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BEFORE THE WORLD TRADE ORGANIZATION

EUROPEAN COMMUNITIES – ANTI-DUMPING MEASURE ON FARMED SALMON FROM NORWAY

WT/DS337

OPENING STATEMENT

NORWAY

12 DECEMBER 2006

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I. Introduction

1. Mr. Chairman, distinguished Members of the Panel, let me begin by introducing the Norwegian team this morning. [INTRODUCTION]

2. Allow me first to express our gratitude to you for having accepted to serve on this Panel and for devoting your time and efforts to this case. The case involves many issues covering most of the stages of the EC anti-dumping investigation. This morning we shall highlight some of the key points. My focus on these points does not imply that we attach less importance to other points. Rather, we maintain all the claims and arguments in our First Written Submission.

3. This case has a long history. Disputes with the EC over Norwegian exports date back to 1989, and the contested measure is simply the latest iteration in a long line of trade protection measures. Indeed, the provisional measure in this dispute was introduced on the very same day that the previous safeguard measures were withdrawn.[1]

4. The dumping investigation started in October 2004, at a time when the safeguards investigation was on-going. Norway has submitted press statements showing that the two cases were closely linked.[2] When the pressure from certain EC Members States, Chile and Norway mounted against the safeguard measures, the EC switched to anti-dumping measures. Before the investigation even began, an official from the European Commission accurately predicted in the press the dumping margin they would find.[3]

5. In this dispute, Norway considers that the EC has failed to respect many of the substantive and procedural requirements of the GATT 1994 and the *Anti-Dumping Agreement.* Virtually every aspect of the Definitive Regulation involves an inconsistency with WTO rules, going from initiation to the imposition of the measure.

6. The EC's response fails to address the substance of Norway's claims. There are two main lines of defence. *First*, the EC asserts a very wide discretion for its authority to do as it wished, often in interpretive matters. For example, the EC was free to decide whether or not fillet producers are "producers" of the like product. *Second*, the EC now tries to fill in the

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[1] 27 April 2005. Norway's consultation request in respect of the safeguard measures can be found in WT/DS328/1.

[2] *See* the statements from European Commission official, Fritz-Harald Wenig, Director of Trade Defence Measures, to the Norwegian press. Exhibit NOR-12.

[3] Intrafish News, "EC to decide on Norwegian salmon dumping case", 19 November 2004. Exhibit NOR-12.

many holes in its determination by offering new evidence and new reasons to justify its measure. As Norway sets forth in a moment, this is inadmissible. It also serves to highlight the shortcomings in the EC's determination. Finally, the EC's submission contains numerous errors that reveal ignorance of the record of the investigation. Before turning to the substance, I will address certain procedural issues.

II. INADMISSIBLE EVIDENCE AND *EX POST* RATIONALIZATION

7. Norway wishes to state two objections to the EC's brief. *First*, Norway objects to seven exhibits submitted by the EC because they contain data and evidence that is not part of the record of investigation. These exhibits are, therefore, inadmissible. *Second*, Norway objects to a series of new reasons stated by the EC that are inadmissible *ex post* rationalization for the EC's determinations.

A. *Inadmissible Evidence*

8. The EC repeatedly attempts to defend its determination on the basis of new evidence contained neither in the report of the investigating authority nor in the investigation record. This new evidence cannot be taken into account by the Panel. Article 17.5 of the *Anti-Dumping Agreement* states that the Panel's examination of the matter must be based upon the facts made available to the investigating authority during the investigation. This same rule applies to all trade remedy disputes.

9. In *US – CVD on DRAMS*, the Appellate Body stated that "[t]here is no doubt that a Member may *not* seek to defend its agency's decision *on the basis of evidence not contained in the record of the investigation*."[4] Similarly, panels have held that they can "*not examine any new evidence* that was not part of the record of the investigation."[5]

10. The notion of "new evidence" includes *new data* that was not part of the record and, in addition, *new analyses* of data that *was* part of the record, to present new arguments and justifications that did not feature in the published determination.[6] Examination of new

[4] Appellate Body Report, *US – DRAMS* (DS296), para. 161. Emphasis added.
[5] Panel Report, *Guatemala - Cement II*, para. 8.19. Emphasis added. *See also* Panel Report, *Korea – Dairy*, para. 7.30; Appellate Body Report, *US – Wheat Gluten*, para. 161; Panel Report, *US – Hot-Rolled Steel*, para. 7.6, quoted also in *US – Softwood Lumber VI*, para. 7.37; Panel Report, *EC – Bed Linen*, para. 6.41 – 6.43; Panel Report, *US – Hot-Rolled Steel*, para. 7.6; Panel Report, *Egypt – Rebar*, para. 7.21; Panel Report, *US – Shirts and Blouses*, para. 7.21.
[6] Panel Report, *US – Softwood Lumber V*, paras. 7.40 to 7.41.

evidence and explanations requires a panel "to perform a *de novo* review" of what the investigating authority should have done.[7]

11. A number of the EC's exhibits contain new evidence and are, therefore, inadmissible. Specifically:

- Exhibit EC-2 contains articles from "Intrafish", an online news agency reporting on the seafood industry, that were printed from the Internet on 17 October 2006. The EC uses this Exhibit in support of a claim concerning structural changes in the Norwegian industry.
- Exhibit EC-10 provides new data on (1) export volumes, (2) turnover, and (3) export prices for sampled producers, non-sampled producers, and producers that were deemed "non-cooperating". The EC relies on this Exhibit to support its assertion that non-examined companies were "dumping".[8]
- Exhibit EC-12 introduces new data on the level of dumped imports from Norway that excludes imports from one of the sampled companies. The EC relies on this Exhibit to remedy its incorrect finding that all imports from Norway were dumped.[9]
- Exhibit EC-13 introduces new data on the proportion of sales made by the EC salmon industry in the United Kingdom. The EC uses this Exhibit to justify the authority's analysis of the price trends of Scottish companies in euros.[10]
- Exhibit EC-14 provides a table entitled "injury data with Corrected US/Canadian Imports". The bolded figures in this table provide new data.[11]
- Exhibit EC-15 provides a table entitled "Imports originating in other third countries (corrected data)". The bolded figures in this table provide new data.[12]
- Exhibit EC-16 consists of wholly new data concerning salmon imports from the United States.

12. Norway requests that the Panel reject these Exhibits as inadmissible because they contain new data that is not part of the record of investigation. An objective assessment of these data by the Panel would, in each case, require a *de novo* review to determine whether, *in the Panel's judgment*, this evidence would have led the EC's authority to the same determination or a different determination. That is not the Panel's task.

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[7] Panel Report, *US – Softwood Lumber V*, para. 7.40.
[8] *See* paras. 111 and 112 below.
[9] *See* para. 118 below.
[10] *See* para. 129 and 130 below.
[11] *See* para. 140 below.
[12] *See* para. 140 below.

B. *Inadmissible Ex Post Rationalization*

13. Norway also objects to numerous new explanations the EC now provides for the investigating authority's determinations that were not provided by the investigating authority itself in its published determination. In many instances, the EC:

- provides a new explanation where the authority provided *no* explanation;
- provides new reasons to *supplement* an inadequate explanation given by the authority; or
- provides an explanation that is *different* from the explanation given by the authority.

14. This litigation technique has been referred to by panels as "*ex post* rationalization".[13] It is established that a WTO Member may not justify an authority's determinations by providing reasons that the authority itself did not provide.[14] A panel's task is to establish whether the *investigating authority* provided a reasoned and adequate explanation in its *published determination*, and not whether the *defending Member* did so in a *subsequent dispute*.

15. For instance, in *US – Wheat Gluten*, the Appellate Body found that the United States could not justify its authority's explanation on the basis of "clarifications" that were not contained in the published determination.[15] Similarly, the panel in *Argentina – Poultry* noted that Argentina had "failed to indicate where [certain] arguments are set forth in the [authority's report]. Such arguments therefore constitute *ex post* rationalization which we are precluded from taking into account."[16]

16. The EC's submission is replete with *ex post* rationalization. Norway will point out to certain instances in its opening statement and will address this issue further in its second written submission.

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[13] Panel Report, *Argentina - Poultry*, paras. 7.284, 7.306 and 7.321. Panel Report, *Guatemala – Cement II*, para. 8.48.

[14] Appellate Body Report, *US – Wheat Gluten*, para. 162. Panel Report, *Argentina - Poultry*, paras. 7.284, 7.306 and 7.321. Panel Report, *Guatemala – Cement II*, para. 8.48; *see also* Appellate Body Report, *US – CVD on DRAMS*, para. 165.

[15] Appellate Body Report, *US – Wheat Gluten*, para. 162 ("We do not see how the Panel could conclude that the USITC Report *did* provide an adequate explanation of the allocation methodologies, when it is clear that the Panel itself saw such deficiencies in that Report that it placed extensive reliance on 'clarifications' that were not contained in the USITC Report").

[16] Panel Report, *Argentina - Poultry*, paras. 7.321. Underlining added.

III. THE PRODUCT UNDER CONSIDERATION

17. Norway first turns to its claims regarding the EC's determination of the "product under consideration". The determination of the "product under consideration" is key to the scope of the investigation because everything from "standing" to "injury to domestic industry" to the "imposition of the measure" is linked to that product.

18. To recall, Norway argues that Articles 2.1 and 2.6 of the *Anti-Dumping Agreement* require that all models of the "product under consideration" be "like", that is "identical" or "closely resembling" each other. Because the EC failed to determine the "product" consistently with these provisions, the EC acted inconsistently with Article 5.4 of the *Agreement* in initiating the investigation; Article 2.1 in its dumping determination; and Article 3.1 in its injury determination.

C. *The Term "Product under Consideration" Must Have an Ordinary Meaning*

19. The EC's reply is that "it is ***impossible*** to discern any obligation" in the *Anti-Dumping Agreement* on the investigating authority's determination of the "product under consideration".[17] The EC concludes that the investigating authority has an unfettered discretion to combine whatever products it wishes into a single "product under consideration".

20. The EC's argument is contrary to the most basic tenets of treaty interpretation that panels and the Appellate Body rely on. The *Vienna Convention on the Law of Treaties* requires that every treaty term have an ordinary meaning, whether it is expressly defined or not. 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.

21. Not surprisingly, 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* "does not define" the term "in the ordinary course of trade" in Article 2.1.[18] Nonetheless, they both interpreted the term, and found that a rule for assessing sales "in the ordinary course of trade" violated Article 2.1. In

[17] *See, for example*, EC First Written Submission ("FWS"), paras. 18, 20 and 22. Original emphasis.
[18] Panel Report, *US – Hot-Rolled Steel*, para. 7.108; Appellate Body Report, *US – Hot-Rolled Steel*, para. 139. *See also* Appellate Body Report, *EC – Asbestos*, paras. 87 to 100.

this dispute, the Panel must also interpret a term in Article 2.1, even though it is not expressly defined in the treaty.

22. The EC contends that Article 2.1 imposes obligations with respect to the meaning of "dumping", but not the "product under consideration". However, 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*".

23. 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. As the EC would have it, each of these concepts is subject to multilateral disciplines, except the "*product under consideration*". This is absurd. 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.

D. *The EC's Approach Is Contrary to the Object and Purpose of the Anti-Dumping Agreement*

24. The need for multilateral rules on the meaning of "product under consideration" is particularly important because the "product" influences every step in the process of establishing a right to impose anti-dumping duties. Importantly, the selection of the product determines which imported products are subject to duties. It also determined the amount of those duties, which may well exceed the bound tariffs agreed on a product-specific basis. The selection of the product, therefore, has a direct bearing on the enjoyment of market access concessions.

25. Absent multilateral disciplines, the importing Member can manipulate the product scope of an investigation to secure dumping and injury determinations that would not otherwise be possible. Norway has explained the potential abuses that may arise in its First Written Submission. Although the EC argues that its authority has unfettered discretion to define the "product", the EC has failed to address the difficulties its approach creates.

26. For example, assume that an authority bundles together <u>bicycles</u> and <u>cars</u>, referring to the "product" as "<u>certain vehicles</u>". It sub-divides the "product" into two models. Suppose that <u>bicycles</u> are *dumped*, and <u>cars</u> are *not*. However, on an aggregate basis, the two products, labeled as <u>certain vehicles</u>, *are dumped*. Suppose also that the <u>bicycle industry</u> is

injured, whereas the car industry is *not*. However, by combining the two industries in a single injury determination, the authority concludes that the domestic industry producing certain vehicles is injured.

27. If an authority has an unfettered discretion to bundle bicycles and cars together, the importing Member could impose duties on cars in excess of the agreed tariff on that product, even though imported cars are not dumped. Moreover, the domestic car industry would enjoy the protection of anti-dumping duties, even though it is not injured. This is what happened in this case.

28. In other words, the authority can manipulate its dumping and injury determinations simply by altering the scope of the "product under consideration" to include non-like products. As a result, the carefully crafted disciplines on dumping and injury determinations could be easily undermined if the investigating authority enjoyed unfettered discretion to determine the "product under consideration". The interpretative vacuum that the EC proposes is, therefore, anathema 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.[19]

29. As Norway has set forth in its written submission, under the text, and object and purpose, of the *Anti-Dumping Agreement*, the "product under consideration" 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.

E. *A "Dumping" Determination Involves a Single Overall Comparison of Export Price and Normal Value for the Investigated Product*

30. Article 2.1 defines "dumping" in terms of a comparison between the export price for the product under consideration and the normal value for that product. The focus in Article 2.1 is on a single comparison made for "a product" as a whole.[20] Thus, under Article 6.10, the authority must make a single overall dumping determination for the "investigated product". The "product under consideration" in Article 2.1 must, therefore, include only "models" of that same product to enable a single determination of price discrimination, or

[19] *See, by analogy*, Appellate Body Report, *US – Line Pipe*, para. 83.
[20] Appellate Body Report, *US – Softwood Lumber V,* para. 93.

"dumping". Contrary to what is suggested by the EC,[21] neither Article 2.1 nor any other provision of the *Agreement* refers to determinations made simply for "product categories".

