

**IN THE WORLD TRADE ORGANISATION**

**WT/DS397**

**European Communities – Definitive Anti-Dumping Measures on Certain  
Iron or Steel Fasteners from China**

**Third Party Submission**

**by**

**Norway**

**Geneva**

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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 – CVDs on DRAMS</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties of Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by the Appellate Body Report, WT/DS141/AB/R
<i>EC – Bed Linen (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III.965
<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>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by the Appellate Body Report, WT/DS219/AB/R
<i>EC – Tube or Pipe Fittings (AB)</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>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 as modified by the Appellate Body Report, WT/DS184/AB/R, DSR 2001:X, 4769

Short Title	Full Case Title and Citation
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, 1875

## 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 Peoples' Republic of China ("China") regarding the consistency with the *Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") and the *General Agreement of Tariffs and Trade* (the "*GATT 1994*") of the definitive anti-dumping measures taken by the European Union<sup>1</sup> ("EU") on certain iron or steel fasteners from China.
2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Norway will rather confine itself to discussing the following interpretative issues discussed in the First Written Submissions of China and the EU:
  - whether the EU correctly determined the domestic industry (Section II)
  - whether the EU correctly determined the product scope (Section III)
  - whether the EU correctly determined the impact of dumped imports in its injury determination (Section IV)
  - whether the EU correctly determined the volume of the dumped imports (Section V)
  - whether the EU fulfilled certain procedural requirements (Section VI)

## II. THE DETERMINATION OF THE DOMESTIC INDUSTRY

### A. Introduction

3. China contends that the EU failed to determine the domestic industry in a manner consistent with Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*.<sup>2</sup> This led to an incorrect injury determination.
4. Norway will not address all of China's claims related to the determination of the domestic industry, but will rather focus on one of the issues raised, namely the exclusion of certain

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<sup>1</sup> With reference to the notification of 30 November 2009 (WT/L/779), where the European Communities notified its change of name to the European Union, Norway will use the European Union as the name of the party in this dispute, except where it is necessary to use the previous name European Communities ("EC") for the sake of historical correctness.

<sup>2</sup> First Written Submission of China, paras. 245, 268, 282 and 296.

categories of domestic EU producers, that produced the domestic “like product” during the relevant period.

5. Under Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* and Article 17.6(ii) of the *Anti-Dumping Agreement*, the Panel is duty bound to interpret the provisions of the *Anti-Dumping Agreement* “in accordance with customary rules of interpretation of public international law.” These rules are codified, among others, in Article 31 of the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”), which requires that a treaty be interpreted in accordance with the ordinary meaning of the terms, read in the context and in light of the object and purpose.<sup>3</sup>
6. Norway will therefore review the relevant treaty text, context, and object and purpose relating to the term “domestic industry” in Article 4.1 of the *Anti-Dumping Agreement*, in order to show that the investigating authority in the determination of the domestic industry cannot exclude groups of producers.

**B. Article 4.1 does not permit the exclusion of certain categories of producers**

7. China claims that the EU violated Article 4.1 and Article 3.1 of the *Anti-Dumping Agreement*, by excluding from the definition of the domestic industry all companies that did not make themselves known within 15 days of the date of publication of the notice of initiation, as well as those companies that did not support the investigation.<sup>4</sup> To the extent that the Panel does not agree with the EU’s submission that the Chinese claim should be rejected due to a lack of consultations on the subject,<sup>5</sup> Norway would like to underline some important points relating to the interpretation of Article 4.1.
8. Article 4.1 of the *Anti-Dumping Agreement* provides a definition of the term “domestic industry” that applies “[f]or the purposes of this Agreement”:

... 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 ... (emphasis added)

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<sup>3</sup> Appellate Body Report, *US – Gasoline*, page 16.

<sup>4</sup> First Written Submission of China, paras. 227 and 245.

<sup>5</sup> First Written Submission of the EU, paras. 285-290.

9. The EU seems to argue that an investigating authority has the discretion to exclude whichever producers it wishes, provided that the remaining producers represent a “major proportion” of the industry.<sup>6</sup> Norway strongly disagrees that Article 4.1 permits such a determination, which would prevent an objective examination of the industry, as required by the *Anti-Dumping Agreement*.

