

IN THE WORLD TRADE ORGANISATION

WT/DS425

**China – Definitive Anti-Dumping Duties on X-Ray Security Inspection
Equipment from the European Union**

Third Party Submission

by

Norway

Geneva

21 May 2012

Table of Contents

I.	INTRODUCTION	1
II.	ARTICLE 6.5.1.....	1
III.	ARTICLE 6.9.....	6
IV.	ARTICLE 6.4.....	8
V.	ARTICLE 6.2.....	10
VI.	CONCLUSION.....	12

Table of cases cited in this submission

Short Title	Full Case Title and Citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
<i>Argentina – Poultry</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>EC – Fasteners</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Salmon</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS431/R, adopted 21 October 2008, DSR 2008:IX, 3179
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007, DSR2007:IV, 1207
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW, DSR 2007:IX-X, 3609

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by the European Union (“EU”) regarding the consistency of the definitive anti-dumping measures taken by the Peoples’ Republic of China (“China”) on certain X-ray security inspection equipment from the EU with the *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “*Anti-Dumping Agreement*”).
2. As a starting point, Norway would like to underline the importance of adhering to the procedural rules contained in the *Anti-Dumping Agreement*. An anti-dumping investigation involves 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 duties. In order to protect the interests of interested parties, the *Anti-Dumping Agreement* requires 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 EU. Accordingly, Norway will in the following discuss the claims by the EU that China violated the procedural rules in Articles 6.5.1, 6.9, 6.4 and 6.2 of the *Anti-Dumping Agreement*.

II. ARTICLE 6.5.1

4. The EU contends that China failed to ensure that interested parties provided non-confidential summaries of confidential information, inconsistent with Article 6.5.1 of the *Anti-Dumping Agreement*, and likewise that China did not ensure that such summaries

contained sufficient detail.¹ Additionally, the EU claims that China failed to require a statement of reasons explaining why summarisation was not possible, inconsistent with Article 6.5.1 of the *Anti-Dumping Agreement*.² China, on the other hand, argues that these claims are without merit.³

5. Norway notes that these issues requires the Panel to address a number of questions of facts and evidence as to what information was actually presented and the sufficiency of any summarisation and statements of reasons of why summarisation was not possible. Norway will not discuss the factual aspects here, nor all of the EU's claims under Article 6.5.1, but will point to two interpretive issues raised by the parties to the dispute relating to the following points:

- i) What constitutes an adequate summary in accordance with Article 6.5.1
- ii) Whether Article 6.5.1 requires that the statement of reasons why summarisation is not possible be made public.

A. What constitutes an adequate summary in accordance with Article 6.5.1

6. As to the first issue, the EU claims that several of the non-confidential versions of documents submitted contained inadequate summaries, specifying that, in at least three cases, namely the replies to question 32, 33 and 38 of Nuctech's non-confidential Questionnaire Response, the confidential passages were simply marked "confidential".⁴

7. The relevant parts of Article 6.5.1 of the *Anti-dumping Agreement* provides that whenever confidential information is submitted to an investigating authority, the authority

“(...) shall require (...) non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.”

¹ EU's First Written Submission, paras. 41-42.

² EU's First Written Submission, para. 78.

³ China's First Written Submission, para. 40.

⁴ EU's First Written Submission, para. 75.

8. As stated above, this requirement feeds into the important minimum standard of due process rights of an anti-dumping investigation, and is aimed at making it possible for interested parties to defend their interest and to make “rebuttal” arguments, even towards information in confidential submissions. As the wording indicates (“thereof”), it is the confidential information that is to be summarised. In Norway’s view, the disclosure of a document with the confidential parts simply deleted, whether this deletion is marked “confidential” or not, would thus not fulfil the requirement of summarising the confidential information. There may of course be some exceptions to this, inter alia if the original document itself summaries the deleted confidential sections in question.
9. The panel in *Mexico – Olive Oil* supports this interpretation of the wording of the parallel provision in the *Agreement on Subsidies and Countervailing Measures*, and indicates that the circumstances where such a document would be sufficient are not likely to be abundant:

“There may be circumstances in which the information remaining in the public version of a document may be sufficient, in itself, to provide the required summary of the confidential information. In such circumstances, no additional summary would be required. Such circumstances are likely to be limited, however, given that what the *SCM Agreement* requires is that the summary conveys a reasonable understanding of the substance of the confidential information. In any event, the sufficiency of a public version of a document from which confidential information has been removed as a “summary” of the removed information clearly must be determined on a case-by-case basis.”⁵

10. Consequently, it is Norway’s view that simply deleting the confidential information without summarising it would, as a main rule, not fulfil the requirement of summarisation of Article 6.5.1. If, as China argues,⁶ the content of the information is of such a nature that summarisation is not possible, Article 6.5.1 requires that a statement of the reasons explaining the exceptional circumstances why this is so needs to be provided.

