when they are imported as they have yet to be investigated. Canada asserts that Chinese Taipei ignores this, and does not explain how the CBSA could properly apply one of the

<sup>255</sup> Panel Report, *China – Broiler Products*, para. 7.306.

<sup>256</sup> Canada's first written submission, para. 210.

<sup>257</sup> Canada's first written submission, para. 209.

<sup>258</sup> Panel Report, *China – GOES*, para. 7.390. In its response to Panel question No. 5.7, at para. 61, Canada similarly suggests that investigating authorities enjoy flexibility with regard to the treatment of new model types for the purpose of duty assessment (because the Anti-Dumping Agreement is silent on this issue). Canada argues that the CBSA's application of facts available to establish normal values for new product model types was in line with that flexibility. We disagree. Whatever flexibility might exist for Members assessing anti-dumping duties under a prospective normal value assessment system, the use of facts available is circumscribed by the requirements of Article 6.8. Facts available may not be used outside of the conditions set forth in that provision.

<sup>259</sup> Chinese Taipei's first written submission, para. 234; second written submission, para. 178.

<sup>260</sup> Canada's first written submission, para. 214.

<sup>261</sup> Canada's first written submission, para. 215.



Article 2.2 methodologies to new models of subject goods exported to Canada after the original CSWP investigation.<sup>262</sup> Canada submits that, 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 or types.<sup>263</sup>

#### 7.9.4.2 Evaluation by the Panel

7.179. We have already upheld Chinese Taipei's Article 9.3 and 6.8 claims concerning the CBSA's determination of the amount of anti-dumping duty imposed or collected on imports of new product models or types from investigated and cooperative exporters. Chinese Taipei's Article 2.2 claim is concerned with essentially the same issue regarding the CBSA's methodology. It is therefore not necessary for us to also evaluate that additional claim in order to effectively resolve this dispute or provide guidance in the event this issue arises in implementation.

#### 7.9.5 The determination of an additional margin of dumping: Article 6.10 of the Anti-Dumping Agreement

##### 7.9.5.1 Main arguments of the parties

7.180. Chinese Taipei submits that Canada violated Article 6.10 of the Anti-Dumping Agreement because it determined more than one individual margin of dumping for investigated Chinese Taipei exporters.<sup>264</sup> In particular, Chinese Taipei contends that after establishing an individual margin of dumping for the product of each producer as a whole, the CBSA calculated the duty for new product types on the basis of the highest dumping margin found for a different exporter. According to Chinese Taipei, this additional step results in the determination for the same exporting producer of two different dumping margins, namely the dumping margin established for the subject product during the investigation and a residual dumping margin applicable to new model types of the subject product.<sup>265</sup>

7.181. Canada contends that Chinese Taipei's claim is premised on an incorrect interpretation of the term "margin of dumping" and a fundamental misunderstanding of Canada's prospective duty assessment system. The CBSA would not be establishing two margins of dumping for cooperating Chinese Taipei exporters in the event it applied the ministerial specification to establish normal values for new product models.<sup>266</sup>

7.182. According to Canada, 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.<sup>267</sup> In *US – Zeroing (Japan)*, the Appellate Body made this clear when it found that:

A product under investigation may be defined by an investigating authority. But "dumping" and "margins of dumping" can be found to exist only in relation to that product as defined by that authority. They cannot be found to exist for only a type, model, or category of that product. Nor, under any comparison methodology, can "dumping" and "margins of dumping" be found to exist at the *level* of an individual transaction.<sup>268</sup>

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<sup>262</sup> Canada's first written submission, para. 216.

<sup>263</sup> Canada's first written submission, para. 217.

<sup>264</sup> Chinese Taipei's first written submission, para. 243; second written submission, para. 183.

<sup>265</sup> Chinese Taipei's first written submission, para. 247.

<sup>266</sup> Canada's first written submission, para. 221.

<sup>267</sup> Indeed, at paras. 198 and 199 of its first written submission, Chinese Taipei itself acknowledges this. (Canada's first written submission, para. 222).

<sup>268</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 115. (emphasis original, fns omitted)

7.183. Canada asserts that a "margin of dumping", by definition, cannot be based on transactions pertaining only to specific product models.<sup>269</sup> Canada submits therefore that, what Chinese Taipei claims is a second margin of dumping for new product models is nothing of the sort.

7.184. Canada further asserts that the general rule under Article 6.10 has limited relevance after the conclusion of an anti-dumping investigation, since in Canada's system the margin of dumping for a particular exporter calculated during the investigation phase has no relevance during the enforcement phase. During the latter phase, the CBSA compares the relevant normal value to an individual export transaction price to determine the appropriate amount, if any, of the anti-dumping duty to be collected. Canada recalls that 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.<sup>270</sup>

#### **7.9.5.2 Evaluation by the Panel**

7.185. We have already upheld Chinese Taipei's Article 9.3 and 6.8 claims concerning the CBSA's determination of the amount of anti-dumping duty imposed or collected on imports of new product models or types from investigated and cooperative exporters. Chinese Taipei's Article 6.10 claim is concerned with essentially the same issue (in the sense that Chinese Taipei alleges that the residual margin of dumping established for new product models or types constitutes a second exporter-specific margin of dumping not envisaged by Article 6.10). It is therefore not necessary for us to also evaluate that additional claim in order to effectively resolve this dispute or provide guidance in the event this issue arises in implementation.