10. Under Article 4.1, the “domestic industry” 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. Article 4.1 does not authorise an authority to limit an industry solely to the producers that supported the investigation, or exclude “silent” producers.

11. This reading of Article 4.1 is supported by strong contextual evidence provided by Articles 3 and 5 of the *Anti-Dumping Agreement*. These Articles confirm that the “domestic industry” must be defined in a manner that reflects the totality of that industry. Article 3.1 requires 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 result that is “*unbiased, even-handed, and fair.*”<sup>7</sup> 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.<sup>8</sup>

12. 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

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<sup>6</sup> First Written Submission of the EU, paras. 296-297.

<sup>7</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.

<sup>8</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196. Emphasis added.

unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.”<sup>9</sup>

13. Furthermore, the Appellate Body held that, under Article 3, “[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.*”<sup>10</sup> 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”.<sup>11</sup> Thus, an investigating authority cannot single out particular parts or groups of the domestic industry for investigation, to the exclusion of other parts.
14. This ruling is significant because it demonstrates that the requirements of objectivity in Article 3 impose contextual constraints on how the investigating authority defines the “domestic industry” under Article 4.1. The authority cannot define the industry “on a selective basis” that involves examination of just “one part” of the industry.<sup>12</sup> 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”,<sup>13</sup> something that would typically be the case if the domestic industry is restricted to the complainants only.
15. Article 5 also provides relevant context for interpreting the term “domestic industry”. Article 5.4 expressly envisages 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 under Article 4.1 by excluding one of these groups, for example “silent” producers or producers that oppose an investigation, in its entirety. Accordingly, the panel in *EC – Salmon* found that Article 4.1 does not permit the exclusion from the domestic industry of the group of producers who did not express a view during the investigation.<sup>14</sup>
16. 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

<sup>9</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 193. Emphasis added.

<sup>10</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.

<sup>11</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.

<sup>12</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 190 and 211.

<sup>13</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 193 and 196.

<sup>14</sup> Panel Report, *EC- Salmon*, para 7.122.



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. This is especially so if the authority excludes all producers other than the supporters of an investigation.

17. Footnote 13 of the *Anti-Dumping Agreement*, which is attached to Article 5.4, also provides strong contextual support for Norway's view. 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)

18. 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, 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, 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.
19. The object and purpose of the text furthermore supports Norway's view. The injury determination is one of the pre-conditions for the imposition of anti-dumping duties, which protect all domestic producers. An authority cannot impose duties unless that is warranted by the need to protect the domestic producers, as a whole, and not just a select group of them.
20. Accordingly, it is Norway's firm view, in light of the above and with the focal point of Article 4.1 being the totality of the domestic industry, that an investigating authority cannot exclude categories of producers from the definition of the domestic industry,

whether these categories are based on the production of a particular type or model of the like product or their opposition or silence in respect of the investigation.

### III. THE DETERMINATION OF THE PRODUCT SCOPE

#### A. Introduction

21. China claims that the EU failed to determine the “product under consideration” and the “like product” consistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.<sup>15</sup> The determination of the product scope is key to the scope of an anti-dumping investigation, as all other determinations are dependent on this. For example, the determination of the domestic industry, the dumping calculation, the injury test and the duty imposition are all constituted on the basis of the product scope. An incorrect determination will thus have far-reaching implications for the rest of the entire anti-dumping action.

#### B. Article 2.1 and 2.6 contain obligations that must be fulfilled

22. Norway would first like to address the argument presented by the EU that Article 2.1 and 2.6 of the *Anti-Dumping Agreement* contain a definition, and therefore are incapable of forming the basis of a claim that a measure is inconsistent with the *Anti-Dumping Agreement*.<sup>16</sup> Norway would like to point out that this is contrary to a long line of cases that establishes that investigating authorities must make determinations consistently with any definitions in the covered agreements.<sup>17</sup> As an example, the panel and the Appellate Body in *US – Hot-Rolled Steel* both found that the United States had violated Article 2.1 of the *Anti-Dumping Agreement*.<sup>18</sup> The EU’s approach is therefore misguided.

