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Panel Proceedings

***European Union – Measures Related to Price Comparison
Methodologies***

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Third Party Oral Statement

by

Norway

at the Third Party Session of the Panel

Geneva, 7 December 2017

I. INTRODUCTION

Mr. Chairman, Members of the Panel,

1. Norway would like to thank the members of the Panel for the opportunity to make a statement at this meeting. Norway did not present a written submission to the Panel.
2. The dispute raises several questions of systemic importance. As a third party, Norway does not take upon itself to address all the issues raised. We will confine ourselves to comments on what we consider to be the key issues in the dispute.
3. In this oral statement Norway will therefore set out its views on the proper legal interpretation of Article VI:1 of the General Agreement of Tariffs and Trade (hereinafter “GATT 1994”), as well as the so-called “Ad-note” to Paragraph 1 of Article VI.
4. This will be followed by a discussion of how Norway interprets Articles 2.1, 2.2 and 2.2.1.1 of the Agreement on Implementation of Article VI of the GATT 1994 (hereinafter “ADA”) in regards to this dispute.
5. Norway understands that Section 15 (d) of China’s Accession Protocol makes clear that the provisions of subparagraph (a)(ii) of that Section shall expire 15 years after China’s accession to the WTO. As a result, as of 11 December 2016, that special rule on how to determine price comparability between normal value in the home market and export price no longer applies.

II. ARTICLE VI:1 OF THE GATT 1994 AND ITS AD NOTES

Mr. Chairman, Members of the Panel

6. Article VI:1 of the GATT 1994 and Article 2.1 of the ADA define dumping to occur when “products of one country are introduced into the commerce of the importing country at less than the *normal value*,” which is the case when the price of an exported product “is less than the *comparable* price, *in the ordinary course of trade*, for the like product” when destined for consumption in the home market of the exporting country.
7. A determination of dumping is thus conditioned on a comparison between a product’s export price when sold to the importing country, and the “normal value” – this being the “comparable price, in the ordinary course of trade” in the exporter’s home market.
8. The point of departure when determining “normal value” is the sales price in the domestic market of the exporter. However, both Article VI:1(b) of the GATT 1994 and Article 2.2 of the ADA envisage that such a home market price does not exist, and that recourse may be had to another benchmark for “normal value”.
9. Article VI:1 expressly sets forth that, where there are no comparable price in the ordinary course of trade in the exporting country, then normal value may be calculated on the basis of either (b) (i) the highest comparable price for export to any third country in the ordinary course of trade; or (b) (ii) the cost of production in the country of origin plus a reasonable addition for selling cost and profit. These two alternatives are further developed in Article 2.2. of the ADA.
10. Article VI:1 is supplemented by two so-called “Ad Notes”. The Second Note “recognize[s]” the “special difficulties” that arise in determining price comparability in respect of imports from countries with a “complete or substantially complete monopoly of its trade ... where all domestic prices are fixed by the State”. The text makes clear that such domestic prices – i.e., prices determined by the state rather than by normal commercial practice – may not be “appropriate” for determining the existence or margin of dumping.

11. As observed by the European Union and several third parties, the treaty does not characterize any of the Ad Notes as an exception to Article VI. Rather, by their own terms, Article VI and the Ad Notes together (in conjunction with any other relevant treaty provisions) circumscribe and qualify the obligations by which all Members have agreed to be bound. Therefore, rather than comprising an exception to Art VI:1, Norway sees the *Ad Note* to *elaborate upon* the definitions set out in Art VI:1.
12. The Second Note reflects that the obligation incumbent upon investigating authorities, to determine the appropriate “normal value” benchmark for the proper comparison with the exporting price, may be achieved by other methods than those set out in the text of Article VI:1 itself.
13. The Second Note identifies *one* situation (being a state-controlled economy where all domestic prices are fixed by the State) in which “special difficulties may exist in determining price comparability.” The text is silent on whether this is the *exclusive* situation in which “special difficulties may exist”. Norway sees no need, however, for the Panel to take a position on whether there could possibly be more such special situations, to resolve this dispute.

III. ARTICLE 2 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

Mr. Chairman, Members of the Panel,

14. Before turning to Article 2.2 of the ADA, let me preface my comments by underscoring that the Anti-Dumping Agreement implements and applies the relevant provisions of the GATT 1994. Consequently, the two Agreements must be interpreted and applied together.
15. 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 there are *no* or *insufficient* sales in the ordinary course of trade in the domestic market of the exporter.