⁵ Panel Report, *Mexico – Olive Oil*, para. 7.88.

⁶ China’s First Written Submission, para. 93-94.

B. Whether Article 6.5.1 requires that the statement of reasons why summarisation is not possible be made public

11. As to the second issue, the EU claims that China failed to require a statement of reasons explaining why summarisation was not possible in its injury analysis, in particular with respect to the statement by the Chinese Public Security Bureau of the Civil Aviation Administration.⁷ China, on the other hand, argues that, as long as the interested party provides a statement explaining why summarisation is not possible and the investigating authority assesses this statement, Article 6.5.1 does not confer an obligation to make such a statement public in the non-confidential file.⁸
12. Norway would like to underline that the only meaningful interpretation of Article 6.5.1 is that the investigating authority has an obligation to require that such a statement is provided by the interested party. Accordingly, numerous panels have found that Article 6.5.1 does impose such an obligation on the investigating authority.⁹ Furthermore, in *EC–Fasteners*, the Appellate Body confirmed this interpretation.¹⁰
13. As to the question of whether MOFCOM required a statement in compliance with Article 6.5.1, Norway would like to point out that such a statement *must* contain the “reasons why summarization is not possible” in order to comply with the wording of Article 6.5.1. Moreover, these reasons must be linked to the “exceptional circumstances” that justify the impossibility of summarisation in the first place. Panels and the Appellate Body have found general statements simply referring to the nature of the information as insufficient in this regard.¹¹ With respect to a similar statement as the one provided in the present case, the Appellate Body stated:

“With respect to Agrati, its statement asserting for each category that “[t]he information cannot be summarized without disclosing confidential information” speaks to a justification for providing confidential treatment in the first place. It does not address the issue of why summarization of the information is not possible, or why the particular

⁷ EU’s First Written Submission, para. 78.

⁸ China’s First Written Submission, para. 104.

⁹ Panel Report, *Guatemala – Cement II*, para. 8.213., Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.379, Panel Report, *US – Oil Country Tubular Goods Sunset Reviews* (Article 21.5 – Argentina), para. 7.135, Panel Report, *Mexico – Olive Oil*, para. 7.89, with regards to the parallel provision in Agreement on Subsidies and Countervailing Measures.

¹⁰ Appellate Body Report, *EC – Fasteners*, para. 544 and 549.

¹¹ Panel Report, *Mexico – Olive Oil*, para. 7.101, and Appellate Body Report, *EC – Fasteners*, para. 553.

information presents exceptional circumstances that would justify a failure to provide a non-confidential summary.”¹²

14. Norway notes that China considers that Article 6.5.1 does not contain an obligation to make the statement in question public in the non-confidential file. Norway disagrees with this notion. In *EC – Fasteners*, the Appellate Body noted the following on the background for the provision:

“Where information is kept confidential upon "good cause" shown, and it is not possible to provide a non-confidential summary of the information that permits a reasonable understanding of its substance, the balance struck under Articles 6.5 and 6.5.1 is altered, and the due process rights of other parties to the investigation are not fully respected. Therefore, when it is not possible to furnish a non-confidential summary, Article 6.5.1 requires a party to identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible.”¹³

15. Accordingly, the Appellate Body confirmed the Panel’s finding that the investigating authority must scrutinise the statement provided, as otherwise, “the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel”. For the same reasons, Norway holds that it is not sufficient that the investigating authority scrutinises the statement; this must also be made public. In Norway’s view, the mere structure of Article 6.5.1 indicates that the statement needs to be public. The purpose of the non-confidential summaries of the confidential information is to “permit a reasonable understanding of the substance of the information submitted in confidence”. This is of course directed towards the interested parties, as the investigating authorities will have access to the confidential information. Accordingly, the interested parties will have a strong interest in knowing why such a summary cannot be provided. Information that is withheld as confidential will often be important for the right of defence for interested parties and Members. Norway reiterates the serious effects anti-dumping investigations may have, and the corresponding need to ensure that the investigation follows certain rules of procedural justice and fairness. When information is kept confidential, it is thus of great importance to ensure that this is done for the right reasons. If the investigating authority is not required to make public statements containing the reasons why summarisation of confidential information is not possible, the potential for abuse would be significant.

¹² Appellate Body Report, *EC – Fasteners*, para. 553.