31. Article VI:1 supports this reading because it states that a "product" is dumped when the export price of a given "product" is "less than *its* normal value" in the home market. The possessive pronoun "its" provides textual confirmation that a "dumping" determination addresses price discrimination for a *given product*. The EC also appears to agree in principle because it is at pains to assert that "[t]his is not a case in which *different* goods or products… have been grouped together."[22]

32. Norway also relies on Article 2.6 of the *Anti-Dumping Agreement*. The EC contends that Article 2.6 is irrelevant because it contains a definition but imposes no obligations.[23] Contrary to the EC's views, it is well established that investigating authorities must make determinations that meet the requirements of definitional provisions such as Article 2.6.[24] As well as imposing obligations, Article 2.6 is also relevant as context for interpreting the term "product" in Article 2.1.

33. Article 2.6 requires that the "like product" be identical to, or "closely resembling", the "product under consideration". The EC expressly recognizes the importance of this definition because it states that the "like product" definition ensures "*discrimination has actually been identified*".[25] Thus, the parties agree that Article 2.6 ensures a like-with-like comparison.

34. However, the EC appears to believe that the likeness of the products need only be established within "models" of the "product", and not for the "product under consideration" in all its forms. Thus, so long as <u>bicycles</u> are "like" <u>bicycles</u>, it is irrelevant that <u>bicycles</u> are not like <u>cars</u>. Norway disagrees that it is sufficient for an authority to ensure likeness solely within models.

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[21] EC's FWS, para. 35.
[22] EC's FWS, para. 50. Emphasis added.
[23] EC's FWS, para. 18.
[24] In *Argentina – Poultry*, the panel found that "Article 4.1 [of the *Anti-Dumping Agreement*] imposes an express obligation on Members to interpret the term 'domestic industry'" consistently with the definition in that provision (para. 7.338); in *US – Lamb*, the Appellate Body found that the United States violated the definition of "domestic industry" in Article 4.1(c) of the *Agreement on Safeguards* (para. 96); the panel in *US - DRAMS* found a violation of Article 1.1 of the *SCM Agreement* (para. 8.1).
[25] EC's FWS, para. 35. Emphasis added.

35. In Norway's view, the EC attaches undue importance to the concept of "models", a term that does not appear in the *Anti-Dumping Agreement*. Although an investigating authority can temporarily sub-divide the "product" into models, it cannot make "dumping" determinations for models.[26] A "dumping" determination must be based on the prices of "*all* transactions involving *all* types of the *product under investigation*".[27]

36. In other words, under Article 2.1, a "dumping" determination involves a *single aggregate comparison* of export price and normal value for the investigated product. In making that comparison, models are a helpful, but temporary, tool that authorities may use to minimize the need for adjustments under Article 2.4.[28] However, the *disaggregated* models must always be *re-aggregated* to establish a single determination of price discrimination for the "product". There is, therefore, little purpose to a rule that requires, for example, that bicycles be like bicycles, but not cars, because an aggregate comparison and determination must be made for bicycles and cars together.

37. Norway notes also that the EC has not addressed many arguments advanced by Norway. For example, it fails to address Article 3.6, which suggests that the existence of separate production processes is an indication that separate products are produced.[29]

F. *The EC Failed to Provide a Reasoned and Adequate Explanation for Its Product Determination*

38. The EC suggests that it was not required to make any "determination" of the "product under consideration".[30] However, it is difficult indeed to understand how an authority could conduct an investigation without making such a determination. This determination forms the basis for virtually every aspect of the process, from the decision to initiate, to the comparison of product prices, to the scope of the domestic industry, to the scope of the duties imposed. Moreover, it is also clear that in this dispute, the EC did make a determination of the "product".[31]

[26] Panel Report, *US – Softwood Lumber V*, para. 7.216.
[27] Panel Report, *US – Softwood Lumber V*, para. 7.224.
[28] Panel Report, *US – Softwood Lumber V*, para. 7.207.
[29] Appellate Body Report, *US – Lamb*, footnote 55.
[30] EC's FWS, para. 36.
[31] Provisional Regulation, paras. 10 and 11; Definitive Regulation, para. 8.

39. That product was so broadly determined that the EC asked for model-specific information for 8 separate products, with separate reporting for fresh and frozen fish, with three separate qualities and 7 different sizes. This gives a total of 306 different models.

40. The EC has failed to point to any explanation given in the measure that justifies its broad product determination. For the first time, the EC now refers to certain evidence of record, namely the "Kontali" memorandum. However, it does so merely to assert that the memorandum is irrelevant because it "was not submitted in time".[32] In fact, this document was submitted by the Norwegian Seafood Federation ("FHL") during the investigation. Moreover, the document highlights perfectly the type of factual analysis that the EC should have provided in deciding whether there was single product. No other evidence of record is referred to by the EC, presumably because there is no such evidence supporting its determination.

41. Norway has presented detailed arguments in its First Written Submission substantiating why there should be at least two different products in this case, namely "whole fish" (including head-on gutted fish) and fillets, *in particular* because they are produced by two different industries. For the sake of brevity, I will not repeat those arguments here, but just refer the Panel to paragraphs 131-165 of our First Written Submission. None of our arguments have been rebutted by the EC in its First Written Submission.

G. *Conclusion on the "Product under Consideration"*

42. The EC failed to determine the scope of the "product under consideration" consistently with Articles 2.1 and 2.6 of the *Anti-Dumping Agreement*. That violation taints every determination in the investigation that relates to the "product". In particular:

- the EC initiated an investigation into the wrong product, in violation of Article 5.4;
- the EC made a single "dumping" determination, under Article 2.1, for an improperly defined single product, without establishing that the different products subject to that determination were, in fact, dumped; and, finally,
- the EC made an injury determination under Article 3 premised on an incorrect product determination.

[32] EC's FWS, para. 49.

IV. DOMESTIC INDUSTRY

43. Although the EC defined the "product under consideration" in very broad terms, it defined the EC domestic industry in extremely narrow terms. In particular, whereas the "product under consideration" includes fillets, the producers of these products are excluded from the "domestic industry". The EC also improperly excluded numerous other categories of producer.

44. As a result, there is a fatal mismatch between the scope of the product and the domestic industry. This mismatch means that the EC failed to establish that the initiation of the investigation was supported by the properly defined domestic industry; and it also made an injury determination for the wrong industry. Moreover, after defining the domestic industry to include just 15 complainants, the EC examined certain injury factors on the basis of a sample of just five producers.

A. *Article 4.1 of the Anti-Dumping Agreement Imposes Obligations*

45. The EC contends that "Article 4.1 of the *Anti-Dumping Agreement* does not, in itself, impose any obligation on the EC or any other WTO Member. It merely contains a definition."[33] This is incorrect. In fact, this issue was expressly addressed by the panel in *Argentina – Poultry*, which held:

> Article 4.1 provides that the term "domestic industry" "shall" be interpreted in a specific manner. In our view, *this imposes an express obligation on Members to interpret the term "domestic industry" in that specified manner*. Thus, if a Member were to interpret the term differently in the context of an anti-dumping investigation, that Member would violate the obligation set forth in Article 4.1.[34]

46. Similarly, in *US – Lamb*, the Appellate Body found that the United States violated the definition of "domestic industry" in Article 4.1(c) of the *Agreement on Safeguards*.[35] In *US – Hot-Rolled Steel*, the panel and the Appellate Body both found that the United States had violated Article 2.1 of the *Anti-Dumping Agreement*, which provides a definition of

[33] EC's FWS, para. 59.
[34] Panel Report, *Argentina – Poultry*, para. 7.338. Emphasis added.
[35] Appellate Body Report, *US – Lamb*, para. 96.

"dumping".[36] In *EC – CVDs on DRAMS*, the panel found that the EC violated Article 1.1 of the *SCM Agreement*, which defines a "subsidy".[37]

47. The EC's argument is, therefore, contrary to a long line of cases that establishes that investigating authorities must make determinations consistently with any definitions in the covered agreements. In this dispute, the EC failed to determine the scope of the "domestic industry" consistently with the definition in Article 4.1.

B. *The Domestic Industry Cannot Be Defined to Include Solely the Complainants*

48. According to the EC, an investigating authority has the discretion to exclude whichever producers it wishes, provided that the remaining producers are "a major proportion" of the industry. Thus, the EC believes it can exclude all producers, except for certain complainants. Norway disagrees that Article 4.1 permits such a self-serving, biased definition that would prevent an objective examination of the industry, as required by the *Anti-Dumping Agreement*.

49. 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, includes domestic producers from all segments and sectors of the industry on an equal footing. It does not permit the exclusion of any category of producer other than "related" producers. Nor does it authorize an authority to limit an industry solely to the complainants.

50. This reading is confirmed by the context of Articles 3 and 5. Article 5.4 expressly envisages that complainants and other supporters of the investigation may constitute only a minority of the domestic industry. Thus, under Article 5.4, the complainants are regarded as one category of producer in an industry that includes other categories of producer.

51. Further, under Article 3, an investigating authority must make an "objective examination" of whether the "domestic industry" is injured. An "objective examination", to quote the Appellate Body, "must focus on the totality of the 'domestic industry' and not

[36] Appellate Body Report, *US – Hot-Rolled Steel*, para. 240(d), upholding the panel's finding in para. 8.1(c).
[37] Panel Report, *EC – CVDs on DRAMS*, paras. 8.1(a), 8.1(b) and 8.1(c).

simply on one part, sector or segment of the domestic industry."[38] A "selective" examination of "one part" of the industry is not possible.[39] In Norway's view, to ensure coherence between the definition of the "domestic industry" in Article 4.1, and the objective examination of that industry in Article 3.1, Article 4.1 must be interpreted to enable an authority to comply with the requirements of Article 3.1.

52. As a result, Article 4.1 cannot be interpreted to allow the investigating authority to exclude all domestic producers, except for the complainants. By so doing, the EC acted inconsistently with Article 4.1.

C. *The EC Improperly Excluded Numerous Categories of Producer*

53. Norway has set forth, in detail, the numerous categories of producer that the EC excluded from the domestic industry.[40] Norway has also explained that the EC provided no information on the volume of production for each of the excluded categories. Nor did the EC explain the criteria it applied to determine the categorization of producers. For example, the EC excluded organic producers and organic production from the domestic industry. However, the EC never explained how it distinguished between conventional and organic production.

54. Pausing for a minute to consider organic salmon, it is not clear from the Definitive Regulation what the EC's statement that "organic salmon should be disregarded in this investigation"[41] implies for the product under investigation and the definition and sample of domestic industry. No evidence has been provided to show that this exclusion was properly performed. Norway has shown[42] that 3 of the 5 Scottish companies in the sample are producers of organic salmon. However, the EC continued to examine these companies, and even increased the volume of production attributed to them from 8,300 tonnes in the provisional regulation[43] to 8,770 tonnes in the definitive regulation.[44]

55. In its submission, the EC does not even attempt to show that it provided a reasoned and adequate explanation that explains the facts underlying its exclusion of certain defined

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[38] Appellate Body Report, *US – Hot-Rolled Steel*, para. 190.
[39] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.
[40] Norway's FWS, paras. 225 ff.
[41] Definitive Regulation, para 43.
[42] Norway's FWS, paras 247 to 252.
[43] Provisional Regulation, para 48.
[44] Definitive Regulation, para 50 gives their production volumes as 48 percent of the domestic production [of 18.271 tonnes], i.e. 8.770 tonnes.

categories of producer. The EC maintains that all categories of excluded producers together accounted for "about 4,000 tonnes" of salmon and that the industry comprised 18,000 tonnes.[45] Thus, it says, the industry comprises a major proportion of total EC production. Nowhere did the EC state the volume of each category of excluded producers, meaning that there is no way to verify the accuracy of this information. Norway has found nothing in the record that confirms any of the volume figures given by the EC.

D. *EC Fillet Producers Are Part of the Domestic Industry*

56. The EC defined the investigated product to include filleted products. However, the EC then excluded fillet producers from the domestic industry. The EC contends that fillet producers "are not really concerned with bringing the product concerned" into existence; instead, they "are concerned with *consuming* it".[46] Thus, it believes fillet producers are not producers, but "industrial *users*" of the like product under Article 6.12 of the *Anti-Dumping Agreement*.

57. As the EC's examination of the fish processing industry attests, a variety of salmon fillets are produced in the EC in large quantities by a highly developed manufacturing industry.[47] It is absurd to suggest that this industry merely consumes its input products, without producing any output products.

58. Under Article 4.1, there is strict parallelism between the scope of the investigated product and the scope of the domestic industry producing that product. The situation of undertakings that are both *producers and users* of the like product has already been addressed in *US – Cotton Yarn*. In that dispute, certain producers of the like product used their production internally to produce a downstream non-like product. These undertakings were, therefore, both *upstream producers* and *downstream users* of the like product. The Appellate Body ruled that the United States was *not* entitled to exclude these producers/users from the scope of the domestic industry.[48] Among others, the Appellate Body noted that, if these producers/users were excluded from the industry, they would be excluded from the "serious damage" determination but would nonetheless be protected by the safeguard measure.[49]

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[45] EC's FWS, para. 85.
[46] EC's FWS, para. 71. Original emphasis.
[47] Exhibit NOR-17; Norway's FWS, para. 54.
[48] Appellate Body Report, *US – Cotton Yarn*, para. 105.
[49] Appellate Body Report, *US – Cotton Yarn*, para. 101(d).

59. Norway has argued that the exclusion of fillet producers has similar unacceptable consequences in this dispute.[50] Fillet producers are producers/users of the like product that were excluded from the domestic industry. They were, therefore, not examined in the injury determination. However, these producers/users are protected by the anti-dumping duties. Thus, anti-dumping measures are imposed without any determination that the domestic producers protected by the measures actually warrant that protection.

60. Under the *Anti-Dumping Agreement*, another unacceptable consequence arises from the exclusion of producers/users from the domestic industry: the EC failed to establish that initiation of the investigation was supported by these producers, as required by Article 5.4.