23. The EU furthermore asserts that Article 2.1 only imposes obligations regarding the meaning of “dumping”, not the “product under consideration”.<sup>19</sup> This argument is contrary to the basics of treaty interpretation, as embodied in the *Vienna Convention*, which sets out that every treaty term has an ordinary meaning, whether it is expressly defined or not.

<sup>15</sup> First Written Submission by China, para 300.

<sup>16</sup> First Written Submission by the EU, para 423.

<sup>17</sup> Appellate Body Report, *US – Lamb*, para. 96, Panel Report, *Argentina – Poultry*, para. 7.338, Panel Report, *EC – CVDs on DRAMS*, paras. 8.1 (a), 8.1 (b) and 8.1 (c).

<sup>18</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 240 (d), upholding the Panel’s finding in para. 8.1 (c).

<sup>19</sup> First Written Submission by the EU, para 427.

In fact, the vast majority of terms in the covered agreements are not defined. Nonetheless, each has an ordinary meaning that shapes the Members' rights and obligations.

24. Under Article 2.1, “dumping” is the result of a comparison of the “export price” of the “product under consideration” with the “normal value” of the “like product”. Each of these concepts is a constituent element in defining “dumping”. In fact, the word “dumping” is merely a label that describes the outcome of a comparison involving these other concepts. If the EU’s approach was to be followed, each of these concepts would be subject to multilateral disciplines, except the “product under consideration”. This line of logic is clearly flawed. For the term “dumping” to have a multilateral meaning, the constituent elements of “dumping” must also have a meaning. Otherwise, the importing Member could easily fill any empty concepts with a unilateral meaning that defeats the other multilateral disciplines.

25. In line with this, panels and the Appellate Body have frequently interpreted words that were not expressly defined in the treaty. In *US – Hot-Rolled Steel*, both the panel and the Appellate Body noted that the *Anti-Dumping Agreement* did not define the term “in the ordinary course of trade” in article 2.1.<sup>20</sup> Nonetheless, they both interpreted the term, and found that a rule for assessing sales “in the ordinary course of trade” violated Article 2.1. The notion that Article 2.1 does not impose obligations regarding the meaning of the term “product under consideration” should therefore be rejected.

26. In line with Article 31 of the *Vienna Convention*,<sup>21</sup> Norway will thus review the relevant treaty text, context and object and purpose relating to the term “product under consideration”, in order to show how the *Anti-Dumping Agreement* requires all models of the “product under consideration” to be “like” each other.

**C. All models of the “product under consideration” must be “like” each other**

27. The EU argues that the “like product” standard in Article 2.6 does not apply to the selection of the product concerned, and that there is no reason why the *Anti-Dumping Agreement* should impose any particular constraints at all on investigating authorities in

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<sup>20</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.108 and Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 139.

<sup>21</sup> Para 5 of this submission.

this regard.<sup>22</sup> For the reasons set out below, Norway does not agree with this interpretation.

28. According to Article VI:1 of the *GATT 1994*, dumping arises when an exported product is “introduced into the commerce of another country at less than *its* normal value”. The word “its” in this phrase is a possessive pronoun highlighting that, in principle, dumping occurs when the price of an exported product is lower than the home market price of the *very same product* (“its normal value”). In other words, a dumping determination involves a comparison of the prices of a *specific product* in two different markets to establish whether there is international price discrimination.<sup>23</sup>

29. The *Anti-Dumping Agreement* requires a very high standard of similarity between two products before an authority can compare their prices and make a single determination with respect to them. Under Article 2.1 of the *Anti-Dumping Agreement*, the comparison must be made between the prices of an exported product – referred to as the “product under consideration”<sup>24</sup> – and a “like product”. The “like product” is defined in Article 2.6 of the *Anti-Dumping Agreement*, as:

... a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

30. Accordingly, the pricing comparison must, in principle, be made between home and exported products that are “*identical*”. The word “identical” is further defined to mean “*alike in all respects*”. Article 2.6, therefore, requires a comparison between the price of a specific exported product and the domestic price of the “*identical*” product. This ensures that the single dumping determination made for the investigated product focuses precisely on the existence of discrimination whereby a product is treated differently in comparable situations. In the words of Article VI:1, a product’s export price is less than “its” normal value.

