

IN THE WORLD TRADE ORGANISATION

**Mexico – Definitive Countervailing Measures on Olive Oil
from the European Communities
(WT/DS341)**

**Third Party Submission
by
Norway**

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Table of cases cited in this submission

Short Title	Full Case Title
<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
<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 – Bed Linen</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
<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.
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<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
<i>US – Line Pipe</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004
<i>US – Softwood Lumber VI (Article 21.5 – Canada).</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this dispute brought by the European Communities (“EC”) regarding the consistency with the Agreement on Subsidies and Countervailing Measures (“*SCM Agreement*” or “*ASCM*”) on the definitive countervailing measures taken by Mexico on olive oil from the EC.
2. Norway would like to address the following issues discussed in the First Written Submissions of the EC and Mexico:
 - whether Mexico correctly defined the domestic industry as required by the GATT 1994 and the *SCM Agreement* (Section II);
 - whether Mexico fulfilled certain procedural requirements in the *SCM Agreement* (Section III); and
 - the appropriate Standard of Review (Section IV).

II. DEFINITION OF THE DOMESTIC INDUSTRY

2.1 Introduction

3. The EC contends that Mexico failed to define domestic industry in a manner that is consistent with the GATT 1994 and the *SCM Agreement*.¹ This led to a wrongful injury determination. And, furthermore, that Mexico failed to determine that there was sufficient industry support for the initiation of the investigation.²
4. Both questions hinge on the definition and determination of “the domestic industry” in this particular case. The requirement in Article 11.4 of the *SCM Agreement* that the Investigating Authority “...determine[d], on the basis of an examination of the degree of support for,” the application for the initiation of the investigation, requires a determination by the Investigating Authority first of what the product under investigation is and thereafter an investigation into who the domestic producers are that produce the like domestic product. It is of utmost importance to correctly define what constitutes “domestic industry” in a countervailing duty investigation, as the concept of “domestic industry” is involved in key aspects of the investigation. A

¹ EC’s First Written Submission, paras. 158 *ff.*

² EC’s First Written Submission, paras. 93 – 94.

wrongful determination of “domestic industry” will *inter alia* both vitiate the initiation of the investigation and the injury determination.

5. The present case concerns an investigation where the Investigating Authority found injury to an established industry. Norway understands the Final Resolution (imposing the definitive measures) to be based on “material injury to the domestic industry”.³ The case does not concern “material retardation to the establishment of such an industry”, as also confirmed by Mexico.⁴

2.2 Whether injury was caused to an established industry.

6. Article VI.6 (a) of the GATT 1994 requires that injury must be to an “established industry”. Likewise, Article 15.1 of the *SCM Agreement* refers to the impact of subsidized imports on the domestic producers. Furthermore, the definition of “domestic industry” in Article 16.1 of the *SCM Agreement* provides that “domestic industry” must be understood as referring to:

the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total production of those products.

7. The Vienna Convention on the Law of Treaties Article 31.1 provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.
8. Article 16.1 defines the domestic industry in relation to two elements, “producers” and the “products” they produce. The words “producers” and “product” indicate in Norway’s view that there must exist a certain domestic production for there to be a “domestic industry”. In *US – Lamb*, interpreting the term “domestic industry” in the Agreement on Safeguards, the Appellate Body held that “producers” are those that

³ Norway refers in this respect to the translation provided in EC’s First Written Submission, para. 199, where the EC cites the Final Resolution, para. 438.

⁴ Mexico’s First Written Submission, paras 227 and 229.

grow or manufacture an article; “producers” are those who bring a thing into existence.”⁵