61. The EC argues that including fillet producers in the domestic industry "would result in double counting of biblical proportions".[51] The source of this problem is not Norway's claim; it is the EC's decision to combine different upstream and downstream products into an overly broad single "product". The solution to the problem is not to eliminate downstream producers of the like product from the domestic industry, but to re-visit the EC's product definition.

62. Finally, the EC asserts that the domestic industry comprising the complainants alone includes "a major proportion" of the EC producers.[52] However, this argument *assumes* that the EC was entitled to exclude fillet producers (and other categories of producer) from the domestic industry. The evidence of record shows that the EC fillet industry processes "several hundred thousand tonnes" per year.[53] This is far in excess of the meager 18,000 tonnes produced by the complainants. The EC has, therefore, not demonstrated that its domestic industry includes "a major proportion" of the production of the like products in the EC.

E. *The EC's Determination of the "Domestic Industry" Violated Articles 3 and 5 of the Anti-Dumping Agreement*

63. By defining the "domestic industry" inconsistently with Article 4.1, the EC acted inconsistently with Articles 3 and 5 of the *Anti-Dumping Agreement*. The EC argues that these are merely "consequential" claims that fail if there is no violation of Article 4.1.[54] This

[50] Norway's FWS, para. 233.
[51] EC's FWS, para. 66.
[52] EC's FWS, paras. 77 and 85.
[53] Exhibit NOR-17; Norway's FWS, para. 54.
[54] EC's FWS, paras. 60 and 61.

is wrong for two reasons. *First*, the EC incorrectly assumes that Article 4.1 imposes no obligations. In fact, as the case-law shows, Article 4.1 can be violated. *Second*, Norway's claims under Articles 3 and 5 are independent claims within the Panel's terms of reference.

64. Norway submits that the EC failed to comply with Articles 3.1, 3.4 and 3.5 because it failed to conduct an "objective examination" of the domestic industry. Notably, the domestic industry, as defined by the EC, included solely the complainants, and no other domestic producers. As the Appellate Body held in *US – Hot-Rolled Steel*, an exclusive examination of the situation of just one group of producers is not an "objective examination".[55] In this dispute, the selection of the complainants as the sole group of producers in the industry involves an egregious lack of objectivity because these producers are the most likely to be injured. The EC also violated Article 5.4 because it failed to assess whether the complaint was made "by or on behalf" of the proper domestic industry. In particular, the EC failed to include the producers of filleted products in its assessment under Article 5.4. The EC, therefore, had no legal basis to initiate an anti-dumping investigation.

F. *Sampling of the Domestic Industry Is Not Permitted by the Anti-Dumping Agreement.*

65. Norway contends that the EC acted inconsistently with Articles 3.1, 3.4 and 3.5 of the *Anti-Dumping Agreement* because it conducted an examination of certain injury factors on the basis of a sample. Although footnote 13 of the *Anti-Dumping Agreement* authorizes sampling of the domestic industry during initiation, and Article 6.10 authorizes sampling in a in a dumping determination, the *Agreement* does not authorize sampling in an injury determination.

66. The EC responds that the panel in *EC – Bed Linen* upheld the use of sampling in an injury determination.[56] This is incorrect. Although sampling was a feature of the EC's measure, the Panel expressly stated that "India has made no claim regarding the constitution of the sample, and no claim regarding the definition of the domestic industry".[57] The panel did not, therefore, address whether sampling is permitted under Article 3. The EC offers no other justification for its recourse to sampling under Article 3.

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[55] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
[56] EC's FWS, para. 95.
[57] Panel Report, *EC – Bed Linen*, para. 6.180.

67. The United States appears to argue that sampling is permitted in an injury determination on the grounds that the authority enjoys discretion in adopting a methodology to guide its injury analysis. Thus, for the United States, it seems that sampling is *always* permitted, provided the sample is based on "a reasonable set of assumptions or inferences as to the validity of the sample."[58] China also appears to argue that Members can *always* use sampling in an injury determination, provided that the sample is "sufficiently representative" of the domestic industry.[59]

68. Norway disagrees. The provision of express rules governing when and how sampling can be used in footnote 13 and Article 6.10 indicates that the absence of such rules in Article 3 is deliberate, and therefore that sampling is not permitted.

V. DUMPING DETERMINATION

A. *The Composition of the EC's Sample under Article 6.10 of the Anti-Dumping Agreement*

69. The EC chose to compose a sample on the basis of the "largest percentage of the volume of the exports … which can reasonably be investigated".[60] However, the EC included only *non-exporting and exporting producers* in the sample, and excluded all *independent exporters*. The EC thereby failed to examine the largest possible volume of exports from Norway that could have been examined. Even assuming the EC could limit its sample only to producers, the EC still failed to sample the ten producers with the largest export volumes, again violating Article 6.10.

(i) The *Anti-Dumping Agreement* contains no preference for producer over exporter data

70. The EC argues that the *Anti-Dumping Agreement* expresses a *preference* for determining "dumping" for producers, rather than exporters.[61] Thus, it says the authority has an unlimited right to choose to examine solely "producers" to the exclusion of "exporters". Norway disagrees. The *Agreement* addresses *international* price discrimination that arises when goods *are sold for export* at dumped prices. Consistent with this export focus, numerous provisions highlight the central importance of *exporters and exportation*. Article 10.6(i) actually states that "the *exporter practices dumping*". Also, Articles 4.2 and 8

[58] United States' Third Party Submission, para. 14.
[59] China's Third Party Submission, para. 33.
[60] EC's FWS, para. 126.
[61] EC's FWS, para. 144.

indicate that it is "*exporters*", and not producers, that can "*cease exporting at dumped prices*".

71. In fact, the *Agreement* refers to "exporters" much more frequently than it does to foreign "producers".[62] Also, every provision that refers to exporters and foreign producers together, refers to exporters first.[63] None of this suggests that the EC is correct that the *Agreement* places "producers" in a preferential position, to the exclusion of "exporters".

72. The EC also claims that the definition of normal value is "intimately linked to the notion of *production* costs", which it says exporters do not have.[64] In principle, however, normal value is based on the domestic *sales prices*, *not* production costs. It is by way of exception that normal value can be calculated using production costs and, even then, Article 2 expressly envisages calculating *production costs* for *exporters*.[65]

73. Under Article 6.10, the duty to make individual dumping determinations for all known companies requires the authority to investigate *all known exports* that may involve "dumping". Under the sampling rule used by the EC, the authority must approximate this general requirement as closely as possible by composing a sample of the "*largest percentage of the volume of the exports*". This sampling rule refers exclusively to the export "volume", without mentioning "exporters or producers". The provision does not, therefore, confer any right for the authority to *choose* between exporters and producers with a view to *diminishing* the volume of exports investigated.

(ii) The exclusion of Salmar and Bremnes

74. Even if the EC were permitted to exclude exporters, the EC did not meet its own standard because it left out two of the ten companies with the largest export volumes, namely Salmar and Bremnes.

[62] Articles 2.3, 2.4.1, 3.7, 4.2, 6.1.1 (footnote 15), 6.1.3, 6.1.3 (footnote 16), 7.4, 8.1, 8.2, 8.3, 8.4, 8.5, 8.6 and 10.6(i).

[63] Articles 2.2.1.1, 2.2.2, 4.1, 5.2, 6.1.1, 6.10, 6.10.1, 6.10.2, 6.11, 9.4, 9.5 and 12.2.2. Article 9.5 has four references to "exporters or producers", and one reference to "producers or exporters". No other provision refers to "producers" first.

[64] EC's FWS, para. 144.

[65] Article 2.2.1.1 ("…cost shall normally be calculated on the basis of records kept by the exporter…"; "Authorities shall consider all available evidence on the proper allocation of costs, including … allocations [that] have been historically utilized by the exporter…"); Article 2.2.2 ("…actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter…").

75. The EC argues that it was not aware of Salmar and did not have information on its export volume until it was too late for the sample to be changed.[66] The EC also says that FHL "made no effort to bring [Salmar] to the EC authorities' attention" and that FHL's list of the "largest exporters" of 18 November "did not include Salmar".

76. This is wrong. In fact, FHL's proposed sample of 18 November *included* Salmar and was timely submitted almost a week before composition of the sample.[67] Salmar was not included in FHL's list of *exporters* because Salmar is not an *exporter*, but a *producer*. In any event, the EC's sudden focus on the largest exporters is anomalous given that it insists it could reject exporters in favor of producers – of which Salmar was one of the largest.

77. The EC admits that it deliberately left out Bremnes in favour of other producers with *smaller* export volumes.[68] The EC's defense rests entirely on the fact that Bremnes was not proposed by FHL.[69] However, one reason that Bremnes was not proposed by FHL is that FHL requested the inclusion Norway's largest exporters in place of further producers. Disregarding the preference in Article 6.10.1 for the sample to be chosen "with the consent of" interested parties, the EC refused that request. In any event, the consultations process under Article 6.10.1 does not relieve the investigating authority of its obligations under Article 6.10.

B. *Cost Recovery under Article 2.2.1 of the Anti-Dumping Agreement*

78. Norway now turns to the cost recovery test under Article 2.2.1. Article 2.2.1 states that sales may be rejected by reason of price solely if the investigating authorities "determine" that the conditions in that provision – including the cost recovery test – have been met. The Appellate Body has made clear that a "determination" of an investigating authority cannot leave anything "merely implied or suggested; it must be clear and unambiguous [as well as] straightforward".[70]

79. The EC's rejection of sales by reason of price does not even mention the term "cost recovery", far less make a determination that the prices do not provide for cost recovery in a

[66] EC's FWS, para. 189.
[67] *See* Exhibit EC-4.
[68] EC's FWS, para. 191.
[69] EC's FWS, para. 191.
[70] Appellate Body Report, *US – Line Pipe*, paras. 194 and 217; Appellate Body Report, *US – Steel Safeguards*, paras. 296 and 442.

reasonable period. Before the Panel, the EC does not even assert that it made a determination on cost recovery. For this reason alone, the EC has violated Article 2.2.1.

80. The EC devotes much energy to defending claims that Norway never made. Specifically, it argues that it made determinations relating to the first and second conditions in Article 2.2.1, that is, that below cost sales were made within an extended period and in substantial quantities. It notes that its test for substantial quantities is the same as the test in footnote 5 for substantial quantities. However, these arguments do not address the failure to make a determination for the separate condition in Article 2.2.1 relating to cost recovery.

C. *Rejection of Actual Sales Data Because of the Low Volume of Sales*

81. Norway now turns to its claim under Article 2.2.2. For administrative, selling and general ("SG&A") costs and for profits, the EC used actual sales data only when the following three volume-related conditions were met: *first*, overall domestic sales of the product as a whole had to exceed 5 percent of export sales;[71] *second*, the same 5 percent volume test had to be met for each model that was exported and, *third*, the above-cost sales for a model had to exceed 10 percent of total sales of the model.[72] Applying this approach, the EC rejected using actual sales data to calculate profit margins for investigated producers.[73]

82. In *EC – Tube or Pipe*, the panel and the Appellate Body agreed with the EC that Article 2.2.2 requires the use of "actual SG&A and profit data for sales in the ordinary course of trade" if such sales exist, *irrespective of the low volume of the sales*.[74] At the urging of the EC, the Appellate Body held:

> The *absence of any qualifying language* related to low volumes in Article 2.2.2 implies that *an exception for low-volume sales should not be read into Article 2.2.2*.[75]

83. In this dispute, on the same issue, the EC takes a very different position:

[71] Provisional Regulation, para. 27.
[72] Provisional Regulation, para. 28, referring to paras. 22 to 25.
[73] Provisional Regulation, para. 29 ("Five companies had overall representative sales but it was found that for only one company were certain types of the product concerned, which were also exported, sold on the domestic market in the ordinary course of trade"). Although not clear, the EC may have used actual sales data to calculate a profit margin for certain models for one particular producer.
[74] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 97.
[75] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 98. Emphasis added.

> … a *qualification* in respect of low volume sales should be *implied* into the first paragraph of Article 2.2.2.[76]

84. However, as the panel and the Appellate Body held in *EC – Tube or Pipe*, such a qualification cannot be read into Article 2.2.2. In the interests of "security and predictability", the EC's opportunistic change of position should be dismissed.

85. The EC applied a low volume test in each of the three situations identified above. When the EC rejected sales because the sales volume fell below 5 percent, either for the product as a whole or for models, it applied the volume test in footnote 2 of the *Agreement*. In both instances, in violation of Article 2.2.2, the EC refused to consider actual sales data because the sales volume was too low. The EC expressly confirms that it "first rejected sales on the basis of the low-volume criterion".[77]

86. The EC also rejected actual sales when the *volume* of profitable sales was less than 10 percent of total domestic sales. The EC even stated that, when the 10 percent threshold was not met, the model "was sold *in insufficient quantities* for the domestic price to provide an appropriate basis for the establishment of normal value."[78] The EC, therefore, expressly recognized that the 10 percent test is a low-volume test.

87. Before the Panel, the EC argues that, if there is less than 10 percent profitable sales, there are no sales in the ordinary course of trade ("OCT").[79] Article 2.2 does not allow a Member to disregard profitable sales that are otherwise in the OCT, just because the *below-cost sales exceed a particular volume*. Article 2.2.1 addresses below-cost sales, and does not provide for the exclusion of *all* sales just because the volume of below-cost sales reaches a particular threshold.

88. Article 2.2 also indicates that no volume threshold applies in deciding whether there are sales in the OCT. It permits the construction of normal value solely "when there are *no* sales" in the OCT. The ordinary meaning of the word "no" is "*not any*".[80] However, the EC would like to read the phrase "When there are *no* sales" to mean "When there are *10 percent* of sales". This is not acceptable.