<sup>22</sup> First Written Submission by the EU, paras. 434 and 437.

<sup>23</sup> Discrimination arises in the event that a specific thing (i.e. the product) is treated differently in comparable situations (i.e. sold at different prices in the home and export markets).

<sup>24</sup> The term “the product under consideration” appears four times in that *Agreement*, always in the singular (see Article 2.2.1.1; Article 2.6 (twice) and footnote 2).

31. By way of exception, in the event that there are *no* identical products, Article 2.6 permits an authority to determine “dumping” through a comparison between a product’s export price and the domestic price of a “closely resembling” product. However, in that event, the requirement for “close resemblance” still ensures that the products are sufficiently similar to enable a valid comparison, and a single dumping determination, for the two products.
32. Where an authority wishes to group multiple products together in a single investigation, Article 2.6 requires that *any* given category of the “like product” must be “like” *each and every* category of the product under consideration. Article 2.6 contains no exception, or other qualifying language, that allows an authority to establish likeness with respect to one category of the product under consideration, but not with respect to other categories. The products subject to comparison must, in principle, be “alike in all respects” or, at least, “closely resembling” so that a single determination can be made with respect to them. In other words, in assessing whether the conditions for likeness in Article 2.6 are met, the investigated products must be assessed as a whole, and not just by sub-product category.<sup>25</sup>
33. The term “product under consideration” thus has an ordinary meaning that does not permit the bundling of “non-like” products. In every investigation, an authority must, by necessity, make a determination of the investigated product and that determination, as with any other determination, is subject to multilateral control.
34. The context of the “product under consideration” and “like product” also supports the ordinary meaning stated above. The context includes Article 2.4.2 of the *Anti-Dumping Agreement*. The first method of comparison in Article 2.4.2 confirms that the group of products under investigation must all be alike. Article 2.4.2 sets forth three methods of comparing the price of the “product under consideration” and the price of the “like product”. The first comparison method refers to “*a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions*”. This language envisages “a” single comparison between a single normal value and a single export price for the product as a whole.

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<sup>25</sup> This reading of Article 2.6 is borne out by the Appellate Body’s rulings that, in an anti-dumping investigation, the product must be treated as a whole. See Appellate Body Report, *US – Softwood Lumber V*, para. 99.

35. If the authorities could determine the product under consideration to include products that are not all alike, it would be impossible to undertake a single comparison for the product to determine whether the product is exported at less than its normal value. Instead, separate determinations would be *required* for each like product. The *Anti-Dumping Agreement* cannot, however, be interpreted in this way because it renders impossible the single comparison for the “product” under investigation as a whole that is expressly envisaged in Article 2.4.2.
36. It is, of course, true that the authorities can elect to sub-divide the investigated product into models for purposes of comparison. However, in that event, the different models cannot involve different products that are not like. Rather, as the Appellate Body held in *EC – Bed Linen (AB)*, the models must all be sub-categories of a group of products that meet the definition of likeness:
- Having defined the product at issue and the ‘like product’ on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not ‘comparable’. All types or models falling within the scope of a ‘like’ product must necessarily be ‘comparable’, and export transactions involving those types or models must therefore be considered ‘comparable export transactions’ within the meaning of Article 2.4.2.<sup>26</sup>
37. In consequence, if the investigating authority wishes to sub-divide the investigated product into models in the course of making its single, overall dumping determination, it must, nonetheless, ensure likeness within the entire group of sub-products that constitutes the investigated product. Because the different models of a product are all like, it is permissible for the authority to combine the multiple comparison results to produce an individual margin for the product as a whole.
38. This ordinary meaning of the term is supported by the object and purpose of the *Anti-Dumping Agreement*. If an authority were permitted to group together products that are not all alike, a single dumping determination for the different products would not provide an *objective basis* for concluding that each of the different products is dumped. It would mean that the importing Member can manipulate the product scope of an investigation to

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<sup>26</sup> Appellate Body Report, *EC – Bed Linen (AB)*, para. 58.

secure dumping and injury determinations that would not otherwise be possible. As a result, the carefully drafted disciplines on dumping and injury determinations could be easily undermined if the investigating authority is seen to have unlimited discretion to determine the product scope. This would be contrary to the object and purpose of the *Anti-Dumping Agreement*, and the *GATT 1994*, which seek to balance the respective interests of importing Members in protecting an industry injured by dumping, and exporting Members in enjoying market access concessions.