### **7.10 Additional claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994**

#### **7.10.1 Introduction**

7.186. Chinese Taipei has also raised a claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994 regarding all the measures contested in the sections above.

#### **7.10.2 Main arguments of the parties**

7.187. Chinese Taipei argues that the alleged violations of the Anti-Dumping Agreement discussed in the sections above entail a violation of Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.<sup>271</sup>

7.188. Canada insists that it acted in accordance with its obligations under the Anti-Dumping Agreement and that there is therefore no basis for Chinese Taipei's consequential claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.<sup>272</sup>

#### **7.10.3 Evaluation by the Panel**

7.189. We observe that these are consequential claims. As a consequence of the violations of Articles 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 6.8, 9.2, and 9.3 of the Anti-Dumping Agreement, and its Annex II (including its paragraph 7) found above, we also find that Canada has acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. To the extent that we have rejected Chinese Taipei's claims above, we also reject its claim under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

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<sup>269</sup> Canada's first written submission, para. 223 (referring to Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 120).

<sup>270</sup> Canada's first written submission, para. 225.

<sup>271</sup> Chinese Taipei's first written submission, para. 249; second written submission, para. 186.

<sup>272</sup> Canada's first written submission, para. 229.

## 7.11 "As such" claims concerning subsection 2(1), section 30.1, and subsections 35(1), 35(2), 38(1), and 41(1) of SIMA

### 7.11.1 Introduction

7.190. Chinese Taipei claims that certain provisions of SIMA, namely 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 as well as Article VI:2 of the GATT 1994.<sup>273</sup> According to Chinese Taipei, the crux of these claims is the fact that the challenged provisions of SIMA improperly provide for a *de minimis*-test on a country-wide, rather than an exporter-specific basis.<sup>274</sup>

### 7.11.2 Main arguments of the parties

7.191. Chinese Taipei's "as such" claims are in substance similar to the "as applied" claims addressed above. For the most part, Chinese Taipei's "as such" claims are therefore based on the arguments already advanced in that context<sup>275</sup>, in particular the argument that the second sentence of Article 5.8 of the Anti-Dumping Agreement requires immediate termination in respect of exporters with individual *de minimis* margins of dumping.

7.192. Canada also relies principally on the arguments it made in respect of Chinese Taipei's "as applied" claims.<sup>276</sup> Regarding the Article 5.8 "as such" claim specifically, Canada denies that this provision requires termination on the basis of exporter-specific margins of dumping. Canada also asserts that subsection 43(1) of SIMA in any event provides the CITT with discretion to exclude exporters with *de minimis* margins of dumping from the affirmative injury findings, thereby terminating the investigation in respect of such exporters in accordance with the second sentence of Article 5.8.<sup>277</sup>

7.193. Chinese Taipei disagrees that subsection 43(1) of SIMA gives the CITT discretion to exclude exporters from the injury analysis specifically based on their *de minimis* margins of dumping.<sup>278</sup> Chinese Taipei asserts that there is no reference in the text of subsection 43(1) of SIMA to exporters with a *de minimis* margin of dumping, and that this discretion appears to be entirely unrelated to the challenged provisions.<sup>279</sup> Chinese Taipei also submits that it is not aware of any instance in the CITT's past practice in which this provision has been used to exclude an exporter on the basis of an individual margin of dumping being *de minimis*.<sup>280</sup> Chinese Taipei cites in this regard the example of Conares, an exporter from the United Arab Emirates in the CSWP investigation, whose request for producer exclusion under subsection 43(1) of SIMA was denied – and an affirmative threat of injury determination was made – even though a zero dumping margin

<sup>273</sup> In response to Panel question No. 11.10, paras. 14-17, Chinese Taipei clarified that it claims that: (a) subsection 38(1) of SIMA, read together with subsection 2(1), section 30.1 as well as subsections 35(1) and 35(2), is "as such" inconsistent with Article 7.1(ii) of the Anti-Dumping Agreement; (b) subsection 41(1) of SIMA, read together with subsection 2(1) and section 30.1, is "as such" inconsistent with Article 5.8 of the Anti-Dumping Agreement; (c) 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; and (d) subsection 2(1), section 30.1, subsections 35(1), 35(2), 38(1), and 41(1) of SIMA are "as such" inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Canada does not contest Chinese Taipei's understanding of the operation of SIMA, nor does it contest the scope of the SIMA provisions challenged by Chinese Taipei.

<sup>274</sup> Chinese Taipei's first written submission, para. 255.

<sup>275</sup> Chinese Taipei's first written submission, paras. 265-267, 269-274, 280-285, and 287-289.

<sup>276</sup> Canada's first written submission, paras. 239, 244, and 249.

<sup>277</sup> Canada's first written submission, paras. 245-247; second written submission, paras. 169-176.

We also understand Canada to invoke subsection 43(1) of SIMA in response to Chinese Taipei's "as such" claims under Articles 1 and 9.2 of the Anti-Dumping Agreement as well as under Article VI:2 of the GATT 1994. (See Canada's first written submission, paras. 253 and 256 and fn 185).

<sup>278</sup> Chinese Taipei's response to Panel question No. 6.1, paras. 119-124; second written submission, paras. 197-204.

