**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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# 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[1] ("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*.[2] 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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[1] 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.

[2] 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.[3]

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.[4] 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,[5] 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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3 Appellate Body Report, *US – Gasoline*, page 16.
4 First Written Submission of China, paras. 227 and 245.
5 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.[6] 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*."[7] 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.[8]

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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6 First Written Submission of the EU, paras. 296-297.
7 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 133. Emphasis in original.
8 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."[9]

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.*"[10] 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".[11] 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.[12] 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",[13] 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.[14]

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

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9 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 193. Emphasis added.
10 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 190. Emphasis added.
11 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 196.
12 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 190 and 211.
13 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, paras. 193 and 196.
14 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 is 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*.[15] 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*.[16] 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.[17] 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*.[18] 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".[19] 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.

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15 First Written Submission by China, para 300.
16 First Written Submission by the EU, para 423.
17 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).
18 Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 240 (d), upholding the Panel's finding in para. 8.1 (c).
19 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.[20] 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*,[21] 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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[20] Panel Report, *US – Hot-Rolled Steel*, para. 7.108 and Appellate Body Report, *US – Hot-Rolled Steel (AB)*, para. 139.
[21] Para 5 of this submission.

this regard.[22] 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.[23]

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"[24] – 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.

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22 First Written Submission by the EU, paras. 434 and 437.

23 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).

24 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.[25]

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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[25] 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.[26]

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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[26] 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*.[27] 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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[27] First Written Submission by China, para. 433.

the investigation.[28] 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.[29] 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.[30]

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.[31]

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

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28 Panel Report, *EC – Tube or Pipe Fittings*, para 7.149.
29 Appellate Body Report, *US – Softwood Lumber V*, para. 99 and Panel Report, *EC – Salmon*, para. 7.54.
30 Panel Report, *EC – Salmon*, para. 7.54.
31 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 Fasterers Co. Ltd. and Yantai Agrati Fasteners Co. Ltd., who were subject to individual examination, were not dumping.[32] 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*. [33]

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

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32 First Written Submission by China, paras. 397 and 402.
33 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.[34] 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.[35]

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.[36] 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

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[34] 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.
[35] Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 115.
[36] Panel Report, *EC - Salmon*, para. 7.627.