39. In accordance with the preceding arguments, it is Norway's view that all models of the "product under consideration" are required to be "like" each other. The EU's interpretation of the obligations of the *Anti-Dumping Agreement* is thus flawed. To the extent that the Panel finds that standard and special fasteners are not in fact "like" each other, this would in Norway's opinion entail a breach of Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*.

#### IV. THE DETERMINATION OF INJURY

##### A. Introduction

40. China claims that the EU failed to make an injury determination consistent with its obligations under Articles 3.1 and 3.4 of the *Anti-Dumping Agreement*.<sup>27</sup> Norway will not address all four grounds put forward by China, but will concentrate on the claim that the EU improperly considered the displacement of EU products by imports from China in some market segments as being relevant.

##### B. The displacement of sales within the same "like product" cannot result in injury

41. The *Anti-Dumping Agreement* establishes a strict discipline on investigating authorities' injury determination. Article 3.1 is the key provision, which requires the investigating authority to determine the impact of the dumped products on the domestic producers of the "like products".
42. In the case before the Panel, the EU had determined the product scope to be standard and special fasteners. Once this is determined, the product scope remains constant throughout

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<sup>27</sup> First Written Submission by China, para. 433.

the investigation.<sup>28</sup> The reference in Article 3.1 to the “like product” entails an obligation to look at the product as a whole, not certain segments or models within the product. This has been established by panels and the Appellate Body.<sup>29</sup> In *EC – Salmon*, the panel found that the treatment of the product under consideration as a whole meant that:

...where an investigating authority splits the product under consideration into different sub-categories in the course of its "determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping", it is not entitled to discount any of these sub-categories when performing the ensuing analysis.<sup>30</sup>

43. It follows logically from this that injury cannot be found to result from a displacement of sales from one segment to another, within the same “like product”. According to Article 3.1, the EU thus had to determine the impact of the Chinese standard and special fasteners on the domestic producers of standard and special fasteners, seen as a whole.

44. To the degree that the Panel finds that the EU in its determination of material injury did find the displacement of sales from one product segment to another to be a factor, Norway submits that this would be contrary to Article 3.1 of the *Anti-Dumping Agreement*.

## V. THE EXAMINATION OF THE VOLUME OF DUMPED IMPORTS

### A. Introduction

45. China claims that the EU violated Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* by incorrectly determining the volume of dumped imports and thereby failing to make an “objective examination”, on the basis of “positive evidence”, of the volume of dumped imports.<sup>31</sup>

46. Norway will address the following two issues identified by China regarding the EU’s determination of the volume of dumped imports:

<sup>28</sup> Panel Report, *EC – Tube or Pipe Fittings*, para 7.149.

<sup>29</sup> Appellate Body Report, *US – Softwood Lumber V*, para. 99 and Panel Report, *EC – Salmon*, para. 7.54.

<sup>30</sup> Panel Report, *EC – Salmon*, para. 7.54.

<sup>31</sup> First Written Submission by China, para. 397.



- the failure to exclude imports from the Chinese producers that were found not to have dumped; and
- the failure to exclude imports from non-sampled producers.

**B. Imports from producers that were found not to be dumping should not be included in the volume of “dumped imports”**

47. China claims that the EU during the investigation found that two Chinese producers, CELO Suzhou Precision Fasteners Co. Ltd. and Yantai Agrati Fasteners Co. Ltd., who were subject to individual examination, were not dumping.<sup>32</sup> The volume of imports from these producers were still included in the volume of “dumped imports” for the purpose of the injury determination. The EU does not contest this, but argues that this inclusion was warranted because the two producers were “so small and unimportant” and therefore would not make any difference in the determination of whether there has been a “significant increase in dumped imports” according to Article 3.2 of the *Anti-Dumping Agreement*.<sup>33</sup>

48. Article 3.1 of the *Anti-Dumping Agreement* is the central provision in the examination of the volume of dumped imports:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on *positive evidence* and involve an *objective examination* of both (a) *the volume of the dumped imports* and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products. (footnote omitted, emphasis added)

49. Among others, Article 3.1 requires the investigating authority to examine objectively “the volume of the dumped imports”. Article 3.2 elaborates on this obligation, stating that the authority must examine whether there has been a “significant increase in dumped imports”. Article 3.5 adds that the authority must demonstrate that “the *dumped* imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury”. Thus, there is a link between the examination of the volume of dumped imports in Article

<sup>32</sup> First Written Submission by China, paras. 397 and 402.