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[76] EC's FWS, para. 253(ii). Emphasis added.
[77] EC's FWS, footnote 152.
[78] Provisional Regulation, para. 25.
[79] EC's FWS, paras. 228 to 229.
[80] *The Oxford English Dictionary*, J.A. Simpson and E.S.C. Weiner (eds.) (Clarendon Press, 1989, 2nd ed.), Volume X, page 446, column 1, meaning I.1. Exhibit NOR-151.

89. Article 2.2 also distinguishes between the conditions relating to *low-volume* sales and sales *in the OCT*.[81] In connection with low-volume sales, Article 2.2 expresses a precise volume threshold in footnote 2. Further, in connection with below-cost sales, Article 2.2.1 also expresses a precise volume threshold in footnote 5. If the drafters had also intended to apply a low-volume test to sales in the OCT, they would have so specified. Thus, the EC is incorrect in asserting that a low volume of profitable sales amounts to no sales in the OCT.

90. Finally, the EC provides no response to Norway's claims that the determination incorrectly states that SG&A data was accepted for all companies, even though the EC rejected actual SG&A data for one company. [82]

D. *Facts Available and Article 6.8 (Grieg)*

91. Norway turns now to the use of facts available for Grieg. For calculating Grieg's filleting and financing costs, the EC rejected perfectly valid and usable data supplied by Grieg and, instead, resorted to "facts available". This use of "facts available" was contrary to Article 6.8 and Annex II to the *Anti-Dumping Agreement*.

(i) Filleting costs

92. The EC rejected Grieg's filleting costs and instead used costs obtained from a secondary source. The EC argues that, in so doing, it did not use facts available because the EC got the information from a secondary source "that they could trust to give a proper commercial figure and which had been verified."[83]

93. The EC appears to believe that Article 6.8 applies solely when the available facts are *adverse* to the interests of the investigated company. Norway disagrees. Article 6.8 applies whenever an authority uses "*best* information available" "from a secondary source".[84] Even the EC referred to the filleting information it used as "best information available".[85] The "best information" need not be adverse. However, even accepting the EC's definition, the EC did use adverse facts because the filleting costs used by the EC were *higher* than those supplied by Grieg.

[81] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 99.
[82] Norway's FWS, paras. 381 to 382.
[83] EC's FWS, para. 290.
[84] Title of Annex II of the *Anti-Dumping Agreement* and Annex II(7).
[85] Cost of Production Note from the Commission to Grieg, p. 2, point 3 (Exhibit NOR-55).

94. The EC's second argument on filleting costs is that this information was not "verifiable" within the meaning of Annex II(3) because it was supplied in March 2005, after the January verification visit. The EC submits that Norway has not demonstrated how verification could have taken place without a further verification visit to Norway.[86] In fact, the EC could have easily verified Grieg's filleting data, for instance, by requesting the company to send invoices, bank statements or other proof of payment, and/or copies of the company's ledger.

95. Grieg was also denied an effective opportunity to provide "further explanations" regarding its filleting costs, as required by Annex II(6):

- The EC first gave written notice on 8 March 2005 in the Cost of Production Note that the "information" in its questionnaire on filleting costs was "not accepted".[87] The EC invited Grieg to provide "comments".[88]

- Grieg provided comments, with evidence of filleting costs, one week later.[89] This amounts to "further explanations" that were submitted within a "reasonable period" under Annex II(6).

- The EC did not accept Grieg's "further explanations" in the Provisional Disclosure but undertook to "*re-examine*" the issue.[90] Contrary to Annex II(6), the EC gave no "reasons" for rejecting Grieg's explanations, including its evidence of filleting costs.

- Without the promised "re-examination", the EC rejected the "further explanations" in the Definitive Disclosure because the data was not verified in January – two months *before* Grieg was invited to give the explanations. During this time, the EC made verification visits to EC processors.

96. By definition, any information that Grieg submitted *after* the invitation to comment made on 8 March 2005 could not have been verified in January of that year. The EC, therefore, reduced to a nullity Grieg's right to provide "further explanations" on its filleting costs.

97. The EC claims to have raised Grieg's filleting costs orally during verification. Norway does not consider that Annex II(6) permits an authority to "inform" a producer *orally* of the "reasons" for a perceived deficiency in its questionnaire. Due process and certainty

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[86] EC's FWS, para. 296.
[87] In its questionnaire response, Grieg took the view that it did not produce fillets because it paid a processor, Triton, to produce fillets. However, the EC disagreed and required Grieg to present costs for the volume of fillets prepared by Triton.
[88] Cost of Production Information Note. Exhibit NOR-55.
[89] Exhibit NOR-56.
[90] Exhibit NOR-58.

require that the reasons be stated in writing. However, even if oral deficiency notices are permitted, the EC was obliged to give Grieg a "reasonable period" to provide "further explanations". By raising the issue during verification, and expecting Grieg to respond *immediately*, the EC did not provide Grieg with a "reasonable period".

98. Finally, contrary to the EC's argument, Annex II(6) is binding because it is incorporated into Article 6.8.[91]

(ii) <u>Financing costs</u>

99. The EC admits that it rejected the finance costs supplied by Grieg and instead calculated costs using the interest rates of the Central Bank of Norway. Again, it argues that this does not amount to use of facts available. Norway has explained its disagreement already: an authority uses facts available whenever it replaces information from an investigated company with information from a secondary source.[92] Here Grieg's interest costs were replaced with the Central Bank's.

100. The EC contends that it rejected Grieg's interest costs because the loans in question were inter-company.[93] However, the EC is factually incorrect because Grieg's loans were external loans with interest expenditures certified by a bank statement.[94] There was, therefore, no reason to reject the rates on these loans. The inter-company loan the EC mentions was, in fact, a loan *from Grieg to the parent company* that generated income for Grieg.[95] There was, therefore, no reason to apply any interest rate to this loan. The EC does not otherwise address Norway's arguments under Article 6.8 and Annex II with respect to financing costs.

E. *Treatment of Non-Sampled Companies under Articles 6.8 and 9.4 of the Anti-Dumping Agreement*

(i) <u>Article 9.4 of the *Anti-Dumping Agreement*</u>

101. Norway argues that the weighted average dumping margin of 14.8 percent assigned to cooperating non-sampled companies violated Article 9.4 because the EC: (a) incorrectly

[91] Appellate Body Report, *US – Hot-Rolled Steel*, para. 75; Panel Report, *US – Steel Plate*, para. 7.56; and Panel Report, *Egypt – Steel Rebar*, para. 7.152.
[92] *See* para. 93 above.
[93] EC's FWS, para. 307.
[94] *See* Exhibit NOR-56 (p. 7, entitled "Enclosure 2").
[95] *See* Exhibit NOR-57 (p. 16, entitled "Exhibit C").

calculated that margin – something the EC now acknowledges[96] – and (b) failed to exclude from the calculation Grieg's margin, which was based on facts available.[97] Separately, Norway also claims that the "residual margin" of 20.9 percent assigned to non-cooperating non-sampled producers violates the maximum weighted average margin under Article 9.4 and includes Grieg's normal value.[98]

102. The EC accepts that it made dumping determinations for non-sampled companies, but argues that Article 9.4 does not apply to these determinations because the level of the anti-dumping *duties* is not based on those margins.[99] The percentage margins would be important, it says, only if the EC had imposed *ad valorem* duties. Thus, the EC seeks to evade the consequences of its authority failings by arguing that they are without practical effect. However, in fact, the EC expressly relied on the weighted average margin of dumping in determining the level of fixed duties.[100] Thus, this determination is of legal effect.

103. Further, in this dispute, by its own admission, the EC has made the two separate dumping determinations for non-sampled companies. These determinations are not without legal significance. Even in these proceedings, the EC relies on its determination that non-sampled companies were dumping.[101] The companies subject to these margins may find that the determinations have a chilling effect on trade. Further, the EC could switch to *ad valorem* duties at any time by amending the remedy, in which case the incorrect margins would be determinative of the duties imposed. Indeed, the EC initially imposed provisional *ad valorem* duties. The margins determined by the EC must, therefore, conform to Article 9.4.

(ii) Article 6.8 and Annex II

104. Norway claims that the EC violated Article 6.8 by applying facts available with respect to non-sampled companies. The EC "questions" whether Article 6.8 applies "when facts available have been invoked in order to determine a dumping margin", but the dumping duty is not set according to this margin.[102] Again, the EC seeks to evade the failings of its authority by arguing that they are without effect. In fact, the EC made determinations for the

[96] EC's FWS, para. 312.
[97] Norway's FWS, paras. 470 to 477.
[98] Norway's FWS, paras. 478 to 481.
[99] EC's FWS, paras. 312 and 313, and 322.
[100] Definitive Regulation, para. 136.
[101] EC's FWS, paras. 346 and 416.
[102] EC's FWS, para. 322.

non-cooperating, non-sampled companies using facts available. Article 6.8 must, therefore, apply.

105. The EC argues that it complied with Article 6.8 because it provided a notice of initiation to known companies and to industry associations. The EC's arguments must be rejected. Similar to *Mexico – Rice*, the companies that are subject to the residual margin received no notifications, at all, from the EC (Annex II(1)).[103] Also, having concluded that certain companies had not provided necessary information, the EC did not inform any of them of the information that was missing (Annex II(6)); it did not give them a chance to provide further explanations in a reasonable period (Annex II(6)); and, it did not state how the alleged non-cooperation hindered the investigation (Article 6.8). The EC, therefore, did not comply with Article 6.8 and Annex II.

106. Finally, on 2 June 2005, at the request of FHL, the investigating authority held a meeting with the allegedly "non-cooperating" companies.[104] At that meeting, representatives of the companies explained their situation to the authority and offered to cooperate fully in the investigation.[105] The EC did not request any information from any of the companies.

VI. INJURY

A. *Volume of Dumped Imports*

107. Norway's first claim on injury is that the EC incorrectly determined the volume of dumped imports. *First*, the EC treated *all* imports from Norway as dumped, although it had examined dumping for a sample of Norwegian producers accounting for just 30 percent of imports.[106] The EC also simply assumed that a sample containing exclusively *producers* permitted it to draw conclusions regarding dumping by *exporters*. Although the EC assumed that all independent exporters were dumping, it steadfastly refused to include any of them in the investigation. *Second*, the EC treated all imports from Norway as dumped, even though it found that one sampled producer was dumping at *de minimis* levels.

[103] Norway submits a list of those companies in Exhibit NOR-152; this list was submitted to the EC in Annex 2 to a letter from FHL of 4 May 2005.
[104] Letter from FHL to the Commission of 4 May 2005, p. 3 (Exhibit NOR-152).
[105] Memorandum from FHL to the Commission, paras. 6 to 9, and 17 (Exhibit NOR-153).
[106] EC's FWS, para. 340.

(i) The EC Had No Positive Evidence that Independent Exporters Are Dumping

108. The EC argues that the Appellate Body Report in *EC – Bed Linen (21.5)* authorizes it to conclude that *non-sampled independent exporters* were dumping because it had found that *sampled producers* were dumping.[107] However, the EC overlooks that the Appellate Body expressed reservations about the use of extrapolation in cases where the sample is not "statistically valid", but is based on the largest percentage of exports.[108] In this dispute, the EC composed a sample that was not statistically valid.

109. In such a situation, the Appellate Body cautioned that evidence from the sample could be used as one "*part* of the positive evidence" regarding the volume of dumped imports from non-sampled companies.[109] There must, therefore, be *other* "positive evidence" to justify the determination made regarding dumped imports from non-examined companies. In this dispute, the need for additional "positive evidence" is acute because the sample included solely *producers*, whereas the EC extrapolated from the sample to draw conclusions regarding *independent exporters*.

110. The EC has not explained why a dumping determination pertaining to *producers* accounting for a minority of exports permits conclusions to be drawn about the pricing behaviour of independent *exporters* that account for the majority of exports. Moreover, contrary to what the Appellate Body requires, the EC did not offer any *additional* "positive" evidence to support its extrapolations regarding independent exporters.

111. The EC now tries to rely on new evidence in the form of Exhibit EC-10 to justify its extrapolation.[110] This Exhibit introduces new data purporting to show aggregate export pricing data for two large groups of non-sampled Norwegian companies. However, this evidence is *not* part of the record of the investigation. Exhibit EC-10 was also never disclosed in the investigation to allow comment by interested parties. Norway requests the Panel to strike this Exhibit from the record because the Panel cannot conduct a *de novo* review of the significance of this new evidence.

112. In any event, Exhibit EC-10 does not provide "positive evidence" that imports from independent exporters were dumped. As noted, the Exhibit gives aggregate export pricing

[107] EC's FWS, paras. 336 to 344.
[108] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[109] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 138.
[110] EC's FWS, para. 345.

data for two groups of non-sampled companies. The EC uses this data to argue that non-sampled companies are all dumping.[111] However, this data does not indicate any such thing because it merely addresses export prices for large groups of companies. Also, according to the Exhibit, the prices of the non-sampled companies are based simply on an extrapolation from the prices of sampled companies.

113. To justify extrapolation from producers to exporters, the EC also argues that it is irrelevant whether a product is exported by a producer or an independent exporter. The reason is that an independent exporter simply replaces a producer's "in-house exporting department".[112] This ignores commercial reality. Independent exporters and producers are distinct operators, with very different business models and cost structures.[113] Independent exporters source products from a range of producers and sell on a far larger scale than an "in-house export department". This lowers their per unit selling and general costs. It cannot be assumed that dumping by exporting producers necessarily means that independent exporters are dumping.

114. As further alleged evidence of dumping by independent exporters, the EC refers to the fact that it examined sales by producers that were exported to the EC via independent exporters. The fact that these imports were dumped, says the EC, is evidence for dumping by independent exporters.[114]

115. However, a "dumping" determination for an independent exporter involves a comparison of that exporter's export prices with that same exporter's normal value. The EC did not establish normal value for the independent exporters. Its argument appears to assume that the independent exporter's normal value is identical to the normal value of one of its potentially many producing suppliers. There is no basis for this assumption. Also, the comparisons actually made by the EC concern only a small number of the exporter's export sales relating to its purchases from one of potentially many suppliers. Dumping would have to be established on the basis of all the exporter's sales.