9. Article 15.4 and Article 15.5 of the *SCM Agreement* provide highly relevant context for the definition of “domestic industry” in Article 16.1. The conclusion to be drawn from these provisions supports the view that “domestic industry” is an existing industry with on-going production. For example, Article 15.4 lists the factors to be considered in examining the impact of subsidized imports. Factors include sales, market share, profits and productivity, which all refer to conditions of an existing industry. Also Article 15.5 uses language that indicates a reference to a live and on-going industry; *inter alia* subsidized imports that “are (...) causing injury” and “any known factors (...) which at the same time are causing injury”. The word “are” points to what is happening at the time of the investigation, not what happened beforehand.
10. The object and purpose of the rules on countervailing duties in the *SCM Agreement* is to provide a right for Member to impose such measures under certain conditions. However, those rights have to be balanced against the right to use subsidies under certain conditions.⁶ The necessity to find the right balance in this equation suggests a narrow interpretation of “domestic industry” when it comes who should be protected.
11. An industry that does not produce the like product should, therefore, not be afforded a protection as envisaged in the *SCM Agreement* under the provisions relating to injury to an established industry.
12. The period of investigation in the present case covered April 2002 to September 2002.⁷ It is not clear from Mexico’s First Written Submission whether Mexico applied a different period of investigation for injury purposes, although paragraph 226 seems to indicate the existence of such a different period.
13. Norway does not take a position in the present case on the question as to whether an Investigating Authority may rely on different periods for subsidization and for parts of the injury analyses in CVD investigations. In the present case, the Investigating Authority found that the domestic industry was constituted of only one company –

⁵ Appellate Body Report, *US – Lamb*, para. 84.

⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 64 and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

⁷ Mexico’s First Written Submission, para. 222

Fortuny de Mexico, SA de CV (Fortuny). Mexico admits that Fortuny ceased production before the IP, in March 2002, just before the investigating period started.⁸

14. The question for the Panel is thus whether a company having ceased to produce before the IP, can still be considered to form (part of) the established domestic industry, in an investigation into injury to an established industry. Based on the facts as presented by the parties to the dispute so far, it would seem that Fortuny, having ceased production, cannot be considered part of the domestic industry producing the like product.
15. Norway notes that Mexico employs the term “suspensión de actividades de Fortuny”.⁹ Norway does not pronounce itself on the proper connotations to be given to this Spanish term, or the factual situation of Fortuny and its possible plans for any resumption of production after the investigation period. Norway only notes that, to the extent that the Panel considers it necessary to also evaluate whether a “suspension” of production has different implications upon which companies may be considered part of an established industry, the Panel must take into account that its interpretation must not undermine the distinction between investigations into injury caused to an *established industry* as opposed to an investigation into subsidization causing *material retardation* of the establishment of an industry.

2.3 Industry support for the initiation

16. To the extent that the Panel finds that Fortuny could not be considered part of the domestic industry for purposes of the contested investigation, the initiation itself is vitiated, and the investigation as such should never have been initiated.

III. PROCEDURAL ISSUES

17. In this section, Norway will discuss the allegations by the EC that Mexico violated procedural rules in Articles 12.4.1, 12.8, 22.3 and 22.5 of the *SCM Agreement*. Norway

⁸ Mexico’s First Written Submission, paras. 222 and 226.

⁹ Mexico’s First Written Submission, para. 226.

will not go into the factual details of the case, but rather outline how to interpret the various requirements mentioned above.

3.1 The duty to ensure non-confidential summaries of confidential information

18. The EC contends that Mexico failed to require the complainant to provide non-confidential summaries of confidential information, inconsistent with Article 12.4 of the *SCM Agreement*, and likewise that Mexico did not ensure that such summaries contained sufficient detail.¹⁰
19. Mexico, on the other hand, argues that its system provides opportunity for a legal representative of any interested party to see confidential information through its system of “protected access”.¹¹ Furthermore, Mexico argues that a legal representative for the exporters did avail itself of this possibility on numerous occasions.¹² And, finally, Mexico argues that all interested parties did actually present non-confidential summaries of all confidential information presented to the Mexican investigating authority.¹³
20. Norway notes that this issue requires the Panel to address a number of questions of facts and evidence as to what information was actually presented, the sufficiency of any summarization, and the sufficiency of the access actually provided to that information or summaries thereof. Norway will not discuss the factual aspects here, but point to two issues raised by the parties to the dispute:
 - (i) The relationship between a system of “protected access” to the obligation to provide non-confidential summaries; and
 - (ii) The need to refer, in the preliminary or final resolution, to whether non-confidential summaries were requested or provided
21. As to the first issue, Article 12.4.1 of the *SCM Agreement* provides that whenever confidential information is submitted to an investigating authority, the authority

¹⁰ EC’s First Written Submission, paras 103 – 108.