<sup>33</sup> First Written Submission by the EU, paras. 511, 513 and 521.

3.2 and the causation determination in Article 3.5. Under Article 3.5, it is the imports *found to be dumped* under Article 3.2 that must cause injury.

50. As the clear text of these Articles show, it is only the *dumped* imports that are to be included in the determination of injury. The *Anti-Dumping Agreement* does not provide any exceptions to this rule.

51. Accordingly, several panels and the Appellate Body have repeatedly confirmed this interpretation.<sup>34</sup> In *EC – Bed Linen (Article 21.5 - India)*, the Appellate Body expressly stated that

...if a producer or exporter is found to be dumping, all imports from that producer or exporter may be included in the volume of dumped imports, but, if a producer or exporter is found not to be dumping, all imports from that producer or exporter must be excluded from the volume of dumped imports.<sup>35</sup>

52. In *EC - Salmon*, the EC had included imports from one producer, for which a *de minimis* margin of dumping was calculated, as dumped imports in making its injury determination. The panel expressed disagreement with the EC's assertion that while the inclusion of imports from companies with *de minimis* margins in the volume of "dumped imports for injury analysis may be inappropriate in some cases, that was not so in this case, as the exclusion of imports attributable to the producer in question would not have had any significant effect on the injury analysis."<sup>36</sup> The panel considered the issue as a question of interpretation of the term "dumped imports" in Article 3 of the Anti-Dumping Agreement:

We consider that an interpretation of "dumped imports" in Article 3 which would allow an investigating authority to include in the volume of dumped imports for purposes of injury analysis imports attributable to a producer/exporter for which a *de minimis* margin has been calculated is impermissible. As noted above, Article 5.8 requires termination of the investigation upon a determination of *de minimis* margins for imports from a particular foreign producer or exporter, and thus leads to the conclusion that there is no legally cognizable dumping. A consistent interpretation of the term "dumped" requires that such imports be excluded from the "dumped imports" considered in the analysis of injury (and causation, of course). We therefore

<sup>34</sup> Panel Report, *EC – Bed Linen*, para. 6.138; Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 115; Panel Report *Argentina – Poultry*, para. 7.303, Panel Report, *EC – Salmon*, paras. 7.627-7.628.

<sup>35</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 115.

<sup>36</sup> Panel Report, *EC - Salmon*, para. 7.627.

conclude that the EC acted inconsistently with Articles 3.1 and 3.2 by treating imports attributable to Nordlaks as dumped in its injury analysis.<sup>37</sup>

53. In light of the clear text of the *Anti-Dumping Agreement*, and the consistent jurisprudence, the imports of the two Chinese producers that were found not to be dumping should clearly have been treated as non-dumped, and should not have been included in the volume of dumped imports.

**C. Imports from non-sampled producers should not be included in the volume of “dumped imports”**

54. China contends that the EU violated Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* by treating the imports of all non-sampled and non-examined Chinese exporting producers as being dumped, for purposes of the injury determination.<sup>38</sup> The EU does not contest the factual matter – it did include all imports from China in the volume of dumped imports.<sup>39</sup>

55. As established above, the *Anti-Dumping Agreement* lays down strict rules for the investigating authority’s examination of the volume of dumped imports. Article 3.1 requires an “objective examination” of “the volume of the dumped imports”, based on “positive evidence”. Importantly, the text does not contain any exceptions from this obligation.