[111] EC's FWS, para. 345.
[112] EC's FWS, para. 334.
[113] Norway's FWS, para. 300.
[114] EC's FWS, para. 342.

116. The EC also states that Norway did not comment on dumping margins for non-sampled companies during the investigation.[115] Norway did not comment on the weighted average margin determined under Article 9.4 for cooperating companies. However, as the Appellate Body held in *EC – Bed Linen*, that margin provides no positive evidence of dumping.[116] With respect to so-called non-cooperating companies, the EC's statement is false. The residual margin of dumping was raised by Norway a number of times following the Provisional Determination, including at the ministerial level.[117]

(ii) The EC Treated Imports from Nordlaks as Dumped

117. Finally, Norway recalls its claim that the EC was bound to treat the imports of Nordlaks as non-dumped, because it found only a *de minimis* dumping margin for that company. Contrary to the EC's arguments, imports from a producer or exporter with a *de minimis* dumping margin may not be treated as "dumped" for purposes of the injury determination.[118] Thus, the EC was not entitled to include Nordlaks' imports in the volume of dumped imports. Similarly, the EC was obliged to take this fact into account in determining the volume of dumped imports attributable to non-sampled companies.

118. The EC admits that it failed to exclude imports relating to Nordlaks from the volume of dumped imports. However, it argues that the exclusion of Nordlaks would not alter the determination.[119] The EC's arguments are, yet again, based on new evidence in Exhibit EC-12 that is not part of the record. Norway requests that the Panel strike this exhibit from the record because the Panel cannot conduct a *de novo* review of the significance of this new evidence.

B. *Price Undercutting*

119. Norway challenges the EC's determination on price undercutting because the EC failed to take into account a fundamental fact: namely, that EC producers enjoy a considerable price premium over the prices of imported Norwegian salmon. The EC was

[115] EC's FWS, para. 346.
[116] Appellate Body Report, *EC – Bed Linen (21.5 – India)*, para. 124.
[117] Note Verbale 27 May (Exhibit NOR-31), p. 5. *Pour Mémoire* of 9 May 2005 (Exhibit NOR-154). Letter of 2 June 2005 from Jan Petersen, Minister of Foreign Affairs of Norway, to Trade Commissioner Peter Mandelson (Exhibit NOR-155).
[118] Panel Report, *EC – Bed Linen*, para. 6.138. *See also* Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 130. *See* EC's FWS, para. 348.
[119] EC's FWS, para. 351.

fully aware of this factor, which was documented in the record and referred to in the EC's Definitive Disclosure.[120]

120. Norway has explained that Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* require an authority to take account of any factor that affects price comparability.[121] Panels have stated that factors influencing a price comparison must be taken into account in a price undercutting analysis. Panels have identified factors such as "market perceptions" and "brand loyalty" – which lead to a price premium – as such factors.[122]

121. In the Definitive Regulation, the EC gave no reasons to explain why the price premium was not relevant to the price undercutting analysis. Instead, the reference in the Definitive Disclosure to the price premium simply disappeared in the Definitive Regulation. Panels have ruled that "while the authorities may determine that some factors are not relevant … the authorities may not simply disregard such factors, but *must explain their conclusion as to the lack of relevance or significance of such factors*."[123] The EC did not satisfy this requirement.

122. For the first time, the EC offers the Panel reasons for ignoring the price premium. These are, essentially, that the price premium *could not* affect the price undercutting analysis. According to the EC, in a market distorted by dumping, domestic producers cannot enjoy a price premium.[124] However, a price premium does not *disappear* in the face of dumping because the EC consumer is *always* willing to pay 12 percent more for the EC product. The EC consumer pays this premium because of a perception of the difference between the products. The consumers' perception is not affected by the fact that imports are sold below a normal value that is unknown to the consumer. Norway wishes to underline that the EC's justification for ignoring the price premium are irrelevant *ex post* rationalization.

123. The EC now also argues that, if the price premium is taken into account, the price undercutting is just 1.44 percent, and not the 12 percent determined in the contested measure.[125] The EC, thereby, urges the Panel to make a new determination of price undercutting that differs from the determination in the measure. The Panel cannot make new

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[120] Norway's FWS, paras. 528 and 531 to 538.
[121] Norway's FWS, paras. 542 to 547.
[122] Panel Report, *EC – Tube or Pipe*, para. 7.293. Panel Report, *Indonesia – Autos*, 8.400.
[123] *See* Panel Report, *EC – Bed Linen,* para. 6.162; Panel Report, *Mexico – Corn Syrup*, para. 7.129; and Panel Report, *Argentina – Poultry*, para. 7.324. Emphasis added.
[124] EC's FWS, para. 362.
[125] EC's FWS, para. 365.

determinations without conducting an impermissible *de novo* review. In any event, price undercutting of 1.44 percent is not "*significant*" within the meaning of Article 3.2.

C. *Price Trends*

124. Norway now turns to the EC's examination of the EC producers' sales prices. To recall, in the injury determination, the EC examined certain financial indicators for a sample of just five Scottish companies. In so doing, the EC found that the companies' sales prices declined by *9 percent* when measured in euros.

125. Norway claims that the material currency for examining the situation of these companies is pounds sterling, and not euros. During the period considered, the euro appreciated against the pound by almost exactly *9 percent*. Thus, from the perspective of the examined companies, *no price decline* affected their financial performance because of the movement in currencies.

126. The EC argues that Norway has invented a new legal test, namely that of an "operating currency". However, Norway uses this very common term to reflect the fact that the financial performance of the sampled Scottish companies' operations is measured in pounds sterling – *even by the companies themselves*. The companies are all located in Scotland. Most, if not all, of their costs and other financial commitments are settled in pounds sterling, and all five companies keep their accounts in pounds sterling.[126]

127. The Appellate Body has stated that the evidence examined by an investigating authority must be "material", "relevant and pertinent to the issue to be decided".[127] In this case, the material, relevant and pertinent evidence for examining the financial performance of the Scottish companies, in particular their sales prices, is pounds sterling. Contrary to the EC's views, an injury examination must be conducted in a currency that is "material" to the financial performance of an industry. Or, if it is not, it must take into account the impact of currency movements on the companies.

128. The EC points out that a minority of EC producers are located in Ireland, which uses the euro. This does not, however, warrant the use of euros to examine a sample that included only Scottish companies. Moreover, even if the EC had examined Scottish and Irish

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[126] *See* the 2003 and, in some cases, 2004 financial statements for the five sampled Scottish companies, obtained from the Companies House, Edinburgh, Scotland. Exhibit NOR-73.
[127] Appellate Body Report, *Mexico – Rice*, para. 165.

companies together using euros, it was obliged to take into account the effect of currency movements on the Scottish companies' sales prices.

129. As so many times in its submission, the EC attempts to bolster the flawed analysis of its authority by submitting new facts and new explanations to the Panel. Thus, in Exhibit EC-13, the EC introduces new data that "only" 72 percent of sales by Scottish companies were made in the UK, whereas 28 percent of sales were made *outside the UK* in unspecified currencies. This Exhibit is inadmissible because it presents new evidence that is not part of the record. The EC also adds other new evidence in its submission regarding the sales volume of Irish companies, which is also inadmissible.[128]

130. In any event, the new evidence does not show that it was proper to examine the sales prices of Scottish companies in euros. In fact, quite the contrary, the new evidence shows that just 28 percent of the sampled companies' sales were made outside the UK. The vast majority of sales were made in pounds sterling. Further, even assuming that the minority of non-sterling sales were all in euros, the Scottish growers would have had to exchange the euros into pound sterling to meet their costs in pound sterling. The EC's new evidence, therefore, *reinforces Norway's position* that the EC was obliged to examine the sampled companies' sales prices in pounds sterling. Given the currency movements, the sterling-value of sales did not decline.

131. The EC argues that, even if prices had been examined in pounds sterling, the authority's injury determination would be unchanged.[129] The EC's argument urges the Panel to conduct a *de novo* examination of the evidence in pounds sterling, and to reach to its own conclusion that the domestic industry was injured.[130] Needless to say, this is not the task of a panel under the *Anti-Dumping Agreement*.

132. The EC also argues that, even if there were no price decline, the authority's injury determination would be unchanged because the sampled companies were selling below cost of production and were incurring losses during most of the period under consideration.[131] This is a misrepresentation of the Definitive Regulation which states that the determination of material injury is based on the totality of the negative factors, including sales prices in

[128] EC's FWS, para. 387.
[129] EC's FWS, paras. 383 to 388.
[130] EC's FWS, paras. 381, 389 to 391.
[131] EC's FWS, paras. 389 to 391.

euros.[132] The EC cannot now present *ex post* reasoning that asks the Panel to conduct a *de novo* examination and conclude whether the other injury factors alone support an injury determination.

VII. CAUSATION

A. *Increased Costs of Production of EC Producers*

133. One causal factor that the EC failed to examine was the EC producers' increased costs of production. As Norway noted, FHL expressly identified this factor to the EC in the course of the investigation.[133] Moreover, evidence showing the increased costs are part of the investigation record.[134] The EC even recognizes that "it has been established that the *production costs did increase*."[135] FHL explained the significance of the cost increases to the situation of the domestic industry: if costs had not increased, the domestic industry would have remained profitable.[136] In the investigation, the EC failed to examine this factor and, therefore, failed to ensure that the injury caused by cost increases was not improperly attributed to dumped imports.

134. Instead of examining this factor, the EC purported to *compare* the costs of EC and Norwegian producers. It concluded that there was no difference between them. The EC now claims that this comparison of costs was the only way to examine whether the "failure by the Community producers to reduce production costs" was another factor causing material injury.

135. This is nonsense. In an injury determination, what matters is the financial performance of the domestic industry. There is no need for an authority to gather evidence under Article 3 to compare the *relative situation* of the domestic industry with the situation of foreign producers in *other* countries. Indeed, the injury caused to the domestic injury by a particular factor – such as increased costs – is not lessened just because the same factor is simultaneously causing injury to a foreign industry. The EC has not pointed to any text in Article 3 that suggests that an authority must gather and analyze evidence pertaining to the situation of foreign producers in an injury determination.

[132] Definitive Regulation, para 82.
[133] Norway's FWS, paras. 582 to 583.
[134] Norway's FWS, para. 584 and Table 7 therein.
[135] EC's FWS, para. 413. Original emphasis.
[136] Norway's FWS, para. 586.

136. Although the EC freely admits that EC production costs increased,[137] it contends that Norway did not prove that these increased costs *caused injury to the EC industry*.[138] Norway disagrees because it has shown that, absent increased costs, the industry would have remained profitable.[139] It also stands to reason that increased cost will prejudice the financial situation of an industry. In any event, it is not for the *complainant* to prove that a known factor *did* cause injury to the domestic industry. Instead, it was the EC's duty to explain in the measure why this factor caused *no* injury; or, if it did, to ensure that this injury was not attributed to dumped imports. The EC did neither of these things.

B. *Imports of Salmon from the United States and Canada*

137. Norway claims that EC's determination fails to provide an explanation disclosing how the evidence of record supports the EC's determination that salmon imports from Canada and the United States caused no injury to the domestic industry. The EC did not refer to *any evidence* on the record to support its findings that: (1) the vast majority of imports from these countries consists of wild salmon; and (2) farmed and wild salmon do not compete. Thus, the EC's non-attribution finding is based on a series of unsubstantiated assertions. In fact, in addition to offering *no affirmative evidence*, the EC failed to address evidence on the record that *contradicts* its findings.[140]

138. The EC replies that it was not obliged to justify its determination with an explanation that addresses the relevant facts. The EC appears to assert that the requirements of a reasoned and adequate explanation do not apply in this investigation. Norway will not repeat its summary of the case-law regarding a reasoned and adequate explanation.[141] In short, contrary to the EC's view, an authority's explanations must "disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it."[142] The authority must set out the "evidentiary path" leading from the evidence to the authority's

[137] EC's FWS, para. 413. Original emphasis.
[138] EC's FWS, paras. 410 ff.
[139] Norway's FWS, para. 586.
[140] Norway's FWS, paras. 612 to 615.
[141] Norway's FWS, paras. 32 to 43.
[142] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, citing Appellate Body Report, *US – Lamb*, para. 106. Underlining added.

determinations.[143] The EC's explanation fails to disclose any evidence, far less "an evidentiary path" leading from the record to its determinations.

139. The EC also argues that Norway has failed to produce any evidence to *disprove* the authority's *unsubstantiated* factual *assertions*.[144] However, an authority cannot rely on unsubstantiated assertions and require other WTO Members to prove that these are wrong. Instead, the authority must show in the published determination that its assertions are rooted in the facts in the record. Norway has demonstrated that the EC failed to comply with this obligation.

140. Besides contesting the need for a reasoned and adequate explanation, the EC also defends the substance of its conclusions. Remarkably, it now seeks to justify its measure by asking the Panel to *disregard* data in the published determination, and to consider instead new import data and new reasoning.[145] Again, it is totally unacceptable for the EC to submit new evidence because the measure must be assessed on the basis of the record before the authority. The Panel cannot conduct a *de novo* review of injury caused by imports from Canada and the United States. Norway requests that the Panel, therefore, exclude Exhibits EC-14 and EC-15, which relate to the new import statistics.

141. In any event, even the new evidence does not make the EC's case. The volume of imports from Canada and the United States is unchanged in the new evidence and is still sufficient to cause injury. The EC now accepts that wild and farmed salmon *do* compete for sales as a fresh product.[146] This hardly supports its finding to the contrary in the Definitive Regulation.[147] The EC has pointed to no evidence of record concerning its findings regarding the use of wild salmon for tinning and canning.[148] It now also contends that wild salmon is sold for *unidentified end uses* in *unidentified markets* in which farmed salmon *allegedly* does not compete.[149] This new reasoning is not admissible and is, in any event, not supported by facts. The EC also refers to "industry knowledge" as the basis for its

[143] Appellate Body Report, *US – Softwood Lumber VI (21.5 - Canada)*, para. 97.
[144] EC's FWS, paras. 440 and 447.
[145] EC's FWS, paras. 431 ff.
[146] EC's FWS, para. 452.
[147] EC's FWS, para. 85.
[148] EC's FWS, para. 85.
[149] EC's FWS, para. 451. Wild salmon is sold "in *different forms* and into *different markets* than farmed salmon." Emphasis added.

conclusion.[150] However, an investigating authority cannot merely assert that certain facts are within "industry knowledge", unless it gathered positive evidence to substantiate these facts.