16. Article 2.2 makes reference to situations where the “particular market situation” does “not permit a proper comparison”. It, thereafter, refers to two optional benchmarks being (i) the price of the like product when exported to an appropriate third country, or (ii) the cost of production in the country of origin.
17. A key determinant of whether a price is appropriate or suitable to compare to the export price is whether it is compatible with normal commercial practice. The Appellate Body has made clear that sales that are incompatible with normal commercial practice do *not* provide an appropriate basis for calculating normal value.¹ The normal value constructed *in lieu* of the home market price – whether established on the basis of the export price to a third country or the production cost in the country of origin – must be capable of “standing-in” for the price of the like product *in the ordinary course of trade*.
18. There are two consequences to be drawn from this: *first*, where the cost of the input factors are determined by the State or set in a way that is not compatible with normal commercial practice, then the export sales to a third country may not provide an appropriate normal value benchmark; and *second*, that this may also influence the use of “cost of production” as the appropriate proxy for the normal value benchmark.

Mr. Chairman, Members of the Panel

19. 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”

¹ Appellate Body Report, *US – Hot Rolled Steel*, para. 40

be based on records kept by the exporter that reasonably reflect the actual cost of production in the exporting country.

20. 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’ ... indicates that the rule ... admits derogation”³ under conditions that are not “normal” or “ordinary”.
21. Moreover, the panel in *China – Broiler Products* also clarified that “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”⁴.
22. WTO case law indicates hence that an investigating authority may depart “from the norm” of calculating costs on the basis of exporter or producer records where: (i) the relevant conditions or circumstances are not “normal” or “ordinary”; and (ii) the investigating authority explains or justifies that departure.
23. Such an interpretation does *not* suggest that the Investigating Authority must establish that the exporting country, as such, is a non-market economy. 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 a predominant participation of the government as a supplier in the market”⁵. The determination to reject the actual costs of the producer must be specific to the exporter or producer in question, and to the

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

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

⁴ Panel Report, *China Broiler Products*, para. 7.161.

⁵ Appellate Body report, *US – Anti Dumping and Countervailing Duties (China)*, paras. 446-447.

cost factors in question, and based on positive evidence together with a reasoned explanation.

24. 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 authorize resort to an out-of-country benchmark. It is *also necessary* to determine that said presence distorts prices for inputs through the chain of production in such a way that all domestic prices available for comparison would not properly reflect prevailing market conditions.
25. Art 2.2.1.1 does not qualify or otherwise specify the alternative bases that an investigating authority may have recourse to when departing “from the norm” of using the costs reflected in exporter or producer records. Norway therefore agrees with the European Union and several third parties that the absence of any qualifying language does not imply a “prohibition” – as claimed by China – on the use of surrogate prices or costs in an analogue country to determine normal value.
26. However, the requirement in Article 2.2. that there be a “proper comparison” and that – for surrogate export prices – there be made use of “an appropriate third country”, circumscribes the choice of the third country that can be used for this purpose. It should always be borne in mind that the aim is to find a *proxy for determining the normal value in the country of origin*, and not just determining the cost of production elsewhere.

IV. CONCLUSION

Mr. Chairman, Members of the Panel,

27. In conclusion, if a Member’s economy operates pursuant to government directives, as opposed to free market principles, the basic rules on non-discrimination, market access, and fair trading can be easily evaded. GATT Contracting Parties and WTO

members have recognized that non-market prices or costs are not suitable for anti-dumping comparisons because they are not appropriate to use “in determining price comparability”. In anti-dumping determinations, it is necessary to ensure comparability between the normal value and the export price; and comparability is only ensured when the comparison between the normal value and the export price is capable of producing a meaningful answer to the question of whether or not there is dumping as defined by Article VI of the GATT 1994 and the ADA. A substantial government presence in a market is, nonetheless, not in itself sufficient to conclude that prices and costs are distorted, but if the domestic prices or cost factors of the exporter or producer under investigation are determined to not properly reflect market economy conditions, investigating authorities may look to *comparable third countries* that operate under market economy conditions to determine the normal value.

28. Mr. Chairman, distinguished Members of the Panel, this concludes Norway’s statement today. Thank you for your attention.