¹³ Appellate Body Report, *EC – Fasteners*, para. 544.

16. For these reasons, it is Norway's view that the Panel should reject China's argument that Article 6.5.1 does not contain an obligation to make public statements containing the reasons why summarisation is not possible.

III. ARTICLE 6.9

17. Article 6.9 of the *Anti-Dumping 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.”

18. The EU claims that China is in breach of this requirement, as the investigating authority did not disclose the essential facts which formed the basis for the determination of i) the dumping margin of the EU's cooperating producer, ii) the residual duty and iii) injury.¹⁴ China, on the other hand, states that the EU's claims are without merit.¹⁵ 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.

19. Panels and the Appellate Body have interpreted the Article 6.9 of the *Anti-Dumping 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.”¹⁶

20. Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.¹⁷ Rather, the investigating

¹⁴ EU's First Written Submission, para. 83.

¹⁵ China's First Written Submission, para. 127.

¹⁶ Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

¹⁷ 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 *pecially prepared document* summarizing the essential facts under consideration”.¹⁸ 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.¹⁹

21. 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”.²⁰ 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*.

22. 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.”²¹

23. 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”.²² 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 parties are left guessing at the factual basis in the record for the authority’s factual and

¹⁸ Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

¹⁹ Panel report, *Guatemala – Cement II*, para. 8.229.

²⁰ Panel report, *Argentina – Poultry*, para. 7.225.

²¹ Panel report, *EC - Salmon*, para. 7.807.

legal determinations. In that event, they cannot make effective comments on the factual basis for the authority's intended decision.

24. The duty to disclose essential facts is thus more than an obligation to disclose all the information in the file.²³ It is a duty to *identify* which facts in the file that is likely to lead the authority to impose final duties. It may not always be necessary to produce a separate disclosure document. However, the investigating authority must in some way identify the essential facts and allow interested parties an opportunity to comment on the completeness of the relevant essential facts.

IV. ARTICLE 6.4

25. The EU claims that China failed to provide a timely opportunity for all interested parties to see all information that was relevant to defend their interests, and that was used by the authority in the anti-dumping investigation, thereby violating Article 6.4 of the *Anti-Dumping Agreement*.²⁴ China contends that this claim should be rejected as i) it holds that the EU's claims are purely consequential to the claims under Articles 6.5.1 and 6.9 and that there is no violation of these articles, and ii) the EU has not demonstrated a separate violation of Article 6.4.²⁵

26. Norway will not address the issue of whether China has fulfilled the obligations set out in Article 6.4 in this case. Norway will only highlight certain arguments that may be of importance to the Panel when interpreting the requirements of Article. 6.4.

27. Article 6.4 of the *Anti-Dumping Agreement* confers on interested parties a right of access to evidence in the non-confidential record of the investigation:

“The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is *relevant to the presentation of their cases*, that is *not confidential* as defined in paragraph 5, and that is *used by the authorities* in an anti-dumping investigation, and to prepare presentations on the basis of this information.” (Emphasis added.)

²² Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

²³ Panel report, *Guatemala – Cement II*, para. 8.230.

²⁴ EU's First Written Submission, paras. 43 and 84.

²⁵ China's First Written Submission, paras. 108-109 and 191-192.

28. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.²⁶ The essence of due process is that interested parties must be in a position to defend their interests in light of the views of other parties and the information before the authority. An authority cannot, therefore, second-guess whether a particular document could be “relevant” to an interested party’s “presentation”. After all, if one interested party has taken the time to put a document on the record, that party clearly considers it to be relevant and the authority should not deny another interested party the opportunity to comment upon it.
29. The Appellate Body has also held that the phrase “used by the authorities” in Article 6.4 refers to information that the authority must *evaluate* in making its determinations.²⁷ An authority must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it.
30. The duty to allow interested parties to “see” relevant information is subject to limitations in the case of confidential information, which the authorities cannot disclose. However, under Article 6.5.1, a non-confidential summary of confidential information must be included in the record. In “exceptional circumstances”, the duty to provide non-confidential summaries may be waived, provided that “a statement of the reasons why summarization is not possible” is given. China argues that, as the scope of the two provisions are different, there may exist confidential information for which a non-confidential summary must be provided which is not used by the authorities and therefore does not fall within the scope of Article 6.4.²⁸
31. However, as the non-confidential summary of the confidential information must be included in the record, and the investigating authority therefore must evaluate it, as with all information submitted to it, Norway holds that all non-confidential summaries of confidential information must be disclosed according to Article 6.4. The investigating authorities have an obligation to scrutinise the non-confidential summaries provided, in order to ensure that they fulfil the requirement in Article 6.5.1 of including sufficient

²⁶ Appellate Body Report, *EC – Tube or Pipe Fitting*, para. 145.

