IN THE WORLD TRADE ORGANISATION

WT/DS427

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

Oral Statement

by

Norway as a Third Party

Geneva

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Mr Chairman, distinguished Members of the Panel,

1. Norway welcomes this opportunity to present its views on the issues raised in these panel proceedings. In this opening statement I will not repeat the arguments presented by Norway in its written submission, but just highlight a few points that we believe are important to stress.

A. The determination of the «all others» rate

2. The first issue Norway would like to address today is the relationship between the determination of the "all others" rate in the final anti-dumping and countervailing duty determinations and Article 6.8 and Annex II of the *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the *"AD Agreement*") and Article 12.7 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").

3. The U.S. claims that China applied facts available to producers that were not notified of the information required of them, and that did not refuse to provide necessary information or otherwise impede the investigation, thereby acting inconsistently with Article 6.8 and Annex II of the *AD Agreement* and Article 12.7 of the *SCM Agreement*.[1] As China asserts, the facts surrounding the "all others" rate issued in the determinations of the countervailing duty proceedings are virtually the same as those presented with respect to the anti-dumping "all others" rate".[2] Furthermore, the rules regulating the investigating authorities' right to resort to facts available in these two types of proceedings are largely the same. For these reasons, the determination of both the anti-dumping and countervailing duty "all others" rates will be addressed together.

4. Under Article 6.8 of the *AD Agreement* and Article 12.7 of the *SCM Agreement*, an investigating authority is permitted to have recourse to facts available solely when an interested party:

[1] The US' First Written Submission, paras. 146 and 184.
[2] China's First Written Submission, para 187.

> "refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation […]."

5. The Panel in *US – Hot Rolled Steel* established that "necessary information" for purposes of Article 6.8 of the *AD Agreement* is "information which is requested by the investigating authority and which is relevant to the determination to be made."[3]

6. Article 6.8 also provides that the conditions in Annex II of the *AD Agreement* must be respected before an authority resorts to facts available in making determinations. In particular, paragraph 1 of this Annex insists that the authority "specify in detail the information required from any interested party" and ensure that the interested party be "aware that if the information is not supplied within a reasonable time", the authority may use facts available. Article 12.1 of the *SCM Agreement* stipulates that

> "Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

7. In *Mexico – Rice*, the investigating authority sent a notice of initiation to certain known exporters, an association of exporters and the respondent WTO Member.[4] Subsequently, the authority assigned a "residual margin" to other exporters on the grounds that they did not make themselves known to the authority. The residual margin was higher than the weighted average margin of the investigated companies. The exporters subject to the residual margin did not receive any notice from the authority of the information required from them, nor were they made aware that the authority could use facts available if they failed to provide requested information.

8. The Appellate Body ruled that, pursuant to Article 6.8 and Annex II paragraph 1 of the *AD Agreement*, the authority could not apply facts available to the exporters that were not investigated and not notified of the required information.[5] Inaction is thus not sufficient grounds for resorting to facts available.

[3] Panel report, *US – Hot Rolled Steel*, para. 7.55.
[4] Appellate Body Report, *Mexico – Rice*, para. 235 ff.
[5] Appellate Body Report, *Mexico – Rice*, para. 259.

> "In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority - and, therefore, is not notified of the information required to be submitted to the investigating authority - is denied such an opportunity. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement."[6]

9. In the case before the Panel, China submits that a higher level of notice was effected compared to *Mexico – Rice*, as the notice was posted on the website of MOFCOM.[7] The notice was also available in the MOFCOM reading room. The Panel in *China – GOES*, on this very issue, noted the following:

> "Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party."[8]

10. In Norway's view, and as the Panel in *China – GOES* indicated, this conclusion follows directly from an interpretation of the wording of paragraph 1 of Annex II of the *AD Agreement*. "Aware" is defined as "conscious", "not ignorant", "having knowledge" or "well-informed".[9] Hence, a producer cannot be aware of a notice unless he is (at least) conscious, not ignorant or has actual knowledge about such notice. The fact that the notice is available on the internet, together with millions of other documents, does not ensure that the individual producer actually knows about the notice. Furthermore, if this lower threshold was to be applied, inconsistent with the wording of paragraph 1 of Annex II, it would imply that the responsibility of ensuring awareness of the information required is shifted from the investigating authorities to the individual producers. The producers would then have to ensure they were up to date with all potential notices from all investigating authorities in all WTO Members to whom they export goods at all times. According to paragraph 1 of Annex II, this responsibility is clearly put on the investigating authority ("The authorities should also ensure that the party is aware that […]"). The only viable interpretation of paragraph 1 of Annex II is thus that putting a notice on the internet is not sufficient to fulfill the requirement of awareness as stipulated. In such cases, the interested

[6] Appellate Body Report, *Mexico – Rice*, para. 259.
[7] China's First Written Submission, paras. 182-184 and 190-193.
[8] Panel Report, *China – GOES*, para 7.386.

parties cannot be seen to have been notified of the required information in the terms of Article 6.8 of the *AD Agreement*.