<sup>279</sup> Chinese Taipei's response to Panel question No. 6.1, para. 120; second written submission, paras. 200 and 201.

<sup>280</sup> Chinese Taipei's response to Panel question No. 6.1, para. 121; second written submission, para. 202.

had been found for this exporter.<sup>281</sup> Chinese Taipei also refers to a statement made by the CITT in the CSWP investigation in which it "reiterate[d] that producer exclusions are typically not appropriate other than in the most specific set of circumstances".<sup>282</sup> In the view of Chinese Taipei, this leaves no room for the CITT to exclude producers having *de minimis* margins of dumping.

7.194. In addition, Chinese Taipei advances three arguments according to which the exclusion of exporters pursuant to subsection 43(1) of SIMA could not, in any case, satisfy the requirements of the second sentence of Article 5.8. First, Chinese Taipei contends that Article 5.8 imposes a positive obligation and does not allow for any type of discretion in deciding on the termination of the investigation.<sup>283</sup> Second, Chinese Taipei contends that excluding an exporter from an injury finding is not the same as terminating the investigation in respect of such exporter.<sup>284</sup> Finally, Chinese Taipei claims that for "immediate termination" as contemplated in Article 5.8 to occur, termination would need to be decided by the CBSA, and not the CITT.<sup>285</sup>

7.195. Canada asserts that the CITT's past practice regarding the exclusion of *de minimis* exporters under subsection 43(1) of SIMA is irrelevant to the assessment of Chinese Taipei's claim.<sup>286</sup> Canada suggests that the Panel should instead focus its analysis on the wording of subsection 43(1) of SIMA.<sup>287</sup> Canada also submits that Chinese Taipei has ignored subsection 43(1) of SIMA in making its "as such" claims.<sup>288</sup> According to Canada, the burden is on Chinese Taipei to demonstrate that subsection 43(1) of SIMA does not grant the CITT discretion to exclude exporters with *de minimis* margins of dumping. Canada contends that Chinese Taipei has failed to adduce evidence to this effect.<sup>289</sup>

7.196. Regarding Chinese Taipei's argument that Article 5.8 precludes any form of discretion to exclude relevant exporters, Canada points out that this proposition is inconsistent with WTO jurisprudence according to which an "as such" violation cannot be found if discretion exists that allows a WTO Member to comply with its WTO obligations.<sup>290</sup> In addition, Canada argues that the exclusion of *de minimis* exporters from the CITT's affirmative injury finding is consistent with the Appellate Body's statement that "immediate termination" is in most cases achieved through exclusion from the scope of the order establishing the definitive anti-dumping duties.<sup>291</sup>

### 7.11.3 Main arguments of third parties

#### 7.11.3.1 United States

7.197. Without taking any position on the merits of the alleged "as such" inconsistency, the United States submits that the Panel's assessment should focus on whether SIMA and SIMR require WTO-inconsistent conduct or provide discretion to Canada's investigating authority to comply with its WTO obligations.<sup>292</sup> In case Chinese Taipei could show that SIMA and SIMR require Canada to act in a WTO-inconsistent manner or preclude WTO-consistent action, Chinese Taipei

<sup>281</sup> Chinese Taipei's second written submission, para. 208; see also CITT, Finding and Reasons, Injury Inquiry No. NQ-2012-003, 27 December 2012, (Exhibit TPKM-14), para. 181.

<sup>282</sup> Chinese Taipei's second written submission, para. 203 (quoting CITT, Finding and Reasons, Injury Inquiry No. NQ-2012-003, 27 December 2012, (Exhibit TPKM-14), para. 181).

<sup>283</sup> Chinese Taipei's response to Panel question No. 6.1, para. 122; second written submission, paras. 205-207.

<sup>284</sup> Chinese Taipei's response to Panel question No. 6.1, para. 123; second written submission, para. 208.

<sup>285</sup> Chinese Taipei's response to Panel question No. 6.1, para. 124; second written submission, para. 209.

<sup>286</sup> Response of Canada to a question put by Chinese Taipei through the Panel at the first substantive meeting. See also Canada's second written submission, paras. 180 and 182; and opening statement at the second meeting of the Panel, para. 104.

<sup>287</sup> Canada's second written submission, para. 183.

<sup>288</sup> Canada's response to Panel question No. 11.2, para. 48; comments on Chinese Taipei's response to the Panel question No. 11.9, para. 11.

<sup>289</sup> Canada's second written submission, paras. 177 and 180.

<sup>290</sup> Canada's second written submission, para. 179.

<sup>291</sup> Canada's second written submission, paras. 186 and 187.

<sup>292</sup> United States' third-party submission, para. 25.

should prevail on its claims. Moreover, the United States submits that past practice may serve, in certain circumstances, as evidence for the "as such" inconsistency of a challenged measure.<sup>293</sup>

#### 7.11.4 Evaluation by the Panel

7.198. The crux of Chinese Taipei's "as such" claims concerns the fact that SIMA bases the *de minimis*-test on a country-wide, rather than an exporter-specific margin of dumping. We therefore begin with this claim. In doing so, we recall our earlier finding that the second sentence of Article 5.8 of the Anti-Dumping Agreement requires immediate termination of the investigation in respect of exporters for whom a final determination has established individual *de minimis* margins of dumping. We also recall our rejection of many of the arguments that Canada also relies on to rebut Chinese Taipei's "as such" claim under Article 5.8.