56. Jurisprudence has confirmed the strict nature of Article 3.1. With respect to the term “positive evidence”, the Appellate Body in *US – Hot-Rolled Steel (AB)* defined that term to refer to evidence that is “affirmative”, “objective”, “verifiable”, and “credible”.<sup>40</sup> As regards an “objective examination”, the Appellate Body stated that the term “objective” indicates that the examination “must conform to the dictates of the basic principles of good faith and fundamental fairness”.<sup>41</sup> The Appellate Body has also ruled that an “objective examination” requires the authorities to reach a result that is “unbiased, even-handed, and fair.”<sup>42</sup> In *US – Hot-Rolled Steel*, the Appellate Body found that it would not be “even-handed” for investigating authorities:

<sup>37</sup> Panel Report, *EC – Salmon*, para 7.628.

<sup>38</sup> First Written Submission by China, para. 410.

<sup>39</sup> First Written Submission by the EU, para. 511.

<sup>40</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 192.

<sup>41</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 193 (footnote omitted).

... 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.<sup>43</sup>

57. By automatically considering that the volume of imported products from all non-sampled and non-examined producers are at dumped prices, it does indeed become more likely that an investigating authority will find that the domestic industry is injured. The Appellate Body also came to this exact conclusion in *EC – Bed Linen (Article 21.5 – India)*, and therefore stated that such an approach, that is applied irrespective of whether there are examined or sampled exporting producers found *not* to be dumping, cannot be objective.<sup>44</sup> Three out of five producers were found to be dumping, while two were found not to be dumping. As not all of the examined producers were found to be dumping, the Appellate Body found that an investigating authority must consider other evidence in deciding the extent to which imports from unexamined producers may be treated as dumped for purposes of the injury analysis.<sup>45</sup>

58. Accordingly, the panel in *EC – Salmon* found that the investigating authority erred in concluding that all examined producers were dumping, as one producer had been found not to be dumping. The panel therefore concluded:

Thus, not all examined sampled producers were found to be dumping, and to the extent that the EC extrapolated to all imports on the basis of a conclusion that all imports attributable to the examined producers were dumped, it erred.<sup>46</sup>

59. This is parallel to the case before this Panel. By extending conclusions reached regarding the sampled producers to non-sampled producers, the EU made an assumption that that imports from non-sampled producers were all dumped. It did so despite having found that two exporting producers that were subject to individual examination (although not included in the original sample) were not in fact dumping. Whether it is established through sampling or through individual examination that there are producers that are not dumping is irrelevant for this determination. The investigating authority faces the same uncertainty regarding the non-sampled and non-examined exporting producers in both

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<sup>42</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133 (emphasis in original).

<sup>43</sup> Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196 (emphasis added).

<sup>44</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.

<sup>45</sup> As interpreted by the panel in *EC – Salmon*, para. 7.634.

<sup>46</sup> Panel Report, *EC – Salmon*, para. 7.634.

cases. The EU's assertion that this case must be distinguished from the cited cases because all the producers selected for the original sample were found to be dumping must therefore be rejected.<sup>47</sup>

60. Norway does not generally contest that there may be cases where an extrapolation from the *sampled producers* is warranted. However, in this particular case, the expansion of the investigation from the original sample to allow two more companies individual treatment, and the results from the investigation of these companies (being that no dumping took place), implies that an automatic extrapolation from the original sample was not warranted. Further evidence would be required before an extrapolation from the original sample would be justified. Norway is not aware of any additional evidence put forward by the EU. The EU thus failed to make an "objective examination", on the basis of "positive evidence", of the volume of dumped imports from non-sampled exporting producers, in violation of Article 3.1 of the *Anti-Dumping Agreement*.

## VI. PROCEDURAL REQUIREMENTS

### A. Introduction

61. 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 justice and fairness. Norway attaches great importance to these procedural rules, as particular safeguard mechanisms for transparency and the rule of law.

62. Norway will in the following discuss the claims by China that the EU violated procedural rules in Articles 6.2, 6.4 and 6.9 of the *Anti-Dumping Agreement*. Norway will not go into the factual details of the case, but rather outline how to interpret the various requirements mentioned.

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<sup>47</sup> First Written Submission of the EU, para. 545.

## B. Article 6.2 of the *Anti-Dumping Agreement*

63. Article 6.2 of the *Anti-Dumping Agreement* 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. [...]

64. 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.

