IN THE WORLD TRADE ORGANISATION

WT/DS427

China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States

Third Party Submission

by

Norway

Geneva

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Short Title	Full Case Title and Citation
Argentina – Ceramic Tiles	Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
Argentina – Poultry	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003
EC – Salmon	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
Guatemala – Cement II	Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295

I. INTRODUCTION

1. Norway welcomes this opportunity to present its views as a third party in this dispute brought by the United States of America ("US") regarding the consistency of the anti-dumping and countervailing measures taken by the Peoples' Republic of China ("China") on certain broiler products from the US with the *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the *"AD Agreement*") and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").

2. As a starting point, Norway would like to underline the importance of adhering to the procedural rules contained in the *AD and SCM Agreements*. Anti-dumping and countervailing duty investigations involve a process whereby an authority obtains information from a variety of sources and, on the basis of this information, makes a series of factual and legal determinations. These determinations can adversely affect the position of interested parties, including through the imposition of anti-dumping- or countervailing duties. In order to protect the interests of interested parties, the *AD and SCM Agreements* require the investigating authority to conduct its investigation, and make determinations, in accordance with certain minimum standards of procedural transparency, justice and fairness. Norway attaches great importance to these procedural rules, as particular safeguard mechanisms for due process rights.

3. In this third party statement, Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway has chosen to focus on certain interpretative issues of importance to the Panel when assessing the claims presented by the US. Accordingly, Norway will in the following discuss the claims by the US that China violated the rules in Articles 6.2 and 6.9 of the *AD Agreement*.

II. ARTICLE 6.2 OF THE AD AGREEMENT

4. The US claims that China acted inconsistently with Article 6.2 of the *AD Agreement*, by refusing the request for a public hearing.[1] China contends that these claims should be

[1] US' First Written Submission, paras. 39 and 40.

rejected as the refusal was "entirely proper and permitted under Article 6.2 of the *AD Agreement*".[2]

5. Norway notes that the US and China seem to disagree on whether or not the parties with opposing interests were contacted upon the US' request and accordingly declined to attend a hearing. Norway will not discuss these factual aspects of the case, but wishes to focus on certain arguments that may be of importance to the Panel when interpreting the requirements of Article. 6.2.

6. Article 6.2 enshrines a cardinal principle for the conduct of an anti-dumping investigation, and contains specific rules on the right for interested parties to meet those parties with opposing interests:

> "Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally."

7. Article 6.2 guarantees interested parties the right to present views "oppos[ed]" to the views presented by other parties, and to make "rebuttal" arguments. Consistent with the requirements of due process, Article 6.2, therefore, provides that interested parties enjoy the right of defence and the corollary right to be heard.

8. As the wording of Article 6.2 establishes, the authorities are *obliged* to provide opportunities for interested parties to meet those parties with opposing interests, if such parties so request ("the authorities shall"). The only viable reason not to provide such opportunities for a meeting, in line with the *AD Agreement*, is if the parties with opposing interests are contacted and decline the invitation. A different interpretation would be contrary to the first sentence of Article 6.2, which enshrines that all interested parties shall have full opportunity for the defence of their interests. This is a principle Norway holds

[2] China's First Written Submission, para. 21.

very highly, as an anti-dumping investigation can have severe effects on interested parties, including through anti-dumping duties. The protection of due process rights is thus of great importance.

III. ARTICLE 6.9 OF THE AD AGREEMENT

9. Article 6.9 of the *AD Agreement* aims at securing due process rights for interested parties, and requires the investigating authority, before the final determination is made, to

> "...inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

10. The US claims that China is in breach of this requirement, as the investigating authority did not disclose the data and calculations performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents.[3] China, on the other hand, states that it cannot find any basis for the US' interpretation of Article 6.9 to this effect.[4] Norway will not address the issue of whether any disclosure of China actually provided the required information. Norway will only highlight certain arguments that may be of importance to the Panel when interpreting the requirements of Article 6.9.

11. Panels and the Appellate Body have interpreted the Article 6.9 of the *AD Agreement* on several occasions. Panels have found that the aim of disclosure is to "actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures."[5]

12. Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.[6] Rather, the investigating

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3 US' First Written Submission, para. 53.
4 China's First Written Submission, para. 22.
5 Panel report, *Argentina – Ceramic Tiles*, para. 6.125.
6 Panel report, *Guatemala – Cement II,* para. 8.230.

authority must actively identify the facts on which it will rely in making its determination, for instance by "disclosing a *specially prepared document* summarizing the essential facts under consideration".[7] The duty to identify separately the essential facts arises, among others, to make it easier for interested parties to know which information in the file forms the basis of the authority's final determination, as opposed to the facts that are not regarded as determinative.[8]

13. The core of the duty of disclosure under Article 6.9 relates to "essential facts". The term "fact" has been interpreted to mean "a thing that is known to have occurred, to exist or to be true".[9] On the basis of that definition, the panel in *Argentina – Poultry* distinguished "facts" from "reasons". While the authority's *reasons* should explain *inter alia* how it weighed the facts and how the facts in the record supported its determination, the duty of disclosure relates to *evidence*.

14. As to what evidence the investigating authority has an obligation to disclose, the words "essential" and "form the basis of" indicate that the duty relates to the important facts that provide the foundation on which the final determination is constructed. The panel in *EC - Salmon* expressed this as

> "the body of facts essential to the determinations that must be made by the investigating authority before it can decide whether to apply definitive measures. That is, they are the facts necessary to the process of analysis and decision making by the investigating authority, not only those that support decision ultimately reached."[10]

15. The second sentence of Article 6.9 sheds light on the first sentence. Under the second sentence, disclosure must occur "in sufficient time for the parties to defend their interests". Interests can be defended by allowing interested parties an opportunity, among others, to "comment [] on the completeness of the essential facts under consideration".[11] Article 6.9 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures. Absent disclosure of the essential facts, interested

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7 Panel report, *Argentina – Ceramic Tiles*, para. 6.125. China correctly makes references to this point in its First Written Submission, para. 30.
8 Panel report, *Guatemala – Cement II*, para. 8.229.
9 Panel report, *Argentina – Poultry*, para. 7.225.
10 Panel report, *EC - Salmon*, para. 7.807.
11 Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

parties are left guessing at the factual basis in the record for the authority's factual and legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

16. Accordingly, if the calculations performed to determine the existence and margin of dumping, and the data underpinning these calculations, are not disclosed, interested parties cannot assess whether the final determination has been reached in a correct manner. This is important for the legitimacy of the process – to ensure that the investigation has been carried out in accordance with the relevant laws and regulations – as well as a safeguard mechanism for the correctness of the actual numbers and data relied on (ensuring they do not contain errors of any kind). These facts are essential to the final determination, as it could not otherwise be made and no duties could then be imposed. Such disclosure is, in other words, important in order to ensure interested parties have the opportunity to defend their interest, in accordance with Article 6.2 of the *AD Agreement*.

IV. CONCLUSION

17. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the *AD Agreement*.