7.199. With regard to the final dumping determination, the application of a country-wide *de minimis*-test is provided for in subsection 41(1) of SIMA.<sup>294</sup> In the circumstances of this case, to prevail with its "as such" claim under Article 5.8, Chinese Taipei must demonstrate that subsection 41(1) of SIMA necessarily leads to WTO-inconsistent conduct or prevents WTO-consistent conduct, by precluding the termination of an investigation in respect of exporters with an individual *de minimis* margin of dumping.<sup>295</sup> Chinese Taipei has shown that this provision of SIMA requires a final dumping determination to be made in respect of all goods of a country, i.e. including those from exporters with individual *de minimis* margins of dumping, if that country's margin of dumping is 2% or more.<sup>296</sup> The text of subsection 41(1) of SIMA only provides for termination of the investigation when there is a country-wide *de minimis* margin of dumping. It does not provide for immediate termination in respect of exporters with individual *de minimis* margins of dumping, contrary to the requirement of the second sentence of Article 5.8. We therefore conclude that Chinese Taipei has established a *prima facie* case that subsection 41(1) of SIMA is "as such" inconsistent with the second sentence of Article 5.8.<sup>297</sup>

7.200. Canada contends that subsection 43(1) of SIMA provides the CITT with discretion to immediately terminate investigations in respect of exporters with *de minimis* margins of dumping, as required by Article 5.8. We shall therefore consider whether this provision is sufficient to rebut the *prima facie* case of WTO-inconsistency established by Chinese Taipei.<sup>298</sup>

7.201. Subsection 43(1) of SIMA reads in relevant part:

[The CITT shall] not later than one hundred and twenty days after the date of receipt of notice of a preliminary determination with respect to the goods, make such order or

<sup>293</sup> United States' third-party response to Panel question No. 3.1, paras. 10 and 13.

<sup>294</sup> Consistent with Chinese Taipei's response to Panel question No. 11.10, para. 16, we read subsection 41(1) of SIMA together with subsection 2(1) and section 30.1 of SIMA.

<sup>295</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172; and *US – Carbon Steel*, para. 157.

<sup>296</sup> Section 41(1) of SIMA provides, in relevant part, that a final determination of dumping shall only be made if, among others, "the margin of dumping of ... the goods of that country or of any of those countries is not insignificant". (Special Import Measures Act, R.S.C., 1985, c. S-15 (last amended on 1 November 2014), (Exhibits TPKM-25 and CAN-12) (exhibited twice)).

<sup>297</sup> Where the meaning and content of the challenged provision are clear on its face, as it is the case here, an analysis of its text may suffice to establish the "as such" inconsistency of the challenged provision. (See Appellate Body Reports, *US – Carbon Steel*, para. 157; and *US – Corrosion-Resistant Steel Sunset Review*, para. 168).

<sup>298</sup> Our conclusions in respect of subsection 43(1) of SIMA apply irrespective of which party bears the burden of proof regarding the operation of this provision. Nevertheless, we do not accept Canada's argument that it was Chinese Taipei's burden to establish that subsection 43(1) of SIMA does not allow the CITT to exclude exporters based on their *de minimis* margin of dumping. Nothing in the text of the relevant provisions suggests that the mandatory provision of subsection 41(1) of SIMA should be viewed in light of the discretion contained in subsection 43(1) of SIMA. The provisions concern the distinct issues of dumping and injury determinations to be made by different authorities. Past practice also indicates that exclusions under subsection 43(1) of SIMA are made on the basis of the potential for injury, rather than the extent of an exporter's margin of dumping. In the absence of any apparent nexus between subsections 41(1) and 43(1) of SIMA, Chinese Taipei was not required to identify, and discharge a burden of proof with respect to, subsection 43(1) of SIMA in making its "as such" claim in this case. The burden was rather on Canada, as the defending party, to assert and demonstrate that subsection 43(1) of SIMA provides sufficient discretion for Canada to act in a manner consistent with the second sentence of Article 5.8.

finding with respect to the goods to which the final determination applies as the nature of the matter may require, and shall declare to what goods, including, where applicable, from what supplier and from what country of export, the order or finding applies.<sup>299</sup>

7.202. Upon completion of an injury inquiry, the CITT makes an affirmative or negative finding in respect of whether the dumped imports have caused or are threatening to cause material injury to the domestic industry.<sup>300</sup> Subsection 43(1) requires the CITT to specify to what goods, suppliers (i.e. exporters) or countries such an affirmative finding applies. In exercising its discretion under subsection 43(1), the CITT can exclude certain goods, exporters or countries from the application of an affirmative final injury finding. Canada argues that absent any express limitations, this discretion is sufficiently broad to allow the CITT to exclude exporters with *de minimis* margins of dumping from the affirmative injury findings.<sup>301</sup> When specifically asked by the Panel, Canada confirmed that the CITT is able to make such exclusion solely on the basis of an exporter's individual margin of dumping being *de minimis*.<sup>302</sup> Canada also confirmed to the Panel that, in the absence of any statutory limitation on the CITT's discretion under subsection 43(1) of SIMA, such exclusion would be consistent with the mandate and statutory role of the CITT.<sup>303</sup>

7.203. Bearing in mind the absence of any express textual limitations on the type of exporter exclusion that may be made by the CITT under subsection 43(1) of SIMA, and taking into account the assurances provided by Canada in this respect, we do not exclude that subsection 43(1) of SIMA might operate in the manner explained by Canada.<sup>304</sup> However, the second sentence of Article 5.8 of the Anti-Dumping Agreement requires that the termination of the investigation in respect of *de minimis* exporters must be "immediate". As explained in the following, we are not persuaded that any termination of an investigation by way of a producer exclusion under subsection 43(1) of SIMA would occur with the degree of immediacy required by Article 5.8 of the Anti-Dumping Agreement.