11. Although the *SCM Agreement* has no equivalent to Annex II of the *AD Agreement*, the Appellate Body in *Mexico – Rice* found that the same limitations on the authorities' discretion when resorting to the use of facts available applies to Article 12.7 of the *SCM Agreement*:

> "Indeed, in our view, it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations."[10]

12. Annex II of the *AD Agreement* is therefore relevant as context for the interpretation of Article 12.7 of the *SCM Agreement*, together with Article 12.1 of *the SCM Agreement*. It is Norway's view that Article 12.7 of the *SCM Agreement* should be interpreted to the same effect as stipulated above for the anti-dumping "all others" rate. This is fully in line with the object and purpose of Article 12.7 of the *SCM Agreement*, which is to ensure that the work of the investigating authority is not hampered by non-cooperation by interested parties. If the interested parties are not aware that information is required by them, logically, they cannot be expected to provide such information either. Hence, they cannot be seen not to cooperate. In Norway's opinion, a notice placed on the internet is not sufficient to fulfill the requirement of notification as contained in Article 12.1 of the *SCM Agreement*. Inaction on the part of interested parties that were not notified of the required information is thus not grounds for resorting to facts available.

B. Explanation of determinations

13. The second issue Norway would like to address today is linked to the point already made. It concerns the US' claim that China violated Articles 12.2, 12.2.1 and 12.2.2 of the *AD Agreement* and Articles 22.3 and 22.5 of the *SCM Agreement* because the investigating authority failed to provide an adequate explanation for some of its determinations, including the determinations of the "all others" rates and the determinations of injury.[11]

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[9] The Concise Oxford Dictionary of current English, edited by R. E. Allen, 8th edition, Oxford University Press, Oxford
[10] Appellate Body Report, *Mexico – Rice*, para. 295.
[11] The US' First Written Submission, paras. 166-169, 213-218 and 312.

Norway will not address the issue of whether any explanations of China actually provided the required information. Norway will only highlight certain arguments that may be of importance to the Panel when interpreting these requirements of the *AD Agreement* and the *SCM Agreement*.

14. Under the cited provisions, the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive anti-dumping and countervailing duties. Thus, the authority must set forth the relevant facts in the record, and must explain "in sufficient detail", as set out in Article 12.2 of the *AD Agreement* and Article 22.5 of the *SCM Agreement*, the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of duties.

15. These Articles therefore serve the same function as Article 3.1 of the *Agreement on Safeguards*. The Appellate Body and panels have consistently ruled that these provisions require investigating authorities to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.[12] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[13] The authority must provide "sufficient background and reasons for that determination, such that its reasons for concluding as it did can be discerned and are understood".[14]

16. Furthermore, the Appellate Body has emphasised that "the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report".[15]

17. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *AD Agreement* and the *SCM Agreement* governing those determinations. These provisions thus represent an important safeguard mechanism for due process rights, which Norway holds very highly. The Appellate Body has hence stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of

12 Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 - Canada)*, para. 99.
13 Appellate Body Report, *US – Line Pipe*, para 217.
14 Panel Report, *EU – Footwear*, para.7.844.
15 Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 97.

"how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings".[16]

C. Definition of the domestic industry

18. The last issue Norway would like to offer its views on today concerns the definition of the domestic industry. The US claims that China violated Articles 3.1 and 4.1 of the *AD Agreement* and Articles 15.1 and 16.1 of the *SCM Agreement*, by including only domestic producers that voluntarily requested and returned domestic producers' questionnaire responses in the definition of the domestic industry.[17] The US asserts that such a process for defining the domestic industry, which inevitably results in an examination of only producers selected or identified by the petitioner, cannot comply with the objectivity requirement under Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*.[18] These producers are more likely to support the investigation. Furthermore, the US claims that, by excluding producers accounting for half of domestic production from the domestic industry, China acted inconsistently with Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*.[19] Norway notes that there is certain disagreement as regards the facts surrounding the definition of the domestic industry. It is noted that China claims that two of the producers included in the definition of the domestic industry were not identified by the petitioner.[20] Norway will not go into these factual aspects of the case at hand, but would like to underline some important points relating to the interpretation of the said Articles.

19. Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement* require the investigating authority to conduct an "objective examination" of the economic state of the "domestic industry" on the basis of "positive evidence". In *EC – Bed Linen (India - 21.5)*, the Appellate Body ruled that an "objective examination" requires authorities to reach a

[16] Appellate Body Report, *US – Softwood Lumber (Article 21.5 – Canada)*, para. 99.
[17] The US' First Written Submission, para. 257.
[18] The US' First Written Submission, para. 259.
[19] The US' First Written Submission, para. 270.
[20] China's First Written Submission, paras. 246 and 247.

result that is "*unbiased, even-handed,* and *fair*."[21] In *US – Hot-Rolled Steel (AB)*, the Appellate Body found that it would not be "even-handed" for investigating authorities:

> "to conduct their investigation in such a way that it becomes *more likely* that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured."[22]

20. The Appellate Body also stated, in that appeal, that "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation."[23]

21. Furthermore, the Appellate Body held that, under Article 3 of the *AD Agreement*, "[t]he investigation and examination must focus on the *totality* of the 'domestic industry' and *not simply on one part, sector or segment of the domestic industry*."[24] It found that the "*selective*" examination of just "one part" of an industry is not "objective" because the authority could choose the worst performing part of the industry for examination, thereby making an injury determination "more likely".[25] Thus, an investigating authority cannot single out particular parts or groups of the domestic industry for investigation, to the exclusion of other parts.

22. This ruling is also significant because it demonstrates that the requirements of objectivity in Article 3.1 of the *AD Agreement*, and consequently the identically worded Article 15.1 of the *SCM Agreement*, impose contextual constraints on how the investigating authority defines the "domestic industry" under Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*. Article 4.1 of the *AD Agreement* defines the term "domestic industry" as follows (Article 16.1 of the *SCM Agreement* is substantially identical):

> "… the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products …"

[21] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.
[22] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.
[23] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 193. Emphasis added.
[24] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.
[25] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.

23. As the Appellate Body confirmed in *US – Hot Rolled Steel* (AB), the authority cannot define the industry "on a selective basis" that involves examination of just "one part" of the industry.[26] Nor can it define the industry in such a way that an injury determination becomes "more likely" or such that it "favours the interests of any interested party"[27].

24. As to the precise definition of "domestic industry", this, according to Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*, comprises producers "as a whole" of the like products. In the alternative, the industry may be limited to a "major proportion" of the industry. However, the *only* category of producers that may be entirely excluded from the industry is "related" producers. The definition of "domestic industry" therefore ensures the inclusion of domestic producers from all segments and sectors of the industry on an equal footing. Any determinations made with respect to the "domestic industry" will accordingly be representative of that industry as a whole. The said Articles do not authorise an authority to limit an industry solely to a certain group of producers, for example supporters of the investigation.

25. Article 5.4 of the *AD Agreement* and Article 11.4 of the *SCM Agreement* also provides relevant context for interpreting the term "domestic industry". These Articles expressly envisage that the domestic industry includes: domestic producers that "*support*" the investigation; those that "*oppose*" it; and also those that *do not "express a view"*. An authority cannot, therefore, define the domestic industry by excluding one of these groups, for example "silent" producers, in its entirety.[28]

26. To focus on one part of the industry would risk favouring the interests of the included producers possibly to the prejudice of foreign producers and exporters. For example, if an authority excludes certain categories of producers from the domestic industry, the verification of the level of support for an investigation necessarily becomes proportionately easier because the size of the domestic industry is diminished and makes it more likely to reach a conclusion of injury. This is especially so if the authority excludes all producers other than the supporters of an investigation.

[26] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 190 and 211.
[27] Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 193 and 196.
[28] Panel Report, *EC- Salmon*, para 7.122.

27. Footnote 13 of the *AD Agreement*, which is attached to Article 5.4, and footnote 38 of the *SCM Agreement*, which is attached to Article 11.4, also provide strong contextual support. Specifically, in the context of assessing whether the domestic producers support initiation of an investigation, footnote 13 provides:

> In the case of *fragmented* industries involving an *exceptionally large number of producers*, authorities may determine support and opposition by using *statistically valid sampling techniques*. (Emphasis added)

28. This provision indicates that, *generally*, support for an investigation must be measured by reference to all domestic producers. Only where the number of domestic producers is "*exceptionally*" large is sampling permitted under Article 5.4 of the *AD Agreement* and Article 11.4 of the *SCM Agreement*, and this only for purposes of measuring support or opposition to the initiation of the investigation *within* the universe of the domestic industry. In that event, however, the sample must be "statistically valid". This ensures that, even when certain domestic producers are not asked for their opinion under Article 5.4 of the *AD Agreement* and Article 11.4 of the *SCM Agreement*, the domestic producers included in the industry must nonetheless reflect the "totality" of that industry, not just a "part" of it. You use a statistically valid sample for this purpose so as to ensure that you can credibly extrapolate from the sample to gauge and capture the opinion of the totality of the industry.

29. Accordingly, it is Norway's view that an investigating authority cannot limit the definition of the domestic industry to certain categories of producers, such as supporters of the investigation. This would be inconsistent with Article 4.1 of the *AD Agreement* and Article 16.1 of the *SCM Agreement*. Furthermore, such a limitation of the definition of the domestic industry would not fulfil the objectivity requirement of Article 3.1 of the *AD Agreement* and Article 15.1 of the *SCM Agreement*.

Mr. Chairman, distinguished Members of the Panel,

30. This concludes Norway's statement here today. Thank you for your attention.