¹¹ Mexico’s First Written Submission, paras 84 – 85.

¹² Mexico’s First Written Submission, paras 87 – 88.

¹³ Mexico’s First Written Submission, para. 89.

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

22. A countervailing duty 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. As these determinations can adversely affect the position of interested parties, including through the imposition of countervailing duties, the Agreement sets up certain minimum standards of procedural justice and fairness. The requirement to ensure non-confidential summaries of confidential information is one such standard, and is aimed at making it possible for interested parties to defend their interests and to make “rebuttal” arguments, even towards information in confidential submissions. A failure to comply with this requirement will also imply a failure to comply with the general duty in Article 12.3 to “provide timely opportunities for all interested Members and interested parties to see all information that is relevant to the presentation of their cases”. The exercise of this right will not be effective absent access by interested parties to the non-confidential summaries of any confidential information that is submitted to the investigating authorities.
23. In cases where a Member has set up a system of “protected access” allowing interested parties access to all confidential information (provided their legal representative meets certain requirements), the due process concerns may be safeguarded. However, the interested party will only be incited to go through that process if it knows that there is confidential information there to see. The submission of non-confidential summaries of confidential information, or statements explaining why such information cannot be summarized, being placed in the non-confidential file, sends the requisite signal to interested parties that confidential information has been submitted that may be of importance to it. It thus serves as a marker for the interested party to have its legal representative go through the process of gaining access to the confidential file. Norway, therefore, believes that the existence of a system of “protected access” to the confidential file does not in itself absolve the Investigating Authority of its duty to request the provision of non-confidential summaries of confidential information submitted to it.

24. As to the second issue, Norway believes that the reference to whether Mexico required, and interested parties provided, certain non-confidential summaries, is not an issue that revolves around whether there is a “statement” or “reference” to this effect in the final or preliminary resolution. The question for this Panel is whether Mexico actually required the provision of such summaries from interested parties, whether access to such information was provided (*inter alia* by giving access to such non-confidential summaries under ASCM Article 12.3), whether any reliance upon such information was disclosed in accordance with ASCM Article 12.8, and whether sufficiently detailed information was provided in the relevant reports or notices under ASCM Article 22.

3.2 The duty to disclose essential facts

25. Another standard aiming at due process rights for the interested parties, is the requirement in Article 12.8 of the *SCM Agreement*, giving the investigating authority an obligation – before a final determination is made – to
- ... inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.
26. The EC claims that Mexico is in breach of this requirement, as the investigating authority did not (as the EC is aware) communicate a disclosure within the meaning of Article 12.8.¹⁴
27. Mexico, on the other hand, argues that it provided disclosure through the “Resolución Preliminar” (RP).¹⁵ Norway understands this to be the Preliminary Resolution published in the *Diario Oficial* on 10 June 2004 imposing a provisional countervailing duty.¹⁶
28. This issue raises *first* substantive issues as to what information was actually provided in any disclosure provided by the Investigating Authority of Mexico, and *second*

¹⁴ EC’s First Written Submission, para. 109.

¹⁵ Mexico’s First Written Submission, paras. 93 – 94.

¹⁶ EC’s First Written Submission, para. 59.

whether the provision of such information in the RP allowed interested parties sufficient time and opportunity to defend their interests.

29. Absent the factual record, Norway will not address the substantive issue of whether any disclosure of Mexico actually provided the required information. Norway will only high-light certain arguments that may be of importance to the Panel when interpreting the requirements of Article 12.8 of the *SCM Agreement* and applying that interpretation to the facts of this particular case.
30. WTO Panels and the Appellate Body have, in the anti-dumping context, interpreted the parallel provision in 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.”¹⁷
31. Panels have held that the requirement to disclose essential facts cannot be complied with simply by providing access to all information in the file.¹⁸ Rather the investigating authority must actively identify the facts on which it will rely in making its determination, for instance by “disclosing a *pecially prepared document* summarizing the essential facts under consideration”.¹⁹ 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.²⁰
32. The core of the duty of disclosure under Article 12.8 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”.²¹ On the basis of that definition, the panel in *Argentina – Poultry* distinguished “facts” from “reasons”. While the authority’s *reasons* should explain *inter alia* how it weighed the facts and how the facts in the record supported its determination, the duty of disclosure relates to *evidence*.