7.204. In Canada's bifurcated anti-dumping regime, the final dumping determination is issued by the CBSA, and the final injury determination is issued by the CITT. Exclusion under subsection 43(1) of SIMA only becomes effective once the CITT issues its final injury determination, and that final injury determination is only made approximately one month (or more) after the CBSA's final dumping determination.<sup>305</sup> Thus, even though the CBSA determines that an exporter's final margin of dumping is *de minimis*, the investigation will continue to apply in respect of that exporter until such time as the CITT issues its final injury determination.

7.205. The text of the second sentence of Article 5.8 Anti-Dumping Agreement requires that "[t]here shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*". It is the final determination of an exporter's *de minimis* margin of dumping that triggers the obligation to terminate the investigation. Textually, termination must follow "immediately" thereafter. The text of Article 5.8 does not allow for the continuation of the investigation in respect of that exporter beyond the final dumping determination, pending issuance of the final injury determination at some later date, as envisaged under subsection 43(1) of

<sup>299</sup> Special Import Measures Act, R.S.C., 1985, c. S-15 (last amended on 1 November 2014), (Exhibits TPKM-25 and CAN-12) (exhibited twice). The term "preliminary determination" refers to the preliminary dumping determination issued by the CBSA pursuant to subsection 38(1) of SIMA; the term "final determination" refers to the final dumping determination issued by the CBSA pursuant to subsection 41(1) of SIMA; the terms "order or finding" refer to the actual decision made by the CITT pursuant to subsection 43(1) of SIMA following its injury analysis conducted under subsection 42(1) of SIMA as to whether or not dumped imports have caused or are threatening to cause injury. (See Canada's response to Panel question No. 11.3, para. 50).

<sup>300</sup> Canada's second written submission, para. 170.

<sup>301</sup> Canada's second written submission, para. 177; opening statement at the second meeting with the Panel, para. 104; and response to Panel question No. 11.8, paras. 64 and 66.

<sup>302</sup> Canada's response to Panel question No. 11.8, para. 64.

<sup>303</sup> Canada's response to Panel question No. 11.8, para. 66.

<sup>304</sup> Such an approach would be contrary to current CITT policy. However, we do not exclude that the CITT has sufficient discretion to change that policy in light of a proper interpretation of Article 5.8 of the Anti-Dumping Agreement.

<sup>305</sup> Canada's responses to Panel question Nos. 11.4, para. 51, 11.6, para. 58, and 11.12, para. 70. In the underlying CSWP investigation, the CBSA issued its final dumping determination on 9 November 2012, and the CITT issued its final injury determination on 11 December 2012.

SIMA.<sup>306</sup> Subsection 43(1) of SIMA therefore does not result in the "immediate" termination required by Article 5.8.

7.206. Our interpretation of "immediate" termination under Article 5.8 is consistent with our findings in relation to Article 3 of the Anti-Dumping Agreement, interpreted in light of Article 5.8. Imports from exporters with final *de minimis* margins of dumping should not be treated as "dumped imports" in the CITT's final injury analysis, precisely because the investigation should already have been terminated in respect of such exporters.<sup>307</sup> Our approach is also consistent with the fact that the Canadian anti-dumping legislation foresees termination of the investigation immediately after the determination of a country-wide *de minimis* margin of dumping is made.<sup>308</sup> Thus, the CBSA terminated the CSWP investigation in respect of Turkey (based on Turkey having a *de minimis* country-wide margin of dumping) on the same day that the CBSA issued its final dumping determination, i.e. on 9 November 2012.<sup>309</sup>

7.207. Canada argues that the Appellate Body's findings in *Mexico – Anti-Dumping Measures on Rice* provide support for its position that exclusion from the CITT's final injury determination under subsection 43(1) of SIMA constitutes immediate termination within the meaning of Article 5.8. Canada refers in this regard to the Appellate Body's statement that "the only way to terminate *immediately* an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order" that establishes the anti-dumping duties.<sup>310</sup>

7.208. The facts of the present case are very different from those in *Mexico – Anti-Dumping Measures on Rice*. That case concerned Mexico's unitary anti-dumping system, under which the dumping and injury determinations are made simultaneously by the same investigating authority, and the issuance of the order imposing anti-dumping duties is the ultimate step of the investigation following those final determinations.<sup>311</sup> The situation is very different under Canada's bifurcated system. Here the CITT issues its final injury determination approximately one month (or more) after the CBSA issues its final determination.

