

In the World Trade Organization

Panel Proceedings

*Australia — Anti-Dumping and Countervailing Duty Measures on
Certain Products from China*

WT/DS603

Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 8 March 2023

Table of cases cited in this submission

Short title	Full Case Title and Citation
<i>Australia - Anti-Dumping Measures on A4 Copy Paper</i>	Panel Report, <i>Anti-Dumping Measures on A4 Copy Paper</i> , WT/DS529/R, Add.1 and Add.2, adopted 27 January 2020.
<i>US – Clove Cigarettes</i>	Appellate Body Report, <i>US – Clove Cigarettes</i> , WT/DS406/AB/R, adopted 24 April 2012.
<i>China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i>	Panel Report, <i>China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/RW and Add.1, adopted 28 February 2018.
<i>US – Anti Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011.

I. INTRODUCTION

Madam Chair, distinguished Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings.
2. Before introducing Norway's views, we would like to take this opportunity to restate Norway's stance on Russia's ongoing aggression against Ukraine.
3. Norway continues to strongly condemn Russia's egregious military attack on its neighbour Ukraine. Russia's war of aggression against Ukraine constitutes a gross violation of international law, the rules-based system which also underpins this organisation and the dispute settlement mechanism. This military aggression is also gravely hurting multilateral cooperation at a time when we need it more than ever.
4. We reiterate Norway's unwavering support for Ukraine's sovereignty and territorial integrity, within its internationally recognised borders.
5. Now turning to the present proceedings, Norway did not present a written submission to the Panel. Without taking a position on the facts of this dispute, Norway will confine its statement to comment on what we consider to be some of the key issues in the dispute. In this oral statement, Norway will therefore set out its views on the proper legal interpretation of Articles 2.2 and 2.2.1.1 of the Anti-Dumping Agreement (hereinafter "ADA") in regards to this dispute.

II. ARTICLE 2.2 OF THE ADA: WHEN A PARTICULAR MARKET SITUATION RENDERS THE DOMESTIC PRICES UNABLE TO PERMIT A PROPER COMPARISON

6. Article 2.1 of the ADA restates the obligation to ensure a proper comparison between the export price and the normal value, and Article 2.2 provides details on how the

investigating authorities shall ensure price comparability where *domestic sales do not permit a proper comparison*.

7. Among the limited circumstances where an external benchmark should be used to ensure price comparability, Article 2.2 makes reference to situations where sales of the like product destined for consumption in the domestic market of the exporting country “do not permit a proper comparison” because of the “particular market situation”.
8. Norway submits that the mere existence of a “particular market situation” does not in itself permit the investigating authority to disregard home market prices. The wording of the provision establishes a link between the particular market situation and the inability to provide a proper comparison. The term “because of” entails that the situation with sales not permitting a proper comparison must be caused by either “the particular market situation” or “the low volume of sales”.
9. Reference is made to the panel’s findings in *Australia – Anti-Dumping Measures on Paper* para. 7.27: “Specifically, that domestic sales 'do not permit a proper comparison' must be 'because of the particular market situation'. If domestic sales do permit a proper comparison, then they cannot be disregarded as the basis for normal value, regardless of the existence of the particular market situation and its effects, whatever those may be”.
10. Moreover, the fact that the comma appears after the word “when” bundles and links the alternative criteria “particular market situation” and “low volume of sales” to the criterion of sales not permitting a proper comparison. It is clear that this criterion must be applied to situations where there is a “particular market situation” or a “low volume of sales”. Otherwise, there would be no need for the provision to contain the alternative of disregarding home market prices where there are no sales at all.
11. The nexus between the particular market situation or low volume of sales respectively and the ability to permit a proper comparison is evident in the structure of the

paragraph; the first phrase of the first sentence concerns situations where there are no sales and naturally there can be no “such sales” permitting a proper comparison. The second phrase is prefaced by “or”, which creates a distinction from the first phrase and separates the information after the first comma. This, in turn enables application of the criterion of “do not permit a proper comparison” only to the second phrase. If this criterion was not meant to be used for both alternatives, the provision would have been drafted by each of the criteria separated by comma and using “or” before the last alternative.

12. Hence, a literal interpretation of the provision indicates that the criterion of “do not permit a proper comparison” should be applied to both alternatives under the second phrase of the sentence.
13. Norway therefore agrees with Brazil, as argued in its third party written submission,¹ that governmental actions are relevant only if they create market distortions that do not permit a proper comparison of domestic and export prices.

III. ARTICLE 2.2.1.1 OF THE ADA: THE POSSIBILITY OF REJECTING THE EXPORTER’S OR PRODUCERS’S COST OF PRODUCTION AND RESORTING TO AN EXTERNAL BENCHMARK WHEN CALCULATING NORMAL VALUE

14. Turning now to Article 2.2.1.1 of the ADA, and the detailed rules on how to establish the “cost of production” of the exporter or producer under investigation, the plain text of Article 2.2.1.1 of the ADA makes clear that the cost of production shall “normally” be based on records kept by the exporter that reasonably reflect the actual cost of production in the exporting country.
15. The ordinary meaning of the adverb “normally” suggests “[u]nder normal or ordinary conditions; ordinarily; as a rule”.² The Appellate Body confirmed in *US – Clove Cigarettes* that “the qualification of an obligation with the adverb ‘normally’ ...

¹ Brazil’s written third party submission, para. 7.

² *The New Shorter Oxford English Dictionary*, 4th edition, L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 1940.

indicates that the rule ... admits derogation” under conditions that are not “normal” or “ordinary”.³

16. The panel in *Australia – Anti-Dumping Measures on Paper* clarified the relationship between “normally” and the other two conditions in the article. The panel concluded that “in relying on 'normally', the investigating authority should give meaning to the whole of the obligation in Article 2.2.1.1, first sentence, and should therefore examine whether the records satisfy the two explicit conditions and provide a satisfactory explanation as to why, nonetheless, it finds compelling reasons to disregard them». ⁴
17. To give meaning to the whole of Article 2.2.1.1, it is necessary to include the obligation to justify any deviations from using the domestic market price. As laid out by the panel in *China – Broiler Products*, “the use of the term ‘normally’ in Article 2.2.1.1 means that an investigating authority is bound to explain why it departed from the norm and declined to use a respondent’s books and records”.⁵
18. As stated by the Appellate Body in *US – Anti Dumping and Countervailing Duties (China)* the “investigating authority may reject in-country private prices if it reaches the conclusion that *these* are too distorted due to the predominant participation of the government as a supplier in the market”.⁶ The determination to reject the actual costs of the producer must be specific to the exporter or producer in question, and to the cost factors in question, and based on positive evidence together with a reasoned explanation of the compelling reasons for the rejection.
19. Investigating authorities should, consequently, be mindful that it is not sufficient to determine that the government has a substantial presence in a given market to authorise resort to an out-of-country benchmark. It is *also necessary* to determine that the said presence distorts prices for inputs through the chain of production in such a

³ Appellate Body Report, *US – Clove Cigarettes*, para. 273.

⁴ Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.117

⁵ Panel Report, *China Broiler Products*, para. 7.161

⁶ Appellate Body Report, *US – Anti Dumping and Countervailing Duties (China)*, paras. 446-447. Emphasis added.

compelling way that all domestic prices available for comparison would not properly reflect prevailing market conditions.

IV. CONCLUSION

20. Norway respectfully requests the Panel to take account of the considerations laid out in this statement when evaluating the claims set forth in this dispute.
21. Madam Chair, distinguished Members of the Panel, this concludes Norway's statement today. Thank you for your attention.