²⁷ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145. Information submitted regarding injury factors listed in Article 3.4 was information that must “be used by the authorities” in making its determination.

²⁸ China’s First Written Submission, para.113.

detail to permit a reasonable understanding of the substance of the confidential information. The Appellate Body has confirmed such an obligation of scrutiny, as otherwise “the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel”.²⁹ It is therefore clear that non-confidential summaries must always be evaluated by the investigating authorities, and therefore are always “used by the authorities”, as set out in Article 6.4. The duty of disclosure as prescribed by Article 6.4 therefore clearly applies to non-confidential summaries of confidential information. This is in line with the objective of Article 6.5.1, as the carefully drafted balance of the article would otherwise be upset, thereby refusing interested parties fundamental due process rights.

32. The rights of defence guaranteed by Articles 6.2 and 6.4 require that, in making “presentations”, interested parties have an opportunity to “see” and, thereafter, comment upon all information that the authority will evaluate and that could, therefore, form the basis for the authority’s determination. The authority cannot, therefore, selectively limit access to certain information, but must make available all information that might be used by the authority. If interested parties are denied an opportunity to see all information in the record, they cannot adequately formulate their defence “throughout the anti-dumping investigation”, as required by Article 6.2.

V. ARTICLE 6.2

33. The EU claims that, by violating Articles 6.5.1 and 6.9 of the *Anti-Dumping Agreement*, China also deprived the interested parties of their full opportunity to defend their interests, contrary to Article 6.2 of the *Anti-Dumping Agreement*.³⁰ Furthermore, the EU argues that the obligation set out in Article 6.2 is so broad that a finding of violation of Article 6.4 necessarily entails a violation of Article 6.2 in the present case.³¹ China contends that these claims should be rejected as i) it holds that the EU’s claims are purely consequential to the claims under Articles 6.5.1 and 6.9 and that there is no violation of these articles, and ii) the EU has not demonstrated a separate violation of Article 6.2.³²

²⁹ Appellate Body Report, *EC – Fasteners*, para. 544.

³⁰ EU’s First Written Submission, paras. 43 and 84.

³¹ EU’s First Written Submission, para. 66.

³² China’s First Written Submission, paras. 108-109 and 191-192.

34. Norway will not discuss the factual aspects of whether China has fulfilled the obligations in Article 6.2 in this case, but wishes to focus on certain arguments that may be of importance to the Panel when interpreting the requirements of Article. 6.2

35. Article 6.2 enshrines a cardinal principle for the conduct of an anti-dumping investigation:

“Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. [...]”

36. 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.

37. The effective exercise of these rights requires that interested parties have access to information submitted by the other interested parties, as well as to information obtained by the authority during the investigation. Absent access to this information, an interested party cannot formulate an “opposing view”, make “rebuttal arguments”, or generally make effective comments on the evidence in the record and on the authority’s determinations.

38. On these grounds, there is a mutually dependent relationship between Article 6.2 and several of the other procedural rules contained in the *Anti-Dumping Agreement*. The discussion on Article 6.5.1, 6.4 and 6.9, addressed above, must hence be seen in light of Article 6.2. As opposed to what China’s approach seems to be, it is Norway’s view that when an investigating authority violates Article 6.5.1, 6.4 and/or 6.9, it also violates Article 6.2 of the *Anti-Dumping Agreement*. Failure to comply with Article 6.5.1 restricts the interested parties’ access to non-confidential summaries of confidential information, which in turn restricts the opportunity of these parties to defend their interests. Article 6.4 refers to information that is “relevant to the presentation of their [interested parties’] cases”, while Article 6.9 contains an explicit reference to the ability of interested parties to “defend their interests” as a background for the rule of proper disclosure of essential facts. Thus, the requirements of Articles 6.5.1, 6.4 and 6.9 – the opportunity to see non-confidential summaries of confidential information as well as all relevant and used

information, and the proper disclosure of essential facts – serve, among others, the purpose of enabling interested parties to defend their interests as set forth in Article 6.2.

39. For its part, Article 6.2 requires that interested parties be given full opportunity for the defence of their interests *throughout the anti-dumping investigation*. In other words, whenever an interested party is not given full opportunity to defend its interests, during an anti-dumping investigation, the obligation in Article 6.2 is infringed. As a result, it is Norway's view that any violation of the obligation under Articles 6.5.1, 6.4 and 6.9 entails a violation of Article 6.2.

VI. CONCLUSION

40. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the *Anti-Dumping Agreement*.