7.209. The Appellate Body did not contemplate how immediate termination should occur in such situations, where further investigative steps are taken following issuance of the final dumping determination.<sup>312</sup> There is nothing in the Appellate Body's findings to suggest that, in such circumstances, termination under Article 5.8 of the Anti-Dumping Agreement, rather than being "immediate", may be delayed until those additional investigative steps have been undertaken. Furthermore, the fact that the CBSA terminates the investigation in respect of countries with *de minimis* margins of dumping at the same time that it issues its final dumping determination demonstrates that exclusion from the order (via exclusion from the CITT's injury determination) is not "the only way" to immediately terminate an investigation in the context of Canada's bifurcated system.

<sup>306</sup> The term "immediate" is commonly defined to mean "present or nearest in time; most urgent, occurring or taking effect without delay; done at once, instant". (*Shorter Oxford English Dictionary*, 6<sup>th</sup> edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1330). An investigation could not be said to be terminated "without delay" or "at once" if it could continue following the final determination of a *de minimis* margin of dumping.

<sup>307</sup> Under Canada's approach, provisional duties would continue to be levied in respect of *de minimis* exporters until the CITT's injury determination is issued. (See Canada's response to Panel question No. 11.6, para. 58). We see no basis for imposing provisional duties on exporters in respect of which the investigation should already have been terminated pursuant to a *final* determination of *de minimis* dumping. Even if those provisional duties are subsequently refunded, exporters subject to such duties suffer commercial inconvenience that should normally be avoided as a result of immediate termination of the investigation under Article 5.8 of the Anti-Dumping Agreement.

<sup>308</sup> See Special Import Measures Act, R.S.C., 1985, c. S-15 (last amended on 1 November 2014), (Exhibits TPKM-25 and CAN-12) (exhibited twice), subsection 41(1)(b).

<sup>309</sup> CBSA, Decision, Final Determinations Dumping and Subsidizing, 9 November 2012, *Canada Gazette* 2012.I.146.47 (24 November 2012), pp. 3172 and 3173, (Exhibit TPKM-12).

<sup>310</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219. (emphasis original)

<sup>311</sup> See Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 2.6 and 2.7 and fn 4; and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.

<sup>312</sup> The Appellate Body specifically qualified its analysis with the remark that "in most cases" termination of the investigation in respect of a *de minimis* exporter would occur through the order imposing anti-dumping duties. (Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219). In other cases, therefore, an alternative means of termination may be required.

7.210. We conclude that exclusions from the injury findings under subsection 43(1) of SIMA do not constitute immediate termination as required under Article 5.8. Accordingly, we find that subsection 43(1) of SIMA is not sufficient to rebut the *prima facie* case of WTO-inconsistency established by Chinese Taipei in respect of subsection 41(1) of SIMA. We therefore find that subsection 41(1) of SIMA, read together with section 30.1 and subsection 2(1) of SIMA, is "as such" inconsistent with the second sentence of Article 5.8.

7.211. Chinese Taipei also claims that subsection 38(1) of SIMA, read together with subsection 2(1), section 30.1 and subsections 35(1) and 35(2) of SIMA, is "as such" inconsistent with Article 7.1(ii) of the Anti-Dumping Agreement because this provision requires an affirmative preliminary dumping determination to be made for exporters with *de minimis* margins of dumping when the country-wide margin of dumping is more than *de minimis*.<sup>313</sup> Above, we have rejected Chinese Taipei's "as applied" claim that Canada acted inconsistently with Article 7.1(ii) by imposing provisional anti-dumping measures on a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping. Similarly, there is no basis for us to find that subsection 38(1) of SIMA is "as such" inconsistent with Article 7.1(ii). We therefore reject Chinese Taipei's "as such" claim under Article 7.1(ii) of the Anti-Dumping Agreement.

7.212. Chinese Taipei also challenges subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), and 41(1) of SIMA as being inconsistent "as such" with Articles 7.5 and 9.2 of the Anti-Dumping Agreement. Chinese Taipei submits that these provisions of SIMA require affirmative preliminary and definitive dumping determinations to be made for exporters with *de minimis* margins of dumping when the country-wide margins of dumping is above the *de minimis* level, thereby causing anti-dumping duties to be collected from such exporters.<sup>314</sup> Canada does not contest that the challenged provisions of SIMA result in duty imposition on imports from such exporters. We recall our earlier finding that the imposition of definitive anti-dumping duties in respect of imports from exporters with final *de minimis* margins of dumping is inconsistent with Article 9.2. Accordingly, we find that the challenged provisions of SIMA are "as such" inconsistent with Article 9.2, to the extent that they result in the imposition of definitive anti-dumping duties on exporters with final *de minimis* margins of dumping. Above, however, we have rejected Chinese Taipei's "as applied" claim that the imposition of provisional measures in respect of exporters with a preliminarily determined *de minimis* margin of dumping is inconsistent with Article 7.5 of the Anti-Dumping Agreement. Consequently, we also reject Chinese Taipei's "as such" claim under Article 7.5.