142. In sum, the EC provides no evidence of record to support its findings on imports from Canada and the United States, and on competition between farmed and wild salmon. The *only* evidence in the record that Norway can find regarding this issue suggests that, contrary to the EC's conclusion, wild and farmed salmon *do* compete.[151]

VIII. MIPs

143. Norway makes three claims against the EC's MIPs:

- *First*, the EC's MIPs exceed the normal values determined for the investigated producers. This is a violation of Article VI:2 of the GATT 1994 and of Article 9.2 of the *Anti-Dumping Agreement*.
- *Second*, the MIPs exceed the weighted average normal value of the individually examined producers, which is the maximum limit for *non-sampled companies*. This is a violation of Article VI:2 and Article 9.4(ii) of the *Anti-Dumping Agreement*.
- *Third*, the amount of duties imposed on individually examined producers is not limited by the margin of dumping for those producers. This is inconsistent with Article VI:2 of the GATT 1994, and Articles 9.1 and 9.3 of the *Anti-Dumping Agreement*.

144. The EC's response to Norway's first two claims is terse. The EC makes no attempt, whatsoever, to refute Norway's carefully substantiated calculations of the relevant normal values. The EC's only response is the bald assertion that Norway is "wrong", without providing any supporting reasons, facts or figures.[152] With respect to Norway's third claim, the EC argues that the *Anti-Dumping Agreement* or Article VI of the GATT 1994 contain no cap limiting the amount of MIPs to the dumping margin determined for an individual producer. The essence of the EC's argument is that, if the MIPs exceed the dumping margin, the importer may obtain a refund under Article 9.3.2.

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[150] EC's FWS, para. 441.
[151] *See* sections of the Laschinger web site, www.laschinger.de, on Coho and Sockeye Salmon, and on the location of Laschinger's facilities. Exhibit NOR-97. Letter from Dirk Abrahams Räucherei & Spezialitäten to the EC, 7 June 2005. Exhibit NOR-79. Letter from the Food and Drink Federation to the EC, 8 November 2005. Exhibit NOR-80.
[152] EC's FWS, para. 496.

A. *The MIPs Exceed Individual and Weighted Average Normal Values*

145. Norway has provided evidence to demonstrate that the EC's MIPs exceed the individually determined normal values, and also the weighted average normal value. Table 9 in Norway's First Written Submission demonstrates that the MIPs exceed the relevant *individual normal values* in 38 out of 42 examined instances (7 companies and 6 product bundles). Moreover, the MIPs exceed the *weighted average normal values* for all six product bundles. Norway has therefore made *a prima facie* case that the EC's MIPs exceed individual and weighted average normal values and are, therefore, in violation of Articles 9.2, 9.4 and VI:2.

146. The EC's response to Norway's claims is terse indeed. The EC makes no attempt, whatsoever, to refute Norway's carefully substantiated calculations of the relevant normal values. The EC's only response is the bald assertion that Norway is "wrong", without providing any supporting reasons, facts or figures.[153] Nonetheless, the EC failed to reveal its own calculations of the various normal values, as well as its calculation of the MIPs.

147. Thus, the EC continues to assert, without supporting evidence, that the MIPs are lower than normal value. Whilst denying the Panel an opportunity to review the EC's own calculations, the EC also argues that the Panel may not calculate normal values itself because this is the job of the investigating authority.[154] The EC seems to expect Norway and the Panel to trust that the MIPs are, indeed, lower than normal value. However, absent any rebuttal evidence from the EC, the Panel must find for Norway.

148. Finally, as an interpretive matter, the EC accepts that MIPs may not exceed normal value. This is also the view of the United States and Japan.[155] However, the EC refers to a normal value "adjusted … to a CIF Community frontier level".[156] If the EC is suggesting that the limit of MIPs is normal value *plus some additional amount*, Norway disagrees. The EC is unable to point to any text that authorizes a Member to increase the prospective reference price beyond normal value, which provides the threshold of fair pricing in Article 2.1 and Article VI:1.

[153] EC's FWS, para. 496.
[154] EC's FWS, para. 461.
[155] United States' Third Party Submission, para. 28. Japan's Third Party Submission, para. 24.
[156] EC's FWS, para. 463.

B. *The MIPs Are Not Limited to Individual Dumping Margins*

149. Norway also claims that the EC's variable anti-dumping duties may not exceed the individual *dumping margins* determined for sampled companies, contrary to Articles 9.1, 9.2, 9.3 and Article VI:2 of the GATT 1994. This is because there is no cap in the EC's measure that limits the duty to the dumping margin.

150. The EC argues that no such cap is required by the *Anti-Dumping Agreement* and the GATT 1994 *when variable duties are imposed.*[157] According to the EC, the margin of dumping serves as a limit on the amount of duties solely when duties are imposed in *ad valorem* form. As the EC would have it, it is permissible that the amount of duty imposed under a MIP exceed the dumping margin.

151. Articles 9.1 and 9.3, and Article VI:2, govern the imposition and collection of duties on individually examined producers and exporters. Each of these provisions states expressly that anti-dumping duties *cannot* exceed the margin of dumping. None provides that this ceiling applies solely in the case of *ad valorem* duties and not in the case of variable duties. Indeed, all of these provisions apply, in the same way, whether *ad valorem* or variable duties are imposed. There is simply no basis in the text for the EC's view that the margin of dumping serves as a limit on the amount of duties solely in the case of *ad valorem* duties.

152. The EC points to Article 9.4(ii) as a rule that allows variable duties to be imposed by reference to a prospective normal value, but does not cap duties at the level of the margin of dumping. However, as the Appellate Body held, Article 9.4 "has, by its own terms, a limited purpose as an *exception* to the rule in 9.3". Article 9.4 permits the imposition of duties on *non-examined companies* up to the limits specified in Article 9.4.[158] However, the exception in Article 9.4 does not apply to the *examined producers and exporters*. The exception cannot, therefore, override the express requirements of Articles 9.1 and 9.3, and Article VI:2, which do apply to them.

153. The EC also asserts that Article 9.3.2 envisages the imposition of duties by reference to a prospective normal value ("PNV"). Norway agrees. The EC considers that, when duties are imposed on this basis, it is unnecessary to limit the duties to the margin of dumping because an importer can always obtain a refund. However, on the EC's view, there would

[157] EC's FWS, paras. 484, 490 and 493 to 494.
[158] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 125.

also be no need in the *Anti-Dumping Agreement* to limit the amount of *ad valorem* duties initially imposed to the margin of dumping because a refund is also possible under Article 9.3.2 when these duties are imposed. This is wrong.

154. Instead, contrary to the EC's view, Articles 9.1 and 9.3, and Article VI:2, limit the amount of duties that are initially imposed to the margin of dumping. This ceiling is dictated by the *overarching principle* expressed in Article VI:2 and Article 11.1 that an anti-dumping duty is applied only "*to the extent necessary to counteract dumping which is causing injury*."[159] The margin of dumping expresses the extent to which it is necessary to impose duties.

155. The EC's argument that duties can be imposed in excess of the margin also places a very high burden on importers to devote time and money to resort to subsequent reviews. Further, even though a review is possible, the potential for the imposition of duties in excess of the margin of dumping may well have a chilling effect on trade, with importers switching to alternative sources of supply.

156. The EC also argues that the panel in *Argentina – Poultry* approved a system of MIPs that was not limited by the margin of dumping.[160] That panel's conclusions are premised on the view that, under a PNV system, a margin of dumping is determined for an individual import transaction. Thus, for that panel, the duties imposed on an import can never exceed the margin determined for that import. These findings have been discredited by the Appellate Body's ruling that margins are not calculated for individual transactions, either on importation or in reviews.[161] The amount of duties imposed on an individual transaction is *not* a margin of dumping. Instead, consistent with Articles 9.1 and 9.3, and Article VI:2, duties imposed on an individual transaction cannot exceed the margin determined in an investigation or a subsequent review for the product.

IX. FIXED DUTIES

157. Norway also challenges the EC's fixed duties. In defined circumstances, the EC imposes fixed anti-dumping duties in addition to the MIPs.[162] For a number of the

[159] Appellate Body Report, *US – OCTG Sunset Reviews (Mexico)*, para. 115. Emphasis added.
[160] EC's FWS, para. 493.
[161] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 93; Appellate Body Report, *US – Zeroing (EC)*, para. 127. The panel in *US – Zeroing (EC)* relied on the Panel Report in *Argentina – Poultry* in support of findings that the Appellate Body reversed.
[162] As described in Norway's FWS, paras. 670 to 675.

investigated companies, the *ad valorem* equivalent of that duty exceeds the dumping margin. Norway has demonstrated this in Table 10 of its First Written Submission.[163] The EC has, therefore, violated Articles 9.1, 9.2 and 9.3 of the *Anti-Dumping Agreement*.

158. The EC does not contest the correctness of Norway's calculations. Instead, the EC argues that its fixed anti-dumping duties are *not* actually anti-dumping duties, but instead "a very specialized [duty] designed to deter evasion of lawfully imposed anti-dumping duties" through fraudulent customs declarations.[164] Therefore, according to the EC, the fixed duties do not represent "specific action against dumping".[165] Instead, it says, these special duties can be justified by Article XX of the GATT 1994 as a measure "necessary to secure compliance with laws or regulations which are not inconsistent [with the GATT]".[166]

159. Although creative, this argument is wrong. While the EC now says that its fixed duty is not an anti-dumping measure, Article 1(5) of the EC's own measure states precisely the contrary. It provides that, in defined circumstances, "the *fixed anti-dumping duty* set out in column 3 of the table below shall apply".[167] Thus, long before this dispute began, the EC itself characterized the fixed duty as an anti-dumping measure.

160. Moreover, the Definitive Regulation explains that the fixed duty was "calculated on the basis of the weighted average injury margin as this was found to be *lower than the weighted average dumping margin*."[168] Thus, the EC itself believed that the amount of the fixed duty had to conform to the rules that prevent anti-dumping duties from exceeding the dumping margin. The EC, therefore, calculated the fixed duty on the basis of the dumping margin to ensure that the duties were consistent with anti-dumping rules.

161. The proper characterization of the fixed duty as anti-dumping measure is also evident in the legal basis that the EC used to adopt the Definitive Regulation. In EC law, every legislative act must have a legal basis. In this case, the preamble of the Definitive Regulation states that the legal basis for the measure, including the fixed duties, is the EC's Basic Anti-

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[163] Norway's FWS, para. 679.
[164] EC's FWS, para. 501.
[165] EC's FWS, para. 508.
[166] EC's FWS, paras. 508 to 517.
[167] Definitive Regulation, Article 1(5).
[168] Definitive Regulation, para. 136.

Dumping Regulation. This Basic Regulation provides the legal authority for action against dumping.[169] It does not provide authority for sanctions to combat customs fraud.

162. Indeed, under EC law, the Basic Regulation could *not* authorize the EC to impose penalties against customs fraud. As the panel and Appellate Body recently stated in *EC – Selected Customs Matters*, the EC does *not* have competence to adopt penal sanctions against customs fraud. This remains within the competence of EC Members.[170] The Appellate Body noted that the EC itself recognized that EC Member States "provide" "sanctions for the violation of customs laws" that are "effective, proportionate and dissuasive".[171] Despite its arguments to the Panel, the EC therefore has no legal authority to adopt fixed duties that sanction and dissuade customs fraud.

163. In sum, the EC's fixed duties are a form of specific action against dumping, within the meaning of Article 18.1 of the *Anti-Dumping Agreement*. They must, therefore, be imposed consistently with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*. The EC offers no argument that the fixed *anti-dumping* duties are justified by Article XX.

X. PROCEDURAL REQUIREMENTS

A. *Access to the Information under Article 6.4 of the Anti-Dumping Agreement*

164. Norway's claim on access to information is straightforward. The EC failed to provide Norway with access to all the information in the record of the investigation that was relevant to Norway's case. When Norway requested access to the record, I was sent to Brussels for the inspection with a colleague on 28 and 29 November 2005, and another colleague visited on 23 December 2005. I have provided the Panel with an affidavit describing the circumstances of my visit. I would be happy to answer questions on my visit.

165. During the inspection, it was immediately obvious that the files we were given did not contain a number of documents that we knew should have been included. We were told that there were no other files that we could see. To recall, the missing documents included: *all* the submissions of the Government of Norway; *all* the submissions of FHL; and

[169] Article 1(1) of the Basic Regulation ("An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury").
[170] Panel Report, *EC – Selected Customs Matters*, para. 7.443 ("There are no provisions in the Community Customs Code nor in the Implementing Regulation that define offences at the EC level and identify the consequences of such offences (e.g. in the form of penalties)"). *See also,* Appellate Body Report, *EC – Selected Customs Matters*, para. 203. Both the panel and the Appellate Body refer to the judgment of the European Court of Justice in *José Teodoro de Andrade v. Director da Alfândega de Leixões*.
[171] Appellate Body Report, *EC – Selected Customs Matters*, para. 203.

questionnaire responses and other communications from Norwegian producers, EC producers and EC processors.[172] Because we could see that documents were missing, we prepared a list of the documents to which we were given access. Norway has submitted that list to you.[173] Norway used that list to prepare a list of 68 documents that were *missing* from the record we were shown in Brussels.[174]

166. Let me leave the script for a moment, to give you the background to my visit. When we arrived, we were shown into a room with the case files. The files were very disorganized, the documents did not appear in chronological order, and there was even a document from the investigation of bed linen from Pakistan.