¹⁷ Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

¹⁸ Panel report, *Guatemala – Cement II*, para. 8.230.

¹⁹ Panel report, *Argentina – Ceramic Tiles*, para. 6.125.

²⁰ Panel report, *Guatemala – Cement II*, para. 8.229.

²¹ Panel report, *Argentina – Poultry*, para. 7.225.

33. What evidence does the investigating authority have a duty 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.
34. The second sentence of Article 12.8 sheds light on the first sentence. Under the second sentence, disclosure must occur “in sufficient time for the parties to defend their interests”. Interests can be defended by allowing interested parties an opportunity, among others, to “comment [] on the completeness of the essential facts under consideration”.²² Article 12.8 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.
35. The duty to disclose essential facts is thus more than a duty to disclose all the information in the file. 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 or another identify the essential facts and allow interested parties an opportunity to comment on the completeness of the relevant essential facts.
36. In the present case, the document referred to by Mexico is the RP of 10 June 2004. The Panel will have to assess whether that document contained the required information, and whether Mexico provided interested parties with the opportunity to comment and defend their interests based on this document. Norway notes, however, that – according to the time-line of events presented by the EC in its First Written Submission²³ - a number of new questionnaires were sent out, and new submissions and verification visits took place after 10 June 2004. The Panel will thus also have to assess whether, based on the evidence presented by the EC, there are any new facts submitted after the RP that fall within the scope of essential facts subject to disclosure, and that were not disclosed.

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

²³ EC’s First Written Submission, paras. 59 – 70.

IV. STANDARD OF REVIEW: THE DUTY TO PROVIDE A REASONED AND ADEQUATE EXPLANATION IN SUPPORT OF THE AUTHORITY'S CONCLUSIONS

37. The EC claims that Mexico violated the *SCM Agreement* because the investigating authority failed to provide a reasoned and adequate explanation for many of its findings.²⁴

38. Article 22.3 in the *SCM Agreement* provides

Public notice shall be given of any preliminary or final determination (...) Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

39. Article 22.5, in turn, provides

A public notice of conclusion (...) of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty (...) shall contain, or otherwise make available through a separate report, all relevant information on the matters of facts and law and reasons which have lead to the imposition of final measures (...), due regard being paid to the requirement for the protection of confidential information. In particular, the notice or report shall contain the information described in paragraph 4, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by interested Members and by the exporters and importers.

40. Under these provisions the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive countervailing duties. Thus, the authority must set forth the relevant facts in the record, and must explain “in sufficient detail” the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of measures.

41. Articles 22.3 and 22.5, therefore, serves the same function as similar provisions in other covered agreements relating to trade remedy measures, namely, Article 3.1 of the Safeguards Agreement and Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement. The Appellate Body and panels have consistently ruled that these provisions require investigating authorities to provide a *reasoned and adequate explanation*, among

²⁴ EC's First Written Submission paras. 77 – 85.

others, of how the evidence in the record supports the authority's determination.²⁵ The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.²⁶

42. In a recent dispute, the Appellate Body emphasized that "the evidentiary path that led to the inferences and overall conclusions of the investigating authority must be clearly discernible in the reasoning and explanations found in its report".²⁷
43. In sum, the investigating authority must provide an explanation that does not leave the reader guessing why the authority made its determinations. If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *SCM Agreement* governing those determinations.
44. In concluding, Norway submits that the Appellate Body – with regard to the standard of review – has stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of "how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings".²⁸

V. CONCLUSION

45. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the *SCM Agreement*.

²⁵ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.

²⁶ Appellate Body Report, *US – Line Pipe*, para 217.

²⁷ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97.

²⁸ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.