7.213. Chinese Taipei also 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 Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. To the extent that we have found subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), and 41(1) of SIMA to be "as such" inconsistent with Articles 5.8 and 9.2 of the Anti-Dumping Agreement, we also find that these provisions of SIMA are, as a consequence, "as such" inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. To the extent that we have rejected Chinese Taipei's claims concerning subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), and 41(1) of SIMA under Articles 7.1(ii) and 7.5 of the Anti-Dumping Agreement, we also reject its claim of "as such" inconsistency under Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

## **7.12 "As such" claims concerning subsections 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR**

7.214. Chinese Taipei argues that subsections 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR are, as such, inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement. Chinese Taipei contends that these provisions result in the treatment of imports from exporters with *de minimis* margins of dumping as "dumped imports" in the analysis and determinations of injury and causation, contrary to the referenced paragraphs of Article 3.<sup>315</sup>

<sup>313</sup> Chinese Taipei's response to Panel question No. 11.10, para. 16.

<sup>314</sup> Ibid.

<sup>315</sup> Chinese Taipei's first written submission, para. 291; second written submission, para. 215.



7.215. Chinese Taipei relies on the same arguments made in the context of its corresponding "as applied" claims, in particular invoking case law regarding the interpretation of the term "dumped imports".<sup>316</sup>

7.216. Canada does not contest that, in the context of the preliminary and final determinations of injury and causation, the challenged provisions result in the treatment of imports from exporters with a *de minimis* margin of dumping as "dumped imports". As above in the context of the "as applied" claims, Canada denies, however, that the meaning of the term "dumped imports" is limited to imports that are dumped at a margin above the *de minimis* threshold.<sup>317</sup>

7.217. We have already addressed the issue of the interpretation of "dumped imports" under Article 3 of the Anti-Dumping Agreement. We have found that Canada acted in a manner inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 by treating imports from two Chinese Taipei exporters with final *de minimis* margins of dumping as "dumped imports" in the CITT's final determinations of injury and causation. The same reasoning applies in respect of Chinese Taipei's "as such" claims. We therefore find that subsections 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR are "as such" inconsistent with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement, to the extent that the challenged provisions relate to the final determinations of injury and causation. To the extent that the challenge is brought in relation to the preliminary determinations of injury and causation, we reject the claims.

**7.13 Additional "as such" claims concerning subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR**

7.218. Chinese Taipei pursues additional "as such" claims of violation of Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement in respect of subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR.

7.219. Article XVI:4 of the Marrakesh Agreement provides that:

Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.

7.220. Article 18.4 of the Anti-Dumping Agreement provides that:

Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question.

7.221. Chinese Taipei argues that it follows from the alleged inconsistencies of SIMA and SIMR addressed in the sections above that Canada has not ensured conformity of its laws with the GATT 1994 and the Anti-Dumping Agreement, contrary to Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement.<sup>318</sup> Moreover, Chinese Taipei separately challenges these provisions of SIMA and SIMR "as such" under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.<sup>319</sup>

7.222. Referencing its arguments set forth above, Canada submits that Chinese Taipei's claims are without merit.<sup>320</sup>

<sup>316</sup> Chinese Taipei's first written submission, para. 298.

<sup>317</sup> Canada's first written submission, paras. 264 and 265.

<sup>318</sup> Chinese Taipei's first written submission, paras. 304-315.

<sup>319</sup> Chinese Taipei's first written submission, paras. 316 and 317.

<sup>320</sup> Canada's first written submission, paras. 267-270.

7.223. We observe that these are consequential claims. They are therefore addressed in light of the Panel's evaluation of the claims on which they depend. In respect of the final dumping and injury determinations, we found above that subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR are "as such" inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, and 9.2 of the Anti-Dumping Agreement. As a result, we also uphold Chinese Taipei's corresponding consequential claims under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement as well as under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994. In relation to the preliminary dumping and injury determinations, we rejected above Chinese Taipei's "as such" claims under Articles 3.1, 3.2, 3.4, 3.5, 3.7, 7.1(ii), and 7.5 of the Anti-Dumping Agreement concerning subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR. To the same extent, we therefore also reject Chinese Taipei's consequential claims under Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement as well as under Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. Canada acted inconsistently with the second sentence of Article 5.8 of the Anti-Dumping Agreement by failing to immediately terminate the investigation in respect of exporters from Chinese Taipei with final *de minimis* margins of dumping;
- b. Chinese Taipei failed to establish that Canada acted inconsistently with Article 6.10 of the Anti-Dumping Agreement by failing to determine only one individual margin of dumping for each exporter from Chinese Taipei with a *de minimis* margin of dumping when basing the *de minimis*-test on a country-wide margin of dumping;
- c. Chinese Taipei failed to establish that Canada acted inconsistently with Article 7.1(ii) of the Anti-Dumping Agreement by applying provisional anti-dumping measures in respect of imports from a Chinese Taipei exporter with a preliminary *de minimis* margin of dumping;
- d. Canada acted inconsistently with Article 9.2 of the Anti-Dumping Agreement by imposing definitive anti-dumping duties on imports from Chinese Taipei exporters with final *de minimis* margins of dumping;
- e. Chinese Taipei failed to establish that Canada acted inconsistently with Article 7.5 of the Anti-Dumping Agreement by imposing provisional anti-dumping duties on imports from Chinese Taipei exporters with preliminary *de minimis* margins of dumping;
- f. Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, to the extent that Canada imposed definitive anti-dumping duties on imports from Chinese Taipei exporters with final *de minimis* margins of dumping. Chinese Taipei failed to establish that Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, to the extent that Canada imposed provisional anti-dumping duties on imports from Chinese Taipei exporters with preliminary *de minimis* margins of dumping;
- g. Canada acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, and 3.7 of the Anti-Dumping Agreement by treating imports from two Chinese Taipei exporters with final *de minimis* margins of dumping as "dumped imports" in the analysis and final determinations of injury and causation;
- h. Chinese Taipei failed to establish that Canada acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement by failing to undertake a non-attribution analysis in respect of the effect of subsidization for imports from India and the effect of overcapacity in the domestic industry;