167. In response, the EC makes a number of interpretive arguments regarding the obligations in Article 6.4. However, these arguments are not central to the EC's defense and Norway will not dwell on them.

168. The EC does *not* argue that it was not "*practicable*" to show the 68 missing documents to Norway during the visits to the authority in November and December; nor that any of the missing documents was not "*relevant*" to Norway's case; nor that any of the documents was not "*used*" by the authority. In principle, therefore, the EC accepts that it was obliged to show the 68 missing documents to Norway under Article 6.4.

169. The crux of the EC's defense is its assertion that it "simply allowed Norway to consult the whole non-confidential information as it stood at the time of the request".[175] However, the EC offers *no* evidence in rebuttal to support its assertions that it gave me and my colleague access to the 68 missing documents during our inspections. In fact, we were not shown those documents.

170. Because the EC does not maintain a list of the information submitted in the investigation, its authority could not demonstrate to us during the inspections what information the authority had received, or even what information it was disclosing to us. The EC has subsequently refused to confirm that the documents we were shown constitute the full non-confidential record. Instead, Norway is expected to trust that the files provided during the inspections included all relevant non-confidential information.

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[172] Norway's FWS, para. 700.
[173] Exhibit NOR-13, Annex 3-A.
[174] Exhibit NOR-13, Annex 3-B.
[175] EC's FWS, para. 532.

171. Before the Panel, the EC still cannot demonstrate what information was shown to Norway – except by reference to the list that Norway has provided – nor even what information was submitted to the authority during the investigation. The Panel is also expected to trust that all non-confidential information was shown to Norway.

172. The EC undermines its own assertion of full transparency because it states that it provided only the "information that was actually *submitted by Norwegian exporters*."[176] Article 6.4 applies to all relevant information, and not simply information submitted by exporters. In any event, a number of the 68 missing documents *were* submitted by exporters.

173. Instead of submitting rebuttal evidence, the EC suggests an incorrect reason why certain documents are missing from Norway's files: namely, that my colleague and I failed to *copy* the missing documents.[177] In fact, as I said, when we were shown the files, we drew up a comprehensive *list* of all the documents which we were shown. We also made copies of those documents in the files that Norway did not possess. However, when we did not copy a document, we nonetheless included the title of that document on the list you have. Thus, whether or not we *copied* a particular document is not relevant.

174. In sum, the EC has failed to rebut Norway's claim that the EC failed to allow Norway to see 68 specified documents that had been submitted to the EC during the investigation, but that were missing from the files shown to Norway.

B. *Disclosure of Essential Facts under Article 6.9 of the Anti-Dumping Agreement*

175. Norway argues that the EC failed to "inform all interested parties of the essential facts under consideration", pursuant to Article 6.9. Norway makes particular arguments relating to the dumping determination, the definition of the domestic industry, causation, and the remedy determination.

176. The EC appears to believe that Article 6.9 requires the authority to disclose its "factual *findings*", but not the underlying "facts" that form the basis for those findings.[178]

[176] EC's FWS, para. 533.
[177] EC's FWS, para. 535.
[178] EC's FWS, para. 538 ("Norway seems to imply that the investigating authority should support every *factual finding* with a reference to the *supporting evidence*"); para. 539 ("There is no duty to specifically identify in the disclosure document the *source* on which the *assembled facts* are based"); and para. 541 ("[Article 6.9 does not] support Norway's assertion that the disclosure document must contain references to all the *evidence* that the supports the *factual findings* of the investigating authority"). Emphasis added.

Norway disagrees with this interpretation. The text of Article 6.9 refers to the "essential *facts under consideration*" that will "form the basis for the decision to apply definitive measures." The words "under consideration" indicate that the "facts" in question are *still subject to examination* by the authority. In contrast, "factual *findings*" are made when this process of "consideration" *has been completed*.

177. The text of Articles 6.9 and 12.2 confirms this distinction between the "facts" still "under consideration" and the "factual findings". Prior to the final determination, Article 6.9 requires disclosure of the "facts *under consideration*". In contrast, after that determination is made, Article 12.2 requires the authority to publish a notice that sets forth its "*findings* and conclusions *reached* on all issues of *fact* and law".

178. The use of different terminology in these provisions indicates that the "facts under consideration" are not the same as "factual findings". The timing of the obligations also supports this view: Article 6.9 applies when the authority is still considering what factual findings to make; whereas, Article 12.2 applies when the factual findings have been made. Indeed, the EC's practice of providing a disclosure document that is almost identical to the published final determination collapses the distinctions between these two provisions.

179. The word "basis" in Article 6.9 also suggests that the "facts under consideration" are those that *underlie* the authority's factual and legal findings, rather than the findings themselves. As the EC recently argued to the Appellate Body, "the word 'basis' indicates that there is one thing … that is an *underlying support* for something else".[179] In Article 6.9, the "essential facts" are those that provide the underlying support, or "basis", for the authority's factual and legal findings in the final determination.

180. In Norway's view, an authority's "factual findings" are also in the nature of *reasoning* regarding the ultimate weight and credibility to be attached to the facts. However, as panels have found, Article 6.9 is concerned with "facts, as opposed to the reasoning of the investigating authorities."[180]

181. The requirement to disclose the "facts", rather than just the "factual findings", serves important due process ends that inform Article 6. As the panel in *Guatemala – Cement II*

[179] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, footnote 140. Emphasis added.
[180] Panel Report, *US – OCTG from Argentina (Article 21.5 – Argentina)*, para. 7.148 (not yet adopted); Panel Report, *Argentina – Poultry*, para. 7.225.

found, one of the difficulties facing an interested party is "that it will not know whether *particular information in the file* forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties."[181] That panel also stated that "[a]n interested party will not know whether a *particular fact* is 'important' or not unless the investigating authority has explicitly identified it as one of the 'essential facts'".[182] The panel, therefore, stated that Article 6.9 applies to "information" and "facts" "*in the file*", and not just to the authority's own "factual findings".

182. The panel in *Argentina – Ceramic Tiles* also found that Article 6.9 applies to the underlying facts in the file that support the authority's determinations:

> …the exporters could not be aware in this case … that *evidence submitted* by petitioners and *derived from secondary sources*, rather than *facts submitted* by the exporters, *would … form the primary basis for the determination* of the existence and extent of dumping.[183]

183. Thus, the "essential facts" that formed the basis for the authority's dumping determination included "*evidence submitted*" by certain interested parties, *evidence* "derived from *secondary sources*", and not "*facts submitted*" by other interested parties. The "essential facts" were, therefore, the facts in the file submitted by interested parties or gathered by the authority from secondary sources. They were not just the authority's own factual *findings*.

184. If the authority merely discloses its *factual findings*, but not the *underlying facts*, interested parties are not in a position to exercise fully their rights of defense. Like Norway in this dispute, interested parties have no idea of the "basis" in fact for the authority's determination. They cannot, therefore, comment on whether the underlying facts are unreliable or have been incorrectly interpreted by the authority. Nor can they introduce rebuttal evidence to counter the facts relied upon. The EC's interpretation, therefore, frustrates the due process ends of Article 6.9.

185. The EC's objection that Norway's interpretation would compromise confidentiality is without merit because Article 6.5.1 requires that non-confidential summaries of confidential information be prepared. Thus, as a general rule, the file includes a non-confidential document that can be identified under Article 6.9.

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[181] Panel Report, *Guatemala – Cement II*, para. 8.229.
[182] Panel Report, *Guatemala – Cement II*, para. 8.229.
[183] Panel Report, *Argentina – Ceramic Tiles*, para. 6.129.

186. Norway now turns to the EC's arguments regarding the four specific examples Norway provided of the EC's violations of Article 6.9. Concerning the dumping determination, the EC admits that it "re-assessed" the dumping margins of three producers subsequent to the definitive disclosure, without informing them in writing of the facts underlying that "re-assessment".[184] Thus, the essential facts underlying the EC's dumping determination changed after the disclosure.

187. The EC contends that it disclosed the factual basis for the "re-assessment" in "telephone calls and/or hearings".[185] Norway contests that any such oral disclosures were made. The companies themselves were unaware that a "re-assessment" had occurred until they saw that their margin had changed in the Definitive Regulation. They, therefore, requested an explanation from the EC.[186] The EC refused to answer, stating that the reasons for the "re-assessment" were stated in the Definitive Regulation. However, the Regulation does not even recognize that a "re-assessment" occurred; it merely states a new dumping margin for three companies.[187]

188. In any event, Article 6.9 does not permit an oral disclosure of the essential facts. The precise content of an oral disclosure would be extraordinarily uncertain. The authority could not even be certain that it was telephoning the appropriate person. Oral disclosures simply would not meet the interested parties' due process needs and it would also be impossible for a panel or the Appellate Body to verify compliance with Article 6.9.

189. The EC also claims that it was not obliged to provide a disclosure of essential facts *after* the adoption of a definitive measure. This is not Norway's claim. The EC "re-assessed" the dumping margins *after* it issued the definitive disclosure and did not disclose the essential facts underlying that "re-assessment" *before* it adopted the definitive measure. Article 6.9 requires disclosure "*before* a final determination" is made.

190. With respect to the definition of the domestic industry and causation, the EC merely asserts that it was not obliged to disclose the "facts" that support its "factual findings" on these issues. Norway disagrees for the reasons stated above. The EC even failed to disclose its factual *findings* regarding the domestic industry: for example, what volume of production

[184] EC's FWS, para. 555.
[185] EC's FWS, para. 555.
[186] Norway's FWS, para. 725.
[187] Exhibit NOR-95.

was attributable to each of the excluded categories of producer, and what EC production was organic.

191. The limitations in the EC's interpretation of Article 6.9 can be illustrated by the EC's disclosure of its factual findings regarding causation and wild salmon. For example, the EC informed interested parties that wild salmon is "mostly sold in tins and cans". Norway still has no idea of the underlying facts supporting this factual finding, and could not find positive evidence that either confirms or contradicts this finding.

192. With respect to the remedy determination, the EC argues that there was no obligation to disclose the "re-calculation" of the MIPs because it occurred *after* the definitive disclosure. However, if the essential facts *changed* after the disclosure, the initial disclosure could not, by definition, have disclosed the new essential facts that will form the basis for the final determination. Instead, after the "re-calculation", the EC was required to disclose the facts that had become the "essential facts". The EC's spectre of "endless rounds of disclosure" would only occur if the authority endlessly changed its mind regarding the essential facts.[188]

193. The EC also claims that there was no need to disclose facts regarding the revised remedy because "the parties know themselves which data they supplied".[189] This is absurd. The purpose of disclosure is to identify which of the many facts in the file form the basis for the authority's determination.[190] Although one party knows what facts it submitted, it does not know what facts were submitted by all the other parties and, most importantly, none of the interested parties knows what facts will form the basis for the authority's final determination.

C. *Obligation to Provide a Reasoned and Adequate Explanation*

194. Norway also claims that the EC violated Articles 12.2 and 12.2.2 of the *Anti-Dumping Agreement* by failing to provide a reasoned and adequate explanation for a number of its findings.

195. The EC's counter-argument is that "Article 12.2 is satisfied when an investigating authority provides the information that *it* considers relevant, and the reasons that *it* held to be

[188] EC's FWS, para. 552.
[189] EC's FWS, para. 541.
[190] Panel Report, *Guatemala – Cement II*, para. 8.229, quoted at para. 181.

decisive."[191] However, it is absurd to suggest that an authority can decide for itself whether its conduct meets a WTO standard. That is the task of panels and the Appellate Body.

196. The EC also appears to believe that "satisfying the duty to reason" in Article 12.2 merely requires that the authority "draw a conclusion ('therefore')".[192] The EC's minimalist approach to reasoning reverses many years of case-law on the reasoned and adequate explanation. In terms of the case-law the authority must, among others, demonstrate how the evidence on the record supports its determinations.[193] This reasoning serves the vital role of ensuring that an authority imposes anti-dumping duties – which may exceed bound tariffs – solely when it has *demonstrated* that the requirements for imposition of duties have been met.

197. Extraordinarily, the EC even believes that a reasoned and adequate explanation can be given in "verbal notifications", "short e-mails", and "lengthy telephone conferences".[194] In fact, the explanation must be set forth in writing in the "*public notice*" of the final determination.

198. The EC argues that the requirements of confidentiality excuse an authority from giving reasons.[195] Although confidentiality must be considered in formulating reasons, the duty to reason is not, thereby, eviscerated. Investigating authorities routinely formulate an explanation that adequately states the reasons for a determination without disclosing confidential information. The EC should be able to do the same. In any event, the EC has not stated in what way the requirements of confidentiality prevented it from explaining the aspects of its determination that Norway challenges.

199. With respect to the specific instances of violation that Norway set out in its First Written Submission, the EC does not offer any counter-arguments regarding the content of its explanation. Instead, based on its minimalist interpretation of the duty to reason, the EC asserts that it did provide a reasoned and adequate explanation for its determination. However, because Norway disagrees with the EC's interpretation of the duty to reason, Norway disagrees that the EC has satisfied its obligations. In that regard, Norway refers the

[191] EC's FWS, para. 564.
[192] EC's FWS, para. 578.
[193] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 91 to 99.
[194] EC's FWS, para. 588.
[195] EC's FWS, para. 573.

Panel to its First Written Submission where Norway sets out, in detail, the deficiencies in the EC's explanation.[196]

XI. COST ADJUSTMENTS

200. In the last section of this statement, Norway addresses the EC's adjustments to the costs of production reported by the investigated producers. The EC has responded to Norway's detailed arguments in a highly selective manner, with many issues not even defended. Strikingly, although defending the conduct of its own investigation, the EC almost never refers to documents on the record or to its own disclosures. Remarkably, in more than 30 pages on cost of production issues in its First Written Submission, the EC refers to *only one single document generated by the investigating authority*.[197]

201. This morning, Norway focuses on two important cross-cutting issues arising from the EC's submission: (1) the EC's arguments for including all non-recurring costs ("NRC") in the cost of production and (2) the pervasive factual inaccuracies in the EC's statements. However, Norway maintains all of its claims, in full, and will address other issues in its second submission.

