IN THE WORLD TRADE ORGANIZATION

Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

WT/DS482

Third Party Submission

by

Norway

Geneva

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I. INTRODUCTION

1. Norway welcomes the opportunity to be heard and to present its views as a third party in this dispute brought by the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (hereinafter "TPKM") concerning the consistency of Canada's anti-dumping measures imposed on imports of certain carbon steel welded pipe originating in TPKM, and their underlying investigations, with Article VI:2 of the GATT 1994 and a number of Articles of the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter the "Anti-Dumping Agreement").

2. In this written submission, Norway will not address all of the issues upon which there is disagreement between the Parties to the dispute. Rather, Norway will confine itself to discuss one of the legal issues raised: whether the obligation contained in Article 5.8 of the Anti-Dumping Agreement to immediately terminate the investigation where the margin of dumping is *de minimis* pertains to the individual producer or to a country.

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

3. TPKM submits that Canada ignored the individual margins of dumping calculated for each exporter.[1] Instead, it relied on the country-wide margins of dumping in order to determine whether the margins of dumping were *de minimis*. Accordingly, Canada did not terminate the investigation with respect to individual exporters whose definitive margins of dumping were found to be *de minimis* if the corresponding country-wide margin of dumping was 2% or more. TPKM further submits that this entails a violation of Article 5.8 of the Anti-Dumping Agreement,[2] which reads as follows:

[1] First Written Submission of TPKM, para. 53.
[2] First Written Submission of TPKM, para. 54.

> An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. 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. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

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

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

6. The panel in *Mexico – Anti-Dumping Measures on Rice*, found that the term "margin of dumping" in the Anti-Dumping Agreement refers to "the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping".[5] The panel found evidence for this in Article 6.10 of the Anti-Dumping Agreement, which stipulates that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". The exception to this rule also provides for the calculation of individual margins of dumping, and does not envisage the

[3] First Written Submission of Canada, para. 46.
[4] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 216-217.
[5] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.137.

calculation of a country-wide margin. The panel then went on to examine the rest of the Anti-Dumping Agreement, to see whether there were any provisions that would contradict this finding. Upon completing this analysis, the panel ultimately concluded that "whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter."[6]

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

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

9. As for the immediate context of Article 5.8, the panel in *Mexico – Anti-Dumping Measures on Rice* found it relevant that the second sentence of the paragraph stipulates that negligibility, the other basis upon which immediate termination is required, is to be determined in respect of the volume of dumped imports "from a particular country".[10] Thus, while the Anti-Dumping Agreement expressly stipulates that the negligibility test is to be examined on a country-wide basis, no such stipulation is made with regard to the margin of

[6] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140.
[7] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 216-217, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.
[8] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140, and Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218.
[9] First Written Submission of Canada, paras. 52, 63, 72 and 91.
[10] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.141.

dumping. The panel concluded that this context further confirmed their view that the reference to the margin of dumping in Article 5.8 is a reference to the individual margin of dumping which is to be determined on an exporter-specific basis. The Appellate Body confirmed the panel's reasoning on this point.[11] Clearly, Canada's assertion that the panel and Appellate Body's findings with regards to Article 5.8 are undermined because they failed to properly consider the context of Article 5 in general and Article 5.8 in particular is flawed.[12] As set out above, this context was indeed a part of the analysis.

10. Canada further argues that Article 3.3 of the Anti-Dumping Agreement provides relevant context for interpreting the term "margin of dumping" in Article 5.8.[13] Once again, the Appellate Body has previously addressed this issue:

> "[…] in our opinion, Article 3.3 does not add to the analysis of Article 5.8. 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."[14]

[11] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217.
[12] First Written Submission of Canada, para. 88.
[13] First Written Submission of Canada, paras. 82-83.
[14] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 220.

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

12. Norway thus agrees with TPKM that Article 5.8 of the Anti-Dumping Agreement requires WTO Members to terminate anti-dumping investigations with respect to individual exporters that have a *de minimis* margin of dumping. Where all investigated exporters are found to have *de minimis* margins of dumping, this individual producer-specific determination will be extended to a country-wide basis.[17] However, this does not change the producer-specific nature of the determination, but rather follows as a logical consequence of this fact.

III. THE ROLE OF PREVIOUS REPORTS

13. As the question discussed above regarding Article 5.8 of the Anti-Dumping Agreement has largely been addressed by previous panels and the Appellate Body, Norway would like to emphasise the role of previous reports in the WTO dispute settlement system. The very basis of the system is that reports are binding only on the parties to the dispute. The Appellate Body has however underlined "that adopted panel and Appellate Body reports create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute. Following the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same. This is also in line with a key objective of the dispute settlement system to provide security and predictability to the multilateral trading system."[18] Norway would add that by following previous Appellate Body reports, panels also contribute

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

to ensuring fewer disputes and preserve both the system and the systemic function of the Appellate Body.

IV. CONCLUSION

14. Norway respectfully requests the Panel to take account of the considerations set out above when evaluating the claims set forth in this dispute.