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- i. Canada acted inconsistently with Article 6.8 of the Anti-Dumping Agreement, and its Annex II, paragraph 7, by establishing the dumping margin and duty rate for "all other exporters" on the basis of the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperative producer from any country subject to the investigation;
  - j. Canada acted inconsistently with Article 9.3 of the Anti-Dumping Agreement by imposing anti-dumping duties on new product models or types from investigated and cooperative exporters from Chinese Taipei that exceeded their margins of dumping as established under Article 2 of the Anti-Dumping Agreement;
  - k. Canada acted inconsistently with Article 6.8 of the Anti-Dumping Agreement, and its Annex II, by using facts available to determine the amount of anti-dumping duty imposed or collected on imports of new product models or types from investigated and cooperative exporters from Chinese Taipei;
  - l. Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, to the extent that Canada has been found to violate Articles 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, 6.8, 9.2, and 9.3 of the Anti-Dumping Agreement, and its Annex II (including its paragraph 7). Chinese Taipei failed to establish that Canada acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, to the extent that Chinese Taipei's claims under Articles 3.1, 3.5, 6.10, 7.1(ii), and 7.5 of the Anti-Dumping Agreement have been rejected;
  - m. subsection 41(1) of SIMA, read together with section 30.1 and subsection 2(1) of SIMA, is inconsistent "as such" with the second sentence of Article 5.8 of the Anti-Dumping Agreement because it bases the *de minimis*-test for the final dumping determination on a country-wide, rather than an exporter-specific margin of dumping;
  - n. Chinese Taipei failed to establish that section 38(1) of SIMA, read together with subsection 2(1), section 30.1 and subsections 35(1) and 35(2) of SIMA, is inconsistent "as such" with Article 7.1(ii) of the Anti-Dumping Agreement because it requires an affirmative preliminary dumping determination to be made for exporters with *de minimis* margins of dumping when the country-wide margin of dumping is more than *de minimis*;
  - o. subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), and 41(1) of SIMA are inconsistent "as such" with Article 9.2 of the Anti-Dumping Agreement, to the extent that these provisions of SIMA result in the imposition of definitive anti-dumping duties on imports from exporters with final *de minimis* margins of dumping;
  - p. Chinese Taipei failed to establish 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 Article 7.5 of the Anti-Dumping Agreement, to the extent that these provisions of SIMA result in the imposition of provisional anti-dumping duties on imports from exporters with preliminary *de minimis* margins of dumping;
  - q. subsection 2(1), section 30.1 and subsections 35(1), 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, to the extent that these provisions of SIMA have been found to be inconsistent "as such" with Articles 5.8 and 9.2 of the Anti-Dumping Agreement. Chinese Taipei failed to establish 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 Article 1 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, to the extent that these provisions of SIMA have not been found to be inconsistent "as such" with Articles 7.1(ii) and 7.5 of the Anti-Dumping Agreement;
  - r. subsections 42(1), 42(6), and 43(1) of SIMA and subsection 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, to the extent that these provisions of SIMA and SIMR result in the treatment of imports from exporters with final *de minimis* margins of dumping as "dumped imports" in the final determinations of injury and causation. Chinese Taipei

failed to establish that subsections 42(1), 42(6), and 43(1) of SIMA and subsection 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, to the extent that these provisions of SIMA and SIMR result in the treatment of imports from exporters with preliminary *de minimis* margins of dumping as "dumped imports" in the preliminary determinations of injury and causation; and

- s. subsection 2(1), section 30.1 and subsections 35(1), 35(2), 38(1), 41(1), 42(1), 42(6), and 43(1) of SIMA and subsection 37.1(1) of SIMR are inconsistent "as such" with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement as well as with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, to the extent that these provisions of SIMA and SIMR have been found to be inconsistent "as such" with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 5.8, and 9.2 of the Anti-Dumping Agreement, namely in relation to the final determinations of dumping and injury. To the extent that these provisions of SIMA and SIMR have not been found to be inconsistent "as such" with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 7.1(ii), and 7.5 of the Anti-Dumping Agreement, namely in relation to the preliminary determinations of dumping and injury, Chinese Taipei failed to establish that they are inconsistent "as such" with Article XVI:4 of the Marrakesh Agreement and Article 18.4 of the Anti-Dumping Agreement as well as with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.2. We do not consider it necessary to address Chinese Taipei's claims under Articles 2.2 and 6.10 of the Anti-Dumping Agreement concerning the determination of the amount of anti-dumping duties imposed or collected on imports of new product models or types from investigated and cooperative exporters from Chinese Taipei.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the Anti-Dumping Agreement, the GATT 1994 and the Marrakesh Agreement, they have nullified or impaired benefits accruing to Chinese Taipei under those agreements.

8.4. Pursuant to Article 19.1 of the DSU, we recommend that Canada bring its measures into conformity with its obligations under the above-mentioned Agreements.

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