A. *The EC's Improper Inclusion of All NRC in the Costs of Production*

202. Norway argues that the term "costs of production" measures *the value of the resources that are used to produce a good*.[198] Thus, for a cost to be a cost of production, there must be a relationship between the cost and production. This relationship is captured by the matching principle: the cost of the resources used to produce goods must always be related to the revenue earned from the sale of those goods.

203. The EC concedes the importance of the matching principle because it bases its argument on project accounting on this principle.[199] It even "agrees" that *cost allocation* "is based on the expected *relationship* between the *use of resources in production* and revenues earned from the *sale of that production*."[200] Production costs, therefore, pay for resources used in the current or future production of identifiable goods.

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[196] Norway's FWS, paras. 762 to 777.
[197] EC's FWS, footnote 341 refers to the Definitive Disclosure of a sampled company.
[198] Norway's FWS, para. 798.
[199] *See, for example*, EC's FWS, para. 618.
[200] EC's FWS, para. 618.

204. It follows that, when resources are not used in production, no goods are produced, and no sales revenues earned, as a result of the commitment of those resources. There is no relationship between the cost and production. In that event, the EC must also agree that the resources in question do not give rise to a cost that can be allocated to production.

205. This is consistent with accounting principles as well as the text of the *Anti-Dumping Agreement*. The ordinary meaning of the word "production" refers to the process of *producing* the like product. The relevant costs are, therefore, those incurred in the production process used to produce the like product. Article 2.2.1.1 makes the same point when it refers to "cost associated with the production and sale of the product under consideration".

206. The cost allocation rule in Article 2.2.1.1 also confirms Norway's view. In the case of NRC, that provision states that solely those NRC that "*benefit*" current or future production can be allocated to the costs of production. The verb "benefit" means to "confer an advantage on", or "to contribute to", something. The thing that must be benefited is *production*. Thus, costs "benefit" production when they pay for resources that contribute to production. If they do not, the cost has nothing to do with production.

207. Although the EC insists on the matching principle, its arguments abandon that principle. *First*, the EC considers that *any* cost that benefits "future *profitability*" is a "cost of production".[201] In economic and accounting terms, a cost that benefits profitability is not necessarily a cost that provides resources used in production. In legal terms, the EC rewrites Article 2.2.1.1 as referring to NRC that "*benefit* future and/or current [*profitability*]". However, the drafters of the *Anti-Dumping Agreement* used the word "profit" in other provisions of the *Anti-Dumping Agreement* when they saw fit.[202] The relationship required by the *Agreement* – and the matching principle – is between *costs* and *production*, not *costs* and *profitability*.

208. *Second*, the EC also claims that any *reduction* in the equity or "wealth" of a company is a cost that benefits production in the IP or in the future.[203] Again, the EC abandons the matching principle. When a company's asset value declines, the resources lost are not necessarily devoted to the production process.

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[201] EC's FWS, paras. 642, 658, 668 and 672.
[202] Article 2.2, 2.2.2 and 2.2.2(iii).
[203] EC's FWS, para. 642.

209. For example, suppose that the closure of a bicycle factory involves a $10 million asset write-down. However, the company continues to operate a second factory that also produces bicycles. The $10 million write-down does not pay for any raw materials, electricity, labor, or other resources, that contribute to the production of bicycles at the second factory. The production of bicycles at the second factory continues after the closure of the first factory.

210. Thus, the fact that the wealth of the company declined because of the closure does not mean that the $10 million provided resources that benefit *production* at the second factory. Similarly, the fact that the company's profitability improves because losses at the first factory no longer eat into profits at the second factory does not mean that the $10 million contributed to *production* at the second factory. Again, the bicycles produced at the second factory do not benefit in any way from the closure of the first factory. From an economic, accounting and legal standpoint, the $10 million were not costs of producing those bicycles, and are not part of the constructed normal value of those bicycles.

211. In this dispute, the same principle applies to the many NRC that Norway contests: plant closures, severance pay, the write-down of deformed fish, and investment losses. None of these involved the commitment of resources that benefited current or future production of salmon.

212. As a textual matter, the EC also argues that the distinction between recurring and non-recurring costs is *irrelevant* with respect to the calculation of cost of production.[204] It further suggests that Article 2.2.1.1 "does *not* prevent the inclusion of [NRC] that do *not* 'benefit future and/or current production'".[205] For the EC, it appears that any NRC can be treated as a cost of production regardless of the relationship between the cost and production.

213. This interpretation reduces the last sentence of Article 2.2.1.1 to a nullity because that sentence provides rules that apply only to "non-recurring costs". If there were no difference between recurring and non-recurring costs, and if any NRC were costs of production whether or not they benefited current or future production, there would be no reason for the careful wording of the last sentence of Article 2.2.1.1.

214. Norway offers an interpretation of the cost allocation rules in Article 2.2.1.1 that reconciles the last sentence of that provision with the remainder of it. Norway's view is also

[204] EC's FWS, para. 689.
[205] EC's FWS, para. 621.

consistent with the matching principle accepted by the EC: cost allocation under Article 2.2.1.1 is based on the relationship between "the use of resources in production and revenues earned from the sale of that production."[206]

215. The allocation rules in Article 2.2.1.1 require an authority to make an allocation solely for NRC *that benefit current or future production*. In the second last sentence, the allocation rules identify specific situations where NRC benefiting current or future production would be spread over time. These are NRC that are "amortiz[ed]" or "depreciat[ed]" during the period that they benefit future production; and NRC in the form of "allowances" for "*capital expenditures* and *other development costs*", which also benefit future production. The last sentence of Article 2.2.1.1 recognizes that the allocation rules just mentioned may not have addressed all NRC that benefit current or future production. Thus, the last sentence requires an authority to adjust the costs of production for any other NRC benefiting current or future production that are not allocated under normal GAAP accounting rules in the country of exportation.

216. Finally, even if some or all of the NRC Norway challenges are costs of production, the EC made no attempt to allocate them across the current and future periods when these NRC will benefit, in the EC's words, *profitability*. Instead, the EC simply totaled up NRC for a three-year period and divided the total by three.

B. *The EC's Defense Is Premised on Factual Inaccuracies*

(i) The EC Did Not Use Project Accounting to Determine Production Costs

217. Norway challenges the EC's approach of selectively averaging NRC and finance costs over a three year period, rather than for the period of investigation. In response, the EC has concocted a novel theory to justify its three-year averaging approach. The EC's theory runs as follows.

218. Because the production cycle of salmon exceeds one financial year, many companies apply "project accounting" ("PA").[207] Under PA, *farming* costs are accumulated during the salmon growth cycle of a particular generation of fish. Thus, the producer accumulates a "bucket" of costs attributable to a particular "pen" of fish. These costs are all expensed when

[206] EC's FWS, para. 618.
[207] EC's FWS, para. 604.

the fish are sold.[208] Thus, the costs of the fish harvested in the IP are matched with the costs of growing those fish. This is *not an averaging of costs over time*, but a precise matching of costs associated with growing specific fish with the revenues received from the ultimate sale of those fish.[209]

219. The EC says it would be a "*manifest error*" to use the costs incurred in the IP.[210] It asserts repeatedly "that smolt costs, feed costs, veterinary costs, well-boat costs, costs of slaughtering, insurance and rent costs *were not determined on the basis of data for the IP alone, as wrongly claimed by Norway, since that would be inconsistent with the project accounting approach*".[211] It also states that it used the *PA approach for finance costs*.[212] Finally, it says that, typically, the PA period is three years because that is the growth period for "egg to fish". As a consequence, it decided to *average* NRC over three years.[213]

220. The EC's statements show spectacular ignorance of its own determinations and of the record of this investigation. *First*, although the EC now claims it would be a "manifest error" to use an IP approach to calculate costs, that is exactly the approach that the EC instructed sampled companies to use in the questionnaire.[214]

221. *Second*, although the EC claims that the sampled companies reported costs on a PA basis, they did not.[215] Eight out of nine Norwegian companies reported all of their costs on an IP basis because that is precisely what the EC instructed them to do.[216] In fact, only one company reported any costs on a PA basis; and, even then, that company reported half of its costs on an IP basis.

222. *Third*, although the EC now claims it would be a "manifest error" to use an IP approach, and although the EC claims to have used a PA approach in all instances, it did not

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[208] PA generally includes egg and smolt costs, feed, veterinary, direct labour and other farming costs. Generally, it does not include harvesting costs, processing costs, selling costs, general and administrative costs, finance, and non-recurring costs.
[209] Exhibit NOR-156 contains an explanation of the PA and IP approaches, taken from a presentation shown by one of the investigated companies to EC officials during the verification visits. This slide is taken from a presentation made by Fjord at verification, entitled "Cost of Production – Presentation of Principles Used".
[210] EC's FWS, para. 618. Under this approach, the COP includes all costs incurred in the IP for all salmon generations. The total of these costs is then divided by the weight of fish harvested in the IP.
[211] EC's FWS, para. 700. *See also* paras. 614 and 617 to 619.
[212] EC's FWS, para. 700.
[213] EC's FWS, para. 692.
[214] Norway's FWS, para. 977.
[215] EC's FWS, para. 619.
[216] Exhibit NOR-157. Norway has no information regarding Nordlaks.

do so.[217] In fact, the EC calculated the costs for eight out of nine companies exclusively on an IP basis. To Norway's knowledge, the EC used a PA approach for only one company and, even then, only for five cost elements.[218]

223. The EC's arguments on the significance of the PA approach to the Panel are, therefore, a gross mischaracterization of the approach that the EC actually took in the investigation.

224. The EC has also provided the Panel with inconsistent justifications for why the PA approach justified using a three-year period for calculating average NRC and financial costs. The reason given by the EC in the Definitive Regulation was that three years is the growth-cycle of salmon from ***smolt*** to the harvestable fish.[219] In its submission to the Panel, however, the EC now gives a different explanation, namely, that the three-year period is justified as the growth cycle from ***egg*** to harvestable fish.[220] This departure from its reasoning in the Definitive Regulation invalidates the whole basis for the EC's cost adjustments under its "Three Year Averaging Approach".

225. The EC also argues that three years was the correct reference period for a PA approach because "36 months is a (generally) accepted average" for the salmon growth period.[221] This is incorrect. Some investigated companies grew from *smolt* to harvestable fish, thus capturing their costs over much less than 36 months. Even companies that grew from egg to harvestable fish had shorter time periods than 36 months. Only one of the ten companies indicates a growth cycle whose *maximum* length was 36 months.

226. The EC's submission is therefore replete with erroneous statements concerning project accounting. These erroneous statements provide inadmissible and incorrect *ex post* rationalization for the EC's use of a three-year averaging period for NRC and finance costs. There is no justification for the resort to this averaging approach for NRC and finance costs.

(ii) Other factual inaccuracies

227. The EC compounds its inaccurate statements on the PA approach by claiming that it applied "the same principles … to all companies" when it computed NRC using a three-year

[217] EC's FWS, para. 700.
[218] [[xx.xxx.xx]].
[219] Definitive Regulation, para. 18.
[220] EC's FWS, paras. 617 and 692.
[221] EC's FWS, para. 696.

average approach.[222] In fact, the EC did not. For one company, the EC used a three-year time frame from 2001 to 2003.[223] For two other companies, the EC chose a different time frame, namely from 2002 to 2004.[224] For yet another company, the EC did not use a three-year period approach but included NRC on a one-year IP basis, forgetting again that this was a "manifest error".[225]

228. Another staggering example of the EC's erroneous statements concerns the EC's refusal to make an adjustment of [[xx.xxx.xx]] to [[xx.xxx.xx]] costs of purchased salmon.[226] The EC's *sole* argument in reply is that the [[xx.xxx.xx]] is an

> *entirely new figure*, not mentioned in any reply or submission before, not substantiated during the investigation and impossible to have been verified (*sic*).[227]

229. This is demonstrably false and, yet again, shows that the EC simply does not know the record of its own investigation. The [[xx.xxx.xx]] was reported to the EC in [[xx.xxx.xx]] *questionnaire response* as a *deduction* from the company's salmon processing costs.[228] In the Definitive Disclosure, *the EC itself actively eliminated* this deduction of [[xx.xxx.xx]] from the slaughtering costs, thereby increasing [[xx.xxx.xx]] slaughtering costs by the same amount.[229]

230. There is, therefore, no doubt that the EC was thoroughly familiar with the figure and had ample opportunity to verify it. Indeed, Norway assumed that, under Article 6.6 of the *Anti-Dumping Agreement*, the EC had "satisfied" itself as to the "accuracy" of the figure before adding it to [[xx.xxx.xx]] costs. I should add that this adjustment is particularly important for Sinkaberg because, without it, the company's dumping margin would have been less than zero.

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[222] EC's FWS, para. 649.
[223] Norway's FWS, para. 957.
[224] Norway's FWS, para. 962.
[225] [[xx.xxx.xx]] closure of [[xx.xxx.xx]]. *See* Norway's FWS, para. 957.
[226] *See* Norway's FWS, paras. 1062 to 1076.
[227] EC's FWS, para. 715.
[228] *See* the figure of [[xx.xxx.xx]] in DMCOP, worksheet COP Gutted Packed Salmon, cell E 6. (Exhibit NOR-158).
[229] *See* [[xx.xxx.xx.]] (Exhibit NOR-159). The corresponding electronic Excel file was submitted as Exhibit NOR-[[xx.xxx.xx]].

231. This morning, I will not go through all the other factual and legal errors that the EC made in adjusting costs. Suffice it to say that the gross errors made by the EC vitiate all the COP determinations and thus all the dumping determinations that Norway has referred to.

XII. CONCLUSION

232. Mr. Chairman, members of the Panel, staff of the Secretariat, that concludes our statement. With this statement we have also submitted to you Exhibits NOR-151 to NOR-159. I would like to thank you for your attention and look forward to answering your questions.