65. 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.

66. 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 6.4 and 6.9, addressed below, must hence be seen in light of Article 6.2. As opposed to what the EU’s approach seems to be,<sup>48</sup> it is Norway’s view that when an investigating authority violates Article 6.4 and/or 6.9, it also violates Article 6.2 of the *Anti-Dumping Agreement*. Article 6.4 refers to information that is “relevant to the presentation of their [interested parties’] cases”, while Article 6.9 refers to the ability of interested parties to “defend their interests”. Thus, the requirements of Articles 6.4 and 6.9 – the opportunity to see 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.

67. 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

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<sup>48</sup> First Written Submission of the EU, paras. 684-687.

anti-dumping investigation, the obligation in Article 6.2 is infringed. As a result, any violation of the obligation Articles 6.4 and 6.9 entails a violation of Article 6.2.

### C. Article 6.4 of the *Anti-Dumping Agreement*

68. 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.)

69. China claims that the EU is in breach of the obligation contained in Article 6.4 on several counts.<sup>49</sup> Norway will not address the substantive (factual) issue of whether the EU has fulfilled the obligations 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.

70. The Appellate Body has ruled that the relevance of information must be assessed from the perspective of the interested parties.<sup>50</sup> 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.

71. 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.<sup>51</sup> An authority must evaluate all of the information submitted to it that relates to its determinations, and cannot ignore any of it. Only when submitted information is rejected, it may be removed

<sup>49</sup> First Written Submission by China, paras. 541, 564, 569, 577, 598 and 608.

<sup>50</sup> Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, para. 145.

<sup>51</sup> Appellate Body Report, *EC – Tube or Pipe Fittings (AB)*, 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.

from the investigating authority's files, and if it is relevant, not confidential, and used by the investigating authority, interested parties must be given timely opportunity to see it.<sup>52</sup>

72. 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.

73. The duty under Article 6.4 to allow interested parties to "see" relevant information is also not onerous. In disclosing information under Article 6.4, the authority is not expected to make qualitative judgements regarding its own perception of the pertinence of the information nor is it expected to "expressly identif[y]" information as important, as is required by Article 6.9. Instead, the authority must simply ensure that the relevant information is made available for interested parties to "see".

74. 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.

#### **D. Article 6.9 of the *Anti-Dumping Agreement***

75. 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

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<sup>52</sup> Panel Report, *EC – Salmon*, para 7.771.



disclosure should take place in sufficient time for the parties to defend their interests.

76. China claims that the EU is in breach of this requirement, as the investigating authority did not communicate a disclosure within the meaning of Article 6.9 on three accounts.<sup>53</sup> The EU on the other hand, states that China's claim is outside the Panel's terms of reference, as it was not consulted on, and that China in any case has not substantiated its claim.<sup>54</sup> Norway will not address the preliminary issue of the Panel's terms of reference, or the substantive issue of whether any disclosure of the EU 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.

77. 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."<sup>55</sup>

78. Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.<sup>56</sup> Rather, the investigating 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".<sup>57</sup> 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.<sup>58</sup>

79. 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".<sup>59</sup> On the basis of that definition, the panel in *Argentina – Poultry* distinguished

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<sup>53</sup> First Written Submission by China, paras. 583-586.

<sup>54</sup> First Written Submission by the EU, paras. 744 and 746,

<sup>55</sup> Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

<sup>56</sup> Panel report, *Guatemala – Cement II*, para. 8.230.

<sup>57</sup> Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

<sup>58</sup> Panel report, *Guatemala – Cement II*, para. 8.229.

<sup>59</sup> Panel report, *Argentina – Poultry*, para. 7.225.

“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*.

80. 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.”<sup>60</sup>

81. 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”.<sup>61</sup> 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 legal determinations. In that event, they cannot make effective comments on the factual basis for the authority’s intended decision.

82. The duty to disclose essential facts is thus more than an obligation to disclose all the information in the file.<sup>62</sup> 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.

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<sup>60</sup> Panel report, *EC - Salmon*, para. 7.807.

<sup>61</sup> Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

<sup>62</sup> Panel report, *Guatemala – Cement II*, para 8.230.

## **VII. CONCLUSION**

83. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

